

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

AMERICAN CIVIL LIBERTIES UNION,)
AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION,)
AMERICAN CIVIL LIBERTIES UNION)
OF MONTANA FOUNDATION, Inc.,)

Plaintiffs,)

v.)

DEPARTMENT OF DEFENSE,)
DEPARTMENT OF HOMELAND)
SECURITY,)
DEPARTMENT OF THE INTERIOR,)
DEPARTMENT OF JUSTICE,)

Defendants.)

Civil Action No. 9:18-cv-154 (DWM)

DECLARATION OF PAUL P. COLBORN

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

OLC’S RESPONSIBILITIES

2. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions

involving the operations of the Executive Branch. OLC does not purport to make policy decisions, and in fact lacks authority to make such decisions. OLC's legal advice and analysis may inform the decisionmaking of executive branch officials on matters of policy, but OLC's legal advice is not itself dispositive as to any policy adopted.

PLAINTIFF'S FOIA REQUESTS

3. On January 23, 2018, OLC received a FOIA request from Jacob J. Hutt and others representing the American Civil Liberties Union Foundation, the ACLU of Montana, the ACLU of North Dakota, the ACLU of Nebraska, and the ACLU of South Dakota on behalf of the American Civil Liberties Union and the American Civil Liberties Union Foundation, seeking the following documents from OLC and others:

(1) Legal and policy analyses and recommendations related to law enforcement funding for and staffing around oil pipeline protests. Such recommendations may include, but are not limited to, declarations of a state of emergency by state and local entities in order to marshal additional funds, and requests by state or local entities for federal agencies to provide funding or personnel for counter-protest operations; and

(2) Travel of federal employees to speaking engagements, private and public meetings, panels, and conferences on the subject of preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(3) Meeting agendas, pamphlets, and other distributed matter at speaking engagements, private and public meetings, panels, and conferences where federal employees are present to discuss preparation for oil pipeline protests and/or cooperation with private corporations in furtherance thereof; and

(4) Communications between federal employees and state or local law enforcement entities or employees thereof, and between federal employees and private security companies or employees thereof, discussing cooperation in preparation for oil pipeline protests.

See Ex. A, at 6 (FOIA Request (Jan. 23, 2018)). The FOIA Request included a date restriction, confining the request to records "created since January 27, 2017." *Id.* The FOIA Request

requested expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and, in relevant part, 28 C.F.R. § 16.5(e)(1)(ii). *Id.* at 6-11.

4. By letter dated January 31, 2018, I responded to Mr. Hutt on behalf of OLC, acknowledging receipt of the FOIA Request and informing him that the request for expedited processing had been denied, and that the request had been tentatively assigned to OLC's "complex" processing track. *See* Ex. B, at 1 (OLC Acknowledgment (Jan. 31, 2018)).

5. Following the commencement of this litigation, by letter dated January 23, 2019, I responded to the FOIA Request. *See* Ex. C, at 1-2 (OLC Response (Jan. 23, 2019)). I informed Mr. Hutt that a search of OLC's records had identified no responsive records. *Id.* at 1. I also provided him with a brief description of that search. *Id.*

OLC'S SEARCH

Storage of OLC's Records

6. OLC's records are stored in a number of locations. OLC's unclassified records may be located in the paper files of individual OLC employees or stored electronically in two types of electronic systems: a shared central storage system for the office's final unclassified work product and the computer accounts of individual employees. The central storage system consists of documents in their original file format (e.g., Microsoft Office, WordPerfect, PDF) collected in folders, which are organized by date, on a shared network drive on the Department of Justice electronic file server. It is OLC's practice to save all final unclassified written legal advice to this central storage system; accordingly, if OLC has provided any unclassified written advice or has memorialized any unclassified oral advice in writing, that advice should be accessible through this system. Because OLC attorneys use this database to perform research, it is in OLC's interest to keep the database as complete as possible. OLC uses a search engine

called Perceptive Workgroup Search (“Perceptive”) to perform keyword searches of this collection of final work product files. Perceptive searches the full text of documents (including PDF files) within this collection of final work product, as opposed to searching only document titles or email subject lines. The keyword searches in Perceptive support wildcards and expanders, but also capture simple variations on the terms used without the need for wildcards or expanders. For example, a search for “pipeline” would identify results containing “pipelines” and vice versa.

The Search for Documents Responsive to the FOIA Requests

7. Most OLC FOIA searches begin with a search of the Perceptive system, to discover whether any responsive final legal advice exists and also to begin the process of identifying custodians if further searches are necessary. OLC initially searched the Perceptive database for responsive records within the date range provided by Plaintiffs. This search was designed to be over-inclusive and included the following terms:

- a. keystone
- b. pipeline
- c. protest*
- d. "law enforce* w/10 cooperat*"

8. OLC’s FOIA staff reviewed the results of these searches for responsiveness and identified no responsive records.

9. OLC’s FOIA staff then consulted with the senior officials and subject matter experts best positioned to know whether responsive records existed or were likely to exist. Those officials identified no potentially responsive records or locations where potentially

responsive records would be likely to exist. OLC's FOIA staff concluded that all locations likely to contain responsive records had been searched.

* * * * *

10. In conclusion, I respectfully submit that that the searches conducted by OLC were reasonable and well-designed to locate any responsive records.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: April 26, 2019, Washington, D.C.



PAUL P. COLBORN