

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELECTRONIC PRIVACY
INFORMATION CENTER,

Plaintiff,

v.

U.S. NATIONAL ARCHIVES AND
RECORDS ADMINISTRATION,

Defendant.

Case No. 18-cv-2150 (ABJ)

JOINT STATUS REPORT

In accordance with the Court's September 24, 2018 Minute Order, counsel for the parties, who have conferred, jointly notify the Court of the status of this matter, and offer their joint proposal regarding further proceedings:

1. This action involves two Freedom of Information Act ("FOIA") requests from Plaintiff Electronic Privacy Information Center ("EPIC") seeking records relating to the Honorable Brett M. Kavanaugh during his time working in the White House during the 2000s.

2. On August 1, 2018, EPIC submitted two FOIA requests to the George W. Bush Presidential Library and Museum, which is a component of Defendant the United States National Archives and Records Administration ("NARA").

3. EPIC filed its complaint on September 17, 2018, ECF No. 1. A few days later, on September 20, 2018, EPIC filed a motion for a preliminary injunction, ECF No. 6.

4. The Court held a telephonic scheduling conference on the afternoon of September 24, 2018. All parties expressed their preference that unnecessary briefing be avoided, in favor of

an agreement upon a reasonable schedule for further proceedings. The Court ordered the parties to meet and confer and file a joint status report no later than September 28, 2018 at 2 p.m.

5. Since Monday's scheduling conference, counsel have had several lengthy discussions regarding the current status of EPIC's requests, EPIC's priorities and the specific sorts of records that it is most likely to be interested in, a reasonable schedule for the processing of these requests, and the course of future proceedings in this matter.

6. In particular, the parties have engaged in extensive discussions about the current status of NARA's ongoing processing of approximately 900,000 pages of Judge Kavanaugh's White House records, pursuant to an outstanding "Special Access Request" by the Senate Judiciary Committee under the Presidential Records Act, *see* 44 U.S.C. § 2205(2)(C).¹ A significant portion of the records requested by EPIC in the FOIA requests at issue in this case will also be responsive to the Special Access Request from the Senate Judiciary Committee. Because all of the records in question are Presidential Records (rather than typical "agency records" subject only to FOIA), NARA has been processing (and will continue to process) records responsive to the Senate Judiciary Committee's request for public release, subject to any appropriate FOIA exemptions *or* any appropriate Presidential Records Act restrictions, consistent with the terms of the Presidential Records Act.

7. Although negotiations are ongoing and additional agreements will need to be reached at a later date, at this time, the parties have agreed on the following:

- **PHASE I: On or before October 3, 2018**, NARA will conduct a series of searches within the set of records that have already been reviewed by NARA and noticed for potential release pursuant to 44 U.S.C. § 2208 in response to the Senate Judiciary Committee's pending Special Access

¹ *See* July 27, 2018 Ltr. of Senator Grassley to George W. Bush Presidential Library, available at <https://www.archives.gov/files/foia/07.27.2018-grassley-to-bush-library-re-kavanaugh.pdf>

Request. In particular, NARA will search for the following email records among the set of records that has already been noticed for release:

1. Emails sent to/from/cc/bcc² Brett M. Kavanaugh and to/from/cc/bcc John C. Yoo between September 1, 2001 and February 1, 2002.
 2. Emails sent to/from/cc/bcc Brett M. Kavanaugh and to/from/cc/bcc Michael Hayden between September 1, 2001 and February 1, 2002.
 3. Emails sent to/from/cc/bcc Brett M. Kavanaugh that include the terms “Michael Hayden” or “National Security Agency” between September 1, 2001 and February 1, 2002.
 4. Emails sent to/from/cc/bcc Brett M. Kavanaugh that include the terms “Patriot Act” or “PATRIOT Act” or “surveillance”
 5. Emails sent to/from/cc/bcc Brett M. Kavanaugh that include the terms “CAPPS II” or “Privacy Act” or “Fusion Center”
- Once these searches are complete, counsel for NARA will promptly inform counsel for EPIC how many records were located in response to each search.
 - NARA will then promptly produce the responsive records to EPIC, once the agency is legally permitted to do so under 44 U.S.C. § 2208.
 - NARA will also promptly make available to EPIC the textual records (*i.e.*, paper records) that have been processed in response to the Senate Judiciary Committee’s Special Access Request, once the agency is legally permitted to do so under 44 U.S.C. § 2208.
- **PHASE II: On or before October 10, 2018**, NARA will conduct the same series of searches as above in PHASE I, but within the set of email records that (1) are currently being processed for potential public release pursuant to 44 U.S.C. § 2208, in response to the Senate Judiciary Committee’s pending Special Access Request; but (2) have not yet been noticed for potential release pursuant to 44 U.S.C. § 2208.

² Counsel for NARA has informed counsel for EPIC of his understanding that the email records already noticed for release, which will be searched as part of PHASE I, only include emails sent “from” Judge Kavanaugh, as those emails were prioritized in responding to the Senate Judiciary Committee’s request.

- Once these searches are complete, counsel for NARA will promptly inform counsel for EPIC how many records were located in response to each search.
- EPIC will then consult with NARA in a good-faith effort to further prioritize the processing of responsive records based on the results of the search.
- **PHASE III:** NARA will conduct a series of searches for records created during Judge Kavanaugh's tenure as White House Staff Secretary (which are not responsive to the Senate Judiciary Committee's pending Special Access Request).
 - On or before October 10, 2018, EPIC will propose to NARA a specific methodology for conducting searches of these records, reflecting EPIC's priorities.
 - The parties will work diligently and in good faith to reach agreement with respect to these searches, and NARA will aspire to complete these searches on or before October 24, 2018, to the extent reasonable under the circumstances.
 - Thereafter, the parties will work diligently and in good faith to reach agreement with respect to the processing of these records.

8. The parties jointly and respectfully request that the Court adopt the parties' agreed-upon schedule.

9. EPIC hereby withdraws its motion for a preliminary injunction, ECF No. 6.

Dated: September 28, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Director, Federal Programs Branch

/s/ Stephen M. Pezzi

STEPHEN M. PEZZI (D.C. Bar No. 995500)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20530
Phone: (202) 305-8576
Fax: (202) 616-8470
Email: stephen.pezzi@usdoj.gov

Attorneys for Defendant

MARC ROTENBERG, D.C. Bar # 422825
EPIC President and Executive Director

/s/ Alan Butler

ALAN BUTLER, D.C. Bar # 1012128
EPIC Senior Counsel
ELECTRONIC PRIVACY
INFORMATION CENTER
1718 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20009
(202) 483-1140 (telephone)
(202) 483-1248 (facsimile)

Attorneys for Plaintiff