

**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

SIXTH 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 omnibus Sixth Joint Status Report. *See* Minute Order, May 30, 2019 ("May 30 Order").

Overview

1. The background of this case has been set forth in more detail in the parties' previous Joint Status Reports. *See* Joint Status Report ("1st JSR"), ECF No. 20; Joint Status Report ("2d JSR"), ECF No. 22; 3d Joint Status Report ("3d JSR"), ECF No. 23; 4th Joint Status Report ("4th JSR"), ECF No. 24; 5th Joint Status Report ("5th JSR"), ECF No. 25.

2. At issue in this case are three Freedom of Information Act ("FOIA") requests filed by NACDL with various of Defendants' component offices.

3. 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.

4. 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 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.

5. 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.

6. 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.

7. On March 4, 2019, the parties filed their first Joint Status Report. 1st JSR. 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 OLC, the Criminal Division, and EOUSA. See *id.* ¶¶ 9–11, 17–19.

8. On April 3, 2019, the parties filed their second Joint Status Report. 2d JSR. 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.

9. On May 6, 2019, the parties filed their third Joint Status Report. 3d JSR. 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.

10. On May 28, 2019, the parties filed their fourth Joint Status Report. 4th JSR. As described in more detail in that filing, the Criminal Division had completed its search and initially identified 522,488 pages of potentially responsive electronic documents, as well as an additional approximately 2,800 documents. *Id.* ¶ 11. At that point, the Criminal Division had not provided NACDL with additional information NACDL had requested about the search, and as a result, the parties had not identified workable ways to narrow the scope of the Main Justice Request. *See id.* ¶ 18.

11. On May 30, 2019, the Court ordered the parties to “promptly confer in good faith regarding the issues identified in their [Fourth] Joint Status report regarding the Criminal Division’s search for and production of responsive records, and file a further joint status report on those matters on or before 6/13/2019.” May 30 Order. The Court further ordered that the parties

file an “omnibus joint status report on or before 6/28/2019, which shall contain a proposed schedule for further proceedings if litigation is going to be necessary.” *Id.*

12. On June 12, 2019, the parties filed their fifth Joint Status Report. 5th JSR. As described in more detail in that filing, NACDL and the Criminal Division were working in good faith to narrow the scope of the dispute and had a conference call scheduled for June 24, 2019 to exchange information. *Id.* ¶¶ 4–6.

The BOP Request

13. As described above, the parties agreed that the BOP would process responsive records at a rate of 200 pages per week and would make monthly releases to NACDL. 1st JSR ¶¶ 7, 15.

14. On March 21, 2019, the BOP made its first production to NACDL. On March 21, 2019, the BOP sent its first production to NACDL. In the letter accompanying the production, the 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. 3d JSR ¶ 8. The first rolling release included the processing step of removal of a total of 2,824 blank pages of records. *Id.* Additionally, the BOP processed 207 pages as part of its first production. *Id.* 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. *Id.*

15. On April 30, 2019, the BOP made its second production to NACDL. In the letter accompanying the production, the BOP stated the release included the processing of a total of 812 pages. *Id.* 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. *Id.* 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. *Id.*

16. On May 29, 2019, BOP made its third production to NACDL. In the letter accompanying the production, the BOP stated the release included the processing of a total of 801 pages. After removal of nonresponsive pages and pages created as a result of the search process, a total of forty-four pages were responsive to the FOIA request. *Id.* Of the forty-four pages, three pages were released in full, twenty-seven pages were released in part, and three pages were withheld from release in full. Additionally, eight pages were referred to the EOUSA.

17. BOP anticipates making its fourth production to NACDL next week.

The Main Justice Request

18. **OIP.** As described above, the parties agreed that OIP would complete its search by March 25, 2019, and would complete production of any non-exempt responsive records by May 24, 2019. 1st JSR ¶¶ 8, 16. On May 23, 2019, OIP informed NACDL that it had located no records responsive to the Main Justice Request.

19. **OLC.** On March 22, OLC informed NACDL that it had found no records responsive to the Main Justice Request.

20. The Criminal Division.

a. The Criminal Division ran three searches, which the parties are referring to as Search Category 1, Search Category 2, and Search Category 3, corresponding to the three categories of records sought in the Main Justice Request.

b. The Criminal Division has completed its responsiveness review of Search Category 3 records and has determined that approximately 650 pages are responsive. These records have not been reviewed to determine whether any are duplicative.

c. The Criminal Division has also completed the responsiveness review of Search Category 1 records and has determined that approximately 2,389 pages are responsive. These records have not been reviewed to determine whether any are duplicative.

d. The parties agree that the Criminal Division will begin processing of Search Category 1 records upon completion of processing Search Category 3 records.

e. After its initial search, the Criminal Division identified 50,980 items¹ potentially responsive to Search Category 2. This total reflects the raw search results (i.e., it does not reflect the number of records or pages requiring processing after a responsiveness review and removal of duplicative records).

f. The parties agree that there may be useful lessons learned after review of Search Category 1 and Search Category 3 records that could narrow the search terms, and thus the results, in Search Category 2. As a result, the parties have agreed to continue discussing how to handle the results in Search Category 2 as the other responsive records are processed and released.

21. **EOUSA.** Based on the Criminal Division's August 24, 2018 letter acknowledging receipt of the Main Justice Request, it is NACDL's understanding that the Criminal Division referred the Main Justice Request to EOUSA to search for responsive records. Records responsive to the Main Justice Request located by EOUSA have not yet been released to NACDL.

The EOUSA Request

22. As described previously, the parties agreed that EOUSA would complete its search and produce responsive, non-exempt documents by June 20, 2019. *See, e.g.*, 4th JSR ¶¶ 13, 17. EOUSA's search resulted in 233 potentially responsive pages of records. *See, e.g., id.* ¶ 13.

¹ The number of potentially responsive "items" does not equate to the number of potentially responsive "records."

23. On June 12, 2019, EOUSA produced records responsive to the EOUSA Request. The EOUSA released thirty-eight pages in full, released nine pages in part, and withheld forty-three pages in full.

24. EOUSA also indicated it had located some records that originated with BOP or the Criminal Division, and that EOUSA had forwarded those records to the relevant agencies for review and release. EOUSA's letter does not indicate how many records were referred, and those records have not yet been released to NACDL.

Remaining Dispute: The Criminal Division's Processing Rate

25. The parties currently dispute the reasonableness of the Criminal Division's proposed processing rate.

26. The Criminal Division's Position.

a. The Criminal Division will complete the processing of the approximately 650 pages of responsive records in Search Category 3, with an interim response letter being sent to Plaintiff by September 30, 2019. Beginning October 1, 2019, the Criminal Division will begin the processing of the approximately 2,389 pages of responsive records in Search Category 1, with a processing schedule of 300 pages per month with an interim response letter being sent to Plaintiff at the end of each 3-month period, with the first interim response letter being sent to Plaintiff on December 31, 2019.

b. The Criminal Division advises that the approximately 650 pages of responsive records in Search Category 3 will likely require further consultations and/or concurrences with both other named defendant-agencies and internally within the Criminal Division and its' components. The approximately 650 pages of responsive emails will also need to be de-duped which will add to the length of time required to complete the overall processing of these records.

The Criminal Division further advises that the approximately 2,389 pages of responsive records in Search Category 1 will also likely require further consultations and/or concurrences with both other named defendant-agencies and internally within the Criminal Division and its components. The approximately 2,389 pages of responsive emails will also need to be de-duped which will add to the length of time required to complete the overall processing of these records.

c. The Criminal Division reasonably anticipates that there will be some similar or duplicative types of responsive emails contained within each of the respective Search Categories 1, 2 and 3. The responsive emails within Search Categories 1 and 3 which are similar or duplicative will have been identified and thus the Criminal Division will be able to eliminate these records from the page counts for Search Category 2. Ultimately, the goal of the Criminal Division is to further narrow down the page count of responsive records for Search Category 2, which will speed up the overall processing of the records.

27. NACDL's Position.

a. NACDL requests that the Criminal Division be ordered to process 800 pages per month of records that have been pre-screened for responsiveness. Further, NACDL requests that the Criminal Division be directed to make monthly productions.

b. The Main Justice Request was filed nearly eleven months ago, and to date, the Criminal Division has not begun processing responsive records for release. Given the delays in the case thus far, the Criminal Division should be held to processing at least 800 pages per month, the rate agreed to by BOP, the only other component in this case that must process a significant number of records. Permitting the Criminal Division's proposed rate will needlessly drag this case out for years, and the Criminal Division has provided no persuasive explanation for why it cannot meet the pace of another agency viewing related and comparable records.

28. **Briefing.** The parties propose memoranda of points and authorities be limited to fifteen pages, and that no reply be filed. Further, the parties propose NACDL's motion on this issue be filed on or before July 17, 2019, and the Criminal Division's opposition be filed on or before July 31, 2019.

Potential Future Litigation

29. The parties have begun discussions about the likely motions for summary judgment that will be necessary in this case.

30. **Adequacy of Defendants' Searches.** NACDL may challenge the adequacy of some of the searches conducted. Defendants have begun sharing information about the searches they ran, and the parties plan to continue their negotiations on this front. Based on the information received to date, and unless circumstances substantially change, NACDL does not plan to challenge the adequacy of OLC's search.

31. **Defendants' Withholdings.** NACDL may challenge some of Defendants' withholdings of information. The parties will continue negotiating in an attempt to narrow their disputes, but will not be able to assess the overall scope of challenges until Defendants have completed their productions of responsive records.

32. **Timing.** Barring any unforeseen circumstances and at the current rate, the BOP will complete its production of records in October or November 2019. However, in light of the ongoing dispute over the Criminal Division's processing rate and the current lack of clarity about how many pages of records found by the Criminal Division are actually responsive to the Main Justice Request, the parties are unsure of when they will be prepared to file summary judgment motions.

33. **Proposal.** In addition to any other joint status reports ordered by the Court, the parties propose filing a joint status report one week after the BOP completes its final production of records

with an update on the remaining disputes and proposing either an agreed upon schedule for summary judgment briefing or the parties' respective positions on the issue.

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