



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

October 15, 2004

VIA HAND DELIVERY

Hon. Alvin K. Hellerstein
United States District Court
Southern District of New York
500 Pearl Street, Room 1050
New York, New York 10007-1312

Re: ACLU, et al., v. Department of Defense, et al.,
No. 04 Civ. 4151 (AKH)

Dear Judge Hellerstein:

We write respectfully to report on the Government's efforts to comply with the Court's September 15, 2004 Opinion and Order (the "September 15 Order"). The following agencies and agency components have fully complied with the September 15 Order: the Office of Information and Privacy of the Department of Justice, the Office of Intelligence Policy and Review of the Department of Justice, and the Criminal Division of the Department of Justice. The following agencies are in partial compliance with the September 15 Order and are hereby seeking limited relief from the terms of the order: the Federal Bureau of Investigation, the Central Intelligence Agency, the Department of State and the Department of Defense.

Under cover of this letter, we are delivering to the Court and to plaintiffs a collection of indices and declarations concerning the September 15 Order. The indices respond to the Court's requirement that the Government "identify all responsive documents" that are not otherwise produced. September 15 Order at 5. The declarations serve two purposes. First, they respond to the Court's requirement that the Government "provide plaintiffs with a declaration, as specified in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), stating justification for non-production of documents itemized in plaintiffs' August 16 List." Id. Second, they provide "good and specific reasons" why certain agencies and agency components could not comply fully with the terms of the Court's order. See id. at 7. Under separate cover, the Government is producing responsive documents to plaintiffs.

The following is a report on each defendant's compliance with the September 15 Order, the indices, declarations and documents provided by that agency or agency component, and, where appropriate, a request for partial relief from the Court's order:

Office of Information and Privacy – The Office of Information and Privacy of the Department of Justice (“OIP”) has fully complied with the requirements of the September 15 Order. Under separate cover to plaintiffs, OIP has produced a final administrative response to plaintiffs’ FOIA requests and documents responsive to plaintiffs’ requests. Under cover of this letter, OIP is providing an index of documents responsive to plaintiffs’ requests that have not otherwise been produced. OIP is not producing a Vaughn declaration because it located no OIP documents responsive to plaintiffs’ August 16, 2004 request (the “August 16 List”). OIP’s response to plaintiffs’ FOIA requests is now complete.

Office of Intelligence Policy and Review – The Office of Intelligence Policy and Review of the Department of Justice (“OIPR”) is likewise in full compliance with the terms of the Court’s September 15 Order. On October 14, 2004, OIPR produced all documents (totaling 520 pages) responsive to plaintiffs’ FOIA requests. The documents were redacted to withhold information covered by exemptions to the FOIA statute. OIPR has not provided an index of documents, as it has produced all of the documents it located. OIPR has not provided a Vaughn declaration because it located no OIPR documents responsive to the August 16 List. OIPR’s response to plaintiffs’ FOIA requests is now complete.

Criminal Division – The Criminal Division of the Department of Justice also has fully complied with the September 15 Order. Under separate cover to plaintiffs, the Criminal Division has produced a final administrative response to plaintiffs’ FOIA requests and documents responsive to plaintiffs’ requests. Under cover of this letter, the Criminal Division is providing an index of documents responsive to plaintiffs’ requests that have not otherwise been produced. The Criminal Division is not producing a Vaughn declaration because it located no Criminal Division documents responsive to the “August 16 List.” The Criminal Division’s response to plaintiffs’ FOIA requests is now complete.

Office of the Legal Counsel – The Office of the Legal Counsel of the Department of Justice (“OLC”), even though not a defendant to this action, has responded to plaintiffs’ FOIA requests because it created responsive documents that were located by other agencies and agency components during the search for responsive documents. Under cover of this letter, OLC is producing a Vaughn declaration from Steven G. Bradbury, the Principal Deputy Assistant Attorney General for the OLC, for documents responsive to the August 16 List. Also under cover of this letter, OLC is producing an index of documents referred to OLC that are responsive to plaintiffs’ FOIA requests.

Federal Bureau of Investigation – The Federal Bureau of Investigation (“FBI”) has substantially complied with the September 15 Order. The FBI finished its searches and, under separate cover, produced redacted versions of 1,388 pages of documents that were previously identified as potentially responsive to the August 16 List. The redactions note the exemption claimed for the information withheld. Further, under cover of this letter, the FBI is producing a public log of documents responsive to plaintiffs’ FOIA requests. The FBI needs additional time, however, to draft a Vaughn declaration providing a more full narrative

explanation of the exemptions claimed on the redacted documents and to complete an in camera log that identifies the remainder of the documents responsive to plaintiffs' FOIA requests.

The FBI has allocated significant resources to plaintiffs' FOIA requests. Two FBI employees are assigned full-time to this case, numerous other employees from a variety of FBI divisions have worked extensively on plaintiffs' FOIA requests, and the acting head of the Bureau's Litigation Support Unit ("LSU") has been working on the case full-time. See Declaration of Keith R. Gehle, dated October 15, 2004 ("Gehle Decl."), ¶ 9, which is provided under cover of this letter. Although it is difficult to quantify the total number of hours all of FBI's employees have spent on this case, the LSU employees alone have spent roughly 250 hours of overtime working on plaintiffs' FOIA requests. See id.

Nevertheless, a combination of unforeseen events has prevented the FBI, despite its best efforts, from providing a narrative Vaughn. First, the FBI's classification review of the documents responsive to the August 16 List, which has raised unique issues and has required input from different components, has taken longer than expected. See Gehle Decl. ¶ 14. Second, several urgent and competing litigation deadlines have prevented the FBI from focusing exclusively on this case. For example, on September 16, 2004, the day after this Court entered its order, the Northern District of California ordered the FBI to reprocess and release approximately 12,000 pages of documents by October 15, 2004. Gehle Decl. ¶ 8. The unanticipated impact of these orders, coupled with the difficulties that arose in the classification review process, over-taxed the FBI's resources and prevented it from fully complying with the Court's order.¹

Accordingly, the FBI respectfully requests a brief extension, until October 22, 2004, to produce a Vaughn declaration explaining the exemptions claimed on the redacted documents and to submit an in camera log of the remaining responsive documents that were not produced or included in the public log. Plaintiffs will not be prejudiced as a result of this extension, as the redacted documents produced to plaintiffs as responsive to the August 16 List already note the exemptions claimed, and plaintiffs will have not access to the in camera log.

Central Intelligence Agency – CIA partially complied with the September 15 Order. Under cover of this letter, the CIA produced a Vaughn declaration stating justifications for withholding documents responsive to the August 16 List. See Declaration of Marilyn A. Dorn, dated October 15, 2004. The CIA respectfully requests partial relief from the Court's September 15 Order, however, because (i) there are documents the CIA cannot process because they are the subject of ongoing investigations by the Agency's Office of the Inspector General ("OIG"); and (ii) the CIA cannot log the remaining responsive documents that it has located until November 4, 2004.

¹ The FBI has also had to seek relief from the Northern District of California order. Gehle Decl. ¶ 16.

The CIA cannot review operational documents that are the subject of ongoing investigations by the OIG until those investigations are closed. Ordinarily, the CIA is statutorily exempt from searching operational files for documents responsive to FOIA requests. See 50 U.S.C. § 431 (“Operations files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of section 552 of Title 5 (Freedom of Information Act)”). Here, however, some of the CIA’s operational files will become searchable due to OIG investigations. See Declaration of Scott A. Koch, dated October 15, 2004 (“Koch Decl.”), ¶¶ 20-22; 50 U.S.C. § 431(c)(3) (the operational files exemption does not apply to the “specific subject matter of an investigation” by the OIG of the CIA). The CIA cannot ascertain which operational files will be no longer exempt from plaintiffs’ FOIA requests because the OIG, in the interests of protecting its ongoing investigations, will not reveal the specific subject matter of its investigations until those investigations are closed. See id. ¶¶ 24-25.

As the OIG investigations are closed, the CIA will search the operational files that were the subject of those investigations for documents responsive to plaintiffs’ requests. It is not clear, however, when the OIG investigations will be completed. Therefore, we respectfully propose that the CIA provide the Court with a status update by December 15, 2004 and continue such updates on the OIG investigations until all of those investigations are closed. Because this proposal is the effective equivalent of a stay, we will serve and file papers before the hearing on October 25, 2004 in support of a motion for a stay of the Court’s September 15 Order with regard to the CIA’s operational files.

The CIA also respectfully requests until November 4, 2004 to finish logging responsive documents it has gathered to date that were neither produced nor included in its Vaughn declaration. The CIA has gathered numerous documents as a result of its searches of non-operational files. Many of those documents, however, are not responsive to plaintiffs’ requests. See Koch Decl. ¶ 30. The CIA needs to process the documents to determine whether they are responsive. Despite the significant resources dedicated to plaintiffs’ requests, see id. ¶ 34, the CIA has not finished processing the documents. Moreover, the CIA cannot log non-responsive documents given the sensitive nature of intelligence sources and methods. Therefore, the CIA respectfully requests approximately an additional two weeks, until November 4, 2004, to cull the non-responsive documents from the documents gathered to date. At that time, the CIA will identify responsive documents. See id. ¶¶ 36.

Department of State – The Department of State (“DOS”) has complied with nearly all of the requirements of the September 15 Order. First, DOS has completed its searches. See Second Declaration of Margaret P. Grafeld, dated October 15, 2004 (“Grafeld Decl. II”), ¶ 5, which is produced under cover of this letter. Second, DOS has provided a Vaughn declaration of documents responsive to plaintiffs’ August 16 List. Id.; see also First Declaration of Margaret P. Grafeld, dated October 15, 2004 (“Grafeld Decl. I”), which is produced under cover of this letter. And third, under cover of this letter, DOS has produced an index identifying approximately 5,300 documents. Id. Nevertheless, DOS must still complete the identification process for approximately 2,000 documents retrieved from the files of a few individuals. Id. ¶ 6.

Accordingly, DOS respectfully requests a brief extension of one week, until October 22, 2004, to complete the identification process for those documents.

The documents that remain to be logged (the bulk of which are emails and email attachments) were found in the files of a handful of DOS employees who work closely on detainee and Iraq-related issues. Given the nature of their work, the demands on their schedules, the volume of potentially responsive material involved, and the greater difficulty encountered in searching and retrieving documents in electronic format, these searches generated a number of additional documents late in the search process. Id. ¶ 6. Despite DOS's best efforts, roughly 2,000 documents from those files were not processed for identification.² DOS estimates that it will take until October 22, 2004 to complete the identification process for those documents. See id. ¶ 7.

In accordance with the Court's September 15 Order (at 7), DOS has produced responsive documents to plaintiffs on an ongoing basis. For example, in conjunction with an administrative response dated September 16, 2004 concerning twenty-two documents from the Office of the Legal Adviser, DOS produced two documents in full to plaintiffs. Further, DOS provided plaintiffs with an administrative response dated September 21, 2004 with regard to thirty-five documents responsive to plaintiffs' August 16 List; that response included the production of eight documents, five in full and three with excisions. By letter dated October 14, 2004, DOS released an additional document with excisions from the thirty-five documents responsive to plaintiffs' August 16 List. Finally, DOS provided plaintiffs with three administrative responses dated October 5, 2004 that addressed twenty-four documents and included the release of thirteen documents in full. Thus, since the September 15 Order, DOS has provided plaintiffs with administrative responses for eighty-one documents and has produced twenty-four documents, twenty in full and four with excisions.

DOS's good faith in responding to the Court's September 15 Order is further demonstrated by the significant resources the agency has dedicated to plaintiffs' requests. Since September 15, over twenty employees and nine student employees in the Department's Office of Information Programs and Services have worked over 1,200 hours searching for, identifying and processing documents in this case. Grafeld Decl. II ¶ 4. Those hours include overtime work on weekends, in the evenings and during one holiday. Id. An undefined but significant number of additional DOS employees from other bureaus, including at least seven employees in the Office of the Legal Adviser, have likewise worked on the case by completing document searches, assisting with document identification, and preparing the Vaughn declaration.

Accordingly, we respectfully submit that DOS has demonstrated good faith as well as good and specific reasons justifying a brief extension of the ordered schedule to allow DOS to complete the identification process for a discrete number of documents.

² A considerable number of those documents are likely to be non-responsive, duplicates, or documents to be referred to other agencies. Grafeld II Decl. ¶ 7.

Department of Defense – DOD has taken substantial steps to comply with the Court’s Order. DOD is releasing to plaintiff the Report of Major General Anthony Taguba and its annexes, which consists of approximately 4,000 pages, the report of Major General Donald Ryder, and nine closed files from investigations conducted by U.S. Army Criminal Investigative Command (“CID”). See Declaration of Stewart F. Aly, dated Oct. 15, 2004 (“Aly Decl.”), ¶¶ 6-8. In addition, DOD has searched for responsive documents within the Army, Navy and the Defense Intelligence Agency (“DIA”). *Id.* ¶ 3. To memorialize these searches, DOD has produced logs and declarations describing the responsive documents located to date. These logs include the attached index of over 100 pages from the Defense Intelligence Agency, two logs of over 170 pages from the Army, and one log from the Navy. In addition, DOD has submitted declarations justifying non-production of documents and explaining the specific reasons for its inability to fully comply with the Court’s Order. See Aly Decl.; Declaration of Philip J. McGuire, dated October 14, 2004; Declaration of Major Samuel W. Morris, dated October 15, 2004; Declaration of Robert Storer, dated October 15, 2004; Declaration of Margaret B. Baines, dated October 15, 2004; Declaration of Brian S. Kinsey, dated October 15, 2004. DOD’s efforts at compliance with the Court’s Order have utilized more than 250 personnel from the Department and totaled thousands of hours. Aly Decl. ¶ 12.

Notwithstanding its efforts, DOD is unable to fully comply with the Order for two reasons: 1) the incredible breadth of the search request made by plaintiffs and the resulting vast amount of documents that must be individually reviewed on a line-by-line basis; and 2) the existence of documents in the possession of the Coalition Provisional Authority (“CPA”), the organization that had authority for governing Iraq after the removal of Saddam Hussein. See Aly Decl. ¶¶ 13-23. The overbreadth of plaintiffs’ search request results from the generic terms used in the request and the lack of limitation in the search as the search seeks any and all documents regarding the treatment of detainees by the United States overseas but does not limit its definition of the terms “detainees” or “treatment.” The Department’s search results to date confirm the overbroad nature of plaintiff’s request. For example, DIA conducted a search of its computerized database of records using the search terms contained in plaintiffs’ request and the result exceeded one million pages worth of documents. Similarly, the Army has not yet catalogued all of the results of its search but the documents identified to date total 145,000 pages worth of documents, not including the documents that are in the possession of the Army CID (the relevant Army CID documents include more than 200 criminal investigations). Given the vast amount of documents generated by plaintiffs’ request, the Government asks the Court to narrow the scope of the request regarding the treatment of overseas detainees to allegations of physical or mental abuse that have been the subject of investigations by any component within the Department. Even if the search is limited to documents concerning the abuse or mistreatment of detainees held in Iraq, Afghanistan and the Naval Base at Guantanamo Bay, the Department estimates that it would require hundreds of thousands of hours to complete the search and process responsive documents.

In addition, responsive documents are likely to exist in the possession of the Coalition Provisional Authority (CPA), the organization charged with running Iraqi governmental functions following the removal of Saddam Hussein. As the CPA ceased to exist

as of June 2004, however, it does not possess any staff knowledgeable about its operations to conduct a search of its files for responsive documents. There is a DOD project to preserve documents created during the operation and existence of the CPA, which will result in the preservation and archiving of 500,000-700,000 pages of documents. Storer Decl. ¶ 3. To date, the project has captured approximately 420,000 pages of documents, and the project will not be complete for approximately 90 days. Storer Decl. ¶ 4. The archiving project makes it possible to conduct electronic searches for key terms but each search involves a significant investment of time and money. Storer Decl. ¶ 7. The Department has not yet searched the existing CPA database. The Department requests leave of the Court to search the database after the archiving project is complete and, in the meantime, to focus the Department's efforts on the search and processing of documents within the rest of the Department. However, if the Court wishes, the Department can institute a search of the existing database as soon as possible, but such an approach will require another substantial search after the database has been completed.

Finally, there are substantial hurdles to the expeditious processing of documents responsive to plaintiffs' List. Many of these documents contain classified information, which must be reviewed by appropriate personnel within the Department to determine if the information can be released. Unlike the search task, where the Department can more readily assign additional individuals to work on the project at many locations where responsive documents may be located, the Department has a limited and finite number of personnel with the expertise and appropriate security clearances needed to perform the security review. In some subject areas, there may only be a handful of individuals who can reasonably make these determinations. Accordingly, the Department respectfully requests that the Court set a schedule for the processing of documents whereby the Department would process at least 5,000 pages per month and, every thirty days, release those documents to plaintiffs if appropriate or identify the basis for withholding those documents. The Department estimates that processing 5,000 pages per month would require hundreds of hours to review the documents for classification and other exemptions and then prepare any documents containing non-exempt information for release.

Referred Documents – In addition to the partial relief requested above, the Government must respectfully request blanket relief from the September 15 Order for all of the agencies for documents that are referred from one agency to another. When an agency locates records responsive to FOIA requests that originate with another agency or component, it refers those records to the originator for its direct response to the requestor. See, e.g., Stone v. Def. Investigative Serv., No. 91-2013, 1992 WL 52560, at *1 (D.D.C. Feb. 24, 1992) (recognizing that agencies may refer responsive records to originating agencies in responding to FOIA requests), aff'd, 978 F.2d 744 (D.C. Cir. 1992) (unpublished table decision); 28 C.F.R. § 16.4(c)(2) (Department of Justice regulation containing referral procedures). Here, given the volume documents, numerous referrals have been made between the agencies.

Where possible, the Government has included referrals in the indices and Vaughn declarations produced under cover of this letter. See, e.g., OLC index and Bradbury Decl. Nevertheless, many referrals were made in the last week as agencies continued to search and review documents, and the agencies have not yet had the opportunity to process referred

documents that they just received. The vast majority of these referrals have no impact upon this case because they are merely duplicates of documents already included within the search and processing of the originating agency, and plaintiffs have agreed that the Government need not produce duplicates. See Plaintiffs' Letter to the Court, dated September 1, 2004 at 2 ("Plaintiffs have agreed to Defendants' request to eliminate news articles and duplicates from the agency search process"). Until the agencies have reviewed all of the referred documents, however, the Government will not know whether or when it will need to make supplemental productions concerning referred documents.

Accordingly, we respectfully request leave to address referred documents on a separate track. The Government will write the Court by October 22, 2004 with a proposal for addressing the processing of non-duplicate referred documents.

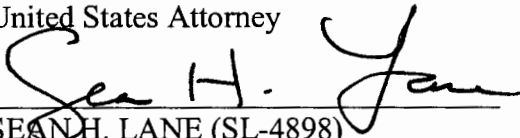
Conclusion

In conclusion, the following agencies and agency components have fully complied with the September 15 Order: OIP, OIPR, OLC and the Criminal Division. Moreover, despite the good faith efforts of the remaining agencies to comply with the Court's order, the Government must respectfully request the following relief: (i) leave for the CIA to search those operational files implicated by the OIG's investigations when those investigations are closed and an extension until November 4 of the CIA's time to submit an index; (ii) an extension until October 22 of the FBI's time to submit a Vaughn declaration and an in camera log; (iii) an extension until October 22 of DOS's time to complete the identification process for 2,000 documents; and (iv) a contraction of the scope of DOD's search, leave for DOD to search the COD database when it is completed in 90 days, and approval of a schedule by which DOD will process 5,000 pages of documents per month going forward.³

Respectfully,

DAVID N. KELLEY
United States Attorney

By:


SEAN H. LANE (SL-4898)
PETER M. SKINNER (PS-9745)
Assistant United States Attorneys
Telephone: (212) 637-2737

cc: Lawrence S. Lustberg, Esq.

³ We respectfully request that the Court docket this letter and the accompanying declarations and indices. Because this is an Electronic Case Filing action, we offer, with the Court's permission, to file the letter and the accompanying declarations and indices electronically.