

Schmidlin, S.

**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, and Federal Bureau of Investigation (collectively, the "DOJ Components"), as well as United States Department of the Treasury component Internal Revenue Service (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;

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

WHEREAS, pursuant to a Stipulation and Order between Defendants and ACLU dated December 13, 2012, and endorsed by the Court on December 14, 2012 (the "December 2012 Stipulation"), the parties reached agreement on a plan for searching for, processing and producing records responsive to four of the six paragraphs of the FOIA Requests — specifically, paragraphs 1, 2, 5 and 6 (the "Original Paragraphs"). The December 2012 Stipulation constituted the final agreement between the parties with respect to the records sought by ACLU in connection with the Original Paragraphs, and released Defendants from conducting searches for, processing or producing any records in connection with those paragraphs other than the records encompassed by the December 2012 Stipulation.

WHEREAS, the December 2012 Stipulation did not limit or otherwise affect ACLU's claims with respect to paragraphs 3 and 4 of the FOIA Requests (the "Remaining Paragraphs");

WHEREAS, Defendants and ACLU have now conferred and agreed on a plan for searching for, processing and producing records responsive to the Remaining Paragraphs, as set forth below;

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

1. EOUSA shall ask the current Criminal Chiefs in each of the following United States Attorneys' Offices whether, since *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010), their respective Offices have ever authorized a request to a court for access to the contents of a person's private electronic communications for law enforcement purposes without a warrant or

on a standard less than probable cause: 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"). 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.

2. The question set forth above in paragraph 1 requires only a "yes" or "no" response, and by April 19, 2013, EOUSA shall inform ACLU, in writing, how each of the relevant Criminal Chiefs responded (*i.e.*, "yes" or "no"). If any Criminal Chief responds "yes," by April 30, 2013, EOUSA shall provide ACLU with the most recent unsealed judicial opinion or order that: (a) addressed a request from that Criminal Chief's USAO to a court for access to the contents of a person's private electronic communications for law enforcement purposes without a warrant or on a standard less than probable cause; and (b) the Criminal Chief can readily locate. EOUSA retains the right to redact information from any such opinion or order before producing it.

3. If EOUSA complies with its obligations as set forth in paragraphs 1 and 2 above, ACLU waives the right to challenge any aspect of the search or production described in those paragraphs, except that ACLU may challenge any redactions to any opinions or orders produced pursuant to paragraph 2 above. ACLU also retains the right to argue that EOUSA failed to comply with one or more of its obligations as set forth in paragraphs 1 and 2 above.

4. The United States Attorney's Office for the Northern District of Illinois ("USAO-NDIL") maintains a file (the "CM/ECF File") in which it has preserved a copy of many (but not

all) of the documents submitted to the CM/ECF system in cases handled by USAO-NDIL since at least 2008. Among the documents contained in the CM/ECF File are court opinions and orders. Many (but not all) of the documents contained in the CM/ECF File are text-searchable. The CM/ECF File does not contain copies of documents submitted in matters that are under seal.

5. EOUSA shall arrange for a search of the CM/ECF File for court opinions or orders issued from January 1, 2008, through December 31, 2012, in response to requests for access to the contents of a person's private electronic communications for law enforcement purposes. The terms "electronic communications" and "contents" have the meaning set forth above in paragraph 1.

6. From the pool of responsive records located in response to the search referenced above in paragraph 5, EOUSA shall produce a selection of 25 such records, with an equal number of records from each year from 2008 through 2012. If the search of the CM/ECF File produces fewer than 25 responsive records in total or fewer than 5 responsive records for a given year, EOUSA shall produce as close to 25 responsive records as possible, with as close to equal distribution among the years as possible. EOUSA retains the right to redact information from the records before producing them.

7. EOUSA and ACLU shall negotiate in good faith on the protocol that will be used in searching the CM/ECF File, and shall endeavor to reach agreement by April 19, 2013. If EOUSA and ACLU reach agreement on a search protocol on or before April 19, 2013, EOUSA shall complete its production of responsive records within 60 days of the date the parties reach agreement on a search protocol. If EOUSA and ACLU reach agreement on a search protocol and if EOUSA arranges for the CM/ECF File to be searched pursuant to that protocol and

produces records in accordance with paragraph 6 above, ACLU waives the right to challenge any aspect of the search or production involving the CM/ECF File, except that ACLU may challenge any redactions to any records produced. ACLU also retains the right to argue that the CM/ECF File was not searched in accordance with the agreed-upon protocol.

8. If EOUSA and ACLU fail to reach agreement on a protocol to be used in searching the CM/ECF File by April 19, 2013, EOUSA shall arrange for the CM/ECF File to be searched on April 22, 2013, using whatever protocol it deems appropriate. In that instance, EOUSA shall complete its production of responsive records in accordance with paragraph 6 above by June 19, 2013, and ACLU reserves the right to challenge the search protocol and any redactions to any records produced.

9. No later than 30 calendar days from the date that EOUSA fulfills its obligations under this Stipulation, counsel for ACLU shall notify counsel for Defendants, in writing, whether ACLU intends to challenge any aspect of EOUSA's performance under this Stipulation. Such notice shall identify the specific matter(s) being challenged.

10. If ACLU does not intend to challenge EOUSA's performance under this Stipulation, 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 informing the Court of this fact.

11. If ACLU does intend to challenge EOUSA's performance under this Stipulation, 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.

12. This Stipulation represents the final agreement between ACLU and Defendants with respect to the records sought by ACLU in connection with the Remaining Paragraphs (*i.e.*, paragraphs 3 and 4 of the FOIA Requests). With respect to the Remaining Paragraphs, Defendants are released from conducting searches for, or processing or producing, any records that are not encompassed by this Stipulation. This Stipulation has no preclusive effect on future FOIA requests by ACLU.

13. This Stipulation contains the entire agreement between ACLU and Defendants as to the Remaining 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.

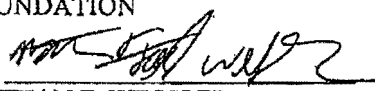
14. This Court shall retain jurisdiction over this action.

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

Dated: New York, New York
March 22, 2013

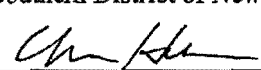
Dated: New York, New York
March 22, 2013

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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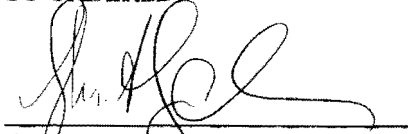

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Attorney for Defendants

SO ORDERED:


HON. SHIRA A. SCHEINDLIN
United States District Judge 

Dated: 3/27/13