

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMERICAN CIVIL LIBERTIES UNION
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY,
OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE,
DEPARTMENT OF JUSTICE, and
CENTRAL INTELLIGENCE AGENCY,

Defendants.

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16-cv-8936 (RMB)

~~PROPOSED~~ STIPULATION AND ORDER SETTING FORTH CASE MANAGEMENT
PLAN AND RELATED AGREEMENTS RMB

The following Case Management Plan is entered after consultation with the parties. This Plan is also a Rule 16 and Rule 26(f) scheduling order as required by the Federal Rules of Civil Procedure.

1. The parties believe there will be no joinder of additional parties.
2. Amendments to the pleadings are due on or before February 3, 2017.
3. The parties do not presently anticipate discovery in this Freedom of Information Act case, but Plaintiffs reserve the right to request leave to conduct discovery if they believe it is warranted after they receive Defendants' document releases and/or responses. Defendants reserve the right to oppose any application for leave to take discovery.

4. The parties do not consent to have this matter referred for all purposes to a Magistrate Judge.
5. Status of settlement discussions: The parties have discussed issues relating to case management and search and production protocols. The parties agree that overall settlement negotiations are not feasible at this time. The parties will maintain open communication and discuss partial or complete settlement at the earliest feasible time.
6. Other scheduling issues – search and processing deadlines:

On or before April 11, 2017 (“First Production Deadline”), Defendants will complete their searches for and processing of records described by Plaintiffs as “Priority Records” (identified in Exhibit A annexed hereto), and by that date Defendants shall produce all responsive documents, or portions thereof, that they deem to be non-exempt. By that date, Defendants shall also identify to Plaintiffs any Priority Record withheld in full as well as the exemption(s) claimed as a basis for withholding, including a statement of the date and title (if any) of any fully withheld record except where Defendants believe that information would reveal FOIA-exempt information; and/or Defendants shall provide to Plaintiffs any “Glomar” response with respect to the Priority Records.

Subject to the parties’ successful completion of the discussions described in paragraphs 7 and 8 hereof, on or before August 22, 2017 (“Second Production Deadline”), Defendants will complete their searches for and processing of all other records responsive to Plaintiffs’ requests, and by that date shall produce all responsive documents, or portions thereof, that they deem to be non-exempt. By that date, Defendants shall also identify to Plaintiffs any other requested record withheld

in full as well as the exemption(s) claimed as a basis for withholding, including a statement of the date and title (if any) of any fully withheld record except where Defendants believe that information would reveal FOIA-exempt information; and/or Defendants shall provide to Plaintiffs any “Glomar” response with respect to those records. If the parties’ discussions described in paragraphs 7 and 8 do not result in an agreement, the searches and deadlines addressed in those paragraphs may be the subject of applications to the Court as discussed below.

7. With respect to category 7 of Plaintiffs’ request for records, as set forth in paragraph 28 of their Complaint (Dkt. No. 1), the parties have engaged in good-faith discussions regarding the scope of searches and/or possible modification of this category of requested records. The parties have agreed to continue their discussions and to attempt to reach agreement by January 25, 2017. If they are able to reach such an agreement, then all searches, processing, and production of responsive records (other than Priority Records) shall be completed by the Second Production Deadline. If the parties are unable to reach agreement as to search or scope modifications for category 7 by January 25, 2017, they will make an appropriate further application to the Court.
8. With respect to the first item listed in Exhibit A hereto, Defendants acknowledge that Plaintiffs seek release by the First Production Deadline of documents referenced in or submitted with the “Summary of Notable Section 702 Requirements” submission to the FISC other than those that have previously been publicly released. Defendants will engage in good-faith discussions with Plaintiffs concerning whether some or all such documents can be searched for, processed, and released by the First Production Deadline. In order to facilitate these discussions, Defendants will provide Plaintiffs

with a list of these documents if feasible and if doing so would not reveal classified or exempt information, or otherwise a reasonably detailed description of their nature and number that does not reveal classified or exempt information, by January 18, 2017. The parties have agreed to continue these discussions and to attempt to reach agreement by January 25, 2017. If they are able to reach such an agreement, then all searches, processing, and production with respect to an agreed-upon subset of these documents shall be completed by the First Production Deadline, and all searches, processing, and production of any remaining documents referenced in or submitted with the “Summary of Notable Section 702 Requirements” shall be completed on or before the Second Production Deadline. Defendants’ agreement in the preceding sentence is without prejudice to their possible contention that this aspect of Plaintiffs’ request is so burdensome that the contemplated August 22, 2017 deadline is not feasible as to this subset of documents. If the parties are unable to reach agreement by January 25, 2017, as to the search, processing, and production of documents that are referenced in or submitted with the “Summary of Notable Section 702 Requirements” report, they will make an appropriate further application to the Court.

9. Defendants shall release records to Plaintiffs on a rolling basis to the extent feasible, if possible before the deadlines specified in paragraph 6 of this stipulation, although Defendants represent that many records at issue are classified and will need to receive successive classification reviews by multiple agencies, such that a coordinated approach may be required as to many documents.

10. Nothing in this Stipulation and Order, including the fact of its entry, should be taken as a concession by Defendants that Plaintiffs have “substantially prevailed” in this action in whole or in part, as that term is used in 5 U.S.C. § 552(a)(4)(E).

Additional provisions to be set at conference with the Court:

11. Motions:

The parties anticipate that the case will be resolved by cross-motions for summary judgment, and respectfully request a schedule that will permit reasonable time for discussions following Defendants’ releases so that the parties can assess, based on those releases, the most efficient way to litigate any challenges to Defendants’ searches, responses, or withholdings and can attempt to resolve or narrow disputes prior to motion practice. The parties propose that, on or before April 25, 2017, Plaintiffs shall inform Defendants whether they intend to file a partial motion for summary judgment concerning the Priority Records, or whether any challenges will be addressed in a single consolidated motion for summary judgment following the Second Production Deadline. ^{Subject to adherence to Court's rule re: pre-motion letters + conference, RMB} If Plaintiffs intend to file a partial motion for summary judgment concerning the Priority Records, the parties shall confer and propose a briefing schedule to the Court on or before May 1, 2017. If Plaintiffs intend to file a single consolidated motion for summary judgment following the Second Production Deadline, the parties shall confer and propose a briefing schedule to the Court on or before September 22, 2017. ^{Court's preference is for single SJ motion. RMB}

12. Oral Argument: _____

13. Joint Pre-Trial Order to be submitted by: N/A

14. Final Pre-Trial Conference: N/A

15. Trial: N/A

16. Other: _____ (The parties have no further case management requests.)

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Dated: New York, New York
January 11, 2017

AMERICAN CIVIL LIBERTIES UNION
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Counsel for Defendants

As Amended,

SO ORDERED:

RMB

The Honorable Richard M. Berman
United States District Judge

1/11/17
Date

EXHIBIT A

Priority Records

DOJ

1. The “Summary of Notable Section 702 Requirements” submitted to the FISC.
2. Amicus briefs submitted to the FISC or FISCER addressing Section 702 surveillance, including but not limited to the brief(s) filed by amicus curiae Amy Jeffress pursuant to FISC orders dated August 13 and September 16, 2015.
3. The most recent version of the Attorney General guidelines mandated by 50 U.S.C. § 1881a(f).

NSA

1. The most recent yearly or monthly estimate available of the number of communications to or from U.S. persons collected via Section 702.*
2. The most recent yearly or monthly estimate available of the number of communications collected via PRISM surveillance under Section 702.*
3. The most recent yearly or monthly estimate available of the number of communications collected via Upstream surveillance under Section 702.*
4. The NSA Office of the Inspector General report dated October 29, 2013.
5. The three sets of NSA procedures addressing the use of U.S. person identifiers for queries of communications collected via Section 702, as described in the NSA OIG report dated February 20, 2015.

ODNI

1. The most recent versions of the Section 702 targeting and minimization procedures for each agency, and any amendments thereto.
2. The most recent set of Section 702 certifications and any supporting or related filings submitted to the FISC.
3. The policy described by ODNI General Counsel Robert Litt in remarks delivered on February 4, 2015. The request seeks the full records reflecting that policy, and any

* To the extent that it would facilitate public release of the requested information, the agency may substitute a less recent record reflecting the same category of data—i.e., another record from on or after January 1, 2013.

modification of it, not merely those portions of the records that have already been publicly released.

CIA

1. Policies, procedures, or guidance addressing the use of U.S. person identifiers for queries of communications collected under Section 702.

All Defendants

1. Inspector General reports addressing Section 702 surveillance that are dated on or after January 1, 2013, and have not previously been publicly released. (Any Inspector General reviews or assessments authorized by 50 U.S.C. § 1881a(l)(2) shall be searched for and processed in response to Plaintiffs' request, but not as Priority Records.)

* * *

Plaintiffs have provided the agency designations above for guidance purposes only. Those designations shall not be interpreted to limit the scope of Plaintiffs' request should another Defendant possess the requested record. If multiple agencies have identical copies of any given document, they need not all separately search for and process each of multiple copies of that document, so long as each responsive record is searched for, located, and processed by at least one Defendant.