

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF)
VIRGINIA, AMERICAN CIVIL LIBERTIES)
UNION OF MARYLAND, AMERICAN CIVIL)
LIBERTIES UNION OF PENNSYLVANIA,)
and AMERICAN CIVIL LIBERTIES UNION)
OF DELAWARE,)

Case No. 1:17-cv-00441-LMB-IDD

Plaintiffs,)

v.)

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

Defendants.)

JOINT STATUS REPORT

Pursuant to the Court’s October 10, 2017 Order (D.E. #44) requiring the parties to submit a Joint Status Report on October 25, 2017, the parties jointly submit this Report. The parties incorporate by reference their October 4, 2017 Joint Status Report (D.E. #42) and September 13, 2017 Joint Case Management Report (D.E. # 41).

In their initial status report, the parties agreed that it was premature to set a schedule for discovery or other case deadlines. (D.E. #41). The parties jointly requested that the Court set October 4, 2017 as the deadline for the submission of another Joint Status Report and stated that they would confer cooperatively ahead of that submission. *Id.*

In their October 4 Joint Status Report, the parties again jointly requested permission to defer any case scheduling, and to permit the parties to file another supplemental status report on October 25. (D.E. #42).

For reasons set forth below, Plaintiffs now ask the Court to set a schedule requiring Defendants (i) to provide, within 14 days, an initial production from the 2,800 responsive emails they have already identified as potentially responsive to Plaintiffs' Request (none of which have yet been produced); (ii) to produce, on a rolling basis at 30-day intervals, all records responsive to the request; (iii) to identify the date by which production of responsive records and any Vaughn index will be completed.

Defendants propose that the Court set a schedule of rolling releases of responsive, non-exempt records from the email records collected from six identified custodians under the purview of the Baltimore Field Office, with the first interim release scheduled for no earlier than 30 days after the upcoming status conference scheduled for November 3, 2017, successive releases every 30 days thereafter until completed. Defendants further propose that the parties provide the Court with quarterly joint status reports while Defendants' processing of these records is ongoing.

1. PLAINTIFFS' POSITION

Plaintiffs are the ACLU affiliates in states with ports of entry covered by the Baltimore Customs and Border Protection ("CBP") Field Office. On February 2, 2017, they submitted a FOIA request seeking records related to CBP's local interpretation and enforcement of President Trump's January 27, 2017, Executive Order entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States." See Complaint (D.E. #1) & Ex. A. The order purported to halt refugee admissions and bar entrants from a number of predominantly Muslim countries from entering the United States. *Id.* at ¶ 4.

The requested records are of manifest public interest, due in part to the chaotic implementation of the Executive Order at Washington-Dulles International Airport and Philadelphia International Airport. *Id.* at ¶¶ 11-16. CBP officials at the airport – apparently relying on their interpretation of the Executive Order – detained a number of arriving passengers, some of

whom were refused entry to the United States. *Id.* at ¶¶ 11-13 CPB officials at Dulles and Philadelphia also appeared to ignore court orders requiring that detained travelers have access to attorneys. *Id.* at ¶¶ 12, 14. Plaintiffs submitted their FOIA request specifically so that they could learn what happened at Dulles, Philadelphia and elsewhere during the Executive Order rollout.

But Defendants have had Plaintiffs' Request for almost 9 months – since February 2, 2017 – and have yet to produce a single responsive record. While Defendants have made small, initial releases of records (a total of 469 pages; without duplicates, the total is 277 pages), those records are not responsive to Plaintiffs' Request, which explicitly seeks documents from sites within the purview of the CBP's Baltimore Field Office, i.e. Washington Dulles Washington Dulles International Airport, Baltimore Washington International Airport, Philadelphia International Airport, Pittsburgh International Airport, and "Port of Entry Offices" in Baltimore, Philadelphia, Pittsburgh, Port of Washington-Dulles and Wilmington (collectively "Local Sites"). Defendants' initial release of records came solely from CBP's headquarters, rather than the Local Sites, as explicitly sought in the Request. Indeed, the Request explicitly *excludes* CPB headquarters. And only a small handful of the 469 pages produced from CBP headquarters appear to have Baltimore Field Office personnel as recipients or senders. Plaintiffs understand that Defendants intend to release additional records this week, but, again, only from CPB headquarters, not from the Local Sites.

Defendants recently informed Plaintiffs that it expects to take *27 months* to complete processing and releasing responsive email records only. This delay is untenable and unacceptable, and exacerbated by the fact that Defendants also have advised Plaintiffs that they have yet to collect or review documents other than emails, are limiting the email search to January 27 through February 4, 2017, and will not apply search terms specifically requested by Plaintiffs in an effort

to capture responsive records, all in contravention of the Request. If Defendants meet their own proposed time frame, Defendants' proposal means that their production of responsive records will not be complete for *36 months* since receipt of Plaintiffs' Request.

Even more surprising is that Defendants advised Plaintiffs that it has identified just "approximately 2,800 [email] records totaling approximately 9,100 pages held by custodians in the Baltimore Field Office." 10/16/17 Email from J. Straus Harris to M. Eckstein (email string attached as Exh. 1). The agency asserts a review rate of "approximately 3,575 pages per month." 10/20/17 Email from J. Straus Harris to M. Eckstein (Exh. 1). At that rate, it should be able to review and produce the approximately 9,100 pages of responsive email records in 2 ½ months. Yet, Defendants contend that they cannot be produced for 27 months.

Defendants' continued protestations about their inability to timely produce records responsive to Plaintiffs' Request stands against the fact that the Request was served on February 2 – more than nine months ago. Defendants have had a substantial amount of time in which to search for and produce responsive records. Further delays should not be countenanced.

Accordingly, Plaintiffs believe the Court should set a 14-day deadline for an initial production from the 2,800 responsive email records that Defendants have already identified as potentially responsive to Plaintiffs' Request. Defendants also should be required to produce, on a rolling basis at 30-day intervals, all records – email and otherwise – responsive to the Request. Finally, the Court should set a date by which all responsive records will be produced and a *Vaught* index provided. Additionally, should the parties fail to reach agreement regarding the issues noted above – the application of certain search terms, the search for certain files, and the date range applicable to the Request – Plaintiff will seek appropriate discovery about, and/or move for

summary judgment regarding, the sufficiency (or lack thereof) of Defendants' search for and production of responsive documents.

2. DEFENDANTS' POSITION

The FOIA Request at issue is attached to Plaintiffs' Complaint and speaks for itself. Defendants are processing Plaintiffs' Request as quickly as practicable and have begun making releases of records responsive to Plaintiffs' Request on a rolling basis, including three releases on July 14, 2017, July 26, 2017, and September 21, 2017 ("Interim Releases"). The agency anticipates making another interim release of responsive records this week. 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 personnel at CBP's headquarters and personnel in CBP field offices across the country, including personnel in CBP's Baltimore Field Office.

Despite Plaintiffs' protestations to the contrary, these communications between personnel at CBP headquarters and personnel in the field offices are responsive to Plaintiffs' Request. Though Plaintiffs' Request seeks records "held" locally and disclaims 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 Baltimore 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.¹

As Defendants previously explained, the agency has gathered over 8,600 potentially responsive email messages and attachments (“email records”), totaling over 23,700 pages², from six custodians for the time period from January 27 through February 4, 2017 by searching for all email messages to or from these custodians during that period. The six custodians are the Director of Field Operations for the Baltimore Field Office, the Assistant Director of Field Operations for the Baltimore Field Office, the Port Director for Baltimore-Washington International Airport, the Port Director for Philadelphia International Airport, the Port Director for Pittsburgh International Airport, and the Port Director for Washington Dulles International Airport. The agency identified these custodians as those most likely to possess email records responsive to the Request as the agency understands it.

Defendants also note that 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). For each of the 19 ACLU requests seeking records from CBP field offices, the agency

¹ For example, many emails already released by the agency consist of communications sent from personnel at CBP headquarters to the directors of field operations in all 20 field offices throughout the country. Plaintiffs’ suggestion that an email is only responsive if produced from a “local” field office custodian would mean that a single such email would need to be produced from the Baltimore Director of Field Operations in this case; from the Detroit Director of Field Operations in the related case in the Eastern District of Michigan; from the Chicago Director of Field Operations in the related case in the Northern District of Illinois; and so on for all field offices covered by the ACLU affiliate requests. That outcome would only delay the release of records and unnecessarily burden the agency, and is inconsistent with the purposes and requirements of the FOIA.

² This total page count does not include spreadsheets attached to email messages, as it is difficult to translate spreadsheets into pages.

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 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 over 100,000 potentially responsive email records 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. These email records total approximately 275,000 pages of potentially responsive records for the agency to search and review. This total page count does not include several thousand spreadsheets attached to email messages, for the reason stated *supra* n.1.

In processing Plaintiffs' 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.

Plaintiffs in this case and the plaintiffs in some of the other cases brought by ACLU affiliates proposed search terms for the agency to apply to these email records. Applying these 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 search terms that is reasonably calculated to identify

responsive records. By email to Plaintiffs' counsel dated October 16, 2017, Defendants' counsel provided Plaintiffs with the "core list of search terms" that the agency has determined are reasonably calculated to identify records responsive to Plaintiffs' FOIA request, as well as the FOIA requests submitted by the other ACLU affiliates. *See* Exh. 1.

As Defendants' counsel explained in the October 16, 2017 email, and further explained in an email to Plaintiffs' counsel dated October 20, 2017, the agency has loaded the email records collected from the 85 field office custodians across all 19 ACLU field office requests into a review platform that allows for deduplication and email threading, which enable considerable efficiencies. *Id.* To maximize the efficiencies gained by deduplication 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 in the records collected from particular custodians or field offices. *Id.*

The agency has begun its review of these documents by applying the core list of search terms attached to Defendants' counsel's October 16, 2017 email. *See id.* These terms identify approximately 30,000 potentially responsive documents totaling approximately 90,000 pages, including approximately 2,800 documents totaling approximately 9,100 pages held by custodians in the Baltimore Field Office. *Id.* While the records from the Baltimore field office custodians amount to approximately 10% of these records by page count, as explained *supra*, in order to take advantage of the significant efficiencies gained by deduplication and email threading, the agency will not be processing the records identified from the Baltimore field office custodians in isolation. *Id.* For the consolidated review of the records of all 85 ACLU custodians, the agency has determined that it can process approximately 3,575 pages per month. Each month, those approximately 3,575 processed pages will include records from each of the field offices, so some

fraction of each monthly release will consist of records from the Baltimore field office custodians. Based on this processing rate, the agency estimates that it will be able to complete processing and release of all responsive, non-exempt records from the 85 ACLU custodians within 27 months. The agency intends to release these records on a rolling basis. Defendants propose that the Court order quarterly status reports to advise the Court on the agency's progress and to assure the Court that the agency is proceeding diligently under the circumstances.

This estimated completion date reflects the agency's estimate as to when it will review all of the approximately 30,000 records identified by the agency's core list of search terms across the 85 field office custodians. As Defendants have explained, 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 will likely prevent 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.

Importantly, 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 personnel at headquarters 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. The agency intends to assess whether additional searches are warranted based in part on its review of the records located in its initial searches, and Defendants are open to continuing discussions with Plaintiffs regarding the scope of the agency's search. Specifically, in the October 20, 2017 email from Defendants' counsel to Plaintiffs' counsel, Defendants noted that although the agency plans to move forward with a search consisting of the agency's core list of search terms, 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 will consider the additional search terms proposed by Plaintiffs in the October 20, 2017 email from Plaintiffs' counsel to Defendants' counsel. *See* Exh. 1. As in any FOIA case, the agency is entitled to determine in the first instance what search is reasonable and adequate. Further, as Defendants' counsel explained in the October 20, 2017 email to Plaintiffs' counsel, the agency is unlikely to adopt search terms that appear calculated solely to seek records with respect to the identity of particular individual travelers. Setting aside whether such terms would be reasonably likely to identify records responsive to the request, such terms would likely raise significant privacy concerns.

In response to Plaintiffs' suggestion that they may seek discovery about Defendants' search for and processing of responsive records, Defendants reiterate that discovery is generally unavailable to plaintiffs in FOIA actions. The adequacy of an agency's search for records responsive to a FOIA request and the appropriateness of an agency's decision to withhold information are ordinarily determined on the basis of declarations supplied by the agency at the

EXHIBIT 1

From: [Straus Harris, Julie \(CIV\)](#)
To: [Eckstein, Maya](#)
Cc: [Barghaan, Dennis \(USAVAE\)](#)
Subject: RE: ACLU-Virginia v. DHS
Date: Friday, October 20, 2017 3:14:18 PM

Maya,

Thank you for getting the ball rolling on the next JSR. I will actually be traveling Tuesday and Wednesday next week for a hearing on Wednesday morning, so my response time during that period will likely be delayed; accordingly, it would be great to get as much of this worked out before Tuesday afternoon as possible.

As explained in my email below, the agency has determined that it can maximize efficiency in its review by conducting a single search across all of the 85 custodians for the parallel requests submitted by ACLU affiliates across the country ("ACLU custodians"), rather than running separate, sequential searches in the records collected from particular custodians or field offices. As also explained below, applying search terms to all of these records has yielded approximately 30,000 potentially responsive documents totaling approximately 90,000 pages. While the records from the Baltimore field office custodians amount to approximately 10% of these records by page count, the agency will not be processing them in isolation. For the consolidated review of the records of all 85 ACLU custodians, the agency has determined that it can process approximately 3,575 pages per month. Each month, those ~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 Baltimore field office custodians. Based on this processing rate, the agency expects to complete processing and release of all responsive, non-exempt records from the 85 ACLU custodians within 27 months. Importantly, during this same time, the agency will continue to process and release to you responsive, non-exempt records located through searches of the records collected from personnel at CBP headquarters. (As explained in the last JSR, many emails collected from headquarters custodians (including many already released to you by the agency) consist of communications sent from personnel at headquarters to the directors of field operations in all 20 field offices throughout the country.) Also, as previously explained, the agency will also be searching for non-email records but intends to prioritize processing of email records.

With respect to your request regarding the additional search terms you proposed on September 11, 2017, the agency plans to move forward with its current search consisting of the core set of search terms attached to my prior email for the reasons stated there. As I stated in that email, the agency will later consider whether additional searches are reasonably calculated to identify additional records responsive to your request and, as part of that process, the agency will consider your additional proposed search terms. As in any FOIA case, the agency is entitled to determine in the first instance what search is reasonable and adequate. Please note that the agency is unlikely in any event to adopt search terms that appear calculated solely to seek records with respect to the identity of particular individual travelers. Setting aside whether such terms would be reasonably likely to identify records responsive to the request, such terms would likely raise significant privacy concerns.

Additionally, the agency expects to make its next interim release to you next week. As requested, the release will be sent to Mitra. I want to make sure you are aware of this upcoming release so that you can coordinate with Mitra given that this was an issue for the release last month.

Thank you,
Julie

Julie Straus Harris

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From: Eckstein, Maya [mailto:meckstein@hunton.com]
Sent: Friday, October 20, 2017 9:29 AM
To: Straus Harris, Julie (CIV) <julharri@CIV.USDOJ.GOV>
Cc: Barghaan, Dennis (USAVAE) <Dennis.Barghaan@usdoj.gov>
Subject: RE: ACLU-Virginia v. DHS

Julie,

Thank you for this update.

Please advise when you expect to be able to review and produce documents specific to the Baltimore Field Office. With your search terms resulting in just “approximately 2800 documents totaling approximately 9100 pages”, it should not take a considerable amount of time to review and produce them.

In addition, we ask that you apply the following search terms, previously provided to you on Sept. 11, 2017, to the “approximately 6,600 documents totaling approximately 18,200 pages held by custodians in the Baltimore Field Office.”

- A. Warner [US Senator]
- B. Kaine [US Senator]
- C. Beyer [US Representative for VA]
- D. Raskin [US Representative for MD]
- E. Kenney [Philadelphia mayor]
- F. Brady [US Representative for PA]
- G. Casey [US Senator]
- H. Wolf [PA Gov]
- I. Evans [US Representative for PA]

- J. Harris [state representative for PA]
- K. Sims [state representative for PA]
- L. Aziz [barred native of Yemen]
- M. Al Murisi [barred native of Yemen]

Please advise us of the document and page count resulting from the application of these search terms to these documents.

Please provide this information by Monday, so that we can advise the Court in the status report due on Wednesday.

We are making these requests without any waiver of our objections to the search conducted by the agency thus far.

Maya

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From: Straus Harris, Julie (CIV) [<mailto:Julie.StrausHarris@usdoj.gov>]
Sent: Monday, October 16, 2017 9:22 PM
To: Eckstein, Maya
Cc: Barghaan, Dennis (USAVAE)
Subject: ACLU-Virginia v. DHS

Counsel,

I am writing to update you on CBP's search for documents responsive to your FOIA request, and the parallel requests brought in other districts.

The agency has identified three classes of field office custodians whose email records have been collected and will be searched in response to these requests: Directors of Field Operations, Assistant

Directors of Field Operations, and Port Directors. There are 85 such custodians in the field offices subject to these parallel requests, including 6 in the Baltimore Field Office. The agency is searching these email records from January 27 through February 4, 2017.

The agency has loaded these documents into a review platform that allows for deduplication and email threading, which enable considerable efficiencies. Deduplication and email threading are being applied across all identified field office custodians for the applicable date range. After completing that process, there are approximately 100,000 documents totaling approximately 275,000 pages, including approximately 6,600 documents totaling approximately 18,200 pages held by custodians in the Baltimore Field Office. To maximize the efficiencies gained by deduplication and email threading, however, the agency will conduct a single search across all of the custodians during the applicable time period, rather than run separate, sequential searches in the records collected from particular custodians or field offices.

The agency has begun its review of these documents by applying a core list of search terms, which is attached to this email. These terms identify approximately 30,000 potentially responsive documents totaling approximately 90,000 pages, including approximately 2,800 documents totaling approximately 9,100] pages held by custodians in the Baltimore Field Office. The list of core search terms was largely derived from the terms suggested by you and some of your colleagues around the country. The agency reviewed and analyzed all of the search terms suggested by the ACLU affiliates. Where suggested terms were omitted, it was because the agency determined that they would return a large proportion of unresponsive documents and that responsive records containing those search terms were likely to contain other terms on the core list attached here. The agency intends to review the documents identified by its core search terms for responsiveness and for any information that should be withheld pursuant to a FOIA exemption, and to release responsive, non-exempt documents on a rolling basis. That review is now underway. As it nears completion, the agency will consider whether additional searches are reasonably likely to identify additional records responsive to your request.

Please let me know if you have any questions about this process.

Julie

Julie Straus Harris

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