

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION
OF MICHIGAN,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY and U.S. CUSTOMS AND
BORDER PROTECTION,

Defendants.

Case No.: 5:17-cv-11149-JEL-EAS

**DEFENDANTS' PROPOSAL FOR
REVIEW AND PRODUCTION OF EMAIL RECORDS**

In response to the Court's September 7, 2017 Order Regarding Production and Setting of Dates, ECF No. 35, the U.S. Department of Homeland Security ("DHS") and U.S. Customs and Border Protection ("CBP") (collectively, "Defendants") hereby state the following:

1. As Defendants' counsel advised Plaintiff's counsel on August 25, 2017, CBP ("the agency") had gathered 5,877 potentially responsive email messages from six custodians for the time period from January 27 through February 4, 2017 by searching for all email messages to or from those custodians during that period. The six custodians are the Director of Field Operations for the Detroit Field Office, the Assistant Director of Field Operations for the Detroit Field Office, the Port Director for Detroit Metropolitan Airport, the Port Director for the Ambassador Bridge and Detroit-Windsor Tunnel, the Port Director for the

International Bridge (Sault Ste. Marie), and the Port Director for the Blue Water Bridge. The agency identified these custodians as those most likely to possess emails responsive to Plaintiff's requests, as the agency understands them.

2. On August 28, 2017, Plaintiff provided Defendants with an initial list of proposed search terms that Plaintiff would like the agency to apply to the email messages collected from the six custodians.¹

3. The agency ran a search of the email messages collected from the six custodians using the initial list of search terms proposed by Plaintiff. As a result of this search, the agency identified 4,412 email messages that contained at least one of the proposed search terms.

4. Following this Court's September 7, 2017 order, the agency ascertained that the 4,412 email messages that contained at least one of the proposed search terms comprised 45,598 pages of potentially responsive records.

¹ The search terms proposed by Plaintiff are as follows: Protecting /3 Nation; Executive /3 Order; Vetting; Secondary /3 Screen!; Enforcement /3 Examination; Waiver; Questioning; Adjudicat! /3 Claim!; Foreign; Terrorist; ISIS; Entry; Permanent /3 Resident!; Green /3 Card; Refugee; Visa; Muslim; Islam!; Iran!; Iraq!; Libya!; Somalia!; Sudan!; Syria!; Yemen!; Arab; Renaud; Darweesh; Tootkaboni; Kelly; Yates; Donnelly; Brinkema; Zilly; Burroughs; Gee; EO; Judge /5 order; Court /3 order; Court /3 stay; Crisis Action Team; CAT; "waiver request"; Exemption /5 request; EO /3 request; DTW; Detroit /3 Metro!; Metro! /3 Airport; Ambassador; International /3 Bridge; Sault /3 Sainte /3 Marie; Sault /3 Ste. /3 Marie; Blue /3 Water; Port /3 Huron; Windsor /3 Tunnel; Tunnel; and Dearborn. Defendants advised Plaintiff that some of Plaintiff's proposed search terms (most notably, but not exclusively, the Detroit-area geographic terms) were not likely to be effective in isolating responsive records and were likely to retrieve a large number of non-responsive records.

This equates to an average of 10.33 pages per email message, including any attachments.

5. As Defendants have previously explained, *see* ECF No. 33 at 15, the CBP FOIA Office has received nearly 100 requests for information pertaining to Executive Order 13,769, and 21 of those requests are in litigation in district courts around the country. Nineteen of these requests were submitted by ACLU affiliates, and 15 of these requests are in litigation in thirteen cases brought by the requesting ACLU affiliate(s).

6. For each of the 19 ACLU requests seeking records from CBP field offices, the agency identified the local custodians most likely to possess emails responsive to each respective request. Nationwide, the agency has identified approximately 85 field office custodians across all 19 ACLU field office requests, in addition to the headquarters custodians whose records the agency is searching in connection with another ACLU request and other non-ACLU FOIA requests. From these 85 custodians, the agency gathered approximately 111,400 potentially responsive email messages for the time period from January 27 through February 4, 2017 by searching for all email messages to or from those custodians during that period.

7. As Defendants have explained, in processing Plaintiff's request and the requests of other ACLU entities, as well as some of the others of the nearly 100 requests for information pertaining to Executive Order 13,769 that seek overlapping information, some coordination of the processing is equitable and fair to all of the requests. Further, such coordination will yield economies of scale in

processing and review that will increase the efficiency and speed of the agency's processing and response times. For example, coordinating review for the 19 ACLU field office requests would allow streamlined review of similar documents located across the field offices. It would also allow de-duplication of identical documents located in multiple field offices that cannot be achieved when searches are conducted separately by field office. Accordingly, in an effort to determine "a firm date for review and production of the email records from the initial six identified custodians" as required by the Court's September 7, 2017, the agency undertook to estimate the total number of potentially responsive pages requiring FOIA review and processing across the 19 ACLU field office requests. To determine a reasonable estimate, the agency applied the following assumptions:

a. Because Plaintiff in this case was the only plaintiff to provide Defendants with a proposed list of search terms, the agency assumed that a similar list of search terms would be applied to the email messages collected from all 85 custodians. As to the six custodians for this case, approximately 75% of the collected email messages contained at least one of the proposed search terms. Accordingly, the agency assumed it would need to review 75% of the approximately 111,400 email messages collected from the 85 identified custodians, or approximately 83,600 email messages.

b. The agency also assumed that the average page count (10.33 pages) for the 4,412 email messages from the six custodians for this case that contained at least one of the proposed search terms would apply to the email messages collected from all 85 custodians. This equates to a total of

approximately 864,000 pages of emails (including any attachments) requiring review.

8. In the first 8 months of this fiscal year (October 2016 through May 2017), the agency processed and released a total of 45,552 pages in response to FOIA requests, or an average of approximately 5,700 pages per month. *See* Dep't of Homeland Sec'y, Customs & Border Protection, *Monthly Reporting: Requests Processed Under FOIA Only* (May 2016), available at <https://www.cbp.gov/sites/default/files/assets/documents/2017-Jun/FOIA%20Monthly%20Reporting%20Form%20%2805.2017%29.pdf>. Even if the agency were able to process the documents for the ACLU field office requests at a comparable rate, it would take the agency approximately 152 months, or more than 12.5 years, to complete production for all the ACLU field office requests. Notably, this estimate assumes that the agency would devote all of its current FOIA resources exclusively to these 19 requests, and devote no attention to any of the approximately 90,000 other FOIA requests the agency is on pace to receive in this Fiscal Year (nor to any that the agency receives in the next 12.5 years), *see* ECF No. 33 at 15, including every expedited FOIA request that the agency received before it received the ACLU requests, each of which would be ahead of the ACLU requests in the agency's FOIA processing queue.² From the agency's perspective, and the perspective of other requesters who would be significantly

² It would also be to the exclusion of processing any non-email records in response to the ACLU field office requests. The agency is currently searching for such records but, as Defendants have previously stated, the agency intends to prioritize its processing of email records.

disadvantaged, such an allocation of resources is both inequitable and untenable. Moreover, Defendants expect that such a processing schedule would be unacceptable to either Plaintiff or the Court.

9. Importantly, Defendants believe that the average monthly processing rate that the agency experienced in the first 8 months of this fiscal year is not achievable for processing the ACLU field office requests.

a. Based on the agency's experience thus far processing records responsive to the ACLU field office requests, it has become clear to the agency that the records sought by the ACLU field office requests require more time to process. The vast majority (approximately 80-85%) of FOIA requests that the agency receives seek one or more of certain categories of travel records related to an individual which generally require minimal redactions due to their display format, or redactions which are fairly routine. While a human reviewer actually reviews each record before any record is released, the manner in which the record is displayed significantly reduces the processing time on the part of the reviewer. The email records described above and sought by the ACLU field office requests are, however, substantively different from the majority of the records CBP routinely processes, requiring much more extensive efforts to review and redact.

b. Additionally, for the vast majority of FOIA requests that the agency receives, only certain FOIA exemptions (typically, Exemptions 6 and 7) tend to apply. For the records responsive to the ACLU field office requests, the agency has found that additional FOIA exemptions apply,

including Exemption 5, which protects from disclosure information covered by the deliberative process privilege, the attorney-client privilege, and the attorney work product privilege. As the Court and Plaintiff are no doubt aware, the subject matter of the records sought by the ACLU field office requests was the subject of litigation in numerous jurisdictions during the time period of the requests, and that litigation remains ongoing. Given the nature of the information protected by Exemption 5, application of this Exemption can be more involved and time-consuming than application of some other Exemptions that tend to apply in the records responsive to the vast majority of FOIA requests that the agency receives.

c. Records responsive to the ACLU field office requests go through three stages of review: review by a first-level reviewer; review by a second-level reviewer; and legal review, which includes review by the CBP Office of the Chief Counsel, coordination with DHS Office of General Counsel, and coordination with Department of Justice litigation counsel. The agency expects that the time necessary for each review step will decrease over time as the agency reviewers gain more experience reviewing these types of records. Additionally, because the ACLU field office requests, as well as other requests the agency has received this year, seek documents of a different type and in much greater volumes than the typical FOIA requests that the agency receives, the agency has found that its FOIA review and processing systems and apparatus are not adequately efficient for handling the volume and complexity of the requests it is now

receiving. Accordingly, the agency has been exploring ways to increase the efficiency of its review and processing systems and apparatus and is implementing systemic improvements as quickly as possible. Such updates and improvements necessarily take time to implement and are ongoing. Accordingly, at this time, the agency is unable to project the ultimate processing rate it will eventually achieve for these records.

10. Accordingly, Defendants are analyzing the search results in an effort to understand whether any of the search terms proposed by Plaintiff are over-inclusive, and to try to estimate the actual responsiveness rate of the email messages from the six custodians for this case that contained at least one of the proposed search terms. These analyses will aid the conversations Defendants plan to have with Plaintiff (and with the other ACLU affiliate requesters) to agree on a more targeted set of search terms that yields a manageable universe of potentially responsive records for review and/or narrowing the ACLU affiliate FOIA requests. Defendants have already begun these analyses but will require two more weeks to run all the searches and analyses necessary to have fully informed conversations with Plaintiff about modifying the search for responsive records. Additionally, Defendants believe that to be productive and thorough, two additional weeks (after Defendants' analyses have been completed) will be necessary for negotiations with Plaintiff and the other ACLU affiliates about modifying the proposed list of search terms or narrowing the FOIA requests.

11. Based on the foregoing, Defendants request that the court allow the agency one (1) month, until October 16, 2017, to "propose a firm date for review

and production of the email records from the initial six identified custodians,” *see* ECF No. 35. Defendants further request that, consistent with the Court’s September 7, 2017 Order, Plaintiff be given until Friday, October 20, 2017, to “respond to Defendants’ proposal,” and that the parties be given until Monday, October 30, 2017 to “file a joint submission to the Court regarding review and production of the email records.” *See* ECF No. 35.

Dated: September 15, 2017

Respectfully submitted,

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/s/ Julie Straus Harris

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ Julie Straus Harris
JULIE STRAUS HARRIS