

From: Jameel Jaffer [<http://redirect.state.sbu/?url=mailto:JJaffer@aclu.org>]
Sent: Wednesday, June 24, 2015 11:39 AM
To: Normand, Sarah (USANYS)
Cc: Matthew Spurlock
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Sarah, we are okay with your first proposed limitation, but for the avoidance of confusion, we would like to change "or any other terrorist organization" to "any other organization the State Department, Defense Department, or CIA consider to be a terrorist organization."

We are also willing to narrow our request to the CIA in the way that you propose, on condition that (i) the CIA makes the same representation it made in the DC case (the representation you reproduce below); (ii) the CIA acknowledges that the ACLU reserves the right to seek after-action reports after the court has ruled on the issue of strike-metadata; and (iii) the CIA and DOD agree immediately to process (i.e. without waiting for any ruling from the court, and without regard to whether the documents are responsive to other FOIA requests) any and all records concerning after-action investigations into the strike that killed Abdulrahman al-Aulaqi.

I hope that's acceptable to your clients.

Jameel

From: Normand, Sarah (USANYS) [<http://redirect.state.sbu/?url=mailto:Sarah.Normand@usdoj.gov>]
Sent: Wednesday, June 24, 2015 10:03 AM
To: Jameel Jaffer
Subject: Re: ACLU v. DOJ, 15 Civ. 1954 (CM)

Hi Jameel. Nice job yesterday.

Sorry to pester you, but have you had a chance to look at this? We'd like to get our motion on file (both to stay prongs 3 and 4 as to CIA and for relief from the July Vaughn index requirement).

Thanks,
Sarah

From: Normand, Sarah (USANYS)
Sent: Monday, June 22, 2015 04:14 PM
To: Jameel Jaffer <JJaffer@aclu.org<<http://redirect.state.sbu/?url=mailto:JJaffer@aclu.org>>>
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock

<mspurlock@aclu.org<<http://redirect.state.sbu/?url=mailto:mspurlock@aclu.org>>>; Hina Shamsi
<hshamsi@aclu.org<<http://redirect.state.sbu/?url=mailto:hshamsi@aclu.org>>>
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Jameel:

Per our call this afternoon, we would propose the following limitations:

As to all defendants, the request would be limited to "strikes against al Qaeda, the Taliban, associated forces, or any other terrorist organization, whatever the source of authority for the strike, outside of Afghanistan, Iraq and Syria."

As to CIA, we will be moving to stay the third and fourth prongs of the request, in light of the DC case, but we think it makes sense to go ahead and agree on the scope of the ACLU's request. If ACLU is willing to narrow the request to the 4 types of reports we have identified previously, we can make the same representation we made in DC, that those 4 types of records are "sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed, if known. To the extent that the CIA has information about U.S. Government strikes not included in this set of records, such information is not routinely compiled for analytical purposes by the CIA." We understand that ACLU has excluded the records processed in DC; so the request as limited would involve updating the D.C. search to process reports that did not exist and therefore were not processed at the time of the D.C. search. (You also reserved the right to seek after-action reports after the court has ruled on the issue of strike data.)

Thanks in advance,

Sarah

From: Jameel Jaffer [<http://redirect.state.sbu/?url=mailto:JJaffer@aclu.org>]
Sent: Friday, June 05, 2015 1:16 PM
To: Normand, Sarah (USANYS)
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock; Hina Shamsi
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Sarah, I could talk at 2:00, if that works. I'll be at 212 519 7814. Jameel

From: Normand, Sarah (USANYS) [<http://redirect.state.sbu/?url=mailto:Sarah.Normand@usdoj.gov>]
Sent: Friday, June 05, 2015 1:00 PM
To: Jameel Jaffer
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock; Hina Shamsi
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

We assumed that was a typo, thanks.

By chance would you be available for a call today between now and 230? If today is not possible, we could talk on Monday. There are a few items we'd like to discuss further.

Thanks.

From: Jameel Jaffer [<http://redirect.state.sbu/?url=mailto:JJaffer@aclu.org>]
Sent: Thursday, June 04, 2015 4:13 PM
To: Normand, Sarah (USANYS)
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock; Hina Shamsi
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Thanks, Sarah. One typo in the email I sent to you earlier today: "We agree to limit the request to documents dated September 11, 2011 or later" should say "We agree to limit the request to documents dated September 11, 2001 or later." Sorry for any confusion.

Jameel

From: Normand, Sarah (USANYS) [<http://redirect.state.sbu/?url=mailto:Sarah.Normand@usdoj.gov>]
Sent: Thursday, June 04, 2015 3:17 PM
To: Jameel Jaffer
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock; Hina Shamsi
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Jameel:

Thanks for this email. We will review with our clients and follow up if necessary.

Regarding the Gates declaration, I was just preparing a letter to you on that issue, which is attached. The delay in production was an oversight on my part. The agencies completed processing back in February but the documents were inadvertently not produced at that time. They are attached here, with my apologies for the delay.

Sarah

From: Jameel Jaffer [<http://redirect.state.sbu/?url=mailto:JJaffer@aclu.org>]
Sent: Thursday, June 04, 2015 12:21 PM
To: Normand, Sarah (USANYS)
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV); Matthew Spurlock; Hina Shamsi
Subject: RE: ACLU v. DOJ, 15 Civ. 1954 (CM)

Sarah,

I'm writing in response to your May 26, 2015 email proposing a further narrowing of our FOIA request and certain modifications to the briefing schedule set by Judge McMahon. Sorry for the delayed response—as I mentioned, I was traveling last week.

With respect to your first paragraph:

- Our request excludes records already processed in connection with our FOIA requests that are currently the subject of litigation before Judge McMahon and Judge Collyer.
- Except with respect to OLC, we are willing to limit our request to records concerning strikes carried out by the U.S. government. By "strikes," we mean to include all lethal-force strikes, against individuals or groups, outside of Iraq, Afghanistan, or Syria.

With respect to your second paragraph:

- We agree to limit the request to documents dated September 11, 2011 or later.
- We agree to exclude publicly-available documents.
- We cannot limit the second prong of our request to "records pertaining to the process described in the penultimate paragraph of Attorney General Holder's May 22, 2013 letter to Senator Patrick Leahy and other members of Congress," except with respect to the DOS. We agreed to this limitation with DOS because we concluded that DOS was unlikely to have responsive records pertaining to processes other than those described in the Attorney General's letter. We believe that other agencies, however, are likely to have such records.
- We cannot exclude "records that are purely internal DOJ communications." However, consistent with our previous agreement to exclude purely internal OLC communications, we are willing to exclude communications that are purely internal to other components of DOJ. To be clear, we are not excluding written communications between DOJ components, or between DOJ components and agencies other

than the DOJ, or between DOJ components and the Attorney General.

With respect to your third paragraph:

- We are willing to exclude from the first and second prongs of our request drafts of documents that were eventually finalized, but only where the final versions of the drafts have been disclosed to us or are listed individually on the relevant agency's public Vaughn index.
- We are willing to exclude documents created by other defendant agencies but only where the documents have been disclosed to us or are listed individually on the other agency's public Vaughn index.
- We are willing to exclude all documents created for the purpose of litigation or in connection with the processing or litigation of FOIA requests. However, we are not willing to exclude the state-secrets declaration submitted by then-Secretary of Defense Robert Gates in *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010). As you may remember, DOD stated in its briefing before Judge McMahon that this "document was not identified during DOD's search" but that it had "located [the] document" and would "process it for release in redacted form." *N.Y. Times v. Dep't of Justice*, No. 1:12- cv-00794-CM, Dkt. 113 (S.D.N.Y. Dec. 19, 2014). That was six months ago. Can you ensure that the Defense Department completes its processing of this document in the next week or so?
- We are willing to exclude documents relating to the raid that resulted in the death of Osama bin Laden.

With respect to your fourth paragraph: We cannot agree to stay the CIA's processing of the third and fourth prong of our request pending the resolution of cross-motions for summary judgment filed in *ACLU v. CIA*, No. 1:10-cv-436 (D.D.C.). However, we would be willing to limit the third and fourth prongs of our request (with respect to all of the agencies) to "strike metadata"—that is, information sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed, if known, with respect to all agencies. However, we would reserve the right to seek after-action reports (relating to all strikes or a subset of them) after the court has ruled on our entitlement to strike metadata.

And with respect to your final paragraph: We are not persuaded that preliminary Vaughn indexes would not be helpful to us in preparing our submission with regard to waiver. It's conceivable, for example, that your preliminary Vaughn index might list records relating to particular strikes, in which case our waiver submission might list official acknowledgements relating to those particular strikes. This said, we will take a position on your motion once you've filed it (and once we've had an opportunity to review it).

Please let me know if you'd like to discuss any of this. Thanks.

Jameel

From: Normand, Sarah (USANYS) [<http://redirect.state.sbu/?url=mailto:Sarah.Normand@usdoj.gov>]
Sent: Tuesday, May 26, 2015 4:03 PM
To: Jameel Jaffer; Matthew Spurlock
Cc: Shapiro, Elizabeth (CIV); Powell, Amy (CIV); Elliott, Stephen (CIV)
Subject: *ACLU v. DOJ*, 15 Civ. 1954 (CM)

Jameel and Matthew:

We are writing to make several proposals for narrowing the ACLU's FOIA requests in the above-captioned case. While the ACLU has agreed with certain agencies to narrow aspects of its requests, the Court's compressed schedule and the scope of the ACLU's requests make it imperative that the parties

agree to additional narrowing. Once you have reviewed this e-mail, we would be happy to schedule a telephone call to discuss further. We also welcome any counter-proposals you may have to help achieve our common goal of concluding this litigation as promptly and efficiently as possible.

First, as an initial matter, it is our understanding that the ACLU's FOIA requests: (1) exclude materials already processed for the ACLU's previous two FOIA requests on this topic, which are still in litigation before Judge McMahon (SDNY) and Judge Collyer (DDC) respectively; and (2) are limited to materials regarding counterterrorism strikes by the United States government. Please let us know as soon as possible if the ACLU does not concur with this understanding of your requests.

Second, we wish to ensure that the FOIA requests are interpreted consistently by the various agencies. In pre-suit discussions with several of the agencies, the ACLU agreed to limit or modify its requests in certain ways. We would like to apply those limitations and modifications consistently to each agency, as follows:

- Limit requests to documents dated September 11, 2001 or later (as agreed with OLC and OIP);
- Exclude any publicly available documents (as agreed with OIP and DOS);
- Limit the second prong of ACLU's requests "to records pertaining to the process described in the penultimate paragraph of Attorney General Holder's May 22, 2013 letter to Senator Patrick Leahy and other members of Congress" (as agreed with DOS); and
- Exclude records that are purely internal DOJ communications (ACLU previously agreed to exclude purely internal OLC communications).

Third, we request that the ACLU agree to the following additional limitations:

- Exclude from the first and second prongs of ACLU's requests all drafts for which a final document exists. Such drafts are likely to be privileged in their entirety.
- Exclude all documents created by another defendant agency, to avoid duplication.
- Exclude all documents created for the purpose of litigation or in connection with the processing or litigation of FOIA requests, e.g., material related to the litigation with Nasser Aulaqi and documents related to other FOIA litigation. Such documents are likely to be privileged in their entirety.
- Exclude all documents pertaining to the raid on the compound in Abbottabad, Pakistan, resulting in the death of Osama bin Laden. We do not understand ACLU's request to be directed at these records.

Fourth, we request that the ACLU agree to stay the third and fourth prongs of its request as they pertain to the CIA pending the resolution of the cross-motions for summary judgment filed in the D.C. lawsuit, *ACLU v. CIA*, No. 1:10-cv-436 (D.D.C.). These prongs of the request seek access to records that are functionally identical to the materials the ACLU sought in its lawsuit pending in D.C. Specifically, the ACLU in the D.C. case agreed to limit its requests to "four types of records containing charts or compilations about U.S. Government strikes sufficient to show the identity of the intended targets, assessed number of people killed, dates, status of those killed, agencies involved, the location of each strike, and the identities of those killed, if known." In this case, the ACLU similarly requests from the CIA, among other things, records pertaining to "after action" investigations into individual targeted-killing strikes," as well as "the number and identities of individuals killed or injured in targeted-killing strikes." Both of the ACLU's lawsuits thus seek records from the CIA documenting casualty figures, which are likely to raise substantially similar if not identical legal issues. A limited stay of the third and fourth prongs of the request to CIA will promote the interest of judicial economy and minimize the possibility of conflicting judicial decisions.

Finally, subject to approval by Judge McMahon, we propose that the agencies should not submit Vaughn indexes by July 17, 2015, in advance of the submissions due on September 30, 2015. As you know,

Vaughn indexes are typically submitted with the government's summary judgment motion, although they are sometimes submitted earlier in order to facilitate a negotiated resolution of some or all issues. Here, it is unlikely that preliminary Vaughn indexes will lead to a negotiated resolution, and we do not believe that preliminary Vaughn indexes will significantly aid the ACLU in preparing its August 28, 2015 submission with regard to waiver. Given the breadth of the ACLU's request and the volume of potentially responsive records, we believe the significant time and resources that would be necessary to prepare preliminary Vaughn indexes for each defendant by July 17 would be better directed at searching for and processing the responsive records and preparing the submissions due September 30, 2015. Indeed, we have serious concerns about the defendants' ability to meet the July 17 deadline, particularly given the classified nature of many of the documents, and the associated handling controls.

Thanks in advance for your consideration.

Sarah, Betsy, Amy and Steve