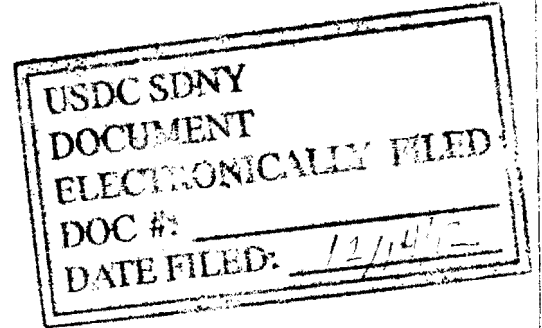


Settled in 1/5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE, including components Criminal
Division, Executive Office for United States
Attorneys, Office of Information Policy, and
Federal Bureau of Investigation; UNITED
STATES DEPARTMENT OF THE TREASURY,
including component Internal Revenue Service,

Defendants.

No. 12-CV-4677 (SAS)

ECF Case

STIPULATION AND ORDER

WHEREAS, by letters dated February 16, 2012, the American Civil Liberties Union Foundation ("ACLU") submitted identical requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to United States Department of Justice ("DOJ") components Criminal Division, Executive Office for United States Attorneys ("EOUSA"), Office of Information Policy ("OIP"), and Federal Bureau of Investigation ("FBI") (collectively, the "DOJ Components"), as well as United States Department of the Treasury component Internal Revenue Service ("IRS") (collectively, with the DOJ Components, the "Components" or "Defendants"), seeking records relating to the Components' access to the contents of individuals' private electronic communications (collectively, the "FOIA Requests");

WHEREAS, the FOIA Requests contain six distinct paragraphs, each of which seeks the disclosure of specified records;

WHEREAS, on June 14, 2012, ACLU filed this action, seeking the release of records responsive to the FOIA Requests;

WHEREAS, Defendants and ACLU have conferred and agreed on a Final Production List ("FPL") with respect to four of the six paragraphs of the FOIA Requests — specifically, paragraphs 1, 2, 5 and 6 (the "Covered Paragraphs"). The FPL, among other things, limits the information sought by ACLU as to the Covered Paragraphs; identifies and limits the Components, as well as the offices or units within the Components, that must conduct searches for records responsive to the FPL; and specifies the format and time-frame in which any non-exempt records responsive to the FPL must be processed and produced. The FPL is attached hereto as Exhibit A;

WHEREAS, this Stipulation and the FPL relate only to the Covered Paragraphs and do not limit or otherwise affect ACLU's claims with respect to paragraphs 3 and 4 of the FOIA Requests;

IT IS HEREBY STIPULATED AND AGREED, by and between Defendants and ACLU as follows:

1. Defendants will produce any non-exempt records responsive to the FPL in accordance with the terms of this Stipulation and the FPL. Inclusion of particular types or categories of records in the FPL is not a concession by Defendants that such records exist or that they will not be withheld, in whole or in part, pursuant to FOIA's statutory exemptions.
2. By December 24, 2012, Criminal Division, EOUSA, FBI and IRS shall each provide ACLU with a further written description of their search methodologies (*i.e.*, a written description beyond what is already set forth in paragraph 3 of the FPL). Each such further

written description (collectively, the "Search Methodologies") shall include, at a minimum (and to the extent not already set forth in paragraph 3 of the FPL): (1) the title of each individual who will be instructed to search for records responsive to the FPL; (2) a description of the location(s) that each such individual will search; (3) a description of how each such individual intends to search the location(s) for responsive records; (4) if any such individual proposes to conduct an electronic search, a list of proposed search terms and connectors; and (5) an explanation why it is reasonable to limit the search to the individual(s) and location(s) identified.

3. By January 4, 2013, counsel for ACLU shall notify counsel for Defendants, in writing, whether the Search Methodologies referenced above in paragraph 2 are acceptable to ACLU. To the extent ACLU finds any Search Methodology unacceptable, by January 4, 2013, counsel for ACLU shall provide counsel for Defendants with a written explanation as to why the Search Methodology is unacceptable. The parties shall thereafter undertake a good faith effort to reach agreement on a Search Methodology that is acceptable to ACLU.

4. On the date that counsel for Defendants receives a written notification from ACLU approving a particular Component's Search Methodology, that Component shall begin to search for and process records in accordance with the FPL and its approved Search Methodology. In this circumstance (*i.e.*, where ACLU has approved in writing a particular Component's Search Methodology), if the Component searches for records in accordance with the FPL and its approved Search Methodology, ACLU waives the right to challenge the adequacy of the Component's search. ACLU retains the right, however, to argue that the Component failed to search for records in accordance with the FPL and its approved Search Methodology.

5. If counsel for Defendants has not received a written notification from ACLU approving a particular Component's Search Methodology by January 25, 2013, that Component shall begin to search for and process records in accordance with the FPL, and whatever search methodology it deems appropriate, on January 25, 2013. In this circumstance (i.e., where ACLU has not approved in writing a particular Component's Search Methodology), ACLU reserves the right to challenge the adequacy of the Component's search.

6. With respect to OIP, ACLU finds the search methodology for OIP set forth in paragraph 3(a) of the FPL acceptable. Accordingly, OIP shall begin to search for and process records in accordance with the FPL on the date counsel for Defendants receives notification through the Court's Electronic Case Filing system that this Stipulation has been "so ordered" by the Court. If OIP searches for records in accordance with the FPL, ACLU waives the right to challenge the adequacy of OIP's search. ACLU retains the right, however, to argue that OIP failed to search for records in accordance with the FPL.

7. Each Component shall complete its search for, and processing and production of, records in accordance with the FPL, and any approved Search Methodology, within 90 calendar days of the date the Component is required to begin processing records under this Stipulation. Accordingly, each Component shall have completed its processing and production of records no later than April 25, 2013. Although the Components are afforded 90 calendar days to complete their productions, if practicable, they will complete their productions before that deadline.

8. No later than 30 calendar days from the date the last Component completes its production of records in accordance with the FPL, each Component shall provide ACLU with a *Vaughn* index containing a list of any records responsive to the FPL that were withheld in part or

in full, and a justification for such withholding. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

9. No later than the 21 calendar days from the date that the Components provide ACLU with their *Vaughn* indices, counsel for ACLU shall notify counsel for Defendants, in writing, whether ACLU intends to challenge any Components' withholdings or search. Such notice shall specify, by Component, the search and withholding(s) challenged.

10. If ACLU intends to challenge any Component's withholdings or search, no later than seven calendar days from the date that counsel for ACLU notifies counsel for Defendants of this fact, counsel for ACLU and counsel for Defendants shall submit a joint letter to the Court proposing a summary judgment briefing schedule.

11. This Stipulation and the attached FPL represent the final agreement between the parties with respect to the records sought by ACLU in connection with the Covered Paragraphs (i.e., paragraphs 1, 2, 5 and 6 of the FOIA Requests). With respect to the Covered Paragraphs, Defendants are released from conducting searches for, or processing or producing, any records that are not encompassed by this Stipulation and the FPL. This Stipulation and the FPL have no preclusive effect on future FOIA requests by ACLU, or on the two paragraphs of the FOIA Requests that are not resolved by this Stipulation (i.e., paragraphs 3 and 4 of the FOIA Requests).

12. This Stipulation and the FPL contain the entire agreement between ACLU and Defendants as to the Covered Paragraphs. No statements, representations, promises, agreements, or negotiations, oral or otherwise, between the parties or their counsel that are not included herein shall be of any force or effect.

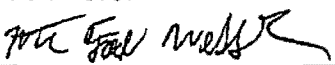
13. This Court shall retain jurisdiction over this action.

14. This Stipulation is for settlement purposes only and non-precedential with respect to any other FOIA case.

Dated: New York, New York
December 13, 2012

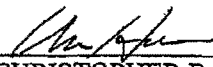
Dated: New York, New York
December 13, 2012

AMERICAN CIVIL LIBERTIES UNION
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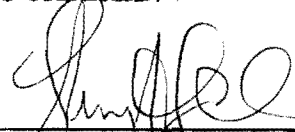
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Attorney for Defendants

SO ORDERED:


HON. SHIRA A. SCHEINDLIN
United States District Judge

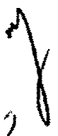
Dated: Dec. 14, 2012 

EXHIBIT A

Final Production List

1. Description of records sought from Defendants in response to Paragraphs 1, 2, 5 and 6 of the FOIA Requests:

a. Final policies, procedures, and practices in effect at any point between January 1, 2008, and November 15, 2012, followed to obtain the contents of a person's private electronic communications for law enforcement purposes. The phrase "final policies, procedures, and practices" encompasses only those documents that reflect a final agency position or an actual agency procedure or practice, and excludes documents that are predecisional and deliberative in nature. A record that is otherwise responsive shall not be excluded merely because it is in a form other than a signed memorandum or letter. Responsive records could include, among other things, manuals, handbooks, PowerPoint presentations or emails. The term "electronic communications" has the meaning set forth in 18 U.S.C. § 2510(12). Consistent with 18 U.S.C. § 2510(8), the term "contents" encompasses only information concerning the substance, purport, or meaning of electronic communications.

b. Final guidance in effect at any point between June 18, 2008, and November 15, 2012, addressing the impact of *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), and/or *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), on the government's ability to obtain the contents of a person's private electronic communications for law enforcement purposes. The term "final guidance" encompasses only those documents that reflect a final agency position, and excludes documents that are predecisional and deliberative in nature. A record that is otherwise responsive shall not be excluded merely because it is in a form other than a signed memorandum or letter. Responsive records could include, among other things, manuals, handbooks, PowerPoint presentations or emails. The terms "electronic communications" and "contents" have the meaning described above in connection with paragraph 1(a).

c. Company manuals and other documents reflecting pricing and data access policies provided to DOJ by Internet Service Providers and mobile carriers between January 1, 2008, and November 15, 2012, relating to the government's ability to obtain the contents of a person's private electronic communications for law enforcement purposes. The terms "electronic communications" and "contents" have the meaning described above in connection with paragraphs 1(a) and 1(b).

2. Description of each Defendant's search obligations:

a. With respect to paragraph 1(a) above: (1) OIP will search for responsive final policies; (2) Criminal Division will have its Computer Crime and Intellectual Property Section ("CCIPS") and Office of Enforcement Operations ("OEO") search for responsive final policies, procedures, and practices; (3) EOUSA will have the United States Attorney's Offices for the Southern District of New York, the Eastern District of New York, the Northern District of Illinois, the Northern District of California, the Eastern District of Michigan and the Southern District of Florida (collectively, the "USAOs") search for responsive final procedures and practices; (4) FBI will have the Investigative Law Unit, the Science and Technology Law Unit, and the Science and Technology Policy Law Unit within its Office of the General Counsel (collectively, the "FBI Units") search for responsive final procedures and practices; and (5) IRS will have its Headquarters Office of Chief Counsel and Headquarters Criminal Investigation Division (collectively, the "IRS Headquarters Offices") search for responsive final policies, procedures, and practices.

b. With respect to paragraph 1(b) above, OIP, CCIPS, OEO, the USAOs, the FBI Units, and the IRS Headquarters Offices will search for responsive final guidance.

c. With respect to paragraph 1(c) above, CCIPS will search for responsive documents.

3. Description of each Defendant's search methodology:

a. OIP will conduct an electronic search of the database of the Departmental Executive Secretariat (the "Database") for records reflecting any final policies, and any final guidance, responsive to paragraphs 1(a) and 1(b) above. The Database is the official records repository for the Offices of the Attorney General and the Deputy Attorney General, and contains all memoranda and other final guidance transmitted to other DOJ components. OIP will search the Database using the following search terms and connectors: electronic and communication; private and communication; private and electronic; Warshak; Quon; [Arch Wireless]; warrantless and (electronic or email or e-mail or [text message]); without and warrant and (electronic or email or e-mail or [text message]); [probable cause] and (electronic or email or e-mail or [text message]); [Stored Communications Act]; [Electronic Communications Privacy Act]; [18 U.S.C. § 2703].

Where OIP searches the Database using the formulation "electronic and communication," the search will pull any document in which the terms "electronic" and "communication" both appear. Where OIP searches the Database using the formulation "(electronic or email)," the search will pull any document in which at least one of the terms "electronic" or "email" appears. Where OIP searches the Database using the formulation "[Arch Wireless]," the search will pull any document in which the words "Arch" and "Wireless" appear next to one another in that order. Searches of the Database

are not case specific (*e.g.*, a search for “[Arch Wireless]” will pull a document where “Arch” and “Wireless” are not capitalized), and will capture the plural form of singular terms (*e.g.*, a search for “electronic and communication” will pull a document in which the words “electronic” and “communications” appear).

b. Criminal Division will send the agreed-upon language for paragraphs 1(a), 1(b) and 1(c) above to the Chief and Principal Deputy Chief of CCIPS (and potentially to additional CCIPS personnel should the Chief and/or the Principal Deputy Chief deem it appropriate). Criminal Division will send the agreed-upon language for paragraphs 1(a) and 1(b) above to the Principal Deputy Chief of OEO (and potentially to additional OEO personnel should the Principal Deputy Chief deem it appropriate). All CCIPS personnel to whom the agreed-upon language ultimately is sent will be instructed to collect: documents reflecting any final policies, procedures or practices responsive to paragraph 1(a) above; documents reflecting any final guidance responsive to paragraph 1(b) above; and any documents responsive to paragraph 1(c) above. All OEO personnel to whom the agreed-upon language ultimately is sent will be instructed to collect documents reflecting any final policies, procedures or practices responsive to paragraph 1(a) above, and documents reflecting any final guidance responsive to paragraph 1(b) above.

c. EOUSA will send the agreed-upon language for paragraphs 1(a) and 1(b) above to the Chief of the Criminal Division for each of the USAOs (and potentially to additional USAO personnel should a relevant Chief deem it appropriate). All USAO personnel to whom the agreed-upon language ultimately is sent will be instructed to collect documents reflecting any final procedures or practices responsive to paragraph 1(a) above, and documents reflecting any final guidance responsive to paragraph 1(b) above.

d. FBI will send the agreed-upon language for paragraphs 1(a) and 1(b) above to a point of contact (“POC”) within each of the FBI Units. The POC will instruct all current personnel within the Units to collect documents reflecting any final procedures or practices responsive to paragraph 1(a) above, and documents reflecting any final guidance responsive to paragraph 1(b) above.

e. IRS will send the agreed-upon language for paragraphs 1(a) and 1(b) above to the following individuals: Special Counsel, Office of the Associate Chief Counsel (Corporate); Special Counsel, Office of the Division Counsel/Associate Chief Counsel (Criminal Tax); Special Counsel, Office of the Associate Chief Counsel (Financial Institutions and Products); Special Counsel, Office of the Associate Chief Counsel (Income Tax and Accounting); Special Counsel, Office of the Associate Chief Counsel (International); Special Counsel, Office of Division Counsel (Wage & Investment); Senior Level Counsel, Office of Division Counsel (Large Business & International); Technical Advisor to the Special Counsel (National Taxpayer Advocate Program); Associate Chief Counsel (Passthroughs and Special Industries); Assistant Division Counsel, General Litigation (Small Business/Self-Employed); Chief, Claims,

Labor and Personnel Law Branch (General Legal Services); Chief, Branch 6 (Procedure & Administration); Senior Technician Reviewer, Exempt Organizations Branch (Tax Exempt and Government Entities); Director, Labor & Employee Relations Division (Finance and Management); and Senior Analyst (Criminal Investigation). These individuals will be instructed to collect documents within their respective IRS Headquarters Offices reflecting any final policies, procedures or practices responsive to paragraph 1(a) above, and documents reflecting any final guidance responsive to paragraph 1(b) above.

4. Description of additional exclusions, limitations and obligations:

a. IRS records that constitute return information under 26 U.S.C. § 6103(b), or tax convention information under 26 U.S.C. § 6105(c), are non-responsive to this FPL.

b. To the extent the same final policy, procedure or practice (responsive to paragraph 1(a) above), or the same final guidance (responsive to paragraph 1(b) above), is memorialized in more than one document, Defendants are not required to search for and process each responsive document; it is sufficient for Defendants to search for and process one such document. For example, if the same IRS procedure is memorialized in both a handbook and an email, IRS may search for and process only the handbook.

c. Any records produced by the Components shall be bates stamped and, to the extent practicable, produced as text-searchable PDF images. The Components shall not be required to produce metadata.