

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____ )	
AMERICAN CIVIL LIBERTIES UNION )	
OF MASSACHUSETTS and )	
AMERICAN OVERSIGHT )	D. Mass No. 21-10761-NMG
Plaintiffs, )	
v. )	
U.S. IMMIGRATION AND CUSTOMS )	
ENFORCEMENT )	
Defendants. )	

**DECLARATION OF RICHARD CLARK**

**In Support of The United States Immigration Customs Enforcement Motion For  
Summary Judgment**

**I. INTRODUCTION**

I, Richard Clark, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am employed as the Chief Technology Officer (CTO) in the Office of the Chief Information Officer (OCIO) for the U.S. Immigration and Customs Enforcement (ICE). I have held this position since January 28, 2019. Prior to this position, I was the Chief Enterprise Architect (CEA) in OCIO for ICE. I have over twenty-five years of experience in Information Technology. I have a degree in Electrical and Computer Engineering from Clarkson University.
2. ICE OCIO is responsible for providing information technology services and products that enable ICE to meet its mission. Services that the OCIO provides include the purchasing and contracting of mobile devices, their supporting services, mobile device management

infrastructure, electronic mail (e-mail) and supporting infrastructure for e-mail operations for all ICE employees.

3. As the CTO and CEA I have specific knowledge of the policies, procedures and capabilities of the ICE infrastructure and contracted services pertaining to email and mobile devices issued by ICE to their employees.

4. I make this declaration in my official capacity in support of Defendant in the above captioned Freedom of Information Act (“FOIA”) action. The statements contained in this declaration are based upon my personal knowledge and experience, upon information provided to me in my official capacity, and upon conclusions and determinations made in accordance therewith.

## **II. ICE’S Enterprise Vault (EV) Email Journaling System**

5. Beginning in December 2008, ICE implemented a system for journaling email known as the Enterprise Vault (EV). Through this system, agency emails are maintained in accordance with applicable record retention schedules. Under this system, emails from December 2008 through July 2018 were backed up in such a way as to be searchable and recoverable.

6. Starting July 2018, ICE OCIO stores email in Microsoft 0365 system. Under this system, emails from July 2018 to present are backed up in such a way as to be searchable and recoverable.

7. In order for OCIO to conduct a search of email communications after 2008, a request should be made, via the Request for Electronic Documentation (RED) system. The RED system is where request for electronic data such as old emails, here post-2008, are submitted. This request should contain names of custodians identified by the requester and the time frame for archived emails. The OCIO team will use the Symantec Discovery

Accelerator tool to perform retrieval of the email from our Enterprise Vault (EV) based on the time frame and custodian name(s).

8. On June 4, 2021, The ICE FOIA office tasked OCIO, which is the office that stores all electronic data including emails, and thus the office most likely to have responsive records relating to the requested information. Plaintiffs requested all emails of the following individual(s): Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello from March 15, 2018, through April 25, 2019 as set forth in Plaintiffs FOIA request.

9. OCIO collected all email communications of Thomas Homan, Matthew Albence, Thomas Blank, Tracy Short, Jon Feere, Natalie Asher, and Ronald Vitiello; who were identified by Plaintiffs' FOIA request.

10. These documents were then transferred to ICE FOIA paralegal, who was in charge of processing this data through ICE's "Relativity" platform. Relativity is an eDiscovery tool which was used to process and narrow-down the results by using search terms most relevant/likely to produce records from Plaintiffs' Request.

### **III General Information Regarding ICE's Short Message Service System (SMS) Backup**

11. For the purposes of this discussion, the term "text messages" will refer to those conveyed by carrier-based services known as Short Message Service (SMS), Multimedia Message Service (MMS) as well as Apple's Messages. Text messages are not systematically archived and journaled by ICE.

12. Due to the significant technological differences in the management and transport of text messages, as compared to e-mails, there are challenges which organizations face when it comes to meeting federal records keeping requirements of text messages. The only means

through which ICE can access an employee's text messages is with the cooperation of the employee or through a forensic analysis of the specific device.

13. ICE has an archive and journaling system which allows us to retain and search e-mails. ICE discourages employees from utilizing text messages for the creation of records and provides instructions to employees on how to appropriately retain text messages, in the event that they inadvertently do.

14. ICE practices when it comes to text messages are consistent with DHS guidance. DHS Policy Directive 141-03 issued on February 23<sup>rd</sup>, 2018, is attached. *See EXHIBIT A.*

15. DHS Policy Directive 141-03 reminds employees that records exist independent of their means of creation. Policy further indicates that, for in-person communications or telephonic conversations of substance, the best way to memorialize transactions which would meet the definition of a "record" if in written form is to create a memorandum to file to capture the exchanges. Given the overarching policy that discourages the creation of records via text message, coupled with instructions on how to appropriately preserve them should they coincidentally be created, federal records would only exist on employee phones for a brief and transitory amount of time.

16. Additionally, during the timeframe in question, to prevent the possibility of a data breach resulting from residual information which may have temporarily resided upon a mobile phone, it was standard practice at ICE to factory reset/securely wipe/destroy and delete all contents of mobile phone devices as they were being taken out of service.

17. Short Message Service (SMS) and Multimedia Message Service (MMS) are telephone company/carrier services. None of the carriers keep the contents of SMS or MMS messages beyond a very brief period of time, less than 30 days. Apple messages/iMessages are

not telephone company/carrier services, but provided by Apple. Apple may store SMS or MMS messages within iCloud in addition to iMessages; however, all information stored within iCloud is encrypted, and Apple will only provide iCloud content in response to a search warrant issued with probable cause or customer consent. Apple considers the end user/ICE employee, not ICE the agency, the customer who needs to consent. Apple does not retain iCloud content after it is deleted, or the associated account is deactivated.

18. In summary, ICE has no means by which to systematically search mobile phones for text messages. ICE expects employees to move relevant text messages from their phones to a more appropriate system which meets federal records keeping requirements. There would no longer be any copies of text messages within the telephone carriers or mobile device equipment providers infrastructure.

19. Thus, should any records exist, OCIO's email search of the seven custodians on June 4, 2021, would have located them. Since there is no evidence to indicate additional records exist, further searches of email records are unnecessary and, given ICE's inability to search for text messages, Plaintiff's insistence that ICE does so is unreasonable.

#### **JURAT CLAUSE**

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this \_\_9th\_\_ day of February 2022.

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Richard J. Clark  
Chief Technology Officer  
Technology Transformation Office  
Office of the Chief Information Officer  
U.S. Immigration and Customs Enforcement  
Department of Homeland Security

**RICHARD J**  
**CLARK**

Digitally signed by  
RICHARD J CLARK  
Date: 2022.02.09  
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