



May 24, 2018

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Re: Request Under Freedom of Information Act (Expedited Processing & Fee Waiver/Limitation Requested)

To Whom It May Concern:

The American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Northern California (together, the “ACLU”),¹ submit this Freedom of Information Act (“FOIA”) request (the “Request”) for records pertaining to social media surveillance, including the monitoring and retention of immigrants’ and visa applicants’ social media information for the purpose of conducting “extreme vetting.”

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I. Background

Multiple federal agencies are increasingly relying on social media surveillance to monitor the speech, activities, and associations of U.S. citizens and noncitizens alike.

The Department of Homeland Security (“DHS”) has used social media surveillance for “situational awareness,” intelligence, and “other operations.”² According to documents that the ACLU obtained through FOIA, as of 2015 the DHS Office of Intelligence and Analysis was collecting, analyzing, retaining, and disseminating social media information related to “Homeland Security Standing Information Needs”—subjects on which DHS continuously gathers information.³ A February 2017 report by the DHS Inspector General also confirmed DHS’s use of manual and automated social media screening of immigration and visa applications, the establishment within DHS of a “Shared Social Media Screening Service,” and the planned “department-wide use of

¹ The American Civil Liberties Union Foundation is a 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases, educates the public about civil rights and civil liberties issues across the country, directly lobbies legislators, and mobilizes the American Civil Liberties Union’s members to lobby their legislators. The American Civil Liberties Union is a separate non-profit, 26 U.S.C. § 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

² Dep’t of Homeland Security, Privacy Impact Assessment of the Office of Operations Coordination and Planning, *Publicly Available Social Media Monitoring and Situational Awareness Initiative 3* (June 22, 2010), available at <https://goo.gl/R1LVxM>.

³ Dep’t of Homeland Security, Office of Intelligence and Analysis, Policy Instruction IA-900, *Official Usage of Publicly Available Information 2* (Jan. 13, 2015), available at <https://goo.gl/6gnmzn>.

social media for screening.”⁴ The same report concluded, however, that DHS lacked the means to evaluate and measure the effectiveness of such programs.⁵ Similarly, internal reviews obtained through FOIA from U.S. Citizenship and Immigration Services show that its social-media screening efforts lacked protections against discrimination and profiling and yielded few actionable results.⁶

Nonetheless, DHS is expanding its social media surveillance efforts as part of the Trump administration’s “extreme vetting” initiatives. The department issued a public notice in September 2017 indicating that the records it retains in immigrants’ files include “social media handles, aliases, associated identifiable information, and search results.”⁷ U.S. Immigration and Customs Enforcement (“ICE”) also solicited proposals from contractors to utilize “social media exploitation” to vet visa applicants and monitor them while they are in the United States.⁸ According to contract documents, ICE plans to spend \$100 million on a program that will employ approximately 180 people to monitor visitors’ social media posts.⁹

The State Department plays a significant role in the collection of social media information for vetting purposes. In May 2017, the department submitted an emergency request to the Office of Management and Budget to expand the information sought from approximately 65,000 visa applicants each year to include, *inter alia*, social media identifiers.¹⁰ On March 30, 2018,

⁴ Office of Inspector General, OIG-17-40, *DHS’ Pilots for Social Media Screening Need Increased Rigor to Ensure Scalability and Long-term Success* 1 n.2, 4 (Feb. 27, 2017), available at <https://goo.gl/WDb5iJ>.

⁵ *Id.* at 2.

⁶ See Aliya Sternstein, “Obama Team Did Some ‘Extreme Vetting’ of Muslims Before Trump, New Documents Show,” *Daily Beast*, Jan. 2, 2018, available at <https://goo.gl/azKwLm>.

⁷ Dep’t of Homeland Security, Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,557 (Sept. 18, 2017), available at <https://goo.gl/GcLYoQ>.

⁸ Dep’t of Homeland Security, Immigration & Customs Enforcement, *Extreme Vetting Initiative: Statement of Objectives* §§ 3.1-3.2 (June 12, 2017), available at <https://goo.gl/ZTHzBS>.

⁹ Dep’t of Homeland Security, Acquisition Forecast No. F2018040916 (Apr. 11, 2018), available at <https://goo.gl/Zd7p1p>; see also Drew Harwell & Nick Miroff, “ICE Just Abandoned Its Dream of ‘Extreme Vetting’ Software That Could Predict Whether a Foreign Visitor Would Become a Terrorist,” *Wash. Post*, May 17, 2018, available at <https://goo.gl/UxiF5P>.

¹⁰ Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20,956 (May 4, 2017), available at <https://goo.gl/2hsRNi>. On August 3, 2017, the State Department notified the public that it would extend the collection of social media information beyond the emergency period. See Sixty-Day Notice of Proposed Information Collection: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 36,180 (Aug. 3, 2017), available at <https://goo.gl/JXTFfi>.

the department signaled a dramatic expansion of its collection of social media information, publishing two notices of new rules which, if adopted, would require nearly all of the 14.7 million people who annually apply for work or tourist visas to submit social media identifiers they have used in the past five years on up to 20 online platforms in order to travel or immigrate to the United States.¹¹ The notices do not indicate how such information may be shared across government agencies or what consequences its collection may have for individuals living in America, including U.S. citizens.

The Federal Bureau of Investigation (“FBI”) also engages in extensive social media surveillance. In 2012, the FBI sought information from contractors on a planned “social media application” that would enable the FBI to “instantly search and monitor” publicly available information on social media platforms.¹² The FBI revealed in November 2016 that it would acquire social media monitoring software designed by Dataminr that would enable it to “search the complete Twitter firehose, in near real-time, using customizable filters” that are “specifically tailored to operational needs.”¹³ News reports indicate that the FBI is now also establishing a social media surveillance task force, the purpose and scope of which remain unclear.¹⁴

The FBI uses social media surveillance not only “to obtain information about relevant breaking news and events in real-time,” but also to identify subjects for investigation.¹⁵ For instance, it acquired the Dataminr software so that it could identify content that “track[s] FBI investigative priorities.”¹⁶ Similarly, the FBI appears to be using social media as a basis for deciding who to interview, investigate, or target with informants or undercover agents.¹⁷

¹¹ 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 13,806 (Mar. 30, 2018), available at <https://goo.gl/Rakt1v>; 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 13,807 (Mar. 30, 2018), available at <https://goo.gl/SxJVBk>.

¹² Federal Bureau of Investigation, Strategic Information and Operations Center, Request for Information – Social Media Application (Jan. 19, 2012), available at <https://goo.gl/kRPLZt>.

¹³ Federal Bureau of Investigation, Requisition Number DJF-17-1300-PR00000555, Limited Source Justification, 1 (Nov. 8, 2016), available at <https://goo.gl/Ty9WFZ>.

¹⁴ Chip Gibbons, “The FBI Is Setting Up a Task Force to Monitor Social Media,” *The Nation*, Feb. 1, 2018, available at <https://goo.gl/Ud6mVD>.

¹⁵ See FBI, Limited Source Justification, *supra* note 13 at 1.

¹⁶ See *id.*

¹⁷ See, e.g., Center on National Security at Fordham Law, *Case by Case: ISIS Prosecutions in the United States* 19 (July 2016), available at <https://goo.gl/eCE8hh> (concluding that a significant percentage of individuals prosecuted for certain national security-related crimes came to the attention of the FBI through social media use).

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Technology plays a critical role in enabling government agencies to surveil and analyze social media content. The migration of speech and associational activity onto the social media web, and the concentration of that activity on a relatively small number of social media platforms, has made it possible for government agencies to monitor speech and association to an unprecedented degree. At the same time, advances in data mining, network analysis, and machine learning techniques enable the government to search, scrape, and aggregate content on a vast scale quickly and continuously, or to focus and filter such content according to specific investigative priorities.

Government surveillance of social media raises serious constitutional and privacy concerns. Most online speech reflects no wrongdoing whatsoever and is fully protected by the First Amendment. Protected speech and beliefs—particularly expression or association of a political, cultural, or religious nature—should not serve as the sole or predominant basis for surveillance, investigation, or watchlisting. When government agencies collect or share individuals’ online speech without any connection to investigation of actual criminal conduct, they foster suspicion about individuals and make it more likely that innocent people will be investigated, surveilled, or watchlisted. Additionally, the knowledge that the government systematically monitors online speech has a deeply chilling effect on the expression of disfavored beliefs and opinions—all of which the First Amendment protects. People are likely to stop expressing such beliefs and opinions in order to avoid becoming the subject of law enforcement surveillance. Basic due process and fairness is also undermined when significant decisions affecting peoples’ lives—such as decisions about immigration status or whether an investigator targets a person for additional scrutiny—are influenced by proprietary systems running secret algorithms, analyzing data without necessary context or rules to prevent abuse. Finally, suspicionless social media surveillance can facilitate government targeting of specific racial and religious communities for investigation and promotes a climate of fear and self-censorship within those communities.

Despite the significant resources federal agencies are expending on social media surveillance and the constitutional concerns it raises, little information is available to the public on the tools and methods agencies use for surveillance, or the policies and guidelines that govern their use. The public similarly lacks information on whether surveillance of social media contributes meaningfully to public safety or simply floods agencies with information on innocent individuals and innocuous conduct. Because government social media surveillance could impact free expression and individual privacy on a broad scale, it has generated widespread and sustained public and media interest.¹⁸

¹⁸ See, e.g., Harwell & Miroff, *supra* note 9; Michelle Fabio, “Department of Homeland Security Compiling Database of Journalists and ‘Media Influencers,’” *Forbes*, Apr. 6, 2018, available at <https://goo.gl/THDSLZ>; Brendan Bordelon, “New Visa Rules Suggest

To provide the public with information on the federal government's use of social media surveillance, the ACLU submits this FOIA Request.

II. Requested Records

- 1) All policies, guidance, procedures, directives, advisories, memoranda, and/or legal opinions pertaining to the agency's search, analysis, filtering, monitoring, or collection of content available on any social media network;
- 2) All records created since January 1, 2015 concerning the purchase of, acquisition of, subscription to, payment for, or agreement to use any product or service that searches, analyzes, filters, monitors, or collects content available on any social media network, including but not limited to:
 - a. Records concerning any product or service capable of using social media content in assessing applications for immigration benefits or admission to the United States;
 - b. Records concerning any product or service capable of using social media content for immigration enforcement purposes;

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Expanded Plans for 'Extreme Vetting' Via Algorithm," Nat'l Journal, Apr. 5, 2018, available at <https://goo.gl/9Ux2mX>; Arwa Mahdawi, "Hand Over My Social Media Account to Get a U.S. Visa? No Thank You," Guardian, Mar. 31, 2018, available at <https://goo.gl/tpU6Ba>; Sewell Chan, "14 Million Visitors to U.S. Face Social Media Screening," N.Y. Times, Mar. 30, 2018, available at <https://goo.gl/RDUvKm>; Brendan O'Brien, "U.S. Visa Applicants to be Asked for Social Media History: State Department," Reuters, Mar. 30, 2018, available at <https://goo.gl/3PRMef>; Stephen Dinan, "Extreme Vetting: State Department to Demand Tourists' Social Media History," Wash. Times, Mar. 29, 2018, available at <https://goo.gl/YwazXd>; "U.S. Plans 'Enhanced Vetting' of Every Visa Applicant With Orders to Hand Over Their Social Media History, Old Email Addresses and Phone Numbers," Daily Mail, Mar. 29, 2018, available at <https://goo.gl/yY1g6m>; Gibbons, *supra* note 14; Sternstein, *supra* note 6; Lily Hay Newman, "Feds Monitoring Social Media Does More Harm Than Good," Wired, Sept. 28, 2017, available at <https://goo.gl/4obGFj>; Tal Kopan, "Vetting of Social Media, Phones Possible as Part of Travel Ban Review," CNN.com, Sept. 12, 2017, available at <https://goo.gl/BXf4k3>; Aaron Cantú & George Joseph, "Trump's Border Security May Search Your Social Media by 'Tone,'" The Nation, Aug. 23, 2017, available at <https://goo.gl/MuTmVN>; Conor Finnegan, "Trump Administration Begins Vetting Social Media Profiles for Visa Applicants," ABC News, June 5, 2017, available at <https://goo.gl/cJbnjg>; Russell Brand, "Can Facebook and Twitter Stop Social Media Surveillance?," Verge, Oct. 12, 2016, available at <https://goo.gl/hzA2fY>; Ron Nixon, "U.S. to Further Scour Social Media Use of Visa and Asylum Seekers," N.Y. Times, Feb. 23, 2016, available at <https://goo.gl/y5C7Ba>.

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- c. Records concerning any product or service capable of using social media content for border or transportation screening purposes;
 - d. Records concerning any product or service capable of using social media content in the investigation of potential criminal conduct;
- 3) All communications to or from any private business and/or its employees since January 1, 2015 concerning any product or service that searches, analyzes, filters, monitors, or collects content available on any social media network;
 - 4) All communications to or from employees or representatives of any social media network (*e.g.*, Twitter, Facebook, YouTube, LinkedIn, WhatsApp) since January 1, 2015 concerning the search, analysis, filtering, monitoring, or collection of social media content; and
 - 5) All records concerning the use or incorporation of social media content into systems or programs that make use of targeting algorithms, machine learning processes, and/or data analytics for the purpose of (a) assessing risk, (b) predicting illegal activity or criminality, and/or (c) identifying possible subjects of investigation or immigration enforcement actions.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

III. Application for Expedited Processing

The ACLU requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E).¹⁹ There is a “compelling need” for these records, as defined in the statute, because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

¹⁹ *See also* 6 C.F.R. § 5.5(e); 28 C.F.R. § 16.5(e); 22 C.F.R. § 171.11(f).

- A. *The ACLU is an organization primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.*

The ACLU is “primarily engaged in disseminating information” within the meaning of the statute. 5 U.S.C. § 552(a)(6)(E)(v)(II).²⁰ Obtaining information about government activity, analyzing that information, and widely publishing and disseminating that information to the press and public are critical and substantial components of the ACLU’s work and are among its primary activities. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit public interest group that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience” to be “primarily engaged in disseminating information”).²¹

The ACLU regularly publishes *STAND*, a print magazine that reports on and analyzes civil liberties-related current events. The magazine is disseminated to over 980,000 people. The ACLU also publishes regular updates and alerts via email to over 3.1 million subscribers (both ACLU members and non-members). These updates are additionally broadcast to over 3.8 million social media followers. The magazine as well as the email and social-media alerts often include descriptions and analysis of information obtained through FOIA requests.

The ACLU also regularly issues press releases to call attention to documents obtained through FOIA requests, as well as other breaking news,²² and ACLU attorneys are interviewed frequently for news stories about

²⁰ *See also* 6 C.F.R. § 5.5(e)(1)(ii); 28 C.F.R. § 16.5(e)(1)(ii); 22 C.F.R. § 171.11(f)(2).

²¹ Courts have found that the ACLU as well as other organizations with similar missions that engage in information-dissemination activities similar to the ACLU are “primarily engaged in disseminating information.” *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU*, 321 F. Supp. 2d at 29 n.5; *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003).

²² *See, e.g.,* Press Release, American Civil Liberties Union, U.S. Releases Drone Strike ‘Playbook’ in Response to ACLU Lawsuit (Aug. 6, 2016), <https://www.aclu.org/news/us-releases-drone-strike-playbook-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, Secret Documents Describe Graphic Abuse and Admit Mistakes (June 14, 2016), <https://www.aclu.org/news/cia-releases-dozens-torture-documents-response-aclu-lawsuit>; Press Release, American Civil Liberties Union, U.S. Releases Targeted Killing Memo in Response to Long-Running ACLU Lawsuit (June 23, 2014), <https://www.aclu.org/national-security/us-releases-targeted-killing-memo-response-long-running-aclu-lawsuit>; Press Release, American Civil Liberties Union, Justice Department White Paper Details Rationale for Targeted Killing of Americans (Feb. 4, 2013), <https://www.aclu.org/national-security/justice-department-white-paper-details-rationale-targeted-killing-americans>; Press Release, American Civil Liberties Union, Documents Show FBI Monitored Bay Area Occupy Movement (Sept. 14, 2012), <https://www.aclu.org/news/documents-show-fbi-monitored-bay-area-occupy-movement-insidebayareacom>.

documents released through ACLU FOIA requests.²³

Similarly, the ACLU publishes reports about government conduct and civil liberties issues based on its analysis of information derived from various sources, including information obtained from the government through FOIA requests. This material is broadly circulated to the public and widely available to everyone for no cost or, sometimes, for a small fee. ACLU national projects regularly publish and disseminate reports that include a description and analysis of government documents obtained through FOIA requests.²⁴ The ACLU also regularly publishes books, “know your rights” materials, fact sheets, and educational brochures and pamphlets designed to educate the public about civil liberties issues and government policies that implicate civil rights and liberties.

The ACLU publishes a widely read blog where original editorial content reporting on and analyzing civil rights and civil liberties news is posted daily. See <https://www.aclu.org/blog>. The ACLU creates and disseminates original editorial and educational content on civil rights and civil liberties news through multi-media projects, including videos, podcasts, and interactive features. See <https://www.aclu.org/multimedia>. The ACLU also

²³ See, e.g., Cora Currier, *TSA's Own Files Show Doubtful Science Behind Its Behavioral Screening Program*, Intercept, Feb. 8, 2017, <https://theintercept.com/2017/02/08/tsas-own-files-show-doubtful-science-behind-its-behavior-screening-program/> (quoting ACLU staff attorney Hugh Handeyside); Karen DeYoung, *Newly Declassified Document Sheds Light on How President Approves Drone Strikes*, Wash. Post, Aug. 6, 2016, <http://wapo.st/2jy62cW> (quoting former ACLU deputy legal director Jameel Jaffer); Catherine Thorbecke, *What Newly Released CIA Documents Reveal About 'Torture' in Its Former Detention Program*, ABC, June 15, 2016, <http://abcn.ws/2jy40d3> (quoting ACLU staff attorney Dror Ladin); Nicky Woolf, *US Marshals Spent \$10M on Equipment for Warrantless Stingray Device*, Guardian, Mar. 17, 2016, <https://www.theguardian.com/world/2016/mar/17/us-marshals-stingray-surveillance-airborne> (quoting ACLU staff attorney Nathan Freed Wessler); David Welna, *Government Suspected of Wanting CIA Torture Report to Remain Secret*, NPR, Dec. 9, 2015, <http://n.pr/2jy2p71> (quoting ACLU project director Hina Shamsi).

²⁴ See, e.g., Hugh Handeyside, *New Documents Show This TSA Program Blamed for Profiling Is Unscientific and Unreliable — But Still It Continues* (Feb. 8, 2017, 11:45 AM), <https://www.aclu.org/blog/speak-freely/new-documents-show-tsa-program-blamed-profiling-unscientific-and-unreliable-still>; Carl Takei, *ACLU-Obtained Emails Prove that the Federal Bureau of Prisons Covered Up Its Visit to the CIA's Torture Site* (Nov. 22, 2016, 3:15 PM), <https://www.aclu.org/blog/speak-freely/aclu-obtained-emails-prove-federal-bureau-prisons-covered-its-visit-cias-torture>; Brett Max Kaufman, *Details Abound in Drone 'Playbook' — Except for the Ones That Really Matter Most* (Aug. 8, 2016, 5:30 PM), <https://www.aclu.org/blog/speak-freely/details-abound-drone-playbook-except-ones-really-matter-most>; Nathan Freed Wessler, *ACLU Obtained Documents Reveal Breadth of Secretive Stingray Use in Florida* (Feb. 22, 2015, 5:30 PM), <https://www.aclu.org/blog/free-future/aclu-obtained-documents-reveal-breadth-secretive-stingray-use-florida>; Ashley Gorski, *New NSA Documents Shine More Light into Black Box of Executive Order 12333* (Oct. 30, 2014, 3:29 PM), <https://www.aclu.org/blog/new-nsa-documents-shine-more-light-black-box-executive-order-12333>; ACLU, *ACLU Eye on the FBI: Documents Reveal Lack of Privacy Safeguards and Guidance in Government's "Suspicious Activity Report" Systems* (Oct. 29, 2013), https://www.aclu.org/sites/default/files/assets/eye_on_fbi_-_sars.pdf.

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publishes, analyzes, and disseminates information through its heavily visited website, www.aclu.org. The website addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The ACLU's website also serves as a clearinghouse for news about ACLU cases, as well as analysis about case developments, and an archive of case-related documents. Through these pages, and with respect to each specific civil liberties issue, the ACLU provides the public with educational material, recent news, analyses of relevant Congressional or executive branch action, government documents obtained through FOIA requests, and further in-depth analytic and educational multi-media features.

The ACLU website includes many features on information obtained through the FOIA.²⁵ For example, the ACLU's "Predator Drones FOIA" webpage, <https://www.aclu.org/national-security/predator-drones-foia>, contains commentary about the ACLU's FOIA request, press releases, analysis of the FOIA documents, numerous blog posts on the issue, documents related to litigation over the FOIA request, frequently asked questions about targeted killing, and links to the documents themselves. Similarly, the ACLU maintains an online "Torture Database," a compilation of over 100,000 pages of FOIA and other documents that allows researchers and the public to conduct sophisticated searches of FOIA documents relating to government policies on rendition, detention, and interrogation.²⁶

²⁵ See, e.g., Nathan Freed Wessler & Dyan Cortez, *FBI Releases Details of 'Zero-Day' Exploit Decisionmaking Process* (June 26, 2015, 11:00 AM), <https://www.aclu.org/blog/free-future/fbi-releases-details-zero-day-exploit-decisionmaking-process>; Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>; *ACLU v. DOJ – FOIA Case for Records Relating to the Killing of Three U.S. Citizens*, ACLU Case Page, <https://www.aclu.org/national-security/anwar-al-awlaki-foia-request>; *ACLU v. Department of Defense*, ACLU Case Page, <https://www.aclu.org/cases/aclu-v-department-defense>; *Mapping the FBI: Uncovering Abusive Surveillance and Racial Profiling*, ACLU Case Page, <https://www.aclu.org/mappingthefbi>; *Bagram FOIA*, ACLU Case Page, <https://www.aclu.org/cases/bagram-foia>; *CSRT FOIA*, ACLU Case Page, <https://www.aclu.org/national-security/csrt-foia>; *ACLU v. DOJ – Lawsuit to Enforce NSA Warrantless Surveillance FOIA Request*, ACLU Case Page, <https://www.aclu.org/aclu-v-doj-lawsuit-enforce-nsa-warrantless-surveillance-foia-request>; *Patriot FOIA*, ACLU Case Page, <https://www.aclu.org/patriot-foia>; *NSL Documents Released by DOD*, ACLU Case Page, <https://www.aclu.org/nsl-documents-released-dod?redirect=cpreirect/32088>.

²⁶ *The Torture Database*, ACLU, <https://www.thetorturedatabase.org>; see also *Countering Violent Extremism FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/cve-foia-documents>; *TSA Behavior Detection FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/tsa-behavior-detection-foia-database>; *Targeted Killing FOIA Database*, ACLU, <https://www.aclu.org/foia-collection/targeted-killing-foia-database>.

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The ACLU has also published a number of charts and explanatory materials that collect, summarize, and analyze information it has obtained through the FOIA. For example, through compilation and analysis of information gathered from various sources—including information obtained from the government through FOIA requests—the ACLU created an original chart that provides the public and news media with a comprehensive summary index of Bush-era Office of Legal Counsel memos relating to interrogation, detention, rendition, and surveillance.²⁷ Similarly, the ACLU produced an analysis of documents released in response to a FOIA request about the TSA's behavior detection program²⁸; a summary of documents released in response to a FOIA request related to the FISA Amendments Act²⁹; a chart of original statistics about the Defense Department's use of National Security Letters based on its own analysis of records obtained through FOIA requests³⁰; and an analysis of documents obtained through FOIA requests about FBI surveillance flights over Baltimore.³¹

The ACLU plans to analyze, publish, and disseminate to the public the information gathered through this Request. The records requested are not sought for commercial use and the requesters plan to disseminate the information disclosed as a result of this Request to the public at no cost.

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

These records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, the requested records relate to the federal government's use of social media surveillance and its interactions with the private sector for the purpose of obtaining social media surveillance technology. As discussed in Part I, *supra*, federal agencies are expanding their use of social media surveillance—which implicates the online speech of millions of social media users—but little information is available to the public regarding the nature, extent, and consequences of that surveillance.

²⁷ *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance*, ACLU (Mar. 5, 2009), https://www.aclu.org/sites/default/files/pdfs/safefree/olcmemos_2009_0305.pdf.

²⁸ *Bad Trip: Debunking the TSA's 'Behavior Detection' Program*, ACLU (2017), https://www.aclu.org/sites/default/files/field_document/dem17-tsa_detection_report-v02.pdf.

²⁹ *Summary of FISA Amendments Act FOIA Documents Released on November 29, 2010*, ACLU, <https://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>.

³⁰ *Statistics on NSLs Produced by Department of Defense*, ACLU (2014), <https://www.aclu.org/other/statistics-nsls-produced-dod>.

³¹ Nathan Freed Wessler, *FBI Documents Reveal New Information on Baltimore Surveillance Flights* (Oct. 30, 2015, 8:00 AM), <https://www.aclu.org/blog/free-future/fbi-documents-reveal-new-information-baltimore-surveillance-flights>.

Given the foregoing, the ACLU has satisfied the requirements for expedited processing of this Request.

IV. Application for Waiver or Limitation of Fees

The ACLU requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and because disclosure is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *See* 5 U.S.C. § 552(a)(4)(A)(iii).³² The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).

A. The Request is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the ACLU.

As discussed above, credible media and other investigative accounts underscore the substantial public interest in the records sought through this Request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance. Because little specific information about government surveillance and monitoring of social media is publicly available, the records sought are certain to contribute significantly to the public’s understanding of whether and under what circumstances the government monitors social media content, and how such monitoring affects individual privacy and liberty.

The ACLU is not filing this Request to further its commercial interest. As described above, any information disclosed by the ACLU as a result of this FOIA Request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (quotation marks omitted)).

B. The ACLU is a representative of the news media and the records are not sought for commercial use.

The ACLU also requests a waiver of search fees on the grounds that the ACLU qualifies as a “representative of the news media” and the records

³² *See also* 6 C.F.R. § 5.11(k); 28 C.F.R. § 16.10(k); 22 C.F.R. § 171.16.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

are not sought for commercial use. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II).³³ The ACLU meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *See* 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012) (requesters, including ACLU, were representatives of the news media and thus qualified for fee waivers for FOIA requests to the Department of Defense and Department of Veterans Affairs); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011) (finding that the ACLU of Washington is an entity that “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience”); *ACLU*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”). The ACLU is therefore a “representative of the news media” for the same reasons it is “primarily engaged in the dissemination of information.”

Furthermore, courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media” as well. *See, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the news media” for purposes of the FOIA); *Nat’l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).³⁴

On account of these factors, fees associated with responding to FOIA requests are regularly waived for the ACLU as a “representative of the news media.”³⁵ As was true in those instances, the ACLU meets the requirements for a fee waiver here.

³³ *See also* 6 C.F.R. § 5.11(d)(1); 28 C.F.R. § 16.10(b)(6); 22 C.F.R. § 171.14(b).

³⁴ Courts have found these organizations to be “representatives of the news media” even though they engage in litigation and lobbying activities beyond their dissemination of information / public education activities. *See, e.g., Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 5; *Nat’l Sec. Archive*, 880 F.2d at 1387; *see also Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260; *Judicial Watch, Inc.*, 133 F. Supp. 2d at 53-54.

³⁵ In August 2017, CBP granted a fee-waiver request regarding a FOIA request for records relating to a muster sent by CBP in April 2017. In May 2017, CBP granted a fee-

* * *

Pursuant to applicable statutes and regulations, the ACLU expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii).

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UNION FOUNDATION

If the Request is denied in whole or in part, the ACLU asks that you justify all deletions by reference to specific exemptions to FOIA. The ACLU expects the release of all segregable portions of otherwise exempt material. The ACLU reserves the right to appeal a decision to withhold any information or deny a waiver of fees.

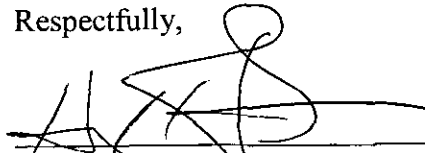
Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Hugh Handeyside
American Civil Liberties Union
125 Broad Street—18th Floor
New York, New York 10004
hhandeyside@aclu.org

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

waiver request regarding a FOIA request for documents related to electronic device searches at the border. In April 2017, the CIA and the Department of State granted fee-waiver requests in relation to a FOIA request for records related to the legal authority for the use of military force in Syria. In March 2017, the Department of Defense Office of Inspector General, the CIA, and the Department of State granted fee-waiver requests regarding a FOIA request for documents related to the January 29, 2017 raid in al Ghayil, Yemen. In May 2016, the FBI granted a fee-waiver request regarding a FOIA request issued to the DOJ for documents related to Countering Violent Extremism Programs. In April 2013, the National Security Division of the DOJ granted a fee-waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted a fee-waiver request regarding a FOIA request for documents related to “national security letters” issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee-waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists.

Respectfully,

A handwritten signature in black ink, appearing to read 'H. Handeyside', written over a horizontal line.

Hugh Handeyside
American Civil Liberties Union
Foundation

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New York, New York 10004
212.549.2500
hhandeyside@aclu.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3
4 SAN FRANCISCO DIVISION

5 AMERICAN CIVIL LIBERTIES UNION
6 FOUNDATION, ET AL.,

7 Plaintiffs,

8 v.

Case No. 19-cv-00290-EMC

9 DEPARTMENT OF JUSTICE, ET AL.,

10 Defendants.

11
12 **DECLARATION OF DAVID M. HARDY**

13 I, David M. Hardy, declare that the following statements are true and correct to the best of my
14 knowledge and are based on my own personal knowledge, on information contained in the records of the
15 Federal Bureau of Investigation ("FBI"), or on information supplied to me by employees under my
16 supervision. If called upon to testify, I would testify competently to the facts set forth in this declaration.

17 1. I am currently the Section Chief of the Record/Information Dissemination Section
18 ("RIDS"), Information Management Division ("IMD"), of the FBI, in Winchester, Virginia. I have held
19 this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the
20 Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of
21 Freedom of Information Act ("FOIA") policy, procedures, appeals, and litigation for the Navy. From
22 October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely
23 worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of
24 Texas since 1980.

25 2. In my official capacity as Section Chief of RIDS, I supervise approximately 245 FBI
26 employees, supported by approximately 71 contractors, who staff a total of twelve (12) FBI Headquarters
27 ("FBIHQ") units and two (2) field operational service center units whose collective mission is to
28

1 effectively plan, develop, direct, and manage responses to requests for access to FBI records and
 2 information pursuant to the FOIA, as amended by the OPEN Government Act of 2007 and the OPEN
 3 FOIA Act of 2009; the FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order
 4 (“E.O.”) 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and
 5 Presidential and Congressional directives. The statements contained in this declaration are based upon
 6 my personal knowledge, upon information provided to me in my official capacity, and upon conclusions
 7 and determinations reached and made in accordance therewith.

8 3. Due to the nature of my official duties, I am familiar with the procedures followed by the
 9 FBI in responding to requests for information from its files pursuant to the provisions of the FOIA,
 10 5 U.S.C. § 552. Specifically, I am familiar with the FBI’S handling of the Plaintiffs’ FOIA request for
 11 records related to social media surveillance.

12 4. This declaration is submitted in response to the Court’s Minute Order dated February 5,
 13 2020 to produce letter briefs addressing appropriate deadlines for processing and producing FOIA
 14 documents. *See* ECF 44. In order to provide the Court and Plaintiffs with an explanation of the basis for
 15 the amount of time requested by the FBI to review responsive records, this declaration provides 1) a brief
 16 description of the administrative history of Plaintiffs’ request; 2) a description of the nature of responsive
 17 records; 3) an overview of the FBI’s efforts to respond to an unpredictable and significant increase in the
 18 agency’s FOIA workload; and 4) a proposed processing schedule for the release of any segregable
 19 information identified through its review.

20 I. ADMINISTRATIVE HISTORY

21 5. By letter dated May 24, 2018, Plaintiffs submitted a FOIA request to the FBI concerning
 22 social media surveillance. In association with this subject, Plaintiffs sought the following:

- 23 1. All policies, guidance, procedures, directives, advisories, memoranda, and/or legal
 24 opinions pertaining to the agency’s search, analysis, filtering, monitoring, or collection
 of content available on any social media network (herein “item 1”);
- 25 2. All records created since January 1, 2015¹ concerning the purchase of, acquisition of,
 26 subscription to, payment for, or agreement to use any product or service that searches,
 27 analyzes, filters, monitors, or collects content available on any social media network,

28 ¹ By email dated June 3, 2019, Plaintiffs agreed to change the start date for the timeframe for all
 items, except items 1 and 5, from January 1, 2015 to January 1, 2016.

1 including but not limited to:

- 2 a. Records concerning any product or service capable of using social media
3 content in assessing applications for immigration benefits or admission to the
4 United States;
- 5 b. Records concerning any product or service capable of using social media
6 content for immigration enforcement purposes;
- 7 c. Records concerning any product or service capable of using social media
8 content for border or transportation screening purposes;
- 9 d. Records concerning any product or service capable using social media content
10 in the investigation of potential criminal conduct (herein "item 2");
- 11 3. All communications to or from any private business and/or its employees since January
12 1, 2015 concerning any product or service that searches, analyzes, filters, monitors, or
13 collects content available on any social media network (herein "item 3");²
- 14 4. All communication to or from employees or representatives of any social media
15 network (e.g., Twitter, Facebook, YouTube, LinkedIn, WhatsApp) since January 1,
16 2015 concerning the search, analysis, filtering, monitoring, or collection of social
17 media content (herein "item 4");³ and
- 18 5. All records concerning the use or incorporation of social media content into systems or
19 programs that make use of targeting algorithms, machine learning processes, and/or
20 data analytics for the purpose of (a) assessing risk, (b) predicting illegal activity or
21 criminality, and/or (c) identifying possible subjects of investigation or immigration
22 enforcement actions (herein "item 5").

18 Plaintiffs requested its request be granted expedited processing pursuant to 5 U.S.C. § 522(a)(6)(E)(i)(II).

19 Plaintiffs also requested a waiver of all fees associated with the processing of their request.
20

21 ² By email dated June 3, 2019, Plaintiffs modified their request for item 3 to "all email
22 communications (including attachments) to or from any private businesses and/or its employees since
23 January 1, 2016 concerning the potential acquisition of any product or service that searches, monitors, or
24 collects content available on any social media network, including such communications from vendors
25 offering software capable of monitoring social media services and/or users."

24 ³ By email dated June 3, 2019, Plaintiffs modified their request for item 4 to "all email
25 communications (including attachments) to or from employees or representatives of any social media
26 network (e.g., Twitter, Facebook, YouTube, LinkedIn, WhatsApp) since January 1, 2016 concerning the
27 search, monitoring, or removal of social media content that arguably violate a social media network's
28 terms of service, "Community Guidelines," or other rules maintained by the social media network(s) and
that regulate the speech of that social media networks' users." This part of the request was limited to the
FBI's National Security Branch, Criminal Investigative Division, Office of the Private Sector, Science
and Technology Branch, and Information and Technology Branch. Following internal communications,
the FBI determined this request was still too broad to conduct an adequate search. Plaintiffs later
dismissed the FBI from this item of the request.

1 6. By letter dated June 8, 2018, the FBI acknowledged receipt of Plaintiffs' request, and
2 informed Plaintiffs it was assigned FOIPA Request No. 1407258-000. Additionally the FBI informed
3 Plaintiffs it could neither confirm nor deny the existence of records responsive to their request pursuant
4 to FOIA Exemption 7(E), because the mere acknowledgement of whether or not the FBI had any records
5 in and of itself would disclose techniques, procedures, and/or guidelines that could reasonably be expected
6 to risk circumvention of the law. Additionally, the FBI informed Plaintiffs they could appeal the FBI's
7 response to DOJ, Office of Information Policy ("OIP"), within ninety (90) days of its letter, seek dispute
8 resolution services through the Office of Government Information Services ("OGIS"), or contact the FBI's
9 FOIA Public Liaison.

10 7. By letter dated July 18, 2018, Plaintiffs appealed the FBI's June 8, 2018 response to OIP.
11 Plaintiffs averred the FBI's "Glomar"⁴ response should be reversed. Additionally, Plaintiffs argued their
12 requests for expedited processing and a fee waiver should be granted.

13 8. By letter dated July 23, 2018, OIP acknowledged receipt of Plaintiffs' appeal, and assigned
14 it appeal number DOJ-AP-2018-006841. Additionally, OIP denied Plaintiffs' request for expedited
15 processing of their appeal. OIP informed Plaintiffs if they were dissatisfied with OIP's response, they
16 could file a lawsuit in accordance with 5 U.S.C. § 552(a)(6)(E)(iii); and/or seek mediation services through
17 OGIS.

18 9. On January 17, 2019, Plaintiffs filed their complaint in this instant action. *See* ECF No. 1.

19 10. By letter dated January 31, 2019, OIP advised Plaintiffs it was remanding their appeal back
20 to the FBI so the FBI could search for responsive records with regard to certain portions of the request.

21 11. By letter dated May 31, 2019, the FBI advised Plaintiffs it was modifying its earlier
22 response. The FBI explained that in regards to items 2)a-c, the FBI could neither confirm nor deny the
23 existence of any responsive records pursuant to FOIA Exemption (b)(7)(E). In regard to items 3 and 4
24 of the request, the FBI advised that these items did not constitute proper FOIA requests since it would not
25

26
27
28

⁴ The term "Glomar" refers to an agency's response stating confirming or denying records would present a harm under a FOIA Exemption. In *Phillipi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981), a FOIA requester sought information concerning a ship named the "Hughes Glomar Explorer" and the CIA refused to confirm or deny its relationship with the "Glomar" vessel because to do so would compromise the national security or divulge intelligence sources and methods.

1 allow the agency to locate records with a reasonable amount of effort pursuant to 28 C.F.R. § 16.3(b).
2 Finally, the FBI advised that it was currently conducting searches for records responsive to the remaining
3 portions of Plaintiffs' request. On November 18, 2019, the court denied the FBI's use of a Glomar with
4 regard to items 2)a-c. Plaintiffs subsequently agreed to modify item 3. *See supra* note 2.

5 II. NATURE OF THE RESPONSIVE RECORDS

6 12. Following OIP's January 31, 2019 remand response, the FBI conducted targeted searches
7 of divisions most likely to maintain potentially responsive records and located approximately 60,000
8 pages of potentially responsive policies, guidance, procedures, directives, advisories, memoranda, and/or
9 legal opinions, email communications, as well as contracts and/or purchase orders pertaining to social
10 media surveillance.

11 13. The FBI's Record/Information Dissemination Section ("RIDS") initiated its search for
12 potentially responsive records on or about February 7, 2019 and completed its search in or around May
13 2019. RIDS began conducting a page-by-page review of the approximately 60,000 pages to determine
14 responsiveness. On or about June 3, 2019, Plaintiffs advised the FBI of the modifications to their request.
15 At this time, RIDS re-reviewed approximately 15,000 pages it had already reviewed to ensure they
16 remained responsive to Plaintiffs' request. RIDS also initiated a search of Facilities and Finance Division
17 ("FFD") in response to the modified item 3 in the request. Following the re-review, RIDS continued its
18 page-by-page review of the approximately 45,000 remaining pages to determine responsiveness. RIDS
19 completed its scoping review on or about September 30, 2019 identifying approximately 8,000 pages of
20 responsive records. Following the Court's denial of the FBI's Glomar concerning items 2)a-c, the FBI re-
21 reviewed the potentially responsive records for all parts of item 2. When the FBI conducted their search
22 of the entities where records were most likely to be maintained, it included the language for all aspects of
23 item 2. *See ¶5 supra*. Any records determined to be responsive to item 2)a-c were already included in
24 the responsive records to be processed. Although it is outside of RIDS normal practice to begin processing
25 responsive material prior to completion of scoping of all potentially responsive records, RIDS began
26 reviewing 500 pages per month, per its standard interim release policy,⁵ and made its first release on
27

28 ⁵ *See ¶¶ 21-27 infra*.

1 August 30, 2019. The FBI continues to make monthly rolling releases of 500 pages reviewed on the last
2 business day of every month and to date has reviewed 3,045 pages and released 310 pages in whole or
3 part. The FBI advised Plaintiffs, through counsel, it anticipated completing its substantive review on or
4 about November 2020 with a full completion of other government agency and third party corporation
5 consultations on or about January 2021.

6 **III. THE FBI'S FOIA WORKLOAD**

7 **UNPREDICTABLE GROWTH IN THE NUMBER OF REQUESTS SUBMITTED TO THE FBI**

8 14. The FBI is currently inundated with an extraordinary number of Freedom of
9 Information/Privacy Act ("FOIPA") requests. In recent years the FBI has experienced a spike in requests
10 submitted to the agency. In Fiscal Year ("FY") 2019, the FBI received 31,344 FOIPA requests (a 78%
11 increase over intake from five years ago), when in FY 2014, intake was 17,653 requests. In FY 2019, the
12 FBI resolved 31,962 FOIPA requests and reviewed over one million pages of records in response to
13 FOIPA requests.

14 **INCREASE IN COMPLEXITY OF REQUESTS**

15 15. Further, in recent years, requests have grown significantly more complex. Many of the
16 requests which the FBI receives today are no longer simple, relatively straightforward, first-party requests
17 from individuals seeking investigative records about themselves, e.g., a request for a single bank robbery
18 file. Rather, many of the requests contain numerous and/or multi-faceted subjects and often require much
19 more coordination with external and internal stakeholders to ensure the FBI makes appropriate disclosure
20 decisions.

21 16. In cases like this where there are thousands of pages, the volume of material proportionally
22 impacts - and dramatically affects - the complexity of the FOIPA processing required as well as the
23 resources and time needed to respond to a particular request. This includes increases in the number of
24 referrals (for either consultation or direct response) to other DOJ components and agencies, the need for
25 internal reviews, classification/declassification considerations, and the time needed to conduct page-by-
26 page, line-by-line reviews of all potentially responsive material to determine what can be released and/or
27 withheld.

28 17. Additionally, RIDS has found FBI records increasingly contain more other federal

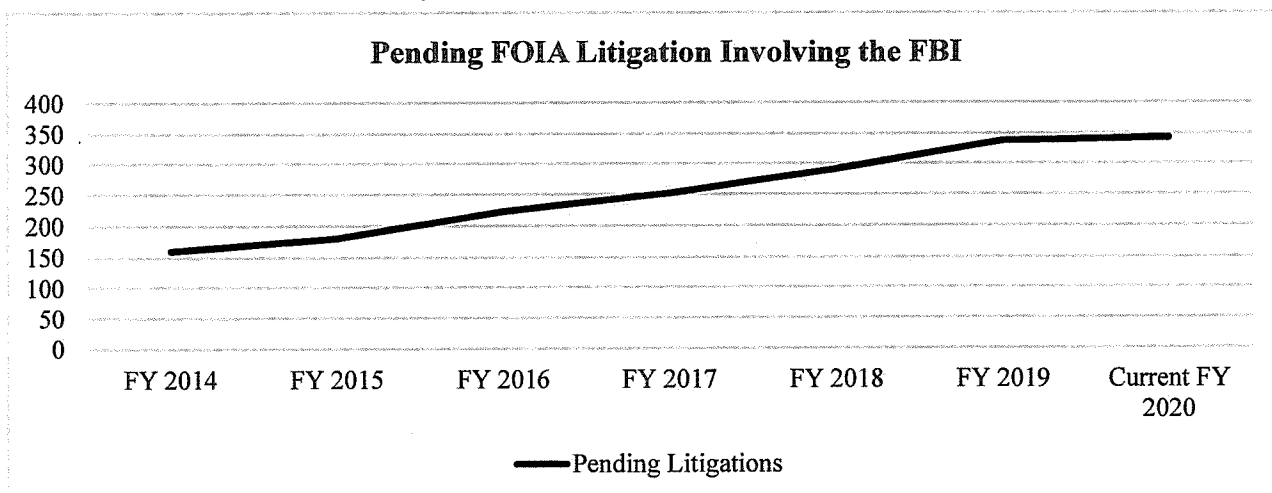
1 government agency (“OGA”) information. After reviewing the United States Government’s response to
 2 the terrorist attacks of September 11, 2001, the National Commission on Terrorist Attacks upon the United
 3 States (“9/11 Commission”) recommended agencies within the federal government increase their ability
 4 to share and collaborate on gathered intelligence.⁶ The FBI, like other members of the United States
 5 Intelligence Community, adopted this recommendation. FBI records thus increasingly contain OGA
 6 information equities, requiring the FBI seek these OGAs’ redaction determination prior to releasing their
 7 information, and increasing the administrative burden associated with processing FOIA requests

8 INCREASE IN FOIA LITIGATION DEMANDS

9 18. In addition to the burdens described above, there is a constant litigation demand imposed
 10 on the FBI by those requests that become the subject of litigation. The FBI is currently involved in
 11 approximately 347 pending FOIPA litigations, many of which have court ordered/established processing
 12 deadlines. In the last six years, the number of FOIPA litigations has unpredictably increased to all-time
 13 program highs. The below tables represent this progression between 2014 and the present.

Fiscal Year	Number of Pending FOIA Litigations
2014	160
2015	180
2016	223
2017	252
2018	292
2019	338
Current 2020	347

26
 27 ⁶ *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the*
 28 *United States*. Chapter 13, “How to do it? A Different Way of Organizing the Government.” U. S.
 Government Printing Office.



19. Further, while there may be some correlation to the overall rise in request volume, RIDS has no data which can predict which and how many FOIPA requesters will elect to seek judicial relief. As depicted in the charts above, there was a 111% increase in FOIPA litigations involving the FBI between FY 2014 and FY 2019. In FY 2019 alone, the FBI received 151 new FOIPA lawsuits directly against the FBI, or lawsuits against other government agencies that involve FBI records. This one year increase is nearly equal to the total number of FOIPA litigations involving the FBI in FY 2014 (151 new litigations compared with 160 total pending litigations). Mirroring the trend seen in the FOIPA requests recently received by the FBI, these litigations have become increasingly more complex. In terms of monthly processing output, at least 99 of the FBI's FOIPA requests in litigation currently have processing demands. Approximately 50 of these cases require monthly releases of information. This represents approximately 25% of RIDS' resources, but only accounts for one percent of requests processed by RIDS. In other words, any increase in processing demands for litigations has a tangible negative impact on the FBI's ability to equitably distribute its resources to provide records to a wider requester community.

20. Additionally, by nature, the work allocated to a request in litigation is much more labor intensive relative to a request processed administratively as there is a trove of additional administrative tasks which attach to requests in litigation such as: tracking the FBI's application of Exemptions to properly defend this information against potential future challenges; Bates stamping; and the added review of connecting the document processing to specific written justifications in the agency declaration in support of summary judgment. In some instances, this may as much double the amount of resources

1 needed when compared to traditional, administrative FOIPA requests. Many of these litigations involve
 2 complex or high volumes of records and put a particular strain on the FBI's limited FOIA-processing
 3 resources. Particularly, 19-cv-1278, *Leopold & BuzzFeed, Inc. v. DOJ, et al.* The FOIA requests at issue
 4 in this lawsuit, seeks records related to the Office of Special Counsel Robert Mueller's investigation into
 5 links and/or coordination between the Russian government and individuals associated with the campaign
 6 of President Trump; and any matters that arose from the investigation. This is a uniquely burdensome
 7 case consisting of potentially millions of highly sensitive pages. With respect to the SCO records
 8 specifically, RIDS designated a single, specialized team of 23 Government Information Specialists (GIS)
 9 to handle requests for SCO and SCO-related records. Additionally, three Office of General Counsel,
 10 FOIA Litigation Unit attorneys (half of the Unit's attorney staff) are handling lawsuits involving SCO and
 11 SCO-related records. Finally, a small but varying number of SMEs are assisting in the review of SCO
 12 and SCO-related records⁷, depending on the particular records at issue. Other examples of these
 13 larger/more complex litigations include, but are not limited to:

Civil Action No.	Case Title	Court⁸	Subject	Monthly Production⁹
18-cv-4009	Wasim Mohammad v. FBI	NDCA	Death of Faisal Mohammad	500 ppm
16-cv-02320	Freedom Watch v. Bureau of Land Management, et al.	DDC	Cliven Bundy, et al.	500 ppm
16-cv-01506	Francisco Martinez v. DOJ	DDC	Chicano Civil Rights Movement	500 ppm
17-cv-2503	Property of the People, et al. v. Department of Homeland Security ("DHS"), et al.	DDC	Black Lives Matter, Black Identity Extremism, et al.	500 ppm
16-cv-1790	Colbert v. FBI et al.	DDC	D.B. Cooper Skyjacking	500 ppm
19-cv-1495	Fassett v. FBI	DDC	Adrian Lamo	500 ppm
19-cv-0290	American Civil Liberties Union, et al. v. DOJ, et al.	NDCA	Social Media Surveillance	500 ppm

24 ⁷ The number of SMEs varies pending on the particular records and subjects at issue.
 25 Nevertheless, this is a necessarily limited universe of personnel, due to the knowledge and expertise
 26 required and also given their other duties and responsibilities to conduct or provide operational support
 on on-going FBI investigations and enforcement/intelligence-gathering activities.

27 ⁸ For ease of the Court, districts have been abbreviated by, "ND" (Northern District), "SD"
 (Southern District), "ED" (Eastern District), "WD" (Western District), "CD" (Central District), or only
 28 "D" for District; and the two letter state postal code for the states in which districts reside.

⁹ Pages per month is abbreviated as "ppm."

1	18-cv-1885	Lerone Martin v. DOJ	DDC	William (Billy) Graham, Jr.	500 ppm
2	19-cv-4048	Ader v. FBI, et al.	NDIL	Jon Burges	500 ppm
3	18-cv-2563	Judicial Watch v. DOJ	DDC	Investigation of Iman Awan, et al.	500 ppm
4	18-cv-381	Joshua Phillips v. DHS, et al.	DDC	Hate Crimes since 2015	500 ppm
5					
6	16-cv-00475	Judicial Watch v. DOJ	DDC	Adnan Gulshair Shukrijumah	500 ppm
7	18-cv-154	Judicial Watch v. DOJ	DDC	Communications between Peter Strzok and Lisa Page	500 ppm
8					
9	18-cv-1459	Center for Investigative Reporting v. DOJ	NDCA	June 2, 1965 incident involving the Klu Klux Klan	500 ppm
10	18-cv-01833	Daily Caller v. FBI	DDC	Richman, Daniel	500 ppm
11	18-cv-1890	Peter Paul v DOJ	DDC	Peter Paul	500ppm/medi a
12	19-cv-573	Judicial Watch v DOJ	DDC	Communications between General Counsel Jim Baker/former DOJ Attorney	500ppm
13	13-cv-01135	Bartko v DOJ, et al	DDC	Bartko, Gregory and others	500ppm
14	16-cv-09003	Rosebraugh v DOJ	CDCA	Rosebraugh, Craig	500ppm
15	16-cv-948	White v DOJ, et al [White II]	SDIL	White, William and various third party subjects	500ppm
16	19-cv-113	Rashid Minhas v EOUSA [FBI NOT A PARTY]	DDC	Minhas, Rashid	500ppm
17	14-cv-330	Pickering v DOJ	WDNY	Pickering, Leslie	500ppm
18	19-cv-1465	Center for Media Justice, et al v FBI, et al	NDCA	Black Identity Extremism	500ppm
19	19-cv-419	Socolov v DOJ, et al	WDTX	Coplon, Judith	500ppm
20	16-cv-0780	Gabor v USA	DDC	Gabor, Michael	500ppm
21	19-cv-0001	Leslie Pickering v DOJ	WDNY	Leonard Peltier	500ppm
22	18-cv-4852	Center for Investigating Reporting, et al v DOJ	NDCA	4Chan, FBIAnon	500ppm
23	18-cv-00739	Tran v DOJ, et al	DDC	Tran, Vo and Doa, Alex	500ppm
24	18-cv-2422	American Oversight v FBI	DDC	FBI Headquarters Consolidation; Trump Hotel Communications	500ppm
25	18-cv-2769	Freeman v FBI	DDC	Freeman, Michael	500ppm
26	15-cv-00569	Matthews v FBI	DDC	Matthews, Alexander Otis	500ppm
27	18-cv-2375	Pasquale Stiso v DOJ	MDPA	Pasquale Stiso	500ppm
28	18-cv-841	William White [WHITE III]	SDIL	Michael Lekfow, Teens of Satan, et al	500ppm
	18-cv-1488	Privacy International, et al v FBI, et al	WDNY	Government Hacking	500ppm

DECLARATION OF DAVID M. HARDY
NO. 19-cv-00290 EMC

1	19-cv-106	Davey, Jonathan v DOJ	DDC	Black Diamond Ponzi/Jonathan Davey	500ppm
2	19-cv-3130	Steven and Perienne de Jaray v FBI	DDC	De Jaray, Steven and Perienne	500ppm
3	18-cv-1635	Michael Withey v DOJ, et al	WDW A	Levane Forsythe	500ppm
4	18-cv-2791	Joseph Michael Guarascio v FBI, OIP, DOJ	DDC	Joseph Michael Guarascio (plea agreement issue)	500ppm
5	18-cv-2116	Freedom Watch, et al v DOJ, et al	DDC	Francis Schaffer Cox	500ppm (media and photo production)
6	19-cv-12242	ACLU and SCLUM v DOJ, et al	MA	Facial Recognition, etc.	500ppm
7	17-cv-4782	Boundaoui v DOJ	NDIL	Operation Vulgar Betrayal	500ppm
8	19-cv-1278	Leopold/Buzzfeed v DOJ and CNN v DOJ (consolidated)	DDC	SCO Investigation	800ppm ¹⁰
9	19-cv-2545	Giacchino v DOJ	DDC	FBI Video of Fresh Kills Recovery Site Post 9/11	500ppm (media)

12
13 The factors described above have made it virtually impossible for RIDS to respond to Plaintiffs' FOIA
14 request within the timeframe they are proposing.¹¹ To meet Plaintiffs' proposed processing rate, the FBI
15 would have to shift resources away from processing the requests of other requestors, and apply a
16 disproportionate amount of its limited processing resources to Plaintiffs' request.

17 **IV. PROPOSED PROCESSING SCHEDULE**

18 **THE FBI'S INTERIM RELEASE POLICY**

19 21. The 500-pages-per-month rate at which the FBI is processing records in this case is the
20 FBI's standard processing rate, which the FBI employs to ensure equitable distribution of its limited
21 resources.

22 22. On or about January 2010, RIDS instituted a policy of reviewing/processing 500 pages per
23 month on CD for requests exceeding 500 pages. The FBI's policy derives from and/or is the FBI's effort
24 to comply with DOJ FOIA regulations at 28 C.F.R. § 16.5(b) (regarding prompt disclosure of responsive
25 material upon payment of any applicable fees) and adherence to this policy remains one of key elements
26

27 ¹⁰ In this instance, the Court ordered the FBI to produce responsive material at a larger
processing rate.

28 ¹¹ Plaintiff is proposing completion of all responsive material no later than August 31, 2020.

1 in addressing the influx of requests and backlog of requests. The rationale for the FBI's policy concerning
2 the processing of 500 pages a month is three-fold.

3 23. First, the policy is based on sound FOIA business practice. FOIA encourages agencies to
4 develop multi-track processing with the goal of responding to more requests. Accordingly, the FBI
5 established four processing queues – small queue (1-50 pages), medium queue (51-950 pages), large queue
6 (951-8,000 pages), and extra-large queue (more than 8,000 pages). Within each queue, requests are
7 processed in FIFO order. By making interim releases in 500-reviewed pages increments, RIDS regularly
8 provides more pages to more requesters across the four queues, thus avoiding a system where a few, large
9 queue requests monopolize finite processing resources resulting in less pages provided to fewer requesters
10 on a more infrequent basis.

11 24. Second, the policy promotes both RIDS and requester efficiencies. RIDS processes
12 responsive records in 500-reviewed pages increments, meaning 500 pages are reviewed for release and
13 once all security protocols are run, a CD containing the segregable releasable portions of these 500 pages
14 reviewed is prepared; then, the next 500 pages are reviewed and prepared for release; and so on until all
15 responsive pages are reviewed and released. By working in 500-page increments, RIDS has found that
16 more pages get processed, reviewed, and released to more requesters each month. In terms of managing
17 work-flow, the interim releases can be assigned to multiple processors and the 500-page size has proven
18 to be ideal for reviewing officials, and other components or agencies that must be consulted before release.
19 Moreover, maintaining a steady interim release posture is key in meeting the demands posed by the
20 growing number, size, and complexity of FOIA/Privacy Act requests received by the FBI.

21 25. Third, part of the process in finalizing material for release involves information security.
22 Many FBI records contain classified information requiring the FBI FOIA/Privacy Act requests to be
23 processed on a classified computer network. Thus, when a CD is prepared for release after review and
24 consultation, it must also undergo a multi-step information security review. Specifically, the FBI employs
25 security software that must be utilized every time information is taken from the classified network and
26 released to a requester in an unclassified format. This entails running a general security protocol, whereby
27 the software scans for prescribed code words; and an individualized protocol, whereby the software scans
28 for words that RIDS determines are unique to the particular request and may include searches for specific

1 exempt words, names, confidential sources, or classified techniques. Due to the security requirements,
2 the 500-reviewed pages size has proven ideal in maintaining a steady release flow. The running of these
3 security protocols, and resolving any issues that may arise, can require a significant amount of effort and
4 time which increases as more pages are added.

5 26. In RIDS's experience, the 500 pages reviewed per month workflow size allows for a steady
6 flow of information to the public at large. The 500-page incremental size enables a manageable monthly
7 production rate because it allows for the processing of the material by an analyst, review time, and the
8 application of FBI information security protocols that must be followed before FBI information can be
9 made public.

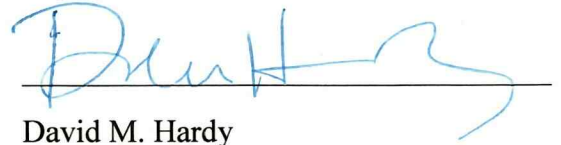
10 27. All three of the above-mentioned factors work together to form the basis of the FBI's
11 interim release policy, designed to most equitably provide the largest number of requesters the largest
12 amount of information possible. Altering the FBI's interim release policy to provide more information at
13 a higher rate for requesters who litigate over those that do not creates an imbalance of RIDS's finite FOIPA
14 processing resources. In this instance, it would mean processing Plaintiffs' request ahead of other
15 requesters, some of whom submitted requests prior to Plaintiffs. Additionally, it would increase the
16 administrative burden associated with processing Plaintiffs' request, forgoing the efficiencies described
17 garnered through processing requests in manageable, 500 page increments.

18 CONCLUSION

19 28. Since August 2019, the FBI has been providing rolling productions to Plaintiffs, processing
20 records at a rate of 500 pages per month. The FBI respectfully requests it be allowed to continue reviewing
21 responsive records at this rate, to ensure maximum efficient and equitable application of its limited
22 processing resources. The FBI anticipates that it can complete its internal processing by November 2020,
23 and that any subsequent referral consultations with other government agencies and third party corporations
24 will be completed by January 2021.

1 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and
2 correct.

3 Executed this 19th day of February, 2020.

4
5 

6 David M. Hardy
7 Section Chief
8 Record/Information Dissemination Section
9 Information Management Division
10 Federal Bureau of Investigation
11 Winchester, Virginia

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 19-CV-00290-EMC

**DECLARATION OF VANESSA R.
BRINKMANN**

I, Vanessa R. Brinkmann, declare the following to be true and correct:

1. I am Senior Counsel in the Office of Information Policy (OIP), United States Department of Justice (Department or DOJ). In this capacity, I am responsible for supervising the handling of the Freedom of Information Act (FOIA) requests subject to litigation processed by the Initial Request Staff (IR Staff) of OIP. The IR Staff of OIP is responsible for processing FOIA requests seeking records from within OIP and from within six senior leadership offices of the Department, specifically the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), Associate Attorney General (OASG), Legal Policy (OLP), Legislative Affairs (OLA), and Public Affairs (PAO).

2. The IR Staff of OIP is responsible for conducting searches in response to FOIA requests seeking records of the above-referenced offices, for determining whether records

1 located pursuant to its searches are responsive to those FOIA requests, and, if so, whether such
2 records are appropriate for release in accordance with the FOIA. In processing such requests, the
3 IR Staff consults with Department personnel in the senior leadership offices, with Department
4 records management staff and/or with other components within the Department, as well as with
5 others in the Executive Branch.

6 3. I make the statements herein on the basis of personal knowledge and on information
7 acquired by me in the course of performing my official duties, including my familiarity with
8 OIP's resources and procedures for responding to FOIA requests, and my review of the request
9 at issue in this case.

10
11 **Plaintiffs' FOIA Request to OIP**

12 4. By letter dated May 24, 2018, ACLU and ACLU of Northern California ("Plaintiffs")
13 submitted a FOIA request to OIP seeking records "pertaining to social media surveillance,
14 including the monitoring and retention of immigrants' and visa applicants' social media
15 information for the purpose of conducting "extreme vetting." Plaintiffs' FOIA request included
16 a list of five specific categories of records that Plaintiffs are seeking related to social media
17 monitoring.

18
19 5. On June 6, 2018, the OIP Attorney-Advisor assigned to this request reached out to
20 Plaintiffs' representative via phone and email to discuss Plaintiffs' request and a proposal to
21 narrow Plaintiffs' FOIA request. The Attorney-Advisor spoke to Plaintiffs' representative on the
22 phone on June 11, 2018. According to notes taken contemporaneously by the Attorney-Advisor,
23 the Attorney-Advisor explained to Plaintiffs' representative that OIP believed FBI would be the
24 DOJ component most likely to maintain the records sought in Plaintiffs' FOIA request. As such,
25 to the extent that Plaintiffs are seeking records of the DOJ senior leadership offices, the
26 Attorney-Advisor asked Plaintiffs' representative if he would be willing to narrow Plaintiffs'
27
28

1 request to official policy only, as OIP believed that the Federal Bureau of Investigation (FBI),
2 and not the DOJ senior leadership offices, would maintain underlying records regarding the
3 implementation of policy related to Plaintiffs' FOIA request. As Plaintiffs' representative was
4 advised, limiting the request to official policy would allow OIP to quickly conduct a search for
5 records using a database that does not have a pending backlog queue (unlike OIP's pending
6 search queue for other DOJ senior leadership email and electronic documents) and therefore
7 respond to Plaintiffs' FOIA request significantly faster. Plaintiffs' representative informed the
8 Attorney-Advisor that Plaintiffs were not willing to narrow their request, and wanted OIP to
9 conduct a full search of all offices for which OIP processes FOIA requests.
10

11 6. By letter dated June 13, 2018, OIP acknowledged receipt of Plaintiffs' FOIA request,
12 provided request tracking number DOJ-2018-005910, and informed Plaintiffs that OIP would be
13 conducting searches on behalf of OAG, ODAG, OASG, OLP, OLA, PAO, and OIP.

14 7. On January 17, 2019, Plaintiffs filed suit in connection with the above-referenced
15 FOIA request. See Complaint, ECF No. 1.

16 8. As reported in the parties' June 5, 2019 Joint Case Management Statement, see ECF
17 No. 21, OIP engaged in negotiations with Plaintiffs shortly after Plaintiffs filed suit, in which the
18 parties ultimately agreed to a narrower list of custodians for which OIP would conduct its search
19 for records responsive to Plaintiffs' request. The negotiated set of custodians – which still
20 totaled forty-four custodians each requiring a full email and electronic documents search – would
21 allow OIP to complete its search in three months from the time the parties came to this
22 agreement, instead of six months.
23

24 9. In the parties' June 21, 2019 Joint Status Report, see ECF No. 25, OIP described the
25 challenges faced by both OIP and the Justice Management Division, Office of the Chief
26 Information Officer (JMD/OCIO) (the entity which conducts all electronic searches, including
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28

1 emails on behalf of OIP), which have resulted in significant backlogs in search and processing
2 queues for FOIA requests pending with OIP.

3 10. In the parties' August 29, 2019 Joint Status Report, see ECF No. 29, OIP reported to
4 Plaintiffs and the Court that its initial search had been completed within the projected timeframe.
5 Due to the large volume of potentially responsive material that the search yielded, OIP sought to
6 meet and confer with Plaintiffs to discuss further narrowing options.

7
8 11. After engaging in narrowing negotiations over a number of months, OIP reported in
9 the parties' January 9, 2020 Joint Status Report, see ECF No. 40, that the parties came to an
10 agreement and Plaintiffs agreed to narrow the universe of documents sought from OIP. OIP
11 reported that even with this narrowing, its Attorney-Advisor must review over 25,000 documents
12 (not pages) located in its initial search to determine whether each document is responsive to
13 Plaintiffs' FOIA request. OIP informed Plaintiffs and the Court that this responsiveness review
14 would take six months to complete, due to the large volume of records that must be reviewed.
15 OIP further reported that it would propose a processing and response schedule once this
16 responsiveness review is completed and the number of potentially responsive records is
17 identified. Instead of engaging directly with OIP to attempt to negotiate a processing schedule
18 amenable to both parties, Plaintiffs requested in this Joint Status Report that this Court require
19 OIP to complete its responsiveness review, processing, and production of records by August 31,
20 2020. This request would require the Attorney-Advisor assigned to this case to review over
21 25,000 documents, process any potentially responsive records that are identified, consult with
22 other DOJ components and Executive Branch agencies as required by DOJ FOIA regulations,
23 28 C.F.R. § 16.4(d), and issue a final response on an unidentified number of responsive records
24 all within six months' time. OIP simply does not have the resources to accomplish this. OIP
25 maintains that it would have been open to further negotiating its responsiveness review timeline
26
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1 had Plaintiffs engaged directly with OIP prior to the filing of the January 9, 2020 Joint Status
2 Report – including the possibility of providing information to Plaintiffs about this review, and
3 other options for narrowing the universe of potentially responsive records informed by OIP’s
4 review of the search results, on an interim or rolling basis – and is still open to doing so.

5 12. In an effort to engage in a fruitful negotiation with Plaintiffs, OIP recently proposed
6 that it would complete its initial responsiveness review by April 9, 2020, effectively cutting
7 OIP’s initial six-month timeframe in half. However, it is extremely difficult for OIP to provide
8 an accurate estimate for the time needed to process the potentially responsive records under the
9 FOIA, complete consultations with other DOJ components and Executive Branch agencies, and
10 issue a final response to Plaintiffs on those records without an accurate page count of records that
11 are responsive to Plaintiffs’ request or an opportunity to assess the number and nature of
12 consultations that will be required before OIP can provide a final determination to Plaintiffs.¹
13
14 Instead, OIP can agree to process 250 pages per month once its responsiveness review is
15 completed.² OIP’s first response to Plaintiffs in which OIP processes 250 pages would be issued
16 on May 9, 2020. OIP would continue to process 250 pages per month until all responsive
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18
19
20 ¹ It is important to note that each DOJ component and Executive Branch agency with which OIP
21 will be required to consult will have its own processing queues and timelines that will weigh into
22 the amount of time they will need to provide input on the documents. These timelines are
23 impossible to predict until we know what consultations will be required.

24 ² “Processing” will consist of OIP’s initial review of the records retrieved pursuant to OIP’s
25 records searches, including OIP’s review for responsiveness to Plaintiffs’ request, for application
26 of FOIA exemptions, and for identification of equities requiring consultations with and/or
27 referrals to other DOJ components and Executive Branch agencies. As discussed in footnote 1
28 *supra*, OIP cannot predict the processing timelines in other DOJ components and Executive
Branch agencies, nor can it at this time accurately predict what equities specific documents may
contain. Therefore, while initial designation of responsiveness and exempt information of 250
pages may be completed by OIP each month, the final consultations and release determinations
for all 250 pages may not be completed within the same timeframe. Records sent on
consultation to other DOJ components and Executive Branch agencies will be considered
“processed” and will be reported in OIP’s monthly response letters to Plaintiff.

1 records have been processed. This proposal was provided to Plaintiffs on February 18, 2020 and
2 Plaintiffs declined to agree to this proposal.

3 13. As described *infra*, OIP simply does not have the resources to complete all review
4 and processing by August 31, 2020.

5 **OIP's Current Caseload and Staffing Levels**

6 14. As stated above, OIP's Initial Request Staff (IR Staff) is responsible for processing
7 FOIA requests seeking records from within OIP and from within six senior leadership offices
8 (OAG, ODAG, OASG, PAO, OLA, OLP).³ The IR Staff's Litigation Team is specifically
9 responsible for handling those requests that are in litigation. The remainder of the IR Staff is
10 responsible for handling all other FOIA requests – *i.e.*, requests that are not in litigation.
11

12 15. As of February 18, 2020, OIP has 1,715 open FOIA requests and 121 ongoing
13 litigations.

14 16. The non-litigation staff consists of five full-time employees (FTEs) (Chief of the
15 Initial Request Staff, one reviewer, and three Senior Government Information Specialists (GIS)),
16 one temporary detailee (six-month detail with one and a half months left with OIP), and three
17 contractors. The three GIS, three contractors, and one detailee are responsible for processing all
18 FOIA requests received by OIP that are not in litigation, subject to review by the IR Staff
19 reviewer and/or Chief. In sum, the 1,715 non-litigation FOIA requests involving senior
20 leadership office and SCO records under OIP's purview are currently processed by a staff of
21 seven individuals and two reviewers.
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26 _____
27 ³ As part of its FOIA responsibilities on behalf of the senior leadership offices, OIP also is
28 responsible for processing certain records of the Special Counsel's Office (SCO). FOIA requests
and associated litigation for SCO records, which is an extraordinarily large records collection,
accounts for a significant amount of the IR Staff's workload.

1 17. The IR Staff's Litigation Team consists of seven FTEs (Senior Counsel, two Senior
2 Supervisory Attorneys, four Attorney-Advisors), and three temporary detailees (each for a six-
3 month detail with just under five months left with OIP). Each FOIA litigation is assigned to a
4 team of two: one of the four Attorney-Advisors, paired with one of the two Senior Supervisory
5 Attorneys. Each Attorney-Advisor is responsible for handling all aspects of each litigation
6 request assigned to them, including searching for and processing responsive records,
7 coordinating consultations within the Executive Branch, drafting declarations and other court
8 filings, and working with the litigators assigned to each case, subject to review by the Senior
9 Supervisory Attorney and/or the Senior Counsel. Each of the new detailees is assigned either to
10 specific tasks related to ongoing litigations, or to handle new litigations paired with one of the
11 two Senior Supervisory Attorneys. Given the very short amount of time they have been with
12 OIP, the detailees carry a significantly smaller caseload than the staff attorneys. In sum, all 121
13 FOIA litigations involving senior leadership office records under OIP's purview are processed
14 by a staff of four attorneys, three reviewing attorneys, and three temporary detailees.
15

16 18. Of the 121 matters being handled by the IR Staff Litigation Team, OIP is a named
17 litigant in 104 cases at varying stages in multiple jurisdictions. Of these 104 cases, five are filed
18 in the United States District Court for the Northern District of California and ninety-nine are
19 filed in other jurisdictions. Of the remaining seventeen matters, nine are litigation consultations
20 and eight are litigation referrals, which OIP receives from other DOJ components or Executive
21 Branch agencies who are named defendants in FOIA litigation. For perspective, about one year
22 ago, as of February 19, 2019, OIP was involved in a total of ninety-three ongoing litigation
23 matters – amounting to a 31% increase in litigation in the past year alone.
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1 19. OIP has been inundated by an ongoing and unprecedented surge of FOIA requests,
2 which began in the middle of Fiscal Year⁴ (FY) 2016 and which has not abated. In addition to
3 the sheer volume of incoming FOIA requests, OIP has also experienced an influx of increasingly
4 complicated requests requiring complex, voluminous searches of a variety of electronic records,
5 most notably emails, often implicating dozens of records custodians and vast amounts of
6 electronic data. At the same time, the number of lawsuits filed in connection with requests being
7 processed by OIP has exponentially increased – in fact, tripling in the past three years.⁵ This
8 combination of increased volume of requests and custodians, request scope and complexity, and
9 exponential increase in litigation has substantially increased the amount of time and resources
10 required for OIP to complete its searches and processing, and has exhausted OIP’s resources.

12 20. To OIP’s knowledge, DOJ has not requested additional funding from Congress to hire
13 Federal employees to assist in processing FOIA requests. The Department recognizes that the
14 solution to modernization is a combination of hardware, software, and staffing. Solely adding
15 staff, without increasing capacity, will not fully address the problem. Consequently, the
16 Department has invested significant resources to bolster the Department’s technical capacity and
17 capability in an effort to handle the increased volume of FOIA requests, as well as shifted
18 internal resources to address issues with FOIA and e-discovery.

20 21. In FY 2019, OIP acquired three contractors and one temporary detailee to work on
21 non-litigation FOIA requests, as described *supra* in paragraph sixteen, allowing the IR Staff to
22 process more requests than it received over the last six months of FY 2019. Additionally, in FY
23

24 _____
25 ⁴ A fiscal year is defined by the U.S. Government’s budget cycle, and runs from October 1 of the
26 budget’s prior calendar year through September 30 of the calendar year being described. For
example, Fiscal Year 2020 begins on October 1, 2019 and ends on September 30, 2020.

27 ⁵ At the beginning of FY 2017, OIP was involved in forty FOIA litigation matters. As noted
28 elsewhere, OIP is currently involved in 121 FOIA litigation matters.

1 2018 and FY 2019 OIP reallocated internal resources, and the IR Staff Litigation Team acquired
2 two Senior Attorneys from another team within OIP to address the exponential increase in
3 litigation. To further address staffing constraints and directly address this exponential increase in
4 litigation matters, at the beginning of Calendar Year 2020, the Litigation Team on-boarded three
5 Attorney-Advisor detailees, and is exploring acquiring contractors, to assist with the litigation
6 demand.

7
8 22. Furthermore, in FY 2019, OIP reorganized its internal search processing queues by
9 expanding the number of search queues used by JMD/OCIO, the entity which conducts all
10 electronic searches, including emails on behalf of OIP. These search queues are distinguished
11 from each other by the total number of senior leadership office search custodians required to be
12 searched. This process allows JMD/OCIO to more efficiently and effectively run searches for
13 simpler/narrower requests, which may be completed more quickly when they are not in the
14 search queue behind larger, more complex requests involving more search custodians.

15
16 23. Finally, OIP is working closely with JMD/OCIO to make improvements to efficiency
17 and search capacity for the FOIA records searches it handles on behalf of OIP. JMD/OCIO has
18 been able to devote additional resources to address the backlog of records searches pending in
19 their queues with the addition of four contractors in FY 2020. Additionally, JMD has an
20 expected increase of four servers between FY 2019 and FY 2020 and increased their software
21 licensing capacity by 250%, contributing to a more effective and efficient search process.

22
23 24. Despite all of the challenges described above, OIP continues to respond by employing
24 a variety of system improvements and adaptive methods that have resulted in record numbers of
25 FOIA requests being processed to completion each year. However, OIP recognizes that even
26 with these adaptations and advances, its backlog of requests continues to grow, and it is therefore
27 essential that OIP continue to identify new efficiencies in our FOIA processing methods to
28

1 ensure that the management of our FOIA caseload is as dynamic as the breadth, complexity, and
2 volume of the FOIA requests being received by OIP. For this reason, OIP continues to look at
3 ways to increasing staffing levels while also improving the technological processes which are at
4 the heart of processing the FOIA requests received by OIP.

5 25. Notwithstanding our limited resources and surging FOIA obligations, OIP has
6 consistently succeeded in fulfilling more FOIA requests annually. In FY 2014 and 2015, OIP
7 fulfilled 1,265 and 1,528 FOIA requests, respectively. In FY 2016, OIP fulfilled over 2,000
8 requests for the first time, fulfilling a total of 2,054 FOIA requests. In FY 2017 OIP fulfilled
9 2,113 FOIA requests. FY 2018 was OIP's all-time record, fulfilling 2,790 FOIA requests. FY
10 2019 was the first time since 2014 where OIP did not fulfill more requests than the previous
11 year, likely due to both the month-long government shutdown at the beginning of FY 2019 and a
12 change in OIP's tracking system that took place halfway through FY 2019. Still, OIP was able
13 to fulfill 2,460 FOIA requests in FY 2019, which is more requests than OIP received in the same
14 Fiscal Year.
15

16
17
18 Pursuant to 8 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
19 and correct.

20
21 

22 Vanessa R. Brinkmann
23 Senior Counsel

24 Executed this 19th day of February 2020.
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 19-CV-00290-EMC

DECLARATION OF ERIC F. STEIN

Pursuant to 28 U.S.C. § 1746, I, Eric F. Stein, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department” or “State”) and have served in this capacity since January 22, 2017. Previously, I served as the Acting Director since October 16, 2016, and as the Acting Co-Director since March 21, 2016. I am the State official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other records access provisions. As the Director of IPS, I have original classification authority and am authorized to classify and declassify national security information. Prior to serving in my current capacity, I worked directly for State’s Deputy Assistant Secretary (“DAS”) for Global Information Services (“GIS”) and served as a senior advisor and deputy to the DAS on all issues related to GIS offices and programs, which include IPS.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of Executive Order No. 13526 of December 29, 2009, governing classified national security information), by members of Congress, by other government agencies, and those made pursuant to judicial process, such as subpoenas, court orders and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of State's library; and (8) technology applications that support these activities.

3. I am familiar with the efforts of State personnel to process the FOIA request that is the subject of this litigation, and I am in charge of coordinating State's processing efforts with respect to that request. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties.

4. The purpose of this declaration is to respond to Plaintiffs' request for a final production deadline in August 2020 and explain the basis for State's projected processing timeline. Specifically, this declaration explains the status of the administrative processing of Plaintiffs' FOIA request, State's FOIA burden and resources, and IPS's ability to process Plaintiffs' FOIA request in light of these circumstances.

I. Administrative Processing of Plaintiffs' FOIA Request

5. By letter dated May 24, 2018, Plaintiffs submitted a FOIA request seeking certain State records related to social media.

6. State subsequently made every effort to respond to Plaintiffs' request within the statutory timeframe. In June 2018, State engaged with Plaintiffs in an attempt to narrow the

scope of the request. Plaintiffs declined any such narrowing. Accordingly, by letter dated June 22, 2018, State informed Plaintiffs that it was unable to process the request because it did not reasonably describe records sought. The letter further informed Plaintiffs of their appeal rights. By letter dated September 19, 2018, Plaintiffs appealed State's June 22, 2018 determination. By letter dated September 27, 2018, State acknowledged Plaintiffs' appeal. By letter dated October 16, 2018, State informed Plaintiffs that, due to unusual circumstances, it would not be able to respond within a 20-day time period but expected to issue a response by October 31, 2018. By letter dated October 30, 2018, State informed Plaintiffs that the Department's Appeals Review Panel upheld the original decision that the request was overly broad and burdensome.

7. After the initiation of this lawsuit, State again sought to negotiate a narrowing of the scope of the request with Plaintiffs. As reflected in the June 5, 2019, Joint Case Management Statement (ECF No. 21), the Parties reached agreement on a narrowed scope for the request.

8. Since that time, State has been working diligently to process Plaintiffs' narrowed request. Thus far, State has made five productions to Plaintiffs in six-week increments beginning on August 1, 2019.¹ With these productions, State has released 19 records in full and 108 records in part, and has determined that 70 records must be withheld in full. State has processed a total of approximately 2,500 pages of documents potentially responsive to Plaintiffs' narrowed FOIA request to date.²

9. State's next production is currently scheduled for February 28, 2020.

¹ State made its October production in two parts on October 29, 2019 and October 30, 2019, respectively, so Plaintiffs have received six release determination letters from State.

² In addition to pages of documents released in full, released in part, and withheld in full, this number includes pages of documents that State determined to be non-responsive to Plaintiffs' narrowed request or duplicative of documents previously processed in response to the request.

II. State's FOIA Burden and Resources

10. Over the past several years, State's FOIA burden has grown significantly, as evidenced by the agency's FOIA caseload, exceptionally demanding court orders in several FOIA litigation cases, and the queue of non-litigations requests.

11. State was a defendant in approximately 50 FOIA litigation cases in early 2014; currently, State is a defendant in approximately 180 FOIA litigation cases, involving approximately 300 FOIA requests. Despite a drop in the number of FOIA requests received by State in FY 2018, the number of FOIA litigation cases brought against State has been steadily increasing over the past four years: State received 57 cases in FY 2016, 53 cases in FY 2017, 75 cases in FY 2018, and approximately 85 cases in FY 2019. In FY 2020, State has thus far become involved in approximately 30 new FOIA litigation cases.

12. FOIA requests subject to litigation comprise approximately 2% of all FOIA requests at State but demand a disproportionate share—approximately 90%—of IPS's current FOIA review resources. In all cases, State meets any court-ordered minimum processing requirements and strives to process at least 300 pages per month even in the absence of a court order. As of February 2020, the Department is attempting to process at least 33,900 pages per month for litigation. FOIA litigation cases that do not have regular production schedules also require resources for various tasks such as conducting searches for potentially responsive material, ingesting that material into State's document review platform, and drafting and reviewing *Vaughn* indices. At the same time, State must continue to use its resources to process the thousands of requests that are not currently the subject of lawsuits. This processing is becoming more difficult due to the demands of FOIA litigation.

13. The efforts required to meet litigation obligations come at the expense of all other requesters seeking information from the government. In FY 2019, State's FOIA backlog increased for the first time in two years; it is currently about 14,500 requests. There is a direct correlation between State's FOIA litigation demands and this backlog. In response to the most demanding court order in a State FOIA case in recent memory, the Department must process 5,000 pages per month. *Open Society Justice Initiative v. CIA et al.*, No. 19-cv-00234-PAE (S.D.N.Y.), ECF 50, May 30, 2019. This order has impeded State's ability to satisfy FOIA requests not in litigation. In FY 2017 and FY 2018, the Department closed approximately 1,800 and 900 cases per month, respectively. In FY 2019, the Department closed an average of 545 cases per month. From October through December 2019, the first quarter of FY 2020, the Department averaged just over 230 cases closed per month.

14. State is also facing a recent increase in its FOIA burden due to the volume of requests and litigation related to matters concerning Ukraine, including more than 160 FOIA requests and 17 FOIA lawsuits.

15. As State's FOIA burden grows, its FOIA resources are becoming increasingly taxed. Whereas the Department used to be able to offer at least 500 potentially responsive pages processed per month in cases, now the Department generally can only offer 300 potentially responsive pages processed per month (or 450 pages per six weeks) given the increase of FOIA litigation demands.³ In July 2016, State quantified its FOIA processing⁴ capability to determine

³ State evaluates the types of records that are likely to be responsive to a request, and is occasionally able to offer a higher rate when the records are expected to be easier than usual to process (for example, when no exemptions are anticipated to apply to the documents and no intra- or inter-agency clearances are anticipated). This case involves more difficult documents—involving deliberative process privilege, law enforcement-related information, and overlapping intra- and inter-agency equities, among other sensitivities—so the Department cannot commit to processing at a higher rate.

⁴ "Processing" a document encompasses the full review, including assessing its responsiveness, reviewing for

how many pages it could process each month. State determined that each of its FOIA reviewers processed approximately 300 pages per month after those records were located through the Department's search. Since that time, State has endeavored to maintain that pace of review despite its increasing FOIA burden.

16. There are certain constraints on the Department's ability to precisely analyze and predict its processing capability. IPS currently employs retired Foreign Service Officers (Retired Annuitants or "REAs") as reviewers to leverage their knowledge of the Department. This reviewer staff mostly works on a part-time basis because their employment status with the Department limits them to 1,040 hours per calendar year. Given the cap on many reviewers' time, they typically do not work every pay period of the year in order to distribute work evenly throughout the year. As a result, it is difficult for IPS to estimate at any given time how many reviewers it has available to work on FOIA cases, as the number is continuously fluctuating. On average, IPS had 66 reviewers working on both litigation and non-litigation FOIA cases in FY 2018, and in the most recent pay period, approximately 46 FOIA reviewers processed records for release. With these resources, State is already overextended in its efforts to meet its existing litigation obligations.

17. Although State is currently undertaking steps to hasten its responses to FOIA requests (including by procuring new technology and recruiting additional personnel), the agency's current FOIA burden, available resources, and the rate at which new cases are being

applicable FOIA exemptions, consulting as necessary with the appropriate Department offices, other federal agencies, and any other offices or organizations that would need to review the document, incorporating those entities' input, and making a release determination.

filed remain serious constraints. I have therefore determined that State can only commit to processing an average of 300 pages per month or 450 pages per six weeks in most new cases.⁵

IV. The Department's Processing of Plaintiffs' FOIA Request

18. Approximately 3,700 pages of potentially responsive documents remain to be processed in this case. State continues to process this material at an average rate of 450 pages every six weeks,⁶ making productions of any responsive, non-exempt material to Plaintiffs every six weeks. This processing rate is commensurate with the rate to which State can routinely commit (i.e., 300 pages per month or 450 pages per six weeks), as described above. At this rate, State expects to complete processing of Plaintiffs' FOIA request by December 18, 2020.

19. Deviating from this timeline, which Plaintiffs have not previously disputed in this case, would result in a disproportionate share of State's FOIA resources being devoted to processing this request. Such resource allocation would compromise State's ability to comply with court orders in other FOIA lawsuits, as well as its ability to process FOIA requests that are not currently in litigation.

20. IPS processes FOIA requests on a first-in, first-out basis within each of three request tracks: expedited, simple, and complex. When a request goes into litigation, it is transferred to a different specialized component of IPS responsible for litigation and appeals: the Litigation and Appeals Branch of the Programs and Policies Division of IPS ("IPS/PP/LA"). IPS/PP/LA undertakes FOIA processing for litigation cases, including ensuring the performance of adequate searches for potentially responsive documents, coordinating review of such

⁵ As mentioned above, the Department evaluates each case individually, but in the vast majority of cases is unable to promise a higher rate without jeopardizing the program as a whole.

⁶ Although State processed fewer than 450 pages for some productions, the number of pages it processed for other productions exceeded 450 pages such that the current average processing rate across the five productions exceeds 450 pages.

documents, and preparing responses to the requester. Exceptionally demanding FOIA litigation court orders for regular productions result in the prioritization of those requests in litigation over all other pending requests, even those for information that the public may consider more compelling than topics that are the subject of litigation. In addition, as in the case of the court order in *Open Society Justice Initiative v. Central Intelligence Agency, et al.*, court orders that require processing in excess of State's declared capabilities adversely impact the Department's overall FOIA program, including its capacity to satisfy requests by other members of the public.

V. Conclusion

21. State is constantly pursuing opportunities to increase processing rates and give requesters the information that they seek as quickly as possible. However, State's processing schedules are based upon data to which I have access regarding the rate of review in past FOIA cases, State's existing and anticipated FOIA workload and processing resources, and the complexity of processing that will be required in each case. In light of these circumstances, State requires until December 18, 2020, to complete processing of Plaintiffs' FOIA request.

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

Executed this 19th day of February 2020, Washington, D.C.



Eric F. Stein

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION**

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION; AMERICAN CIVIL
LIBERTIES FOUNDATION OF
NORTHERN CALIFORNIA,

Plaintiffs,

v.

Civil Action No. 19-CV-00290

DEPARTMENT OF JUSTICE; FEDERAL
BUREAU OF INVESTIGATION;
DEPARTMENT OF HOMELAND
SECURITY; U.S. CUSTOMS AND BORDER
PROTECTION; U.S. CITIZENSHIP AND
IMMIGRATION SERVICES; U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT; DEPARTMENT OF
STATE.

Defendants.

DECLARATION OF MELISSA SMISLOVA

I, Melissa Smislova, do hereby state and declare as follows:

1. I am the Deputy Under Secretary for Intelligence Enterprise Readiness (“DUSIER”) for the Office of Intelligence and Analysis (“I&A”), U.S. Department of Homeland Security (“DHS”). I&A is a component of DHS, as well as an element of the U.S. Intelligence Community. In my official capacity, I have direct oversight of Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a (“Privacy Act”), policies, procedures, and litigation involving DHS I&A records, to include oversight of the two I&A personnel dedicated to the FOIA and Privacy Act request processing. As DUSIER, I have the

authority to release or withhold records, and the authority to articulate the position of I&A in actions brought under the FOIA and the Privacy Act.

2. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

3. DHS is an executive department of the federal government within the meaning of title 5 of the United States Code. Its primary statutory missions under the Homeland Security Act of 2002 are as follows:

- (A) Prevent terrorist attacks within the United States;
- (B) Reduce the vulnerability of the United States to terrorism;
- (C) Minimize the damage, and assist in the recovery, from terrorist attacks that do occur in the United States;
- (D) Carry out all functions of entities transferred to DHS, including by acting as a focal point regarding natural and manmade crises and emergency planning;
- (E) Ensure that the functions of the agencies and subdivisions within DHS that are not related directly to securing the homeland are not diminished or neglected except by a specific explicit Act of Congress;
- (F) Ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland;
- (G) Ensure that the civil rights and civil liberties of persons are not diminished by efforts, activities and programs aimed at securing the homeland; and
- (H) Monitor connections between illegal drug trafficking and terrorism, coordinate efforts to sever such connections, and otherwise contribute to efforts to interdict illegal drug trafficking.

6 U.S.C. § 111(b)(1).

4. I&A is a component of DHS operating at the headquarters-level of the Department. Pursuant to statute, the office is headed by an Under Secretary for Intelligence and Analysis, who doubles as the Chief Intelligence Officer for DHS. *Id.* § 121(b)(1)-(2).

5. I&A has broad intelligence- and information-gathering and sharing responsibilities under the Homeland Security Act of 2002, Executive Order No. 12,333, as amended, and Executive Order No. 13,388. These responsibilities obligate I&A to gather and share intelligence information in support of DHS's broader counterterrorism, homeland security, and component-specific missions; in support of the broader national intelligence mission of the Intelligence Community; and as part of the federal information-sharing environment.

6. The National Security Act of 1947, 61 Stat. 495 (1947) (codified as amended in scattered sections of 50 U.S.C.), defines the term "Intelligence Community" as including, among others, I&A. *See* 50 U.S.C. § 3003(4)(K) (listing I&A as one of seventeen elements of the Intelligence Community); *see also* Exec. Order No. 12,333 § 3.5(h)(14). As such, I&A falls within the purview of Executive Order 12,333, which sets forth general guidance regarding the collection, retention, and dissemination of intelligence and other information.

7. I&A currently has 23 pending FOIA requests not in litigation and is involved with 18 pending lawsuits. Last year, I&A received 254 FOIA requests, as well as numerous record consultations and referrals. I&A anticipates a similar volume of FOIA requests this year.

THE FOIA REQUEST AND I&A'S SEARCH

8. I&A received the Plaintiffs' FOIA request on January 8, 2020 after referral from the DHS Privacy Office. I&A did not receive this request directly from the Plaintiffs.

9. After receipt of the referral, I&A FOIA tasked out searches to all I&A personnel who would reasonably have records responsive to the requests. In addition, I&A worked with

DHS Office of the Chief Information Officer (OCIO) to run automated searches of certain I&A personnel email accounts. In an abundance of caution, and recognizing the limitations of term-based searches, these OCIO searches used broad terms likely to be overinclusive as follows:

- “Social Media Task Force”
- “SMTF”
- “Social media pilot”
- (“search*” OR “analy*” OR “filter*” OR “monitor*” OR “collect*” OR “purchase” OR “buy” OR “subscri*” OR “pay*”) AND (“social media” OR “Facebook” OR “Twitter” OR “instagram” OR “LinkedIn” OR “WhatsApp” OR “YouTube”)
- (“machine learning” OR “ML” OR “artificial intelligence” OR “AI” OR “algorithm*”) AND (“social media” OR “Facebook” OR “Twitter” OR “instagram” OR “LinkedIn” OR “WhatsApp” OR “YouTube”)

10. I&A FOIA has begun reviewing the results of the searches to complete page counts and eliminate duplicates. I&A has identified approximately 850 potentially responsive pages from I&A personnel’s searches and 14,135 potentially responsive pages from OCIO’s automated email searches, for a total of approximately 15,000 pages. In reviewing a sampling of the latter, I&A anticipates that the vast majority of these emails will be determined to be non-responsive during processing.

11. From an initial review, the potentially responsive records from I&A personnel’s searches appear to fall into two categories. First, I&A has records relating to the Social Media Task Force. The Social Media Task Force was not an I&A body, but rather a Department-wide Task Force chaired by a former Under Secretary for I&A and co-chaired by representatives from the DHS Office of Policy and the Transportation Security Administration, examining non-intelligence social media use programs. I&A anticipates that all such records will be referred to other DHS offices and components as these records did not originate with I&A. Second, I&A has records related to I&A’s intelligence collection of social media to address foreign

intelligence threats. These records appear unrelated to the issues and events discussed in Plaintiffs' FOIA request, and most of these records post-date Plaintiffs' May 2018 request. However, I&A anticipates that some records would fall within the five broad categories of "Requested Records" listed on pages 6-7 of Plaintiffs' request, if the descriptions of those categories of records were read in isolation from the rest of the request. Were Plaintiffs to confirm that they do not seek such unrelated records, I&A would be able to reduce its processing timeline.

PROCESSING PROPOSAL

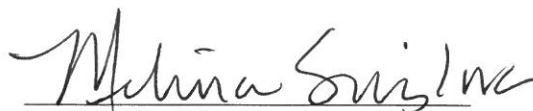
12. I&A proposes to prioritize processing of the records resulting from I&A personnel's searches given increased likelihood of responsiveness. To best address Plaintiffs' interests, I&A will process the results of the I&A personnel searches first. Beginning in March, I&A will process at least 250 pages each month and will make its first interim response by the end of the month. I&A will complete processing of the records located in I&A personnel's searches no later than the end of April. As addressed above, I&A can reduce this timeline if the Plaintiffs confirm they do not seek the records related to I&A's foreign intelligence mission.

13. Given the high likelihood of unresponsive emails, I&A will review the OCIO results after completing processing of the I&A personnel search records. I&A will also seek the assistance of the DHS Privacy Office in identifying more strategic uses of the document review software to enable I&A to more efficiently process the records and reduce the raw totals provided above before manual review. No later than May, I&A will reduce the raw totals through duplication and other technical efforts to provide an updated count of likely responsive records. I&A will complete review and processing all results of the OCIO searches by the end of calendar year 2020, processing no less than 500 pages per month from May through December.

14. As production by August would not be feasible given record volume and limited FOIA resources, I&A proposes the timeline described herein as a nevertheless aggressive processing timeline that prioritizes review of those records most likely to be responsive.

I certify, pursuant to 28 U.S.C. § 1746, under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of February, 2020, in Washington, D.C.

A handwritten signature in black ink, appearing to read "Melissa Smislova". The signature is written in a cursive style with a horizontal line underneath the name.

Melissa Smislova
Deputy Under Secretary for Intelligence
Enterprise Readiness
Office of Intelligence and Analysis
U.S. Department of Homeland Security

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES	:	
UNION FOUNDATION, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Case No. 19-CV-00290-EMC
	:	
DEPARTMENT OF JUSTICE, et al.,	:	
	:	
Defendants.	:	

DECLARATION OF JAMES V.M.L. HOLZER

I, James V.M.L. Holzer, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Chief Freedom of Information Act (“FOIA”) Officer for the Department of Homeland Security (“DHS”) Privacy Office (“Privacy Office”).
2. In this capacity, I am the DHS official responsible for implementing FOIA policy across DHS and responding to requests for records under the FOIA, 5 U.S.C. § 552, the Privacy Act, 5 U.S.C. § 552a, and other applicable records access provisions. I have been employed by DHS Privacy in this capacity since May 2016. I previously served as the Director of the Office of Government Information Services within the National Archives and Records Administration, and prior to that I served as the Senior Director of FOIA Operations for DHS.
3. Through the exercise of my official duties, I have become familiar with the background of Plaintiffs’ FOIA request, and I have also become familiar with the background of this litigation. I make the statements herein based on my personal knowledge, as well as on

information that I acquired while performing my official duties.

4. Under the leadership of the Chief Privacy Officer, the DHS Privacy Office is responsible for monitoring FOIA operations across the Department and recommending adjustments to agency practices, policies, personnel, and funding as may be necessary to improve performance, providing FOIA-related training, and preparing the required annual reports on the Department's FOIA performance.¹
5. These responsibilities are carried out by a FOIA Team under the DHS Privacy Office to promote efficiency, effectiveness, and statutory compliance throughout the Department. The FOIA Team is comprised of three teams: 1) Disclosure; 2) FOIA Appeals and Litigation; and 3) FOIA Policy, Compliance, and Training.
6. The DHS Privacy Office's FOIA staff currently consists of a Deputy Chief FOIA Officer, a Senior Director of FOIA Operations and Management, a Senior Director of FOIA Litigation, Appeals, and Policy, three (3) director level positions, one (1) non-director supervisory analyst, one (1) senior level policy analyst position, six (6) full-time litigation analyst positions (to include four (4) contractors), thirteen (13) FOIA specialist positions, and sixteen (16) other contractors. At this time, four (4) of the DHS Privacy Office FOIA employees are new or with little to no experience processing records for complex FOIA requests, one (1) of the full-time litigation analyst positions is vacant and one (1) of the FOIA specialist positions is vacant. Additionally, a part-time litigation analyst resigned unexpectedly, effective September 30, 2019, one of the full-time litigation analysts resigned effective January 21, 2020, and two of the contractors who supported

¹ *FOIA Improvement Act of 2016*, Pub. L. No. 114-185, 130 Stat. 538 (2016) (provisions codified at 5 U.S.C. § 552) and Pub. L. No. 110-175 (Dec. 31, 2007).

the Litigation Team have resigned effective January 31, 2020, and February 21, 2020.

While DHS is currently working to hire additional staff to replace the individuals who have left the office, and to insulate the team against further attrition, these positions have not been filled, and will not be filled for some time. Lastly, one (1) of the Directors is on a temporary 120-day detail to the DHS Office of Civil Rights and Civil Liberties (CRCL) to fill as its acting FOIA Officer.

7. Of most relevance to this litigation, the DHS Privacy Office FOIA Appeals and Litigation team serves as liaison between Office of the General Counsel (OGC) and the DHS Privacy Office leadership on complex FOIA requests. In addition, the team provides guidance and training on recent developments in the field of disclosure, to include court decisions and current legislation. The team also researches, analyzes, and evaluates complex FOIA requests to determine whether the FOIA/PA was properly applied during the original processing of a FOIA request.
8. The DHS Privacy Office Disclosure team is responsible for receiving, tracking, processing, and closing all FOIA requests received by the DHS Privacy Office. The DHS Privacy Office FOIA staff processes initial FOIA and Privacy Act (PA) requests to the Office of the Secretary (including the Military Advisor's Office), Office of the Citizenship and Immigration Services Ombudsman, Countering Weapons of Mass Destruction Office, Office of the Executive Secretary, Office of Partnership and Engagement, Management Directorate, Office for Civil Rights and Civil Liberties, Office of Operations Coordination, Office of Strategy, Policy, and Plans, Office of the General Counsel, Office of Legislative Affairs, and Office of Public Affairs. This team is also

responsible for engaging with the Components on the proper handling and processing of all FOIA transfers and referrals to DHS Privacy Office. As of the Fiscal Year (FY) 2020, the DHS Privacy Office Disclosure team is also responsible for processing initial FOIA and PA requests for the Office of Biometric Identity Management (OBIM), the Office of Science & Technology and other DHS Headquarters components. The DHS Privacy Office is also responsible for coordinating FOIA responses across DHS components when the requests involve cross-cutting issues involving multiple components and DHS Headquarters. Finally, as the lead for FOIA matters across the department, the DHS Privacy Office has been called upon to assist DHS component FOIA offices with the processing of records when those components have an urgent need to comply with a court order.

9. The DHS Privacy Office FOIA Policy, Compliance, and Training team is responsible for developing FOIA resource guidance and training materials for FOIA professionals and DHS employees. The team ensures Departmental and component guidance is in compliance with FOIA/PA policies and procedures while promoting openness and transparency. In addition, this team has responsibility for completing required annual reports, which involves gathering information from all DHS components, analyzing the data and information they provide, and compiling it all into a final consolidated report. The Policy, Compliance, and Training team is also tasked with regularly providing detailed statistical analyses of DHS-wide FOIA operations.
10. FOIA specialists handle all aspects of the FOIA request process. They receive new FOIA requests, along with referrals and consultation requests from other agencies or

DHS components, log those new FOIA requests into the FOIA case tracking system, and send out search taskers to various offices compelling them to search for records. Once those searches are complete, FOIA specialists review any records located and make withholding determinations, redacting any exempt information pursuant to the FOIA exemptions. FOIA specialists also send out FOIA responses and work on other FOIA projects for the DHS Privacy Office, as needed.

11. In FY 2018, the DHS Privacy Office received 1,448 requests, a seven percent increase compared to FY 2017, and processed 1,435 requests, a 39 percent increase compared to FY 2017. Despite the increase in FOIA requests, and resource constraints, the DHS Privacy Office continues to make good faith efforts and exercises due diligence in processing requests on a first-in, first-out basis. As a result of these efforts, the DHS Privacy Office's backlog ended at 511 requests, only a 17 percent increase compared to FY 2017. Were it not for these efforts, the backlog would be considerably higher. About two-thirds of the requests received by the DHS Privacy Office are categorized as complex requests, meaning that they require a wide-ranging search, frequently across multiple offices, and involve a large number of records.

12. The uptick in FOIA demands over the last two years is a significant departure from the rate of increase seen over the prior decade. The summary table below provides a snapshot of the FOIA demands placed on the DHS Privacy Office since FY 2008. As the table shows, the number of FOIA requests received by DHS increased from 849 in FY 2008 to 1,317 in FY 2011. From FY 2012 to 2016, the DHS Privacy Office saw a steady decline in the number of requests received from 730 requests in FY 2012, to 599

requests in FY 2016. However, from FY 2017 to FY 2018 the number of requests more than doubled from FY 2016. These large spikes reflect that DHS has experienced a doubling of initial FOIA demand over a two-year period, while the previous years showed a continued decline in the number of requests received. The number of FOIA requests received by the DHS Privacy Office increased exponentially in FY 2019, to 43,024. This increase is a result of the realignment that made the DHS Privacy Office responsible for processing FOIA requests directed to OBIM. While the majority of FOIA requests directed to OBIM can be categorized as “simple,” the sheer volume requires that a majority of the FOIA staff focus on those requests to avoid a corresponding increase in the backlog. Additionally, while fewer in number, most requests received for Headquarters records have become increasingly complex, as they are now broadly worded, resulting in retrieval of huge volumes of documents requiring review.

DHS Privacy Office 11-year snapshot

Fiscal Year	Received	Processed	Litigation ²	Personnel
2008	849	844		7.25
2009	1,045	992	6	14.6
2010	1,113	1,163	9	17
2011	1,317	1,327	25	16
2012	730	709	36	15.75
2013	798	840	19	16
2014	705	665	20	17
2015	649	697	22	18.6
2016	599	14,4883	24	16.58

²The DHS Privacy Office did not officially track litigation statistics, but it logs an increase from six (6) cases in FY 2009 to 64 in FY 2017 and 48 in FY 2018.

³ In FY 2016, the DHS Privacy Office partnered with the National Protection and Programs Management Directorate (NPPD)/Office of Biometric Identity Management (OBIM) leadership to execute an aggressive 40-day Backlog Reduction Plan. As a result of this partnership, the teams were able to reduce OBIM’s backlog by 75 percent by the end of FY 2016 and reduce the Department’s projected FY 2016 overall backlog by 26 percent.

Fiscal Year	Received	Processed	Litigation ²	Personnel
2017	1,348	14,0344	64	19.25
2018	1,448	13,4355	48	25
2019	43,024	43,062	32	39

13. Furthermore, during that same time the DHS Privacy Office has experienced an unanticipated spike in FOIA litigation. The DHS Privacy Office is currently involved in over 80 active lawsuits, 32 of which were filed in FY 2019. In FY 2018, the DHS Privacy Office reviewed over 100,000 pages of records from DHS Components relating to this and other Component FOIA litigations.

14. In addition to processing incoming FOIA requests for records, DHS Privacy must also process records that are the subject of these litigations. Of the cases in which the DHS Privacy Office is directly involved, 16 cases are at the point where the DHS Privacy Office is actively facilitating the production of documents, and DHS anticipates that several more will reach that stage within the next month. These cases, which include cases where a Court has ordered DHS to produce a set number of pages, or where DHS has agreed to produce a set number of pages and informed the Court of those agreements, require the DHS Privacy Office to process at least 7,500 pages per month, and it is anticipated that similar court orders may be issued in one or more other pending cases potentially making this total even higher in the near future.

⁴ The DHS Privacy Office again partnered with NPPD/OBIM leadership in April 2017 to execute an aggressive Backlog Reduction Project. As a result of this collaboration, the teams reduced OBIM's backlog by over 99 percent by the end of FY 2017, thereby reducing the Department's backlog by 30 percent. At the end of FY 2017, the OBIM backlog stood at less than 40 cases.

⁵ In FY 2018, the DHS Privacy Office collaborated with several Components in aggressive backlog reduction efforts that resulted in the closure of 12,000 requests that otherwise would likely have been in the DHS backlog at the end of the fiscal year.

15. In addition to processing records for various litigation releases, members of the DHS FOIA litigation team also assist agency counsel in preparing Answers upon receipt of new Complaints, constantly provide updates and edits for Joint Status Reports, draft Declarations that are filed in FOIA litigation, and draft *Vaughn* indices. The team also has duties that do not relate directly to litigation, such as logging-in, acknowledging, and transferring all administrative appeals of FOIA responses to the U.S. Coast Guard administrative law judges who adjudicate DHS Headquarters FOIA appeals. Litigation team members also are frequently called upon to train new employees and assist with highly complex FOIA requests outside of litigation.
16. The DHS Privacy Office has taken a number of steps to address the recent rise in FOIA requests and litigation. In FY 2016, the DHS Privacy Office conducted a comprehensive review of its staff structure, alignment, and procedures to identify opportunities to create additional efficiencies, which resulted in a realignment of staff and the request-processing structure. For example, the DHS Privacy Office realigned its staff and created three dedicated teams: Disclosure; FOIA Appeals and Litigation; and FOIA Policy, Compliance, and Training. The reorganization substantially contributed to a 39 percent increase in processed FOIA requests compared to the previous fiscal year. In addition, there were improved efficiencies on the DHS Privacy Office FOIA Litigation Team processing because staff assigned to such requests were able to concentrate solely on those types of cases. This team reviewed and processed more than 100,000 pages in FY 2018. In addition, the DHS Privacy Office has been able to substantially increase staffing levels on the FOIA team, from 16.58 in FY 2016 to more than 25 Full Time

Equivalents in FY 2018, to 43 Full Time Equivalents in the current Fiscal Year. The DHS Privacy Office is currently taking steps to address the staffing shortfall, including the recent hiring of a Senior Director to supervise the FOIA Litigation team, the future hiring of a Team Lead to lead the FOIA Litigation team operations, and working to bring on additional full-time federal employees and contractors. However, the process to hire additional staff and to get those employees through the clearance process can be lengthy and unpredictable, and we are unable to predict when staff members may decide to seek employment outside of the Privacy Office. To assist in meeting the surge in production demands caused by the increased litigation activity, my office authorized overtime at a cost of \$45,000 in FY19 alone. Despite these best efforts, however, the DHS Privacy Office is struggling to handle the significant increase in number of FOIA requests and FOIA litigation matters. Many of these litigations have monthly court ordered production deadlines. The DHS Privacy Office is endeavoring to meet all these deadlines at the same time as being responsive to all of the incoming FOIA requests as well as the continuous need to show progress in each given case in litigation.

17. With regard to the instant case, by letter dated May 30, 2018, DHS acknowledged Plaintiffs' request dated May 24, 2018, assigned Plaintiffs' request the reference number 2018-HQFO-01016, advised Plaintiffs that the request is too broad in scope/did not specifically identify the records sought, and asked Plaintiffs to more reasonably describe the records requested. Plaintiffs filed the Complaint in this case on January 17, 2019.
18. Beginning about May 2019, DHS has attempted to work with Plaintiffs in an effort to narrow the scope of Plaintiffs' five separate requests to more particularly identify the

records sought and to come to an agreement as to the searches. As a result of these negotiations, the parties reached agreement on a set of search terms and date parameters to be used in the electronic search in early February 2020.

19. The DHS Privacy Office tasked the Office of Chief Information Officer (OCIO) to conduct the searches on January 14, 2020, after receiving the custodian information. On January 15, 2020, DHS received information from OCIO stating that OCIO has started searching but that they had to split the search into three parts by date range because of how the data is stored. Plaintiffs have since agreed to exclude the earliest date range, January 1, 2015, through April 30, 2015, so OCIO now only needs to search the two later date ranges. For part 1, OCIO conducted a search using the date range May 1, 2018, through May 24, 2018, using the Department's current archiving solution, Office365. This search resulted in greater than 200GB of data. DHS's IT systems do not allow for transfers of files over 100GB, and transferring files over 30GB can cause the system to experience errors. After conducting the initial search, OCIO informed the DHS Privacy Office that it believed that one of the search terms, "analy*" was responsible for causing most of the hits, but that it was likely that the other search terms which use wildcards ("*") could also be driving up the file size. Plaintiffs agreed to remove the term "analy" from the search, on February 6, 2020, and on February 10, 2020, OCIO re-ran the search removing that term. OCIO made this search a priority, halting or postponing searches for other litigation matters and other FOIA requests, in order to provide the DHS Privacy Office with the results of the search on an expedited basis. The revised search returned 199GB, which is still too large for DHS' systems to transfer.

20. OCIO has advised that they have not started the next search, which covers the May 1, 2015, through May 24, 2018, date range. For part 2, OCIO will conduct a search of the older journaling storage system, the Enterprise Vault. As this search covers a three-year period, it is expected to return an even larger data set than the first search.
21. An additional factor contributing to the size of the search results is the number of accounts OCIO has been asked to search. OCIO is currently searching the accounts of 161 individuals. That number includes almost the entire staff of the DHS Policy office. DHS will seek to negotiate with Plaintiffs further on the scope of accounts to be searched in order to reduce the size of the search results.
22. In a further effort to resolve the search issues, DHS plans to propose to Plaintiffs revised search terms and a narrower set of custodians by March 4, 2020 and, once a sufficiently limited search is agreed to by the parties, will again task OCIO. Once DHS Privacy tasks a search to OCIO it typically takes OCIO two to four weeks to conduct a search depending on a number of variables, including the keywords, number of individuals, and time period used, other searches in the queue, and court-ordered priorities that may take precedence.
23. Once the search is complete, DHS estimates that the next steps, described below, will take at least 2 to 4 additional weeks because of the large amount of data returned from the initial search. The three-step process that follows the search includes:
- Step 1. RMD DA places the data on the DHS Privacy Office server pending ingestion into FOIAXpress (“FX”). This is not an e-discovery tool but rather a single, unified application for managing the entire lifecycle of FOIA requests and appeals, from the initial

inquiry to delivery of documents. At this stage in the search process, the DHS Privacy Office will only know the file size of the potentially responsive universe of records (e.g., five (5) GB of data) rather than the number of files/documents or page numbers.

Step 2. The DHS Privacy Office then uploads the data into FX's Advanced Document Review (ADR), an application within FX that will de-duplicate files, and allow FOIA staff to further review and identify potentially responsive records. The DHS Privacy Office is then able to provide the number of documents that were uploaded into the system, how many files were duplicates, and whether any of the files failed to upload. At this stage, the DHS Privacy Office will know the total number of files (e.g., 410 potentially responsive documents/files), but not a page count.

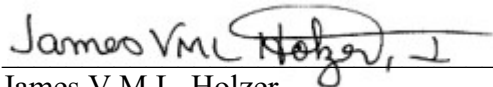
Step 3. Once the individual file(s) have been reviewed for responsiveness to the request, the DHS Privacy Office then moves the identified set of responsive files into Document Manager ("DM"), the application in FX that allows for the processor to make withholding determinations on the documents after a line-by-line review. It is only at this stage of processing that the DHS Privacy Office will then be able to provide a page count. It is only when DHS knows the total number of pages that DHS will be in a position to provide the requester with a processing schedule.

24. Based on the above, I am unable to estimate when DHS will complete these searches, or provide a production schedule at this time. DHS is committed to continuing to work with Plaintiffs to craft a search that will both locate the records Plaintiffs are seeking, and be tailored in scope so that DHS' systems will be able to handle the data located. Additionally, the DHS Office of Intelligence & Analysis (I&A) is also conducting a search for records responsive to Plaintiffs' request. As their search is expected to locate records with DHS Headquarters equities, the DHS Privacy Office will be responsible for

issuing any releases of I&A records. The DHS Privacy Office is unable to speculate how long that search will take or how many records it will locate.

I declare the foregoing is true and correct to the best of my knowledge and belief, under penalty of perjury, pursuant to 28 U.S.C. § 1746.

Dated the 19th day of February, 2020

A handwritten signature in black ink that reads "James V.M.L. Holzer, J." with a horizontal line extending to the right.

James V.M.L. Holzer
Deputy Chief FOIA Officer
U.S. Department of Homeland Security