UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN,

Plaintiff,

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

v.

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

Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' PROPOSAL FOR REVIEW AND PRODUCTION OF EMAIL RECORDS

A. Production Deadline

On September 7, 2017, the Court ordered that, by September 15, 2017, Defendants U.S. Department of Homeland Security ("DHS") and U.S. Customs and Border Protection ("CBP") (collectively, "Defendants") would provide Plaintiff American Civil Liberties Union of Michigan ("Plaintiff") with a date certain for the production of email records from the initial six local custodians Defendants identified as having responsive records. The Court ordered Defendants to commit to a production date in part because Defendants have delayed responding to Plaintiff's Freedom of Information Act ("FOIA") requests for more than seven months, and the Court recognized that the information Plaintiff seeks is of extreme public interest and vital to the foundation of our constitutional democracy.

On September 15, 2017, Defendants did not—as ordered—provide a date certain for production. Instead, Defendants asked for a month extension to propose a production date. Defendants further claimed it would take Defendants ***more than 12.5 years*** to process just the email records from the initial set of custodians over a one-week period (January 27-February 4, 2017) for the ACLU affiliate requests. This timeline is even more extraordinary, given that, in a May 26, 2017 letter, Director of FOIA Appeals and Litigation Kevin L. Tyrrell granted expedited processing for the Plaintiff's FOIA requests, thereby acknowledging the time sensitivity of the release of these records.

Defendants have stalled long enough, and the argument for an extension has already been rejected by the Court. At the status conference on September 7, 2017, the Court explicitly stated that, while Defendants may have several pending FOIA requests from ACLU affiliates and other requestors, this case is the only litigation before the Court. In response to claims that it would take an extremely long time to review and prepare responsive records for production, the Court told Defendants that its order for a date certain for production was intended to spur Defendants to action and force an allocation of resources that would allow Defendants to meet their obligations under the law.

Defendants have flouted the Court's order to provide a date certain, and have ignored the Court's directive regarding the urgency of production with their

outlandish proposal to take more than a decade to produce just the initial responses for a limited set of custodians. Defendants had the staff resources to implement the Muslim Ban within a matter of hours. It cannot be that it will take Defendants 12.5 years to tell the public what happened.

Defendants' proposal for a month-long extension—just to provide a date certain for its outstanding productions—provides Plaintiff with no idea of when it could actually expect to receive responsive documents, and no guarantee a date would actually be provided in a month's time. Defendants have clearly demonstrated a preference for delaying their response to Plaintiff's FOIA requests, and have indicated that, even if they did provide a date, it may be ***years*** in the future. Plaintiff cannot wait any longer for Defendants to prioritize their legal obligations, and the Court should set a production deadline, as indicated in the September 7, 2017 status conference.

To this end, Plaintiffs have attached a Declaration from Scott Pilat, Manager of Litigation Support at Honigman Miller Schwartz and Cohn LLP ("Honigman"), marked as Exhibit A. As that declaration makes clear, a typical Honigman attorney can review and redact documents at an estimated rate of 52,800-66,000 pages per month, a contract attorney at an estimated rate of 33,000-46,200 pagers per month, and a "hybrid" attorney (taking the average of the two types of attorney) at an estimated rate of 42,900-56,100 pages per month. Even assuming for the sake of

argument that review and redactions under FOIA are more complex and time-consuming that review and redactions for complex litigation, at half the normal estimated rate of review, a Honigman attorney could still produce 26,400-33,000 pages per month, a contract attorney 16,500-23,100 pages per month, and a hybrid attorney 21,450-28,050 pages per month.

The bottom line is that Defendants' proposed rate of 5,700 pages per month is entirely unacceptable if FOIA is to serve the purpose of informing the public. As the attached Declaration details, 45,598 pages could be reviewed by a single reviewer in as few as 15-19 days. Even assuming Defendants' FOIA review takes twice as long as the typical document review, a single reviewer could complete the task in anywhere from 31-61 days, depending on familiarity with the material. Since Defendants should clearly dedicate more than one staffer to reviewing and processing Plaintiff's requests, their proposed pace is unacceptable.

Accordingly, Plaintiff proposes a production schedule of 49,500 pages per month, which is a reasonable rate of production. This proposed rate is based on two "hybrid" attorneys working at half the speed as would be expected for review and redaction of litigation-related documents, and takes the average of the possible rate range described in the Declaration (where the range was 42,900-56,100 pages per month, 49,500 pages per month is the average rate for two attorneys). Working at

this rate, the initial email productions from the six custodians should be completed within 21 days.[1]

This rate of production would be ongoing, until Defendants have completed their search for all responsive documents. Once the initial email documents have been produced, Defendants would produce other responsive documents based on further searches. Plaintiff is willing to work with Defendants to prioritize among responsive documents and narrow the search. For example, Plaintiff is prepared to discuss the existing search terms to see if the terms can be adjusted to reduce the number of potentially responsive pages that need to be reviewed for emails from the initial six custodians, so that Defendants can move on more quickly to producing other responsive documents.

It is clear that Customs and Border Protection has a practice of ignoring its obligations under FOIA. Chris Rickerd, policy counsel for the national ACLU, has previously written to CBP about CBP's poor track record for FOIA responsiveness, noting "the public is routinely denied access to critical information about CBP activities," by way of "extensive delays, inappropriate denials, and non-responses."

[1] Defendants' Proposal states that between October 2016 and May 2017, Defendants reviewed and released 45,552 pages in response to FOIA requests, or an average of 5,700 pages per month. Defendants claim there are 4,412 responsive email documents, totaling 45,598 pages, which they have collected from their initial six custodians. At their proposed rate of 5,700 pages per month, it would take Defendants ***8 months*** to review and release the ***initial round*** of documents.

See Rickerd Letter,[2] marked as Exhibit B. In its 2017 annual FOIA report to the Attorney General, DHS reported that it closed 31% fewer "complex" requests in FY2016 than in FY2015, and had an overall backlog of 46,788 requests (of which 1,172 were requests to CBP).[3] The 2017 and 2016 reports omit any data for the average processing time of complex and expedited requests, but the 2015 edition reported that CBP specifically took an average of 238 days to process the complex FOIA requests that it closed, with a high of 680 days—well above the 107-day average across DHS.[4] Even expedited requests averaged 82 days before resolution—much higher than the 35 day average for such requests across DHS.[5] For complex requests that were closed in 2015 where information was actually granted to the requester, the average processing time was 262 days—well above the

[2] This letter was originally filed as Exhibit A to Chris Rickerd's Declaration in *ACLU of San Diego and Imperial Counties v. U.S. Dept. of Homeland Security*, 8:15-cv-00229 (C.D. Cal.).

[3] *2017 Chief Freedom of Information Act Officer Report to the Attorney General of the United States*, Department of Homeland Security, Privacy Office (Mar. 2017), https://www.dhs.gov/sites/default/files/publications/2017-chief-foia-officer-report-july-21-2017.pdf, at 31-32.

[4] *2015 Freedom of Information Act Report to the Attorney General of the United States*, Department of Homeland Security, Privacy Office (Feb. 2016), https://www.dhs.gov/sites/default/files/publications/dhs-foia-annual-report-fy-2015.pdf, at 12.

[5] *Id.*

102-day average across DHS.[6] Expedited requests where information was actually granted averaged 94 days in process, worse than triple the DHS average of 31 days.[7]

Defendants are clearly failing to uphold their obligations under FOIA. In this case, accountability means ordering Defendants to comply with a reasonable ongoing schedule for production of responsive documents. The only way that CBP will begin taking its obligations under FOIA seriously is if courts—including this one—require CBP to comply with reasonable production schedules in the cases that come before them.

B. Coordination Among ACLU Affiliates

At the September 7, 2017 status conference, the Court ordered Plaintiff to respond to Defendants' September 15, 2017 proposal, and to include responses regarding whether the ACLU affiliates were willing to coordinate a production schedule and document formatting. Defendants represented that a letter was being sent to Plaintiff proposing coordination, but that letter has not been sent by the date of this filing. On September 16, 2017, Plaintiff's counsel contacted Defendants' counsel to inquire about when the letter would be forthcoming. On September 18, 2017, Defendants' counsel indicated that such a letter would not be coming before

[6] *Id.*

[7] *Id.*

Plaintiff's September 20, 2017 response deadline, and did not indicate when that letter could be expected.

Plaintiff cannot be expected to negotiate production schedules against other ACLU affiliates, particularly without seeing Defendants' proposal. Plaintiff therefore does not (and cannot) address its ability to coordinate production. Plaintiff and other ACLU affiliates have conducted preliminary discussions regarding Defendants' impending request for coordination and are open to solutions that accelerate Defendants' document productions. But with no formal coordination request, a definitive response from Plaintiff is premature.

More fundamentally, if Defendants claim it will take more than ***12.5 years*** to produce merely the initial round of responsive records, there is no reason to expect that coordination among ACLU affiliates will have any meaningful ability to speed production. Indeed, if the ACLU affiliates were to decide on a schedule of production, potentially leaving Plaintiff at the bottom of the list, Defendants would intend to produce documents in more than a decade, at best. Clearly, no sequencing of the ACLU affiliate requests would solve Defendants' resource allocation problem.

Plaintiff is also concerned that Defendants are demanding that ACLU affiliates coordinate, while at the same time Defendants are threatening to conduct discovery of inter-affiliate communications. *See, e.g.*, Joint Case Management

Report/Discovery Plan, Dkt. No. 32, Pg. ID #375. Plaintiff's willingness to coordinate with other affiliates is preconditioned on assurance from the Defendants, or a court order, that there will not be discovery of inter-affiliate communications.

C. Native Format

At the September 7, 2017 status conference, Plaintiff requested that Defendants produce documents in their native format, or in a format capable of manipulation. Defendants claimed that they were under no duty to provide documents as Plaintiff wished, and rather claimed that they were only required to provide documents in a "readily reproducible" format, citing "e-FOIA amendments." Defendants however misstated their obligations.

The Department of Justice has issued guidance on this issue.[8] It counsels that the Electronic Freedom of Information Act Amendments of 1996 require an agency to provide requested records "in any form or format requested … if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552(a)(3)(B). FOIA "require[s] agencies to honor a requester's specified choice among existing forms of a requested record" and entitles "the requester, not the agency … to choose the form of disclosure when multiple forms of a record already exist."[9]

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[8] *FOIA Update: Congress Enacts FOIA Amendments*, The United States Department of Justice, Office of Information Policy (Jan. 1, 1996), https://www.justice.gov/oip/blog/foia-update-congress-enacts-foia-amendments.

[9] *Id.*

While Plaintiff clearly has the right to request documents in a format of its choosing, Plaintiff will narrow its request to maximize the efficiency of Defendants' production. Plaintiff requests that all Excel spreadsheet files be produced in their Native .xls or .xlsx format. All other documents should be produced in fully searchable .pdf files, as Defendants have previously provided. Plaintiff reserves its right under the Electronic FOIA Amendments to request a different format for any document produced as a .pdf that exists in other formats.

Dated: September 20, 2017

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served on the attorneys of record in this matter by efiling on September 20, 2017.

The statement above is true to the best of my knowledge, information and belief.

/s/ Gabriel E. Bedoya
Gabriel E. Bedoya