

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

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS

and

DEPARTMENT OF JUSTICE,

Defendants.

No. 18-cv-2399-KBJ

JOINT STATUS REPORT

Plaintiff National Association of Criminal Defense Lawyers (“NACDL”) and Defendants Federal Bureau of Prisons (“BOP”) and Department of Justice (“DOJ”) respectfully submit this Joint Status Report in response to the Court’s Minute Order of February 11, 2019.

Overview

1. At issue in this case are three Freedom of Information Act (“FOIA”) requests filed by NACDL with various of Defendants’ component offices.
2. On August 2, 2018, NACDL filed a FOIA request with the BOP (“the BOP Request”) seeking, among other things, technical features of the BOP’s inmate email system and related policies. *See* Ex. A to Am. Compl., ECF No. 9-2.
3. On August 2, 2018, NACDL filed a FOIA request with DOJ’s Office of Information Policy (“OIP”), Office of Legal Counsel (“OLC”), and Criminal Division (“the Main Justice Request”) seeking, among other things, policies and guidance regarding the circumstances under which

prosecutors may access emails between inmates and their attorneys. *See* Ex. B to Am. Compl., ECF No. 9-3.

4. On August 2, 2018, NACDL filed a FOIA request with the Executive Office for United States Attorneys (“the EOUSA Request”) seeking, among other things, records regarding the practices of different U.S. Attorneys’ Offices for obtaining emails between inmates and their attorneys. *See* Ex. C to Am. Compl., ECF No. 9-4.

5. On October 18, 2018, NACDL sued to enforce the BOP Request and the Main Justice Request. *See* Compl., ECF No 1. On November 15, 2018, NACDL filed an Amended Complaint to enforce all three Requests. *See* Am. Compl., ECF No. 9. Defendants filed an Answer on February 11, 2019. *See* Ans., ECF No. 18.

6. On February 11, 2019, the Court ordered the parties to “promptly confer and file a joint proposed schedule for briefing or disclosure,” the deadline for which was extended to March 4, 2019. *See* Minute Order (Feb. 27, 2019); Minute Order (Feb. 11, 2019). This Joint Status Report contains those proposals.

Defendants’ Search Updates and Proposed Disclosure Schedule

7. **BOP:** The search within the BOP has yielded approximately 5660 pages of potentially responsive records for review. Based on the number of pages of records, the potential likelihood exemptions appertaining thereto, and the number other requests the Government Information Specialist is currently working on, the processing goal related to this request is approximately 200 pages weekly with rolling releases every 30 days. It is anticipated that the first rolling release will happen in March 2019, and every 30 days thereafter. Unfortunately, due to the nature of the request, the scope of the search, the number of records located, the number of FOIA requests

received by BOP, and the current staffing shortages and limitations on hiring, to finalize the processing of records for this request will take the BOP approximately seven months.

8. **OIP:** OIP and NACDL have agreed to provisionally narrow the scope of searches for, and types of records responsive to, the Main Justice Request as it relates to OIP's handling of the request on behalf of the Offices of the Attorney General ("OAG"), Deputy Attorney General ("ODAG"), Associate Attorney General ("OASG"), and Legal Policy ("OLP"). The parties have agreed to omit emails from OIP's searches, that OIP will conduct searches of the electronic database of the Departmental Executive Secretariat for responsive records of OAG, ODAG, and OASG, and that OIP will conduct a search of OLP. As a result of this agreement, OIP intends to complete its searches by March 25, 2019, and complete processing and production of any non-exempt responsive records by May 24, 2019.

9. **The Criminal Division:** The Criminal Division FOIA/PA Unit has completed its preliminary searches and located approximately 2,300 pages of potentially responsive records. The Criminal Division proposes it be given 60 days to complete supplemental searches before agreeing to enter into a production schedule of any non-exempt responsive records. This will allow it time to assess the complete volume of potentially responsive records and more accurately estimate how much time it will need to complete its review, in order to present the Plaintiff with a reasonable processing timeline for production of any non-exempt responsive records. Additionally, the Criminal Division FOIA/PA Unit is a relatively small office, as a result of vacancies and fiscal circumstances, with four Government Information Specialists, three staff attorneys, and two supervising attorneys. Currently, the Criminal Division FOIA/PA Unit has 42 pending litigation matters, the instant case is number 36 in that queue. Plaintiff's processing proposal for the Criminal Division FOIA/PA Unit is unworkable and in recent litigation matters, where it has not been able to reach agreement with Plaintiff, it has been ordered to process between 200-400 pages per month.

Tim Blixseth v. U.S. Department of Justice, No. 18-cv-02281 (D.D.C.) (December 17, 2018 Minute

Order) (directing that the Criminal Division FOIA/PA Unit process 300 pages per month); *Summer Shaw v. U.S. Department of Justice*, No. 18-cv-00593 (D.D.C.) (July 31, 2018 Minute Order) (directing that the Criminal Division FOIA/PA Unit process 200 pages per request per month (this case involved two requests)).

10. **OLC:** OLC is confirming the breadth of the OLC searches and anticipates being able to provide to Plaintiff an update as early as next week on whether and what estimate of documents have been or are expected to be found that are potentially responsive to the request.

11. **EOUSA:** The EOUSA is completing its preliminary searches in the twenty-seven U.S. Attorneys' Offices named in the FOIA request and proposes that it be allowed 60 days to assess the results and determine if any supplemental searches need to be completed before it enters into a production schedule. The EOUSA believes that this period will allow it time to assess the volume of potentially responsive documents and more accurately estimate how much time it will take to complete its review, so it can propose a reasonable processing timeline.

12. Defendants propose that a further status update be filed with the Court in 30 days. Defendants believe that Plaintiff's proposal for processing minimums other than those where the parties agree is unworkable. The cases upon which they rely are not on point, and at least one other judge of this Court has agreed to lesser processing figures. *See, e.g., Blixseth, supra; Shaw, supra; Citizens United v. Dep't of State*, Civil Action No. 18-326 CRC (June 6, 2018 Minute Order) (directing that the agency would process 300 pages per month). Defendants propose that any non-agreed minimum number of pages to process should await briefing, which could include declarations from the many components tasked with processing the documents so that the Court is fully informed.

NACDL's Proposed Disclosure Schedule

13. FOIA requires that agencies make records “promptly available” upon request. 5 U.S.C. § 552(a)(3)(A).

14. As described in NACDL’s previous Motion for Extension of Time, NACDL has repeatedly sought relevant information to propose a schedule tailored to the needs of this case, including the agencies’ proposed timeline for completing their searches and processing and producing the results of those searches. *See* ECF No. 19.

15. **BOP:** To date, only BOP has indicated its search is complete and processing has begun. NACDL consents to BOP’s proposed schedule outlined above and respectfully requests the Court enter a scheduling order directing BOP to process the responsive records at a rate of at least 200 pages per week and to produce responsive records to NACDL once a month, starting in March 2019.

16. **OIP:** As outlined above, NACDL and OIP have agreed to provisionally narrow the scope of OIP’s search for responsive records. NACDL respectfully requests that the Court enter a scheduling order directing OIP to complete its search by March 25, 2019, and complete processing and production of responsive records by May 24, 2019.

17. **OLC:** In light of FOIA’s command that OLC make records “promptly available” and the fact that the Main Justice Request was filed more than seven months ago, NACDL respectfully requests that OLC be directed to complete its search by March 15, 2019. NACDL also requests that the parties be ordered to file a Joint Status Report on March 20, 2019, informing the Court how many pages of responsive records the search yielded and their respective proposals for a deadline for processing and production.

18. **The Criminal Division:** In light of FOIA's command that the Criminal Division make records "promptly available" and the fact that the Main Justice Request was filed more than seven months ago, NACDL requests the Court enter a scheduling order directing the Criminal Division to complete its search by March 15, 2019, and to process and produce responsive records at a rate of at least 750 pages per month. This rate is well under what has been ordered of government agencies in other cases, *see, e.g., Nat'l Immigration Project*, No. 18-cv-00659 (S.D.N.Y.), ECF No. 55 (ordering agencies to process 1,500 pages per month); *Seavey v. Dep't of Justice*, 266 F. Supp. 3d 241 (D.D.C. 2017) (ordering FBI to process 2,850 pages per month); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 218 F. Supp. 3d 27, 37 (D.D.C. 2016) (summarizing initial order requiring agency to process at least 2,000 pages per month); *Clemente v. FBI*, 71 F. Supp. 3d 262, 264 (D.D.C. 2014) (ordering FBI to process 5,000 pages per month). Further, this rate will contribute to a prompt resolution of this case because the Criminal Division's productions would be complete in just over three months, rather than drawing them out over an unspecified number of months.

19. **EOUSA:** In light of FOIA's command that EOUSA make records "promptly available" and the fact that the Requests were filed more than seven months ago, NACDL respectfully requests that EOUSA be directed to complete its search by March 15, 2019. NACDL also requests that the parties be ordered to file a Joint Status Report on March 20, 2019, informing the Court how many pages of responsive records the search yielded and their respective proposals for a deadline for processing and production.

20. NACDL agrees that a further status update should be filed with the Court in 30 days.

Parties' Availability for Conference Call with the Court

21. Per the Court's General Order and Guidelines Applicable to FOIA Cases, *see* Part 4(a), ECF No. 6, the parties are available at the following times for a conference call with the Court to resolve the scheduling disputes described above:

- a. Monday, March 11, 2019, from 12pm to 4pm ET;
- b. Tuesday, March 12, 2019, from 12pm to 4pm ET;
- c. Thursday, March 14, 2019, from 12pm to 4pm ET; and
- d. Monday, March 18, 2019, from 12pm to 4pm ET.

DATED: March 4, 2019

/s/ Megan Graham

Megan Graham (*pro hac vice*)
Catherine Crump (*pro hac vice*)
Samuelson Law, Technology & Public Policy
Clinic
U.C. Berkeley School of Law
353 Boalt Hall
Berkeley, CA 94720-7200
(510) 664-4381
mgraham@clinical.law.berkeley.edu

Counsel for Plaintiff

Barry J. Pollack, DC Bar #434513
Robbins, Russell, Englert, Orseck,
Untereiner & Sauber, LLP
1801 K Street, N.W.
Suite 411L
Washington, DC 20006
(202) 775-4514 phone
bpollack@robbinsrussell.com

Counsel for Plaintiff

Respectfully submitted,

JESSIE K. LIU, DC Bar #472845
United States Attorney

DANIEL F. VAN HORN, DC Bar #924092
Chief, Civil Division

By: _____/s/
W. MARK NEBEKER, DC Bar #396739
Assistant United States Attorney
555 4th Street, N.W.
Washington, DC 20530
(202) 252-2536
mark.nebeker@usdoj.gov

Counsel for Defendants