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Attorneys for Plaintiff
Electronic Frontier Foundation

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ELECTRONIC FRONTIER FOUNDATION,

Plaintiff,

v.

DEPARTMENT OF JUSTICE,

Defendant.

) Case No.: 4:13-cv-2946 PJH

) **JOINT CASE MANAGEMENT**
) **STATEMENT**

) Date: September 26, 2013

) Time: 1:45 p.m.

) Place: Telephonic Conference

) Judge: Hon. Phyllis J. Hamilton

1 Plaintiff Electronic Frontier Foundation (“EFF”) and Defendant the United States
2 Department of Justice (“DOJ”) respectfully submit the following joint case management statement.

3 **1. Jurisdiction and Related Issues**

4 The parties stipulate and agree that (1) venue is properly laid in this District under 5 U.S.C.
5 § 552(a)(4)(B); and (2) that the Court has subject matter jurisdiction over the action pursuant to
6 28 U.S.C. § 1331. No issues exist regarding personal jurisdiction. Defendant has been properly
7 served pursuant to Fed. R. Civ. P. 4(i)(1).

8 **2. Facts**

9 Between June 25, 2012 and July 5, 2012, Plaintiff sent three FOIA requests via email to the
10 Federal Bureau of Identification (FBI), a component of Defendant DOJ, concerning its use of facial
11 recognition and development of its Next Generation Identification (NGI) system. Each of these
12 requests sought search, review and duplication fee waivers based on EFF’s status as a news media
13 requester and based on the fact that disclosure of the requested information is in the public interest
14 within the meaning of 5 U.S.C. § 552(a)(4)(A)(ii)-(iii).

15 The first request, dated June 25, 2012, sought records related to the FBI’s plans to partner
16 with states to build out its facial recognition database. The request sought all agency records,
17 including electronic records, created from January 1, 2010 to the present discussing, concerning, or
18 reflecting (1) any memorandum of understanding (MOUs) or other similar contracts or agreements
19 between the FBI and any states concerning submitting facial recognition photographs to and
20 retrieving or accessing photographs to the FBI’s NGI database, (2) any discussions between the
21 FBI and any states regarding the state’s participation in a program to submit and/or retrieve facial
22 recognition photographs to the FBI’s NGI database, and (3) any records related to a “Face Report
23 Card,” possibly created by FBI’s NGI Program Office to provide feedback to individual agencies
24 regarding the quality of images submitted to the FBI’s NGI database.

25 The second request, dated July 5, 2012, sought records discussing, concerning, or reflecting
26 (1) developing and/or implementing a “Master Name” or unique identity for civil records or civil
27 and criminal records in the Integrated Automated Fingerprint Identification System (IAIS) or NGI
28

1 databases, (2) combining civil and criminal biometric and biographic records in IAFIS or NGI or
2 another repository and discussions related to migrating to an automated identity management
3 structure that would maintain all information about a person in the system in a single records based
4 a unique identity, and (3) rules and policies that govern or define the sharing or dissemination of
5 civil information once civil and criminal records are stored together in a single repository.

6 The third request, dated July 5, 2012, sought records related to the reliability of facial
7 recognition capabilities in the FBI's Next Generation Identification (NGI) database. Specifically, it
8 sought records discussing, concerning or reflecting (1) any studies, reports, notes, comments, or
9 other records on the reliability of facial recognition biometric data in the NGI database and/or the
10 Face Recognition Pilot (FRP) project in the NGI database, (2) any information on the total current
11 number of face recognition capable records and/or searchable frontal photographs in the database
12 and the proposed number at deployment, and (3) any studies, reports, notes, comments, or other
13 records that discuss specific image quality metrics, best practices, and recommendations regarding
14 quality of images submitted to or enrolled in the system.

15 Although FBI acknowledged receipt of Plaintiff's first request and assigned it a FOIA
16 Request Number, Defendant did not make a final determination on Plaintiff's fee waiver request
17 and did not produce any records. After Defendant failed to process or produce records, Plaintiff
18 filed this lawsuit on June 26, 2013. Defendant answered the Complaint on July 26, 2013 (ECF
19 No. 10).

20 Since that time, the parties have been working in good faith in an attempt to resolve some
21 of the issues in this action and to agree on a schedule for the release of information responsive to
22 Plaintiff's FOIA request.

23 **3. Legal Issues**

24 This case presents a procedural issue concerning the timing of Defendant's processing of
25 EFF's FOIA request. Once Defendant completes processing, the remaining legal issue is whether
26 Defendant has properly withheld records in whole or part under 5 U.S.C. § 552. EFF reserves the
27 right to challenge the adequacy of Defendant's searches for responsive records after Defendant
28

1 completes processing of EFF's request and after it files declarations or indices pursuant to *Vaughn*
2 *v. Rosen*, 484 F.2d 820, 826-8 (D.C. Cir. 1973).

3 **4. Motions**

4 There are no prior or pending motions. The parties anticipate that this case is likely to be
5 disposed of on dispositive motions. The parties submit, however, that scheduling any such motion
6 is premature at this time. The parties are currently working in good faith to resolve some of the
7 claims and issues in this action.

8 **5. Amendment of Pleadings**

9 No party anticipates amending its pleadings to add or dismiss claims or defenses.

10 **6. Evidence Preservation**

11 Defendant is taking all reasonable steps to preserve documents responsive to EFF's FOIA
12 request.

13 **7. Disclosures**

14 The parties agree and stipulate under Federal Rule of Civil Procedure 26(a)(1)(A) that
15 initial disclosures are not necessary, as this is a FOIA action for which there is no need to
16 exchange.

17 **8. Discovery**

18 To date, no discovery has been taken by any party. The parties do not anticipate proposing
19 any limitations or modifications of the discovery rules. Defendant contends that discovery is
20 generally not appropriate in FOIA actions. *See Lane v. Dep't of Interior*, 523 F.3d 1128, 1134 (9th
21 Cir. 2008) (stating that in FOIA "cases courts may allow the government to move for summary
22 judgment before the plaintiff conducts discovery").

23 **9. Class Actions**

24 This case is not a class action.

25 **10. Related Cases**

26 There are no related cases pending before this Court as defined by Local Rule 3-12.
27
28

1 **11. Relief**

2 EFF seeks injunctive relief with respect to the release and disclosure of all records
3 responsive to its FOIA request. EFF also seeks reasonable attorney's fees incurred in this litigation.
4 Defendant denies that plaintiff is entitled to the relief requested or any relief whatsoever.

5 **12. Settlement and ADR**

6 The parties believe that the prospect of settlement is low at this time. The parties have
7 conferred about ADR processes in conformance with ADR Local Rule 3-5. The parties believe
8 that this case is not well suited to ADR resolution, and therefore have filed a Notice of Need for
9 ADR Phone Conference pursuant to ADR Local Rule 3-5(c)(2), (ECF No. 15), and an ADR
10 telephone conference has been set for September 23, 2013 (ADR Remark dated Sept. 11, 2013).
11 The parties do intend, however, to meet and confer upon the conclusion of Defendant's processing
12 in an attempt to narrow the issues in dispute before presenting any such issues to the Court.

13 **13. Consent to Magistrate for All Purposes**

14 The parties have not agreed to consent to assignment of this case to a magistrate judge.

15 **14. Other References**

16 The parties agree that this case is not suitable for reference to binding arbitration or a
17 special master, or reference to the Judicial Panel on Multidistrict Litigation.

18 **15. Narrowing of Issues**

19 The parties have not agreed to narrow the legal issues remaining in this case at this time. No
20 party requests bifurcation of any issues, claims, or defenses. As noted above, the parties anticipate
21 that they will meet and confer upon the completion of Defendant's processing in an attempt to
22 narrow any issues in dispute before bringing any such dispute before the Court.

23 **16. Expedited Trial Procedure**

24 The parties agree that this is not the type of case that can be handled under the Expedited
25 Trial Procedure of General Order No. 64 Attachment A.

1 **17. Scheduling**

2 Counsel for the parties spoke by telephone on September 13, 2013 regarding Defendant's
3 response to Plaintiff's FOIA request. At that time, Counsel for Defendant confirmed that
4 Defendant would process the first round of responsive records—totaling approximately 500
5 pages—and release non-exempt portions of those records to Plaintiff by October 13, 2013.
6 Defendant would process the second round of responsive records and release non-exempt portions
7 to Plaintiff by November 13, 2013. If any records remain, those would be processed and released to
8 Plaintiff by December 13, 2013.

9 The parties anticipate that, upon the completion of Defendant's processing, they will meet
10 and confer in an attempt to narrow any issues, and any remaining areas of dispute will be presented
11 to the Court by one or more motions for summary judgment.

12 **18. Trial**

13 The parties anticipate that this entire case will be resolved by the Court on dispositive
14 motions, and do not anticipate that this case will be decided by a jury.

15 **19. Disclosure of Non-Party Interested Entities or Persons**

16 Defendant has not filed a Certification of Interested Entities or Persons because Local
17 Rule 3-16 excuses government entities or their agencies from this requirement. EFF filed a
18 Certification of Interested Entities or Persons as required by Local Rule 3-16 stating that, aside
19 from the named parties, there is no interest to report. (ECF No. 19)

20 **20. Other Matters As May Facilitate the Just, Speedy and Inexpensive Disposition**
21 **of This Matter**

22 None.

23
24 DATED: September 19, 2013

Respectfully submitted,

25 /s/ Jennifer Lynch
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10 **DECLARATION PURSUANT TO CIVIL L. R. 5-1(i)(3)**

11 I, Jennifer Lynch, attest that I have obtained the concurrence of Marcia K. Sowles, counsel
12 for Defendant, in the filing of this document.

13 Executed on September 19, 2013, in San Francisco, California.

14 /s/ Jennifer Lynch
15 Jennifer Lynch