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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: February 2, 2022**

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 Civil
4 Conference Minute Order dated December 15, 2021. ECF No. 36 (“Order”).

5 The Order required the parties to “meet and confer immediately to discuss the CBP
6 production,” with the meet and confer to “include a CBP representative(s) who is able to speak
7 with knowledge and authority on how the Clearwell system works, the technical problems that
8 have recently arisen, and the specific issues involved in the CBP review and production of
9 documents in this case.” ECF No. 36. The Court set a further CMC for January 19, 2022, with
10 the parties’ updated joint CMC statement due by January 12, 2022. *Id.* The parties thereafter
11 met and conferred on all issues, consistent with the Court’s order, by telephone on December 22,
12 2021 and January 7, 2022, and by email on January 6, 11, and 12, 2022.

13 On January 13, 2022, the Court granted the parties’ stipulated request to continue the
14 CMC set for January 19, 2022 by two weeks to February 2, 2022, with the parties updated joint
15 CMC statement due by January 26, 2022. ECF No. 39. The parties have continued to meet-and-
16 confer by email and telephone on the topics set forth in the Order.

17 **I. Factual Background**

18 This action was brought by American Civil Liberties Union of Northern California,
19 Mijente Support Committee, Just Futures Law, and Immigrant Defense Project (together,
20 “Plaintiffs”), pursuant to the Freedom of Information Act (“FOIA”). Plaintiffs submitted a FOIA
21 request (the “Request”) on October 19, 2020 to ICE, CBP, and the U.S. Department of
22 Homeland Security (“DHS”) (together, “Defendants”) seeking the release of records related to
23 the use of facial recognition surveillance technology to identify, locate, and track individuals.
24 Plaintiffs filed this action on April 13, 2021, at which time Defendants had not yet released
25 records responsive to the Request. Defendants filed their answer on May 19, 2021. Defendants
26 have been working to respond to the Request, which contains more than nineteen subparts, as
27 further described below.
28

1 **II. Status of FOIA Production**

2 **A. Plaintiffs' Statement on Status of FOIA Production:** Since the previous case
3 management conference, Plaintiffs have received a production from ICE, and are awaiting
4 further information and productions from each of the defendant agencies, as described in further
5 detail below.

6 1. **ICE:** Plaintiffs have received monthly productions from ICE dated December 15,
7 2021 and January 14, 2022. In accordance with the Court's Order, ICE reviewed approximately
8 1,000 pages of potentially responsive documents for these productions. ICE filed declarations
9 regarding its process for determining duplicates that complies with the requirements of the
10 Court's order. Plaintiffs note that there are approximately 40 pages for which ICE has stated that
11 submitter's notices with outside organizations are required; approximately 90 pages referred to
12 DOJ for review and release; and approximately 20 pages referred to CBP for review and release.

13 2. **DHS:** Plaintiffs last received a production from DHS dated October 29, 2021.
14 Plaintiffs understand that DHS has completed its search for records responsive to the FOIA
15 Request, and is currently reviewing pages referred to it for review by other agencies, including
16 ICE. There are 182 pages that have been referred to DHS by ICE and are pending review and
17 release by DHS.

18 3. **CBP:** As set forth in Defendants' portion of the CMC statement, below, CBP has
19 located two tranches of potentially responsive records: (1) records located by CBP's National
20 Targeting Center ("NTC") that consist of emails and policy documents; and (2) emails that
21 resulted from searches conducted by CBP to locate records responsive to Plaintiffs' FOIA
22 Requests No. 7 and No. 8.¹

23
24 ¹ **Request No. 7:** Correspondence among or between DHS, CBP and ICE personnel and/or an
25 individual or agency acting on behalf of DHS, CBP, and ICE, regarding Clearview AI facial recognition
26 technology, including but not limited to e-mails, internal reports or dossiers, and instant messages, that
27 were created on or after September 1, 2017.

28 **Request No. 8:** Correspondence between DHS, CBP and ICE personnel and/or an individual or
agency acting on behalf of DHS, CBP, and ICE, and any employee of Clearview AI, that was created on
or after September 1, 2017. Please search for all email communications to and from help@clearview.ai;
and all email communications to and from email accounts utilizing the "clearview.ai" email domain.

1 Counsel for the parties, together with agency counsel for CBP, have discussed the
2 agency's software for de-duplication, Clearwell, including the process by which documents are
3 uploaded to Clearwell, the process for identifying exact duplicate pages and near-duplicate
4 pages, the process for determining a final page count of potentially responsive records, the
5 process of prioritization of certain records for review, the batching and review process, and the
6 most efficient sequencing of these procedures.

7 To date, CBP has not identified a final page count of potentially responsive records for
8 the first tranche (NTC records). For the second tranche (emails responsive to Request Nos. 7 and
9 8), CBP has identified a minimum of 130,983 potentially responsive pages, though this number
10 excludes certain file types and other records for which the agency continues to encounter
11 technical difficulties.

12 Plaintiffs have told CBP that they wish to prioritize production of records as follows: (1)
13 review and release of the first tranche (NTC records); (2) after NTC records have been released,
14 any emails from NTC custodians should be removed from the second tranche of documents in
15 order to avoid unnecessary review; and (3) a sample of the second tranche documents, e.g., a
16 month's worth of emails, be reviewed and released. Plaintiffs believe that review and release of a
17 sample of the second tranche documents (currently number over 130,000 pages) will assist the
18 parties in assessing how many pages are "near duplicates," and whether there are particularly
19 keywords, custodians, or other factors that could be used to eliminate irrelevant material or
20 significantly narrow the corpus of potentially responsive pages to be reviewed and released.

21 Plaintiffs also have reviewed Defendants' third option for release and review, as detailed below.

22 Working from Defendants' third option, Plaintiffs would agree to CBP's proposal that the
23 agency first process and release non-email documents from the first tranche (program
24 office/NTC documents). Given that the agency still has not yet arrived at a final page count of
25 potentially responsive pages, Plaintiffs propose that CBP review this first tranche at a rate of
26 1000 pages/month.

27 Plaintiffs would be amenable to next steps in Defendants' third option—that CBP process
28 the item 7 records in the second tranche that are from the NTC custodians, followed by item 8

1 records, followed by the remaining records in the second tranche (*i.e.*, the item 7 records from
2 the remaining custodians)—but suggest that a sampling approach continue to be explored in
3 order to reduce the number of potentially responsive pages to reviewed and released.

4 B. Defendants’ Statement on Status of FOIA Production:

5 As noted above, and consistent with the Court’s order, ECF No. 36, the parties met and
6 conferred by telephone on December 22, 2021, and January 7 and January 24, 2022, and by
7 email on January 6, 11, 12, 13, 14, 19, 21, 25 and 26, 2022.

8 On December 22, 2021, Defendants shared with Plaintiffs by telephone information
9 about how the Clearwell system works, the technical problems that had arisen, and the specific
10 issues involved in CBP’s review and production of documents in the case. Plaintiffs raised
11 several follow up questions, which Defendants addressed in part by email on January 6, 2022
12 and by telephone on January 7, 2022. Defendants shared details with Plaintiffs about CBP’s
13 progress with respect to the two tranches of CBP records: (i) program office documents, and (ii)
14 e-discovery searches in response to items 7 and 8 of Plaintiffs’ FOIA request. With respect to
15 the first tranche of records (program office documents), the upload had only been partially
16 successful. The FOIA office determined that a number of documents were in a PDF Portfolio
17 filetype, which made them either too large or too complex to upload. The FOIA office was
18 working on converting those files manually, in order to attempt to re-upload them. However,
19 while it worked to resolve the issue with the first tranche of records (program office documents),
20 the agency ran a duplicate report for the second tranche (items 7 and 8) and informed Plaintiffs
21 that it hoped to have an update on that effort before the parties’ joint CMS was due. CBP also
22 recommended, with respect to prioritization, that Plaintiffs suggest keywords.

23 On January 11, 2022, Defendants provided a further update regarding CBP’s efforts.
24 Defendants shared that CBP was in the process of de-duplicating the second tranche (items 7 and
25 8) and expected to generate a page count for the second tranche by the early afternoon on
26 January 12, 2022. Defendants also shared that CBP successfully ran a near-duplicate report as
27 well, however the raw data needed to be compiled in such a way that the agency could determine
28 how many documents (and eventually how many pages) were near duplicates. As it currently

1 stands, the near-duplicate report identifies the same parent document multiple times when it is a
2 near duplicate with multiple other documents. Defendants provided Plaintiffs with a partial
3 screenshot of how this information appears. Defendants noted that these near duplicates may
4 need to be processed by a human to confirm that they are sufficiently identical to be omitted
5 from the agency's review.

6 On January 12, 2022, Defendants shared with Plaintiffs the following: 30% of the items
7 in the second tranche (items 7 and 8) had been de-duped as exact duplicates. Following this de-
8 duping of exact duplicates, CBP generated a page count of at least 130,983 potentially
9 responsive pages to review. This page count excluded native files like spreadsheets, A/V files,
10 or other file types that are not imaged. It included near duplicates and other items that may be
11 non-responsive. Finally, it excluded approximately 70 items that had errors that prevented them
12 from being included in the page count, which the agency was working to resolve.

13 On January 13, 2022, Plaintiffs emailed Defendants eleven follow up questions, primarily
14 regarding this second tranche of documents (items 7 and 8) and the possibility of narrowing the
15 results. On January 21, 2022, Defendants responded to these questions by email, and the parties
16 met and conferred further by telephone on January 24, 2022. In response to Plaintiffs' questions,
17 Defendants explained as follows:

18 CBP could run searches within the second tranche (items 7 and 8) in minutes, but getting
19 a page count for a search result was more complicated. Because Clearwell deals in numbers of
20 items/documents and not page counts, the search results would need to be placed into a
21 production folder, which was a more time consuming process (that depended heavily on the size
22 of the production folder), but which would then allow the system to generate an estimate page
23 count for that search result.

24 Defendants also explained that the uploaded results regarding item 8 were exclusively the
25 result of a domain search of "clearview.ai." That means that the search returned any agency
26 email with a to/from/cc involving an email address with a "clearview.ai" domain. The agency
27 could filter results by domain in Clearwell to identify the senders and recipients with a
28 clearview.ai domain, to the extent Plaintiffs sought to prioritize those records. In response to

1 Plaintiffs' question regarding whether the agency could "prioritize pages/documents/emails with
2 attachments (i.e., Excel files)," the agency explained that it may be possible to run a general
3 report that shows the overall number of attachments and unique files, and then segregate out the
4 attachments using the associated document IDs, but that it did not yet have experience doing so.
5 Defendants also explained that there are sent and received fields in Clearwell that would supply a
6 date an email was sent with or without an attachment, but that it does not date the attachment.

7 In response to Plaintiffs' questions regarding which search terms were used to populate
8 the second tranche of records (items 7 and 8), which Plaintiffs raised in order to better
9 understand what keywords they might propose to narrow the results, Defendants explained that
10 CBP's collection of records regarding item 7 involved eleven custodians, who were identified by
11 the program offices, and all records were collected that included the search terms Clearview AI
12 or Clearview. Search 8 collected all records that contained the "clearview.ai" domain in the
13 to/from/cc field. Finally, Defendants explained that it may be possible to filter potentially
14 responsive results by file type, but that the agency would need to process the entire email or
15 email discussion to which those files were attached.

16 With respect to the first tranche (program office documents), Defendants explained that
17 CBP was continuing to finalize the upload, and would provide an update as soon as it was
18 complete. Defendants also noted that the first tranche (program office documents) contained
19 both documents and emails, the latter of which would have been included in the broad searches
20 conducted in response to the second tranche (items 7 and 8). However, in compiling potentially
21 responsive emails, the program offices converted their emails into PDFs, thereby changing their
22 metadata. This means that Clearwell will not be able to de-duplicate emails from the first
23 tranche against the second tranche (items 7 and 8). Accordingly, Defendants asked Plaintiffs
24 whether they would be willing to agree that the agency would not need to process the emails
25 contained in the first tranche (program office documents) if it was processing the second tranche
26 (items 7 and 8).

27 During the parties' meet and confer on January 24, 2022, Plaintiffs noted the possibility
28 that a portion of the approximately 130,000 pages of records in the second tranche (items 7 and

1 8) were either near-duplicates that could be removed from the agency's review, or documents
2 that Plaintiffs would not be interested in, which could likewise be removed from the agency's
3 review. Plaintiffs proposed two options for narrowing the records in the second tranche (items 7
4 and 8). The first option would involve Plaintiffs selecting one month, the agency processing
5 records for that month at an agreed-upon rate, and the parties meeting and conferring regarding
6 the results, and whether the remaining results could be narrowed in light of the nature of the
7 reviewed records.

8 The second option would involve the agency prioritizing the production of the first
9 tranche (program office documents) over the second tranche (items 7 and 8). Once the first
10 tranche (program office documents) has been uploaded, the process would involve the following:
11 the agency would process the first tranche (program office documents); the agency would
12 remove the custodians from the second tranche (items 7 and 8) whose emails were already
13 included in the first tranche (program office documents); the agency would pull a one month
14 sampling of the second tranche (the remaining records relating to items 7 and 8); the agency
15 would process those records; the parties would meet and confer about narrowing the records left
16 to review.

17 Defendants have proposed a third option, which would likewise prioritize the production
18 of the first tranche (program office documents). Under this option, the agency would first
19 process non-email documents from the first tranche (program office documents), given that the
20 emails appear to be the items that are preventing the first tranche from being successfully
21 uploaded. Second, the agency would process the item 7 records in the second tranche that are
22 from the NTC custodians. Third, the agency would process the item 8 records in the second
23 tranche. Finally, depending on the parties' meet and confer efforts during this time, the agency
24 would process the remaining records in the second tranche (*i.e.*, the item 7 records from the
25 remaining custodians). CBP is also willing to meet and confer further with Plaintiffs regarding
26 prioritizing items with attachments.

27 Before CBP begins processing records, it may be beneficial for the parties to have time to
28 devise a process to first identify and remove near duplicates from the second tranche (items 7

1 and 8), and set a timeline to complete this process. The near-duplicate report that CBP generated
2 for the second tranche, which contains over 15,000 rows, includes within each row additional
3 information about why two documents were identified as near duplicates. The agency's
4 preliminary review suggests that it may be possible to exclude certain documents, though this
5 will require line-by-line review of the near-duplicate report. Alternatively, the agency can
6 include near-duplicate results as it processes records as set forth in the third option Defendants
7 propose, above.

8 Defendants note that they have approached all discussions with Plaintiffs with a good
9 faith desire to answer Plaintiffs' questions comprehensively and mutually determine the most
10 efficient way for the parties — and the Court — to address Plaintiffs' broad FOIA request,
11 identify and process the records Plaintiffs are interested in, and prioritize records based on
12 keywords Plaintiffs propose. Defendants also note that, though CBP's efforts were delayed due
13 to the implementation of new software, CBP was able to use that software to successfully
14 remove a significant portion of duplicates from the second tranche (items 7 and 8) in an
15 automated fashion. Accordingly, Defendants respectfully disagree with Plaintiffs' request that
16 the Court direct CBP to process approximately 1000 pages per month. Instead, Defendants
17 would respectfully request that the Court allow CBP to process records at a rate of 750 pages per
18 month.

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Respectfully submitted,

DATED: January 26, 2022

/s/ Vasudha Talla
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ECF ATTESTATION

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

/s/ Vasudha Talla
VASUDHA TALLA