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11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION

14 AMERICAN CIVIL LIBERTIES UNION)
15 OF NORTHERN CALIFORNIA,)

16 Plaintiff,)

17 v.)

18 DEPARTMENT OF JUSTICE,)

19 Defendant.)
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No. 12-CV-4008-MEJ

DECLARATION OF PATRICIA J. KENNEY
IN CONNECTION WITH THE PARTIES'
SETTLEMENT AGREEMENT AS TO PART 1
OF PLAINTIFF'S FOIA REQUEST

1 I, Patricia J. Kenney, declare pursuant to 28 U.S.C. § 1746 as follows:

2 1. I am an Assistant United States Attorney (“AUSA”) in the Criminal Division of the
3 Office of the United States Attorney for the Northern District of California (“NDCA”), and am admitted
4 to practice law in the State of California. My pertinent background, experience and collateral FOIA
5 duties, including my responsibilities as the liaison between the United States Attorney’s Office and the
6 Department of Justice in connection with this litigation, is fully set forth in my September 23, 2013
7 declaration. *See* Declaration of Patricia J. Kenney, etc. (“Kenney Decl.”), filed September 23, 2013.
8 The information in this declaration is based on my personal knowledge, or knowledge which has come
9 to me in the ordinary course of my duties as an AUSA, in providing FOIA advice, and in working as a
10 liaison in this litigation with USAO managers, supervisors, line AUSAs, DOJ attorneys, the Records
11 Manager, a paralegal assigned to assist, and other staff.

12 2. The purpose of this declaration is to comply with the parties’ settlement agreement
13 signed on July 8, 2015, as to Part 1 of the American Civil Liberty Union’s (ACLU’s) FOIA request
14 dated April 13, 2012 which sought applications and orders for location tracking information (“ACLU’s
15 FOIA request”). Although the NDCA does not maintain a filing system in a manner that permits the
16 identification of applications and orders for location tracking information as explained in my September
17 23, 2013 declaration, the NDCA attempted to use its Legal Information Office Network System
18 (“LIONS”) to identify the matters/cases in which responsive documents might exist and, in so doing,
19 identified approximately 349 matters/cases which potentially could have documents responsive to Part 1
20 of the ACLU’s FOIA request. *See* Supplemental Declaration of Patricia J. Kenney, etc. (“Kenney Supp.
21 Decl.”), filed December 12, 2013 (explaining that there are 349 cases/matters with possibly responsive
22 documents). In the Court’s September 30, 2014 order, the Court ordered the government to review
23 those 349 matters/cases. *See* Order on Cross Motions for Partial Summary Judgment [Part 1 of the
24 ACLU’s FOIA request], filed September 30, 2014 (Docket #62). As to those 349 matters/cases, the
25 parties agreed in the settlement agreement to a more limited review. In pertinent part, the settlement
26 agreement provides:

27 The parties hereby stipulate and agree that Defendant need not process any open matters.
28 Removing those open matters leaves approximately 257 matters to be processed. USAO-

1 NDCA will retrieve or attempt to retrieve records from those approximately 257 matters.
2 USAO-NDCA will then prepare a declaration regarding the records from those
3 approximately 257 matters that identifies by year (1) whether the matter contains an
4 application and order only for a pen register, (2) whether the matter involves a hybrid
5 (which is a pen register application and Order plus another type of application and order
6 for location tracking information); or (3) whether the matter involves an application and
7 order not covered by (1) and (2), such as a search warrant for location tracking
8 information. The declaration will also account for any records that the USAO-NDCA
9 could not retrieve, specifically stating the reason it was unable to retrieve the file (such
10 as, for example, the file was missing), or determined upon review of the file that it
11 contained records that are not responsive to Part I of the FOIA request. The declaration
12 will not contain any specific, case-related or case-identifying information.

13 3. Before undertaking the retrieval of any files, the undersigned reviewed the calculation of
14 the number of open matters/cases in her previously filed December 12, 2013 declaration. That review
15 changed the number of cases/matters to be retrieved from 349 to 348. *See* Supp. Kenney Decl. In that
16 declaration, the undersigned stated that initially 760 matters/cases were identified from LIONS as
17 possibly containing responsive documents. At that point, the Chief of OCDETF/Narcotics reviewed the
18 spread sheet (without the benefit of having the actual files available) and determined that approximately
19 50% (or 386) of the 760 matters/cases involved active, open and ongoing OCDETF investigations.
20 Subsequently, the undersigned queried other Section Chiefs to review spread sheets for their sections
21 (again without the benefit of having the actual files available) and stated that those Section Chiefs
22 determined at least an additional 25 matters/cases were also open. On review, the undersigned
23 determined that the other Section Chiefs actually identified 26 matters/cases that involved open, ongoing
24 investigations. When the open matters/cases are subtracted from all the cases/matters identified, there
25 was a total of 348 matters/cases with possibly responsive documents ($760 - 386 = 374$ and $374 - 26 =$
26 348). Thus, the Records Manager and the paralegal who conducted a search for the matters/cases with
27 possibly responsive documents had a list of 348 cases/matters to retrieve, and organize for review.

28 **Initial Search & File Retrieval**

1 4. The assigned paralegal created a spread sheet of the 348 matters/cases to be reviewed.
2 The NDCA Records Manager then looked up the 348 matters/cases in LIONS to attempt to determine
3 whether the matters/cases were open or closed, and where the closed files were located. As
4 matters/cases were retrieved over the course of a few months, the spread sheet was constantly updated.

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1 5. Open and closed files are found in a number of places. Typically, the Assistant United
2 States Attorneys assigned to a matter/case have the file. Upon closing, staff sends the file to the criminal
3 docket clerks to close. Once closed, the records retention policy requires the NDCA to maintain the
4 files on premises for a year.¹ To search for files on the list of 348, the Records Manager asked the two
5 criminal docket clerks in San Francisco who process closed cases to search in their offices for the files
6 sent to them to be closed; asked staff in Oakland and San Jose branch offices to perform the same kind
7 of search; and conducted a search of the on-site file storage area at the NDCA where recently closed
8 cases are now stored for the first year. Through this process, the Records Manager and the paralegal
9 identified another 91 active, ongoing investigations and began the process of retrieving the remaining
10 257 matters/cases for review (348 – 91 = 257).

11 6. The general practice for the NDCA is to send matters/cases that have been closed for
12 more than a year to the Federal Records Center (“FRC”) for storage. When sending closed files to the
13 FRC, the Records Manager packs the matters/cases in boxes and creates a transfer form identifying the
14 matters/cases to be transferred and the box in which they are being transferred. To retrieve
15 matters/cases from the FRC is a time-consuming task. The Records Manager has to search LIONS to
16 see if there is an FRC location identifier for each file and fill out Form SF-135. The information given
17 to the FRC identifies the matter/case to be retrieved and identifies the box in which the matter/case was
18 sent to FRC in order for the FRC to locate the box and search it for the requested matter/file. When the
19 files come from the FRC, the Records Manager has to log it, produce a signature form for the requester
20 to sign and staple the form to the file. The FRC did find that some requested files were not located in
21 the specified box. Also, some files had been previously retrieved by this Office from the FRC, but were
22 not returned.

23 7. The Records Manager estimates that she and the NDCA staff spent a total of at least 40
24 hours diligently searching for the 348 matters/cases through March of 2015. The paralegal estimates
25 that through March of 2015 she spent a total of at least 73 hours in connection with coordinating the
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28 ¹ In the undersigned’s original declaration, staff incorrectly informed the undersigned that files
were only retained about six months on site at the NDCA.

1 search for possibly responsive matters/cases, maintaining and updating the master spread sheet and in
2 organizing those retrieved in file cabinets.

3 8. The paralegal and the undersigned each separately reviewed all the files which we
4 retrieved to determine:

- 5 (a) whether the matter/case contained an application/order for only a pen register;
- 6 (b) whether the matter/case involved a hybrid (which is a pen register application/order plus use
7 of another type of authority to support the application for location tracking information); or
- 8 (c) whether the matter/case involved an application/order for location tracking information
9 which was not covered by (a) or (b) above, such as a search warrant for location tracking
10 information.

11 9. In reviewing the matters/files that had been retrieved, the paralegal and the undersigned
12 also determined from the list of 257 matters/cases and the retrieved files which matters could be
13 excluded from the review because:

- 14 (a) the matters/cases were missing and had not been, despite diligent efforts, retrieved;
- 15 (b) the matters/cases had no documents responsive to the ACLU FOIA request;
- 16 (c) the matters/cases were missing documents such that it could not be determined what type of
17 application/order for location tracking information was involved;
- 18 (d) the matters/cases had previously been disclosed to the ACLU by the Executive Office of
19 United States Attorneys in September 2013²; and
- 20 (e) one matter/case retrieved with a USAO number was part of a separate file that had been
21 retrieved with a separate USAO number and therefore the two were consolidated to a single
22 matter/case.

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² Although there were six applications/orders that EOUSA provided to the ACLU in September 2013 because the applications/orders were either not sealed or were previously unsealed, only four of them remained in the list of 348 matters/files that had possibly responsive documents and therefore those four were also excluded.

1 matter/case used the same USAO number to file more than one application and order – each
 2 application/order was counted as a separate application/order. Thus, although there were 198
 3 matters/cases to be reviewed, the number of applications/orders is greater (211) because some
 4 matters/cases had multiple applications/orders that were separately counted.

5 13. The results of the review is set forth below in Table 2:

6 **TABLE 2**

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Year 2008	
8 Pen Register Applications/Orders	0
9 Hybrid Applications/Orders	15
10 Application/Orders Not Involving a Pen Register	2

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Year 2009	
12 Pen Register Applications/Orders	0
13 Hybrid Applications/Orders	19
14 Application/Orders Not Involving a Pen Register	3

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Year 2010	
16 Pen Register Applications/Orders	0
17 Hybrid Applications/Orders	62
18 Application/Orders Not Involving a Pen Register	18

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Year 2011	
20 Pen Register Applications/Orders	1
21 Hybrid Applications/Orders	34
22 Application/Orders Not Involving a Pen Register	25

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Year 2012	
24 Pen Register Applications/Orders	1
25 Hybrid Applications/Orders	20
26 Application/Orders Not Involving a Pen Register	11

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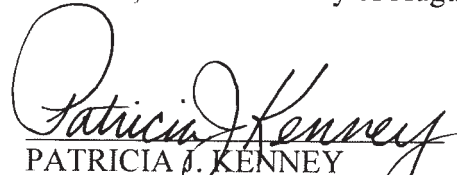
SUMMARY OF 2008 – 2012			
Year	Pen Register	Hybrid	Not Involving Pen Register
2008	0	15	2
2009	0	19	3
2010	0	62	18
2011	1	34	25
2012	1	20	11
Totals	2	150	60

Grand Total (applications/orders) 211

14. From April 2015 through August 2015, the paralegal assisting in this case estimates that she spent approximately 57 hours primarily in reviewing matters/cases and developing spread sheets, and the undersigned spent a minimum of 52 hours reviewing matters/cases and preparing this declaration.

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I, Patricia J. Kenney, declare pursuant to 28 U.S.C. § 1746 on information and belief that the foregoing is true and correct. Executed in San Francisco, California, on this 17th day of August, 2015.


 PATRICIA J. KENNEY
 Assistant United States Attorney