

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	}	
Defendant.	}	
	}	

SECOND SUPPLEMENTAL DECLARATION OF LYNNEA SCHURKAMP

I. INTRODUCTION

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

1. I am a Deputy FOIA Officer in the Freedom of Information Act Office (the “ICE FOIA Office”) at U.S. Immigration and Customs Enforcement (“ICE”). The ICE FOIA Office is responsible for processing and responding to all requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, received at ICE. I have held this position since August 1, 2021. I am the ICE official responsible for supervising ICE responses to requests for records in litigation that fall under the FOIA, 5 U.S.C. § 552. Prior to this position, I was the Assistant Disclosure Officer of the U.S. Secret Service FOIA Office from July 21, 2019 to July 31, 2021. Prior to that I was the FOIA Program Manager/Litigation Coordinator for the National Organic Program in the Agricultural Marketing Service, U.S. Department of Agriculture (“USDA”) for one year.

2. My official duties and responsibilities include the oversight and supervision of the ICE FOIA Litigation Team, which is responsible for reviewing and producing records for ICE FOIA requests when a complaint has been filed with a court. The Litigation Team will conduct a search, gather responsive records, review records for responsiveness, process productions, and release records with applicable withholdings to the plaintiff or plaintiff's counsel. The team is comprised of a Supervisory Paralegal and Paralegal Specialists. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act.

3. The ICE FOIA Office has been responsible for processing and responding to all Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received by ICE since January 17, 2010.

4. The purpose of this second supplemental declaration is to provide the Court with additional information regarding ICE's searches in the instant lawsuit. Specifically, the Court stated that "ICE alleges that it sent a records retention notice upon receipt of the Request, but the affidavit otherwise does not provide the level of detail required for the Court to conclude that ICE was reasonable in declining to collect text messages from the mobile devices of the named custodians."¹

5. Further, the Court instructed ICE to (1) file a supplementary affidavit explaining in detail its retention practices for Homeland Security Investigations (HSI) records and the basis for its decision not to conduct additional searches for HSI records, or (2) conduct a search of HSI records with the terms of this Order and 3) to conduct additional Relativity searches with the

¹ See Memorandum and Order on Cross Motions for Summary Judgment, Doc. 48, LR, D. Mass., 21-cv-10761-AK, June 3, 2022, at p.14.

terms “judge w/5 Newton” and “court w/5 Newton,” applied to the population of documents collected from the Office of the Chief Information Officer (OCIO).

6. The statements contained in this declaration are based upon my personal knowledge, my review of documents kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties.

II. ICE’S EXPLANATIONS RELATING TO RECORDS RETENTION NOTICE

7. This Court’s Order specifically stated that “ICE alleges that it sent a records retention notice upon receipt of the Request.”² To clarify, to the extent the term “records retention notice” is used in the opinion to mean the type of litigation holds that are routinely issued in other types of non-FOIA civil litigations prior to discovery, ICE does not have a policy or practice of issuing litigation holds in FOIA litigations. Rather, as explained in paragraph 24 of my initial Declaration dated December 14, 2021, upon the filing of the instant lawsuit, ICE FOIA issued a “search tasker” to OCIO, directing it to retrieve the electronic inboxes of the specified custodians during the relevant timeframe.³ This “search tasker” alerts the program office that records are being requested under the FOIA.

III. ICE’S EXPLANATION RELATING TO SEARCH OF TEXT MESSAGES

8. In addition to the two previously filed declarations addressing the DHS policy regarding the text messages, ICE simultaneously provided a separate declaration from Richard

² *Id.* at p.14.)

³ OCIO, is the office that stores electronic data including emails, and thus the office most likely to have responsive records relating to the requested information. *See* In Defendant’s Statement of Material Facts in Support of Defendant’s Motion for Summary Judgement, Declaration of Lynnea Schurkamp, Doc.27-1, December 14, 2021, at ¶24.

Clark, Chief Technology Officer (CTO) within OCIO to address why ICE was unable to conduct searches for text messages.

9. My previous declarations both referenced the DHS Policy Directive 141-03 (Electronic Records Management Updates for Chat, Text, and Instant Messaging) that was issued on February 23, 2018, which explicitly prohibits ICE employees from using technology platforms (i.e. chats, apps, SMS etc.) as repositories for retaining federal records. *See* Exhibit A

10. DHS Policy Directive 141-03 provides instructions on how individuals can preserve data should any records be created inadvertently using chat, text, or instant messaging. Specifically, the directive states that the [individual][should] “Write a memo to the file. Be sure to include Date and time of the communication; Type of communication (e.g., text, voicemail, telephone call); Context of the message or conversation (electronic messages); Participants; Subject; Details on any decisions or commitments (verbal communications); Corresponding threads that precede a communication and provide more background.”⁴

11. Below, I explain in detail ICE’s attempts to locate text messages, should they exist, of two of the devices assigned to two of the named custodians in Plaintiffs’ FOIA Request.

IV. SEARCH OF NATHALIE ASHER AND JON FEERE CELL PHONES

12. Pursuant to the Court’s June 3, 2022 Order, it was determined that the Office of Professional Responsibility (OPR) was in possession of Nathalie Asher’s device.

13. OPR promotes public trust and confidence in ICE by ensuring organizational integrity is maintained through a multi-layered approach utilizing security, inspections, and investigations. OPR is responsible for investigating allegations of employee misconduct impartially, independently, and thoroughly. OPR prepares comprehensive reports of

⁴ *See* DHS Policy Directive 141-03 Electronic Records Management Updates for Chat, Text, and Instant Messaging, February 03, 2018, Page 2.

investigation for judicial or management action. OPR inspects and reviews ICE offices, operations, and processes in order to provide executive management with an independent review of the agency's organizational health and assess the effectiveness and efficiency of the overall ICE mission. Additionally, OPR screens potential ICE employees for character and suitability.

14. OPR conducted a manual search of Nathalie Asher's mobile phone, using the date range of March 15, 2018, through April 25, 2019, and searched for any text messages between Nathalie Asher and other custodians named in Plaintiffs' FOIA Request concerning any investigation by ICE of Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment. The search did not locate any potentially responsive records.

15. Regarding Jon Feere's mobile device, ICE has not yet been able to unlock it and respectfully requests 30 days to try and remedy the issue, after which time it will provide the Court with an update.

V. ICE'S ADDITIONAL SEARCHES OF HSI AND RELATIVITY PURSUANT TO THE COURT'S JUNE 3, 2022, ORDER

16. Pursuant to the Court's order dated June 3, 2022, the ICE FOIA office tasked HSI to search for any potentially responsive, non-exempt records relevant to your request.

17. ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now employs more than 20,000 people in offices in every state and in 48 foreign countries.

18. According to DHS website, as a component of ICE, HSI is responsible for investigating a wide range of domestic and international activities arising from the illegal movement of people and goods in, within, and out of the United States. HSI uses its legal

authority to investigate issues such as immigration crime, human rights violations and human smuggling, weapons, and other types of contraband, and financial crimes. In addition to ICE criminal investigations, HSI oversees the agency's international affairs operations and intelligence functions. HSI consists of more than 10,000 employees, of which 6,700 are special agents, assigned to offices at ICE Headquarters in Washington, DC, and more than 200 cities throughout the United States and 48 countries around the world.

19. When HSI receives a FOIA tasking from the ICE FOIA Office, the request is submitted to HSI's Records Disclosure Unit (RDU). Points-of-contact (POCs) in RDU review the substance of the request. Based on the subject matter expertise and knowledge of the program offices' activities within HSI, RDU determines whether it can search for records, or whether it is necessary to forward the FOIA request to specific individuals and component offices to conduct searches of their file systems which in their judgment, based on their knowledge of the manner in which they routinely keep records, would be reasonably likely to have responsive records, if any.

20. Upon receipt of the FOIA request in this case and based on the nature of the Plaintiffs' FOIA request, the RDU POC, relying upon subject matter expertise and knowledge of HSI's activities, tasked the Special Agent (SA) from HSI Boston Field Office, who based on his duties, would be the person most likely to have responsive records relating to the requested information. The SA conducted a search of the information technology (IT) system known as Investigative Case Management (ICM) using search terms responsive to the Plaintiffs' FOIA Request. ICM serves as the core law enforcement case management tool for ICE Homeland Security Investigations (HSI) agents and personnel supporting the HSI mission.

21. The SA conducted a manual search of his computer as well as advanced search in Outlook using search terms responsive to the Plaintiffs' FOIA Request. The search terms used were: Shelley Joseph; Wesley MacGregor; Thomas Homan; Matthew Albence; Ronald Vitiello; Thomas Blank; Tracy Short; Jon Feere and Nathalie Asher. The SA located 368 pages of potentially responsive records and referred them to the ICE FOIA office for review and processing.

22. The ICE FOIA office reviewed the 368 potentially responsive records and further determined that all documents will be withheld pursuant to exemption 7(A) of the FOIA. The ICE FOIA Office issued the final response via email on July 11, 2022.

23. In addition, pursuant to the Court's order addressed above, the ICE FOIA office conducted additional Relativity searches with the terms "judge w/5 Newton" and "court w/5 Newton," which were applied to the population of documents collected from OCIO. The ICE FOIA office located 2,836 pages of potentially responsive records. Upon review, the ICE FOIA office determined that all pages were non-responsive and/or duplicative. A final response was issued to Plaintiffs via email on July 11, 2022.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief.

Signed this 18th day of August 2022.

MERONICA
D STONEY

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MERONICA D STONEY
Date: 2022.08.18 17:07:49
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Meronica Stoney, Supervisory Paralegal Specialist
On behalf of
Lynnea Schurkamp, Deputy FOIA Officer
Freedom of Information Act Office
U.S. Immigration and Customs Enforcement
500 12th Street, S.W., Stop 5009
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U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT**ICE Directive 4007.1: Records and Information Management****Issue Date:** January 25, 2021**Superseded:** None.**Federal Enterprise Architecture Number:** 306-112-002b

1. **Purpose/Background.** U.S. Immigration and Customs Enforcement (ICE) has the responsibility to effectively and efficiently manage all its records to meet the agency's strategic goals and mission requirements. This Directive establishes ICE policy and procedures for governing the management of records regardless of form or characteristics, created or received by ICE, consistent with Department of Homeland Security (DHS) policy and guidance. The preservation of all ICE records must be done in accordance with applicable laws, regulations, and policies.¹
2. **Policy.** All ICE employees and contractors are required to adequately maintain, identify, capture, retain, file, dispose, and transfer all ICE records within their respective Directorate or Program Office. All ICE records are required to be preserved appropriately, easily accessible, and dispositioned at the end of their lifecycle. This includes all ICE records created or received in the course of conducting ICE business, including email, according to applicable federal and DHS regulations. All ICE records, either electronic or hardcopy, must be maintained and stored in a centralized electronic records repository in accordance with records schedules approved by ICE's Office of Information Governance and Privacy (IGP) Records and Data Management Unit (RDM) and the National Archives and Records Administration (NARA).²
3. **Definitions.** The following definitions apply for purposes of this Directive only.
 - 3.1. **Capstone.** Identification and capture of email records that should be preserved as permanent from the accounts of designated senior officials at or near the top of an agency who are generally responsible for agency and program policy and mission-related actions.
 - 3.2. **Disposition.** Actions taken when records are no longer needed to conduct current agency business, which include disposal or permanent preservation.
 - 3.3. **Essential Record.** Information that is essential to the continued functioning or reconstitution of an organization during and after an emergency and also essential to

¹ See 44 U.S.C. §§ 3102 – 07 and U.S. Dep't of Homeland Sec., DHS Directive No. 141-01, Records and Information Management (Aug. 11, 2014).

² There are three types of records: temporary, permanent, and unclassified. Temporary records are those determined by NARA to be destroyed at the end of their lifecycle. Permanent records are determined by NARA to have sufficient value to continue preservation as part of the National Archives. Records that do not fall under a NARA-approved records schedule cannot be legally destroyed or transferred for storage. Unclassified records are considered permanent until a records schedule is approved by NARA. More information regarding ICE adherence to records schedules can be found in the accompanying Handbook.

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protecting the rights and interests of that organization and of the individuals directly affected by its activities.

- 3.4. Essential Records Manager.** Serves as the individual responsible for coordinating the agency's Essential Records Program and Plan.
- 3.5. Essential Records Plan.** Guidance that identifies records critical to continued agency operations in the event of an emergency and ensures that records are adequately protected and accessible.
- 3.6. Headquarters Responsible Officials (HROs).** Executive Associate Directors (EADs) of Enforcement and Removal Operations, Homeland Security Investigations, and Management and Administration (M&A); the Principal Legal Advisor; the Associate Director of the Office of Professional Responsibility; and the Assistant Directors, Officers, or equivalent positions who report directly to the Director, Deputy Director, or Chief of Staff.
- 3.7. Permanent Records.** Records appraised by NARA as having sufficient historical or other value to warrant continued preservation by the Federal Government beyond the time it is needed for administrative, legal, or fiscal purposes.
- 3.8. Records.** All recorded information made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or deemed appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data they contain. Records do not include: library and museum material made or acquired and preserved solely for reference or exhibition purposes, or duplicate copies of records preserved only for convenience.³
- 3.9. Records Assistants (RAs).** Representatives within a Directorate or a Program Office responsible for assisting the Records Liaison Officers (RLOs) with day-to-day records management activities.
- 3.10. Records Liaison Officers (RLOs).** Designated representative responsible for overseeing records management activities within a Directorate or Program Office and coordinating those activities with RDM.
- 3.11. Records Schedule.** A set of instructions that provides the legal authority for retention and disposition of records grouped together in a series. It is used to indicate the length of time records must be maintained, identifies records as either permanent or temporary, and provides mandatory instructions for the disposition of records. It may also be referred to as a retention schedule.

³ See 44 U.S.C § 3301.

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3.12. Temporary Records. Records approved by NARA to be disposed of after a specified period.

4. Responsibilities.

4.1. HROs are responsible for ensuring compliance with this Directive within their Directorates and Program Offices, including the designation of RLOs and RAs.

4.2. The ICE Records Officer is responsible for:

- 1) Overseeing, developing, issuing, and implementing ICE-wide records management policy and procedures;
- 2) Conducting site assessments and compliance visits of Directorates and Program Offices to include all ICE facilities—regardless of whether they are controlled by the Government or by non-government entities (e.g., detention facilities owned and/or operated by contractors)—to evaluate record-keeping practices and provide guidance and feedback concerning any risks or vulnerabilities that may exist;
- 3) Developing and implementing records management training;
- 4) Coordinating with the Office of the Chief Information Officer (OCIO) to ensure that electronic records management considerations for systems access and security controls are implemented;
- 5) Developing and implementing the Essential Records Plan; and
- 6) Establishing procedures and guidance for email records, to include Capstone.

4.3. OCIO is responsible for coordinating with the RDM basic framework for electronic records management storage that enables ICE employees and contractors to follow records management policies.

4.4. The Essential Records Manager is responsible for coordinating the agency's Essential Records Program, developing and maintaining ICE's Essential Records Plan, coordinating agency inventory of essential records, outlining measures to protect them, and annually conducting an Essential Records Risk Assessment. The Essential Records Manager periodically tests emergency plans and procedures to determine whether essential records are properly identified, protected, and managed, and also modifies plans and procedures when needed.

4.5. RLOs are responsible for:

- 1) Assisting RDM with coordination and implementation of records policies and procedures within specific Directorates and Program Offices;

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- 2) Conducting an annual records inventory;
 - 3) Ensuring that office records are managed pursuant to DHS, ICE, NARA, and Office of Management and Budget policies, as well as applicable laws and regulations; and
 - 4) Ensuring that all Directorate and Program Office recordkeeping procedures are established, implemented, and periodically updated for all electronic and hardcopy records.
- 4.6. RAs** are responsible for assisting the RLO in coordinating RIM activities for the Directorate or Program Office, including managing the transfer and retrieval of program records to or from storage facilities, the creation of box lists documenting the records maintained in storage, and assisting with the management of paper and electronic filing systems that may exist within the Directorate, the Program Office or its sub-divisions. RA functions are a secondary duty. Directorate or Program Office leadership will assign these duties as needed.
- 4.7. ICE Employees and Contractors** are responsible for:
- 1) Complying with the terms of this Directive;
 - 2) Transferring ICE records upon departure or separation and complying with the mandate to not exit with any records without prior approval from the Records Officer;
 - 3) Working with their Directorate or Program Office's RLO and/or RA to maintain, store, transfer, and/or dispose of records in accordance with law and policy; and
 - 4) Completing annual records management training.
- 5. Procedures/Requirements.** See the most current version of the *Records and Information Management Handbook* for implementing guidance and procedures.
- 6. Recordkeeping.** All records created by the RDM will be maintained in accordance with a NARA approved retention schedule.
- 7. Authorities/References.**
- 7.1.** 5 U.S.C. § 552(a), (g).
 - 7.2.** 44 U.S.C. §§ 3101 – 07.
 - 7.3.** 44 U.S.C. § 21.
 - 7.4.** 44 U.S.C. § 29.
 - 7.5.** 36 C.F.R. §§ 1220.1 – 1239.26.

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- 7.6. U.S. Dep't of Homeland Sec., DHS Directive No. 141-01, Records and Information Management (Aug. 11, 2014).
- 7.7. U.S. Dep't of Homeland Sec., Fed. Emergency Mgmt. Agency, Federal Continuity Directive 1 (Jan. 2017).
8. **Attachment.** None
9. **No Private Right.** This Directorate provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



Tae D. Johnson
Acting Director
U.S. Immigration and Customs Enforcement



Homeland Security

Issue Date: 02/23/2018

Policy Directive 141-03

MEMORANDUM FOR: Component Heads

FROM: Claire M. Grady *CMG 2/23/18*
Under Secretary for Management

SUBJECT: Electronic Records Management Updates for Chat, Text, and Instant Messaging

The Presidential and Federal Records Act Amendments of 2014 ([Public Law 113-187](#)) enacted on November 26, 2014, expands the definition of federal records to include all recorded information, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form.

Much like in-person or telephonic conversations, business communications created and transmitted between Department employees that include substantive information about agency business, policies, and activities made via chat, text, or instant message may be considered federal records and must be preserved. DHS employees must take appropriate steps to establish and maintain a separate record of the communication that may be considered federal records. All DHS business transactions by electronic means are required to comply with the Department's records management policies. For more information about what constitutes a federal record, please refer to Title 44, United States Code, Chapter 33, Section 3301 and the Records and Information Management Program's [Frequently Asked Questions page](#) and the enclosed attachment, "Documenting Electronic Messages and Verbal Communications."

In order to comply with federal law, applicable regulations, policy, and [DHS Directive 141-01](#), the Department has implemented the following electronic records management guidance for the use of chat, text, or instant messaging:

- All DHS business transactions by electronic means are required to comply with the Department's records management policies. DHS employees should take steps to establish and maintain federal records when conducting business using chat, text, or instant messaging.
- All internal DHS chat/messaging systems (i.e., Lync, Skype, or other tools) must display a banner/disclaimer prohibiting the system to be used to formally transact agency business or to document the activities of the organization.

If you have any questions, visit the [DHS Records and Information Management \(RIM\)](#) site or, contact Tammy Hudson, DHS Records Officer, Office of the Chief Information Officer, phone: 571-512-1122, email: tammy.hudson@hq.dhs.gov.

Attachment: Documenting Electronic Messages and Verbal Communications

What is an “electronic message”?

Electronic messages include a range of communications from text to chat to IM (instant messages). They reside and are exchanged on agency networks and devices, on personal devices, or they can be hosted by third-party providers.

What is a "verbal communication"?

Verbal communications include telephone conversations, voicemail messages (or series of voicemails), a formal meeting, or even an informal chat with a coworker in the hallway.

The Department must capture and manage these records in compliance with Federal records management laws, regulations, and policies.

What kind of verbal communications or electronic messages might be considered a record?

Any communication in which an Agency decision or commitment is made or where an action is committed to, that is not otherwise documented, needs to be captured. For example:

- A meeting or conference call where a decision is made, if formal meeting minutes or notes are not taken.
- A text or telephone call giving guidance to a member of the regulated community.
- A telephone call responding to a member of the public about DHS policy.

What is the best way to capture conversations that are records?

- Write a memo to the file. Be sure to include:
 - Date and time of the communication
 - Type of communication (e.g., text, voicemail, telephone call)
 - Context of the message or conversation (electronic messages)
 - Participants
 - Subject
 - Details on any decisions or commitments (verbal communications)
 - Corresponding threads that precede a communication and provide more background

Does this mean that I have to write a transcript of every conversation or copy every text message?

No, not all electronic messages or verbal communications are records. Only write a memo to the file if one is needed to document your activities as a federal employee, contractor, and not otherwise captured.

How can I get additional guidance?

If you have policy questions about electronic messages or verbal communication records, contact your Component or the DHS Records Officer. You can find additional guidance in the following publications:

- [DHS Instruction 141-01-001, “Records and Information Management”](#)
- Documenting Your Public Service, National Archives and Records Administration