

**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

**PLAINTIFF'S RESPONSE TO DEFENDANT DEPARTMENT OF JUSTICE'S
MEMORANDUM ON THE CRIMINAL DIVISION'S PROCESSING RATE**

Per the Court's order, ECF No. 27, Plaintiff National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this response to Defendant Department of Justice's ("DOJ") filing providing an explanation of the Criminal Division's proposed processing and production schedule, ECF No. 28.

Because the underlying Freedom of Information Act ("FOIA") request (the "Request") was filed more than a year ago and the Criminal Division has not yet started to process responsive records for release, the agency has engaged in unreasonable delay and the Court should use its equitable powers to require the Criminal Division to process and produce responsive records forthwith. *See Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C. 2014). NACDL respectfully requests that the Court issue an order directing the Criminal Division to process responsive records at a rate of at least 800 pages per month of records that have been pre-screened for responsiveness and to make monthly productions to NACDL.

Background

The Federal Bureau of Prisons (“BOP”) allows many inmates to use an email system known as TRULINCS to communicate with individuals outside of BOP custody. *See* Am. Compl. ¶ 3, ECF No. 9; Ans. ¶ 3, ECF No. 18. In order to use TRULINCS, inmates are required to consent to the monitoring of their communications, including those with their attorneys. *See* BOP, *Inmate Agreement for Participation in TRULINCS Electronic Messaging Program*, BP-A0934 (June 2010), https://www.bop.gov/policy/forms/BP_A0934.pdf. NACDL, the nation’s leading organization of criminal defense attorneys, believes this policy impedes the representation criminal defendants receive.

NACDL filed three FOIA requests to shed light on DOJ’s policies, practices, and procedures for requesting copies of inmates’ emails from BOP, including those sent between inmates and their attorneys. Relevant here, on August 2, 2018, NACDL filed the Request with the Criminal Division, along with other relevant components of DOJ. The Request seeks three categories of information: (1) guidance and other communications sent to U.S. Attorney’s Offices about policies, practices, or procedures for requesting inmates’ emails with their attorneys from BOP; (2) guidance and other communications sent to U.S. Attorney’s Offices about policies, practices, or procedures for requesting inmates’ emails more generally from BOP; and (3) legal and policy memoranda about enacting or changing DOJ policies, practices, or procedures for excluding attorney-client emails when inmates’ emails are produced. *See* Ex. B, Am. Compl., ECF No. 9-3.

To date, NACDL has not received any responsive records from the Criminal Division. Every other component that received the Request or one of the other two FOIA requests at issue in this lawsuit has either indicated its production is complete or has made substantial progress on

producing records responsive to NACDL's requests. *See* Sixth Joint Status Report ("6th JSR") ¶¶ 13–24, ECF No. 26.

Argument

NACDL requests a processing schedule that will ensure that the public has access to the information sought in a timely manner, as required by FOIA. More than a year has passed since the filing of the Request and nearly ten months have elapsed since this lawsuit was filed. NACDL has still not received any records responsive to the Request from the Criminal Division, nor has the Criminal Division adequately explained or justified its delay. Thus, it is reasonable for the Criminal Division to be required to process at least 800 pages per month of records that have been pre-screened for responsiveness, which is the same rate agreed to by BOP, the only other defendant in this case processing a significant number of pages of responsive records. Further, NACDL requests that the Criminal Division be ordered to provide monthly releases.

The purpose of FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 212, 242 (1978); *see also* 5 U.S.C. §§ 552(a)(3)(A), (a)(6)(C)(i). The prompt release of records in response to a FOIA request is key to accomplishing that purpose. *See Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n* ("CREW"), 711 F.3d 180, 188 (D.C. Cir. 2013) ("As to actual production, FOIA requires that the agency make the records 'promptly available,' which depending on the circumstances typically would mean within days or a few weeks of a 'determination,' not months or years."). Indeed, "it is long established in this circuit that an agency's compliance with FOIA depends upon its good faith effort and due diligence to comply with all lawful demands for records in as short a time as is possible." *Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 781 (D.C.

Cir. 2018) (quotation marks and alterations omitted) (quoting *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976)).

Specifically, FOIA requires that agencies issue a “determination” within twenty working days of receiving the request, or within up to thirty if the agency invokes “unusual circumstances,” as the Criminal Division did in this case. 5 U.S.C §§ 552(a)(6)(A)(i), (a)(6)(B)(i). “The D.C. Circuit has found that unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent such abuses.” *Clemente*, 71 F. Supp. 3d at 269 (internal quotation marks and alterations omitted) (quoting *Elec. Privacy Info. Ctr. v. DOJ*, 416 F. Supp.2d 30, 35 (D.D.C. 2006)). Thus, a court “may use its equitable powers to require the agency to process documents according to a court-imposed timeline.” *Id.* As one court noted, relevant case law “implicitly reject[s] the notion that the decision of practicability is to be determined solely by the agency and support[s] the contention that courts have the authority, and perhaps the obligation, to scrutinize closely agency delay.” *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 38.

The Criminal Division’s proposal in this case would potentially drag out its productions for decades. Doing so would harm NACDL’s and the public’s interests in gaining prompt access to the information sought, as guaranteed by FOIA.

Based on the Criminal Division’s affidavit, it is currently processing records in just thirteen cases that are in litigation, including this one.¹ At least one of those cases involves a large number of potentially responsive records, a similar approach to narrowing the scope of records the parties

¹ In addition to this case, the affidavit discusses six cases with court-ordered production schedules, one where the Criminal Division is negotiating a schedule with the plaintiff, and five cases where processing is happening at a rate that is not court-ordered. Decl. of Amanda Marchand Jones ¶¶ 9–10, ECF No. 28-1.

have pursued in this case, and a rate higher than NACDL is requesting.² *See* Decl. of Amanda Marchand Jones ¶9, ECF No. 28-1 (“The fourth litigation matter has a processing schedule requiring the Criminal Division to process at least 1,000 pages per month. For this matter, the beginning page count of potentially responsive records exceeded 35,000, but over the course of a year the FOIA/PA Unit was able to deduplicate and make responsiveness determinations, reducing then number of pages to be processed in half.”). And the Criminal Division has made no argument that it is so overburdened or understaffed that it is facing “exceptional circumstances” that might necessitate “additional time to complete its review of records.” *CREW*, 711 F.3d at 185; *see also* 5 U.S.C. § 552(a)(6)(C)(ii) (indicating that “delay that results from a predictable agency workload” cannot constitute “exceptional circumstances”). As a result, the Criminal Division should be directed to process responsive records at a rate of 800 pages per month to guarantee that the records are made promptly available, as required by the statute.

Furthermore, in the interest of resolving this case as quickly as possible, NACDL is requesting monthly productions, as is common in FOIA cases.³ NACDL has diligently been reviewing the productions as they arrive both to process the information the records contain and to identify withholdings it may challenge in subsequent stages of the litigation. Decl. of Megan

² The Criminal Division does not provide enough information in its affidavit to identify the specific cases in litigation that are subject to court-imposed production schedules, and NACDL was unable to locate them via PACER and WestLaw searches. Thus, NACDL can only compare those cases to this one based on the facts stated in the Criminal Division’s affidavit.

³ BOP has agreed to monthly productions in this case, *see* 6th JSR ¶13, and this practice is common in other FOIA cases. *See, e.g.,* Minute Entry, *Asian Ams. Advancing Justice v. USCIS*, No. 1:19-cv-411 (D.D.C. May 30, 2019) (indicating defendant agency was making monthly productions); Stipulation & Order ¶1, *Nat. Res. Def. Council v. U.S. Dep’t of Transp.*, No. 1:19-cv-820 (S.D.N.Y. May 17, 2019), ECF No. 14 (ordering defendant agency to make monthly productions); Minute Order, *Earth Island Inst. v. Dep’t of Interior*, No. 1:19-cv-39 (D.D.C. May 16, 2019) (ordering defendant agency to make monthly productions); Minute Order, *James Madison Project v. Dep’t of Def.*, No. 1:18-cv-2796 (D.D.C. Feb. 1, 2019) (same).

Graham (“Graham Decl.”) ¶¶ 2–3, Aug. 5, 2019. By disclosing records quarterly, NACDL will be significantly hampered in its ability to expeditiously review the records it is receiving, as they will come less regularly and in larger batches. *Id.* ¶ 4. As a result, and in the interest of conserving the Court’s and the parties’ resources, NACDL requests that the Criminal Division be directed to make monthly productions, much like BOP has agreed to do.

Finally, NACDL respectfully requests that the processing and production schedule clarify that the rate applies to records that have been reviewed for responsiveness and de-duplicated in light of the significantly smaller number of records that would encompass. Thus far, rather than making the requested records promptly available, the Criminal Division has prolonged both its initial searches and the process of determining how many pages of records are actually responsive to the Request (i.e., the number of pages of responsive records once the initial search is conducted, reviewed for responsiveness, and de-duplicated). It is this latter number that is most relevant for the Court’s assessment of the proper processing rate, and the Criminal Division’s affidavit does not provide it for any of the cases in which it is under a court-ordered production schedule. As an illustration of how the number of “potentially responsive records” (i.e., initial search results) the Criminal Division references in its affidavit vary from records that are actually responsive and are thus reviewed for release, during the parties’ negotiations and filings in this case, the Criminal Division has articulated the following results:

- **Search 1**
 - Potentially responsive (i.e., initial results): 1,845 items (~39,000–47,000 pages)
 - After responsiveness review: 2,389 pages
 - After de-duplication: 350 pages
- **Search 2**
 - Potentially responsive: 50,980 items (~2 million pages)
 - Responsiveness review and de-duplication have not been done
- **Search 3**
 - Potentially responsive: 667 items (~2,500–3,200 pages)
 - After responsiveness review: 650 pages

- After de-duplication: 250 pages

See Graham Decl. ¶¶ 6–9. Whatever production rate the Court determines is proper, NACDL requests that it apply to records that have already been reviewed for responsiveness and have been de-duplicated to ensure that the Criminal Division makes responsive records promptly available.

Conclusion

For the foregoing reasons, NACDL respectfully requests that the Court order the Criminal Division to process at least 800 pages per month of records that have been pre-screened for responsiveness. Further, NACDL requests that the Criminal Division be ordered to make monthly productions.

DATED: August 5, 2019

Respectfully submitted,

/s/ Megan Graham
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NATIONAL ASSOCIATION OF CRIMINAL
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**DECLARATION OF MEGAN GRAHAM IN SUPPORT OF
PLAINTIFF'S RESPONSE TO CRIMINAL DIVISION**

Pursuant to 28 U.S.C. § 1746, I, Megan Graham, declare and state as follows:

NACDL's Process for Reviewing Responsive Records

1. I am the primary attorney responsible for conducting an initial review of responsive records received from the defendants in this case.
2. I review copies of responsive records as quickly as my schedule and other work obligations permit.
3. While reviewing records, I track and note the substance of the record, information of particular interest to NACDL's efforts, which Freedom of Information Act ("FOIA") exemptions are invoked for any redactions, and the scope of the withholdings. This review includes an initial assessment, based on the available information, of whether NACDL should consider challenging each withholding.

4. Given my other work obligations, monthly, smaller productions are easier to process in a timely manner compared to quarterly, larger productions. NACDL will be better able to assess its interests and to advance the litigation expeditiously if the Criminal Division makes monthly productions.

The Criminal Division's Search Results

5. The Criminal Division has run three searches, one each corresponding to the three categories of information sought in the relevant FOIA request.

6. During the parties' negotiations about the Criminal Division's search for responsive records, the Criminal Division has provided several page totals for each search as it has honed and reviewed its search results.

7. For Search 1:

- a. The Criminal Division initially indicated it found 1,845 "potentially responsive" items, which it estimated corresponded to approximately 39,000–47,000 pages;
- b. After conducting a responsiveness review, the Criminal Division indicated it had identified 2,389 pages of responsive records; and
- c. After de-duplicating the responsive records, the Criminal Division indicated there were 350 pages of responsive records that needed to be reviewed for release.

8. For Search 2, the Criminal Division initially indicated it found 50,980 "potentially responsive" items, which it estimated corresponded to approximately 2 million pages. To my knowledge, it has not yet reviewed those items for responsiveness, nor has it de-duplicated the records.

9. For Search 3:

- a. The Criminal Division initially indicated it found 667 “potentially responsive” items, which it estimated corresponded to approximately 2,500–3,200 pages;
- b. After conducting a responsiveness review, the Criminal Division indicated it had identified 650 pages of responsive records; and
- c. After de-duplicating the responsive records and conducting another responsiveness review, the Criminal Division indicated there were 250 pages of responsive records that needed to be reviewed for release.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed: August 5, 2019



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