

SLR:KMA; 2019V03293

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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CLEAR, AMERICAN CIVIL LIBERTIES UNION,  
and AMERICAN CIVIL LIBERTIES FOUNDATION,

Plaintiffs,

Civil Action No. 19-CV-07079

-against -

(Reyes, M.J.)

UNITED STATES CUSTOMS AND BORDER  
PROTECTION,

Defendant.

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**DECLARATION OF ASSISTANT U.S. ATTORNEY  
KATHLEEN A. MAHONEY**

I, Kathleen A. Mahoney, declare and state as follows:

1. I am an Assistant United States Attorney, Eastern District of New York. I was assigned the defense of this action in July 2020. The matter was previously defended by then Assistant United States Attorney F. Franklin Amanat.

2. Exhibit A annexed to this declaration is a true and accurate printout of an email thread between former Assistant U.S. Attorney Amanat and Plaintiffs' counsel.

3. Exhibit B to annexed to this declaration is a true copy of an email thread between myself and Plaintiffs' counsel including the document attached to Plaintiffs' counsel's email dated September 21, 2020.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: Brooklyn, New York  
October 22, 2020

s/Kathleen A. Mahoney  
KATHLEEN A. MAHONEY

**From:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Sent:** Thursday, June 18, 2020 11:20 AM  
**To:** Amanat, Franklin (USANYE) <[FAmanat@usa.doj.gov](mailto:FAmanat@usa.doj.gov)>  
**Cc:** Patrick Toomey <[ptoommey@aclu.org](mailto:ptoommey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** RE: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Dear Franklin,

I've attached a draft joint status letter for the Government's review.

We've consulted with our client regarding narrowing Category 9 of the FOIA request. We're fine with CBP narrowing that category to records concerning investigations of and/or disciplinary action related to TTRT officers with respect to the three categories proposed ((1) profiling, (2) First Amendment concerns and (3) recording, retaining and disseminating information) on the condition that CBP also add a fourth category: misuse or abuse of TTRT/TTRP (Tactical Terrorism Response Program). This category was one included in the disciplinary records released in the last production and we believe it would capture information also relevant to our request.

Thank you.

Best,  
Scarlet

**From:** Amanat, Franklin (USANYE) <[Franklin.Amanat@usdoj.gov](mailto:Franklin.Amanat@usdoj.gov)>  
**Sent:** Monday, June 15, 2020 6:29 PM  
**To:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Cc:** Patrick Toomey <[ptoommey@aclu.org](mailto:ptoommey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** Re: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

I'll send a meeting invite for 530.

Sent from Frank Amanat's iPhone

On Jun 15, 2020, at 3:32 PM, Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)> wrote:

Dear Franklin,

Thank you for your email. I'm available from 5:30-6:00 tomorrow for a call if that works on your end.

In advance of our call tomorrow, we thought we would flag that we'd like to give CBP the opportunity and courtesy of addressing a few issues that we might otherwise want to include in the update.

First, certain redactions in the production cite to Exemption 3, without indicating the underlying federal statutory provision exempting disclosure. Second, certain redactions in the production cite to Exemption 5, without indicating the underlying privilege (e.g. deliberative process privilege, attorney work-product privilege, attorney-client privilege) upon which the agency is relying. We hope CBP will be willing to address these deficiencies.

Happy to discuss the above and the status update further on our call.

Best,  
Scarlet

**From:** Amanat, Franklin (USANYE) <[Franklin.Amanat@usdoj.gov](mailto:Franklin.Amanat@usdoj.gov)>  
**Sent:** Monday, June 15, 2020 3:16 PM  
**To:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Cc:** Patrick Toomey <[ptoommey@aclu.org](mailto:ptoommey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** RE: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Counsel,

We have a status report due to the court on Friday. Are you available to meet and confer tomorrow or Wednesday to discuss the case and the plan? Let me know your availability please.

Frank Amanat  
Senior Counsel, USAO EDNY  
(718) 254-6024  
[franklin.amanat@usdoj.gov](mailto:franklin.amanat@usdoj.gov)

**From:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Sent:** Monday, May 18, 2020 12:30 PM  
**To:** Amanat, Franklin (USANYE) <[FAmanat@usa.doj.gov](mailto:FAmanat@usa.doj.gov)>  
**Cc:** Patrick Toomey <[ptoommey@aclu.org](mailto:ptoommey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** RE: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Hi Franklin,

Thanks for your email. The purpose of our email was not to propound interrogatories but rather to confer over potential issues that we believe can be resolved at this stage so as a way to avoid time-consuming litigation over them down the line. It is a practice that we have regularly engaged in with opposing counsel in other FOIA litigation based on a mutual recognition of its benefits in narrowing litigation. It is also typical FOIA practice for requesters to ask FOIA officers to clarify certain aspects of the production and we've certainly engaged in this practice even during FOIA litigation with the cooperation of opposing counsel.

We appreciate the answers that you have provided. And in line with the above, we hope that we can continue to confer with you about future issues that may arise as production continues.

Best,  
Scarlet

**From:** Amanat, Franklin (USANYE) <[Franklin.Amanat@usdoj.gov](mailto:Franklin.Amanat@usdoj.gov)>  
**Sent:** Friday, May 15, 2020 7:19 PM  
**To:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Cc:** Patrick Toomey <[ptoomey@aclu.org](mailto:ptoomey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** RE: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Apologies for the delay in responding, Scarlet. I have been jammed up on other more pressing matters.

With respect, I object to your questions. FOIA provides a means for requesters to obtain records and other nonexempt responsive material in the government's possession. It does not provide a means to propound interrogatories or to ask agencies to explain their productions or production processes to requesters. If, once the agency's responses to the request are complete, you continue to harbor doubts about the adequacy of the agency's search, we can meet and confer to discuss steps to assuage or otherwise resolve your concerns. Until then, your questions are out of order.

With all of that said, I will provide you with the following brief information, as a courtesy and with the hope of avoiding further litigation.

1. The answer to the second question is yes, the datasets correspond to the requested date range.
2. This request is particularly objectionable. The case law is clear that FOIA requesters cannot specify the databases that should be searched or the search terms to be used; these are left to the discretion of the agency. CBP used the search terms necessary to search for the documents requested and searched the relevant systems that contain information responsive to Plaintiffs' document requests.
3. The pages provided consist of the entirety of the presentation.
4. There is no index. CBP will produce nonexempt documents that are responsive to Plaintiffs' request, consistent with its obligations under FOIA and the scheduling order on which the parties agreed.

I hope that information is helpful to you. Have a nice weekend.

Frank Amanat  
Senior Counsel, USAO EDNY  
(718) 254-6024  
[franklin.amanat@usdoj.gov](mailto:franklin.amanat@usdoj.gov)

**From:** Scarlet Kim <[ScarletK@aclu.org](mailto:ScarletK@aclu.org)>  
**Sent:** Thursday, May 14, 2020 11:25 AM  
**To:** Amanat, Franklin (USANYE) <[FAmanat@usa.doj.gov](mailto:FAmanat@usa.doj.gov)>  
**Cc:** Patrick Toomey <[ptoomey@aclu.org](mailto:ptoomey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>  
**Subject:** RE: CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Dear Franklin,

I hope you're well. I'm just writing to follow-up on the message below.

Thank you,  
Scarlet

**From:** Scarlet Kim

**Sent:** Thursday, May 7, 2020 11:38 AM

**To:** Amanat, Franklin (USANYE) <[Franklin.Amanat@usdoj.gov](mailto:Franklin.Amanat@usdoj.gov)>

**Cc:** Patrick Toomey <[ptoomey@aclu.org](mailto:ptoomey@aclu.org)>; Robert Hodgson <[RHodgson@nyclu.org](mailto:RHodgson@nyclu.org)>

**Subject:** CLEAR v. CBP, No. 19-cv-7079 (E.D.N.Y.) - Questions for CBP re: Production to Date

Dear Franklin,

As you know, we've received two productions from CBP and are following up with some clarifying questions for the agency.

Global

1. What is the date range for the datasets that have been produced (pp. 10-26 of March 2020 production and pp. 1-12 of April 2020 production)? Do they correspond to the date range specified in the request (i.e. since January 1, 2017)?
2. Could you identify the databases used to search for the datasets produced and the search terms that you are using? We would be happy to discuss databases and search terms that we believe are relevant as a way of narrowing the search process and ensuring the location of all responsive records. For example, based on our comparison of the various datasets, there seems to be missing data. The dataset on p. 11 of the March 2020 production indicates that 8287 passengers were refused entry by TTRT. In the April 2020 production, p. 7 indicates that there were 5147 withdrawals and p. 8 indicates there were 1051 emergency removals. The disposition of the remaining 2089 travelers is unclear. (These numbers assume the date range across all datasets is the same, reinforcing the need to understand the date range for the datasets.)

March 2020 Production

3. As to the first document (U.S. Customs and Border Protection, *National Targeting Center, Tactical Terrorism Response Team*, pp. 1-9 of the production):
  - a. This document appears to be missing pages 2, 7, 10-12. Some of the pages are out of order but these pages seem to be actual missing pages.
  - b. Were there accompanying presentations for each session? If so, we believe those would equally fall under category 2 of the request.

April 2020 Production

4. As to the first document (*Class of Admsn*, pp. 1-3 of the production),
  - a. Is there an index accompanying the dataset? If so, we believe that would equally fall under categories 4 and 7 of the request. Some of the classes are listed with explanatory

text; others are not. For example, it is unclear what the distinction between WD and WD2 is. The latter is defined but the former is not.

- b. Are the categories listed in any particular order? (e.g. ascending or descending number)
5. As to the fourth document (Tactical Terrorism Response Team, *Training Class Schedule*, pp. 9-12 of the production), were there accompanying presentations for each session? It appears as if one set of those slides has been produced, which is the fifth document (*Writing & Testimony, Overview & Best Practices*, pp. 12-22 of the production), but if there are others, they have not and we believe those would equally fall under category 2 of the request.

Thank you,  
Scarlet

**Scarlet Kim**

Pronouns: she, her(s)

Staff Attorney, National Security Project  
American Civil Liberties Union  
125 Broad St., New York, NY 10004  
646.885.8350 | [scarletk@aclu.org](mailto:scarletk@aclu.org)  
<image001.png>

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## **Mahoney, Kathleen (USANYE)**

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**From:** Patrick Toomey <ptoomey@aclu.org>  
**Sent:** Monday, September 21, 2020 12:08 PM  
**To:** Mahoney, Kathleen (USANYE)  
**Cc:** Scarlet Kim; Robert Hodgson  
**Subject:** Re: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)  
**Attachments:** CLEAR v. CBP - Documents at Issue (FRE 408).docx

Hi Katie,

Hope you had a good weekend. I'm attaching a document that identifies which records/withholdings we intend to challenge in the summary judgment motions. After you've had a chance to review the list, please let me know if you'd like to discuss at all or if there's any uncertainty or ambiguity about the documents we plan to challenge.

A couple notes:

Since CBP's productions weren't stamped with Bates numbers, we've used the PDF page numbers to identify partially withheld documents. To make things easier going forward, CBP may want to stamp these documents or create an index that allows the parties and the court to readily identify them.

We don't intend to challenge Exemptions 6 and 7(c) in any of the documents insofar as those exemptions have been applied to the names of members of the public or lower-level agency employees, information drawn directly from personnel files, or medical information. If CBP is asserting Exemptions 6 and 7(c) to withhold other types of information, we need additional information in order to determine whether we would challenge those withholdings.

Thanks very much,  
Patrick

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**From:** Mahoney, Kathleen (USANYE) <Kathleen.Mahoney@usdoj.gov>  
**Sent:** Monday, September 14, 2020 2:17 PM  
**To:** Patrick Toomey <ptoomey@aclu.org>  
**Subject:** RE: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Yes, I would appreciate such a discussion before we get into the motion practice. Either later this week is good for me. Thank you

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**From:** Patrick Toomey <ptoomey@aclu.org>  
**Sent:** Monday, September 14, 2020 2:09 PM  
**To:** Mahoney, Kathleen (USANYE) <KMahoney2@usa.doj.gov>  
**Subject:** Re: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi Katie,

Hope you had a good weekend and thanks for this update. If it would be useful to confer over the scope of what Plaintiffs expect to challenge in the cross-motions, I'm happy to do that later this week or early next. We can identify what we plan to challenge in an email, though it's possible some follow-up discussion will be needed.

Thanks,  
Patrick

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**From:** Mahoney, Kathleen (USANYE) <Kathleen.Mahoney@usdoj.gov>  
**Sent:** Friday, September 11, 2020 3:49 PM  
**To:** Patrick Toomey <ptoomey@aclu.org>  
**Subject:** RE: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi, Patrick:

The searches conducted by Customs and Border Protection would have located any records in its files, including TRIP complaints, that are responsive to Category 9 of the FOIA request.

Katie

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**From:** Patrick Toomey <ptoomey@aclu.org>  
**Sent:** Monday, August 31, 2020 10:46 AM  
**To:** Mahoney, Kathleen (USANYE) <KMahoney2@usa.doj.gov>  
**Subject:** Re: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi Katie,

Thanks for drafting the status letter and hope you had a good weekend. I'll send you any proposed edits as soon as I can. In the meantime, here's the follow-up question for CBP on the search adequacy issue that I mentioned:

While we understand that TRIP complaints would initially be received and processed by DHS, we believe CBP should have its own records related to any complaints and investigations initiated through the TRIP process that involved TRTT officers. Did CBP conduct searches that would identify those records, which would be responsive to Category 9 of the request?

Best,  
Patrick

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**From:** Mahoney, Kathleen (USANYE) <Kathleen.Mahoney@usdoj.gov>  
**Sent:** Thursday, August 27, 2020 12:11 PM  
**To:** Patrick Toomey <ptoomey@aclu.org>  
**Subject:** RE: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi, Patrick.

Yes, I did receive your email. I needed to confer with Customs and Border Patrol (CBP) before responding. They responded promptly, but I have been tied up with other matters.

The proposed briefing schedule is acceptable to CBP. As of now, it is okay with me. If it turns out that I need more time, I will contact you.

Regarding your question about whether CBP searched the Travelers Redress Inquiry Program (TRIP): The CBP did not search that system. The TRIP is a DHS system, not a CBP system.

Katie

Kathleen A. Mahoney  
Assistant U.S. Attorney  
Eastern District of New York  
271-A Cadman Plaza East, 7<sup>th</sup> Floor  
Brooklyn, New York 11201  
(718) 254-6026

**From:** Patrick Toomey <ptoomey@aclu.org>  
**Sent:** Thursday, August 27, 2020 9:30 AM  
**To:** Mahoney, Kathleen (USANYE) <KMahoney2@usa.doj.gov>  
**Subject:** Re: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi Katie, I just wanted to confirm that you received my email below about the upcoming status letter.

Thanks very much,  
Patrick

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**From:** Patrick Toomey <ptoomey@aclu.org>  
**Sent:** Tuesday, August 25, 2020 1:25 PM  
**To:** Mahoney, Kathleen (USANYE) <Kathleen.Mahoney@usdoj.gov>  
**Subject:** Re: CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Hi Katie,

I hope you're doing well. I'm writing to confer about our status update due to the Court on September 1. The most important update on our end, in terms of how the case proceeds, is that we're planning to challenge a number of CBP's withholdings and may also challenge the adequacy of some of its searches. That being the case, one thing to address for the status letter is a briefing schedule that would be agreeable to both sides and that we could jointly propose to the Court.

#### Briefing schedule

Based on our experience in other FOIA cases, here's what we'd suggest:

Friday, October 16 – CBP motion for summary judgment  
Friday, November 20 (+5 weeks) – Plaintiff cross-motion for summary judgment and opposition  
Friday, December 18 (+4 weeks) – CBP reply and opposition  
Friday, January 15 (+4 weeks) – Plaintiff reply

One reason for the longer schedule on our side is that my colleague Scarlet, the lead attorney on the case, is out on parental leave with a new baby until mid-October.

#### Search adequacy

Beyond the schedule, I'm also happy to discuss the scope of what we expect to challenge in more detail, though in many instances we have only limited information about how CBP conducted its searches and the basis for its withholdings.

In terms of CBP's searches, it would help us decide whether or not to proceed with a challenge to search adequacy if CBP is able to provide us with some additional information about records we expected to find in its production but did not. Here's our question:

In searching for documents responsive to Category 9 of the FOIA request, did CBP search for investigations into the conduct of TTRT officers named or implicated in Travel Redress Inquiry Program (TRIP) complaints? If not, what was the reason?

Please let me know whether the briefing schedule above would work on your end, and if there's anything else we should discuss, as soon as you're able.

Thanks so much,  
Patrick

**Patrick Toomey**  
Senior Staff Attorney  
American Civil Liberties Union  
125 Broad St., New York, NY 10004  
■ 212.519.7816 ■ [ptoomey@aclu.org](mailto:ptoomey@aclu.org)  
[www.aclu.org](http://www.aclu.org)

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**From:** Mahoney, Kathleen (USANYE) <[Kathleen.Mahoney@usdoj.gov](mailto:Kathleen.Mahoney@usdoj.gov)>  
**Sent:** Friday, August 14, 2020 4:04 PM  
**To:** Patrick Toomey <[ptoomey@aclu.org](mailto:ptoomey@aclu.org)>  
**Subject:** CLEAR, et al. v. United States Customs and Border Protection, 19-CV-07079 (EK)(RER)

Patrick:

Attached are the "Vaughn" index and cover letter for this action pursuant to the Freedom of Information Act.

The next deadline is September 1, when the parties are to submit a joint status report updating the Court as to how we intend to proceed.

Katie  
Kathleen A. Mahoney  
Assistant U.S. Attorney  
Eastern District of New York  
271-A Cadman Plaza East, 7<sup>th</sup> Floor  
Brooklyn, New York 11201  
(718) 254-6026

**Documents Withheld in Full**

<b>Index No.</b>	<b>Document Description</b>
1	Encounters at Ports of Entry Identify Individuals with Potential Links to International Terrorism
4	Tactical Terrorism Response Team Curriculum v2
5	TTRT Officer Reference Job Aid 2020
9	2.CTD TTRT101
10	Map of TTRT Locations
11	Culture and Religious Awareness Class
14	CND 101_20200205
15	CTD 10 TTRT Orientation 20200304
16	Memorandum – Importance of Targeting Rules
18	Muster – Updated Guidance [redacted]
19	Nomination Referrals
27	TOC Watchlisting Overview
28	TTP_[redacted] Presentation
29	TTRT [redacted] SOP [redacted] BSI 2018
30	TTRT [redacted] Accomplishments
32	Enhanced Communication Course

**Documents Produced in Part**

<b>APRIL 2020 Combined Records</b>	
<b>PDF Pages</b>	<b>Document Description</b>
1-3	Dataset: TTRT Encounters, by class of admission
4-8	Dataset: TTRT Encounters, by POE
<b>MAY 2020 Combined Records</b>	
<b>PDF Pages</b>	<b>Document Description</b>
7-19	CBP Directive: Passenger Analytical Unite Procedures
20	CBP “Tactical Terrorism Response Team”
22-30	TTRT PowerPoint Presentation
32-35	TTRT Local Standard Operating Procedures
40-42	TTRT Responsibilities
43-61	TTRT PowerPoint
62-80	NTC PowerPoint
86-93	Watchlisting Reference Guide