

**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.

Civil Action No. 18-2399 KBJ

THIRD JOINT STATUS REPORT

Per the Court's order, Plaintiff National Association of Criminal Defense Lawyers ("NACDL") and Defendants Federal Bureau of Prisons ("BOP") and Department of Justice ("DOJ") respectfully submit this Third Joint Status Report. *See* Minute Order, Apr. 5, 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, information about 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. Attorney’s 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 March 4, 2019, the parties filed their first Joint Status Report. Joint Status Report (“1st JSR”), ECF No. 20. In that Joint Status Report, the parties agreed that BOP would process the responsive records it found at a rate of at least 200 pages per week and to produce responsive records once a month. *See id.* ¶¶ 7, 15. The parties also agreed that OIP would complete its search by March 25, 2019, and would complete production of responsive records by May 24, 2019. *See id.* ¶¶ 8, 16. The parties disputed the appropriate search and production timelines for the Criminal Division, OLC, and EOUSA. *See id.* ¶¶ 9–11, 17–19.

7. On April 3, 2019, the parties filed their second Joint Status Report. Joint Status Report (“2d JSR”) ¶ 9, ECF No. 22. As described in more detail in that filing, BOP released its first production on March 21, 2019, and OLC completed its search on March 22, 2019. *See id.* ¶¶ 6, 9. At that point, the parties had still not reached agreement as to the search or processing schedules for the Criminal Division or EOUSA. *See id.* ¶ 11.

Current Developments

8. **BOP:** On March 21, 2019, BOP sent its first production to NACDL. In the letter accompanying the production, BOP stated that when accounting for all of these pages of raw, unprocessed search results, a total of 7,972 were actually received in response to the searches for records. The first rolling release included the processing step of removal of a total of 2,824 blank pages of records. This resulted in the BOP processing 207 pages as part of its first production. Of the pages processed for the first production, 140 pages were released in full, eighteen were released in part, and forty-nine were withheld in full. Further, on April 30, 2019, the BOP sent its second production to NACDL. In the letter accompanying this production, the BOP stated the release included the processing of a total of 812 pages. After removal of nonresponsive pages and pages created as a result of the search process, a total of 302 pages were responsive to the FOIA request. Of the 302 pages, 253 pages were released in full, thirty-three pages were released in part, and sixteen pages were withheld from release in full.

9. **OIP:** Pursuant to the provisional agreement between OIP and NACDL set forth in the parties' first Joint Status Report, OIP has conducted (1) searches of the Departmental Executive Secretariat for responsive records of the Office of the Attorney General, Office of the Deputy Attorney General, and Office of the Associate Attorney General, and (2) a search of the Office of Legal Policy. OIP is now reviewing the results of both searches, and will complete processing and production of any non-exempt responsive records by May 24, 2019.

10. **The Criminal Division:** The supplemental search of one additional Criminal Division section is complete and returned approximately 2,800 additional potentially responsive items. The search of two additional Criminal Division sections is nearly complete, however, finishing this task has been hampered by the illness of a key employee within the Information

Technology Management (“ITM”) unit, who has been absent for one and one-half weeks. ITM is the component responsible for conducting searches for responsive records within the Criminal Division’s electronic database. The Criminal Division believes that an additional two-week period will allow it time to complete its supplemental searches and assess 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.

11. **OLC:** On March 22, 2019, OLC informed NACDL that it had completed its search and found no responsive records.

12. **EOUSA:** The EOUSA has now completed its preliminary searches in the twenty-seven U.S. Attorneys’ Offices named in the FOIA request and is processing the results, consisting of approximately 233 pages of potentially responsive documents. The EOUSA believes that it can make a release of responsive, non-exempt documents within 45 days.

The Parties’ Agreements

13. **BOP:** As mentioned in the parties’ March 4, 2019 Joint Status Report, NACDL and BOP have agreed that BOP will process the responsive records found in its search at a rate of at least 200 pages per week and will produce responsive records to NACDL once a month. *See* 1st JSR ¶¶ 7, 15.

14. **OIP:** As mentioned in their previous Joint Status Reports, the parties have agreed that OIP will complete the processing and production of non-exempt portions of responsive records by May 24, 2019. 1st JSR ¶¶ 8, 16; 2d JSR ¶ 7.

15. **OLC:** The parties have agreed to continue negotiations and exchange information to determine whether NACDL will challenge the adequacy of OLC’s search.

16. **EOUSA:** The parties have agreed to the timeline as set forth in paragraph 12.

Matters for the Court to Address

17. The parties have not come to an agreement on a search or processing schedule for the Criminal Division. The disagreements are discussed in more depth in the parties' March 4, 2019 Joint Status Report. *See* ECF No. 20, ¶¶ 9, 11, 18–19.

18. NACDL asks the Court to order the Criminal Division to complete its searches on or before May 20, 2019—giving the Criminal Division the additional two weeks it represents it needs—and to file an update with the Court on that date setting forth the total number of potentially responsive pages found. NACDL further asks that the parties be directed to file a Fourth Joint Status Report on May 28, 2019, setting forth either an agreed upon processing and production schedule for the Criminal Division or their respective positions.

DATED: May 6, 2019

/s/ Megan Graham
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Respectfully submitted,

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