IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS, *et al.*,	)	Case No. 1:17-cv-002768
Plaintiffs,	)	Judge Robert M. Dow Jr.
v.	)	
U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. CUSTOMS AND BORDER PROTECTION,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO THE COURT'S
REQUEST IN ITS MINUTE ORDER OF NOVEMBER 16, 2017

The Court has requested that Plaintiffs "accept[] the current set of search terms as constituting a 'reasonable effort' by Defendant, subject to extraordinary circumstances that would be needed to justify future search requests." (Nov. 16, 2017 Minute Order, ECF No. 71.) After consulting with our client, counsel for Plaintiffs thought it would be constructive to advise the Court of Plaintiffs' position in advance of the motion hearing set for November 21, 2017.

Plaintiffs fully appreciate what the Court is requesting and the reasons why. Like the Court, Plaintiffs' primary objective is prompt compliance with their request — not extended litigation. However, Plaintiffs do not understand the Court to be asking that they waive their right to an adequate search — a fundamental right under FOIA — in order to require Defendants to comply with its statutory obligations. There is no basis in law for such a *quid pro quo*, and Plaintiffs are not aware of any other cases in which the plaintiff was asked to do so. Indeed, in a FOIA case, "the plaintiff is at a distinct disadvantage in attempting to test" the agency's claims that it is conducting an adequate search, and the law puts the burden of establishing such squarely on the agency. *Ethyl Corp. v. EPA*, 25 F. 3d 1241, 1250 (4th Cir. 1994) (quoting *Exxon*

Corp. v. FTC, 663 F.2d 120, 126 (D.C. Cir. 1980)); *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325–26 (D.C. Cir. 1999) (agency must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents").[1] Plaintiffs thus understand the Court's request to be limited to the threshold question of reasonableness of the core search terms – which the parties themselves understood were only the first step in Defendants' search. (ECF No. 65, at 6 (The Defendants' position is that "the agency will consider whether any additional searches are reasonably likely to identify additional responsive records and will engage in discussions with Plaintiffs to that end.").)

Previously, in the spirit of cooperation and in an effort to finally receive some responsive records, Plaintiffs provided Defendants with a list of suggested preliminary search terms on September 29, 2017. (ECF No. 65, at 3.) Defendants took the list under advisement, but did not use and/or rejected a substantial number of Plaintiffs' suggested terms. (*Id*.) Plaintiffs did not challenge Defendants' search terms at that time, as others have done out of the gate, but instead agreed to work with Defendants. Defendants likewise noted their reciprocal intent to cooperate if further searches were required. (*See infra* ECF No. 65, at 6.) Given the imbalance of information, Plaintiffs respectfully submit that they are not in a position to fully and meaningfully assess whether additional search terms would be required unless and until they are able to see and assess responsive documents.

Nevertheless, in the interest of time and at this Court's request, Plaintiffs agree that Defendants' search terms are reasonable as to an initial search of the email accounts of the four

[1] This typically takes place at the summary judgment stage via detailed, good-faith affidavits. *Rubman v. U.S. Citizenship & Immigration Servs.*, 800 F.3d 381, 387 (7th Cir. 2015); *see also Valencia-Lucena*, 180 F.3d at 325–26 ("At the summary judgment stage, where the agency has the burden to show that it acted in accordance with the statute, the court may rely on a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched.") (citations omitted).

prioritized custodians and that Plaintiffs will not seek additional search terms absent exceptional circumstances. Plaintiffs want to be clear, however, that this does not negate Defendants' obligation to search for paper records and other databases (such as Form 6501 and the TECS database[2]). (There may be additional paper documents, but Defendants' counsel has advised that the agency has not yet ascertained whether there are any paper documents to be searched.) Nor does it preclude Plaintiffs from requiring Defendants to search the other eight (8) custodians identified by the government, as well as other custodians that the produced records might reveal would be reasonable and necessary to search in order to satisfy Defendants' adequate search obligations under FOIA.

DATED this 20th day of November 2017.

Respectfully submitted,

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[2] Plaintiffs understand that a Form 6501 is completed when an electronic device is seized. The TECS database is supposed to record interactions with travelers sent to secondary inspection.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically filed the foregoing **PLAINTIFFS' RESPONSE TO THE COURT'S REQUEST IN ITS MINUTE ORDER OF NOVEMBER 16, 2017** with the Clerk of the Court using the ECF system which will send notification of such filing to all attorneys of record.

/s/ Natalie J. Spears