

U.S. District Court
District of Columbia

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Case Name: CHILDREN'S HEALTH DEFENSE
v. FOOD AND DRUG ADMINISTRATION

Case Number: 1:23-cv-02316-TJK <https://ecf.dcd.uscourts.gov/cgi-bin/DktRpt.pl?258420>

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MINUTE ORDER granting the FDA's

[11] motion for an 18-month stay of proceedings. FOIA provides that agencies shall make requested records "promptly available," 5 U.S.C. § 552(a)(3)(A), but "[i]f the Government can show exceptional circumstances exist and that 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," *id.* § 552(a)(6)(C)(i).

Accordingly, the District of Columbia Circuit has recognized that an agency may obtain a stay of proceedings if it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A), and when the agency can show that it 'is exercising due diligence' in processing the requests." *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976). Here, the FDA has shown both exceptional circumstances and due diligence justifying an *Open America* stay.

The FDA was ordered by another court to produce 5.7 million pages of records at an unprecedented rate which, this month, picks up to 180,000 records per month. *See* ECF No. 11-2 ¶ 26; *Pub. Health & Med. Pros. for Transparency (PHMPT) v. FDA*, No. 21-cv-1058, ECF No. 35 (N.D. Tex.); *PHMPT v. FDA*, No. 22-cv-915, ECF Nos. 31, 38 (N.D. Tex.). Despite the agency's efforts to hire and train additional personnel to respond

to the *PHMPT* requests, it has been unable to scale up its FOIA capabilities at the speed necessary to handle the volume of other requests, ECF No. 11-2 ¶¶ 24-25, 28-30, and "it is not the role of the judiciary to question how executive agencies request and allocate resources, absent some compelling evidence of purposeful conduct," *Democracy Forward Found. v. DOJ*, 354 F. Supp. 3d 55, 62 (D.D.C. 2018). The FDA has exercised due diligence in responding to Plaintiff's request, which, though mired behind several hundred other requests in the "complex requests" queue, will be resolved on a first-in, first-out basis. ECF No. 11-2 ¶¶ 11-12; ECF No. 14-2 ¶ 11; *see Open America*, 547 F.2d at 613; *Appleton v. FDA*, 254 F. Supp. 2d 6, 10 (D.D.C. 2003) (concluding that "defendants have demonstrated good-faith efforts and due diligence in processing the plaintiff's request on a first-in, first-out basis"). Other courts to be confronted with the same question have come to the same conclusion. *Informed Consent Action Network v. FDA*, No. 23-cv-219 (RBW), ECF No. 27 (D.D.C. Nov. 11, 2023) (granting FDA an 18-month *Open America* stay in light of the expedited production schedule in the *PHMPT* litigations). And it bears note: any pending deadlines in this case will be vacated, but Plaintiff will not lose its place in the queue, and the FDA will continue to process requests in the order received. ECF No. 14-2 ¶ 12. Accordingly, the [11] motion is GRANTED. It is further ORDERED that this case is STAYED until further order of the Court. It is further ORDERED that Defendant shall file a status report by June 13, 2024, updating the Court on the status of this case and any continued need for a stay of proceedings, and Plaintiff may file any response to that report by June 20, 2024. Signed by Judge Timothy J. Kelly on 12/13/2023. (lctjk1)