

**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

FOURTH 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 Fourth Joint Status Report. *See* Minute Order, May 7, 2019 ("May 7 Order").

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”), 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.

8. On May 6, 2019, the parties filed their third Joint Status Report. 3d Joint Status Report (“3d JSR”), ECF No. 23. As described in more detail in that filing, BOP released its second production on April 30, 2019, and the parties reached an agreement as to the production schedule for EOUSA. *See id.* ¶¶ 8, 12. Additionally, the parties agreed that the Criminal Division would complete its search by May 20, 2019. *See id.* ¶¶ 10, 18. At that point, the parties had still not reached an agreement as to the processing schedule for the Criminal Division. *See id.* ¶¶ 17–18.

Current Developments

9. **BOP:** The BOP’s first two productions are described in detail in the parties’ Third Joint Status Report. *See* 3d JSR ¶ 8. The BOP is currently finalizing its third rolling release with an anticipated release date of May 31, 2019.

10. **OIP:** Pursuant to the provisional agreement between OIP and NACDL set forth in the parties’ first Joint Status Report, OIP 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 completed its review of the results of both searches and, on May 23, 2019, provided a response indicating that no records responsive to NACDL’s request were located.

11. **The Criminal Division:** The Criminal Division reports that it has completed its entire search as of May 20, 2019. The Criminal Division located approximately 522,488 pages of potentially responsive electronic documents and an additional approximately 2,800 documents. The Criminal Division further reports that it desires to work with NACDL to narrow its search from the timeline of 2006 to the present, if not, it will be required to review and process all of the potentially responsive pages and records located as a result of its search. The Criminal Division, however, has located two documents dated in 2009 that relate to the subject matter of NACDL’s

request. These documents will need to be referred to other agencies before processing of the documents can be completed.

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

13. **EOUSA:** The EOUSA has completed its preliminary searches in the twenty-seven U.S. Attorney's Offices named in the FOIA request and is processing the results, consisting of approximately 233 pages of potentially responsive documents. On May 6, 2019, the EOUSA indicated that it could make a release of responsive, non-exempt documents by June 20, 2019. *See id.* ¶ 12. EOUSA believes that it remains on track to make the releases from the twenty-seven United States Attorney's Offices as previously reported, including any referrals to other agencies.

The Parties' Agreements

14. **BOP:** As mentioned in the parties' first 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.

15. **OIP:** As mentioned in their previous Joint Status Reports, the parties agreed that OIP would complete the processing and production of any non-exempt portions of responsive records by May 24, 2019. 1st JSR ¶¶ 8, 16; 2d JSR ¶ 7; 3d JSR ¶ 14. On May 23, 2019, OIP informed NACDL that it located no records responsive to NACDL's request. The parties have agreed to continue negotiations and, where appropriate, exchange information to determine whether NACDL will challenge the adequacy of OIP's search.

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

17. **EOUSA:** The parties have agreed that EOUSA will release responsive, non-exempt documents by June 20, 2019, as set forth in paragraph 13.

Matters for the Court to Address

18. The parties have not come to an agreement on a search or processing schedule for the Criminal Division.

a. **The Criminal Division's Position:** The Criminal Division did complete its search for potentially responsive records by May 20, 2019. It believes that, with the dates of the two documents described above in paragraph 11, the electronic search can be narrowed to the period October 2008 through May 2011. The Criminal Division has determined that, if those date parameters are applied, there will be approximately 995 pages of potentially responsive documents to be processed. If such a limitation is adopted, the Criminal Division can begin processing the approximately 995 potentially responsive pages immediately and have that, as well as the two documents described above in paragraph 11, completed within a twelve-week period.

b. Undersigned counsel was away from the office during the afternoon of Thursday, May 23, 2019, and all of Friday, May 24, 2019; he did not forward the questions posed in NACDL's May 23, 2019, 1:38 p.m. email until today, May 28, 2019. He regrets if this has caused any delay in securing the answers. The Criminal Division remains willing to negotiate with NACDL to narrow the results of its search, including exchanging information related to its search, where appropriate, and will answer NACDL's questions no later than May 30, 2019.

c. **NACDL's Position:** The Main Justice Request was filed nearly 10 months ago, *see* Ex. B to Am. Compl., and the Criminal Division has said three times in recent months that it would be able to complete its search before the end of May 2019, *see* 1st JSR ¶ 9; 2d JSR ¶ 8; 3d JSR ¶ 10. Additionally, the Court directed the Criminal Division to complete its search "for records

responsive to Plaintiff's FOIA request" by May 20, 2019. *See* May 7 Order. Instead the Criminal Division now says its initial search turned up more than 500,000 pages of "potentially responsive records" using search terms that it has not shared with NACDL. Thus, the Criminal Division has still failed to identify the records responsive to the Request. *See* ¶¶ 11, 18(a), *supra*; *but see* 1st JSR ¶ 9 (indicating the Criminal Division's initial search resulted in "approximately 2,300 pages of potentially responsive records"). Further, NACDL does not believe the Criminal Division's proposed narrowed timeframe is appropriate in light of changes in policies and the technical capabilities of the BOP's inmate email system that occurred in 2014 and 2017. While NACDL sought additional information about the Criminal Division's search and the results on May 23, 2019 in a good faith attempt to negotiate a more appropriate narrowing of the Request, the Criminal Division has indicated it needs at least two more days to provide that information, adding further delay to this already drawn out process.

19. NACDL renews its request for an in-person status conference, ECF No. 21, to resolve this disagreement expeditiously and to set a scheduling order for the Criminal Division to complete its search for and processing of responsive records. The Criminal Division takes no position on this request.

DATED: May 28, 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