

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Electronic Privacy Information Center,
Plaintiff,

v.

United States Department of Justice,
Defendant.

Declaration

Docket No. 18-1814

STATE OF NEW YORK)
) ss.
COUNTY OF NEW YORK)

DECLARATION OF JOHN M. McENANY

I, JOHN M. McENANY, pursuant to 28 U.S.C. §1746, hereby affirm the truth of the following under penalties of perjury:

1. **Introduction.** I am an Assistant U.S. Attorney in the Office of the United States Attorney for the Southern District of New York (“USAO-SDNY”). I currently serve as the Associate U.S. Attorney, on the Office’s Executive Staff, and have served in that position since 1991. I am generally familiar with the methods by which criminal case files are kept within the Office. I respectfully submit this declaration in connection with *Electronic Privacy Information Center v. United States Department of Justice*, Docket No. 18-1814 (D.D.C.) (TNM), which relates to a series of FOIA requests made by plaintiff for “The first page of all 2703(d) orders for production of cell site location information” during the years 2016-2019. I make this declaration on information and belief, based on my own experience, and based on consultation with personnel in our Criminal Clerks Office and IT Services Department, our FOIA Specialist, Records Manager, and the Chief of our White Plains branch office, among others.

2. **Relevant Time Frame.** Although plaintiff's requests cover the period 2016-2019, the relevant time frame, for practical purposes, subject to any ruling of the Court, for determining what kind of search may reasonably be conducted is in fact shorter, from plaintiff's starting point of 2016 through September 2017. That is because USAO-SDNY stopped submitting 2703(d) cell site orders in September 2017.

3. **Criminal Clerk's Log.** Within the main (Manhattan) office of USAO-SDNY we have a Criminal Clerks office that, on request of an Assistant U.S. Attorney or paralegal, will deliver documents to the court. The Criminal Clerks keep a log of documents they bring to court. The log includes the name of the AUSA; some other identifying data such as a subject telephone number, a magistrate's docket number, or a USAO-SDNY file number; and a brief description of the document. For the entire 2016-2019 time frame, the Criminal Clerks log shows approximately 268 items referencing "cell site." (Consistent with our abandonment of 2703(d) cell site orders in September 2017, the Criminal Clerks log references only one "cell site" item after that date, and that particular item is unresponsive to Plaintiff's requests.) USAO-SDNY has one branch office, in White Plains, NY; that office does not have a log similar to the Criminal Clerks log maintained in Manhattan. We have been searching for responsive documents based on the "cell site" items referenced in the Criminal Clerks log and anticipate that search will be completed in November 2019.

4. **No Other Central Tracking System.** Because it is common practice for AUSAs and paralegals to bring orders to the Magistrates Clerks without going through our Criminal Clerks, we cannot represent that the Criminal Clerks' log contains the universe of all 2703(d) cell site

orders for the relevant time frame. Nor, beyond that log, does USAO-SDNY otherwise centrally track or file 2703(d) cell site orders. 2703(d) cell site orders are used in many types of cases and accordingly a search for all 2703(d) cell site orders would require an individual search of all USAO-SDNY criminal matters open during the relevant period.

5. **Magnitude.** A search for 2703(d) cell site orders beyond those indicated by the Criminal Clerks log would require identification of all criminal cases and matters open during the relevant period (approximately 6656 for the period 2016-September 2017 and approximately 10,178 for the entire period of 2016-2019); identification of the AUSAs who worked on those matters during that time (USAO-SDNY had a moving roster of approximately 155-165 criminal AUSAs during that time; approximately 56 criminal AUSAs on duty during the period 2016-September 2017 are no longer with the Office); locating and searching physical case files, many of which will have to be retrieved from the Federal Records Center (“FRC”); locating and searching cloud-based network case files (we create approximately 1800 cloud-based network case files a year); and locating and searching individual AUSA network folders and retained email data.

6. **Digital File Search Constraints.** Our IT Services personnel advises that an effort to conduct a search of our digital files for records responsive to Plaintiff’s request would be completely unfeasible. (By digital search I mean a search for the following terms: 2703; cell site; cellsite.) Set forth below are some of the specific concerns.

(a) **No Automatic Search Capability.** USAO-SDNY has no ability to conduct a digital search for 2703(d) cell site orders within our network environment. USAO-SDNY network files are not kept in a document management system that automatically indexes documents as they are

created and allows for easy key-word or other advanced searches. Instead files are stored in what may be analogized to a folder/subfolder tree structure. The files are not indexed. The bulk of our files are stored in the “cloud” where large quantities of data can be archived but where the rate of transfer of files to the user is extremely slow. (For example, we instruct paralegals to not transfer evidence files during the work day, but rather to arrange for such file transfers to be initiated after hours. Some file transfers in individual cases are set to run overnight or longer; when such file transfers are sought to be done during the day normal operations are extremely degraded and certain applications crash.) Nor could any attempt to digitally search these files for purposes of responding to this FOIA matter be undertaken. USAO-SDNY currently has about 200 TB of data in storage and any effort by USAO-SDNY IT Services to access and digitally search that data would render the system unusable for ordinary business purposes. Any effort to access even just file names to do a filename search would have the same result: under our current configuration, even just identifying a filename triggers the process to download file data. We do not have a count of the number of files in our cloud-based network folders but believe the order of magnitude is in the billion range. (By way of illustration, a single cellphone can have 100,000 files.) And even if a file search were limited to files created during the period 2016-September 2017, the properties of all files would still have to be accessed to determine which were created during that period. This is not a search that USAO-SDNY IT Services could run with our current system and file configuration.

(b) **Cloud-Based Network Files.** More specifically, our cloud-based storage contains case folders (which we refer to locally as shared folders) that have an average size of approximately

300 gigabytes. We create roughly 1800 cloud-based network case folders per year, which would amount to roughly 3150 folders for the relevant time frame. Our IT Services specialists advise that it would be operationally unfeasible to make all of this data for the relevant period available to our FOIA Specialist to search. Nor would difficulties of access be eliminated if multiple persons were tasked with searching cloud-based network folders; the drain on network resources would be the same. Given that we already need to delay much of our current network activity to after-hours, attempting to assign multiple persons to network searches would not be a solution.

(c) **Individual AUSA Network Files.** AUSAs may also store case data in local server-based folders to which only the individual AUSA has access. We refer to these as “N: drive” files, and even systems administrators require special permission to access a user’s N: drive. Accessing these files present similar system-resource limitations on the conduct of our normal business. IT Services personnel estimate, very roughly, it could take two-three hours per AUSA for all current AUSAs who were on duty during the relevant time frame (approximately 135) to search their N: drives and copy, for later review, potentially responsible documents. Assuming IT Services personnel obtained permissions to search user N: drives, a similar amount of time (270-300 hours) would be required to conduct the search, except that to avoid severely overtaxing our network during normal business hours, our limited number of IT Services personnel would have to conduct this search after-hours, and still at cost to normal after-hours network usage. From a calendar perspective, assuming IT Services personnel could devote up to 8 hours of after-hours time per week for such a search, it would take over a year to conduct such a search, all at substantial cost to our network capabilities and our IT Services personnel’s after-hours availability.

(d) **Backup Email.** Responsive documents may also be contained in attachments to email. Email may be retained locally by users in, for example, InBoxes; stored by users in .pst files within network or cloud folders; maintained in a user's Outlook Archive Folder; or in a USAMail archive file system maintained by the Executive Office for U.S. Attorneys ("EOUSA") for generally three years. From inquiries we have made in connection with this litigation, we have recently been advised that we or EOUSA may run a search across our USAMail Archive and across our users' Personal Archive Folders. We have never conducted such a search and do not know how it may run in practice; at this moment our best estimate would be a week (or weeks) of processing time that might have to be spread over a much longer period of time. If such a search were conducted by or on behalf of other U.S. Attorney's Offices, a different magnitude of delay and disruption would likely result. This does not include the amount of time necessary to copy and process potentially responsive documents generated by such a search.

7. **Hard-Copy Criminal Case Files.** We create approximately 3,000 hard-copy case files per year. Active cases are generally stored at USAO-SDNY or at our Manhattan storage center, and closed cases are sent to the FRC. It would generally take about 10 minutes per file for our Records Manager to determine the general location of a file, plus additional time to specifically find and retrieve the file itself, depending on its storage within the USAO-SDNY, our Manhattan storage facility, or the FRC. Once the hard-copy file, or such relevant portions as can be determined from available indices, are in the hands of our FOIA Specialist, we estimate it would average about 20 minutes per file to search for 2703(d) cell site orders (amounting to roughly six months of uninterrupted work). Again, this does not include the overhead to get physical custody of the files

from their various locations into the hands of our FOIA Specialist. In order not to bring our other records and FOIA activity to a standstill, this work would also have to be spread out over time as well.

8. Sealed Records. Finally, it was consistent practice for 2703(d) cell site orders to be sealed. Unsealing orders are rarely obtained. As a result, most if not all responsive orders would be subject to a court sealing order and thus exempt from disclosure in any event.

Dated: New York, New York
November 13, 2019



JOHN M. McENANY
Assistant United States Attorney