

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| NATIONAL ASSOCIATION OF CRIMINAL |) | |
| DEFENSE LAWYERS, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | |
| |) | Civil Action No. 18-2399 (KBJ) |
| FEDERAL BUREAU OF PRISONS |) | |
| |) | |
| and |) | |
| |) | |
| DEPARTMENT OF JUSTICE, |) | |
| |) | |
| <i>Defendants.</i> |) | |
| _____ |) | |

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION TO AMEND
SCHEDULING ORDER AND ORDER TO SHOW CAUSE AND
CROSS-MOTION TO MODIFY THE BRIEFING SCHEDULE**

Defendants, the Federal Bureau of Prisons (“BOP”) and the United States Department of Justice (“DOJ” and together with BOP “Defendants”), by and through its undersigned counsel, respectfully submit this combined opposition to Plaintiffs’ Motion for Amended Scheduling Order and Order to Show Cause, ECF No. 44, and cross-motion to extend the current briefing schedule, or in the alternative, to allow Defendants to move for partial summary judgment on the current deadline. The grounds for this relief are set out below.

BACKGROUND

The current schedule, which was proposed jointly by Defendants and Plaintiff National Association of Criminal Defense Lawyers (“NACDL”, or “Plaintiff”) on June 5, 2020, ECF No. 40, was modified and set by this Court in a Minute Order entered on June 30, 2020.

At issue in this case are three Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”) requests submitted by NACDL to various DOJ component offices, which the parties have identified in the litigation as “the BOP Request,” “the Main Justice Request,” and “the Office of Executive Office for United States Attorneys (“EOUSA”) Request.” The BOP Request sought, 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. The Main Justice Request directed to the Criminal Division sought, 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. The EOUSA Request sought, 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; *see also* 8th Joint Status Report ¶¶ 2–6, ECF No. 31 (describing requests and parties’ previous litigation)

The parties have filed fourteen Joint Status Reports that summarize and describe their negotiations and the agencies’ productions to date. *See* Joint Status Report, ECF No. 40 ¶ 2. In the fifteenth Joint Status Report, the parties informed the Court that the remaining disputes would be briefed. *Id.* ¶ 3. The remaining disputes include challenges to specific withholdings by BOP, the DOJ Criminal Division, and the EOUSA. Additionally Plaintiff is challenging the adequacy of EOUSA’s searches, conducted in 27 U.S. Attorney’s Offices (“USAOs”). *See* Plaintiff’s Second Amended Complaint For Injunctive Relief, ECF No. 42 ¶¶ 38, 43, 48, 49.

While preparing for briefing, the parties have further conferred to attempt to narrow the search challenges with respect to EOUSA. These discussions prompted an internal review of EOUSA’s past searches that has prompted EOUSA to undertake additional supplemental searches starting in June 2020. These searches have uncovered records (with a page count forthcoming)

deemed potentially responsive, but EOUSA has not yet determined if any of these records are duplicative of those previously reviewed. EOUSA is in the process of reviewing and processing these records for release to Plaintiff on an expedited basis.

In its original FOIA request to EOUSA, Plaintiff requested specific records from 27 USAOs – Southern District of Alabama, District of Arizona, Central District of California, Northern District of California, Southern District of California, District of Colorado, Middle District of Florida, Southern District of Florida, District of Hawaii, Northern District of Illinois, District of Kansas, Eastern District of Kentucky, Eastern District of Louisiana, District of Massachusetts, Eastern District of Michigan, District of Minnesota, Eastern District of New York, Southern District of New York, Eastern District of Pennsylvania, Western District of Pennsylvania, District of Puerto Rico, Eastern District of Texas, Southern District of Texas, District of the Virgin Islands, Eastern District of Virginia, Eastern District of Washington, and Western District of Washington.

Upon substitution of Defendants' new undersigned counsel into this case on July 21, 2020, she determined that briefing all 27 searches would be cumbersome and neither an efficient nor prudent use of the parties' or the Court's resources. Instead, the parties conferred and attempted to narrow the search challenges, with Defendants' new counsel proposing that all EOUSA searches of the 27 USAOs be re-run using a more standardized procedure for conducting the search and reporting the results, to ensure greater consistency and hopefully increased Plaintiff's satisfaction with the searches conducted. When this option was not accepted, Defendant EOUSA endeavored to provide Plaintiff's counsel with descriptions of the searches that had already been done by each of the 27 USAOs. While assembling and documenting the searches by the USAOs, the new Assistant United States Attorney assigned to this matter determined that supplemental searches

needed to be run in multiple U.S. Attorney offices in order to ensure that those offices have conducted reasonable searches calculated to uncover all potentially responsive agency records. EOUSA conducted or is conducting supplemental searches in 14 USAOs and they will all be finished by October 12, 2020. Of those 14 supplemental searches, additional potentially responsive documents were located in 10 of the searches, and those records have either been produced to Plaintiff, are being processed for release to Plaintiff, or referred to BOP for processing and direct response to Plaintiff. These documents are currently in production and there are additional outstanding searches still ongoing in 4 USAOs. Once all of the searches are completed, EOUSA will be able to provide an accounting of the volume of records to be reviewed and processed and an appropriate schedule for making a final, supplemental release that should be completed on or before October 19, 2020.

EOUSA's undertaking additional searches has been in good faith. On September 4, 2020, when Defendants' counsel had sufficient information to recognize that EOUSA's supplemental searches would not be complete nor would productions be concluded by September 14, 2020, Defendants' counsel promptly reached out to Plaintiff's counsel to confer about how to adjust the deadlines in the litigation to account for the unexpected discovery of additional responsive records. Defendants' counsel proposed amending the briefing schedule. On the same day, Plaintiff would only agree to a one week extension of time for the current deadline for serving Defendants' motion for summary judgment, which would have moved it to September 21, 2020.

Despite EOUSA's diligent efforts to wrap up document production and answer Plaintiff's questions, Defendants were unable to get all the additional documents produced by September 17, 2020, at which time Plaintiff continued asking questions and EOUSA was still providing additional information. Defendants' counsel proposed either abandoning the current briefing schedule or

shifting deadlines by a few weeks to allow for productions to conclude before beginning summary judgment briefing. Plaintiff's counsel disagreed and insisted on adhering to the existing schedule for briefing. As required by the Court's General Order, counsel for the parties jointly called Chambers on September 23, 2020 to schedule time to discuss their dispute the Court and were waiting for a response when Plaintiffs filed their motion for an order to show cause and/or hold Defendants in contempt.

ARGUMENT

A. The Remaining Disputes Are Not Ripe for Full Briefing at This Time and Partial Summary Judgment Motions Would Be Inefficient

Because EOUSA's supplemental searches and releases are currently ongoing in this case, the remaining disputes are not yet ripe for full briefing. This Court's General Order states that "[i]n a case in which processing and disclosure occurs after the complaint is filed, **the parties shall file a joint notice informing the Court of the completion of the agency's processing and disclosure of records, and proposing a schedule for further proceedings.**" ECF No. 6 ¶ 4(c). While productions were completed at the time of June 5, 2020 Joint Status Report, EOUSA (and BOP, due to referrals from EOUSA) are now in the middle of supplemental document productions.¹ Therefore, the agencies' processing and disclosure of records is not complete at this time, nor will it be done by September 30, 2020, which is when Plaintiff proposes that Defendants move for summary judgment. Defendants are not in a position to move for summary judgment on all issues; however, as stated in Part C, Defendants are ready to brief the Court on Plaintiff's challenges to withholdings taken by BOP and DOJ Criminal Division.

¹ As stated later in this motion, Defendants' counsel apologizes for not promptly withdrawing the Notice of Completion once productions resumed to alert the Court.

As a practical matter, briefing at this stage will likely only prolong this litigation. First, Plaintiff cannot be certain that it will not have more challenges to withholdings in documents not yet produced, which could necessitate another round of briefing the application of FOIA exemptions. Second, the parties are still conferring about the supplemental searches conducted by EOUSA. Third, Defendants are not requesting additional months of time to complete productions and move for summary judgment; they are requesting mere weeks, in a case that has been pending for almost two years based in part on the scope of the FOIA requests, to present to the Court the most efficient and narrow set of challenges that can be agreed upon by the parties, while ensuring that Plaintiff receives all potentially responsive documents that have been located. Defendants acknowledge the Plaintiff's apparent frustration with the discovery of additional records after EOUSA had indicated that its search was complete, but respectfully suggest that a single round of summary judgment briefs submitted after the newly discovered records have been processed and appropriate supporting declarations can be prepared is more efficient than Plaintiff's alternative because belated release of additional records ultimately should avoid a delay were the Court to conclude that EOUSA's prior searches were inadequate.

B. Defendants Have Shown Good Cause for Adjusting the Interim Briefing Deadlines Without Imperiling the Final End Date Previously Established by the Court

First, Defendants' counsel apologizes to the Court for not filing a timely motion to extend the Court's deadline for serving the initial summary judgment motion, if that would have been appropriate. Defendants' counsel was focused on the substance of assisting EOUSA with completing its supplemental searches and releasing additional records, as well as conferring with Plaintiffs' counsel on narrowing challenges. Defendants' counsel sincerely believed that placing a call to Court, as directed in the General Order, was the appropriate method for bringing these developments and the parties' scheduling dispute to the Court's attention for resolution, as

opposed to filing a motion. Defendants' counsel also apologizes for not withdrawing the Notice of Completion filed on June 5, 2020, which undersigned counsel acknowledges should have been done when EOUSA located additional potentially responsive records during its supplemental searches in or around mid-June, and is simultaneously filing that withdrawal with this motion. Unless otherwise directed by the Court, Defendants will file an appropriate Notice of Completion upon EOUSA's final supplemental release. Defendants did not intend to intentionally violate the Court's scheduling Order; these mistakes were born of inexperience of a recently appointed Assistant United States Attorney, and not ill-intent.

Additionally, the supplemental searches that EOUSA commenced this summer were hampered by the overwhelming workloads that USAOs are experiencing, as well as the workplace restrictions that are in place due to COVID-19. While initially the USAOs tasked were optimistic that the searches could be done quickly and in time for the September briefing, the combination of these two factors slowed the offices down significantly due to reduced staffing, telework issues, and an influx of litigations. Also, as Plaintiff clarified their search challenges, several USAOs altered their supplemental searches to be more comprehensive, which elongated the process. However, while the offices struggled with these limitations, at no point did EOUSA (and the USAOs tasked with searches) act in bad faith.

Moreover, under the guidance of Defendants' new counsel, who was substituted into the case mere weeks before briefing was to take place, the narrowing negotiations in this case have accelerated to a pace previously unseen on this case. In this short timeframe, EOUSA provided Plaintiff with descriptions of 25 of the 27 USAO searches, resulting in the elimination of 12

search challenges² in just a few short weeks (with more dismissals potentially forthcoming). Also notable is that in mid-August, Defendant EOUSA proposed re-running all searches in a manner decided on by both parties, to ensure no search challenges would remain, which Plaintiff declined. Defendants' counsel has also offered to provide Plaintiff's counsel drafts of the *Vaughn* indices prepared by BOP and DOJ Criminal Division, in hopes of narrowing or resolving any challenges to their withholdings. Throughout this process, Defendants have proactively communicated with Plaintiff's counsel and kept Plaintiff reasonably informed about Defendants' progress and suggested reasonable solutions to the scheduling disagreement. Defendants endeavor to substantively answer Plaintiffs' questions regarding withholdings and searches (which are still forthcoming as of September 25, 2020) within a few days, if not hours. In short, Defendants and their counsel have shown good faith efforts to substantially narrow challenges in this case, as to not burden the Court with an unnecessarily large set of briefings on issues that can be amicably resolved without the Court's intervention. In response, Plaintiff has engaged with Defendants and resolved certain issues, while steadfastly refusing to commit to extending the briefing schedule past the first few days of January 2021.

Based on the entire record, Defendants respectfully submit that no sanction is warranted on Defendants or its counsel, particularly not civil contempt, because although the scheduling conflict could have been handled differently, Defendant EOUSA and its counsel used reasonable means to address the matter within the procedures laid out by the Court and to vindicate the purposes of the FOIA. *See SEC v. Bilzerian*, 112 F.Supp.2d 12, 16 (D.D.C. 2000) (civil contempt

² Challenges to searches run in the following jurisdictions have been withdrawn: Southern District of Alabama, Central District of California, Northern District of California, Southern District of California, District of Hawaii, Eastern District of Kentucky, Eastern District of Louisiana, District of Minnesota, Eastern District of Texas, Southern District of Texas, Eastern District of Washington, and District of Kansas.

penalty only should be imposed after recalcitrant party has been given an opportunity to purge itself of contempt by complying with prescribed purgation conditions).³

Plaintiff's assertions that Defendants' actions have caused a delay that harms NACDL's interests is counterintuitive to purpose of the FOIA to disclose requested records in which there is legitimate public interest and no foreseeable harm. Once its current counsel determined that the documentation of EOUSA's searches was not sufficient to demonstrate adequate searches, Defendants moved quickly to remedy deficient searches to ensure that *more* responsive documents would be released to Plaintiffs. If anything, these recent weeks of intense work by EOUSA have placed Plaintiff in a superior posture because additional information gleaned from their FOIA request has been made public.

Defendants respectfully submit that there is sufficient time to complete summary judgment briefs by the Court's existing deadline of January 29, 2020 if the current schedule is delayed to begin on or around October 30, 2020. This delay provides adequate time for concluding EOUSA's releases and obtaining the necessary supporting declarations for Defendants' full

³ Due process require that one charged with contempt be advised of the charges against her or him and that she or he have a reasonable opportunity to defend such a charge. *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967) ("Like any civil litigant, a civil contemnor is . . . clearly entitled to those due process rights, applicable to every judicial proceeding, of proper notice and an impartial hearing with an opportunity to present a defense."). Thus, in order to initiate a contempt proceeding, the movant must set forth specific and detailed factual allegations that would constitute contempt of a court order if proven. *See, e.g., Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) (court should examine moving party's allegations to determine whether a case is sufficiently made out for an order to show cause). Thus, the Court should treat Plaintiff's motion as one seeking an order to show cause, and Defendants respectfully submit that the drastic sanction of contempt is disproportionate to the circumstances in this FOIA case. *Shepherd v. American Broadcasting Companies, Inc.*, 62 F.3d 1469 (D.C. Cir. 1995) (courts exercising inherent powers should exercise restraint and discretion because of their potency). *Washington-Baltimore Newspaper Guild v. The Washington Post*, 626 F.2d 1029, 1031 (D.C. Cir. 1980) (because the contempt power is to be reserved for only intolerable violations of the Court's authority, the burden of demonstrating conduct warranting its use is a heavy one).

summary judgment motion. Also during that time, the parties may be able further to narrow the issues to be resolved by the Court which would, in turn, reduce the scope of the briefs.

Specifically, Defendants respectfully request that the Court extend the current deadlines for briefing to the following: October 30, 2020 for Defendant's opening brief; November 30, 2020 for NACDL's opposition and cross motion; December 18, 2020 for Defendants' reply brief; and mid-January for NACDL's reply brief, with a final batched submission to the Court no later than January 29, 2020.

C. Alternatively, Defendants BOP and DOJ Main Can Move for Partial Summary Judgement by October 5, 2020 and EOUSA Can File a Separate Motion for Partial Summary Judgment Later

In the alternative, Plaintiff's remaining challenges regarding final responses from Defendants BOP and Main DOJ (specifically, the Criminal Division) are limited to the withholdings and can be briefed in a motion for partial summary judgement on the withholdings only. Defendants can endeavor to have that motion for partial summary judgement conveyed to Plaintiff by October 5, 2020. However, because EOUSA may refer documents to BOP or the Criminal Division at Main DOJ as it did previously, it is possible, if not likely, that those agencies will need to provide supplemental declarations to justify any withholdings in a second round of briefing involving EOUSA.

CONCLUSION

At a time when this Court and government agencies are inundated with FOIA litigations, Defendants have endeavored to put this case on a course of efficiency while prioritizing document delivery to and communications with Plaintiff. Given that the parties jointly called Chambers to settle this dispute without motions on September 23, 2020, and despite Plaintiff's motion for an order to show cause to hold them in contempt, Defendants still believe that full briefing of

summary judgment can be completed by the original deadline of January 29, 2020, or in the alternative, partially briefed regarding BOP and DOJ Criminal Division within a week and partially briefed for EOUSA at a date to be determined once productions are completed.

Date: September 29, 2020

Respectfully submitted,

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