

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

AMERICAN CIVIL LIBERTIES UNION OF MAINE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 2:17-cv-132-GZS
)	
U.S. CUSTOMS AND BORDER PROTECTION, et al.,)	
)	
Defendants.)	
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JOINT STATUS REPORT

Plaintiffs American Civil Liberties Union of Maine, American Civil Liberties Union of New Hampshire, American Civil Liberties Union of Vermont, American Civil Liberties Union of Massachusetts, American Civil Liberties Union of Connecticut, and American Civil Liberties Union of Rhode Island (collectively, “Plaintiffs”) and Defendants U.S. Customs and Border Protection and U.S. Department of Homeland Security (collectively, “Defendants”) hereby file their Joint Status Report pursuant to the Court’s September 15, 2017 Scheduling Order. (ECF No. 27):

I. BACKGROUND

This case has been brought under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. On February 2, 2017, Plaintiffs sent to Defendants a FOIA request seeking records pertaining to the local implementation of President Trump’s January 27, 2017 Executive Order titled “Protecting the Nation from Foreign Terrorist Entry Into the United States,” Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017), at certain local international airports and ports of

entry (the “FOIA Request” or “Plaintiffs’ Request”). The FOIA Request is attached to Plaintiffs’ Complaint at Exhibit A, and speaks for itself. (ECF No. 1-1). The FOIA Request “seeks information regarding CBP’s interpretation and enforcement of the Executive Order at the Local International Airports, not information held in the records of CBP Headquarters.” (*Id.* at 7). Plaintiffs filed the above-captioned case on April 12, 2017, to obtain injunctive relief requiring Defendants to respond to the FOIA Request. (ECF No. 1).

On September 13, 2017, the Parties filed a Joint Report and Motion in which they jointly requested that the Court set November 1, 2017 as the deadline for the submission of a Joint Status Report. (ECF No. 26). On September 15, 2017, the Court ordered the parties to submit a joint status report by November 1, 2017, “addressing the status of defendant’s search for and production of records . . . , the status of any negotiation on the scope and timing of future productions, and the parties’ proposed schedule for future proceedings herein.” (ECF No. 27).

II. PRODUCTION PROGRESS AND THE STATUS OF NEGOTIATION ON THE SCOPE AND TIMING OF FUTURE PRODUCTIONS

Defendants’ Position:

Some background information is necessary in order to explain Defendants’ search and production process here. 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. Eighteen of these requests seek records from various CBP field offices, and were submitted by ACLU affiliates (the “ACLU field office requests”), and 15 of those requests are in litigation in thirteen cases brought by the requesting ACLU affiliate(s), including the instant matter. For each of the 18 field office requests, the agency identified the

local custodians most likely to possess email records responsive to each respective request.

Nationwide, the agency has identified 85 field office custodians across all 18 ACLU field office requests. In addition, CBP has located custodians from CBP headquarters, whose records the agency is searching in connection with another ACLU request and other non-ACLU FOIA requests.

This background information is significant because, in processing Plaintiffs' request and the requests of other ACLU entities, as well as some of the nearly 100 requests for information pertaining to Executive Order 13,769 that seek overlapping information, some coordination of the processing is necessary in order to be 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 18 ACLU field office requests will allow streamlined review of similar documents located across the field offices. It also allows de-duplication of identical documents located in multiple field offices that cannot be achieved when searches are conducted separately by field office.

CBP has been processing Plaintiffs' FOIA Request as quickly as practicable, and has begun making releases of records responsive to Plaintiffs' Request on a rolling basis, including three interim releases of records, on July 14, July 26, September 21, 2017 and October 24, 2017 ("Interim Releases"). To date, Defendants' Interim Releases focus primarily on information responsive to parts 2 through 4 of the Request, which seek certain numerical data, and parts 1(b) and 5 of the Request, which seek "'guidance' that was 'provided to DHS field personnel shortly' after President Trump signed [Executive Order No. 1]." Additionally, some of the material in

Defendants' Interim Releases consisted of email exchanges between CBP personnel at the headquarters and field office locations across the country, including personnel in CBP's Boston Field Office. In relation to other requests, CBP is continuing to search, review, and process records from CBP's headquarters. That process is ongoing, and it is anticipated that some of those additional records from headquarters may also be responsive to Plaintiffs' request.

These communications between CBP personnel at headquarters and in the field offices are responsive to Plaintiffs' Request. Though Plaintiffs' Request seeks records "held" locally, as opposed to records "held" at headquarters, this distinction is nonexistent in the context of electronic documents. By their nature, electronic communications between personnel at headquarters and personnel in the Boston Field Office are "held" both locally and at headquarters. While the copy of the email that the agency produced happens to be the copy that was located in the files of the custodian at CBP headquarters, that copy is identical to the copy that would be located in the files of the custodians at CBP field offices across the country. For example, many emails already released by the agency consist of communications sent from CBP HQ personnel to the directors of field operations in all 20 field offices throughout the country.

In addition to documents gathered from CBP headquarters, CBP also has collected and begun processing approximately 103,000 potentially-responsive records consisting of email messages and attachments to or from 85 custodians in the various field offices covered by the ACLU field office requests. These records comprise approximately 275,000 pages.¹

¹ This total page count and all total page counts provided by Defendants in this document do not include several thousand spreadsheets that are attached to email messages, as it is difficult to translate spreadsheets into pages. However, the agency plans to process such spreadsheets in its review.

Specifically with respect to Plaintiffs' FOIA request, CBP has collected approximately 9,559 potentially responsive email messages and attachments, comprising approximately 25,096 pages, to or from seven custodians in the Boston Field Office and corresponding local airports. These custodians are the Director of Field Operations for the Boston Field Office, the Assistant Director of Operations for the Boston Field Office, and the Port Directors for Bradley International Airport, Bangor International Airport, Logan International Airport, Manchester International Airport, Burlington International Airport, and TF Green Airport. In addition, CBP has also collected approximately 10,000 email messages and attachments from custodians at CBP Headquarters, some of which include communications with the custodians in the Boston Field Office and corresponding local airports.²

The volume of the records compiled and the complexity of the review necessary for processing records potentially responsive to Plaintiff's request compelled the agency to transition the collected email files to a new review platform that allows for more efficient processing. This effort was recently completed, and it is designed to streamline processing for all of the ACLU FOIA requests, increase efficiencies from de-duplication of documents within and across field offices, and enhance the agency's ability to ensure consistent and accurate treatment of information exempt from disclosure under the FOIA. The agency expects that the transition to the new platform will expedite the agency's review and release of responsive, non-exempt information.

² The agency has not yet determined how many, if any, of these records are non-duplicative records collected from the custodians in the Boston Field Office and/or are responsive to Plaintiffs' request.

By email dated October 17, 2017, Defendants provided Plaintiffs' counsel a list of "core search terms," which were developed in consultation with Plaintiffs from some of the parallel actions brought by other ACLU affiliates.³ *See* Ex. 1. The agency has determined that these core search terms are reasonably calculated to identify records responsive to Plaintiffs' FOIA request, as well as the FOIA requests submitted by the other ACLU affiliates. The agency will review the documents identified by this core list of search terms for responsiveness and for any information that should be withheld pursuant to a FOIA exemption, and will continue to release responsive, non-exempt records on a rolling basis.

The agency has begun its review of these documents by applying the core list of search terms attached to Defendants' counsel's October 17, 2017 email. *See id.* To maximize the efficiencies gained by de-duplication and email threading, the agency conducted a single search across all 85 of the custodians covered by the ACLU field office requests, rather than run separate, sequential searches in the records collected from particular custodians or field offices. Application of the core search terms identified approximately 30,000 potentially responsive documents totaling approximately 90,000 pages, including approximately 2,804 documents totaling approximately 8,976 pages held by the seven custodians in the Boston Field Office and corresponding local airports.

* * *

³ Plaintiffs in some of the other cases brought by ACLU affiliates proposed search terms for the agency to apply to the email records. Applying their proposed search terms did not significantly reduce the page count of the universe of potentially-responsive email records. Accordingly, over the last several weeks, Defendants have analyzed the proposed search terms to identify a set of terms that is reasonably calculated to identify responsive records.

To the extent Plaintiffs may seek to challenge the search terms and/or custodians being used to respond to their FOIA Request, Defendants object to any such attempt to challenge the adequacy of Defendants' search prior to summary judgment. Such arguments are properly raised at the summary judgment stage once the agency has completed processing Plaintiffs' request, and the Court has before it affidavits from the agency attesting to the specific custodians whose records were searched, the methods used during those searches, and the agency's rationale for doing so.

Moreover, CBP has not at this stage determined whether additional searches would be reasonable and intends to evaluate the potential need for additional searches based on its review of records it has collected from the identified seven custodians in the Boston Field Office and corresponding local airports. Defendants are open to continuing discussions with Plaintiffs regarding the scope of the agency's search. As explained by email from Defendants' counsel to Plaintiffs' counsel on October 17, 2017, although the agency plans to move forward with a search consisting of the agency's core list of search terms at this time, the agency will later consider whether additional searches are reasonably calculated to identify additional records responsive to Plaintiffs' request and, as part of that process, the agency may consider additional search terms proposed by Plaintiffs. As in any FOIA case, the agency here is entitled to determine in the first instance what search is reasonable and adequate.

Plaintiff's Position:

This is a stand-alone case about documents relating to local implementation of Executive Order 13,769. The Government complicates the issue by focusing on its efforts in separate cases, in separate courts, relating to separate regions. In effect, the Government is seeking to

relitigate the merits of its motion to consolidate all FOIA cases relating to Executive Order 13,769 into a single multi-district litigation. That motion was denied, and this case proceeds independently. *See* Order Denying Transfer, *In re: American Civil Liberties Union Freedom of Information Act (FOIA) Requests Regarding Executive Order 13769*, J.P.M.L., Docket Number MDL-2786, Document Number 88 (Filed August 2, 2017).

The status of production is that the Government has produced limited interim records, and has identified a modest quantity of other records responsive to our local request. As the Government states, it has identified “approximately 9,559 potentially responsive email messages and attachments . . . to or from seven custodians in the Boston Field Office and corresponding local airports.” Those messages and attachments comprise “approximately 25,096 pages.”

The status of negotiations is that Plaintiffs have requested this modest quantity of responsive records, and the Government has refused to provide them at this time, or even to provide a date certain for the production. Plaintiffs have requested that, at the very least, the Government agree to review and produce records at a rate of 820 pages per month. The Government has refused. Instead, it insists on processing these local records alongside the records requested in separate cases. While we do not presume to dictate how the Government chooses to process these records, we do object to the Government using obligations in separate cases to delay this case.

To the extent the Government argues that it must take time to de-duplicate, apply search terms, and process the less-than-10,000 records before producing them, we do not agree that such measures are necessary for the limited quantity of documents in this case. It would not be

uncommon for a lawyer in practice in Maine to review 9,000 documents in a week. The Government ought to be able to process Plaintiffs' entire request in a matter of weeks, not years.⁴

Although the Government relies on the additional burden of processing records in CBP Headquarters, our FOIA request was clearly limited to "information regarding . . . Local International Airports, *not information held in the records of CBP Headquarters.*" FOIA Request, ECF No. 1-1 at 7 (emphasis added). The Government quibbles with the meaning of records "held" at CBP Headquarters, *supra* at 4, but the remainder of that qualifier is clear that we request only those records "regarding" Local International Airports.⁵ FOIA Request, ECF No. 1-1 at 7. The Government has identified less-than 10,000 records as responsive to that narrower request, and it should produce those records. If the Government refuses to do so, this case should proceed to summary judgment briefing to determine whether the Government's refusal is valid.

In short, we ask that the Government act expeditiously on this case. The Government implemented the President's travel ban order in a matter of hours, but they now claim that it will take years to review and produce all of the documents generated by that implementation. That is unacceptable, particularly given the expedited processing requested in Plaintiffs' FOIA request. FOIA Request, ECF No. 1-1 at 8-11 (citing, *e.g.*, 5 U.S.C. § 552(a)(6)(E)).

III. PROPOSED DEADLINES FOR PRODUCTION

⁴ In any event, without any documents to review, it is impossible for Plaintiffs at this time to take a position on whether the proposed search terms and custodians will lead to production of all documents to which Plaintiffs are entitled.

⁵ "Local International Airports" is defined in our FOIA request as Bradley International Airport, Bangor International Airport, Logan International Airport, Manchester International Airport, TF Green Airport, and Burlington International Airport, and corresponding Port of Entry Offices and Regional Field Operations Offices. FOIA Request, ECF No. 1-1 at 4.

Defendant's Position:

Due to the recent completion of the migration of records to a new processing platform, CBP has required additional time to accurately estimate a monthly processing rate. The agency has now loaded the email records collected from the 85 field office custodians across all 18 ACLU field office requests into a review platform that allows for de-duplication and email threading, which enable considerable efficiencies. As explained above, to maximize the efficiencies gained by de-duplication and email threading, the agency will conduct a single search across all of the custodians during the applicable time period, rather than run separate, sequential searches of the records collected from particular custodians or field offices. The agency has applied search terms to these documents, which resulted in the identification of approximately 30,000 potentially responsive documents totaling approximately 90,000 pages, including approximately 2,804 documents totaling approximately 8,976 pages held by the seven custodians in the Boston Field Office and corresponding local airports.

The agency currently estimates that it will be able to process on average approximately 3,575 pages per month across all of the related ACLU FOIA requests concerning Executive Order 13,769, of which Plaintiffs' request is one. Each month, those approximately 3,575 processed pages will include records from each of the field offices, so some fraction (which will likely vary from month-to-month) of each monthly release will consist of records from the Boston field office custodians. The agency intends to release these records on a rolling basis, and continue monthly productions until completed. CBP proposes that the Court order quarterly status reports to advise the Court on CBP's progress and to assure the Court that CBP is proceeding diligently under the circumstances.

As Defendants have explained above, centralization of the agency's processing of these parallel requests allows for efficiencies from de-duplication across cases and streamlined review and treatment of similar records. The agency believes that this centralized review will allow for faster processing of records potentially responsive to all ACLU requests, and that production schedules for records tied to any particular field office prevents the agency from ensuring that it is processing the requests in the most efficient way possible. In addition, this centralized review process will enhance the agency's ability to ensure consistent and accurate treatment of exempt information, which may implicate sensitive government information and personally identifiable information pertaining to individual travelers.

During this same time, the agency will continue to process and release responsive, non-exempt records located through searches of the records collected from personnel at CBP headquarters. As explained, *supra*, many emails collected from headquarters custodians (including many already released to Plaintiffs) consist of communications sent from CBP headquarters personnel to the directors of field operations in all 20 field offices throughout the country.

The agency is also searching for non-email records but intends to prioritize processing of email records.

Plaintiff's Position:

We respectfully request that the Court order the Government to produce responsive local records by January 19, 2018. That provides more than two-and-a-half months to produce less than 10,000 records. The subject matter of this request is a matter of intense concern to Plaintiffs

and to the public. The Government is under a legal obligation to respond to this request, and they must allocate the resources necessary to do so.

In the alternative, and at the very least, we respectfully request that the Court order the Government to produce 820 pages per month. In a similar case related to records in the possession of the Customs and Border Protection Detroit Field Office, Judge Levy of the United States District Court for the Eastern District of Michigan recently ordered DHS to review and produce records at a rate of 820 pages per month.⁶ In another case related to records in the possession of the Seattle Field Office, Judge Pechman of the United States District Court for the Western District of Washington recently ordered DHS to review and produce records at a rate of 1,000 pages/month.⁷ Even at that rate, an additional year would pass before the Government responds to our FOIA request (filed approximately ten months ago). That is a far cry from the expedited processing that we requested and are entitled to by statute. 5 U.S.C. § 552(a)(6)(E). The Government must be able to meet at least that low bar.

Plaintiffs further respectfully request that the Court order the parties to file a joint status report and proposed summary briefing schedule within 14 days after the Government's production is complete.

Dated: November 1, 2017

Respectfully submitted,

⁶ See *American Civil Liberties Union of Michigan v. United States Department of Homeland Security, et al.*, 5:17-cv-11149-JEL-EAS, Document No. 42 (filed October 26, 2017).

⁷ See *American Civil Liberties Union of Washington, et al. v. United States Department of Homeland Security, et al.*, 2:17-cv-00562-MJP, Document No. 36, ¶¶ 2-4 (filed October 20, 2017).

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Core Search Terms for Field Office Records in ACLU Requests

executive w/3 order
EO
"E.O."
"13,769"
13769
protecting w/3 nation
President w/5 order
"foreign terrorist entry"
waiver w/3 request
exemption w/3 request
Iran*
Iraq*
Syria*
Sudan*
Yemen*
Somali*
Libya*
"seven countries"
"7 countries"
"seven nations"
"7 nations"
LPR*
permanent w/3 residen*
"extreme vetting"
CAT
"crisis action team"
secondary w/3 screen*
secondary w/3 inspect*
secondary w/3 interrogat*
secondary w/3 question*
enforcement w/3 examination
Muslim*
Islam*
Arab
Arabs
Judge* w/5 (order or Robart or Roberts or Birotte or Zilly or Brinkema or Burroughs or
Gee or Donnelly)
TRO
"temporary restraining order"
court* w/3 (order or enjoin* or stay)
injunction
Daniel w/2 Renaud
response w/2 "recent litigation"
("United States Attorney" or "U.S. Attorney*") w/8 (Pennsylvania OR Philadelphia)