IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SOUTHEASTERN LEGAL FOUNDATION, INC.,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	FILE NO. 1:23-cv-03819-LLM
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,	)	
Defendant.	)	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS JOINT STATUS REPORT POSITION

"The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). "FOIA was enacted to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Batton v. Evers*, 598 F.3d 169, 175 (5th Cir. 2010) (quoting *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976)). NARA seeks to re-write—or ignore—the plain terms of FOIA. But Congress's unambiguous command to make government records "promptly available" in no way requires the Court to defer to NARA's assessment of how taxing it would be to meet its obligation. No one disputes that this Court can order

NARA to process at 1,000 PPM or greater, or to provide periodic *Vaughn* indexes. NARA's longstanding, years-deep backlog is not an excuse to drag out its response—especially to a long pending, time-sensitive request. Rather than explaining that it has complied or will comply with this clear congressional mandate, NARA argues that it—not Congress—should be allowed to define its obligations under FOIA. The Court should order full and prompt compliance with FOIA.

ARGUMENT

I. This Court should order production at a rate not less than 1,000 PPM.

A. FOIA requires prompt availability, and NARA's rate of 600 PPM is non-compliant.

NARA seeks to make FOIA compliance turn on its own internal concerns, specifically (1) its capacity (which is within its own control) and (2) its internally set priorities for "managing its caseload." NARA's Brief (Doc. 15 at 2.) And it seeks to make this briefing turn on the question that it prefers—whether SLF's request qualifies for expedited processing—rather than the question before this Court: whether NARA's long delays fail to meet FOIA's requirement that "each agency, upon any request for records . . . *shall* make the records *promptly available*." 5 U.S.C. § 552(a)(3)(A) (emphasis added). Prompt availability means "within days or a few weeks of a 'determination,' *not months or years*." *Citizens for Resp. and Ethics in Wash. v. Fed. Election Comm'n (CREW)*, 711 F.3d 180, 188 (D.C. Cir. 2013)

(Kavanaugh, J.)[1] (emphasis added). NARA does not deny that processing will take at least four years under its 600 PPM rate (not counting further proceedings after its initial production). That is not prompt availability.

SLF has argued solely that NARA's production violates FOIA's prompt availability command. ((*See, e.g.*, Doc. 14 at 5) ("FOIA protects the right to public transparency by requiring prompt availability of responsive documents."); *see also id*. at 8 (stating 19 months "is not prompt"); *id.* at 9 ("NARA has not moved with promptness."); *id.* at 11 ("This is not 'prompt availability' in any sense.").) SLF has not contended that expedited processing is required and is not asking for that now, almost twenty months after its Request. NARA's obligation to make the documents promptly available is the sole issue.[2]

The history of this case demonstrates why prompt availability is the actual legal issue. NARA placed SLF's initial request deep into the complex queue. Fourteen months later, SLF's request had not budged. Without this litigation, it is unclear if, or when, NARA would have taken *any* action to process SLF's Request. NARA's brief makes not even a single reference to prompt availability, despite SLF's brief using the term "prompt" sixteen times.

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[1] Contrary to NARA's claims, (*see* Doc. 15 at 8), *CREW*'s "within days or a few weeks" instruction applies to the time to produce records, 711 F.3d at 188–89, *not* an untimely "determination" that obviates administrative exhaustion.

[2] Because the issue is prompt availability and not expedited processing, NARA's expedited processing cases are irrelevant. (Doc. 15 at 13 n.4, 15 nn.6–7.)

NARA's processing system does not set the standard for prompt availability. *See Pub. Health & Med. Pros. for Transparency v. FDA (Pub. Health II)*, No. 22-cv-0915, 2023 U.S. Dist. LEXIS 82290, at *5 (N.D. Tex. May 9, 2023) ("[T]he number of resources an agency dedicates to such requests does not dictate the bounds of an individual's FOIA rights."). No definition of "prompt" involves a queue that remains static for more than a year with 28 requests remaining ahead of SLF's. "Instead, the Court must ensure that the fullest possible disclosure of the information sought is timely provided—as 'stale information is of little value.'" *Id.* (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)). NARA brushes whether it complied with the prompt availability requirement in favor of tilting at the windmill of expedited processing.

NARA admits that it has processed at rates exceeding 1,000 PPM in other cases but argues that those cases did not "contain an agreed processing rate or even any commitment by NARA to process documents at a particular rate each month." (Doc. 15 at 16.) It is unclear why that matters. NARA has shown that it can comply with an order for 1,000 PPM or more. Even if NARA were processing the same documents for multiple parties at the same time, it was processing—by its own statements—over 8,000 pages in five months (*American Oversight*) and over 9,000 pages in six months (*Heritage Foundation*) for an average of nearly 1,600 PPM. (*See*

Doc. 14 at 13.) And NARA acknowledges that, like those cases, SLF's request involves "overlapping" requests. (Doc. 15-1 ¶ 39); (Doc. 15 at 16.)

NARA dismisses in one sentence and four footnotes no fewer than eight cases that disprove its claim that 500 PPM is the national standard. (Doc. 15 at 15–16, 18 nn.8–11.) The distinctions it draws are not found in the opinions themselves, and the cases supposedly involving "factors absent here" also involved more significant factors that *are* present here. *See Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014) (ordering 5,000 PPM in light of public "importance," including "allegations of corruption" and rising "public attention on the issue," along with "possibility that [requestor] may have only a limited time" in light of illness); *Seavey v. DOJ*, 266 F. Supp. 3d 241, 245–48 (D.D.C. 2017) (rejecting 500 PPM and ordering 2,850 PPM to fulfill "duty" under FOIA); *Villanueva v. DOJ*, No. 19-23452, 2021 U.S. Dist. LEXIS 237920, at *3 (S.D. Fla. Dec. 13, 2021) (holding 500 PPM "woefully inadequate" when agency produced 500 documents in 3.5 years and refused to provide a sufficient *Vaughn* index); *Elec. Privacy Info. Ctr. v. DOJ*, No. 05-845, 2005 U.S. Dist. LEXIS 40318, at *3 (D.D.C. Nov. 16, 2005) (ordering 1,500 pages every 15 days because "an incredibly small amount of pages have been released to Plaintiff"); *Open Soc'y Just. Initiative v. CIA*, 399 F. Supp. 3d 161, 169 (S.D.N.Y. 2019) (ordering 5,000 PPM after "[w]eighing DOD's duties to effect *prompt disclosure* under FOIA" and the public interest surrounding disappearance of Jamal

Khashoggi (emphasis added)); *ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501, 504–05 (S.D.N.Y. 2004) (holding agency's one-year "glacial pace" on "matters of public interest" "subvert[s] the intent of FOIA; not addressing expedited processing separately).[3]

NARA unpersuasively dismisses *Judicial Watch v. U.S. Department of Energy*, 191 F. Supp. 2d 138 (D.D.C. 2002), and *National Resources Defense Council v. Department of Energy (NRDC)*, 191 F. Supp. 2d 41 (D.D.C. 2002), claiming they do "not address[] any of the equitable factors courts now generally consider." (Doc. 15 at 16 n.11.) NARA does not suggest that some new test abrogated these cases though; the Southern District of New York cited both favorably in 2018. *See Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 550 (S.D.N.Y. 2018). For its part, *NRDC* was cited as recently as December 8, 2023. *See ACLU Found. of S. Cal. v. U.S. Immigr. & Customs Enf't*, No. 22-CV-04760, 2023 U.S. Dist. LEXIS 223089, at *36 (C.D. Cal. Dec. 8, 2023); *see also Public Health I*, 2022 U.S. Dist. LEXIS 5621, at *4 (ordering 55,000 PPM without considering NARA's preferred "equitable factors").

[3] NARA does not address *Boundaoui v. FBI* at all. No. 17-4782, 2020 U.S. Dist. LEXIS 174663, at *3, *23 & n.5 (N.D. Ill. Sept. 23, 2020) (ordering 1,000 PPM only because FBI's FOIA department was "operating at only a third of its typical staffing because of COVID-19"). 1000 PPM is hardly unprecedented. *Freedom Coal. of Drs.*, 2024 U.S. Dist. LEXIS 2581, at *40 (ordering between 4,000 and 60,000 PPM).

NARA cites *National Security Counselors v. DOJ* in support of its proposed 600 PPM rate, but the main issue in that case was the fees the FBI charged, not its processing rate. 848 F.3d 467, 469 (D.C. Cir. 2017). The case did not address whether 500 PPM met the requirement of prompt availability, and—contrary to NARA's claim—the court did not apply any "factors." (Doc. 15 at 9.) NARA errs similarly with the only other case it cites in its brief on this point. ((*See* Doc. 15 at 10) (citing *Ctr. For Immigr. Studies v. USCIS*, 628 F. Supp. 3d 266, 273 (D.D.C. 2022) (discussing the overbreadth of the request, not processing rate).)

Even as NARA appears to accept that it agreed to process at 1,250 PPM in *America First Legal*, (Doc. 15-1 ¶ 40), it tries to dismiss the case's relevancy by arguing that it involved three requests that merely totaled 1,250 PPM. That does not mean that NARA did not agree to the rate, thereby demonstrating its capability. NARA's decision to split or combine requests is irrelevant; no doubt, NARA would raise the same arguments if SLF had made 3 requests that produced the same number of documents. *See Seavey*, 266 F. Supp. 3d at 247–48 ("The Court does not believe that this kind of disparate treatment can be rationally justified.").

If an 87% upsurge in requests in 2023 strained NARA, then the decision to hire a mere two staffers falls far short of the "impressive responsiveness" that still

did not stop the court in *Open Society* from ordering 5,000 PPM. 399 F. Supp. 3d at 166. In any event, SLF's request preceded the 2023 surge.[4]

Nor does it matter that those cases involved NARA components other than AOD. (Doc. 15 at 17.) The inquiry focuses on a "reasonable agency's technological capacity," *Open Soc'y Just. Initiative,* 399 F. Supp. 3d at 169, not how this agency chose to break itself down into divisions. NARA can certainly pull resources from other components if it needs to. *See id.* at 166.

B. NARA's backlog does not justify skirting the requirement of prompt availability.

Rather than attempt to show that production on a four-year timeline somehow is prompt, NARA misdirects by detailing its heavy workload. This excuse is unpersuasive. And NARA fails to show that it cannot move more swiftly.

NARA cannot use its limited resources as a shield, guarding it against the clear congressional demand for prompt availability. *See, e.g.*, *Open Soc'y Just. Initiative,* 399 F. Supp. 3d at 168–69 (holding agency's "decision to thus far deny itself the technologic capacity to speed its review cannot dictate the Court's assessment of the review pace"); *Washington v. NARA*, No. 21-cv-00565, 2022 U.S. Dist. LEXIS 48691, at *16 (W.D. Wash. Mar. 18, 2022) (rejecting NARA's workload excuses and

[4] And NARA had notice of SLF's request as early as October of 2021, when NARA denied SLF's initial request as barred by the PRA's five-year delay. *See* Decl. of Kimberly Hermann, Ex. 2.

noting that despite the steady increase in its backlog, NARA hired only one additional part-time staff person five months *after* the request and three months after suit was filed). If it can shield itself this way, then NARA is encouraged to keep its resources limited and its FOIA responses slow. That flies directly in the face of a congressional directive. And nowhere is responsiveness more critical than in a "matter of exceptional public importance and obvious and unusual time-sensitivity." *Open Soc'y Just. Initiative*, 399 F. Supp. 3d at 167. Courts can order processing rates that "require [the agency] either to divert resources from other FOIA requests or to mobilize additional resources." *Id*. at 166. If that means NARA must "augment, temporarily or permanently, its review resources, human and/or technological," then it must. *Id*. at 169.

The bottom line is that NARA is continuing to make the same excuses it has been making for years—before SLF's request and after—all without meaningfully changing its priorities, structure, technology, or methods, with predictable results. Even though NARA details how it staffs the Archival Operations Division, (Doc. 15-1 ¶¶ 24–28), it merely references other "components" without demonstrating that they cannot add capacity. (Doc. 15-1 ¶ 37); *see Seavey,* 266 F. Supp. 3d at 246–47 (faulting agency for failing to sufficiently detail ability to process).

Finally, NARA faults SLF for not agreeing to prioritize requests. (Doc. 15 at 14.) It is NARA that has a duty to make documents promptly available, and SLF has

already substantially limited its request to its priorities. (Doc. 12 at 2–6.) Once NARA produces documents under a rate that satisfies FOIA, SLF is more than willing to engage in "good faith negotiations" to "materially reduce the production timetable." *Open Soc'y Just. Initiative,* 399 F. Supp. 3d at 168. But SLF cannot do so when it has not one document to shape its refinements.

C. Nothing about the request alters NARA's obligations.

Contrary to NARA's representation, the records have not been available since 2014. (Doc. 15 at 14) ("Plaintiff waited until June 2022 to submit a FOIA request for records from *eight years prior*.") (emphasis preserved). The Presidential Records Act shields Vice-Presidential records from FOIA requests for 5 years after the Vice President's term ends, or, in this case, until January 20, 2022. *See* 44 U.S.C. § 2204(b)(2). NARA knows this. It invoked this rule in response to SLF's earlier request in October 2021. *See* Decl. of Kimberly Hermann, Ex. 2 (records not available until 2022).

Nor, as NARA contends, does SLF believe that the information it seeks is "only valuable . . . before the presidential election." (Doc. 15 at 14.) It is true that the documents sought relate to "a matter of *intense* interest" in an election year. *Open Soc'y Just. Initiative,* 399 F. Supp. 3d at 167 (emphasis added). The more information released now, the better informed the "public, legislators, other policymakers, and journalists" will be. *Id*. But the information had value when SLF

first requested the records—before President Biden announced he was running for re-election. And they will continue to have value for years to come, including historical and legal value. Regardless, the records will certainly be *less* valuable if produced on NARA's timeline.

Paradoxically, NARA seems to suggest that 1,000 PPM is too slow to be timely. (*See* Doc. 15 at 14 n.5.) But if that's true then 600 PPM is definitely not prompt. Courts do order production at a rate high enough to make all the documents available no later than August 1. *See Freedom Coal. of Drs.*, 2024 U.S. Dist. LEXIS 2581, at *23–24 & n.28, *40–41 (ordering staged equivalent of between 4,000 and 60,000 PPM)[5]; *Pub. Health I*, 2022 U.S. Dist. LEXIS 5621, at *4 (ordering 55,000 PPM). The Court should order a processing rate of at least 1,000 PPM.

II. Interim *Vaughn* indexes are necessary for efficient compliance with FOIA here.

NARA no longer musters the confidence to assert that it is "well established" that agencies only file a *Vaughn* index at the time of summary judgment. (*Compare* Doc. 12 at 21 *with* Doc. 15 at 19.) Indeed, courts often require them on some periodic basis. (Doc. 14 at 18–21); *see also ACLU v. Dep't of Def.*, 339 F. Supp. 2d at 504–

[5] The court in *Freedom Coalition of Doctors* based its ranges based on the plaintiff's estimates of the number of characters and words per page, yielding the PPM ranges above. 2024 U.S. Dist. LEXIS 2581, at *24 n.28.

05. NARA now only argues that FOIA does not provide a *right* to a *Vaughn* index.[6] (Doc. 15 at 19.) No one has said otherwise. (Doc. 14 at 19–20) (arguing courts have the *power* to order a periodic *Vaughn* index).

NARA instead leans on its "standard practice." (Doc. 15 at 20.) But it is hardly "standard" to wait years in a time sensitive case to disclose if NARA has been withholding presidential records from the public.[7] *See Keeper of the Mountains Found. v. DOJ,* No. 06-cv-98, 2006 U.S. Dist. LEXIS 39915, at *6 (S.D. W. Va. June 14, 2006) (rejecting argument that "the standard practice" is to await filing of a dispositive motion because "there is no consensus"); *see also Brennan Ctr. for Just.*, 300 F. Supp. 3d at 547; *Knight Pub. Co. v. U.S. DOJ*, 608 F. Supp. 747, 751 (W.D.N.C. 1984); *Ettlinger v. FBI*, 596 F. Supp. 867, 879 (D. Mass. 1984).

The decision in *Ferguson v. FBI,* 729 F. Supp. 1009, 1012 (S.D.N.Y. 1990), said nothing about assisting the agency "at summary judgment." (*Contra* Doc. 15 at 19.) On the contrary, the court rejected the FBI's "contentions that plaintiffs request

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[6] The plaintiff in *Schwarz v. United States Department of the Treasury* was not seeking a *Vaughn* index in advance of summary judgment. 131 F. Supp. 2d 142, 147 (D.D.C. 2000). The court simply corrected the plaintiff's mistaken notion that the agency was required to have generated a *Vaughn* index during an administrative proceeding. *Id*.

[7] The court in *Miscavige v. IRS*, 2 F.3d 366 (11th Cir. 1993), merely held that affidavits were sufficient in lieu of a *Vaughn* index if they provided as accurate a basis for decision as would sanitized indexing, a random representative sample, *in camera* review, or oral testimony; therefore, a *Vaughn* index would not have been of help.

for an index for an index is premature" and ordered a *Vaughn* index before completion of production. *Ferguson*, 729 F. Supp. at 1012. *Ferguson* is anything but "inapposite," (Doc. 15 at 23), and certainly not because NARA "has not yet produced responsive documents." (Doc. 15 at 23). Within two weeks after the filing of this brief, NARA will be making its first production of responsive documents and knows what withholdings and redactions it has made. (Doc. 15-1 ¶ 19.) SLF is content to wait until then.

NARA attempts to distinguish *Villanueva*, 2021 U.S. Dist. LEXIS 237920, at *1, by arguing that the issue only arose after summary judgment. But the court there ordered that *Vaughn* indexes accompany each monthly production of belatedly processed documents in response to the defendants' motion for entry of a production schedule. *Id*. The court's ruling was not in response to any motion from plaintiff and there was no schedule for summary judgment proceedings regarding the more than 20,000 documents still to be produced. *Id*. at *8–9.

NARA misses the point when it objects to "having to draft *Vaughn* information for each and every redaction it makes in these documents, whether or not Plaintiff intends to challenge them." (Doc. 15 at 21.) SLF cannot tell NARA in advance which withholdings and redactions it will challenge, because it is the index that provides SLF with information it does not know: the *reasons* for the withholdings. *See Vaughn*

v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973) (explaining government must provide a "detailed justification" for any withholdings or redactions).

NARA's withdrawal sheets are an inadequate substitute. (*See* Doc. 15-3.) They lack "an explanation of how disclosure would damage the interest protected" by any claimed exemption. *Cal. ex rel. Brown v. U.S. EPA*, No. 08-0735, 2008 U.S. Dist. LEXIS 62528, at *6 (N.D. Cal. Aug. 1, 2008) (quoting *Schiffer v. FBI*, 78 F.3d 1405, 1408 (9th Cir. 1996)); *id.* at *7 (quoting *King v. U.S. DOJ*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (describing how "for each withholding [the agency] must discuss the consequences of disclosing the sought-after information, and requiring "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant"). The minimal information on the withdrawal sheets does not meet this standard. *See Keeper of the Mountains Found.*, 2006 U.S. Dist. LEXIS 39915, at *3–4, *6 (holding a form response is insufficient). To the extent the withdrawal sheets contain some of the information a *Vaughn* index will contain, NARA is only demonstrating that the task of assembling a proper *Vaughn* index is partially done already.

This Court should order the preparation and production of a *Vaughn* index on a periodic basis.

CONCLUSION

For these reasons, the Court should order NARA to (a) process at least 1,000 PPM and (b) provide interim *Vaughn* indexes with its production.

Dated: January 30, 2024. Respectfully submitted,

By: /s/ B. H. Boucek

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CERTIFICATION

Under LR 7.1(D), Counsel hereby certifies that this Brief has been prepared with one of the font and point selections approved by the Court in LR 5.1(B).

CERTIFICATE OF SERVICE

The undersigned served this document today by filing it using the Court's CM/ECF system, which automatically notifies the parties below and counsel of record:

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Dated: January 30, 2024.

/s/ B.H. Boucek
BRADEN H. BOUCEK

DECLARATION OF KIMBERLY S. HERMANN

1. The facts set forth in this declaration are based on my knowledge and, if called as a witness, I can competently testify to their truthfulness under oath.

2. I am over the age of 18, have personal knowledge of the facts set forth herein, and am competent to testify.

3. I make this declaration in support of the Complaint in this matter.

4. I have personal knowledge of myself, my activities, my intentions, and the activities of others employed by SLF, including those set out in the foregoing Complaint.

5. I am employed as the General Counsel and have held that position since 2016.

6. As the General Counsel, I am familiar with all aspects of our emailing system. The items attached to this Complaint and marked as exhibits are true and correct copies of emails between individuals at SLF acting in their representative capacity and individuals employed by Defendant.

7. All copies of these emails were made contemporaneous to the time they were sent, and we keep our emails in the course of a regularly conducted activity as part of our regular practice.

8. I verify under penalty of perjury under the laws of the United States that the factual statements in this Complaint are true and correct to the best of my knowledge, information, and belief.

Dated: January 30, 2024.

/s/ Kimberly S. Hermann
KIMBERLY S. HERMANN

EXHIBIT 1

October 1, 2021 FOIA Request and October 4, 2021 NARA Response Emails

From: Presidential Materials Division
To: Presidential Materials Division
Cc: Kimberly Hermann
Subject: Re: FOIA Request
Date: Monday, October 4, 2021 10:45:26 AM
Attachments: 2022-0001-F (Biden) - Final Response.pdf

Dear Ms. Hermann:

Your FOIA request was forwarded to the Archival Operations Division for a response. The Archival Operations Division is responsible for administering the Biden Vice Presidential records collection. I have attached the official response to your request which explains that Biden Vice Presidential records are not subject to FOIA requests at this time.

Please let us know if you have any questions. You can contact us directly at presidential.materials@nara.gov.

Sincerely,

Anna Yallouris
Archivist
Archival Operations Division
National Archives and Records Administration

> ---------- Forwarded message ---------
> From: **Kimberly Hermann** <khermann@southeasternlegal.org>
> Date: Fri, Oct 1, 2021 at 2:44 PM
> Subject: FOIA Request
> To: foia@nara.gov <foia@nara.gov>
> Cc: Cece O'Leary <coleary@southeasternlegal.org>
>
> Dear FOIA Officer:
>
> This email constitutes a request under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.
>
> Request
>
> This email constitutes a request under the federal Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Pursuant to the FOIA, I am seeking copies of all emails President Joe Biden preserved through the National Archives and Records Administration from his time as vice president for the following email addresses: robinware456@gmail.com, JRBWare@gmail.com and Robert.L.Peters@pci.gov. Stories in JustTheNews.com and the New York Post as well as a letter from Sens. Ron Johnson and Chuck Grassley identify these three email addresses as having been used by Joe Biden when he was vice president to transmit to his son and receive from his vice presidential staff official government

information. Some examples are attached.

As you know, government officials have an obligation to preserve all government records whether transmitted on official government email servers or private email accounts. This FOIA request copies of all emails to and from the above three emails addresses that are preserved or possessed by NARA as well as any correspondence between Joe Biden and/or his legal or government representatives concerning the use of these emails and preservation of records from them from Jan. 1, 2009 through present.

Fee Waiver Request

The Southeastern Legal Foundation is a 501 c 3 public interest law firm representing John Solomon, a full-time professional journalist employed by Just the News.com. As such we collectively request a public interest fee waiver. We are willing to pay up to $100 to process my request. Please inform me if the fees will exceed that amount before proceeding.

Further, SLF makes this request for records pursuant to Freedom of Information Act, 5 U.S.C. § 552, *et seq*. Accordingly, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), SLF requests that the agency furnish the records without charge. While a court is ultimately not required to defer to an agency's interpretation of the FOIA, in anticipation of a request for additional information, we have organized our fee waiver justification to coincide with the six factors listed in the 1987 fee waiver policy guide memorandum by then-Assistant Attorney General Stephen J. Markman to determine whether disclosure is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Disclosure is in the public interest.

The first factor is satisfied because the subject of the request concerns identifiable operations or activities of then-vice president Joe Biden and his use of private emails to transmit to his son, Hunter Biden, official government information. We are requesting one email exchange. The communication between State Department official George Kent and U.S. Ambassador Marie Yovanovich most certainly involves a discreet and identifiable activity of the State Department.

I am seeking copies of all emails President Joe Biden preserved through the National Archives and Records Administration from his time as vice president for the following email addresses: robinware456@gmail.com, JRBWare@gmail.com and Robert.L.Peters@pci.gov. Stories in JustTheNews.com and the New York Post as well as a letter from Sens. Ron Johnson and Chuck Grassley identify these three email addresses as having been used by Joe Biden when he was vice president to transmit to his son and receive from his vice presidential staff official government information. Some examples are attached.

As you know, government officials have an obligation to preserve all government records whether transmitted on official government email servers or private email accounts. This

FOIA request copies of all emails to and from the above three emails addresses that are preserved or possessed by NARA as well as any correspondence between Joe Biden and/or his legal or government representatives concerning the use of these emails and preservation of records from them from Jan. 1, 2009 through present.

The second factor is satisfied because the requested records have significant informative value into the operations and activities of then-vice president Joe Biden and information he provided his son regarding official government business. . Two years after leaving office, Joe Biden couldn't resist the temptation to brag to an audience of foreign policy specialists about the time as vice president that he strong-armed Ukraine into firing its top prosecutor. His threat was so severe that Ukraine would have lost $1 billion in U.S. loan guarantees sending Ukraine toward insolvency. So the question is – why? Why did Joe Biden demand the immediate firing of Prosecutor General Viktor Shokin? And what did the State Department know about Hunter Biden's dealings in Ukraine and Ukraine's investigations into those business dealings? The American public deserves answers.

The third factor is satisfied because the requested records will contribute to "public understanding" because SLF will disseminate the requested information to the largest audience possible by disseminating it through the following various mediums: 1) its publicly available website (www.slfliberty.org) which combined receive nearly one million hits per year; 2) its regular mailings (averaging one mailing per week for a total of approximately three million per year) to interested parties providing educational information on the operations and activities of the FBI; 3) its bi-annual or quarterly newsletters to interested parties, totaling approximately ten to twenty thousand per year, also providing educational information on the operations and activities of the FBI; 4) regular spots on a wide-variety of radio programs; 5) spots on television programs; 6) frequent op-eds that run in national newspapers; 7) legislative testimony; 8) participation in legal and policy panels; and 9) SLF's various social media accounts. SLF's methods of dissemination, combined with its nearly 50-year reputation as one of the nation's leading constitutional public interest law firms and policy centers, supports granting SLF's fee waiver request.

The fourth factor is satisfied because the requested records with "significantly" contribute to the public understanding. As previously mentioned, the American public has a right to know and understand what information then-vice president Joe Biden provided to his son regarding government business.

No commercial interest.

Disclosure of the requested records is not in the commercial interest of SLF because the Foundation has absolutely no commercial or financial interest in the requested information, and would receive no pecuniary benefit from the information sought. SLF is a nonprofit

public interest law firm and policy center specializing in the practice of constitutional law. Rather, the requested records are of great public interest.

Request for Expedited Processing

We also request that this FOIA be expedited under the law's compelling need provisions. As a journalist Mr. Solomon has been primarily engaged in disseminating information about the Russia collusion, Hunter Biden and Ukraine investigations conducted by the FBI, CIA and Congress and these documents provide compelling and urgent materials that will inform the public concerning actual or alleged federal government activity and possible wrongdoing. Additionally, Southeastern Legal Foundation has been seeking related records for years from the State Department. Given the State Department's continued delay and the public importance of this information, State Department should expedite this request.

Format of Production

Pursuant to 5 U.S.C. § 552(a)(3)(B), SLF requests that the production of any and all responsive records be made electronically. Please email any and all responsive records to khermann@southeasternlegal.org. SLF is willing to receive responsive records on a rolling basis, if needed, to expedite production and response. If this is not possible, please let us know with an explanation of the reason for any delay. If any or all of the production if refused based on some privilege or other legal ground, please set forth the legal basis for the denial so that SLF may properly address the denial.

If this request is denied in whole or part, please justify all such denials by reference to specific exemptions, and provide an explanation of why ODNI "reasonably foresees that disclosure would harm an interest" protected by that exemption or why "disclosure is prohibited by law[.]" 5 U.S.C. § 552(a)(8). Please also ensure that all segregable portions of otherwise exempt material are released.

If you have any questions regarding this request, please feel free to contact me at 770-977-2131.

I look forward to your determination within 10 calendar days of this request, as required by law.

Thank you in advance for your assistance in this matter.

Kimberly Hermann

Kimberly S. Hermann

General Counsel

Southeastern Legal Foundation

Rebuilding the American Republic ®

560 West Crossville Rd., Ste 104

Roswell, Georgia 30075

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EXHIBIT 2

October 4, 2021 NARA Final Response letter

NATIONAL ARCHIVES

VIA EMAIL
October 4, 2021

Kimberly S. Hermann
Southeastern Legal Foundation
560 West Crossville Rd., Ste 104
Roswell, Georgia 30075

Dear Ms. Hermann:

This letter is in response to your Freedom of Information Act (FOIA) request dated October 1, 2021 for access to Biden Vice Presidential records pertaining to Vice President Biden email for the following email addresses: robinware456@gmail.com, JRBWare@gmail.com, and Robert.L.Peters@pci.gov. Your request was received by the Archival Operations Division on October 1, 2021 and has been assigned case number 2022-0001-F. FOIA requests for Biden Vice Presidential records are governed under provisions of the 1978 Presidential Records Act, as amended (PRA) (44 U.S.C. §§ 2201-2209), which incorporates the Freedom of Information Act (5 U.S.C. § 552) in substantial part.

As provided in section 2204 of the PRA, Vice Presidential records are not subject to public access requests, including the Freedom of Information Act requests, for a period of five years after the National Archives and Records Administration (NARA) takes custody of the records or until NARA staff has completed processing and organization of an integral file segment of these Presidential records, whichever is earlier. The National Archives took custody of the Biden record collection on January 20, 2017. At this time, we have not completed the processing and organization of the records relating to your research. Neither has the five-year period described above expired. Therefore, the Biden Vice Presidential records that you seek are not subject to request under the Freedom of Information Act until January 20, 2022.

Because these records are not yet subject to FOIA, we are denying your request on procedural grounds. At this time, you may appeal by writing to the Deputy Archivist of the United States, (ATTN: FOIA Appeal Staff), Room 4200, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740-6001. You should explain why you believe this response does not meet the requirements of the FOIA. Both the letter and the envelope should be clearly marked "FOIA Appeal." To be considered timely, your appeal must be postmarked or electronically submitted within 90 calendar days from the date of this letter.

If you would like to discuss our response before filing an appeal to attempt to resolve your dispute without going through the appeals process, you may contact our FOIA Public Liaison John Laster for

assistance at: Archival Operations Division, National Archives and Records Administration, 700 Pennsylvania Avenue, NW, Room G-7, Washington, DC 20408-0001; email at libraries.foia.liaison@nara.gov; telephone at 202-357-5200; or facsimile at 202-357-5941.

If you are unable to resolve your FOIA dispute through our FOIA Public Liaison, the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, offers mediation services to help resolve disputes between FOIA requesters and Federal agencies. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road – OGIS, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

I am sorry that we could not be of more help to you at this time. However, if you would like to contact us again on or after January 20, 2022, we would be happy to assist you with your FOIA request.

Sincerely,

STEPHANNIE ORIABURE
Director
Archival Operations Division