

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
AT PORTLAND

**AMERICAN CIVIL LIBERTIES UNION
OF OREGON,**

PLAINTIFF,

v.

**U.S. DEPARTMENT OF HOMELAND
SECURITY; and IMMIGRATION AND
CUSTOMS ENFORCEMENT,**

DEFENDANTS.

Case No. 3:18-cv-00247-PK

JOINT STATUS REPORT

The parties, by and through their undersigned counsel, respectfully submit this Joint Status Report. The parties provide separate statements with respect to Part IV below, captioned “Proposed Scheduling.”

I. Background and Procedural History

This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Per its Complaint, Plaintiff seeks to compel the release of records relating to Immigration and Customs Enforcement (“ICE”) practices concerning the monitoring, detaining and arrest of individuals on suspicion of immigration violations in and around state courthouses within Oregon, as well as records of ICE surveillance of other individuals engaged in lawful activities within the same vicinity.

Plaintiff submitted its FOIA request (“Request”) on October 10, 2017. ICE ultimately granted the Request expedited status, but did not produce documents or provide a subsequent substantive response to the Request or Plaintiff’s administrative appeal. Thereafter, Plaintiff filed its Complaint in this Court on February 7, 2018. (ECF No. 1.) Defendants answered the Complaint on March 14, 2018. (ECF No. 6.)

ICE made its first, and so far only, production of responsive records on April 23, 2018, producing approximately 1,375 pages of records which pertained to ongoing investigations. All but four of the pages produced were redacted in full under FOIA Exemption 7(A). ICE has informed Plaintiff that ICE intends to produce 500 pages each month going forward due to resource constraints.

Counsel for the parties have conferred on this matter on multiple occasions between February and the date of this report, and have agreed to submit this Joint Status Report for the Court’s review.

II. Stipulated Matters

1. The parties stipulate that initial disclosures are not necessary in this case. Contemporaneously with this Joint Status Report, and pursuant to Local Rule 26-2, the parties are filing a “Fed. R. Civ. P. 26(a)(1) Discovery Agreement.”

2. Without waiving any claim for future discovery, the parties agree that discovery in FOIA litigation is rare and is not anticipated to be necessary in this case, based on current information. The parties therefore stipulate that a discovery schedule is not appropriate at this juncture.

3. While settlement of this matter may be possible, settlement is unlikely for the foreseeable future, and the parties therefore stipulate that they are not seeking ADR or a settlement conference at this time.

4. Because this dispute will likely be resolved on cross-motions for summary judgment, the parties stipulate, pursuant to Local Rule 16-5(a) and subject to Court approval, that no pretrial order need be filed either now or in the foreseeable future.

5. As addressed below, the parties agree that the primary issue before this Court at this stage of the proceedings is the establishment of a production schedule by ICE for documents to be produced in response to the FOIA request. The parties stipulate that all current discovery and pretrial deadlines should be stayed pending determination of that production schedule.

III. Scope of Search and Production

On February 21, 2018, the parties participated in a teleconference discussing a potential production schedule and the types of documents identified in ICE's initial search of records conducted pursuant to Plaintiff's Request. ICE advised it had conducted a search for records pursuant to Plaintiff's Request, which had yielded approximately 28,000 pages of records. ICE further advised that it has an agency policy of producing 500 pages of records per case, per month, due to resource constraints.

The parties have attempted to explore potential options for expediting, and possibly narrowing, the search. However, the parties have been unable to reach a resolution of this matter. Accordingly, the parties each submit their own proposals below.

IV. Proposed Scheduling

A. Plaintiff's Position

Plaintiff requests that this Court order ICE to complete its production by October 10, 2018 – which is one year from the date Plaintiff submitted its FOIA Request. Plaintiff further requests that this Court order ICE to complete 1/3 of that production by June 10; 1/3 of that production by August 10, and the remainder by October 10.

Plaintiff submits that its proposed production schedule is more than reasonable. Plaintiff filed the original records request more than seven months ago. It did not receive any documents until April 23, 2018, and to date, it has received a total of only 4 pages of records that were not redacted in their entirety. As Plaintiff has emphasized to ICE, disclosure of the requested public records is a time sensitive issue. Plaintiff seeks records that will help inform an ongoing public debate on an issue of nationwide significance. The more dated the information becomes, the less relevant it becomes as well. Timely access to these public records is essential to allow the public to understand the actions that are taken by its government, on the public's behalf. Plaintiff reiterates that this case concerns records from only one year, and only in regards to specific ICE actions in a single state, Oregon.

Moreover, Plaintiff has expressed its willingness to work collaboratively with ICE to identify and prioritize the types of documents to be produced. The parties discussed potential options to allow Plaintiff to provide feedback on a sample set of documents in order to determine if there are certain categories or types of documents that can be narrowed from the review. Unfortunately, no solution was found – and time continues to pass.

ICE counsel has explained that ICE's technology constraints limit its ability to categorize and group the documents to be reviewed, and limit the ability to provide Plaintiff with additional information about the documents themselves. ICE has agreed to provide on an expedited basis

aggregate data about its enforcement actions within Oregon, and to evaluate options for prioritizing the review of records related to a specific incident identified in the FOIA Request. Plaintiff appreciates these steps from ICE. But absent additional information about the set of records at issue in the FOIA Request, Plaintiff is not in a position to even evaluate whether any narrowing of the production is feasible. That information has not been provided, and based on the parties' conferrals to date, it is Plaintiff's understanding that such information will not be available for months, if then. Plaintiff submits that further delays in establishing a production completion date will prejudice Plaintiff's ability to obtain the requested records in a timely fashion.

B. Defendants' Position

The ICE FOIA Office has an increasingly heavy workload. Accordingly, ICE FOIA has adopted the court-sanctioned practice of generally handling backlogged requests on a "first-in, first-out basis." The ICE FOIA Office receives requests for ICE records directly from myriad requesters including, but not limited to, individuals, media outlets, nonprofit organizations, and researchers. The ICE FOIA Office also receives a high volume of FOIA requests referred to ICE by U.S. Citizenship and Immigration Services (USCIS) FOIA Office. The ICE FOIA Office is responsible for processing these referred requests, which typically consist of ICE documents from an individual's Alien File (A- file), and then responding directly to the requester.

By January 31, 2018, over the first four months of year Fiscal Year (FY) 2018, ICE had received 54,651 new FOIA requests, and also had a backlog of approximately 27,024 FOIA requests (meaning that the requests were pending for more than 20 business days). These numbers represent a substantial increase in the number of FOIA requests received by ICE in

previous years. As of January 2018, ICE has 55,186 FOIA requests (54,651 new requests plus a backlog of 535 old requests). ICE has received approximately 10,000 more FOIA requests in the first four months of FY 2018 than it received in the entire FY 2015.

The dramatic increase in the ICE FOIA Office's workload over the course of three years is mainly due to an increase in the number of referrals received from USCIS. In addition to the increase in USCIS referrals of documents contained in A-Files, ICE has also experienced an increase in the number and complexity of FOIA requests, such as Plaintiffs' request, which seek documents other than those typically found in an A-File. These FOIA requests take considerably longer to process due to the extensive search that is usually required and the intricacies of the documents or data produced.

The ICE FOIA litigation processing unit consists of three individuals, all three of whom are occasionally required to assist other units within ICE FOIA on the processing of incoming FOIA requests, congressional inquiries and other projects at any given time. Each team member can process on average 100-300 pages per day, depending on the complexity of the documents.

Since January 31, 2018, the ICE FOIA litigation processing unit has been working on 54 active FOIA litigations. The ICE FOIA Office is currently processing documents for rolling production in 17 of those cases with an additional 3 cases that are scheduled to be added shortly. The current total average monthly litigation production page count is between 9,000 to 10,500 pages per month. The additional three cases are expected to contribute a combined total of 2,500 pages per month. This will put the total workload for litigation unit in ICE FOIA at reviewing and processing between 10,500 to 13,000 per month.

In order to meet its obligations for all cases in litigation with the resources that the office currently has, the ICE FOIA Office typically cannot process more than 500 pages per month for each case, including the case at issue here.

ICE requests that the Plaintiff review the next additional 1,000 pages of documents that are produced and then work with ICE to determine if the search can be narrowed to a smaller universe of documents.

DATED this 4th day of May, 2018.

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By s/ Derek D. Green

Derek D. Green, OSB #042960

Email: derekgreen@dwt.com

Telephone: (503) 778-5264

Alicia J. LeDuc, OSB #173963

Email: aliciaeduc@dwt.com

Telephone: (503) 778-5236

Facsimile: (503) 778-5299

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF OREGON

Mathew W. dos Santos, OSB #155766

Email: mdossantos@aclu-or.org

Telephone: (503) 552-2105

Kelly Simon, OSB #154213

Email: ksimon@aclu-or.org

Telephone: (503) 444-7015

Attorneys for Plaintiff
American Civil Liberties Union of Oregon

By s/ Kevin Danielson (with consent)

Billy J. Williams, OSB #901366

United States Attorney, District of Oregon

Kevin Danielson, OSB #065860

Assistant United States Attorney

kevin.c.danielson@usdoj.gov

1000 SW Third Avenue, Suite 600

Portland, OR 97204-2902

Telephone: (503) 727-1000

Facsimile: (503) 727-1117

Attorneys for Defendants Immigration and
Customs Enforcement, and U.S. Department
of Homeland Security