

familiar with the processing of FOIA/PA responses, including, at times, by directly reviewing for adequacy and compliance with federal laws and regulations.

3. The statements in this Declaration are made on the bases of: (1) my personal knowledge of the internal operations of this office and agency; and (2) information acquired by me in the course of the performance of my official duties.

4. I am familiar with the procedures followed by CBP in responding to requests for information pursuant to the provisions of FOIA, and with the procedures followed in responding to the request made by the American Civil Liberties Union of Massachusetts, Inc., the Plaintiff in the above-captioned matter.

5. The purpose of this Declaration is to explain the actions CBP has taken since receiving Plaintiff's FOIA request dated December 28, 2018 (the Request), and to provide an explanation of the procedures used in searching for CBP records that were potentially responsive to Plaintiff's Request.

CBP'S STANDARD PROCEDURE FOR INITIATING SEARCHES IN RESPONSE TO FOIA REQUESTS

6. CBP is a law enforcement agency comprised of more than 60,000 employees charged with enforcing hundreds of federal statutes. Approximately 45,000 of those employees are armed law enforcement officers engaged in carrying out CBP's expansive border security mission (U.S. Border Patrol Agents, Field Operations Officers, and Air and Marine Interdiction Agents).

7. Broadly, the FOIA Division at CBP reviews FOIA requests, determines whether responsive records exist and, if so, whether they can be released in accordance with the FOIA.

In processing such requests, the FOIA Division consults with CBP personnel and, when appropriate, with other components within DHS, as well as other Executive Branch agencies.

8. Despite the large size of CBP as an organization, the FOIA Division currently consists of 35 full-time staff and student interns, and four supervisory employees.

9. A GIS, also known as a FOIA processor, is tasked with reviewing information and providing assistance to managers and employees concerning FOIA issues, policies, and procedures. He or she is also responsible for processing FOIA requests for CBP records. A GIS is responsible for reviewing and preparing draft responses to requests for releases of information and, in so doing, must apply relevant statutes, regulations, agency rules, and/or executive orders as they pertain to FOIA requests.

10. A Branch Chief is responsible for managing policy formulation, advising agency management, and ensuring compliance with federal laws governing the release of information. Branch Chiefs oversee the release of CBP documents and information, assist with FOIA litigation matters, and oversee the processing of FOIA responses and adherence to federal laws and regulations.

11. Generally, the FOIA Division often has no direct access to records that may be responsive to a request. Rather, the FOIA Division must first determine which CBP offices are likely to have responsive information and then work with those offices to gather any potentially responsive records. Based on the FOIA Division's familiarity with the types of records that each office maintains, assessments of where responsive records are likely to be maintained are based on a review of the content of the request itself and the nature of the records sought, as well as discussions with knowledgeable agency personnel. Accordingly, when CBP receives a FOIA request that reasonably describes the records requested and complies with the agency's rules

governing the procedures for FOIA requests, the office likely to have responsive information must search for and retrieve potentially responsive records.

PLAINTIFF’S REQUEST AND CBP’S SEARCH FOR RESPONSIVE RECORDS

12. By emailed letter dated December 28, 2018, Plaintiff submitted the Request to the Department of Homeland Security (DHS), seeking: (1) the “contract” referenced in a December 24, 2018 Twitter announcement (Announcement) by the President of the United States (“I am in the Oval Office & just gave out a 115 mile long contract for another large section of the Wall in Texas”); and (2) “All purchase orders, RFPs, documentation of selection, sole source or limited source justification and approval documents, studies of cost, efficacy, and/or environmental impact, and other memoranda and documentation pertaining to the ‘contract’ referenced in the Announcement.” A copy of the Request is attached as Exhibit A.

13. By emailed memorandum dated January 28, 2019, the DHS Privacy Office transferred the Request to the CBP FOIA Division. DHS also provided copies of correspondence between Plaintiff and the DHS Privacy Office Disclosure Team related to the Request. Included in the correspondence was Plaintiff’s January 16, 2019 response to a request from the DHS Privacy Office for further specificity regarding the documents sought, where Plaintiff explained that they were seeking records pertaining to a “single ‘115 mile long contract for another large section of the Wall in Texas’ signed on December 24, 2018.” See Letter from Plaintiff dated January 16, 2019, attached as Exhibit B.

14. On January 31, 2019, the request was entered into the FOIAonline system under tracking number CBP-2019-025646, which also sent an email to the Plaintiff providing notification of the transfer.

15. Upon receiving the Request, CBP FOIA Division staff carefully evaluated the Request and considered which offices, databases, and personnel were likely to hold responsive information. CBP FOIA determined that any responsive DHS records would fall under the purview of CBP because CBP is the component of DHS with primary responsibility for securing the border. Based on FOIA expertise and experience with prior, similar requests for information regarding the border wall (Wall) it was determined that the office most reasonably likely to maintain information responsive to the request – if any such information existed – was the Office of Acquisition (OA) within CBP’s Enterprise Services Office. The OA is responsible for all CBP procurement and the only office that processes procurement contracts and interagency agreements (IAAs) for CBP, and the contract referred to in the request would have been a procurement contract or IAA. Accordingly, CBP began its search with OA. If OA does not have responsive records, it is not reasonably likely that other offices within CBP or DHS, including DHS Headquarters, would have responsive records.

16. CBP FOIA Division tasked OA with searching for any responsive records “regarding all purchase orders, invoices, RFPs, documentation of selection, sole source or limited source justification and approval documents, studies of cost, efficacy, and/or environmental impact, and other memoranda and documentation pertaining to the ‘contract’ referenced in the Presidential tweet of December 24, 2018, stating ‘I am in the Oval Office & just gave out a 115 mile long contract for another large section of the Wall in Texas’”.

17. The time period of the search was not specified in the tasking but was self-evident from the date of the President's December 24, 2018 Announcement noted in Plaintiff's request ("I . . . *just* gave out a 115 mile long contract for another large section of the Wall in Texas.").

18. Within OA, searches were performed by members of a team in the Procurement Directorate, Facilities Maintenance and Engineering Division (FM&E Division, now known as the Administration and Facilities Contracting Division), Facilities Contracting Branch. This team is responsible for administering all Border Patrol Wall Program Management Office contracts and IAAs, including construction requirements, service requirements, professional services requirements, and engineering requirements, for the border barrier systems and border fencing infrastructure (which includes both technology related to border barriers, such as remote video surveillance, and the actual physical infrastructure making up the Wall) along the southern border in Texas. Because CBP lacks construction capabilities, it actually does not award contracts to vendors for the construction of physical Wall infrastructure. Instead, CBP writes technical requirements into statements of work that are then provided by the FM&E Division to the U.S. Army Corps of Engineers (USACE) pursuant to existing or new IAAs. The USACE awards contracts to vendors for the performance of the project based on technical requirements provided by CBP using funds provided by CBP. OA maintains IAA files, which include statements of work, funding requests, and other correspondence with USACE, in electronic format with paper duplicates printed out as needed.

19. Within the Facilities Contracting Branch team, the tasking was sent to Keisha Benford, the Contract Specialist for Concrete Border Wall Design Build Contracts, who is also the lead Contract Specialist overseeing Border Barrier IAAs with the USACE. Ms. Benford was not aware of a single contract or IAA for 115 miles in Texas that had been awarded, and she

would have been aware of any such contract or new IAA. She knew that any contract or IAA of that size and significance, such as the Concrete Border Wall Design Build Contracts she had worked on previously, would have been processed by her team as well as likely initiated by an Executive Order and certainly designated as a high visibility project by CBP leadership, but no such IAA or contract had come to her attention. Nonetheless, in an abundance of caution, she searched the electronic records in her personal files relating to IAAs she processed, which include the IAAs, statements of work, funding requests, and other correspondence with USACE as well as congressional notification documents, for “115 miles” or any combination of miles that could potentially add up to 115 miles and “Texas” plus “wall” or “fencing” and found nothing responsive for December 24, 2018 or any dates before or after that date. She did not search her paper files because any paper documents would be printed out duplicates from her electronic files and in this case she found no responsive electronic originals. Given the steps taken by Ms. Benford, and her personal knowledge of procurement related to the Wall, it is not reasonably likely that any records responsive to Plaintiffs’ request are in the possession of DHS or CBP.

20. On February 14, 2019, OA informed the FOIA Division that they found no responsive records and suggested that the Plaintiff be referred to the USACE.

21. On February 15, 2019, the FOIA Division uploaded OA’s response to FOIAonline, closed the request, and sent an emailed final response letter to Plaintiff.

22. On February 26, 2019, in an abundance of caution, Ms. Benford performed an additional search. Following the same process that she used on February 13, 2019, she searched the electronic records in her personal files relating to IAAs she processed with the additional search terms of “barrier” or “border barrier systems” together with “115 miles” or any

combination of miles that could potentially add up to 115 miles and “Texas.” She also emailed the Request to the other members of the team. She advised them to “Please see the FOIA Request below regarding the award of a 115 Mile Contract for a section of the Wall in Texas. Please reference terms such as ‘wall’, ‘fence’, ‘barrier’, and ‘border barrier systems. **If you have any knowledge of this award please respond directly to me**” (emphasis in original). No responsive records were reported by the other members of the team. Nor did any team member report having any knowledge of the contract. Ms. Benford also emailed the Team Lead Contracting Officer, John Callahan, and Mindy Shivers, the Contracting Officer Representative for all border barrier related IAAs, both of whom would have been aware of a single contract or new IAA for 115 miles, asking if they were aware of such a contract as described in the Request. Neither Mr. Callahan or Ms. Shivers were aware of such a contract.

23. I declare under a penalty of perjury that the information provided is true and correct to the best of my information, knowledge, and belief.

Signed this 16th day of May 2019.

Patrick A. Howard

Patrick Howard
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Office of the Commissioner
U.S. Customs and Border Protection
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