UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

* * * * * * * * * * * * * * *
NAOISE CONNOLLY RYAN, et al.   ) Civil Action
          Plaintiffs,   ) No. 23-3815
vs.   )
)
UNITED STATES   ) March 1, 2024
DEPARTMENT of JUSTICE,   ) 11:04 a.m.
          Defendant.   ) Washington, D.C.
)
* * * * * * * * * * * * * * *

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BERYL A. HOWELL,
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

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ALSO PRESENT: TRACY BRAMMEIER, Court-Appointed Liaison

Court Reporter: Elizabeth Saint-Loth, RPR, FCRR
        Official Court Reporter

Proceedings reported by machine shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

1   THE COURTROOM DEPUTY: Your Honor, this is Civil

2 Action 23-3815. Naoise Connolly Ryan, et al., versus

3 United States Department of Justice.

4   Would the parties please come forward to the

5 lectern and identify yourselves for the record. We'll start

6 with plaintiffs' counsel first this morning.

7   MR. LIPPER: Good morning, Your Honor.

8   My name is Greg Lipper, I represent the plaintiffs

9 in this case. I am joined at counsel table by Tracy

10 Brammeier, who is the court-appointed liaison to the victims

11 of the Ethiopian flight, including many of my clients in

12 this case.

13   THE COURT: All right. Thank you. Good morning.

14   MS. WALKER: Good morning, Your Honor.

15   Anna Walker, Assistant United States Attorney,

16 representing the U.S. Department of Justice.

17   THE COURT: Yes. Good morning.

18   All right. So the plaintiffs have asked for a

19 hearing on their motion for preliminary injunction that was

20 filed on January 23, 2024, seeking an order requiring DOJ,

21 the Department of Justice, to, within 30 days of an order by

22 this Court, to process and produce all responsive documents

23 to their FOIA request -- the operative FOIA request that was

24 filed in August 2022, and produce a Vaughn index identifying

1   any documents withheld of redacted documents, and the

2   exemption being asserted.

3   MR. LIPPER: Your Honor, may I clarify?

4   THE COURT: No, you may not.

5   I am going to be asking a whole series of

6   questions. Please, why don't you step forward to the

7   podium.

8   MR. LIPPER: Absolutely.

9   THE COURT: And all through the plaintiffs'

10   papers, it refers to their FOIA request as filed on

11   April 26, 2022, as I understand the record, that was not

12   perfected because the Department of Justice Criminal

13   Division said it needed some more documentation to, I guess,

14   verify the representation of Judge Cassell of the plaintiffs

15   for whom he was asserting it -- presenting the FOIA request.

16   And when that didn't happen within 30 days, DOJ closed the

17   FOIA request and another person filed, I guess, the same

18   request on August 9, 2022, with all of the necessary

19   documentation; and that's when that FOIA request was

20   perfected. So that's my understanding of the facts here.

21   MR. LIPPER: That is my understanding now.

22   I apologize. That was not my understanding at the

23   time. And I had actually not seen that interim

24   communication. So I have clarified with the relevant

25   submitters that those interim events that the government

1   described -- you are correct about that.

2   THE COURT: Right. So all of the plaintiffs'

3   papers refer to an April 22, FOIA request. You are going to

4   hear me referring to it as the August 2022 --

5   MR. LIPPER: August, understood.

6   THE COURT: -- FOIA request because that's the

7   operative request.

8   MR. LIPPER: Understood.

9   THE COURT: Okay. So now the government says that

10   the search is going to be completed by April 1, and an

11   interim disclosure determination will be made around

12   June 1st, 2024, which is about four months from now. I am

13   not exactly sure what an interim disclosure determination

14   actually means and what that encompasses, and we're going to

15   find out from the government about that.

16   But I just want to be clear that if that includes

17   some production of documents or if it just means production

18   of a Vaughn index by June 1, I want to be clear about what

19   the plaintiffs are asking for.

20   You want within 30 days of today, let's say

21   April 1, which is a couple months in advance of June 1, this

22   interim disclosure determination or -- whatever that means,

23   you want production of documents and you want production of

24   a Vaughn index?

25   MR. LIPPER: Correct, with the clarification I

1   wanted to make. I actually wanted to make two

2   clarifications. The first was the operative FOIA request --

3   the August 22 operative FOIA request requests -- I believe

4   it's 34 or 36 categories of documents. For our preliminary

5   injunction motion, we are seeking a subset, a category --

6   seven categories of documents, six of which relate to

7   Department of Justice communications with Boeing's attorneys

8   during the investigation. So that's what we are seeking --

9   THE COURT: And the seventh request asked for?

10   MR. LIPPER: The seventh was documents relating to

11   representations that the Department of Justice had made to

12   the victims during the investigation.

13   THE COURT: For that you want all emails, all

14   records reflecting any of those discussions?

15   What's the scope of that seventh request?

16   MR. LIPPER: Well, the request itself is sort

17   of -- I guess -- the request itself includes both the

18   discussions about those discussions and also -- and there

19   was concern, obviously, about the accuracy of the

20   information that had been provided to the victims about the

21   status of the investigation at the time, and so part of what

22   we're asking for is sort of the documents underlying those

23   disclosures.

24   I recognize that that part is a little less

25   discrete and so I would say, in terms of order of priority,

1   the six requests related to the communications with Boeing

2   are definitely, I think, what in my clients' view is the

3   most urgent.

4   And then, within that seventh request, I would say

5   there are discussions about the discussions with the victims

6   to the extent those aren't reflected in the discussions with

7   Boeing are the top priority within that seventh request.

8   THE COURT: Well, I hope the Department of Justice

9   understands what you just said because --

10   MR. LIPPER: I am happy to --

11   THE COURT: -- I found it confusing.

12   Okay. Let me just turn to likelihood of success.

13   Yes. So the parties talk about likelihood of

14   success, both of them, but neither one of them actually say

15   in the FOIA context -- in this context -- what does it mean

16   to show a likelihood of success?

17   What is it that the plaintiffs have to show for a

18   likelihood of success on the merits because, generally, that

19   means a likelihood of success on your claims in the original

20   complaint. And in most FOIA cases where there are

21   preliminary injunction motions filed -- and they are very

22   rare --

23   MR. LIPPER: Yes.

24   THE COURT: -- and even more rarely granted, the

25   usual request for the preliminary injunction relief is, "We

1   want expedited processing and we have been denied it."

2   Here the government has -- the Department of

3   Justice has granted you expedited processing. So you are

4   not asking for me to ensure your FOIA request is treated

5   with expedition because you are already getting expedited

6   processing from the Department of Justice.

7   So as I look at -- what do you have to show for

8   the likelihood of success factor to get the preliminary

9   injunctive relief you are seeking, you have to show me --

10   just like any other person seeking a preliminary

11   injunction -- likelihood of success on your underlying

12   claims in your complaint, which is: Give me all of the

13   responsive documents.

14   What do you think you have to show for likelihood

15   of success on the merits?

16   MR. LIPPER: So I will say that I agree with you

17   that the precise contours are not as -- it was not as clear,

18   I think, that that precise question isn't -- I agree with

19   you, isn't as clear in the cases.

20   But the way I see it, I think it's a couple of

21   things. The first thing is, we certainly have not

22   received -- we believe we are certainly entitled to have our

23   request processed, and we have not yet received --

24   THE COURT: And you are having your request

25   processed now. They are searching for records now.

1   MR. LIPPER: Yes.

2   THE COURT: So to the extent that you are asking

3   me for that relief, I think you would have to concede that

4   part of your relief to have your request processed is moot

5   because the Department of Justice is doing that.

6   So what else do you think you are entitled to to

7   show -- and that's important for assessing whether or not

8   you have a likelihood of success.

9   MR. LIPPER: Right. But I think ultimately we're

10   entitled to have the processing of that request completed;

11   that has not happened yet. We all, I think, agree at some

12   point in time that has to happen.

13   THE COURT: So you think that your likelihood of

14   success showing is that -- not just that your request is

15   being processed, which it is, but that it is processed on

16   your timetable?

17   MR. LIPPER: Well, no. I think the timetable

18   aspect is what is accelerated in the preliminary injunction

19   context; and I think that that is addressed by the imminent

20   irreparable harm requirement.

21   THE COURT: Well, you are not saying that the

22   likelihood of success factor in the FOIA context essentially

23   merges with the irreparable harm factor, are you? Or are

24   you?

25   MR. LIPPER: Well, I guess yes and no. I will say

that, I think, in the -- I agree with you, there aren't that

many cases granting preliminary injunction in the FOIA

context; and I have read, I believe, most if not all of

them.

I believe in one of your opinions denying a

preliminary injunction sort of synthesizes them and

ultimately, as a practical matter, the inquiry -- the

various inquiries do seem, in practice, to collapse along

the lines of: Is there an imminent need that requires

processing to be sped up beyond what otherwise happened

absent, sort of, court intervention and imminent relief?

THE COURT: Well, I can't say that my prior

decisions in these issues has been perfect.

I think it's easy, in the FOIA context,

preliminary injunction motions when the issue for the PI is:

Does the plaintiff deserve expedition or not when it was

denied by the agency? That's sort of a thing you can get

your hands around in terms of assessing the public interest,

the need, and so on.

MR. LIPPER: Yes, but --

THE COURT: But it's very rare that -- in any of

those cases where expedition has already been granted by the

agency, like here. So what am I assessing on the likelihood

of success factor?

MR. LIPPER: But I will say in those cases, even

1   in the cases in which expedited processing hasn't been

2   granted, several of those cases the order has been not just

3   to put it in the expedited processing box, but that it is to

4   provide documents and/or, in some cases, a Vaughn index by a

5   certain amount of time. So I think that reflects that

6   expedited processing is, I think, necessary but not

7   sufficient because -- well, for two reasons: One, there is

8   still the question of is it being -- is the expedited

9   processing standard being met sort of reasonable -- as

10   promptly as reasonably practical, number one; but then,

11   number two, you know, in practice: Is it being expedited in

12   a way that, in rare cases, plaintiffs receive it by the time

13   they actually need it?

14   So I think it is -- I guess I would say -- I will

15   offer sort of two arguments in the alternative. I think the

16   main point is: If we are likely to show that we are

17   entitled either to a response -- an actual response -- a

18   production and Vaughn index at some point, then that would

19   suffice; and now we're just asking for that relief to be

20   sped up.

21   But in any event, I think we, secondarily here,

22   have an argument that because -- the government points out

23   in its opposition that they are on track to meet the

24   original nonexpedited estimate that was provided in early

25   2023 of 12 to 18 months, which means that the expedited

processing doesn't seem to have actually been speeding up

the processing. And again, I sort of then -- I don't know

that the inquiry formally collapses, but ultimately we are

entitled to these documents, you know, by some point --

anything that is responsive and not exempt we are entitled

to receive by some point. And here we're entitled to

receive them as soon as is reasonably practicable and, in

this case, A, that timetable needs to be sped up and, B, in

any event -- and especially in light of the imminent

deadlines -- the "as soon as reasonably practicable

standard" isn't being met.

I do want to clarify one recent factual

development; I am happy to do it now or later on in a

colloquy, but --

THE COURT: You can do that now. But I have a

question on my mind that I really want to ask, which is --

the first time you have proposed prioritization of the seven

categories of information you have asked for in your

preliminary injunction is not when you filed your motion, I

would hope. You had conferrals with the Department of

Justice about that before you filed your preliminary

injunction motion?

MR. LIPPER: We tried to have conferrals with the

Department of Justice but we are not able to -- we are not

able to get through, quite frankly. Some of this is

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 1     detailed in Professor Cassell's declaration which is

 2     attached to the preliminary injunction motion.

 3               THE COURT:  When you say you weren't able to get

 4     through --

 5               MR. LIPPER:  In other words, I will -- this is

 6     laid out in his declaration.  Literally, the same day he

 7     received notification that the expedited processing had been

 8     granted --

 9               THE COURT:  Wait, wait, wait.  You filed this

10     complaint in December of 2023 --

11               MR. LIPPER:  Yes.

12               THE COURT:  You filed your preliminary injunction

13     motion a few weeks later, January 2024.

14               MR. LIPPER:  Yes.

15               THE COURT:  So you had a filed complaint and you

16     are then, under the rules of this court -- and we generally

17     ask for conferral between the parties.  So between the time

18     you filed this complaint and the time you filed your

19     preliminary injunction motion, did you confer with the

20     government -- like the representative from the U.S.

21     Attorney's Office here representing the government -- saying

22     "could you prioritize all of these things," before you

23     walked into court with a PI motion?

24               MR. LIPPER:  The government did not assign -- the

25     U.S. Attorney's Office did not assign an attorney to this
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1   case until shortly before -- if you recall, there was that

2   parties' joint scheduling motion a few weeks ago. It was

3   earlier that week that we -- which was several weeks after

4   our -- I forget exactly, but after our preliminary -- it

5   wasn't until that point that the U.S. Attorney's Office had

6   even assigned an attorney.

7   Before that, I have a general email address in

8   which I can serve -- you know, send service copies. But I

9   had no -- I had no legal representative to contact during

10   that time.

11   THE COURT: What about the victims' representative

12   that -- the plaintiffs as a group, plus other plaintiffs --

13   other victims of these two airplane crashes? They're in

14   contact with the victims' representative.

15   Have they conferred with that contact that they

16   have within the Department of Justice to say: Here is some

17   prioritization to work this out short of litigation where

18   all sides have to dig in their heels?

19   MR. LIPPER: Right. So I actually -- let me

20   address that, and then I want to just address --

21   THE COURT: In other words, what are we doing here

22   if you haven't conferred?

23   MR. LIPPER: Well, I think we have -- we have done

24   as much conferring as we reasonably could have under the

25   circumstances.

1   So with respect to the -- the branch of the

2   Department of Justice that is responsible for conferring

3   with victims is not the FOIA office, of course. They

4   can't -- they have been -- as far as I --

5   THE COURT: But they have a phone. They can call

6   and contact other people within the Department of Justice.

7   MR. LIPPER: They do.

8   There are right now discussions -- so, basically,

9   when the appeal was decided in -- sorry -- when the Fifth

10 Circuit decided the appeal in the criminal case in December,

11 at that point the Department of Justice victims' office sent

12 a letter to the victims say- -- they sent a letter in early

13 January: As you know, the Fifth Circuit has ruled and we

14 are now in the six-month review period, and we're going to

15 be setting up a conferral opportunity.

16   Just this morning, actually, the DOJ victims'

17 office sent another email to the victims basically saying --

18 reserving between April 22nd and April 24th for a two-part

19 meeting that's going to constitute the conferral session.

20 And I understand from Ms. Brammeier that that has now been

21 scheduled to take place on April 24th; so that is the

22 conferral. That will be the conferral.

23   There has not been a sort of free-flowing

24 opportunity to confer, you know, where we can pick up the

25 phone and say: Hey, we have this FOIA request; can you do

1   something about it? Anything like that.

2   THE COURT: Okay. Well, after you filed your PI

3   motion and the government assigned Ms. Walker to the case,

4   have you conferred with Ms. Walker about prioritization or

5   has she been too busy responding to your PI motion?

6   MR. LIPPER: Ms. Walker and I did speak briefly.

7   We spoke actually a few times before we submitted

8   scheduling. I did say to Ms. Walker -- I forget my exact

9   words, but it was something -- this is after the motion was

10   filed. I said something along the lines of: Ms. Walker, we

11   can avoid this entire -- I said something along the lines

12   of: It will probably take all of us longer to finish this

13   briefing than it would for the FOIA office to, you know,

14   find and produce the plea communications with Boeing. And

15   she said she would, you know, I think -- I believe something

16   along the lines that she would discuss it with her client.

17   So I certainly made -- you know, I certainly made

18   it clear what our priority was, and I certainly expressed

19   that I still do think it would be faster for the FOIA office

20   to find that, I think, relatively discrete set of

21   communications and produce it than it would be to litigate

22   this case. But we have not -- that offer has not been taken

23   up as far as I know.

24   THE COURT: Okay. Ms. Walker, be prepared to

25   address that quite thoroughly.

1   MS. WALKER: Okay.

2   MR. LIPPER: The final point I do want to make

3   because Professor Cassell and some of the other --

4   THE COURT: I call him "Judge Cassell." He goes

5   by "Professor Cassell" now?

6   MR. LIPPER: I actually asked him --

7   THE COURT: I first met him as a judge.

8   MR. LIPPER: Right. I asked him: How would you

9   like to be described in the court papers? And I think he

10   did not want to be described as a judge, I am assuming,

11   because he doesn't want to be suggesting he is entitled to

12   some judicial -- he doesn't want to be pulling judge rank, I

13   suppose. So I refer --

14   THE COURT: He can't avoid the fact that he was a

15   respected jurist.

16   MR. LIPPER: Certainly no dispute about that. We

17   discussed it and he, I think, preferred to be referred to as

18   "Professor Cassell" as a party in this case. I am sure he

19   doesn't object to you calling him "Judge."

20   In any event, he has been -- in his various

21   communications with the FOIA office -- first of all, he

22   said: Please contact me if there is anything I can do to

23   help you identify or speed this up.

24   But then -- when he received notification in

25   October of 2023 that expedited processing had been granted,

later that day he left a voicemail for the FOIA office; and

then it was this series of voicemails in which he was both

asking about the status and also offering any information or

help he could provide. Back and -- it took many voicemails

to even get calls back. When he did get calls back, he was

told by the person: I don't have information for you, I

will talk to my supervisor.

It was just this ongoing thing. He left many

voicemails, sent many emails. There was then follow-up to

Mr. Murphy, one of the other lawyers, some of that.

THE COURT: All right. I really want to move on.

MR. LIPPER: So I feel like there have been many

attempts made to many different entities.

THE COURT: Okay. The FOIA requests, including

the six at issue or seven at issue in the PI, all regard a

criminal investigation of the criminal case that is still

pending, so it's absolutely no surprise at all that the

Department of Justice has said that they're likely going to

invoke Section 7 and its various subparts, possibly

Exemption 6, to withhold a number of documents. This is no

surprise, I would take it, to the plaintiffs.

MR. LIPPER: Certainly not that they are asserting

it, no.

THE COURT: Okay. So my question is: If you --

all you get -- if all you get, whenever they finish

1   processing -- whether it's on the plaintiffs' timetable or

2   the regular expedited processing schedule of DOJ -- is a

3   Vaughn index, because they're going to say: All of this is

4   subject to Exemption 7(A) and other various subparts of

5   Exemption 7 or others, will a Vaughn Index help the

6   plaintiffs here?

7   MR. LIPPER: I suppose it depends how informative

8   it is. But I think, at the very least, a Vaughn index would

9   enable us to get some information about what is being

10   withheld, what their justification is, and then we can

11   challenge it.

12   I mean, we do think that, again, especially with

13   respect to the communications with Boeing and Boeing's

14   lawyers', that those communications do not -- sort of at

15   least within the --

16   THE COURT: I am going to get to that in a second.

17   MR. LIPPER: Okay.

18   THE COURT: So it will give you an indication of

19   what's withheld.

20   Then you say something that gives me heart

21   palpitations, that you will be able to litigate all of those

22   withholdings. And are you expecting to do that litigation

23   over the appropriateness of application of any exemption on

24   a plaintiffs' timetable?

25   MR. LIPPER: We will of course --

1   THE COURT: Am I going to be seeing one PI motion

2   after another from these plaintiffs about what is a simple

3   straightforward FOIA case?

4   MR. LIPPER: I hope it wouldn't require successive

5   motions. What I would --

6   THE COURT: That's what you are intending, to

7   litigate -- once you get a Vaughn index, if it's on the

8   plaintiffs' timetable, let's say you got your Vaughn index

9   within 30 days if I grant this PI, and that's all you get;

10   that's April 1. And then you still think you need it by

11   July 7, which I am going to get to; so you are going to

12   litigate on an expedited basis. The only way to do that is,

13   I would say, is by yet another TRO or PI saying you need a

14   decision on of all these withholdings by -- I don't know

15   when, before July 7; and then you need the production before

16   July 7.

17   So you are going to want this Court, basically, to

18   put aside all other pending matters, just like you want the

19   Department of Justice to put aside all other expedited

20   requests it has. You are going to want me then to put aside

21   all of my other pending matters to focus only on your PI

22   litigation over the withholdings in this case; is that what

23   you are anticipating?

24   That's what I am seeing buried under your

25   otherwise opaque language about litigating the Vaughn index;

1   that's all you get.

2   MR. LIPPER: I would not expect that anyone would

3   put aside all of their other pending matters to focus on any

4   case, mine or otherwise. It is ultimately, and I think what

5   is --

6   THE COURT: Is that what you are expecting,

7   though, to file TROs or PIs to litigate all of the

8   withholdings on the Vaughn index order to meet your

9   timetable?

10   MR. LIPPER: If we think from the Vaughn index

11   that there are documents that are being improperly withheld,

12   then yes, I expect we would seek expedited relief. Whether

13   we would every -- obviously, we don't know how many

14   documents are going to be on the Vaughn index -- how many

15   documents there are; how many are going to be on the Vaughn

16   index; you know, if there are details of the exemptions that

17   were not what we anticipated. So I can't say right here

18   that every item on the Vaughn index we're going to come to

19   court on. We're certainly going to look at it.

20   If we think there are documents or categories of

21   documents that are being improperly withheld, we would take

22   reasonable steps to get them in time. Now, I also -- again,

23   I don't know --

24   THE COURT: So my heart palpitations are well

25   placed.

1   MR. LIPPER: Well, the only thing I will say, and

2   this may kind of bleed over into the merits --

3   THE COURT: Yet more rushed litigation if all you

4   get is the Vaughn index -- or any Vaughn index, because I am

5   confident you are going to get some Vaughn index with some

6   documents on it given the nature of the documents being

7   requested in this FOIA request about an ongoing pending

8   criminal matter, you will get a Vaughn index.

9   And so what you are alerting me to is that this is

10   only the first of, perhaps, multiple PIs to follow, once you

11   get a Vaughn index, of expedited litigation over

12   withholdings by the Department of Justice to meet what the

13   plaintiffs view is a hard deadline of July 7, 2024; is that

14   right?

15   MR. LIPPER: I don't know that it is "multiple,"

16   but --

17   THE COURT: At least one?

18   MR. LIPPER: If there are -- again, I can't --

19   it's hard for me to say without seeing the Vaughn index; it

20   is certainly possible.

21   I think, obviously, we will recognize both the

22   time constraints and the court constraints -- I mean, that's

23   why we didn't seek a PI on 34 categories of documents --

24   right --? recognizing there are reasonable limitations here?

25   THE COURT: Or reasonable exemptions that may

1   apply?

2   MR. LIPPER: Right. If we think some exemptions

3   are stronger than others. If there are some that can be

4   addressed categorically or more categorically, we will

5   certainly -- both for our time, the Court's time --

6   THE COURT: Let's talk about the exemptions

7   because I appreciate the plaintiffs' view like: How can an

8   exemption apply to communications between the Department of

9   Justice and Boeing?

10   How can any exemption apply?

11   And you cite -- unless I have missed any, you cite

12   two cases for that: *American Oversight v. U.S. Department*

13   *of State,* and *Doe No. 1 v. United States*, which is an

14   Eleventh Circuit case from 2014 dealing with the Jeffrey

15   Epstein case.

16   MR. LIPPER: Right. And that is cited by analogy

17   because that was a civil discovery dispute, not a FOIA case.

18   THE COURT: Right.

19   But correct me if I'm wrong. Having looked at

20   those cases, neither of those cases involved FOIA requests

21   for active ongoing criminal cases, right?

22   No. I looked. They did not.

23   MR. LIPPER: Epstein. Right. Epstein had been a

24   nonprosecution --

25   THE COURT: Right.

1   And neither one of those cases involved the scope

2   of Exemption 7; and neither one involved a pending criminal

3   case.

4   MR. LIPPER: That is correct. And again, I will

5   say it again, it is hard for me to -- without knowing what's

6   on the Vaughn index --

7   THE COURT: Let me just say: From where I sit,

8   that's a lot of confidence that -- from the point of view of

9   the plaintiffs that there is no exemption that can

10   appropriately apply to communications between the Department

11   of Justice and the target of a criminal investigation in an

12   ongoing investigation in a pending criminal case without --

13   with citations to two cases that don't involve this fact

14   pattern at all nor the exemptions that the government has

15   alerted both the Court and plaintiffs that may apply here,

16   which is Exemption 7, and its various subparts.

17   MR. LIPPER: So I was not intending to sort of

18   brief -- officially brief the exemptions in the PI motions.

19   So you know I am clear, that's not --

20   THE COURT: Let me ask you. I saw you didn't do

21   that, and neither did the government.

22   But when I am assessing the likelihood of success

23   on the merits -- let me go back to the first factor.

24   MR. LIPPER: Yes.

25   THE COURT: I am still on the first factor here,

1   just in case you want to know where I am in my thinking.

2   Likelihood of success on the merits, are you going to get

3   responsive records in response to all of your FOIA requests?

4   And I look at the context of this and I look at

5   the fact that it's on ongoing criminal investigation,

6   pending criminal case, Exemption 7 is a clear red flashing

7   light; I look at *Bagwell*, a D.D.C. case from 2016, which

8   found that Exemption 7 was found to properly be applied to

9   withhold agency communications with outside law firms,

10   consulting firms, and associated individuals since -- and I

11   quote, "emails discuss record requests and subpoena requests

12   related to an ongoing" -- in that case -- "OIG criminal

13   investigation." "As such, the production of this

14   information would reveal targets of the investigation who

15   are not publicly known, the nature of matters currently

16   under investigation, and investigatory techniques which

17   could reasonably be expected to interfere with law

18   enforcement proceedings."

19   So if I'm looking at likelihood of success on the

20   merits given the context of this FOIA request and the nature

21   of what the information and records being targeted are, I

22   look at *Bagwell*, and I cite: How can they show a likelihood

23   of success that they are going to get all of these

24   documents?

25   Exemption 7 has a likelihood -- a strong

1   possibility of barring them from getting a lot of these

2   documents. How can you show likelihood of success even on

3   your underlying claim?

4   MR. LIPPER: Well, I think -- first of all, there

5   are a couple of layers here. Ultimately, the likelihood of

6   success --

7   THE COURT: I mean, neither party mentioned or

8   cites *Bagwell.* Neither party really talked about and really

9   wanted to studiously avoid talking about potential

10   application of Exemption 7, and I understand why. But that

11   leaves me, where expedited process has already been

12   granted -- what am I looking at in evaluating and assessing

13   likelihood of success on the merits?

14   I think I have to look at how successful are they

15   going to be in getting the actual documents in hand that

16   they're requesting. And I don't see it any other way but to

17   look at how Exemption 7 likely or might apply here.

18   MR. LIPPER: I am not sure that -- I would say in

19   terms of requiring us, as part of the likelihood of success

20   inquiry to -- without knowing what has been found and what

21   is being withheld to show that unknown set is not exempt is

22   not -- I don't think that is part of the requirement.

23   THE COURT: But you argued that it likely was not

24   going to be exempt so you did argue it. You invited the

25   analysis of whether an exemption would likely apply here by

1   arguing it likely would not --

2   MR. LIPPER: The context in which we argued it

3   was, it reinforces -- we do think -- again, even *Bagwell*, I

4   mean, here we're talking about a case in which -- I

5   understand the case is formally open. But there was an

6   investigation -- a multiyear investigation which was

7   concluded with at least a public preliminary outcome in

8   which there was a public filing in which the Department of

9   Justice issued a press release in which there have been

10   court proceedings and in which a deferred prosecution

11   agreement was reached.

12   There have separately been -- I mean, there was

13   one individual Boeing employee who the government attempted

14   to prosecute a few years ago unsuccessfully.

15   THE COURT: Unsuccessfully?

16   MR. LIPPER: So one Boeing engineer was prosecuted

17   in federal court, I believe it was Texas, and was acquitted.

18   And that -- it was a few years ago.

19   As I understand it -- I am obviously not the

20   definitive authority. But my understanding is there isn't

21   anything going on with respect to the 737 max crashes other

22   than DOJ's review right now as to Boeing's

23   self-certification -- that there isn't anything else. That

24   all other -- again, if there is something going on that I am

25   unaware of, I am sure the government will tell me or tell

1   you.

2   But this is not a case where in the early stages

3   the DOJ is figuring out what crimes were committed and who

4   to charge.

5   The issue that my clients have as victims is that

6   the Department of Justice did all of that without consulting

7   them as was required. And so they didn't find out about it

8   until the game was -- not over, but in the bottom of the 8th

9   inning.

10   THE COURT: And you litigated that up in the Fifth

11   Circuit. And I am sure the presiding judge in the --

12   MR. LIPPER: Right. Northern District of Texas.

13   THE COURT: -- Northern District of Texas is

14   taking all appropriate steps to ensure --

15   MR. LIPPER: Right.

16   THE COURT: -- that the Crime Victims Rights Act

17   is fully, fully implemented.

18   MR. LIPPER: Right. But I think what they have

19   said is: It's not over; but we're -- I don't want to mix my

20   metaphors here -- but we're in the top or bottom of the 9th.

21   All of which is to say -- especially with respect

22   to plea communications, communications with outside

23   attorneys.

24   We're not in a situation where plea communications

25   with Boeing is going to alert Airline 2 and Airline 3 and

1   Airline 4's CFO that: Oh, shoot, I am secretly being

2   investigated as well, and I had no idea.

3   THE COURT: But you don't know that.

4   MR. LIPPER: I don't know that and I can't know

5   that until I see it on a Vaughn index, which is why I resist

6   definitively saying none of these documents are going to be

7   exempt.

8   THE COURT: I am going to say I am going to move

9   on from the likelihood of success on the merits.

10   MR. LIPPER: Okay.

11   THE COURT: I am going to move on now to

12   irreparable harm, and all of the questions I have about

13   that.

14   MR. LIPPER: Okay.

15   THE COURT: But you can tell, I have a lot of

16   doubts about your likelihood of success on the merits.

17   MR. LIPPER: I will say if it is going to be

18   important to your analysis, we are happy to -- again, at

19   least based on the information -- if you would prefer -- if

20   you need more information from us or more analysis from us

21   on the exemptions, we're happy to provide it. Because I do

22   think --

23   THE COURT: I am going to resolve this PI today.

24   MR. LIPPER: Okay.

25   THE COURT: I am a very, very busy district court

1   judge.

2   MR. LIPPER: Understood.

3   THE COURT: Let's move on to irreparable harm.

4   MR. LIPPER: Okay.

5   THE COURT: Plaintiffs say -- and I quote -- they

6   "will have just one chance to persuade the district court to

7   reject the DPA" when the government files its anticipated

8   motion to dismiss on July 24. And if the charges are

9   dismissed, quote: "The families apparently will be unable

10   to reopen the criminal case"; the charges will have been

11   dismissed "with prejudice." That's at the plaintiffs'

12   motion at page 19.

13   So am I correct that the plaintiffs want these

14   responsive records only to influence the court's decision in

15   resolving the motion to dismiss anticipated to be filed by

16   July 24 -- is it July 24?

17   MR. LIPPER: July 7, 2024.

18   THE COURT: July 7.

19   And you have given up on trying to influence the

20   government's decision on whether to file the motion to

21   dismiss?

22   Because I was a little confused, from reading the

23   plaintiffs' papers -- like, you are demanding conferral with

24   the victims' rights representative from the Department of

25   Justice; you have this deadline of July 7. So are you just

1   pointing at the presiding judge or are you also wanting

2   records to influence the Department of Justice on the motion

3   to dismiss?

4   What are we doing here?

5   MR. LIPPER: So until this morning we had no

6   reason to think that -- we had every reason to think, based

7   on my clients' sort of years of experience in this case --

8   our assumption and our understanding was that Department of

9   Justice would schedule a meeting with the victims; we

10   assumed it would be towards the end of the review process;

11   that we wouldn't have an opportunity to submit documents; we

12   would sit down and have a discussion.

13   THE COURT: Meaning the end of the review process

14   on whether or not to file a motion to dismiss?

15   MR. LIPPER: Correct.

16   THE COURT: So a review process of Boeing's

17   compliance?

18   MR. LIPPER: That's correct.

19   THE COURT: Okay.

20   MR. LIPPER: That's correct.

21   So this morning -- the communication from this

22   morning that I mentioned earlier has clarified -- in terms

23   of that conferral, it is all right to confer, but we're

24   essentially at the mercy of the Victims' Rights office. We

25   don't have the ability to just sort of call them up and

1 chat, right?

2   It's conferral, sort of: Here is when the

3 conferral will happen, come confer with us; not, you know,

4 here is my phone number, call me whenever you have concerns.

5   So as of this morning, when we received the

6 email -- and there have been some scheduling emails -- that

7 conferral will take place on April 24th. There will be a

8 sort of morning meeting and an after meeting in Washington,

9 D.C.

10   In that email today the Victims' Rights office

11 clarified that we are welcome to submit documents either

12 before or after that conferral. So certainly -- it would be

13 optimal, certainly, for my clients to have documents in

14 their hands that they can submit to the Victims' Rights

15 office before April 24th.

16   THE COURT: So the July 7 date is now moved up to

17 April 24?

18   MR. LIPPER: Is it's not as -- I don't want to say

19 it's as hard a deadline as July 7. Obviously, if there were

20 documents that could be or are ordered to be produced and we

21 have them by April 24th, those would be very important to

22 have. It's not a -- I don't want to say it's as drop dead

23 as July 7.

24   The review process goes on for six months. So in

25 theory, any documents that my clients receive could be

1   submitted to the Department of Justice before July 7, and

2   that would be helpful. I think we're focusing on the July 7

3   deadline because -- the Department of Justice has its own

4   documents. And so although certainly having the ability to

5   emphasize certain documents in communications with DOJ would

6   be helpful, potentially quite helpful, it is ultimately --

7   July 7 has been the topic of our investigation because that

8   is when -- DOJ is reviewing a narrower question of

9   compliance with the DPA, whereas and the standard -- and it

10   is a demanding standard, to be clear.

11   What the Fifth Circuit said was: Upon a filing of

12   a motion to dismiss by DOJ, the families will have the

13   opportunity to show that, you know, dismissal of the

14   criminal case sort of clearly violates the public interest.

15   And so it is a high bar, but it is a bar that is at least

16   available and that encompasses --

17   THE COURT: Okay. Let me just ask you this

18   because clearly --

19   MR. LIPPER: Yes.

20   THE COURT: -- I see this July 7 date, and I am

21   like -- and I read the Fifth Circuit decision. First of

22   all, you can talk -- you can pose questions to the judge

23   now, presiding over that case, you have raised a whole bunch

24   of -- a series of very serious questions in your motion.

25   At page 20: Why did Boeing belatedly agree to

1   cooperate with the criminal investigation?

2   To what extent did Boeing's lawyers draft the

3   DPA's statement of facts?

4   Why did the DPA fail to recognize the causal

5   connection between Boeing's crimes and the deadly crashes?

6   Why did it fail to address the conduct and

7   culpability of the company's leadership?

8   Was the DPA negotiated or approved by DOJ

9   officials with ties to Boeing's law firm?

10   Why did the parties rush to complete the DPA

11   before President Biden was inaugurated?

12   Why was the case filed in the Northern District of

13   Texas?

14   To what extent did Boeing urge DOJ to exclude the

15   victims' families from the process and otherwise violate the

16   CVRA?

17   All very interesting questions.

18   What is stopping the plaintiffs now from alerting

19   the court, unless you already have, that these are important

20   questions to ask of the Department of Justice?

21   And if the court believes that the answers are

22   necessary in consideration of what it's going to do about

23   the DPA, if there is a motion to dismiss, whether the court

24   should resolve that motion to dismiss in one way or the

25   other, can't you bring those questions to the court? And

1   then the court -- if the court thinks those are legitimate

2   questions, the court can demand answers from the Department

3   of Justice about it.

4   What is stopping the plaintiffs from doing that now?

5   MR. LIPPER: Well, a few things.

6   The first thing is: There is certainly in

7   the briefing -- the victims have, one, the right to

8   participate eventually in the proceeding -- over the

9   Department of Justice's and Boeing's objections.

10   There was a series of motions that were litigated;

11   many of these questions were, in fact, raised; and all of

12   that is what led -- and some additional hearings and

13   whatnot -- led the district court to recognize that my

14   clients are relatives of victims, had that status; and so

15   they were granted the right to participate in the case.

16   The district judge believed -- this is what the

17   subject of the Fifth Circuit appeal is. The district judge

18   believed ultimately that --

19   THE COURT: You are not answering my question.

20   Really just --

21   MR. LIPPER: I am trying.

22   THE COURT: -- listen to the question.

23   Have you already raised these questions with the

24   district court judge who will have to be resolving a motion

25   to dismiss?

1   MR. LIPPER: We have raised many if not all of

2   them, yes.

3   THE COURT: Okay. You have raised them.

4   If that district court judge thinks that these are

5   legitimate questions, have you asked the district court

6   judge to get answers to those questions from the government

7   and/or Boeing or both, and to do so now in order to be

8   prepared for the anticipated motion to dismiss?

9   MR. LIPPER: What the Fifth Circuit order said and

10   what it contemplated -- not yet.

11   THE COURT: But you could do that today?

12   MR. LIPPER: I am not sure that we can.

13   So we have already -- we did ask the district

14   court for document discovery under the CVRA. The district

15   court held that that discovery was not available.

16   The Fifth Circuit's order said the victims will be

17   entitled to participate at all stages of the proceeding and

18   that the next stage is the dismissal motion, at which point

19   the victims will have the right to be heard and, if there is

20   a hearing, to participate.

21   THE COURT: So just because the court found that

22   the plaintiffs weren't entitled to discovery which, okay,

23   sounds perfectly reasonable to me in the middle of a

24   criminal case; but that doesn't mean that the court itself,

25   if confronted with a motion to dismiss, can't pose questions

1   to the Department of Justice in considering the motion to

2   dismiss.

3   So why -- there is nothing stopping the plaintiffs

4   from asking the court to do that and to consider those

5   issues with or without any responsive documents to the FOIA

6   requests, right?

7   MR. LIPPER: We certainly -- in response to a

8   motion to dismiss, if we received zero documents we will

9   raise those questions; but we have a limited public record

10   at a very high standard.

11   If the standard were: There exists significant

12   questions about whether dismissing this case would be

13   contrary to the public interest, that would probably

14   suffice.

15   Our burden, however, is much higher and certainly

16   looking at the way --

17   THE COURT: Where is that burden written?

18   MR. LIPPER: That burden is written in the Fifth

19   Circuit's -- we quote it in our preliminary injunction

20   motion. But it was ultimately written in the Fifth

21   Circuit's December mandamus order; and the Fifth Circuit, in

22   turn, I believe was quoting prior precedent.

23   But we refer to it in our -- quote the Fifth

24   Circuit's articulation of the standard in our preliminary

25   injunction motion, I believe, both in the background section

1   and in our irreparable harm section.

2   In my haste to come up here, I did not bring a

3   copy of my preliminary injunction motion, but I can...

4   THE COURT: All right. Let me just -- now, when

5   the motion to dismiss is filed on July 7, if that's -- I

6   guess that's the latest date, but let's say it is filed; and

7   the Fifth Circuit has made clear that the district court

8   judge should give everybody an opportunity -- not just these

9   plaintiffs in front of me, but other victims of the crashes

10   or other people who want to be heard about this DPA -- why

11   can't the plaintiffs then just ask the district court judge

12   to set a briefing schedule that gives the plaintiffs time to

13   collect any appropriate records because, quite frankly, you

14   say the plaintiffs have asked the presiding judge -- it's

15   not clear to me.

16   You say: This is the normal schedule, which is

17   the normal schedule under the federal rules, and every local

18   rule of most federal courts. You file a motion, you have 14

19   days to respond and 7 days for a reply, but that is just the

20   default rule. Judges control their own dockets, they

21   control their own schedule. You basically seem like that

22   is, like, bound in stone.

23   Have the plaintiffs asked -- let's start with the

24   Department of Justice. Have you conferred with the

25   Department of Justice to say: Will you jointly go in with

1 us to ask the district court judge to set a briefing

2 schedule that is -- sufficiently gives us enough time to get

3 a Vaughn index or to get some documents in response to our

4 FOIA requests and ask the judge to set a briefing schedule

5 that gives you time to get documents?

6   MR. LIPPER: I have not. Although, I don't know

7 that the civil division of the U.S. Attorney's Office in the

8 District of Columbia would have the authority to agree to

9 that.

10   THE COURT: But they can pick up the phone.

11   MR. LIPPER: They can.

12   But there are two additional obstacles -- maybe

13 three, actually. The first is -- this is actually one of

14 the earliest questions I had when I was getting up to speed

15 on the case with my clients. It was something along the

16 lines of: Can we just file a complaint and then tell the

17 district judge, hey, we have this FOIA lawsuit pending?

18   There is a specific statutory provision in the

19 CVRA -- we cite this in both our motion and in our reply

20 brief -- that limits the ability to stay proceedings.

21   THE COURT: I read it, 18 U.S.C. Section

22 3771(d)(3). Although that language has been called somewhat

23 ambiguous by a number of courts, and it is fairly ambiguous.

24   But that language basically says: "In no event

25 shall proceedings be stayed or subject to a continuance of

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1    more than five days."

2              Asking for a briefing schedule is neither a stay

3    nor continuance.  So what are you talking about?

4              That has zero application to asking for a briefing

5    schedule, perhaps jointly with the Department of Justice,

6    that gives you time on the motion to dismiss to wait and get

7    documents.

8              MR. LIPPER:  I don't think it's --

9              THE COURT:  That's not an obstacle.

10             What's your other obstacle?

11             MR. LIPPER:  The only thing I would say about it

12   is in a sense that we can't ask for the district judge to

13   stay the proceedings pending a FOIA response.

14             THE COURT:  Yes.  But in asking for a briefing

15   schedule on the motion to dismiss, it is not asking for a

16   stay and it is not asking for a continuance.

17             MR. LIPPER:  That's true.  But unless and until --

18   at best we can ask for a briefing schedule that predicts we

19   will have responses by certain dates without knowing, in

20   fact -- without an order -- without a court order we still

21   won't be able to provide a date certain, number one.

22             Number two, even if the Department of Justice

23   jointly agrees to that, and I have my significant doubts as

24   to whether they will, Boeing, I am almost certain, will

25   oppose that, and they are a party to the case as well.
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1   THE COURT: Let me just ask you, is Boeing a

2   government contractor?

3   MR. LIPPER: I believe they are.

4   THE COURT: And if Boeing is actually charged in a

5   criminal case, let alone convicted, what happens to its

6   government contracts?

7   MR. LIPPER: I do not know the answer to that.

8   THE COURT: Would that be one of the reasons for a

9   DPA here?

10   MR. LIPPER: I mean, it's possible. We have

11   not -- that's not what we have -- I mean, certainly there

12   has been all sorts of speculation, articles analyzing why it

13   might have happened. We just don't know. We haven't seen

14   the plea communications.

15   THE COURT: Okay. Let me just say, there are lots

16   of -- if the plaintiffs think that -- if they get responsive

17   records they are going to find records that are going to be

18   demonstrative, confirmatory of the nefarious reasons that

19   your questions suggest; but aren't there a lot of other good

20   reasons for a DPA in this case that have nothing to do with

21   the nefarious issues that you have raised?

22   MR. LIPPER: Again, it's just -- if I had to, I

23   can certainly perhaps articulate some, but I don't know if

24   those are the reasons. Certainly, all I can say is --

25   THE COURT: So you really -- you admit that there

1   is absolutely no guarantee that you are going to find the

2   smoking gun, nefarious demonstratives in these responsive

3   records that you are just hoping -- you think that there

4   might be, maybe even hoping there might be, to prove the

5   plaintiffs' position that the DPA somehow needs to be put

6   aside or not confirmed, but it is sort of speculative at

7   this point that you are going to find anything in these

8   responsive records that proves your point.

9   MR. LIPPER: So let me -- I want to answer that

10   question -- well, let me answer that in two ways.

11   The first is, I think it is fair to say right now

12   there is a lot of smoke, whether there is fire or -- maybe

13   there isn't.

14   Obviously -- and again, we have the *Epstein* case.

15   There was actually a lot of fire in those documents, I don't

16   know if there is here or not. But the same sort of

17   questions are being raised in the Boeing case not just by my

18   clients, by all sorts of independent academics, journalists,

19   commentators about --

20   THE COURT: Well, I wouldn't know anything about

21   that. What I know about this case is what I read in these

22   papers, and just using common sense.

23   MR. LIPPER: Right. But, I mean, we have cited a

24   lot of those questions -- those people raising those

25   questions, I think, in our papers.

1   There is a lot of smoke.

2   Whether the documents have some fire, medium fire,

3   hot fire, like the *Epstein* ones, we don't know. I don't

4   know that smoking guns are the only thing that is helpful or

5   relevant to us. But, right now, we have certainly reason to

6   believe those documents are going to illuminate what

7   actually happened and how this got put together.

8   THE COURT: Well, let me just say this. I look at

9   this and I see these alternative mechanisms for plaintiffs

10   to make their points about the smoke, about the DPA, okay?

11   They can ask the court to pose the questions to

12   the government and get answers to those questions with

13   underlying documentation.

14   They can ask the court for a briefing schedule on

15   any anticipated motion to dismiss that gives the plaintiffs

16   time to examine this issue more closely with documents or a

17   Vaughn index that may be produced during the course of a

18   longer briefing schedule.

19   They could ask the government to join them in

20   seeking such a request if Boeing is going to object to it,

21   particularly if the court thinks that these are, with the

22   direction from the Fifth Circuit, about the court's power in

23   evaluating and assessing a DPA. The court may say this is

24   part of my obligation.

25   So with all of these alternative mechanisms to get

1 access to figure out whether this is pure smoke or whether

2 there are other really legitimate national security reasons

3 for DPA here because a government contract is at stake with

4 Boeing and flesh that out -- with alternative mechanisms,

5 how can the plaintiffs show irreparable harm here if I don't

6 grant this 30-day processing production Vaughn index

7 generating schedule?

8   MR. LIPPER: So the case that we relied on the

9 most heavily in our briefing -- I think the closest on point

10 involved a parallel criminal proceeding, and it was -- with

11 the Court's indulgence, I am just going to get my notes so I

12 can be more precise about it.

13   In that case -- the defendant in that criminal

14 case in New York, he wanted the FOIA documents because he

15 thought there was -- those documents might show information

16 about his relationship as a confidential informant, or

17 source of some sort, of the government, and that those

18 documents might help him in a hearing -- in a motions

19 hearing in his case in New York that might help him reopen

20 or defend against his criminal case.

21   I think -- that plaintiffs' argument, I think, was

22 more -- far more speculative than the one we're presenting

23 here, A, because we didn't really have any real reason to

24 know what those documents were going to show or whether they

25 were going to show anything helpful; B, implicating at least

        1   simpler, if not greater concerns about investigation and

        2   sources, and whatnot for the government; and C, that

        3   plaintiff in the FOIA case, who was a criminal defendant in

        4   New York, had far stronger under -- had far stronger

        5   arguments under the Due Process Clause to pause or to get

        6   discovery through his criminal case. Yet, the court, in

        7   granting that preliminary injunction, still found that the

        8   imminent -- and still theoretically had the ability to

        9   postpone that hearing. The district court there still held

       10   that he had satisfied the irreparable harm standard.

       11   There have been other cases -- I mean, there have

       12   been preliminary injunctions granted in one or two of the

       13   cases in which documents were requested by -- not even by --

       14   not by litigants, by reporters or advocacy organizations to

       15   have in time for impeachment proceedings, presidential

       16   impeachment proceedings.

       17   When we didn't have a hard stop date, it was only

       18   a "probably going to be done by Christmas," and in which

       19   those documents had been separately subpoenaed by Congress.

       20   But there were at least --

       21   THE COURT: Let me just ask you.

       22   MR. LIPPER: Yes.

       23   THE COURT: Plaintiffs acknowledge, and I quote:

       24   "The slim chance that the government will revoke the DPA."

       25   MR. LIPPER: Yes.

1   THE COURT: In support of that, you cite the

2   historical record of the 534 corporate and

3   deferred-prosecution agreements and nonprosecution

4   agreements --

5   MR. LIPPER: Yes.

6   THE COURT: -- only seven were extended or revoked

7   due to noncompliance. And you even say: "Even where

8   companies committed new crimes during the term of the

9   DPA/NPA, they got to keep the agreement."

10   I read that. How does this help you?

11   This only shows it doesn't matter what you do,

12 what you find -- doesn't that record undercut your ability

13 to show irreparable harm by not getting these documents

14 because even if you got the documents the DPA would stand?

15   MR. LIPPER: No, no, no. I'm sorry if that wasn't

16 clear.

17   THE COURT: It was clear why you were making this

18 argument. But I read it as: If nothing is going to help

19 you nudge this DPA, how are you going to show irreparable

20 harm?

21   MR. LIPPER: But in the court proceedings, we

22 don't have to persuade the DOJ; we have to persuade the

23 district court.

24   So we were offering that point because the

25 government was arguing that it is -- the government said

1   it's speculative as to whether you are going to even need to

2   respond to a motion to dismiss because DOJ might revoke or

3   extend the DPA. We cited those statistics to show there is

4   a vanishing slim likelihood of DOJ on its own revoking or

5   extending the DPA, which is why it is exceedingly likely

6   that we are going to have to make the case in court.

7   THE COURT: Which brings me back to the point that

8   you can raise all of these issues with the court. And if

9   the court finds that they are all sufficiently troubling

10   because of the smoke, the judge can demand documents,

11   records, and answers from the Department of Justice in

12   considering the motion to dismiss, right?

13   MR. LIPPER: What I can say in the history of this

14   case because -- and we talked about this a little in our

15   reply brief. When my clients moved in the criminal case to

16   participate arguing that they were representatives of

17   victims and they were opposed, my clients asked for a

18   hearing as to whether the victims of the plane crashes were

19   CVRA victims which ultimately collapsed to: Was Boeing's

20   fraud a proximate cause of those crashes?

21   And there was -- a hearing was held. But in the

22   district court's order granting the hearing, the district

23   court relied on and specifically said: I am granting a

24   hearing because you have already presented me with documents

25   and declarations that if credited or substantiated at the

1   hearing would lead me to a certain result. All of which is

2   to say in this posture and especially given this standard,

3   it is likely that the district court is going to -- the

4   district court is unlikely to proceed or go down that path

5   unless we can show him with documents or substantiate with

6   documents the questions we're raising.

7   Obviously, I don't know exactly how he is going to

8   proceed. But historically in this case the district court

9   is going to want to see our documents and our evidence in

10   writing before deciding --

11   THE COURT: Well, why can't you -- have you

12   explained to the court that you have made a FOIA request and

13   this is what they're saying and you have talked to the

14   Department of Justice and the FOIA office, and the FOIA

15   office is resisting doing even a limited search for the six

16   or seven categories; so, Judge, you think these are

17   substantial questions, you think there is smoke here, you

18   get the information from the Department of Justice. And,

19   believe me, the Department of Justice will do what the court

20   asks.

21   MR. LIPPER: We certainly -- if we do not have the

22   documents we will certainly do that.

23   THE COURT: Okay.

24   MR. LIPPER: But I think we are --

25   THE COURT: Or the court may say: There are all

1 of these other reasons for this DPA here, so maybe there is

2 smoke; and for all of these other good reasons for the DPA,

3 I am going to approve it. That may be what the court finds

4 also; I have no idea about that underlying litigation. So

5 that would mean it doesn't matter what these documents

6 say --

7   MR. LIPPER: But I think -- this is what I would

8 say.

9   THE COURT: -- so no irreparable harm.

10   MR. LIPPER: But I think there is.

11   First of all, I think certainly a motion or an

12 opposition will be far stronger or dispositively stronger

13 with the documents already. A party always wants --

14   THE COURT: Absolutely. You think. You think.

15   But it might actually provide a lot -- if they got

16 the documents, it might provide a lot of assurance and

17 reassurance to the plaintiffs that all of the nefarious

18 smoke that they're seeing is nonexistent.

19   MR. LIPPER: Even then -- even then, especially

20 the way the information has been held, that would be a

21 benefit because if they don't have the documents and the

22 case is dismissed, they are now going to always wonder if we

23 had been consulted -- so even that, the really strongly

24 suspecting and not knowing and not having an opportunity to

25 find out at a meaningful time in time to act on an

1   information is itself -- I mean, I don't -- if they see the

2   documents, at least they get that comfort. If they don't,

3   all they have -- all they see is the smoke and they have had

4   no opportunity to explore it, and now it's too late. So

5   that's the first thing.

6   But the second thing I want to say is certainly

7   any litigant prefers to, in their written submission,

8   already have the documents or some documents. The more you

9   have to ask questions that you don't already have clear

10   definitive answers to, the more you are sort of dependent on

11   persuading someone to even let you look, the more you are

12   vulnerable to accusations of fishing, or what do you expect

13   to find; all of those things.

14   Certainly, my clients are in a much -- and I would

15   say a potentially dispositively stronger position with these

16   documents, that's the first thing.

17   The second thing is the irreparable harm analysis

18   in the FOIA cases I have read from this district court that

19   have granted FOIA requests -- so even in a case in which

20   there is an imminent litigation deadline, the analysis

21   hasn't -- the standards haven't collapsed. In other words,

22   the plaintiff hasn't been told: Go see what you can get

23   from the court in that case, and if you can't get it from

24   the court in that case, then you have no right to it anyway,

25   right? That is not what the cases have said.

1   If we would get more from the FOIA response than

2   we would from the district court, which I think is quite

3   probable if not almost certain, then that is an irreparable

4   harm. In other words, it's not a -- there isn't sort of an

5   issue for a claim or issue preclusion thing here where: If

6   the district court won't give them to you as part of his

7   proceeding, then you are not -- then your irreparable harm

8   is somehow delegitimized. That is the first thing I would

9   say.

10   In fact, to reinforce that, the second point I

11   would make is that: Most of even the PI cases involve far

12   more amorphous proceedings: There is an election coming up,

13   impeachment coming up, and documents which could be

14   available to other entities or from other requests in fact

15   are being subpoenaed by Congress or elsewhere. Nonetheless,

16   the reporters or the advocacy organizations are deemed to

17   suffer irreparable harm if they can't get those documents,

18   even if there isn't a decision-maker who they will

19   ultimately be able to take them to.

20   All of which is to say: Certainly, we will do

21   everything we can in front of the district court to get the

22   information we think is out there that we don't have. But

23   the mere theoretical possibility of that does not take away,

24   A, the fact that FOIA may and probably does give us --

25   entitle us to more documents than we might get in the

1   criminal case; and, B --

2   THE COURT: Yes. But FOIA does not require a

3   timetable for production of documents --

4   MR. LIPPER: I understand.

5   THE COURT: -- and that's your big problem on

6   likelihood of success on the merits --

7   MR. LIPPER: I understand. But I think --

8   THE COURT: And that's why PIs are so rare in FOIA

9   cases, because FOIA does entitle you at some point to a

10   response, Vaughn index -- under our law that has been

11   adopted, most other circuits -- listing what's been withheld

12   and why, responsive documents at some point, as soon as

13   practicable. And that leads me to all of the details the

14   government has provided about its backlog and how fast it's

15   processing; and that's the timetable, as soon as

16   practicable. It is not a timetable set by the plaintiffs --

17   MR. LIPPER: I understand. I do think in reading

18   the cases that I have read --

19   THE COURT: -- particularly when you have all of

20   these alternative mechanisms to have other people who can

21   get the documents more quickly -- not "other people" --

22   "lots of other people," both the department and the judge.

23   MR. LIPPER: Right. I guess what I am attempting

24   to -- and let me try and see if I can be a little more

25   concise on it; that the theoretical availability of

1   alternative mechanics does not defeat a showing of

2   irreparable harm if there is no strong or good reason to

3   think those alternative mechanisms are going to bear fruit.

4   In other words, the fact that we could ask --

5   THE COURT: You haven't tried, so how do you know

6   they are not going to get them --

7   MR. LIPPER: We have tried every chance we have

8   had. We won't have an opportunity to try again until we

9   have to respond to the department's motion in July.

10   THE COURT: Wrong. I think that's wrong.

11   Why can't you -- I am not going to litigate that

12   case for you.

13   MR. LIPPER: We have already asked --

14   THE COURT: Judges sit in their chambers every day

15   and they get mail, they get motions. You can file anything

16   you want at any time in front of a judge to get their

17   attention just like you do here and like you are planning

18   with your Vaughn index, I guess, to file multiple -- other

19   emergency motions to have me resolve withholdings on an

20   emergency basis. I just think saying you have to wait until

21   July 7 to communicate with the judge in Northern District of

22   Texas -- I don't know why that is, but that's up to you.

23   MR. LIPPER: We have already asked for documents

24   and have already been denied documents. So it's not just --

25   we have already --

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1              THE COURT:  Yes.  You want documents produced to
2    you.  But raising questions and asking the judge to ask for
3    them, have you done that?
4              MR. LIPPER:  But I don't see any basis -- I mean,
5    yes, in theory we can always send anything.  But without
6    anything pending -- there is no motion pending in front of
7    the judge right now.
8              For us to send a letter saying -- or a motion
9    saying:  Dear Judge, we have the following questions that we
10   think are going to come up when the Department files its
11   motion in July -- I mean, we could do that, but I don't see
12   that -- again, looking at the practice and the history --
13             THE COURT:  I don't know who the judge is in the
14   Northern District of Texas but he is going to hate these
15   suggestions from me, but that's --
16             MR. LIPPER:  It's Judge O'Connor.
17             He has set very tight schedules.  I do not get the
18   impression, from looking at the documents in that case and
19   talking to people involved, that the judge is interested in
20   kind of freewheeling sort of suggestions or questions when
21   there is a motion pending.  There is going to be a motion
22   pending until July 7.  And when there is a motion pending on
23   July 7 -- again, we can try to slow it down -- unless and
24   until we can get a judge who has been very hesitant to
25   extend things by more than a few days at a time -- unless we
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1 can get that extended, it's a July 7 motion, two weeks to

2 respond; and that is our one chance. I take your point.

3   All I am saying is, on the irreparable harm, the

4 availability of sort of theoretical but ultimately not

5 practical alternatives is not in the PI cases in which an

6 injunction has been granted, not defeated the irreparable

7 harm.

8   There is one additional point, though, I do want

9 to make on likelihood of success on the merits, which is

10 that the government's declaration which, I understand, talks

11 about the statistics on the number of pending requests, and

12 all of that, but in that declaration and in the government's

13 opposition, when they're discussing the burdens they face or

14 providing the timetables, they are assuming, without any

15 explanation, that it is impossible to focus on, for

16 instance --

17   THE COURT: I am going to talk to them about that.

18 Mr. Lipper, please sit down. I need to move on.

19   MR. LIPPER: All right.

20   THE COURT: Ms. Walker.

21   The government says that it estimates it will

22 complete its searches for responsive records by April 1,

23 2024, and then make its initial disclosure determination

24 within 60 days after the searches are completed by

25 approximately June 1, 2024.

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 1                What does that mean?

 2                MS. WALKER:  Yes, Your Honor.

 3                So right now the Department of Justice, the

 4     Criminal Division, has submitted the full scope of the

 5     search to the Information Technology Management Unit.

 6     They're conducting a search right now for all of the records

 7     that should be completed by April 1st.  It usually takes

 8     about six weeks.  But because of the fact that they

 9     understand that this is a case that has been granted

10     expedited processing in October of 2023, as soon as they

11     complete the scope of the search, they're asking for

12     expedited completion of that search.

13                With regard to the June 1st, 2024, deadline, right

14     now --

15                THE COURT:  No.

16                MS. WALKER:  I'm sorry.

17                THE COURT:  So by April 1 the searchers will have

18     completed the searches for responsive records?

19                MS. WALKER:  Yes.

20                THE COURT:  And then what does this mean:  Initial

21     disclosure determination within 60 days after that?  Then

22     what happens?

23                MS. WALKER:  After -- let me just explain.

24                After the results of the search come in, they get

25     uploaded to Relativity, and the FOIA and Privacy Act
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1   reviewers will review the information on Relativity to

2   exclude all duplication, to do a preliminary responsiveness

3   review, and then to start going through and to review the

4   material for exemptions, and also, too, in the process,

5   categorize the records by particular detailed-enough

6   categories to support their exemptions on a Vaughn index.

7   So they want to do all of this at the front end.

8   This means that it takes a little bit of time to make an

9   initial disclosure determination, meaning that they will be

10   able to make an initial determination as to what exemptions

11   they're likely to apply to the material. They cannot commit

12   to making an actual production because of the fact that

13   there is a significant likelihood that Exemption 7(A) will

14   apply and that there will not [sic] actually be any

15   production so they use the terms "disclosure determination"

16   to at least indicate that they will make a determination.

17   THE COURT: What are the plaintiffs going to get?

18   What is your status report that's going to be due on June 1

19   going to say to me?

20   "We have made an initial disclosure

21   determination." That means -- what do the plaintiffs get in

22   their hands in terms of either documents, Vaughn index, or

23   information?

24   MS. WALKER: I believe it will include at least

25   more information about the number of records that they have

1   received, and the page number. It will include any

2   determination as to what information is going to be withheld

3   for exemptions for a particular subset of the number of

4   pages that they have processed; meaning, that they have

5   reviewed, say, 500 of a thousand, and they have determined

6   that all 500 are under Exemption 7(A), so it will provide

7   information about what exemptions will apply. And if there

8   is still more pages to process, it will -- we will be able

9   to let plaintiffs know how many further interim disclosure

10   determinations must be made before all records are

11   completely processed.

12   THE COURT: So it's really -- the initial

13   disclosure determination will just be information; no

14   documents in hand and no Vaughn index, is that correct?

15   MS. WALKER: At this --

16   THE COURT: Yes or no?

17   MS. WALKER: Most likely yes, Your Honor.

18   THE COURT: Okay. And that initial disclosure

19   determination will be only the number of responsive

20   documents identified as a whole, that total number?

21   MS. WALKER: Yes, Your Honor.

22   THE COURT: And then out of that total number how

23   many have been reviewed and what exemptions have been found

24   to be properly invoked by the Department of Justice as to

25   those numbers reviewed?

1   MS. WALKER: I believe so.

2   THE COURT: And as to those numbers reviewed not

3   only which exemptions will likely apply and to what number,

4   but how many documents might be subject to release, will

5   that be part of the initial disclosure determination too?

6   MS. WALKER: It might be subject to release.

7   So I think --

8   THE COURT: Or at the time of the initial

9   disclosure determination, June 1, you are not going to have

10   that information at all?

11   MS. WALKER: No. We should have that information,

12   Your Honor.

13   I'm sorry. I know that the agency will have a lot

14   more insight as to the scope of records it's gathered on

15   April 1st --

16   THE COURT: Do you have an idea about that now?

17   MS. WALKER: I don't, Your Honor, because they

18   have to take a look at the records once it's gathered and

19   uploaded to Relativity.

20   THE COURT: Okay. So we are going to get this

21   initial determination disclosure by June 1, which is about

22   60 days after the search is completed. And then how much

23   longer after June 1 before the plaintiffs get a Vaughn

24   index?

25   MS. WALKER: It depends on whether that initial

1   disclosure determination is complete or not. But usually

2   the government -- and this is in Ms. O'Keefe's declaration

3   as well -- needs to complete all of -- its review of all of

4   the documents gathered before it does a Vaughn.

5   THE COURT: I know that's how they like to do it,

6   but the plaintiffs raise a very good question, don't they?

7   They are asking -- in this PI they're focused on

8   communications between the Department of Justice and Boeing,

9   and Boeing's counsel -- and some other internal records, but

10   let's just focus on the Boeing communications.

11   The government says that -- let's see how you

12   exactly put it -- it will not be possible for the Criminal

13   Division to separate in such a short time frame the records

14   responsive to certain portions of plaintiffs' FOIA requests

15   from the entire corpus of records returned from searches;

16   citing the O'Keefe declaration, at paragraph 28.

17   So I look at -- because it makes no sense to me --

18   why can't you -- you are doing electronic searches. Why

19   can't you just look for electronic searches with the Boeing

20   representatives?

21   That seems pretty darn simple. Really simple.

22   So I look at the O'Keefe declaration at paragraph

23   28; it's not helpful at all. It doesn't say -- it's not at

24   all helpful. Why?

25   Why can't they just do a search for the

1   communications with outside counsel?

2   Not internal email, external email, external

3   drafts with attachments, why is that not possible?

4   MS. WALKER: Because the subset of documents that

5   plaintiffs have requested are far from discrete. They're

6   asking for -- even if they are seeking only records -- I'm

7   sorry. Even if they're only seeking on 6 of the 7 subparts

8   communications between Boeing's attorneys and the

9   government's attorneys, they nonetheless seek categories of

10   communications that are broad enough to encompass the

11   subject matter of all of the other requests that they have

12   included in their 32, 34-paragraph FOIA request.

13   So in order to actually go -- so those

14   communications that they call from the large results of

15   their search will not only be communications that are

16   potentially responsive to a subset but be responsive to a

17   lot of other document requests as well contained in this

18   FOIA request. So it is not efficient at this point to do --

19   in addition to the reviews that I have already discussed

20   previously about --

21   THE COURT: Do you have the number of

22   communications between the department -- what are the number

23   of pages, the number of records of -- between the Department

24   of Justice and Boeing counsel?

25   MS. WALKER: I don't have that number, Your Honor.

1   I will have that number after the search is complete --

2   THE COURT: So you won't have that until April 1?

3   MS. WALKER: We won't have that until sometime

4   after April 1, April 15th possibly, because of the fact that

5   it takes time to have the document uploaded and then they

6   can start reviewing it. Though, I will at least have -- I'm

7   sorry, I should qualify that. I will at least have a number

8   of total pages. They might --

9   THE COURT: I'm sorry, Ms. Walker, this makes so

10   little sense to me at all. I really don't understand what

11   Ms. O'Keefe is saying in this.

12   I am looking at paragraph 28. Plaintiffs seek an

13   order directing the unit to produce all responsive records,

14   including a Vaughn index, within 30 days.

15   The FOIA unit can't meet that deadline without

16   significantly compromising its responsibilities. Okay.

17   That has zero to do with the six categories of information

18   with Boeing communications.

19   "As explained above, many of the FOIA unit

20   litigation matters are on established schedules and subject

21   to court ordered deadlines." Got it.

22   Nothing to do with these six and isolating these

23   six communications with Boeing.

24   Then it says: "Although in certain parts of

25   plaintiffs' motions for a PI, plaintiffs suggest they would

1   request only a subset of records responsive to their FOIA

2   requests within 30 days of the court's order, it is not

3   possible for the FOIA unit to separate, in such a short time

4   frame, the records responsive to certain portions of

5   plaintiffs' FOIA request from the entire corpus of records

6   returned from searches." Why?

7   That doesn't explain why. It just says it.

8   Their FOIA requests have only a portion of records

9   responsive to plaintiffs' FOIA request produced in 30 days

10   is, operationally, the same as requesting a disclosure

11   determination on all responsive records in 30 days.

12   Is it just because it throws off their process and

13   that's not how they do things? That's what it sounds like.

14   MS. WALKER: Two reasons actually. I apologize

15   that it's not completely clear.

16   THE COURT: It is not at all, at all.

17   MS. WALKER: The search has been ongoing since --

18   I'm sorry.

19   The government's effort to form a scope of search

20   that will reasonably collect all responsive records has

21   started once the request was perfected and submitted in

22   August of 2022. It's a lengthy process that requires a lot

23   of back-and-forth between subject matter experts.

24   So initially the thought process was that -- you

25   know, we became aware of plaintiffs --

1   THE COURT: You want to collect in one search in

2   order to save time -- because you have a lot of other

3   matters pending, everything that the plaintiffs have asked

4   for in all 45 categories -- and that's not counting the

5   subparts of their categories.

6   MS. WALKER: That's correct.

7   THE COURT: So the plaintiffs have sort of shot

8   themselves in both feet by -- if they really were just

9   interested in the communications with Boeing, that's what

10   they should have asked for in the FOIA request. But because

11   they asked for 34 categories -- including all of the

12   subparts, not even counting how many those might be --

13   that's how you crafted your search -- to have an adequate

14   search?

15   So what you are saying is, actually, to go back in

16   now to do a subpart, you would have to create a whole new

17   search?

18   MS. WALKER: That's one possible solution for

19   getting the subset of records that plaintiffs are seeking.

20   That was the initial thought process of including that

21   statement in this declaration, was that: We're going to

22   have to start over again to gather just this subset of

23   records, and that is a lengthy process. We cannot start it

24   over at this point. We cannot do it in 30 days at this

25   point either. So that's one.

1   The second was that: In the reply brief that

2   plaintiffs filed, the plaintiff suggested, well, can't you

3   take the records that you have already gathered and cull

4   through them and pull out the subset?

5   And the reality is: After the plaintiffs filed

6   their reply brief, I was able to talk to the FOIA MPA unit

7   and ask them, Is this doable? It's absolutely possible.

8   Will it be efficient in this case? No.

9   It will not get to plaintiffs the documents any

10 faster than if they allow the division to continue its

11 efforts it's doing now diligently to review the records and

12 make a disclosure determination on the records as a whole.

13 But at this point it's not possible to run a subset of

14 searches to capture only the communications or the 16

15 subparts of materials or records that touch on statements

16 that the government may have said to the victims in the

17 Boeing criminal case.

18   THE COURT: So that's the Category 7, which has 16

19 subparts?

20   MS. WALKER: 16 subparts. And they are very

21 wide-ranging, including statements regarding to the

22 underlying investigation, statements regarding -- statements

23 to victims, statements regarding reasons for entering into

24 the deferred-prosecution agreement.

25   I just want to point out, too, that at one point

1   my colleague here has mentioned that one of the purposes of

2   having these documents is to seek records relating to the

3   underlying communications and determinations that the

4   Department of Justice has currently ongoing to determine

5   whether Boeing has complied with the terms of the

6   deferred-prosecution agreement.

7   But none of the -- I did a quick skim. I didn't

8   see any -- that particular subject matter addressed in any

9   of the FOIA requests at issue in the subparts that they have

10   identified for purposes of this preliminary injunction, but

11   that would be yet another subcategory of documents that they

12   potentially are seeking.

13   The reason why we didn't have that second

14   explanation is because I had only seen that in the reply

15   brief. But the first thought process was that we cannot

16   redo our search now that it has -- we have gotten the wheels

17   turning, and it's near completion.

18   THE COURT: Okay. So let's say the court in the

19   Northern District of Texas, given the clear direction from

20   the Fifth Circuit, that before they -- in considering the

21   motion to dismiss that's anticipated to be filed by July 7,

22   wants to get to the bottom of these questions generating

23   smoke about the DPA, the government is going to want to

24   answer those questions, right?

25   MS. WALKER: I would assume so, yes. Yes.

1   THE COURT: So if the government, in order to

2   answer those questions, joins with the plaintiff for a

3   briefing schedule that gives the government time to review

4   all of these documents that have been collected because it

5   was a different administration, so they may not -- people

6   have gone who may have been involved in those negotiations,

7   the fraud team in charge of the Boeing prosecution now and

8   the DPA now is probably going to want to look at those to

9   answer questions posed by the court.

10   So you can see a scenario where the government

11   might join with the plaintiffs in asking for a briefing

12   schedule that gives the government time to fully respond to

13   all of those questions to put -- to clear up the smoke.

14   Can you see that possibility?

15   MS. WALKER: I can see that possibility, Your

16   Honor. But I would like to just say that I don't want to

17   speak for the attorneys that are on the prosecution team.

18   THE COURT: Maybe they should have been here.

19   MS. WALKER: Your Honor.

20   THE COURT: But you can talk to them about that,

21   right?

22   MS. WALKER: I could talk to them about that. But

23   my focus today is on the merits of the relief that plaintiff

24   is seeking in this case, which is I think -- you know, what

25   I understood was a complete processing of all records

1   requested in the FOIA request with a Vaughn index.

2   And if I may --

3   THE COURT: Well, can I just say this July 7 date

4   that is, I guess, pursuant to the DPA paragraph 25 that says

5   that six months after the agreement's expiration the fraud

6   section shall seek dismissal with prejudice of the

7   information filed against the company, so that's why July 7

8   has become such a key date here.

9   Is it possible for the fraud team in charge of

10   this DPA to file a motion to dismiss prior to the six

11   months or -- so that is July 7 only the latest date

12   possible, but it could be filed earlier?

13   MS. WALKER: I believe by the language in the

14   deferred-prosecution agreement that's possible. But I do

15   know that the Speedy Trial Act stay has extended that to

16   July 7. So essentially the Speedy Trial Act stay applies

17   until July 7th, so they're using that six months

18   specifically to perform a complete comprehensive review, so

19   I don't think that they would want to necessarily rush that.

20   THE COURT: So the government, in talking about

21   why there is no irreparable harm here, basically says one

22   reason why there is no irreparable harm is that even if they

23   had the records they wouldn't be able to convince the

24   district court overseeing the deferred-prosecution agreement

25   to alter that agreement's terms since the district court has

1   no power to alter the DPA. It says that in the government's

2   opposition on page 20.

3   Is that one of the government's reasons for

4   finding no irreparable harm here?

5   MS. WALKER: Because it was unclear what the

6   purpose of the records that the plaintiffs were seeking --

7   because it was unclear what purpose the plaintiffs were

8   going to use these records for, one of the arguments is

9   that: To the extent that they are using these records to

10   convince the district court in the Northern District of

11   Texas to reject the deferred-prosecution agreement and

12   reopen criminal proceedings, the Fifth Circuit has made that

13   clear that that would not be feasible.

14   And so --

15   THE COURT: I am not so sure about that.

16   I mean, it's not that the district court can -- in

17   resolving a motion to dismiss can't say -- I mean, the

18   district court, in resolving a motion to dismiss, can say

19   yes or no. But if the district court says: No, I am not

20   going to grant the motion to dismiss, that would probably be

21   for a reason that he's finding some deficiency perhaps in

22   the DPA. So it's not that the district court would be

23   rewriting the DPA because that is an executive branch

24   function, but it could give pretty clear signals about what

25   needs to be -- what the district court judge would think

1   would be needed in the DPA.

2   I mean, what happens if the court says no to the

3   motion to dismiss?

4   MS. WALKER: Then the criminal -- I mean, this is

5   an area outside of my expertise, criminal law. But I

6   mean --

7   THE COURT: It might prompt -- just like if a

8   court rejects an 11(c)(1)(C) plea, the parties go back to

9   the bargaining table and make alterations.

10   MS. WALKER: I believe the deferred-prosecution

11   agreement -- in terms of what would happen if the government

12   decides -- finds that Boeing has not complied, it leaves the

13   government available to determine what course of action to

14   pursue next.

15   So what I am trying to say is: The government

16   is -- has the responsibility to bring criminal charges and

17   can then determine the course of action after the

18   deferred-prosecution agreements hypothetically were for some

19   reason found invalid. I am not sure how that works in

20   criminal law. I apologize if I say anything that seems

21   incorrect. But, essentially, the plaintiffs would like for

22   the criminal case to be reopened. And that -- my expertise

23   here is to focus on the FOIA case.

24   THE COURT: Yes. But you made the argument in

25   your briefing that no irreparable harm -- because the

plaintiffs -- even if they found some smoking guns, the

district court has no power to alter the DPA and it does no

good, as I understood your argument.

You opened the door to this.

Well, that's not how I read the Fifth Circuit

decision in any event because, as I read the Fifth Circuit

decision, while the district court in Texas may not have the

power to alter the terms of the DPA, the Fifth Circuit, to

my mind, made it very clear that -- and I quote: "The

district court will assess the public interest according to

case law as well as the CVRA, including violations already

admitted to, as well as any other circumstances brought to

its attention by the victims' families."

It then goes on to cite a series of cases holding

that: District judges are empowered to deny dismissal when

"clearly contrary to manifest public interest" as assessed

"at the time of the decision to dismiss."

And then it drops a footnote, as if that wasn't

enough, to say that the district court has power to and

must -- has an obligation to "assess the public interest"; a

long Footnote 12 reiterating the power of the court in

considering Rule 48 under the Federal Rules of Criminal

Procedure motion to dismiss, to ascertain whether it's

clearly contrary to the public interest; which indicates to

me that the Texas district court not only has the power to

1   deny any government motion to dismiss but has the obligation

2   to consider the public interest.

3   So, I mean, isn't that a correct reading of the

4   Fifth Circuit?

5   MS. WALKER: Your Honor, my understanding is, as

6   we included in -- the extent that we included in our reply

7   brief was that the Fifth Circuit stated that the district

8   court in Texas could not substantially revise the deferred

9   prosecution agreement. What happens beyond that and what

10   the court reviews, I just -- what the court --

11   THE COURT: You didn't read Footnote 12.

12   MS. WALKER: I did, Your Honor. I'm sorry.

13   I am saying that the hypothetical of what might

14   happen is just something that I don't -- I can't answer

15   today.

16   THE COURT: Well, you would agree, wouldn't you,

17   that if the plaintiffs have access to the records they're

18   requesting, they would -- that would make their position

19   stronger in terms of their critiques of the DPA.

20   MS. WALKER: I mean, it's not something that --

21   that's another hypothetical, Your Honor, that I don't think

22   is realistic in this case because of a lot of what was

23   discussed earlier with my colleague is that most of these

24   records are likely to be protected by Exemption 7(A).

25   So it seems that at the end of the day -- the

1   plaintiffs even acknowledged that by insisting that they

2   would like the Vaughn index to be provided as well because

3   with the Vaughn index they are assuming that they can at

4   least get enough information to use to support any response

5   to the motion to dismiss.

6   THE COURT: Can I just ask you something? Just

7   step back.

8   The Department of Justice as an institution, how

9   is Merrick Garland going to feel if the fraud section is

10   resisting providing information?

11   They have already blown the victims' rights under

12   the CVRA so the Fifth Circuit had to say: Do better,

13   district court judge.

14   There is all this smoke according to the

15   plaintiffs. I don't know.

16   According to the plaintiffs there is a lot of

17   smoke generated in the press and other places beyond just

18   the questions that they have raised here that a year from

19   now, when they finally get documents in hand, there are some

20   smoking guns and the justice department didn't inquire,

21   didn't look, didn't try and find that out.

22   How -- I mean, doesn't the justice department want

23   to get to the bottom and find the documents and show that

24   this is just smoke and, in fact, there is no smoking guns

25   and there are really good reasons for this DPA?

1   MS. WALKER: I mean, Your Honor --

2   THE COURT: Just step back for a moment

3   representing the Department of Justice as you are.

4   MS. WALKER: We are in the lane of FOIA, and so

5   we're working diligently --

6   THE COURT: And you are not going to get out of

7   that lane?

8   MS. WALKER: The Criminal Division is operating

9   under FOIA which includes exemptions that protect certain

10   interests. Exemption 7(A) is one of them that protects

11   certain interests.

12   There is an interest here which is that there is

13   an ongoing criminal proceeding. So long as the criminal

14   proceeding is still ongoing, there is an interest to protect

15   documents that might compromise that criminal procedure.

16   THE COURT: Who are your colleagues sitting back

17   here giving you notes?

18   MS. WALKER: My deputy John Truong is sitting here

19   with me.

20   THE COURT: You are from which section of the

21   Department of Justice?

22   MS. WALKER: We are with the U.S. Attorney's

23   Office.

24   THE COURT: The U.S. Attorney's Office.

25   MS. WALKER: Yes, in the civil division.

1   THE COURT: Okay. Well, as a component of the

2   Department of Justice, it just seems to me like resisting --

3   that you would be communicating with the fraud section about

4   all of this smoke that's being generated not just in the

5   Northern District of Texas but in this FOIA litigation. And

6   wouldn't they want to get to the bottom of it somehow and

7   address it, as opposed to just taking sort of as a

8   reputational thing for both the fraud section and the

9   Department of Justice, as a whole, over a matter involving a

10   major U.S. company and over 350 deaths at hand? I mean,

11   this is something that, to me, should be taking a broader

12   picture than just a purely legalistic one on what's expected

13   in the FOIA. And I would have hoped that you would have

14   conferred with the fraud section before you got here on a

15   hearing that I rarely have on FOIA matters which should have

16   demonstrated the importance I give to this matter.

17   MS. WALKER: Yes, Your Honor. I conferred --

18   THE COURT: And conferred with them to say: Are

19   you going to join with the plaintiffs? Are you going to

20   take the plaintiffs' phone calls about how to clear up the

21   smoke here?

22   But that hasn't happened, has it?

23   MS. WALKER: Your Honor, I conferred with agency

24   counsel and they are my liaison with the fraud --

25   THE COURT: Agency counsel.

1   MS. WALKER: -- division; agency counsel with the

2   FOIA Privacy Act unit of the Criminal Division which is

3   responsible for responding to FOIA requests to the 37 other

4   divisions in the Criminal Division, including one of which

5   is the fraud section. They are my point of contact, and

6   they are the ones that have been communicating with the

7   fraud section and relating that information to me.

8   So, yes, in some way I have been conferring with

9   them -- not directly, but through agency counsel which is my

10   appropriate point of contact. And I have stressed -- we

11   have talked about it today and appearing today. And it was

12   stressed to them that they appear, Your Honor, but they have

13   spent a lot of time with me this week to prepare. And I am

14   here to address as many questions as possible. If there are

15   others that --

16   THE COURT: What are the good reasons for the DPA

17   with the Boeing company?

18   Let's say all of the smoke and all of the

19   questions are true. Are there still good reasons for this

20   DPA?

21   MS. WALKER: Your Honor, that is not something

22   that I am prepared to address today and it is not, with all

23   due respect, a part of the issues here, that we are

24   addressing here with the FOIA case and the relief that

25   plaintiffs are seeking.

1   I would also like to -- this wasn't mentioned in

2   the brief, but I would also -- one, would like to, I guess,

3   ask perhaps through the court whether or not some of the

4   requests that are at issue, especially two in the subset

5   that the plaintiffs have identified, were requests that were

6   similarly included in discovery requests that the plaintiffs

7   here -- and are plaintiffs in a civil action pending in the

8   Northern District of Illinois -- could have posed to Boeing

9   and may also have had access to responsive documents.

10   So there are multiple ways in which, I think as

11   you have addressed before -- that plaintiff is able to

12   either access records that they are --

13   THE COURT: I don't know what case you are talking

14   about in the Northern District of Illinois.

15   MS. WALKER: There is a civil action pending in

16   the Northern District of Illinois in front of Judge Durkin

17   that involves the civil claims against Boeing related to at

18   least the --

19   THE COURT: By the same plaintiffs?

20   MS. WALKER: Yes, Your Honor, some of the same

21   plaintiffs; many of the same plaintiffs.

22   And so discovery in that case has been ongoing

23   since 2019. It's possible -- I am not involved in that

24   case, but that's why I would inquire through the court

25   whether or not similar requests for communications between

1   Boeing and the government may have come up in discovery

2   requests in that case as well.

3   But there is a difference here, which this is a

4   FOIA case where FOIA controls, and there are exemptions that

5   apply and that the release of documents under FOIA is not

6   specifically to a particular party where there might be a

7   protective order in place or some other order from the court

8   that guides further disclosure of the documents.

9   This is FOIA where the release would involve a

10   release to all, and so we do have to look at the application

11   of exemptions under FOIA. And within the context of FOIA,

12   the government has been acting diligently to respond to this

13   request.

14   Some of the reasons, as I understood in reading

15   plaintiffs' motion for preliminary injunction for why the

16   department didn't return initial phone calls was because of

17   the same issues that they had with making sure that there

18   were sufficient records in place that -- to release the

19   documents to counsel -- I'm sorry, I am misspeaking.

20   I believe at one point they said that all

21   communications needed to be directed to the attorney

22   representing the clients that were seeking the FOIA

23   requests. So they have responded.

24   The division, as I laid out in -- as we laid out

25   in our brief, has seven people reviewing 1100 FOIA cases

1   that are currently pending at the administrative process.

2   THE COURT: I have read all of those statistics.

3   MS. WALKER: Okay.

4   THE COURT: Is there anything else you want to

5   add?

6   MS. WALKER: If the Court has no further

7   questions, there is nothing else.

8   THE COURT: I just think the Department of Justice

9   needs to take a much more macro look at this whole

10   litigation because, you know, everything -- it seems like

11   you are all very stovepiped over there at the Department of

12   Justice and this could be -- more communication with the

13   plaintiffs might have forestalled a preliminary injunction,

14   and so on, and protected the reputation of the Department of

15   Justice, the Attorney General, in a major piece of

16   litigation a lot better than what I see going on right now,

17   which is just legalistic resistance.

18   All right. You may be seated.

19   Plaintiffs want to respond?

20   MR. LIPPER: Yes, Your Honor.

21   THE COURT: Tell me about the Northern District of

22   Illinois case. 2019 it was filed?

23   MR. LIPPER: My understanding is that there is a

24   consumer fraud lawsuit in the Northern District of Illinois,

25   but any of the civil litigation is necessarily looking at

1   Boeing's conduct.

2   THE COURT: You are not involved in that

3   litigation?

4   MR. LIPPER: I am doing this FOIA case pro bono.

5   I have not been involved in the case at all before this.

6   THE COURT: But is it the same plaintiffs as in

7   this case?

8   MR. LIPPER: I believe that -- it's the

9   government's understanding that it's some of the same

10   plaintiffs, but it's not perfect -- there is overlapping --

11   there is a Venn diagram that overlaps.

12   THE COURT: Is there discovery being requested?

13   If it was pending from 2019, I would expect that there will

14   be discovery in that case.

15   MR. LIPPER: I assume so. I don't know anything

16   beyond that other than the civil litigation is going to be

17   aimed at what Boeing knew or did before the crashes

18   happened. Whether it's consumer fraud litigation or

19   wrongful death litigation, it's going to be focusing on

20   retrospective conduct. These requests are looking at a

21   different window, which is after the crashes, between the

22   crashes, and the announcement of the deferred-prosecution

23   agreement. So we're looking at a different window of time

24   here. That's the first thing.

25   The second thing is that I agree with the Court on

1 the Fifth Circuit's ruling. I agree that we do not have the

2 authority to ask the district judge to amend the DPA, to

3 draw lines through it, to add provisions. The Fifth Circuit

4 has held that we don't have the authority -- we do have the

5 authority, as the Fifth Circuit said and in the language of

6 the footnote that you quoted, which is -- as well as on page

7 13 of our motion, is that if we can make this showing of --

8 contrary to the manifest public interest, then the district

9 court has the authority to deny the motion to dismiss.

10   What DOJ does after that is up to them, obviously,

11 with their obligation to consult us. But dismissal is --

12 denying the motion to dismiss is on the table; that is what

13 the district court thought it didn't have the authority to

14 do and what the Fifth Circuit clarified he does have -- the

15 Court does have the authority to do.

16   I do want to talk a little further about the

17 segregating of requests because I understand sort of

18 conceptually what the government is saying. But I still

19 don't understand why, if there is a sort of corpus in place,

20 why there can't be further, more targeted searches within

21 that corpus. Certainly --

22   THE COURT: I understand you don't understand; I

23 do. Do you want to go on?

24   Anything else before I take a break?

25   MR. LIPPER: The only thing I further wanted to

1   clarify there is that I believe most of the examples the

2   government gave was relating to the seventh of seven of the

3   categories that we're seeking in the PI, and that is the one

4   with the subparts; but the other six are, I think, much more

5   discrete. And so the concerns the government identified

6   with the seven requests with the subparts I don't think

7   would prevent them from doing that subset of searches with

8   the other six which are really sort of just communications

9   with outside counsel.

10   And then -- I am looking through my notes here.

11   The final -- I'm sorry.

12   The final point the government said -- I think the

13   government suggested -- at least I understood it suggested

14   the reason we want the Vaughn index is that we would somehow

15   try to use the contents of the Vaughn index as substantive

16   evidence in opposing the motion to dismiss. That's not our

17   intent.

18   Obviously, I don't know -- I wouldn't expect there

19   to be -- I would not expect there to be enough meaningful

20   information in a Vaughn index to use the substantive

21   evidence to oppose the motion to dismiss.

22   The reason we want the Vaughn index is because we

23   want to know how many documents there are, how many are

24   being withheld, what are the grounds for withholding. And

25   if we think some of those exemptions that are being

1   improperly asserted with respect to discussions with outside

2   counsel --

3   THE COURT: Well, you are going to get some of

4   that information if all you want is the number and the

5   exemptions that are going to be invoked.

6   MR. LIPPER: Right.

7   THE COURT: You are going to get some of that

8   information by June 1 when their initial determination --

9   that's part of the information they are going to be giving

10   you --

11   MR. LIPPER: Right.

12   THE COURT: -- although not in a formal Vaughn

13   index.

14   MR. LIPPER: But even the June 1st -- as I read

15   the declaration in the opposition, it was: The department

16   expects to be done with its search by April 1st. When it is

17   done with its search, it expects to have that initial

18   interim determination within 60 days. Even there it seemed

19   like there are two contingencies. It still seems possible

20   the search may go beyond April 1st. And it seems like the

21   initial interim determination may be more than 60 days after

22   that. So even from reading the affidavit -- it wasn't clear

23   even from that that we would receive it by June 1st.

24   THE COURT: That's right.

25   All right. I am going to take a half an hour

1   break and then we're going to come back, and I will issue my

2   ruling.

3   (Whereupon, a recess was taken.)

4   THE COURT: I am going to issue my ruling on the

5   pending motion for preliminary injunction that was filed on

6   January 23 by the plaintiffs.

7   For the reasons I will explain, plaintiffs' motion

8   is denied. I am going to start with a brief summary of the

9   facts.

10   The matter arises from plaintiffs' FOIA request,

11   which was initially submitted to DOJ's Criminal Division on

12   April 26, 2022, seeking, on an expedited processing

13   timeline, 34 categories of records with multiple subparts to

14   many of those related to the department's investigation and

15   prosecution of the Boeing company following the tragic

16   crashes of two Boeing 737 Max aircrafts that killed

17   everybody on board.

18   Among other requested records, plaintiffs sought

19   records regarding communications with victims' families, the

20   status of the DOJ investigation in 2020, and discussions

21   with Boeing's attorneys.

22   After plaintiffs' counsel failed to timely perfect

23   the FOIA request by submitting verification of the

24   plaintiffs' identities and the representation as required

25   for DOJ to begin searching for the responsive records, the

1   FOIA unit administratively closed the plaintiffs' request.

2   On August 9, 2022, the FOIA unit received a new

3   FOIA request dated August 5, 2022, with, essentially, the

4   same requests for records from plaintiffs seeking the same

5   records and, again, requesting processing on an expedited

6   basis. That record was, as I said, perfected with all of

7   the necessary documentation. So by letter dated

8   November 15, 2022, DOJ denied plaintiffs' request for

9   expedited treatment and proceeded to start processing the

10   request.

11   It was being processed on a complex track for

12   which the average processing time, as communicated by the

13   Department of Justice, was roughly 28 months or 853 days for

14   completion. Although, plaintiffs' request was estimated to

15   be completed within 12 to 18 months, about half that time.

16   Plaintiffs administratively appealed.

17   On October 17, 2023, DOJ's Office of Public

18   Affairs granted plaintiffs' request for expedited processing

19   as a matter of widespread and exceptional media interest in

20   which there exists possible questions about the government's

21   integrity that affect public confidence. So that has all

22   been recognized by the Department of Justice about this

23   pending FOIA request.

24   DOJ then did not produce a single public record

25   responsive to the family's request, nearly -- as they said,

1   20 months, but that's based on their April 2022 date as

2   opposed to the correct August 2022 date, since plaintiffs

3   have submitted their FOIA requests.

4   So plaintiff has, as is their right, filed on

5   December 23, 2023, a five-count complaint against DOJ

6   alleging violations of FOIA arising from DOJ's handling of

7   plaintiffs' FOIA request.

8   Shortly thereafter, on January 2, 2024, plaintiffs

9   received a letter from DOJ's Criminal Division victim

10   witness unit explaining that the three-year term of the DPA

11   was set to expire on January 7, 2024, and the government has

12   a six-month time period during which it will evaluate

13   Boeing's compliance, and that DOJ would hold a conferral

14   session with the crash victim families and their

15   representatives to solicit input and collect any information

16   they wish to present; and after which point, if DOJ

17   concludes that Boeing has complied, DOJ will be obligated to

18   file a motion to dismiss the case.

19   In late breaking news this morning, plaintiffs'

20   counsel advised that that conferral meeting will take place

21   on April 24th.

22   On January 23, 2024, plaintiffs filed the pending

23   motion for a preliminary injunction requesting that this

24   Court issue an order requiring DOJ, within 30 days of the

25   court order, to: One, process and produce all responsive

1   documents; and, two, produce a Vaughn index identifying any

2   documents withheld or redacted, and the exemption being

3   asserted; and three, an expedited hearing under Local Civil

4   Rule 65(d).

5   Pursuant to this Court's January 26, 2024, minute

6   order, the parties jointly proposed a briefing schedule

7   contemplating that briefing would not be ripe until after an

8   expedited PI hearing, as the plaintiffs had originally

9   requested would have been held under Local Civil

10   Rule 65.1(d) and, thus, plaintiffs' request for an expedited

11   hearing under that rule was denied.

12   On February 23, the briefing on plaintiffs' PI

13   motion became ripe; and on February 26 the Court scheduled

14   this hearing that we have held today on the motion.

15   Turning to the legal standard, the Supreme Court

16   has called a preliminary injunction an "extraordinary

17   remedy"; *Winter v. National Resource Defense Council*,

18   555 U.S. 7, jump cite 22, from 2008. This is a remedy that,

19   quote: "Should be granted only when the parties seeking the

20   relief, by a clear showing, carries the burden or

21   persuasion" on each of the four factors.

22   To obtain relief, plaintiffs seeking preliminary

23   injunction must establish: One, they're likely to succeed

24   on the merits; two, they're likely to suffer irreparable

25   harm in the absence of preliminary relief; three, the

1   balance of equities is in their favor; and four, an

2   injunction is in the public interest. See *Winter*, 555 U.S.

3   7, at jump cite 20. See also *Cobell v. Norton*, 391 F.3d

4   251, jump cite 258, D.C. Circuit 2004; and *League of Women*

5   *Voters of the U.S. v. Newby*, 838 F.3d 1, jump cite 6, D.C.

6   Circuit 2016.

7   At the same time, the D.C. Circuit has called the

8   first factor, the likelihood of success on the merits, the

9   most important factor; the second factor, irreparable harm,

10   has also been viewed *sine qua non* for preliminary injunctive

11   relief.

12   The D.C. Circuit has cautioned that a preliminary

13   injunction generally "should not work to give a party

14   essentially the full relief it seeks on the merits,"

15   *Dorfmann v. Boozer*, 414 F.2d, 1168, jump cite 1173, note 13,

16   D.C. Circuit from 1969; and that this equitable power

17   "should not be exercised unless it is manifest that the

18   normal legal avenues are inadequate and that there is a

19   compelling need to give the plaintiff the relief he seeks";

20   jump cite of *Dorfmann* at 1174.

21   The parties agree that plaintiffs seek a mandatory

22   injunction; that is, an injunction whose "terms would alter,

23   rather than preserve, the status quo by commanding some

24   positive act" because plaintiffs request an order for DOJ to

25   take action to produce responsive records and a Vaughn index

1   on a timetable that is not otherwise required under the FOIA

2   statute.

3   For such a mandatory injunction, plaintiffs must

4   "meet a higher standard than in the ordinary case by showing

5   clearly that they are entitled to relief or that extreme or

6   very serious damage will result from the denial of the

7   injunction." See *Daily Caller v. U.S. Department of State*,

8   152 F. Supp. 3d 1, jump cite 6, D.D.C. 2015.

9   Even under a comparatively lower standard

10   applicable to nonmandatory preliminary injunctions, however,

11   plaintiffs have failed to demonstrate that preliminary

12   relief is warranted.

13   Starting with likelihood of success on the merits.

14   This factor generally looks to plaintiffs'

15   likelihood of success on the actual claim asserted in the

16   complaint. This means, in the FOIA context, looking at the

17   FOIA request itself and ascertaining whether this request

18   may very well trigger withholding under the FOIA exemptions.

19   Plaintiffs' request asks for documents from DOJ

20   about an ongoing criminal investigation in a pending

21   criminal case.

22   FOIA Exemption 7(A) protects, quote: "Records or

23   information compiled for law enforcement purposes" -- in

24   relevant part -- "to the extent that the production of such

25   law enforcement records or information can reasonably be

1   expected to interfere with enforcement proceedings." See 5

2   U.S.C. Section 552(b)(7)(A). That exemption protects

3   against interference with enforcement proceedings that are

4   "pending or reasonably anticipated." See *Mapother v. DOJ*,

5   3 F.3d 1533, jump cite 1540, D.C. Circuit from 1993.

6   Moreover, an agency may: Broadly assert

7   Exemption 7(A) over an entire criminal file to satisfy its

8   burden of proof under Exemption 7(A) by grouping documents

9   in categories and offering generic reasons for withholding

10   the documents in each category rather than detailing them

11   document by document by document, as a normal Vaughn

12   indexes. See *Sarno v. DOJ*, 278 F. Supp. 3d 112, jump cite

13   124, D.D.C. from 2017, quoting *Maydak*, 2018 F.3d, jump cite

14   765.

15   I am not going to prejudge what response DOJ will

16   ultimately give to plaintiffs in its FOIA request or even

17   the seven categories that they have put at issue in this

18   preliminary injunction. But given the nature and context of

19   plaintiffs' FOIA request, invocation of Exemption 7(A) and

20   possibly other subparts of Exemption 7 and Exemption 6 are

21   likely. Therefore, plaintiffs have a challenging road to

22   show a likelihood of success on getting every record

23   responsive to their request produced to them. Indeed, the

24   fact that plaintiffs have requested a Vaughn index

25   demonstrates that they are very well aware of this fact. On

1   this reason alone, plaintiffs have failed to show a

2   likelihood of success.

3   Focusing just on the requested issue in the

4   preliminary injunction, plaintiffs seek an order directing

5   DOJ to produce all records responsive to 7 of the 34

6   requested category of records and a Vaughn index indicating

7   the records withheld and the exemptions asserted within 30

8   days of an order from this Court.

9   As noted, DOJ is already processing plaintiffs'

10   request on an expedited basis, which requires processing as

11   soon as practicable. See 5 U.S.C. Section 552(A)(6)(E)(iii).

12   Even if the likelihood of success in this FOIA

13   context is measured only against what plaintiffs have asked

14   for in the PI, that is: Are they entitled to having

15   responsive records in a Vaughn index as to seven parts of

16   the FOIA request produced by a date certain 30 days from

17   now, i.e., that is, April 1 -- they are not so entitled.

18   So, again, they don't show a likelihood of success

19   on the merits either for their full FOIA request in their

20   complaint nor even on the PI.

21   As DOJ correctly points out, the law does not

22   entitle plaintiffs to production of records in response to a

23   FOIA request on a particular timetable.

24   As DOJ explains, FOIA does not dictate a specific

25   truncated schedule for processing even expedited requests.

See the defendant's opposition at page 15.

DOJ is required to produce the responsive records on an "as soon as practicable" processing schedule.

"If exceptional circumstances exist, then so long as the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records." See *Citizens For Responsibility & Ethics in Washington versus Federal Election Commission*, 711 F.3d 180, jump cite 185, D.C. Circuit 2013. See, also, *New York Times Company versus Defense Health Agency*, No. 21-cv-566, 2021 Westlaw 1614817, at *6, D.D.C. April 25, 2021.

DOJ has demonstrated that it is processing the plaintiffs' FOIA request on an expedited basis. It is demonstrating exceptional circumstances here that it is doing it as soon as practicable within the terms and requirements of the FOIA statute, citing data demonstrating that the Criminal Division has "experienced a significant increase in the number of FOIA requests" received in recent years -- specifically, 35 percent increase from '20 to 2022, "with the number of FOIA requests assigned to the complex processing track" to which plaintiffs' request was originally assigned increasing by 57 percent from 2018 to 2022.

The DOJ's Criminal Division "has approximately

1   1100 open administrative requests" which include FOIA and

2   Privacy Act requests, referrals from other agencies

3   regarding their requests of which 22 have already been

4   "granted expedited processing and placed on an expedited

5   processing track."

6   The Criminal Division has further been inundated

7   by FOIA litigation matters, not just this one. It has 148

8   open litigation matters in its litigation queue in 51 of

9   which the Criminal Division is a named defendant. These

10   administrative requests and litigation matters are all

11   processed by a staff of seven individuals and three final

12   reviewers. See the O'Keefe declaration submitted in

13   connection with DOJ's opposition, at paragraph 24.

14   To its credit, DOJ avers that it is "diligently

15   working to respond to plaintiffs' FOIA request as soon as

16   practicable" and that it is making considerable progress in

17   reducing its backlog though it continues to face increased

18   workload.

19   DOJ says it would not actually be practicable to

20   produce all responsive nonexempt records within 30 days of

21   this Court's order since DOJ has not even completed its

22   search record for responsive records, and the FOIA unit

23   estimates it will not make its initial disclosure

24   determination before June 2024.

25   In that initial disclosure determination, as

1   clarified at the hearing today, they will have -- they will

2   be able to provide information to the plaintiffs about the

3   total number of responsive documents recovered in response

4   to the entire FOIA request, which has 34 major categories

5   and multiple, multiple subcategories. It will also be able

6   to determine how many of those responsive records have been

7   searched so far, and to which -- how many of those records

8   might be subject to exemption and what those exemptions may

9   be up to the point that they have been able to do a detailed

10   search by that point of June -- beginning of June 2024.

11   DOJ avers that although plaintiffs request in

12   their PI, preliminary injunction, only a subset of the

13   requested records, that narrowed request does not make

14   processing any more practicable because DOJ would need to

15   separate the records responsive to any subsets of

16   plaintiffs' FOIA requests from all records gathered which it

17   cannot do with such little time.

18   As further clarified at the hearing today because,

19   as the Court indicated during the hearing, the Court, along

20   with the plaintiffs, found that government's explanation of

21   that to be unclear; but given the clarification, the Court

22   better understands what the problem is.

23   When the Department of Justice and the FOIA unit

24   obtain a FOIA request they use a number -- expertise, a lot

25   of analysis to figure out exactly what search terms to

1   execute in order to respond to the entire FOIA request.

2   Stopping now, in completing that search, to go through that

3   same process that requires some expertise to detail exactly

4   what they need to be searching for to encompass the six or

5   seven categories that are at issue in this preliminary

6   injunction motion would both stop that search, require an

7   entire new search; it would complicate the response to this

8   entire FOIA request because they would then have two

9   separate searches going that they would then have to figure

10   out the overlap between them; it would actually slow down

11   the ultimate final response to plaintiffs' entire FOIA

12   request.

13   Even assuming that it wouldn't slow down the

14   process, that it wouldn't overcomplicate the process by

15   processing and searching for a narrowed subset of requested

16   documents, DOJ has persuasively demonstrated that its

17   present strained resources and heavy case load, coupled with

18   the complexity of plaintiffs' FOIA request and the need to

19   apply Exemption 7 carefully, are circumstances that require

20   accommodation to the agency with downside risk -- given the

21   downside risk to important law enforcement interests if

22   rushed on a timetable of plaintiffs' choice.

23   For these reasons, at this stage in the

24   litigation, plaintiffs have failed to demonstrate a

25   substantial likelihood that it will prevail on the merits of

1   its claim in its original complaint against DOJ to get all

2   responsive documents to all parts of their request without

3   any withholding or that the requested time frame of 30 days

4   for a subset is practicable.

5   Turning to irreparable harm, this showing is a

6   "nonnegotiable hurdle" for preliminary injunctive relief.

7   See *California Association of Private Postsecondary Schools*

8   *versus Devos*, 344 F. Supp. 3d, 158, jump cite 167,

9   D.D.C. from 2018. "A movant's failure to show any

10   irreparable harm is grounds for refusing to issue a

11   preliminary injunction, even if the other three factors

12   entering the calculus merit such relief." See *Chaplaincy of*

13   *Full Gospel Churches versus England*, 454 F.3d 290, jump cite

14   297, D.C. Circuit from 2006.

15   To show irreparable harm, a plaintiff must

16   demonstrate that it faces an injury that is: Both certain

17   and great; actual, not theoretical; and of such imminence

18   that there is a clear and present need for equitable relief

19   to prevent irreparable harm. See *Wisconsin Gas Company*

20   *versus Federal Energy Regulatory Commission*, 758 F.2d 669,

21   jump cite 674, D.C. Circuit 1985.

22   Further, plaintiff must show that the alleged harm

23   will directly result from not issuing the requested

24   injunction; meaning, the Court must decide whether the harm

25   will in fact occur. See, also, *Wisconsin Gas Company*. See

1   also *Winter*, 555 U.S. at 22, rejecting a possibility

2   standard as too lenient, and explaining that our frequently

3   reiterated standard requires plaintiffs seeking preliminary

4   relief to demonstrate that irreparable injury is likely in

5   the absence of an injunction.

6   To make this showing, plaintiffs argue that the

7   requested records are essential to the integrity of an

8   imminent event; here, any forthcoming motion to dismiss

9   Boeing's criminal charge by July 7, which plaintiffs, quote:

10   "Will need to be ready to oppose"; and after which point,

11   quote, "the utility of the records would be lessened or

12   lost." See the plaintiffs' motion at pages 18 through 19.

13   Plaintiffs claim that they will suffer extreme or

14   very serious damage absent their preliminary injunctive

15   relief. But this does not withstand scrutiny for at least

16   four reasons, some of which are overlapping.

17   First, even if the injunctive relief were granted,

18   this does not mean plaintiffs would get responsive records

19   that would help them persuade the district court to deny

20   DOJ's anticipated motion to dismiss. No matter how quickly

21   the Department of Justice processes the responsive records,

22   there is simply no guarantee that plaintiffs will get any

23   records -- which may all be exempt, so all the plaintiffs

24   may get in hand is a Vaughn index.

25   This Vaughn index alone, the plaintiffs say might

1   be somewhat helpful, at least they will see how many

2   documents are at issue and what exemptions are at issue.

3   But what their plan is, as clarified during this hearing, is

4   that they will then, as promptly as possible, litigate the

5   application of the exemptions most likely with another

6   preliminary injunction or emergency motion for this Court to

7   resolve all of the withholdings.

8   The Vaughn index alone will simply lead to

9   additional litigation on an emergency basis in this case.

10   Plaintiffs plainly believe that the responsive

11   records will show problems with the process leading up to

12   the DPA warranting setting aside that plea agreement that

13   the Department of Justice reached with Boeing, but that may

14   not be the case. There is no guarantee that the records

15   responsive to plaintiffs' request will, in fact, show the

16   nefarious conduct that would support plaintiffs' concerns

17   about the DPA and implicate the public interest. There

18   simply may be no smoking gun documents sitting in DOJ's

19   files. Plaintiffs think they may find a smoking gun in the

20   responsive records, but they may just be wishful thinking.

21   That is not clear or persuasive. And despite the fact that

22   there is a lot of smoke, as the plaintiffs say, and

23   plaintiffs allege based on press and other people who have

24   looked at this issue in far more detail than this court has;

25   but, as I said, that may be just wishful thinking. And the

1   records that they obtain, even if their preliminary

2   injunctive relief was granted, may not help them at all

3   prove that the smoke that they're seeing is anything more

4   than ephemeral.

5   Of course, the Department of Justice has done not

6   much in this case. They have stayed in their lane on the

7   FOIA litigation to deny or say that there are lots of other

8   reasons for a DPA in this case, but that's the Department of

9   Justice's choice. It's the Department of Justice's

10   reputation and the fraud section's reputation at stake here

11   in how well they're protecting the public interest with this

12   DPA. But standing before me are only representatives of the

13   Department of Justice who want to stay in their lane

14   sticking solely to the FOIA case.

15   There will be another forum in the Northern

16   District of Texas where the Department of Justice may be

17   called upon to clear the smoke that the plaintiffs have

18   raised about this DPA; and that leads me to the second

19   reason they have failed to show irreparable harm.

20   Plaintiffs contend that only through disclosure of

21   the requested records with sufficient time to oppose any

22   date DOJ motion to dismiss the criminal charges against

23   Boeing can questions "raised by the public record" be

24   answered. See their motion at pages 19 through 20; and can

25   plaintiffs, quote: "Present their complete factual

contentions" in opposition to any DOJ motion. See their

reply at page 4.

According to plaintiffs, if the requested

documents are produced after the charges against Boeing have

been dismissed, plaintiffs will be unable to reopen the

criminal case; the charges will have been dismissed with

prejudice.

As support for the documents' utility, plaintiffs

cite a Southern District of Florida district court opinion

holding that the government had violated the CVRA rights of

victims of sex crimes perpetrated by Jeffrey Epstein, which

opinion cited documents that had been produced during

discovery in the plaintiffs' CVRA suit long after the

Epstein criminal case was closed. See *Doe No. 1 v. United

States*, 749 F.3d 999, jump cite 1002, Eleventh Circuit from

2014. Also, see *Doe 1 v. United States*, 359 F. Supp 3d,

1201, jump cite 1217, Southern District of Florida from

2019, and plaintiffs' motion at pages 21 through 22.

This case hurts rather than helps the plaintiffs

since all it suggests -- in fact more than suggests -- shows

that plaintiffs' requested documents would not lose all

utility following July 7 since those cases occurred long

after the *Epstein* criminal case had been closed.

But the fact is nothing is stopping plaintiffs

from raising all of their questions about the process

1   leading up to the DPA now and before the judge who will

2   ultimately have the obligation to resolve any anticipated

3   motion to dismiss.

4   If the court presiding over the criminal case

5   against Boeing deems those questions sufficiently troubling,

6   that judge can make further inquiry and demand answers from

7   DOJ before ruling on the motion to dismiss. Put another

8   way: Persuading the court presiding over the Boeing

9   criminal matter to ask questions is not necessarily

10   dependent on the plaintiffs getting responsive records to

11   its FOIA request even if those records might be helpful.

12   Third, as DOJ suggests: "The purported time limit

13   on the usefulness of the information after July 7, 2024, is

14   not certain."

15   DOJ cites two reasons for this uncertainty about

16   why this deadline of July 7 is really not as critical of a

17   deadline as plaintiffs say. I am skeptical about one of

18   those reasons, while agreeing with the other.

19   One reason DOJ gives for the July 7 date not being

20   certain is that DOJ may decide not to move to dismiss the

21   case. See the defendant's opposition at 19. This is not

22   really persuasive since DOJ has made no indication that

23   Boeing has failed to comply sufficiently with the terms of

24   the DPA; and plaintiffs cite that as showing that DOJ rarely

25   revokes deferred-prosecution agreements even after learning

that the corporate defendant has committed new crimes during

the term of the agreement. Thus, assuming DOJ finds that

Boeing has complied with DPA's terms, as is highly likely;

DOJ shall, according to the DPA's terms, seek dismissal of

the criminal proceeding against Boeing by the July 7, 2024,

motion to dismiss deadline. See the DPA at paragraph 25.

In this context, DOJ's argument as to the

uncertainty of the July 7, 2024, date because DOJ may not

move to dismiss is unpersuasive.

A second reason DOJ gives that July 7, 2024, is

not the date of significance that plaintiffs rely on for

their irreparable harm argument is that the timeline for

resolving any motion to dismiss in the Boeing prosecution

will likely extend far beyond July 7.

DOJ anticipates, quote: "Several parties would

file additional briefing concerning the merits of that

motion and the district court will then hold a hearing."

See the defendant's opposition at pages 20 through 21. This

argument carries greater weight.

Plaintiff responds, to counter this argument,

that: Per local rules, they must file any opposition motion

within 14 days of the DOJ's motion; that even assuming the

court holds a hearing, plaintiffs are unlikely to have the

opportunity to introduce the documents for the first time

then; and that, in any event, any hearing is unlikely to

1   extend the schedule by more than a few days. See

2   plaintiffs' reply at pages 3 through 4.

3   As support for the asserted rigidity of the

4   district court proceedings, plaintiffs cite the CVRA

5   provision providing that proceedings shall be not stayed or

6   subject to a continuance of more than five days. See 18

7   U.S.C. Section 3771(d)(3).

8   But this provision regarding granting a stay or

9   continuance has no relevance whatsoever to a district

10   court's inherent authority to set a briefing schedule or

11   reserve a decision while considering papers submitted by the

12   parties. See *Dellinger v. Mitchell*, 442 F.2d 782, jump cite

13   786, D.C. Circuit 1971, particularly when the district court

14   must, as instructed by the Fifth Circuit, meaningfully

15   "assess the public interest" when considering any DOJ motion

16   to dismiss. See *In re Ryan*, 88 F.4th at 627, which is the

17   Fifth Circuit case involving these same plaintiffs.

18   More to the point, there is nothing stopping

19   plaintiffs -- or as discussed during the hearing today, the

20   plaintiffs, together with the Department of Justice -- from

21   requesting a modified briefing schedule to afford both of

22   them more than the 14 days contemplated by the local rules

23   in the Northern District of Texas to oppose DOJ's motion to

24   dismiss, or even to reserve a decision until plaintiffs gain

25   access to the responsive records.

1   Fourth, and finally: Even if plaintiffs were able

2   to obtain responsive documents with sufficient time to

3   oppose DOJ's motion to dismiss, plaintiffs themselves

4   concede, as already noted, that DOJ rarely revokes

5   deferred-prosecution agreements even after learning that the

6   corporate defendant has committed new crimes during the term

7   of the agreement, and that revocation is especially unlikely

8   here because the DPA did not subject Boeing to oversight by

9   a special monitor.

10   To be sure, plaintiffs' motion, citing public

11   reports, raises serious questions about the terms of the

12   DPA, including "the use of special tactics, such as forum

13   shopping" -- that's a quote from the plaintiffs' motion at

14   page 20 -- quote, "the prospect that the Statement of Facts

15   was 'ghostwritten' by defense counsel"; and "the

16   high-ranking justice department positions held by alumni of

17   Kirkland & Ellis, which represented Boeing."

18   And as plaintiffs concede, plaintiffs can present

19   these concerns now to the district court which must "assess

20   the public interest" when considering any DOJ motion to

21   dismiss, including by considering, quote: "Any other

22   circumstances brought to its attention by the victims'

23   families," as the Fifth Circuit directed.

24   And this distinguishes this instant case from

25   others cited by the plaintiffs, where the movement was able

1   to make the critical showing that the requested records were

2   time sensitive and highly probative, or even essential to

3   the integrity of an imminent event, after which the event

4   the utility of the records would be lessened or lost.

5   The Court is not persuaded that plaintiffs'

6   requested records are "time sensitive" in the sense of

7   losing value vis-à-vis any date certain, and that plaintiffs

8   have demonstrated irreparable harm "based on an actual,

9   impending deadline" because they have alternative ways --

10   through the court, through conferring with DOJ -- to respond

11   to the questions of raising smoke about nefarious reasons

12   for this DPA.

13   One final point that DOJ argues merits addressing.

14   DOJ argues that even if plaintiffs were able to

15   obtain records to persuade the court to reject the DPA and

16   reopen the criminal case by their requested deadline, the

17   records would, in essence, have no impact on any event

18   because the district court cannot substantively revise the

19   DPA.

20   The Fifth Circuit case *In re Ryan*, cited by DOJ

21   for this point makes clear that: While the district court

22   lacks authority to exercise substantive review over DPAs, it

23   has an obligation consistent with Federal Rule of Criminal

24   Procedure 48(a) when considering a motion to dismiss the

25   criminal proceedings to "assess the public interest

1   according to case law as well as the CVRA," and that

2   includes violations already admitted to and, as I have

3   already quoted, other circumstances brought to its attention

4   by the victims' families; and these circumstances brought to

5   the attention by the victims' families could include records

6   pertaining to the DPA that plaintiffs seek here.

7   The Fifth Circuit distinguished as inapt the D.C.

8   Circuit's decision in *U.S. v Fokker* that is cited by DOJ.

9   And in fact, *Fokker* is a Speedy Trial Act case, not a

10   Rule 48 case and is, therefore, as the Fifth Circuit said,

11   inapt to the situation which the Northern District of Texas

12   judge is finding himself.

13   Under Rule 48(a) of the Federal Rules of Criminal

14   Procedure, the government may, with leave of court, dismiss

15   an indictment. And in that context, "the public interest,

16   especially that of crime victims, rests crucially on court

17   approval." And in *Ryan*, the court cited a series of cases

18   holding that "district judges are empowered to deny

19   dismissal when clearly contrary to manifest public interest

20   as assessed at the time of the decision to dismiss." See 88

21   F.4th, at jump cite 627.

22   So that while DOJ is correct that the decisions to

23   charge or dismiss charges once brought -- the questions of

24   what the terms of the DPA should be lie with the executive

25   branch not with the judiciary, it does err in suggesting

1   that the requested records could have no impact on DOJ's

2   motion to dismiss.

3   But insofar as plaintiffs seek their requested

4   records to dissuade the district court from granting such a

5   motion -- and those records could conceivably impact the

6   district court in its consideration of the "public

7   interest," which the Fifth Circuit has instructed the

8   district court to do.

9   At the same time, the degree of any such impact

10   and, in turn, the irreparable harm that may be suffered by

11   plaintiffs without prompt receipt of the requested documents

12   is not at all assured.

13   The Court is mindful of plaintiffs significant

14   interest in receiving timely access to documents regarding

15   the company responsible for the death of their family

16   members. I agree that this involves a matter of widespread

17   and exceptional media interest with potential bearing on the

18   public interest. In fact, DOJ doesn't even dispute this

19   fact, which is why plaintiffs were ultimately granted

20   expedited processing of the FOIA request. Nonetheless, the

21   Court is not persuaded that any injury plaintiffs will

22   experience absent the requested injunction will irreparably

23   hinder their ability to raise concerns in opposition to any

24   DOJ motion to dismiss.

25   So plaintiffs' failure to show a likelihood of

success on the merits or irreparable harm are insufficient

to deny their request for preliminary injunction.

Finally, where the federal government is the

opposing party, the third and fourth factors requiring

consideration of the balance of equities and public interest

factors merge. See *Nken v. Holder*, 556 U.S. 418, jump cite

435, 2009.

Plaintiffs have not shown that the balance of

hardships and the public interest weigh in favor of

injunctive relief. These factors require courts to balance

the competing claims of injury of not just the parties

before them but other parties, consider the effect of

granting or withholding the requested relief, in addition to

paying particular regard for the public consequences and

employing the extraordinary remedy of an injunction. See

Winter, 555 U.S. at 24.

Plaintiffs contend that the imminent litigation

deadline, in a criminal case of unusual public interest and

importance, overrides the government's concerns about

allowing one requester to move ahead in line or otherwise

taxing agency resources, and if there is a strong public

interest in "the approval and supervision of DPAs by federal

judges" and of the Boeing DPA in particular, given the

latest safety scare in which a door-sized section of a 737

Max 9 blew off the aircraft ten minutes after it took off

1   which is, indeed, quite scary. And to be sure, plaintiffs'

2   motion leaves no doubt as to the importance of assuring

3   their full participation in opposing any DOJ motion to

4   dismiss, and the public's interest in scrutinizing the

5   Boeing DPA.

6   I certainly hope that DOJ -- despite the

7   performance here today at this hearing, does take seriously

8   the reputation to the Department of Justice in scrutinizing

9   this DPA carefully in responding to all of the smoke that

10   has been generated about this DPA, although there was nobody

11   from the fraud section here today to even hear this.

12   I am not at all clear about the communication

13   between the people handling the FOIA requests and the people

14   in the fraud section at DOJ. But as I have already

15   explained, such scrutiny is not dependent on the prompt

16   disclosure of plaintiffs' requested records and a Vaughn index.

17   Plaintiffs' effort to jump ahead of the FOIA

18   processing line -- not even the FOIA processing line

19   generally, but the FOIA processing line of all other pending

20   expedited requests -- the Court is very concerned that this

21   will put a significant burden on DOJ and adversely affect,

22   clearly, the other people with pending expedited requests in

23   queue.

24   DOJ already faces a challenge in keeping up with

25   FOIA requests in litigation with approximately 1100 open

1   administrative requests, 148 open litigation matters, and

2   expedited processing of a number of other requests, some of

3   which are ahead of this plaintiffs' request; but it is -- to

4   grant this preliminary injunction motion would most

5   definitely harm all the people -- the 20-plus expedited

6   processing requests ahead of plaintiffs' request in the queue.

7   In processing all outstanding FOIA requests as

8   quickly as possible, DOJ has a responsibility to balance the

9   public's interest and disclosure with equally important

10   public and private interest in safeguarding potentially

11   sensitive information. With all of this in mind, DOJ

12   asserts that it would simply be impracticable to produce all

13   responsive nonexempt records under plaintiffs' requested

14   timeline in light of the resources currently committed to

15   other pending and equally time-sensitive requests.

16   Although plaintiffs contend that DOJ exaggerates

17   the burdens of redaction and production given that they seek

18   only a subset of their underlying motion, most of which --

19   not all of which, but most of which involves communications

20   with an adversarial third party representing a corporate

21   defendant, plaintiffs think that that would not be subject

22   to exemptions. But as other cases have pointed out, that is

23   not at all correct.

24   The plaintiff has relied on cases for that

25   position that are inapposite; none of those involved cases

1   that would trigger application of Exemption 7, and all of

2   its various subparts, as the government has said that the

3   request here will most definitely trigger, and such

4   information compiled for law enforcement purposes that could

5   reasonably expect it to interfere with enforcement

6   proceedings are particularly sensitive and have to be

7   carefully reviewed to ensure that those government interests

8   at stake are not put at risk of inadvertent disclosure by

9   rushing through a search and processing request.

10   In short, forcing DOJ to produce all requested

11   records on an impractically brief deadline raises a

12   significant risk of harm to the public and private interests

13   served by the thorough processing of responsive agency

14   records prior to their ultimate production and also out of

15   concern for displacing other expedited requests currently

16   being processed by DOJ.

17   So these considerations all militate against grant

18   of a preliminary injunction.

19   So having failed to demonstrate any of the four

20   factors governing review of the plaintiffs' instant motion

21   point in their favor, plaintiffs cannot meet their burden to

22   show that issuance of a preliminary injunction is warranted.

23   Accordingly, plaintiffs' request for immediate

24   relief on the merits of its underlying action and the entry

25   of an order requiring DOJ to process and produce all

1   nonexempt requested records in a Vaughn index within 30 days

2   is denied.

3   Plaintiffs' claim will, therefore, proceed to the

4   merits, with the Court exercising its authority to supervise

5   DOJ's progress in processing plaintiffs' request while

6   ensuring that DOJ continues to exercise due diligence in

7   doing so.

8   Consistent with the scheduling order and standing

9   order issued in this case, DOJ shall answer or otherwise

10   respond to plaintiffs' complaint by March 13, 2024.

11   Plaintiffs shall -- parties shall jointly prepare

12   and submit a report to the Court by March 27, including an

13   estimate provided by DOJ of when a final determination of

14   plaintiffs' FOIA request is expected to be made, a proposed

15   schedule for production of responsive records, and for the

16   filing of dispositive motions. See the standing order at

17   paragraph 3(b)(ii), which is already docketed at ECF No. 3

18   and the minute order at January 30, 2024.

19   All right. With that, is there anything further

20   today from the plaintiffs?

21   MR. LIPPER: I'm sorry?

22   THE COURT: Anything further from the plaintiffs?

23   MR. LIPPER: I actually just have a logistical

24   question. Will the Court be --

25   THE COURT: You have to speak into the microphone.

1   MR. LIPPER: I'm sorry.

2   Will the Court be filing its opinion as a written

3   order?

4   Basically, I am just asking do I need to order a

5   transcript to get the full text of your order.

6   THE COURT: Yes.

7   I am not issuing a written opinion, I simply don't

8   have time. This is all you are getting.

9   MR. LIPPER: Thank you.

10   THE COURT: Anything more from the government?

11   MS. WALKER: No, Your Honor.

12   THE COURT: All right. You are all excused.

13   (Whereupon, the proceeding concludes, 2:09 p.m.)

                          * * * * *
                        CERTIFICATE

         I, ELIZABETH SAINT-LOTH, RPR, FCRR, do hereby
certify that the foregoing constitutes a true and accurate
transcript of my stenographic notes, and is a full, true,
and complete transcript of the proceedings to the best of my
ability.

         This certificate shall be considered null and void
if the transcript is disassembled and/or photocopied in any
manner by any party without authorization of the signatory
below.

    Dated this 5th day of March, 2024.

    /s/ Elizabeth Saint-Loth, RPR, FCRR
    Official Court Reporter

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