

I. INTRODUCTION AND RELIEF REQUESTED

Nearly a year ago, the State of Washington filed a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request seeking records related to the controversial decision of the Public Buildings Reform Board (PBRB) to recommend selling the Federal Archives and Records Center that houses the National Archives at Seattle (the Seattle Archives facility) and shipping the Pacific Northwest’s archival records to federal facilities in Missouri and California. The Seattle Archives facility holds a significant body of unique tribal and treaty records, Chinese Exclusion Act records, and Japanese internment records used by researchers, historians, genealogists, tribes, families, and individuals throughout the Pacific Northwest and Alaska. The PBRB failed to consult with any state, local, or tribal leaders before recommending the sale; failed to hold any public hearings in the Pacific Northwest; and, based on the PBRB’s own admissions, the pre-sale process failed to comply with the statutory requirements. The State now seeks the immediate release of public records from the PBRB to understand why the PBRB recommended the Seattle Archives facility for sale and what information the PBRB considered in making its recommendation.

The State filed FOIA requests with the PBRB and several other federal agencies on February 3, 2020. Although the PBRB initially expressed willingness to produce documents to the State, the agency delayed and never actually responded to the State’s FOIA request with a proper determination of what it would or would not produce. By July 2020, the PBRB acknowledged that it had collected and compiled an “extensive” amount of material responsive to the State’s FOIA request, but the agency still has not produced even a single document.

The State has waited patiently for the PBRB to produce responsive documents. But last week, the State learned—from the PBRB’s website—that the agency is in the process of hiring a broker to sell the Seattle Archives facility (and several other federal properties). According to the PBRB’s website, “[t]he Government intends to bring the properties to market by early

2021.”¹ Because the sale is now imminent, the State and the public cannot wait any longer for the PBRB to comply with its responsibilities under FOIA. It is now critical that Washingtonians be given immediate access to the PBRB’s records regarding the Seattle Archives facility.

Accordingly, pursuant to Fed. R. Civ. P. 56 and LCRs 7(d)(3) and 56.1, the State moves for an order granting summary judgment against the PBRB for its FOIA violations and ordering the immediate production of the records responsive to the State’s FOIA request that the PBRB had compiled as of July 2020 as well as any other responsive documents.

II. STATEMENT OF UNDISPUTED FACTS

This litigation arises from the PBRB’s decision to recommend selling the Seattle Archives facility pursuant to the Federal Assets Sale and Transfer Act of 2016 (FASTA), Pub. L. 114–287 (2016), *as amended*, Pub. L. 115–438, and the State of Washington’s request for information relating to that decision.

A. FASTA and the PBRB’s Decision to Sell the Seattle Archives Facility

FASTA was enacted on December 16, 2016. The law created an independent reform board, the PBRB, and a process for the PBRB to make recommendations for federal property disposals, consolidations, lease reductions, cost containment, and “other efficiencies” across the federal government. Under FASTA, the PBRB was initially charged with identifying for sale “not fewer than five Federal civilian real properties . . . with a total fair market value of not less than \$500,000,000 and not more than \$750,000,000.” FASTA § 12(b)(1)(A). To assist the PBRB in this process, FASTA required the Office of Management and Budget (OMB) to develop “standards, criteria, and recommendations” for the evaluation of federal properties and to provide the PBRB “with all supporting information, data, analyses, and documentation.” FASTA § 11(b)–(d).

¹ Home Page, PBRB, <https://www.pbrb.gov/> (last visited Dec. 10, 2020).

1 On December 27, 2019, the PBRB recommended the sale of twelve federal properties,
 2 including the Seattle Archives facility.² However, the PBRB noted in the report accompanying
 3 its recommendation that it “did not benefit from the Section 11 FASTA directive that OMB, in
 4 consultation with GSA, develop standards and criteria to use in evaluating agency submissions
 5 and making recommendations to the PBRB. To the best of PBRB’s knowledge, the standards
 6 and criteria were never developed.”³ Nevertheless, on January 24, 2020, OMB approved the
 7 PBRB’s recommendation.⁴

8 There was a significant and immediate regional outcry once the public learned, largely
 9 after the fact, of the decision to sell the Seattle Archives facility.⁵

10 This is not surprising, as the facility is of intense regional importance, providing public
 11 access to invaluable and unique records created by federal agencies and courts throughout
 12 Alaska, Idaho, Oregon, and Washington.⁶ It houses a significant body of tribal and treaty records
 13 relating to the federally recognized tribes and native corporations in the Pacific Northwest,
 14 including records from Bureau of Indian Affairs offices and Indian agencies and schools in
 15 Alaska, Idaho, Oregon, and Washington.⁷ The facility also maintains 50,000 files related to the
 16 Chinese Exclusion Act of 1882, as well as records related to the internment of Japanese-
 17 Americans during World War II. The Seattle Archives facility is routinely used by local and
 18

19 ² Letter to Mr. Russell Vought, Acting Director of the Office of Management and Budget dated
 20 Dec. 27, 2019 and accompanying *High Value Assets Report, Key Findings and Recommendations Pursuant to the*
 21 *Federal Asset Sale and Transfer Act of 2016 (FASTA)* (hereinafter, the PBRB FASTA Report), at p. 10, available
 at <https://www.pbrb.gov/assets/uploads/20191227%20High%20Value%20Assets%20Report%20as%20Required%20by%20FASTA.pdf> (last visited Dec. 10, 2020).

22 ³ PBRB FASTA Report, *supra* n.2, at 10.

23 ⁴ <https://www.pbrb.gov/assets/uploads/PBRB.pdf> (last visited Dec 10, 2020).

24 ⁵ See, e.g., ‘Terrible and disgusting’: Decision to close National Archives at Seattle a blow to tribes,
 25 historians in 4 states, The Seattle Times (Jan. 25, 2020), https://www.seattletimes.com/seattle-news/terrible-and-disgusting-decision-to-close-national-archives-at-seattle-a-blow-to-tribes-historians-in-4-states/?utm_source=referral&utm_medium=mobile-app&utm_campaign=ios; Don’t send Seattle’s federal archives across the country,
 26 The Seattle Times (Jan. 31, 2020), <https://www.seattletimes.com/opinion/editorials/dont-send-seattles-federal-archives-across-the-country/>; First ‘panic,’ then a battle to keep the National Archives in Seattle, KUOW/NPR (Feb. 6, 2020), <https://www.kuow.org/stories/first-panic-then-a-battle-to-keep-the-national-archives-in-seattle>.

⁶ See <https://www.archives.gov/seattle> (last visited Dec. 10, 2020).

⁷ See <https://www.archives.gov/seattle/finding-aids/bia-subject-guide> (last visited Dec. 10, 2020).

1 national researchers, historians, genealogists, tribes, and the general public, including
2 populations and families affected by the federal government's past policies and practices.

3 **B. The State of Washington's Requests for Information**

4 In order to gain an understanding of why the PBRB decided to recommend selling the
5 Seattle Archives facility, on February 3, 2020, the State submitted a request for certain public
6 records to the PBRB (the FOIA Request), via both electronic and regular mail. The FOIA
7 Request sought, among other things, "[a]ll records and communications related to the Federal
8 Archives and Records Center located at 6125 Sand Point Way NE, Seattle, WA 98115."
9 Declaration of Lauryn K. Fraas in Support of State of Washington's Motion for Summary
10 Judgment (Fraas Decl.) Exs. 1–2. The State also requested a fee waiver for its FOIA Request
11 pursuant to 40 C.F.R. § 2.107(l), as the State has no commercial interest in the requested records,
12 and because disclosure of the requested records is in the public interest and will contribute
13 significantly to public understanding of how the PBRB selected the National Archives at Seattle
14 for sale. *Id.*

15 On the same day it submitted its FOIA Request, the State received an acknowledgement
16 from the PBRB stating that "[y]our email to the Public Buildings Reform Board has been
17 received." Fraas Decl. Ex. 3. On February 19, 2020, the State received an additional email
18 message from the PBRB assigning the FOIA Request control number PBRB-2020-01, and
19 requesting a call to discuss the requested records and fee waiver. Fraas Decl. Ex. 4.

20 On February 24, 2020, the parties held a telephonic conference on the FOIA Request.
21 Fraas Decl. ¶ 6. During that call, the State declined to narrow the scope of its FOIA Request. *Id.*
22 To expedite the production of responsive records, however, the State agreed to receive
23 documents from the PBRB on a rolling basis and also agreed to the prioritization of records
24 relating to the proposed sale of the Seattle Archives facility. *Id.* Immediately following the call,
25 the State sent the PBRB an email summarizing the parties' agreement asking the PBRB to
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1 respond if it had a different understanding. Fraas Decl. Ex. 5. The PBRB did not express a
2 different understanding of the parties' agreement or otherwise respond. Fraas Decl. ¶ 7.

3 Almost six months later, on July 20, 2020, a new attorney for the PBRB emailed the State
4 to advise that the agency had "conducted searches of our records and compiled the material that
5 is responsive to your requested search." Fraas Decl. Ex. 6. Disregarding the State's request for a
6 fee waiver, the agency further stated that it had "solicited bids from service providers to redact
7 the material for production to your office" and "[t]he lowest bid for the service is Sixty Five
8 Thousand Four Hundred Dollars (\$65,400.00)." *Id.* The PBRB further stated "[i]f you would
9 like us to proceed, we will need you to provide us the necessary funds to defray the stated cost."
10 *Id.*

11 On August 17, 2020, the State sent a letter to the PBRB seeking reconsideration of its
12 request that the State pay \$65,400 in redaction costs and implored the agency to begin rolling
13 productions of the responsive materials it had already collected, as previously agreed. Fraas
14 Decl. Ex. 8. The State further requested an explanation of the PBRB's reasoning for declining
15 to waive fees or begin producing documents, to the extent that this was the PBRB's position. *Id.*
16 The State also sought confirmation from the PBRB that it would begin producing responsive
17 records by August 31, 2020. *Id.* Once again, though, the PBRB did not respond. Fraas Decl. ¶ 13.

18 Confronted with the PBRB's failure to respond, its unwillingness to confirm or otherwise
19 state what documents it would produce amongst the "extensive" amount of responsive material
20 it had already compiled, and with the State's request for a fee waiver still unresolved, the State
21 filed this lawsuit on September 16, 2020. Dkt. # 1.⁸ While the PBRB's counsel thereafter
22 expressed a desire to avoid motions practice and establish a rolling production schedule at some
23 unspecified time, *see* Dkt. # 8 at p. 1, the PBRB still did not produce even a single document to
24 the State.

25
26 ⁸ After this litigation was filed, the PBRB agreed not to seek fees under FOIA for responding to the FOIA Request. Fraas Decl. ¶ 15.

1 Then, last Monday, on November 30, 2020, the State unexpectedly learned from a chance
 2 review of the PBRB’s website that the agency intends to bundle the Seattle Archives facility
 3 with several other federal properties and sell them as “a single portfolio.”⁹ See Fraas Decl. ¶ 16.
 4 The PBRB’s website further indicates that “[t]he Government intends to bring the properties to
 5 market by early 2021.”¹⁰ When counsel for the State notified PBRB’s counsel on December 3,
 6 2020 of its intention to immediately move for summary judgment because of this troubling new
 7 development, counsel for PBRB then indicated its intention to begin producing documents soon.
 8 Fraas Decl. ¶ 17. But PBRB’s counsel also indicated that another agency might have to review
 9 them first and still provided no determination as to the scope of the documents that would be
 10 produced and withheld. *Id.*

11 Having received no documents whatsoever in response to its ten-month old FOIA
 12 request, and with the sale of the Seattle Archives facility imminent, the State now moves for
 13 summary judgment in order to compel the immediate production of the “extensive” amount of
 14 responsive material PBRB compiled in July 2020 as well as any other responsive materials held
 15 by the agency. These public records are necessary in order to immediately shed light on how and
 16 why the Seattle Archives facility was recommended for sale and the extent to which the process
 17 underlying the PBRB’s decision complied with the law.

18 III. LEGAL ARGUMENT

19 A. Legal Standard

20 FOIA is a “means for citizens to know ‘what their government is up to[,]’” and it “defines
 21 a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S.
 22 157, 172 (2004). FOIA mandates that federal agencies “shall make records promptly available
 23 to any person” requesting them, 5 U.S.C. § 552(a)(3), and sets forth specific requirements
 24 regarding when and how agencies must respond to requests, identify documents that are exempt
 25

26 ⁹ <https://www.pbrb.gov/recommendations/> (last visited Dec. 10, 2020).

¹⁰ *Id.*

1 from disclosure, and search for and produce responsive documents, *see id.* §§ 552(a)(4), (a)(8)(i),
 2 (b)(6)(A), (b)(6)(B). Any person who has been improperly denied agency records may sue to
 3 compel production, and may be awarded reasonable attorney fees and other litigation costs. *Id.*
 4 §§ 552(a)(4)(B), (E)(i). “[T]he burden is on the agency to sustain its action.” *Id.* § 552(a)(4)(B).

5 Most FOIA cases are resolved on the merits by summary judgment “because the facts
 6 are rarely in dispute and courts generally need not resolve whether there is a genuine issue of
 7 material fact.” *Shannahan v. I.R.S.*, 637 F. Supp. 2d 902, 912 (W.D. Wash. 2009) (citing *Minier*
 8 *v. C.I.A.*, 88 F.3d 796, 800 (9th Cir. 1996)). And because of this, the “usual summary judgment
 9 standard does not extend to FOIA cases[.]” *Id.* Instead, “the court follows a two-step inquiry
 10 when presented with a motion for summary judgment in a FOIA case.” *Id.* First, the court must
 11 evaluate “whether the agency has met its burden of proving that it fully discharged its obligations
 12 under the FOIA.” *Id.* (citation omitted). Second, if the agency satisfies this burden, the court
 13 must determine “whether the agency has proven that the information it did not disclose falls
 14 within one of the nine FOIA exemptions.” *Id.* (citation omitted). Agencies may not rely on
 15 “conclusory and generalized allegations” that an exemption applies. *Id.*; *see also Nat’l Parks &*
 16 *Conservation Ass’n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976).

17 In this case, summary judgment should be granted against the PBRB because it cannot
 18 establish that it “fully discharged its obligations” to respond to the State’s FOIA Request with a
 19 proper “determination” as required by 5 U.S.C. § 552(a)(6)(A)(i), nor did it “promptly produce”
 20 the requested records as required by 5 U.S.C. § 552(a)(3)(A).

21 **B. The PBRB Failed to Respond to the State’s FOIA Request with the Required**
 22 **“Determination”**

23 The PBRB has completely failed to comply with its FOIA obligations from the outset. It
 24 is undisputed that the State submitted a FOIA request to the PBRB on February 3, 2020. Once
 25 an agency receives a FOIA request, the agency “shall . . . determine within 20 [business]
 26 days . . . whether to comply” with the request. 5 U.S.C. § 552(a)(6)(A)(i). The agency must then

1 “immediately” notify the requester of “such determination and the reasons therefor.” *Id.* If any
2 part of the request is denied, the agency must notify the requester of the right to appeal the
3 decision to the head of the agency not less than 90 days later, and the right to seek dispute
4 resolution services from the FOIA Public Liaison of the agency or the Office of Government
5 Information Services. *Id.* § 552(a)(6)(A)(ii).¹¹

6 A “determination” does not require contemporaneous production of the documents, but
7 “within the relevant time period, the agency must at least inform the requester of the scope of
8 the documents that the agency will produce, as well as the scope of the documents that the agency
9 plans to withhold under any FOIA exemptions.” *Citizens for Responsibility & Ethics in*
10 *Washington v. Fed. Election Comm’n (CREW)*, 711 F.3d 180, 186 (D.C. Cir. 2013). It is not
11 enough “simply to express a future intention to produce non-exempt documents and claim
12 exemptions.” *Id.* at 185. Yet, that is exactly what the PBRB did here.

13 The D.C. Circuit in *CREW* explained why FOIA requires an agency to make a proper
14 substantive “determination.” *Id.* at 186–89. The statute provides that an agency’s determination
15 must include “the reasons therefor,” which requires particularized reasons for producing or
16 withholding records, or else the requester cannot know whether and upon what basis to file an
17 administrative appeal. *Id.* at 186. Indeed, the right to an administrative appeal would be
18 meaningless without a substantive explanation of which documents are being produced and
19 which are being withheld. *Id.* This is “critical,” because if an agency could simply state it will
20 produce documents without making the required substantive “determination,” then it “could
21 process the request at its leisure, free from any timelines.” *Id.* The requester would then be unable
22 to pursue an administrative appeal because the agency had not provided the necessary
23 information, but would also be unable to go to court because there had been no appeal. *Id.*
24 Allowing an agency to avoid making a “determination” would thus permit it to “keep FOIA

25 ¹¹ The 20 days for a determination may be extended by 10 days or more in “unusual circumstances,” but
26 this requires written notice from the agency setting forth the circumstances and the date on which a determination
is expected. 5 U.S.C. § 552(a)(6)(B). That statutory exception is not at issue here.

1 requests bottled up in limbo for months or years on end, [and] the statute simply does not
2 countenance such a system[.]” *Id.* at 186–87.

3 Courts within the Ninth Circuit recognize that failing to make a timely determination can
4 constitute improper withholding under the FOIA—even if documents are eventually produced
5 (which they have not been here). *See, e.g., Prison Legal News v. U.S. Dep’t of Homeland Sec.*,
6 113 F. Supp. 3d 1077, 1084–85 (W.D. Wash. 2015); *Munger, Tolles & Olson LLP ex rel. Am.*
7 *Mgmt. Servs. LLC v. U.S. Dep’t of Army*, 58 F. Supp. 3d 1050, 1054–55 (C.D. Cal. 2014)
8 (collecting cases); *Ore. Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or.
9 2007); *Gilmore v. U.S. Dep’t of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998) (noting that
10 an untimely response to a FOIA request constitutes a “separate injury to the requesting party,
11 even if the requested document could be properly withheld”) (citing *U.S. Dep’t of Justice v. Tax*
12 *Analysts*, 492 U.S. 136, 151 n.12 (1989)). The failure to make a timely determination is a FOIA
13 violation where the delay is “egregious,” such as a delay between five to eight months, or where
14 the agency exhibits a “pattern or practice of delay” in response to the specific request at issue.
15 *P.W. Arms, Inc. v. United States*, No. C15-1990-JCC, 2017 WL 319250, *2 (W.D. Wash. Jan. 23,
16 2017). Both of those standards are easily met here.

17 On this point, *Gutierrez* is particularly instructive. In that case, the plaintiff association
18 submitted a FOIA request on March 11, 2004 to the National Oceanic and Atmospheric
19 Administration Fisheries Region for documents about the effects of livestock grazing in
20 particular areas. 409 F. Supp. 2d at 1239. The agency’s FOIA officer received the letter and then
21 wrote to the requester asking if it sought records disclosed in response to a previous request,
22 which the requester answered in April. *Id.* In June, the requester asked for a status update, and
23 the agency responded in July, stating that it had begun searching for responsive records. *Id.* at
24 1239–40. The agency then disclosed small batches of documents over the next several months
25 but never identified the documents it withheld or gave notice to the requester of the right to
26 pursue an administrative appeal until December 20, 2004. *Id.* at 1240. A subsequent FOIA

1 request was submitted on January 7, 2005, and the agency waited until March 7, 2005 to respond,
2 again without explaining any appeal rights. *Id.* The agency argued that the requester’s claim for
3 untimely determination was moot because it had produced all the documents before summary
4 judgment, but the court rejected this argument. *Gutierrez*, 409 F. Supp. 2d at 1248. Even though
5 the agency responded and produced some documents during the eight months between the first
6 request and the determination (and the two months between the second request and that
7 determination), the court concluded that the agency offered no justification for its untimely
8 determinations, “resulting in an improper withholding under [FOIA].” *Id.*

9 Similarly, in *Gilmore*, the plaintiff submitted a FOIA request to the U.S. Department of
10 Energy on December 8, 1993, and did not receive a response until the agency denied his request
11 on May 2, 1994, approximately five months later. 33 F. Supp. 2d at 1185. The agency argued
12 that the requester’s claims were moot because the court previously found the documents he
13 sought were not improperly withheld. *Id.* at 1186–87. The court rejected this argument, citing
14 first the discussion in the House Report on the 1974 amendment to FOIA:

15 [I]nformation is often useful only if it is timely. Thus, excessive delay by the agency
16 in its response is often tantamount to denial. It is the intent of this bill that the
17 affected agencies be required to respond to inquiries and administrative appeals
within specific time limits.

18 *Id.* at 1186 (citing H. Rep. No., 876, 93d Cong. 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6267,
19 6271). The court also noted that when Congress amended the FOIA in 1996, “it continued to
20 express concern that agencies were dragging their feet in responding to FOIA requests.” *Id.*
21 (citing H. Rep. No. 795, 104th Cong., 2d Sess., reprinted in 1996 U.S.C.C.A.N. 3448, 3456).
22 Based on this review and the controlling case law, the court explained that “an agency’s failure
23 to comply with the FOIA’s time limits is, by itself, a violation of the FOIA, and is an improper
24 withholding of the requested documents.” *Id.* And because the Department of Energy did not
25 make a “determination” on the plaintiff’s FOIA request for five months, it violated FOIA. *Id.* at
26 1186 n.1, 1188; *see also, e.g., Friends of the Earth v. U.S. Army Corps of Eng’rs*, 374 F. Supp.

1 3d 1045, 1052 (W.D. Wash. 2019) (finding a several-month delay in responding to a request to
2 be “egregious”); *Prison Legal News*, 113 F. Supp. 3d at 1084–85 (finding the agency’s delay
3 “egregious” where it did not produce documents until almost a year after the initial request and
4 seven months after a second request and awarding attorney’s fees and costs to the plaintiff).

5 Indeed, the facts in this case are even more egregious than the five-month delay in
6 *Gilmore* and the eight-month delay in *Gutierrez*. Here, the State submitted its FOIA request on
7 February 3, 2020. More than ten months have passed, but it still has yet to receive even a basic
8 “determination” from the PBRB identifying “the scope of the documents that the agency will
9 produce, as well as the scope of the documents [it] plans to withhold,” *CREW*, 711 F.3d at 186,
10 much less a single document in response to its FOIA Request. Instead, the PBRB has kept
11 Washington’s request in “limbo for months . . . on end[.]” *CREW*, 711 F.3d at 187. And now
12 that the sale of the Seattle Archives facility is imminent, Congress’s concern that “information
13 is often useful only if it is timely” applies with full force. By failing to make a timely
14 “determination” on the State’s FOIA Request, the PBRB has violated FOIA as a matter of law.

15 **C. The PBRB Failed to Produce Records in Violation of FOIA**

16 The PBRB also has violated FOIA by failing to promptly produce documents in response
17 to the State’s FOIA Request. The Ninth Circuit has long recognized that “unreasonable delays
18 in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts
19 have a duty to prevent these abuses.” *Long v. I.R.S.*, 693 F.2d 907, 910 (9th Cir. 1982). An
20 agency may only withhold documents that fall within one of the enumerated exemptions from
21 FOIA, and must “describe *each* document or portion thereof withheld, and for *each* withholding
22 it must discuss the consequences of disclosing the sought-after information.” *King v. U.S. Dep’t*
23 *of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original). Moreover, an agency
24 must make non-exempt records “promptly available,” which “typically would mean within days
25 or a few weeks of a ‘determination,’ not months or years.” *CREW*, 711 F.3d at 188.
26

1 The PBRB’s delay of more than ten months in producing documents in this case clearly
 2 violates FOIA. *See, e.g., Prison Legal News*, 113 F. Supp. 3d at 1084–85; *Munger, Tolles &*
 3 *Olson*, 58 F. Supp. 3d at 1055 (Army’s delay of three months to produce the first redacted
 4 document was unreasonable); *Gutierrez*, 409 F. Supp. 2d at 1248; *Am. Civil Liberties Union v.*
 5 *Dep’t of Def.*, 339 F. Supp. 2d 501, 503 (S.D.N.Y. 2004) (rejecting agency’s proposal to produce
 6 documents on a rolling basis over a year after delay of eleven months and ordering agency to
 7 produce documents within five weeks); *The Sierra Club v. U.S. E.P.A.*, 75 F. Supp. 3d 1125,
 8 1147 (N.D. Cal. 2014) (awarding attorneys’ fees to plaintiffs where agency failed to produce
 9 documents for eight months).

10 Where “exceptional circumstances” exist, FOIA may relieve an agency of statutory
 11 requirements for prompt production. *See Mayock v. Nelson*, 938 F.2d 1006, 1007 (9th Cir. 1991)
 12 (citing 5 U.S.C. § 552(a)(6)(C)). But “Congress wrote a tough statute on agency delay in FOIA
 13 compliance, and recently made it tougher.” *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035,
 14 1041 (9th Cir. 1999). “[P]ractical problems” do not make “exceptional circumstances.” *Id.* at
 15 1041–42 (holding that an increase in the number of FOIA requests received by the agency did
 16 not establish “exceptional circumstances”). Even “a great number of requests alone does not
 17 constitute ‘exceptional circumstances’ within the meaning of the statute.” *Ray v. U.S. Dep’t of*
 18 *Justice, I.N.S.*, 770 F. Supp. 1544, 1548 (S.D. Fla. 1990); *see also Caifano v. Wampler*, 588 F.
 19 Supp. 1392, 1394 (N.D. Ill. 1984) (rejecting agency’s argument that “exceptional circumstances”
 20 justified a delay because agency personnel were “doing the best they can within their physical
 21 limitations to cope with a crushing number of FOIA requests”). Here, the PBRB likewise cannot
 22 establish any “exceptional circumstances” to justify its ten-month delay.

23 When the State spoke with the PBRB on February 24, 2020, the agency had already
 24 begun identifying responsive documents. *See Fraas Ex. 5*. And although the PBRB referenced
 25 “a delay caused by the Covid Virus disturbances” in its July 20, 2020 email to the State, it also
 26 acknowledged in that email that it had already searched its files and compiled an “extensive”

1 amount of material as of that date. Fraas Ex. 6. Nearly five months have passed since that July
2 email was sent, and still no documents have been provided to the State.

3 Moreover, even if the PBRB *could* demonstrate “exceptional circumstances” for its delay
4 in production, it would also have to show it demonstrated “due diligence” in responding to the
5 State’s FOIA Request. *See Exner v. F.B.I.*, 542 F.2d 1121, 1123 (9th Cir. 1976). It cannot do so.
6 Far from “due diligence,” the PBRB has exhibited a continued pattern of unresponsiveness to
7 the State’s FOIA Request. Indeed, the PBRB’s failure to produce *any* portion of the “extensive”
8 amount of responsive material it collected and compiled back in July is inexcusable.

9 Finally, the PBRB’s failure to promptly produce responsive documents is particularly
10 troubling in light of the significant public interest in the information and the new urgency
11 presented by the impending sale. In the State’s August 17, 2020 letter to the PBRB, the State
12 explained: “Washingtonians and all residents of the Pacific Northwest, including the many
13 federally-recognized tribes and native corporations in this region, deserve to know how your
14 agency decided to sell the federal facility that houses the National Archives at Seattle and
15 relocate these critical historical records across the country. We therefore request that
16 immediately grant the State’s fee waiver and release all responsive materials identified in
17 response to the FOIA request without any further cost or delay.” Fraas Decl. Ex. 8. While
18 completely ignoring the issues raised by the State and the public concern over the planned sale,
19 and without providing any records responsive to the State’s FOIA Request, the PBRB
20 nevertheless proceeded to hold a meeting on October 1, 2020, which revealed that it was
21 planning to sell the Seattle Archives facility in early 2021.¹² The State remained completely

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23 ¹² Notably, when asked for an “update on the sale” of the Seattle Archives facility during that meeting, the
24 PBRB Director confirmed that the facility was in the group of federal properties being prepared for sale, noting that
25 “due diligence work is proceeding.” But he then declined to otherwise comment on the property due to the FOIA
26 litigation, stating: “There is a FOIA lawsuit that’s been filed by the Washington State Attorney General, so I can’t
comment too much more beyond that at this time.” PBRB Oct. 1, 2020 Meeting Tr. at 21:15–22:2, *available at*
<https://www.pbrb.gov/assets/uploads/October%201%202020%20Public%20Meeting%20-%20Agenda%20and%20Presentation.pdf> (last visited Dec. 10, 2020).

1 unaware of this development until it fortuitously discovered the federal government’s plan on
 2 November 30. Any assertion that “exceptional circumstances” justify the PBRB’s extended
 3 delay in disclosing any public records regarding its recommendation to sell the Seattle Archives
 4 facility rings hollow when the PBRB is coordinating in the hiring of a broker and plans to bring
 5 the property to market by early 2021.¹³ As FOIA’s legislative history recognizes, “information
 6 is often useful only if it is timely.” *Gilmore*, 33 F. Supp. 2d at 1187 (N.D. Cal. 1998) (quoting
 7 H. Rep. No., 876, 93d Cong. 2d Sess., reprinted in 1974 U.S.C.C.A.N. 6267, 6271)). The PBRB
 8 should not be permitted to run out the clock on responding to the State’s FOIA Request while
 9 proceeding with the sale.

10 In sum, by failing to promptly produce the responsive documents it long ago identified
 11 and compiled, PBRB has violated FOIA as a matter of law.

12 **IV. CONCLUSION**

13 For the reasons above, the State of Washington respectfully requests that the Court grant
 14 the State’s Motion for Summary Judgment, order the PBRB to immediately produce the
 15 responsive material the agency collected and compiled in response to the State’s FOIA Request
 16 nearly five months ago as well as any other responsive documents held by the agency, and to
 17 award the State its reasonable attorney’s fees and costs.¹⁴

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 24 ¹³ *See id.*

25 ¹⁴ Washington requested reasonable attorneys’ fees and costs in its complaint, Dkt. # 1, p. 10, and
 26 respectfully requests that the Court conclude that such an award is appropriate here, *see Prison Legal News*, 113 F.
 Supp. 3d at 1085. Plaintiff respectfully requests that, in addition to granting summary judgment for the State of
 Washington, the Court set forth an appropriate schedule for fee petition and any appropriate briefing should the
 parties be unable to reach agreement.

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RESPECTFULLY SUBMITTED this 10th day of December 2020.

ROBERT W. FERGUSON
Attorney General

/s/ Brian J. Sutherland
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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 10th day of December 2020, at Seattle, Washington.

/s/ Brian J. Sutherland
BRIAN J. SUTHERLAND, WSBA #37969
Assistant Attorney General