

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES)	
UNION OF MASSACHUSETTS, INC.,)	
)	C.A. No. 19-10291-WGY
Plaintiff,)	
)	
v.)	
)	
U.S. DEPARTMENT OF HOMELAND)	
SECURITY, and U.S. CUSTOMS)	
AND BORDER PROTECTION,)	
)	
Defendants.)	

STATUS REPORT

In advance of the hearing ordered for February 27, 2019, plaintiff American Civil Liberties Union of Massachusetts (“ACLU”) provides the Court with the following status report:

First, pursuant to the Court’s February 19, 2019 Order (Docket No. 5), undersigned counsel sent notice of the hearing to counsel for the government on February 19, 2019. *See* Ex. A (email notice). Counsel for the government acknowledged receipt. *See id.*

Second, ACLU continues to request that the Court expedite this litigation to the maximum extent possible. On February 15th, the President proclaimed that a state of domestic emergency exists at the U.S.-Mexico border and purported to authorize the further deployment of military forces to that region, the transfer of “border lands” to military jurisdiction, and the

diversion of federal appropriations.¹ To date, neither Congress nor the courts have blocked the operation of this proclamation. Consequently, in order to assess whether the President's ongoing actions are improper or unjustified, the public requires immediate access to reliable information concerning the status of the U.S.-Mexico border and the veracity of the President's related factual assertions. *See* 28 U.S.C. § 1657.

Third, ACLUM has received additional correspondence concerning the Request. This suit was filed at approximately 9:31 a.m. on Friday, February 15, 2019. Shortly thereafter, the Associated Press reportedly contacted defendant U.S. Customs and Border Protection ("CBP") for comment. *See* Ex. B (AP Article). Late that afternoon, undersigned counsel received two emails from foiaonline.gov. *See* Ex. C (3:23 p.m. email); Ex. D (3:54 p.m. email). The first amended the tracking number for the Request that is the subject of this suit. *See* Ex. C. The second contained a letter from CBP that purports to be its "final response" to the Request. *See* Ex. D. The letter states that it is responding to a request for "contract records pertaining to 115-miles of border wall in the Rio Grande Valley." *Id.* It further states that CBP "conducted a comprehensive search of files within the CBP databases," and that CBP was "unable to locate or identify any responsive records." *Id.*

The need for judicial intervention remains. As a matter of law, the defendants cannot re-open the administrative process after a FOIA suit has properly been filed. *See, e.g., Pollack v. Dep't of Justice*, 49 F.3d 115, 118-19 (4th Cir. 1995). And, to the extent the Court considers CBP's letter at all, that letter is inadequate, including because:

¹ *See* Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States (Feb. 15, 2019), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-declaring-national-emergency-concerning-southern-border-united-states/>; Remarks by President Trump on the National Security and Humanitarian Crisis on our Southern Border (Feb. 15, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-national-security-humanitarian-crisis-southern-border/>.

- a. CBP's response appears to artificially narrow the scope of the Request. The President announced a "115 mile long contract for another large section of the Wall *in Texas*." Cmpl. ¶31 (emphasis added). However, CBP appears to have construed the Request as seeking "contract records pertaining to 115-miles of border wall *in the Rio Grande Valley*." Ex. D (emphasis added). The Rio Grande Valley is an area located near the southernmost tip of Texas,² which comprises only a small portion of the U.S.-Mexico border in that state.
- b. ACLUM has challenged the adequacy of CBP's search for the requested records. Cmpl. ¶49. The President himself has publicly asserted that the referenced contract exists, and that it procures the construction of a very large section of his proposed border wall. *Id.* ¶31. Yet, astonishingly, CBP claims that it can find no record of either the contract itself or any memoranda and documentation pertaining to it. Ex. D. CBP should be required to prove the adequacy of its search, including by providing detailed affidavits concerning the scope, methodology, and results. *See Maynard v. C.I.A.*, 986 F.2d 547, 559-60 (1st Cir. 1993).
- c. Although the Request was initially directed to the Department of Homeland Security ("DHS"), it appears that DHS has never conducted any search for responsive records at all. If the President actually "gave out" a massive construction contract for a project falling within DHS's jurisdiction, and relating to an issue central to the President's public policy agenda, then DHS and its leadership would almost certainly have received documentation pertaining to that contract. Such documentation is responsive to the Request. DHS should be required to conduct a search, establish the adequacy of that search, and produce any responsive records it may locate.

In summary, continuation of this litigation remains necessary to allow ACLUM and the public to adequately assess whether the referenced contract was issued in violation of federal procurement procedures, whether the President is expending funds without Congressional authorization, and whether the President violated the public trust by fabricating the existence of a major government construction contract.

² *See* USGAO Report, Southwest Border Security, at 8, <https://www.gao.gov/assets/700/693488.pdf>; Rio Grande Valley Area, Tex. Dep't of Transp., <http://ftp.dot.state.tx.us/pub/txdot-info/trv/maps/harlingen-valley-combined.pdf>.

Dated: February 25, 2019

Respectfully submitted,

/s/ Daniel L. McFadden
Matthew R. Segal (BBO #654489)
Daniel L. McFadden (BBO #676612)
American Civil Liberties Union
Foundation of Massachusetts, Inc.
211 Congress Street
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Todd & Weld LLP
One Federal Street
Boston, MA 02110
(617) 720-2626
akennedy@toddweld.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document on all registered participants by filing it in the CM/ECF system.

/s/ Daniel L. McFadden
Daniel L. McFadden

EXHIBIT A

Daniel McFadden

From: Farquhar, Rayford (USAMA) <Rayford.Farquhar@usdoj.gov>
Sent: Wednesday, February 20, 2019 9:59 AM
To: Daniel McFadden
Cc: Matthew Segal; Kennedy, Alycia
Subject: RE: Notice of Hearing in ACLUM v. DHS et al., C.A. No. 19-10291 (D. Mass.)

Yes, received today.

Rayford A. Farquhar
Chief, Defensive Litigation
Civil Division
United States Attorney's Office
1 Courthouse Way, Suite 9200
Boston, MA 02210
(617) 748-3284
Rayford.farquhar@usdoj.gov

From: Daniel McFadden <DmcFadden@aclum.org>
Sent: Tuesday, February 19, 2019 3:57 PM
To: Farquhar, Rayford (USAMA) <RFarquhar@usa.doj.gov>
Cc: Matthew Segal <MSegal@aclum.org>; Kennedy, Alycia <akennedy@toddweld.com>
Subject: RE: Notice of Hearing in ACLUM v. DHS et al., C.A. No. 19-10291 (D. Mass.)

Ray,

I received a notice that the email below did not go through, so I am trying you again at this email address. Could you please confirm receipt?

Thank you,
Dan McFadden

Dan McFadden

Pronouns: he, him, his

Staff Attorney
American Civil Liberties Union Foundation of Massachusetts
211 Congress Street, Boston, MA 02110
617.482.3170 x171 | dmcfadden@aclum.org
aclum.org



From: Daniel McFadden
Sent: Tuesday, February 19, 2019 11:48 AM
To: 'RFarquhar@usa.doj.gov' <RFarquhar@usa.doj.gov>
Cc: Matthew Segal <MSegal@aclum.org>; 'Kennedy, Alycia' <akennedy@toddweld.com>
Subject: Notice of Hearing in ACLUM v. DHS et al., C.A. No. 19-10291 (D. Mass.)

Dear Attorney Farquhar,

On behalf of the ACLU of Massachusetts, we filed the attached complaint in the U.S. District Court for the District of Massachusetts at 9:31 a.m. on Friday, February 15, 2019.

My understanding is that paper copies of the complaint and exhibits are being served this morning on the U.S. Attorney's Office for the District of Massachusetts.

Per the Court's order, I am notifying you of the notice of hearing, below. If I should notify a different attorney, please let me know as soon as possible.

Additionally, our understanding is that, shortly after we filed the suit, the Associated Press contacted U.S. Customs and Border Protection for comment. On the afternoon of Friday, February 15, 2019, I received two emails via foiaonline.gov, one at 3:23 p.m. and the other at 3:54 p.m. As a courtesy, I have attached both emails.

Best regards,
Dan McFadden

Dan McFadden

Pronouns: he, him, his

Staff Attorney
American Civil Liberties Union Foundation of Massachusetts
211 Congress Street, Boston, MA 02110
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aclum.org



From: ECFnotice@mad.uscourts.gov [<mailto:ECFnotice@mad.uscourts.gov>]
Sent: Tuesday, February 19, 2019 11:01 AM
To: CourtCopy@mad.uscourts.gov
Subject: Activity in Case 1:19-cv-10291-WGY American Civil Liberties Union of Massachusetts v. U.S. Department of Homeland Security et al Notice of Hearing

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS***** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first

viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 2/19/2019 at 11:01 AM EST and filed on 2/19/2019

Case Name: American Civil Liberties Union of Massachusetts v. U.S. Department of Homeland Security et al

Case Number: [1:19-cv-10291-WGY](#)

Filer:

Document Number: 5(No document attached)

Docket Text:

ELECTRONIC NOTICE of Hearing. Status Conference set for 2/27/2019 10:00 AM in Courtroom 18 before Judge William G. Young. *Due to the request of the plaintiff for expedition of this matter, counsel for the plaintiff shall notify counsel for the defendants of this hearing.* (Gaudet, Jennifer)

1:19-cv-10291-WGY Notice has been electronically mailed to:

Daniel L. McFadden dmcfadden@aclum.org, waltshuler@aclum.org

Alycia M. Kennedy akennedy@toddweld.com, mcottreau@toddweld.com

1:19-cv-10291-WGY Notice will not be electronically mailed to:

EXHIBIT B

EXHIBIT C

Daniel McFadden

From: admin@foiaonline.gov
Sent: Friday, February 15, 2019 3:23 PM
To: Daniel McFadden
Subject: FOIA Tracking Number Change for referral CBP-OA-2019-025646 (to CBP-2019-025646)

The FOIA referral CBP-OA-2019-025646 has had its Tracking Number changed to CBP-2019-025646. This is normally due to the referral being transferred to another agency (for example, EPA to Dept. of Commerce) or to a sub-agency to process it. Additional details for this referral are as follows:

- Old Tracking Number: CBP-OA-2019-025646
- New Tracking Number: CBP-2019-025646
- Requester Name: Daniel McFadden
- Date Submitted: 01/31/2019
- Long Description: 2019-HQFO-00257. The requester is seeking 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".

EXHIBIT D

Daniel McFadden

From: no-reply@foiaonline.gov
Sent: Friday, February 15, 2019 3:54 PM
To: Daniel McFadden
Subject: Final Disposition, Request CBP-2019-025646
Attachments: CBP-2019-025646_Final Response.pdf

CBP-2019-025646 has been processed with the following final disposition: No Records

1300 Pennsylvania Avenue NW
Washington, DC 20229



**U.S. Customs and
Border Protection**

February 15, 2019

CBP-2019-025646

Daniel McFadden
American Civil Liberties Union of Massachusetts
211 Congress Street
Boston, MA 02110

Dear Mr. McFadden:

This is a final response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP) on behalf of the American Civil Liberties Union of Massachusetts (ACLU-M) submitted to the Department of Homeland Security (DHS) on December 28 and received by CBP on January 28, 2018. In your request you were seeking, contract records pertaining to 115-miles of border wall in the Rio Grande Valley. Due to the nature of your request, you may wish to contact the United States Army Corps of Engineers (USACE) for records which may be responsive. Information on filing a request with USACE may be found at:
<https://www.usace.army.mil/FOIA.aspx>

We conducted a comprehensive search of files within the CBP databases for records that would be responsive to your request. Unfortunately, we were unable to locate or identify any responsive records, based upon the information you provided in your request.

While an adequate search was conducted, you have the right to appeal this determination that no records exist within CBP that would be responsive to your request. Should you wish to do so, you must send your appeal and a copy of this letter, within 90 days of the date of this letter, following the procedures outlined in the DHS regulations at Title 6 C.F.R. §5.9. Please include as much information as possible to help us understand the grounds for your appeal. You should submit your appeal via FOIAonline by clicking on the "Create Appeal" button that appears when you view your initial request. If you do not have computer access, you may send your appeal and a copy of this letter to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

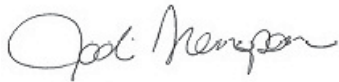
Additionally, you have a right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the

Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

This completes the CBP response to your request. You may contact a FOIA Public Liaison by sending an email via your FOIAonline account, or call 202-325-0150.

Please notate file number CBP-2019-025646 on any future correspondence to CBP related to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jodi Drengson". The signature is fluid and cursive, with the first name "Jodi" and last name "Drengson" clearly distinguishable.

Jodi Drengson
FOIA Analyst, FOIA Division
U.S. Customs and Border Protection