

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY INFORMATION
 CENTER,)
)
 Plaintiff,)
)
 vs.)
)
 UNITED STATES DEPARTMENT OF JUSTICE,)
)
 Defendant.)
 _____)

Civil Action No. 18-1814 TNM

DECLARATION OF JOHN W. KORNMEIER

I, John W. Kornmeier declare the following to be a true and correct statement of facts:

1) I am an attorney advisor with the Executive Office for United States Attorneys (“EOUSA”), United States Department of Justice. In that capacity, my responsibilities include: acting as liaison with other divisions and offices of the Department of Justice (“DOJ”) in responding to requests and the litigation filed under both the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a (“PA”); the review of FOIA/PA requests for access to records located in this office and 94 United States Attorney’s Offices (“USAO’s”) and the case files arising therefrom; the review of correspondence related to requests; the review of searches conducted in response to requests; the location of responsive records; and preparation of responses thereto by the EOUSA to assure that determinations to withhold (or to release) such responsive records are in accordance with the provisions of both the FOIA and the PA, as well as the Department of Justice regulations (28 C.F.R. §§ 16.3 et. seq. and §16.40 et. seq.).

2) As an attorney advisor of the FOIA/Staff Unit of EOUSA, I have authority to release and/or withhold records requested under the FOIA/PA, and to advocate the position of the EOUSA in actions brought under these Acts. The statements I make hereinafter are made on the

basis of my review of the official files and records of EOUSA, on my own personal knowledge, or on the basis of information acquired by me through the performance of my official duties.

3) Due to the nature of my official duties, I am familiar with the procedures followed by this office in responding to the FOIA/PA request(s) made to EOUSA either directly or as a referral from another agency.

4 By letters dated June 14, 2017, June 21, 2017, and July 2, 2019, Plaintiff Electronic Privacy Information Center (“EPIC”) made three FOIA requests for the first page of all 18 U.S.C. § 2703(d) cell site location orders for the years 2016, 2017, 2018, and 2019 for all 94 USAOs.

5) By letter dated October 10, 2018, EOUSA informed plaintiff on the first request that “Our Data Analysis Staff has searched its database and determined that EOUSA does not track the statute requested.”

6) EOUSA manages and administers the CASEVIEW database. This database tracks cases for all 94 USAOs which enter information on every case. The database is cumulative and consequently houses cases in the millions going back many years. In fiscal year 2019 alone the 94 USAOs handled over 250,000 criminal matters which puts the four years total for which EPIC is seeking orders at about 1,000,000,000 matters.

7) Anytime EOUSA receives broad requests which cover some or all the 94 USAOs, it contacts its Data Analysis Staff which applies search algorithms to retrieve the information. Following this procedure we submitted the requests to the Data Analysis Staff which informed us that CASEVIEW does not track this information.

8) We held discussions with EPIC which asked us to inquire as to other possible ways to retrieve the information. Accordingly, we went to our two largest USAOs, the Southern District of New York and the District of Columbia. These two districts informed us that they could not retrieve the information without extensive laborious work by the Criminal AUSAs going through

their hard copy and electronic files. EPIC was informed, however, that limited searches could be performed. For example, on February 7, 2019, counsel for defendant informed EPIC's counsel that the USAO-SDNY had a Criminal Clerk's Log that for 2016, the time period EPIC asked that office to search, contained 39 items that contained the term "cell site." Along with other information, EPIC was also informed of the effort that would be required to do a manual search for 2703(d) orders. EPIC was expressly asked how it wanted to proceed. EPIC responded that it needed time to consider its next steps.

9) Instead of asking USAO-SDNY to undertake any searches, by email dated February 15, 2019, EPIC requested that:

"On February 7, 2019, you sent us a response from the agency about the search of the USAO in the SDNY. Based on that response, we propose that the agency conduct searches in the Eastern District of Oklahoma, the Eastern District of Pennsylvania, and the Southern District of California to see if those offices can locate responsive records."

10) By telephone conference between the parties on March 13, 2019, we agreed that EOUSA would undertake the search requested in EPIC's February 15, 2019 email, as set forth in the joint status report dated March 15, 2019, filed by the parties.

11) By email dated April 25, 2019, counsel for defendant informed plaintiff that:

The Eastern District of Oklahoma reported they do not have access to orders regarding cell site locations. They do not track this information and they do not maintain a log of 2703(d) orders. They would have to manually search all of their case files for the designated time period to find cases in which a 2703(d) order was requested and granted. The SD District of California reported the same thing. And the Eastern District of Pennsylvania also reported that they do not track this information by any means.

By email dated April 26, 2019, EPIC responded: "We need some additional time to review and confirm whether there are any remaining issues in dispute."

12. EPIC continued to consider its position for several months. Then by email dated July 25, 2019, EPIC informed defense counsel that:

We believe that the only way to move forward with this case is for the court to review the agency's pattern and practice of refusing to search and delaying the production of the type of records that EPIC has requested. In order for the Court to consider all relevant factual allegations, including facts about EPIC's other related requests and plans for future requests, we believe it is necessary to amend our complaint.

13) The five districts which looked into the issue are submitting declarations as to why such work by the Criminal AUSAs would be unreasonably burdensome.

14) I contacted the other 94 USAOs to determine whether retrieval of the requested information would be unreasonably burdensome. These districts confirmed that retrieval would be unreasonably burdensome, with the exceptions of Rhode Island and the Virgin Islands, which noted a search might not be unreasonably burdensome because of the small numbers, at least for AUSAs who are still there. Given that EPIC had expressed no interest in partial searches, I did not pursue this.

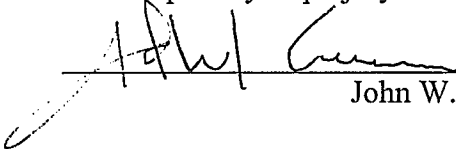
15) Nothing that I determined in my survey of the other 94 districts would enable EOUSA to respond to the comprehensive request for all cell site orders for the 94 USAOs for 2016, 2017, 2018, and 2019.

16) EPIC alleges EOUSA has engaged in a pattern and practice of failing to search for reasonably described requests, although in the Amended Complaint EPIC only identifies its own requests in this case as purported evidence of such a pattern and practice. On the contrary, as indicated in this case, EOUSA did not take the position that the request was not reasonably

described and EOUSA did search its CASEVIEW database for the information requested. However, EOUSA determined that it does not track the information requested in its database so there was no reasonable way to locate the information requested. At EPIC's request, EOUSA also went to its two largest districts and to three other districts that EPIC selected to see if the requested information was tracked or available without an unreasonably burdensome search. There was no refusal to search for a reasonably described FOIA request for EPIC. Indeed, as a general matter EOUSA performs thousands of searches each year in response to requests. I personally have ordered hundreds of searches each year.

17) EPIC also alleges that EOUSA engaged in a pattern and practice of failing to meet the twenty day statutory deadline for production. EOUSA has between four and five thousand FOIA requests per year and 178 FOIA cases in litigation which it handles with eleven attorneys and nine Government Information Specialists. With this staff EOUSA follows the FOIA, regulations, and its procedures to treat all requesters fairly and processes requests as quickly as its available resources will allow. Congress, understanding the tremendous volume of requests, provided in the FOIA for negotiations and extensions on production schedules. Under the FOIA if an agency cannot meet the deadline, it may engage the requester in seeking to narrow the request or seek additional time. EOUSA and EPIC did engage in such negotiations, although EPIC ultimately declined to limit its request to a discreet subset of USAO districts or to any limited searches. Courts also routinely recognize that agencies, overwhelmed by FOIA requests and understaffed, need additional time to respond to FOIA requests and have granted the additional time needed.

I declare under penalty of perjury that the foregoing is true and correct.



John W. Kornmeier, November 13, 2019