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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; SAN FRANCISCO BAY GUARDIAN, Plaintiffs, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	Case No. 12-cv-4008-MEJ NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT AS TO PART 1 AND MEMORANDUM IN SUPPORT Date: November 21, 2013 Time: 10:00 a.m. Place: San Francisco U.S. Courthouse Judge: Hon. Maria-Elena James

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

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NOTICE OF MOTION

PLEASE TAKE NOTICE that on November 21, 2013, at 10:00 a.m. in the United States Courthouse at San Francisco, California, Defendant U.S. Department of Justice, by and through undersigned counsel, will move this Court for summary judgment regarding Part 1 of plaintiffs' Freedom of Information Act request.

MOTION FOR SUMMARY JUDGMENT REGARDING PART 1 OF PLAINTIFFS' FOIA REQUEST

Defendant U.S. Department of Justice hereby moves for summary judgment on all of the claims in plaintiffs' Complaint relating to Part 1 of plaintiffs' Freedom of Information Act request pursuant to Federal Rule of Civil Procedure 56 and the Freedom of Information Act, 5

U.S.C. § 552, for the reasons more fully set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

PRELIMINARY STATEMENT

While the Freedom of Information Act ("FOIA") was created to foster government transparency, it does not require agencies to become full-time researchers for document requesters. In filing a broad-ranging FOIA request for *all* requests, subpoenas, and applications for court orders or warrants seeking location information over a five-year period, however, plaintiffs the American Civil Liberties Union of Northern California and the San Francisco Bay Guardian are attempting to convert the U.S. Attorney's Office for the Northern District of California ("USAO-NDCA") into their own, personalized research service. All the worse, plaintiffs have acknowledged that the types of materials that they seek are typically filed under seal, which precludes the disclosure of all but a small handful of the very records plaintiffs seek. Undeterred, plaintiffs have pushed forward with their broad-based request.

Over the past year, the USAO-NDCA has worked hard to respond, as best it could, to plaintiffs' request. The FOIA only requires agencies to conduct reasonable searches using the recordkeeping systems that they have available to them. A manual search here would be unreasonable, requiring the USAO-NDCA to review, by hand, more than 12,000 files. And the USAO-NDCA's recordkeeping system – known as the Legal Information Office Network System (LIONS) – simply was not designed to identify the records that plaintiffs seek. Nonetheless, the USAO-NDCA has attempted to use that system – limitations and all – by conducting keyword searches in order to ascertain which matters may contain the type of records plaintiffs seek. Based on those efforts, the USAO-NDCA has identified, and released, 148 pages of responsive records to plaintiffs (as those records are not currently sealed).

Any further processing would convert this part of plaintiffs' request into a snipe hunt, sending USAO-NDCA off to spend countless hours processing a request that is unlikely to yield additional, disclosable records. Based on the best records reasonably available to it, as well as the office's understanding of its own internal practices, the remaining files that the USAO-

NDCA has identified as potentially containing responsive records are either under seal (and therefore exempt from disclosure under FOIA), or are otherwise unlikely to yield responsive information that can be disclosed. And attempting to ascertain the precise status of those records will be unduly burdensome, as it will require the retrieval and multi-step hand review of thousands of files. FOIA forecloses such an impractical and wasteful outcome.

In conducting its LIONS searches and releasing records to plaintiffs, the USAO-NDCA has not merely met its requirements under FOIA; it has exceeded them. For these reasons, as set forth in more detail below, it is now time to grant summary judgment to the Department of Justice.

BACKGROUND

1. Plaintiffs' FOIA Request.

In April 2012, plaintiffs submitted a FOIA request for various records relating to location tracking technology. Specifically, plaintiffs' FOIA request sought the following materials:

> 1) All requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008.
>
> 2) Any template applications or orders that have been utilized by United States Attorneys in the Northern District to seek or acquire location information since January 1, 2008.
>
> 3) Any documents since January 1, 2008, related to the use or policies of utilizing any location tracking technology, including but not limited to cell-site simulators or digital analyzers such as devices known as Stingray, Triggerfish, AmberJack, KingFish or Loggerhead.
>
> 4) Any records related to the Supreme Court's holding in *United States v. Jones*, excluding pleadings or court opinions filed in the matter in the Supreme Court or courts below.

See Declaration of Patricia J. Kenney in Support of the Department of Justice's Motion for Summary Judgment as to Part 1 of Plaintiffs' Freedom of Information Act Request ("Kenney Decl."), Ex. A. Plaintiffs, in their FOIA request, proceeded to define "location information" as follows:

> [A]ny information that helps to ascertain the location of an individual or particular electronic device that, in whole or in part, is generated or derived from the operation of an electronic device, including but not limited to a cell phone, smartphone, cell site, global positioning system, cell-site simulator, digital

> analyzer, stingray, triggerfish, amberjack, kingfish, loggerhead, or other electronic device, including both historical and real-time information.

Id.

This motion addresses only Part 1 of the FOIA request (*i.e.*, the "requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008.").[1]

2. USAO-NDCA's Use of Location Information and its Recordkeeping System.

USAO-NDCA does not maintain searchable, central electronic records. Kenney Decl. ¶ 4. While the USAO-NDCA does use an electronic case management system known as the Legal Information Office Network System ("LIONS"), that system merely tracks cases; it does not maintain substantive records. Kenney Decl. ¶ 4. Instead, USAO-NDCA maintains paper records, organized by internal file numbers (known as a "USAO numbers"), for matters, investigations, and cases that are opened by the office. Kenney Decl. ¶ 2. Closed matters, investigations or cases are stored at USAO-NDCA for approximately six months before being sent to the Federal Records Center. Kenney Decl. ¶¶ 2, 5.

Prosecutors use various tools to develop evidence for criminal cases (or potential criminal cases), including search warrants and pen registers to obtain location-tracking information. Kenney Decl. ¶ 2; *see also id.* ¶ 5. These applications for warrants and pen registers (hereinafter, "applications for court orders seeking location information") are not indexed in LIONS or filed separately, but are preserved in the USAO-NDCA paper file for that USAO-NDCA investigation. Kenney Decl. ¶¶ 2, 5. Thus, because these applications for court orders seeking location information are not indexed in LIONS or are otherwise retrievable through the USAO-NDCA's recordkeeping system, the only way to definitively identify and retrieve all records responsive to Part 1 of plaintiffs' FOIA request is to manually retrieve and review all the paper files for all matters, investigations, and cases that have been opened by USAO-NDCA since

[1] The parties have stipulated to, and this Court has adopted, a bifurcated briefing schedule. *See* ECF No. 22, 05/13/2013. Pursuant to that schedule, the parties have already filed cross-motions for partial summary judgment regarding Parts 2-4 of plaintiffs' FOIA request, and this Court has heard oral argument regarding those cross-motions.

January 1, 2008. Kenney Decl. ¶ 5.[2] That would not be an insignificant task; between January 1, 2008 and September 1, 2013, the USAO-NDCA assigned new USAO numbers to 12,699 matters, investigations, and cases. Kenney Decl. ¶ 5. And "[w]hile some matters that were opened since 2008 may consist of a simple folder, many matters turn into long term investigations and later cases which are ongoing for a number of years, and the paper files associated with them are voluminous, filling multiple bankers boxes and in some cases entire storage rooms." Kenney Decl. ¶ 5.

Searching for responsive records is further complicated by the nature of the records themselves. While an application for a court order seeking location information typically takes the form of a search warrant or a pen register, "search warrants and pen registers have wide spread use as criminal investigative tools." Kenney Decl. ¶ 6. Moreover, the frequency of use of applications for court orders seeking location information varies significantly by section within USAO-NDCA. For example, they are frequently used in cases involving street gangs, violent crimes, and drug trafficking; in these cases, location information is often an essential investigative technique. Kenney Decl. ¶ 6. In cases involving economic crimes, securities fraud, or national security matters, by contrast, applications for court orders seeking location information are far less common. Kenney Decl. ¶ 6.

Further complicating matters, the methods by which files are maintained varies significantly from section to section, and even attorney to attorney: Some attorneys obtain a new USAO number when filing applications, whereas others use a USAO number already assigned to an investigation. Kenney Decl. ¶ 6. For example, the general practice in the Organized Crime Drug Enforcement Task Force/Narcotics ("OCDETF") section is to open a new USAO number with each application, and to close the matter when the order is obtained – even though the

[2] Even so, such a paper search would not necessarily retrieve all records responsive to Part 1 of plaintiffs' FOIA request. That request sought responsive records from matters, investigations, or cases actually pending on January 1, 2008. Kenney Decl. Ex. A; *id.* ¶ 4. Thus, a search for matters opened since January 1, 2008 would not capture applications for court orders seeking location information that were filed in a matter opened prior to, and merely pending on, January 1, 2008. The USAO-NDCA, however, has no way of determining from its paper filing system, or from LIONS, which matters, investigations, and cases were pending on January 1, 2008. Kenney Decl. ¶ 4.

related investigation under a separate USAO number may be ongoing. Kenney Decl. ¶ 8. In other sections, such as the Special Prosecutions/National Security section, the general practice is to apply for an order using the same USAO number as the underlying investigation, with the investigation continuing after the sealed order is obtained. Kenney Decl. ¶ 8. Simply put, "[t]here is no uniform office practice." Kenney Decl. ¶ 6.

The applications for court orders seeking location information are typically filed under seal, with the general practice being that both the application and order are sealed. Kenney Decl. ¶¶ 2, 7, 18. Accordingly, USAO-NDCA is precluded from disclosing these sealed applications to the general public. Kenney Decl. ¶¶ 2, 7. Sealing these materials is "critical," as AUSAs seek location information to develop evidence of criminal activities of one or more targets who are usually unaware of the investigation. Kenney Decl. ¶ 7. Premature disclosure of applications and orders would jeopardize those investigations. Kenney Decl. ¶ 7. Moreover, "[e]ven after the indictment of one target, the AUSA often has an interest in not letting the target's associates who are still under investigation become aware of specific investigative techniques which the AUSA may continue to use to develop evidence of criminal activities." Kenney Decl. ¶ 7. In fact, disclosure of the information contained within the sealed applications and orders can have violent adverse consequences:

> In a complex, multi-year[ ] investigation, there are often multiple defendants who could include fugitives from whom the AUSA wants to withhold the investigative techniques used. The sealed applications for location tracking information may be supported by affidavits which identify confidential informants ("CIs") or confidential sources ("CSs"), or include information which could lead to the identification of those CIs or CSs. Disclosure could endanger the CIs or CSs, particularly in investigations involving street gangs, violent crimes and drug trafficking.

Kenney Decl. ¶ 7. Moreover, "[t]here is no systematic review on an ongoing basis of the sealed applications to determine whether the conditions requiring sealing continue, and such a review would be impractical." Kenney Decl. ¶ 9. Among other things, there has been a turn-over of both AUSAs and agents, thus making it difficult (if not impossible) to determine the potential harm of unsealing the documents. Kenney Decl. ¶ 9. In light of the types of crimes prosecuted by the USAO-NDCA, the passage of time would not necessarily lessen the need to keep

information under seal, "even though the USAO's ability to evaluate that need does diminish with time." Kenney Decl. ¶ 9.

3. USAO-NDCA's Attempt to Search for Responsive Records.

Notwithstanding the impossibility of searching its paper files for records responsive to Part 1, USAO-NDCA explored using its electronic case management system, LIONS, to attempt to identify non-sealed files in which there might exist responsive records. Kenney Decl. ¶ 11. As a result of those efforts, USAO-NDCA recently disclosed 148 pages of responsive records to plaintiffs. Kenney Decl. ¶ 23; *see generally* Second Declaration of John W. Kornmeier ("Second Kornmeier Decl.").

Specifically, USAO-NDCA developed a list of search terms that AUSAs and office leadership believed were most likely to have been used by AUSAs and clerks when opening matters in LIONS. Kenney Decl. ¶¶ 11-13. Those terms were shared with plaintiffs, which also provided input. Kenney Decl. ¶ 12. Initially, USAO-NDCA searched only the "caption" field in LIONS (which is a required field for all AUSAs to fill out on a matter/case opening form to obtain a USAO number), but added a search of the "comment" field at plaintiffs' request. Kenney Decl. ¶¶ 11, 12, 14. (The "comment" field, unlike the "caption" field, is not a required field, but may be used at an AUSA's individual discretion. Kenney Decl. ¶ 14.) USAO-NDCA's IT staff then spent a considerable amount of time de-duplicating these results. Kenney Decl. ¶ 12. Searches of the keywords included variations of the keywords; thus, a search of the term "track" would have identified files containing the words "mobile tracking," "tracking mission," "tracking device," and the like. Kenney Decl. ¶ 13.

As a result of these searches, 1184 matters were identified by USAO number. For each of those matters, USAO-NDCA obtained, among other things, caption information, the court docket number (when available), the Criminal Section in which the matter was opened, the AUSA assigned to the matter, and the comments (if any) that the AUSA inputted regarding the matter. Kenney Decl. ¶ 15. While 1184 matters were identified by USAO number, however, the search actually produced key words in 3692 lines of data, as there were multiple "hits" for many

USAO numbers (because there may be multiple entries in the "comment" field for any given USAO number). *See* Kenney Decl. ¶ 15.

As it turns out, the search was substantially over-inclusive. For example, one of the search terms used was "monitor." Kenney Decl. ¶ 16 The use of that term alone resulted in the identification of many matters that are unlikely to contain responsive records, such as this one: "The defendant shll prtpcte in the location monitoring prgm for a prd of six months, directed by the po, and abide by the rules of the program." Kenney Decl. ¶ 16.[3] As a result of this and similar results, USAO-NDCA's Criminal Section Chief personally reviewed the LIONS data. Kenney Decl. ¶ 16. He was able to determine, based on his review of the data alone, that 424 of the approximately 1184 USAO matters are unlikely to have responsive records. Kenney Decl. ¶ 15.

USAO-NDCA, with assistance from the Department of Justice's Civil Division, undertook other steps to analyze the results of its LIONS search. To the extent the LIONS search results contained court docket numbers, those numbers were searched against this Court's electronic case filing system to ascertain whether those dockets were considered by this Court to be under seal. Of the remaining 760 matters identified as potentially involving location information (*i.e.*, the 1184 USAO matters initially identified through the LIONS search, minus the 424 matters that USAO-NDCA does not believe involve applications for court orders for location information), 566 were confirmed to be under seal based on this Court's records. *See* Kenney Decl. ¶ 19 (noting that this Court's ECF system returned the message "Case Under Seal"). In 115 of the 760 files, PACER returned the message "Cannot find case." Kenney Decl.

[3] The search also was likely under-inclusive. Among other things, while the USAO-NDCA used search terms that it believed would most likely have been used in opening matters in which location information was sought, and while the ACLU added to the terms that the USAO-NDCA identified, if an AUSA or the office's clerks did not use these key words (or variations of the key words), then the search would not have identified the matter. Kenney Decl. ¶ 13. To that end, and in processing the seven files that are not currently under seal, the government notes that two of those matters contained unsealing orders that unsealed applications and orders not only in those two miscellaneous matters, but in numerous other, apparently related miscellaneous matters as well. Those separate matters, however, have not been retrieved and processed, as they were not identified through USAO-NDCA's search and, in any event, the applications and orders in those other matters may not have sought location information.

¶ 19. And in 73 of the 760 matters, LIONS did not contain a court docket number to check against the Court's records. Kenney Decl. ¶ 19.

To confirm the USAO-NDCA's usual practice of filing applications for court orders seeking location information under seal, *see* Kenney Decl. ¶¶ 2, 7, USAO-NDCA retrieved a random, 10% sample of files in the "cannot find case" category and the category in which LIONS did not contain a docket number. Kenney Decl. ¶¶ 20, 21. The USAO-NDCA retrieved the sample in order to determine whether these matters contained applications for court orders seeking location information and, if so, to confirm whether the information was sought under seal. Kenney Decl. ¶¶ 20, 21. The samples obtained confirmed the usual practice of filing applications and orders under seal (to the extent they contained responsive records in the first instance). Kenney Decl. ¶¶ 20, 21.

4. The Release of Responsive Records.

As noted above, and based on its search of LIONS, USAO-NDCA was able to determine that six matters appeared in PACER to not be sealed. Kenney Decl. ¶ 22. The USAO retrieved the files associated with these matters: One file had two responsive applications and orders under seal along with an unsealing order; one file had one responsive application and order, as well as an unsealing order; one file had no court documents in it; one file had a single page of a sealed order for location tracking information; and the last two files had responsive applications and orders which were never sealed (as the target was aware of the investigation). Kenney Decl. ¶ 22; *see also* Kenney Decl. ¶ 10 (describing two applications and orders that were never sealed). In the file with two sealed responsive applications and orders, USAO-NDCA determined that the Court had unsealed the file three years later, in August 2012, at the request of the then Deputy Criminal Chief J. Douglas Wilson in connection with an Arizona criminal case. Kenney Decl. ¶ 22. Before applying to unseal the documents, the Deputy Criminal Chief consulted with the agency involved, which acquiesced in unsealing the matter. Kenney Decl. ¶ 22. These materials were provided to the ACLU at about the same time. Kenney Decl. ¶ 22. As for the two USAO files lacking documents (*i.e.*, the file with no court documents and the file with the single page of

a sealed order), USAO-NDCA retrieved copies of the physical documents from this Court's clerk's office in San Jose. Kenney Decl. ¶ 22.

On September 13, 2013, the Department released all of these materials, totaling 148 pages, to plaintiffs. Kenney Decl. ¶ 23; Second Kornmeier Decl. ¶ 5**.** The first two sets of applications (relating to the Arizona criminal case) were released in their entirety, as they had already been disclosed to the ACLU. Kenney Decl. ¶ 23; Second Kornmeier Decl. ¶ 5. The remaining materials were released with minor redactions pursuant to Exemption 7(C), in order to protect against an unwarranted invasion of personal privacy. Kenney Decl. ¶ 23; Second Kornmeier Decl. ¶ 5. Specifically, the Department redacted the names of defendants, cell phone numbers of targeted individuals, docket numbers, names of third parties, magistrate names, the dates of use of location devices, and the filing dates. Kornmeier Decl. ¶ 5. Shortly after that release, plaintiffs expressed concern regarding those redactions and, in particular, indicated their belief that there is a strong public interest in the disclosure of dates defining the period during which location-tracking information was sought. The Department considered plaintiffs' views and, on September 23, re-released these records to plaintiffs, removing the redactions for the dates of use of location devices, and removing the redactions for the year in which documents were filed with the Court. Kornmeier Decl. ¶ 5. (The Department continues to assert Exemption 7(C) over the remaining information that has been redacted in order to protect the privacy of the individuals identified in, or affected by, these records. Kornmeier Decl. ¶¶ 5-6.)

Even though USAO-NDCA determined that these matters were no longer sealed, the face of the documents disclosed indicated a contrary result (as AUSAs typically file the sealed documents in the file at the time a sealing order is obtained). Kenney Decl. ¶ 23. Thus, there is no indication on the face of the disclosed documents that they have been unsealed. Kenney Decl. ¶ 23.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "Because facts in FOIA cases are rarely in dispute, most such cases are decided on motions for summary judgment." *Yonemoto v. Dep't of Veterans Affairs*, 686 F.3d 681, 688 (9th Cir. 2012); *see also Lawyers' Comm. for Civil Rights v. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1131 (N.D. Cal. 2008) ("As a general rule, all FOIA determinations should be resolved on summary judgment."). Discovery is seldom necessary or appropriate. *See Shannahan v. IRS*, 672 F.3d 1142, 1151 (9th Cir. 2012) (holding that district court "properly denied [plaintiff's] discovery requests for information concerning the nature and origins of documents he requested" because FOIA cases "revolve[] around the propriety of revealing certain documents"). A court reviews an agency's response to a FOIA request *de novo*. 5 U.S.C. § 552(a)(4)(B).

As a threshold mater, FOIA requires federal agencies to make records available only upon a request that "reasonably describes" the records sought. 5 U.S.C. § 552(a)(3)(A). As the Ninth Circuit has explained, a request "reasonably describes" a record "if it enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks v. United States*, 578 F.2d 261, 263 (9th Cir. 1978) (citing H.R. Rep. No. 93-876, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271). "The rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters," *Assassination Archives & Research Ctr. v. CIA* (*AARC*), 720 F. Supp. 217, 219 (D.D.C. 1989), nor to allow requesters to conduct "fishing expeditions" through agency files, *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002). Accordingly, it is appropriate for an agency to deny a "broad, sweeping request[]" if the request is insufficiently particular to allow an employee to locate responsive records within a reasonable period of time. *Marks*, 578 F.2d at 263.

More generally, and assuming that a request is, in fact, valid, an agency moving for summary judgment must demonstrate "it has conducted a search reasonably calculated to uncover all relevant documents." *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 986 (9th Cir.

2009) (quotation marks omitted). "This showing may be made by reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* (quotation marks omitted). Such affidavits or declarations are accorded "a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Lawyers' Comm.*, 534 F. Supp. 2d at 1131. Indeed, the agency "need not set forth with meticulous documentation the details of an epic search for the requested records." *Id.* (quotation marks omitted). To that end, the agency does not have to search "every record system" to locate documents or "engage in a vain search where it believes responsive documents are unlikely to be located." *Rosenfeld v. U.S. Dep't of Justice*, No. C 07-3240, 2010 WL 3448517, at *6 (N.D. Cal. Sept. 1, 2010) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). "[T]he issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Citizens Comm'n on Human Rights v. FDA.*, 45 F.3d 1325, 1328 (9th Cir. 1995) (citation and quotation marks omitted). In general, the sufficiency of a search is determined by the "appropriateness of the methods" used to carry it out, "not by the fruits of the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, the failure of an agency "to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004).

Finally, while FOIA was created to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny," *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal quotation omitted), the public's interest in government information under FOIA is not absolute, as "Congress recognized . . . that public disclosure is not always in the public interest." *CIA v. Sims*, 471 U.S. 159, 166-67 (1985). FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quotation omitted). Thus, FOIA is designed to achieve a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent

necessary without permitting indiscriminate secrecy." *Id.* (citation omitted).

ARGUMENT

I. Plaintiffs' Request Did Not Reasonably Describe the Records Sought, Because USAO-NDCA Had No Method to Locate Responsive Records.

As noted above, in the Ninth Circuit a request "reasonably describes" a record "if it enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Marks*, 578 F.2d at 263. As courts have recognized, whether an agency employee could locate a record with a reasonable amount of effort depends both on the nature of the request and the type of records system an agency has. *See, e.g.*, *Nat'l Sec. Counselors v. CIA*, 898 F. Supp. 2d 233, 276 (D.D.C. 2012) ("[A]n agency is presumably unable to determine precisely what records are being requested when it cannot perform a reasonable search for the requested records within the limitations of how its records systems are configured."); *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 228-29 (D.D.C. 2012) (request improper where it imposes an unreasonable burden on agency); *AARC*, 720 F. Supp. at 219 ("[A]gencies are not required to maintain their records or perform searches which are not compatible with their own document retrieval systems."). In that regard, courts have taken a "'practical approach' . . . in interpreting the Act," *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. at 157), allowing agencies to prioritize their resources, notwithstanding the obligations to provide access to records under FOIA. *See, e.g.*, *Int'l Counsel Bureau v. U.S. Dep't of Defense*, 723 F. Supp. 2d 54, 59-60 (D.D.C. 2010).

Here, USAO-NDCA's paper records are not organized and managed in a way that would allow its employees to locate the records that plaintiff requested with a "reasonable amount of effort." Plaintiffs requested "[a]ll requests, subpoenas, and applications for court orders or warrants seeking location information since January 1, 2008." The sweeping nature of plaintiffs' request, in conjunction with fact that USAO-NDCA does not have a method to identify the responsive records with a reasonable amount of effort, *see* Kenney Decl. ¶¶ 2, 5, means that – as

a matter of law – the request does not reasonably describe the records sought and is therefore invalid. Particularly on point is *American Federation of Government Employees v. U.S. Department of Commerce*, 907 F.2d 203 (D.C. Cir. 1990). In that case – just like here – plaintiff sought entire categories of materials from a government agency. *See id.* at 208-09 (seeking, among other things, "every chronological office file and correspondent file"). The D.C. Circuit found that, as a legal matter under FOIA, the requests did not "reasonably describe[ ] a class of documents subject to disclosure": While the requests at issue "might identify the documents requested with sufficient precision to enable the agency to identify them . . . it is clear that these requests are so broad as to impose an unreasonable burden upon the agency." *Id.* at 209 (internal quotations omitted). So too, here: Plaintiffs' request may permit USAO-NDCA to *identify* the *category* of documents that plaintiffs seek (*i.e.*, applications for court orders seeking location information), but by requesting all such documents that USAO-NDCA has, the request is invalid because there is no method for the USAO-NDCA to identify and locate the specific records that plaintiffs seek (absent an unduly burdensome hand-search of all files the office has opened since 2008).

Another good example of this principle is set forth in *Irons v. Schuyler*, 465 F.2d 608 (D.C. Cir. 1972). In that case (just like here), plaintiff sought all documents within a category of cases for which the agency was responsible. Specifically, the plaintiff in *Irons* requested, among other things, "all unpublished manuscript decisions of the Patent Office." *Irons*, 465 F.2d at 610. The request in *Irons* would have required the agency to search through countless files, "any of which may contain one or more" responsive documents. *Id.* at 611. On that basis, the court agreed with the district court's characterization of the request as "'a broad, sweeping, indiscriminate request for production lacking any specificity,' and not a request for records of a 'reasonably identifiable description.'" *Id.* at 612 (quoting district court opinion).[4] Indeed, courts regularly reject these types of indiscriminate requests for "all" documents. *See, e.g.*, *Dale*, 238 F. Supp.2d at 104 (D.D.C. 2002) (request seeking all documents regarding plaintiff improper).

[4] *Irons* involved a prior version of FOIA, in which the statutory standard for defining records was that a request must be for "identifiable records." *Irons*, 465 F.3d at 610.

As these cases make clear, USAO-NDCA would have been justified in denying plaintiffs' request for failing to describe a class of documents subject to disclosure. For that reason alone, summary judgment should be granted to the Department regarding part 1 of plaintiffs' FOIA request.

II. USAO-NDCA Conducted a Reasonable Search for Responsive Records, and Any Further Processing of Plaintiffs' Request is Unnecessary in Light of the Sealed Nature of the Records at Issue.

Even if this Court were to conclude, as a matter of law, that plaintiffs' sweeping request for all applications for court orders seeking location information is a valid request, it must still grant summary judgment to the government. USAO-NDCA has processed that request as best it could, in light of the limitations of its case management system, and should not be required to further process that request as the remaining matters identified through its search are sealed.

In an attempt to narrow the scope of records at issue, USAO-NDCA conducted searches in the caption and comment fields in LIONS. The results of those searches were reviewed by the Criminal Division Section Chief, and matters that did not appear to be likely to contain responsive information were eliminated. Kenney Decl. ¶ 16. The results were also checked against this Court's electronic case filing system to ascertain whether the court dockets identified through the LIONS search remain under seal. Kenney Decl. ¶ 19. The results of these efforts have been fruitful, as 148 pages of responsive records have been identified and released to plaintiffs. Kenney Decl. ¶¶ 22-23; Second Kornmeier Decl. ¶ 5.

What remains, however, is a mess. The majority of the remaining court dockets identified through the LIONS search have been confirmed to be under seal. *See* Kenney Decl. ¶ 19 (noting that 566 of 760 matters reflected sealed dockets). Based on the samples that USAO-NDCA has retrieved regarding the remaining matters, none appears likely to contain disclosable information. *See* Kenney Decl. ¶¶ 20-21. This is not surprising; it is USAO-NDCA's usual practice to file these applications under seal, *see* Kenney Decl. ¶¶ 2, 7, 18, and plaintiffs have acknowledged as much. Accordingly, and as set forth in subpart A, *infra*, these materials are exempt from disclosure. In light of that exemption, and as set forth in subpart B, *infra*, requiring

further processing of plaintiffs' FOIA request would not only be unduly burdensome, but would constitute a waste of USAO-NDCA's very limited resources. *See Solar Sources, Inc.*, 142 F.3d at 1039 (noting that courts have taken a "'practical approach' . . . in interpreting" FOIA).

A. Any Remaining Matters Are Exempt from Disclosure.

As a threshold matter, it is undisputed that courts have the inherent authority to order a docket to be sealed. *See The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004) (recognizing that a court can maintain a sealed docket sheet). Once a court seals a docket, an agency may not disclose the information on it; to do so would be to disclose the existence of a case that a court has ordered to be kept entirely confidential. Any challenge to the court's sealing of the docket must therefore be presented to the court, not the agency. *See id.* (considering First Amendment challenge against chief justice of state supreme court).

Agencies are not permitted to disclose information that a court has enjoined them from disclosing. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980) (recognizing that a court order removes any "discretion for the agency to exercise," and that "[t]he concerns underlying the [FOIA] are inapplicable" in that event because the agency cannot be said to have "improperly" withheld records). Thus, in *GTE Sylvania*, the Supreme Court held that an agency had not "improperly" withheld records whose disclosure was prohibited by a court injunction. The Supreme Court explained that "[t]o construe the [agency's] lawful obedience of an injunction issued by a federal district court with jurisdiction to enter such a decree as 'improperly' withholding documents under the Freedom of Information Act would do violence to the common understanding of the term 'improperly' and would extend the Act well beyond the intent of Congress." *Id.* at 387. The rationale of *GTE Sylvania* has been extended outside its particular, factual context to other types of court-imposed prohibitions (e.g., sealing orders). *See U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 155 (1989) (suggesting that *GTE Sylvania*'s reasoning is implicated in cases where the agency has "no discretion . . . to exercise"); *see also Senate of Commonwealth of P.R. v. U.S. Dep't of Justice*, 1993 WL 364696, at *6 (D.D.C. Aug. 24, 1993) ("The Supreme Court has held that records covered by an injunction, protective order,

or held under court seal are not subject to disclosure under FOIA." (internal citation omitted)).

Moreover, and apart from these threshold considerations, FOIA Exemption 3 permits the withholding of information "specifically exempted from disclosure" by a statute "refer[ring] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Exemption 3 thus incorporates non-disclosure provisions contained in other statutes. *See Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989). As particularly relevant here, courts have routinely upheld the application of Exemption 3 for applications and orders for pen registers, citing 18 U.S.C. § 3123(d). *See Jennings v. FBI*, No. 03-cv-01651-JDB, slip op. at 11 (D.D.C. May 6, 2004) (finding that "[t]his same reasoning [as applied to protect information obtained from authorized wiretap] applies to the evidence derived from the issuance of a pen register or trap and trace device") (attached hereto); *Riley v. FBI*, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *5-*6 (D.D.C. Feb. 11, 2002) (finding that sealed pen register applications and orders were properly withheld pursuant to Exemption 3, noting that "18 U.S.C. § 3123 requires that the pen register materials at issue remain under seal"); *Manna v. U.S. Dep't of Justice*, 815 F. Supp. 798, 812 (D.N.J. 1993) (finding that "two sealed applications submitted to the court for the installation and use of pen registers" and "two orders issued by the magistrate Judge who granted the applications" were properly "protected by [§] 3123(d) and Exemption 3"), *aff'd on other grounds*, 51 F.3d 1158 (3d Cir. 1995).[5] Section 3123(d) is frequently cited by USAO-NDCA as authority for sealing these types of files. *See* Kenney Decl. ¶ 18.

This Court should find that its sealing of dockets precludes the disclosure of information relating to those dockets or, alternatively, reach the same holding as the courts in *Jennings*, *Riley* and *Manna* that Exemption 3 precludes the disclosure of sealed applications and orders for location information. As set forth immediately below, either decision resolves any remaining issues regarding part 1 of plaintiffs' FOIA request.

[5] Similarly, Rule 6(e) of the Federal rules of Criminal Procedure qualifies as an Exemption 3 statute. *See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981) (concluding that Fed. R. Crim. P. 6(e) satisfies Exemption 3's statute requirement because it was amended by Congress).

B. Exemption 3 Precludes Further Processing of Plaintiffs' Request.

If this Court finds that Exemption 3 precludes the disclosure of sealed applications and orders, then further processing of part 1 of plaintiffs' FOIA request would be unnecessary. A contrary ruling – that USAO-NDCA must continue to process plaintiffs' FOIA request – would not merely be unduly burdensome, but would waste the office's limited resources, because no sealed records can be disclosed to plaintiffs in any event.

While the LIONS search has narrowed the scope of potential matters at issue, the task of processing the remaining matters remains monumental. There are 760 matters identified through the LIONS search that may contain responsive records and that have not yet been produced to plaintiffs. However, each matter identified through the LIONS search may contain more than one line of information; in other words, there are likely thousands of additional lines of information that would need to be further reviewed, with each line potentially reflecting a separate application for a court order seeking location information. *See* Kenney Decl. ¶ 15 (noting that 1184 matters produced key words in 3692 lines of data). Further processing of these matters will therefore require that countless files be retrieved and hand-searched. While some matters consist of one folder of information; others may contain many boxes of documents (or even fill an entire storage room). Kenney Decl. ¶ 5. Some materials are located in the USAO-NDCA; others would need to be retrieved from off-site storage. Kenney Decl. ¶ 5. Once retrieved, hand-searching through the materials would be anything but routine: Each document identified as an application for a pen register would need to be reviewed line-by-line, as many pen register applications do not seek location information. *See* Kenney Decl. ¶ 6. In many cases this would be like looking for a needle-in-a-haystack, as some sections rarely use location tracking information. Kenney Decl. ¶ 6. And once the applications are identified, ascertaining their sensitivity would be a nearly impossible task: Particularly for older records, there has been a substantial turn-over in both AUSAs and agents, making it impossible to ascertain with certainty whether the information contained in those older applications and orders are now benign. *See generally* Kenney Decl. ¶¶ 7-9. USAO-NDCA would nonetheless need to try to determine whether any exemptions should be claimed and, because the applications typically

contain declarations from agents, USAO-NDCA would also need to consult with applicable law enforcement agencies in order to allow them to express their views on exemptions. *See, e.g.*, Kenney Decl. ¶ 22 (describing consultation with investigatory agency regarding potential unsealing of applications). Even when an investigation is closed, USAO-NDCA would need to ascertain whether there are any fugitives who could be alerted to the existence of the investigation. *See* Kenney Decl. ¶ 7. As location information is regularly used in prosecuting street gangs, violent crimes, and drug trafficking, *see* Kenney Decl. ¶ 6, the premature disclosure of any of this information could literally result in violence, *see* Kenney Decl. ¶ 7.

Even setting aside the fact that these materials were filed under seal, the tasks that USAO-NDCA would need to undertake to further process plaintiffs' FOIA request would literally turn it into a research service, conducting a full-time investigation into five years of its files in order to ascertain whether individual records are responsive and, if so, whether they can be disclosed on a record-by-record basis. *See AARC*, 720 F. Supp. at 219; *see also Freedom Watch*, 895 F. Supp. 2d at 229 (request impermissibly requires agency "to undertake an investigation"). Relative to the volume of materials that the Criminal Section of USAO-NDCA maintains, the request is "so broad as to impose an unreasonable burden upon the agency." *Am. Fed'n of Gov't Emps.*, 907 F.2d at 209; *see also Int'l Counsel Bureau*, 723 F. Supp. 2d at 59-60 (D.D.C. 2010) (request seeking search of unlabeled and unindexed videos improper); *Dale*, 238 F. Supp. 2d at 104 (D.D.C. 2002) (request seeking all documents regarding plaintiff improper). And, of course, all of this effort would be for naught if none of the records could be disclosed anyway, as the miscellaneous and similar matters in which they were filed remain under seal.

III. To the Extent USAO-NDCA is Required to Further Process Plaintiffs' Request, It Should Not Be Required to Retrieve Files that it Can Determine Involve Open Investigations.

FOIA protects from mandatory disclosure "records or information compiled for law enforcement purposes" when, among other issues, production of the documents "(A) could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). As a threshold issue when analyzing Exemption 7, the Court must make a determination as to

whether the documents have a law enforcement purpose, which, in turn, requires examination of whether the agency serves a "law enforcement function." *Church of Scientology Int'l v. I.R.S.*, 995 F.2d 916, 919 (9th Cir. 1993) (internal quotation marks and citation omitted). There can be no dispute that the U.S. Attorney's Office has such a function. In this Circuit, and in order to satisfy Exemption 7's threshold requirement, a government agency with a clear law enforcement mandate—such as the U.S. Attorney's Office —"'need only establish a rational nexus between enforcement of a federal law and the document for which [a law enforcement] exemption is claimed.'" *Rosenfeld*, 57 F.3d at 808 (citation omitted).

As relevant at this stage of the proceedings, Exemption 7(A) permits the withholding of: (1) "records or information"; (2) "compiled for law enforcement purposes"; (3) the disclosure of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. 552(b)(7). Congress enacted Exemption 7(A) because it "'recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases'" in court. *John Doe Agency*, 493 U.S. at 156 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978)). To satisfy its burden justifying the applicability of this Exemption, the USAO need only demonstrate that (1) a law enforcement proceeding is pending or prospective, and (2) release of the information could reasonably be expected to cause some articulable harm to the proceeding. *Robbins Tire & Rubber Co.*, 437 U.S. at 224.

To the extent that this Court orders USAO-NDCA to process any of the remaining 760 matters identified through its LIONS search, it should not be required to retrieve and process those matters that it can determine, through a review of the results of the LIONS search, involve open investigations. For example, the supervisor of OCDETF/Narcotics investigations has ascertained that approximately one-half of the OCDETF/Narcotics matters identified through the LIONS search involve open investigations. *See* Kenney Decl. ¶ 7. (Other supervisors have not yet had an opportunity to review the LIONS search results to determine whether matters identified through the search involve open investigations.) Accordingly, and in light of the

protections afforded by Exemption 7(A) and the sensitivity of files relating to open investigations, USAO-NDCA should not be required to retrieve these materials.

IV. EOUSA Properly Invoked Exemption 7(C).

Exemption 7(C) exempts the disclosure of personal, private information. Specifically, Exemption 7(C) permits the withholding of "records or information compiled for law enforcement purposes" to the extent that "production of such law enforcement records . . . *could reasonably be expected* to constitute an *unwarranted* invasion of personal privacy." *Id.* § 552(b)(7)(C) (emphasis added); *see Yonemoto*, 686 F.3d at 693 n.7 (describing Exemption 7(C)'s protections). Once a non-trivial, non-speculative privacy interest is present, then the exemption shields the information from disclosure unless "the public interests in disclosing the *particular* information requested outweigh those privacy interests." *Yonemoto*, 686 F.3d at 694. This balances the privacy interest against the asserted public interest. Yet the "*only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would she[d] light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Id.* at 694 (quoting *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997)).

The Supreme Court has held "as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy." *Reporters Committee for Freedom of the Press*, 489 U.S. at 780. In that case, the Court noted that the disclosure under FOIA of the contents of FBI "rap sheets" could constitute an unwarranted invasion of personal privacy, even though that same information could be obtained "after a diligent search of courthouse files, county archives, and local police stations." *Id.* at 764.

These principles have been applied in the context of the LIONS database. In *Long v. Department of Justice*, 450 F. Supp. 2d 42 (D.D.C. 2006), plaintiffs sought data from, and EOUSA withheld certain fields of, the LIONS database and its predecessors. As relevant here, EOUSA withheld, pursuant to Exemption 7(C), the "court number," "file name," "defendant name," and "litigant name" fields in civil and criminal cases where the government was in the

role of a prosecutor or plaintiff, as the disclosure of this information would either directly or indirectly identify the subject of the record. *Id.* at 64, 70. The court held both that, "with regard to case management records compiled for law enforcement purposes, disclosure of fields identifying the subject of the records would implicate privacy interests protected by Exemption 7(C)," and that "the fact that some of the personal information contained in these records already has been made public in some form does not eliminate the privacy interest in avoiding further disclosure by the government." *Id.* at 68 (citing *Reporters Committee*, 489 U.S. at 762-63, 780). The court then balanced these privacy interests against the public interest in disclosure. In so doing, the court acknowledged that, because the information being withheld was available through PACER, it was "less obscure" than the type of records at issue in *Reporters Committee*. *Id.* at 68-69 (noting that "the interests at stake are significantly less substantial than those at issue in *Reporters Committee*"). Nonetheless, the court concluded that plaintiffs had failed to identify an interest in disclosure of these fields of information that outweighed the privacy interests at issue. *Id.* at 70.

Many of the principles set forth in *Long* are applicable here; if anything, the public interest in disclosure is far less potent here than was the interest at issue in *Long*. Plaintiffs here have been provided with the applications and orders for location-tracking information. Those disclosed applications set forth, in great detail, the context in which location-tracking information was obtained. *See* Second Kornmeier Decl., at DOJ-PT1-ReRls-000066 to DOJ-PT1-ReRls-000148 (copies of applications and related materials, with redactions). Only personally identifiable information, or derivative information that, if disclosed, would allow plaintiffs to retrieve the dockets through PACER, have been withheld. *See* Kornmeier Decl. ¶¶ 5-6. Moreover, and in light of the concerns expressed by plaintiffs, the Department has re-processed its release in order to disclose the date ranges when location-tracking information was used, and the years in which the documents were filed with the Court. Accordingly, there is no public interest in the disclosure of the remaining redacted information, as plaintiffs now have the very applications that they sought through the filing of their FOIA request.

To be sure, the D.C. Circuit has recently addressed whether docket information can be withheld in the context of a FOIA request relating to location tracking. *See American Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011). In that case, the court held that the disclosure of docket numbers and case names that identify individuals who had been prosecuted "implicates those citizens' privacy interests." *Id.* at 8; *see also id.* at 7 (noting that the disclosure of a criminal conviction may be embarrassing or stigmatizing); *id.* at 8 ("there is no real dispute that the scope of Exemption 7(C) can extend even to convictions and public pleas"). Nonetheless, the court rejected the Department's argument that it could withhold docket information relating to those individuals, to the extent that they had been successfully prosecuted or pled guilty. *See generally id.* at 6-16. That case is distinguishable, however: The D.C. Circuit's holding related primarily to a list of docket numbers, the disclosure of which would allow the ACLU to obtain the court documents for the actual proceedings at issue. *See id.* at 4, 8, 10. The public benefit of releasing the list was the derivative use of the docket numbers to obtain the actual court documents, which for the most part the ACLU did not have. *See id.* at 15 ("it is true that the case names and docket numbers standing alone generate no public benefit; only through derivative uses can information valuable to the public be obtained"). Here, by contrast, plaintiffs already have the unsealed applications for location-tracking information – there is no marginal "public interest" in identifying the names of the individuals contained in, or derivable from, these documents. In other words, even if the privacy interest is small, the public interest in additional disclosure here is even smaller. And while the D.C. Circuit discussed the withholding of docket numbers and a case name from two actual applications, the court remanded to the district court for further factual development. *See id.* at 17-19.

At the end of the day, and to the extent plaintiffs challenge the Department's remaining redactions, this Court will need to conduct its own balance of the established privacy interests involved against any alleged public interest that plaintiffs may cite in the disclosure of the identities of these individuals. The Department has responded to plaintiffs' concerns by disclosing the date ranges for which location-tracking information was sought and the year in which it was sought. Plaintiffs must now come forward and identify what public interest there is

in the names of the individuals identified in, or identifiable from, these records, and why any such public interest outweighs those individuals' privacy interests. *See Yonemoto*, 686 F.3d at 694.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment regarding part 1 of plaintiffs' FOIA request should be granted.

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