

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA;
MIJENTE SUPPORT COMMITTEE; JUST
FUTURES LAW; and IMMIGRANT
DEFENSE PROJECT,

Plaintiffs,

v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, U.S. CUSTOMS AND
BORDER PROTECTION; and U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

Case No. 4:21-cv-02632-DMR

**JOINT CASE MANAGEMENT
STATEMENT**

**Case Management Conference
Date: December 15, 2021**

Time: 1:30 P.M.

Hon. Donna M. Ryu

1 The parties jointly submit this updated Joint Case Management Conference (“CMC”)
2 Statement pursuant to Civil Local Rule 16-9, the Standing Order for All Judges of the Northern
3 District of California - Contents of Joint Case Management Statement, and this Court’s Amended
4 Civil Minute Order dated October 20, 2021. ECF No. 33 (“Order”).

5 The Order required defendant U.S. Immigration and Customs Enforcement (“ICE”) to
6 review at least 1000 pages per month and file a sworn declaration within 7 days of each
7 production providing certain information about its process for marking duplicates. *Id.* ICE
8 submitted its first declaration on November 16, 2021, ECF No. 34, and will continue processing
9 records and submitting declarations as ordered by the Court.

10 The Order further required that defendant U.S. Customs and Border Protection (“CBP”)
11 provide in the parties’ next joint case management statement, due December 8, 2021, “a full
12 update on the final page count from CBP and whether CBP was able to employ automated ‘de-
13 duping’ and if so, how it is done.” *Id.* The Court also ordered the parties to “include the results
14 of the parties’ meet and confer efforts regarding prioritization of CBP documents as well as
15 review rate.” *Id.* The parties set forth this information below.

16 **I. Factual Background**

17 This action was brought by American Civil Liberties Union of Northern California,
18 Mijente Support Committee, Just Futures Law, and Immigrant Defense Project (together,
19 “Plaintiffs”), pursuant to the Freedom of Information Act (“FOIA”). Plaintiffs submitted a FOIA
20 request (the “Request”) on October 19, 2020 to ICE, CBP, and the U.S. Department of
21 Homeland Security (“DHS”) (together, “Defendants”) seeking the release of records related to
22 the use of facial recognition surveillance technology to identify, locate, and track individuals.
23 Plaintiffs filed this action on April 13, 2021, at which time Defendants had not yet released
24 records responsive to the Request. Defendants filed their answer on May 19, 2021. Defendants
25 have been working to respond to the Request, which contains more than nineteen subparts, as
26 further described below.

27 **II. Status of FOIA Production**

28 Plaintiffs’ Statement on Status of FOIA Production: Since the previous case management

1 conference, Plaintiffs have received a production from ICE, and are awaiting further information
2 and productions from each of the defendant agencies, as described in further detail below.

3 1. ICE: In accordance with the Court’s Order, ICE reviewed approximately 1,000
4 pages of potentially responsive documents for its November 16, 2021 release. ICE released 65
5 pages in full, 86 pages in part, and withheld 31 pages in full. ICE referred 109 pages to DHS,
6 referred 93 pages to the Department of Justice, and submitted notices to outside organizations for
7 64 pages. Over half of the pages reviewed—554 pages—were withheld as duplicates, and 3
8 pages were withheld as non-responsive. ICE filed a declaration regarding its process for
9 determining duplicates that complies with the requirements of the Court’s order.

10 2. CBP: Since the prior case management conference, Plaintiffs have received
11 CBP’s Fourth Interim Production dated October 20, 2021. CBP reviewed 12 pages referred to it
12 by OBIM and 146 pages referred to it by the DHS Office of Civil Rights and Civil Liberties, and
13 determined to withhold all pages in full.

14 Plaintiff acknowledges the information CBP has provided regarding technical problems
15 that have prevented it from providing a final page count of potentially responsive documents.
16 Only after the pages have been de-duplicated, and a final page count has been determined, will
17 Plaintiffs be in a position to determine whether a monthly review rate of 750 pages/month is
18 appropriate given the context of this case.

19 3. DHS: Plaintiffs’ understanding is that DHS has concluded its search for
20 potentially responsive records. On October 29, 2021, DHS’s Privacy Office released 11 pages of
21 records in part or in full, after referring a total of 66 pages to the Office of Biometric Identity
22 Management (“OBIM”) for its review.

23 There remain a few tranches of records that are pending review and release by DHS: 11
24 pages referred to DHS by ICE (referenced in ICE’s release of August 16, 2021); 76 pages
25 referred to DHS by ICE (referenced in ICE’s release of October 16, 2021); 109 pages referred to
26 DHS by ICE (referenced in ICE’s release of November 16, 2021). Counsel will confer in
27 advance of the case management conference to determine how and when these pages that have
28 been referred to ICE by other agencies will be reviewed and released.

1 A. Defendants' Statement on Status of FOIA Production:

2 In the parties' prior CMC statement, dated October 13, 2021, ECF No. 31, CBP reported
3 that it had searched the records of numerous program offices and components, processed certain
4 potentially responsive pages identified thus far, and had identified an additional approximately
5 700 potentially responsive documents, which CBP was working on de-duplicating to obtain a
6 relevant page count.

7 CBP also reported that it had separately run email searches for records responsive to
8 items 7 and 8 of the Request. With respect to item 7, CBP finalized its list of custodians from
9 the program offices on September 1, 2021, and completed its search for responsive records on
10 September 30, 2021. With respect to item 8, CBP completed its search and uploaded the results
11 on September 1, 2021. CBP has identified approximately 120,000 emails relating to items 7 and
12 8. As of the date of the parties' prior CMC, these records were being reviewed for
13 responsiveness and duplicates.

14 Since the date of the parties' prior CMC, CBP has working diligently to determine the
15 final page count of potentially responsive pages that accounts for duplicates. However, CBP has
16 suffered significant network issues that have hindered its ability to upload the third and final
17 batch of potentially responsive documents to its processing system, Clearwell, which it must do
18 in order to obtain an updated page count, and CBP staff have been actively working on resolving
19 these issues. Clearwell has experienced several server issues, including items not loading, which
20 has also prevented users from printing or exporting content. CBP FOIA staff have also
21 experienced issues converting Non-traditional Files (such as Excel spreadsheets) that are not in
22 an easily workable format, resulting in a need to reprocess documents. FOIA staff and
23 supporting groups are experiencing issues with the software they use to connect remotely to the
24 CBP network (e.g., Global Protect and Citrix), which has either slowed or gone down completely
25 for some FOIA staff members. In addition, FOIA staff have experienced delays with the tools
26 used to exchange information among FOIA staff and with component offices, including
27 Microsoft Teams, Sharepoint and Outlook. These delays have included systems locking up,
28 synching issues, and issues uploading and downloading files. The act of clicking to the next

1 page in Adobe has occasionally taken longer than one minute, making each step of the process
2 more challenging.

3 At this time, CBP expects to provide an initial estimated metadata page count to Plaintiffs
4 in advance of the parties' CMC. This metadata page count will be the estimated total number of
5 pages uploaded to Clearwell before the de-duping process has occurred, and therefore will be
6 expected to decrease after processing. The final page count may change when native files are
7 converted in a pre-processing step for redaction.

8 With respect to whether CBP can utilize automated de-duping and, if so, how it is done,
9 CBP's processing system, Clearwell, is capable of identifying duplicate and near-duplicate
10 documents by comparing their metadata. Near duplicates are documents that are highly similar
11 to another document, but contain minor differences, e.g., formatting or metadata. After all
12 material is uploaded to Clearwell, a user may sort, review, and/or export documents or reports
13 based on a variety of elements, including elements identified by Clearwell.

14 CBP remains willing to meet and confer with Plaintiffs about prioritizing its processing
15 of certain CBP documents once it has determined the final page count of potentially responsive
16 records. With respect to a review rate, CBP has assessed in good faith whether it has the
17 capacity to agree to a processing rate equal to the Court-ordered rate of 1000 pages per month for
18 ICE, but has determined that the highest processing rate it can accommodate in light of its
19 limited staffing and large FOIA workload is 750 pages per month.

20
21
22
23
24
25
26
27 ///

28 ///

1 Respectfully submitted,

2 DATED: December 8, 2021

3 /s/ Vasudha Talla
4 VASUDHA TALLA
5 American Civil Liberties Union Foundation of
6 Northern California
7 39 Drumm Street
8 San Francisco, CA 94111
9 Telephone: 415-621-2493
10 vtalla@aclunc.org

11 *Attorney for Plaintiffs*

12 STEPHANIE M. HINDS
13 Acting United States Attorney

14 /s/ Savith Iyengar
15 SAVITH IYENGAR
16 Assistant United States Attorney

17 *Attorneys for Defendants*

18 **ECF ATTESTATION**

19 In accordance with Civil Local Rule 5(i)(3), I, Savith Iyengar, attest that I have obtained
20 concurrence in the filing of this document from the other signatory listed above.

21 /s/ Savith Iyengar
22 SAVITH IYENGAR