

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

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<b>MUSLIM ADVOCATES,</b>		)	
		)	
	<b>Plaintiff,</b>	)	
		)	
<b>v.</b>		)	<b>No. 1:17-cv-00813-TSC</b>
		)	
<b>DEPARTMENT OF HOMELAND SECURITY,</b>		)	
		)	
	<b>Defendant.</b>	)	
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**JOINT STATUS REPORT**

**INTRODUCTION**

By minute order dated July 18, 2017, the Court directed plaintiff Muslim Advocates and defendant Department of Homeland Security (DHS) to file a joint status report addressing certain matters. This document constitutes the parties’ report. The parties propose to file another joint status report on or before October 4, 2017, advising the Court of the progress they have made, if any, in resolving the issues identified in this report.

**DISCUSSION**

Plaintiff seeks an order in this action requiring DHS and U.S. Customs and Border Protection (CBP), a component of DHS, to comply with a multi-item request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for

- (1) records created on or after January 24, 2017 related to CBP’s search, review, retention, and dissemination of information located on or accessed through electronic devices in the possession of individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border; and (2)
- records created on or after February 27 2017 that pertain to Executive Order II and are otherwise responsive to the first request.

ECF No. 1 ¶ 13. DHS and CBP have represented that Plaintiff's request presents them with a number of issues, identified below. At this time, the parties have not had sufficient opportunity to confer for Plaintiff to have sufficient information to accept or object to the issues alleged by DHS and CBP. The parties are prepared to work with one another to try to resolve those issues in a manner that provides Plaintiff with responsive records without subjecting DHS and CBP to undue burden.

**A. DHS'S ALLEGED ISSUES PERTAINING TO THIS CASE AND RELATED CASE**

Plaintiff denominated this action at the time of its commencement as an action related to *Knight First Amendment Institute at Columbia University v. DHS*, No. 1:17-cv-00548-TSC (D.D.C.). ECF No. 3. The plaintiff in *Knight* seeks an order requiring DHS, CBP, and U.S. Immigration and Customs Enforcement (ICE), another component of DHS, to comply with a multi-item FOIA request for "records concerning suspicionless searches of individuals' electronic devices at the nation's borders." *Knight*, ECF No. 10-1 at 1.

DHS has completed its searches for records responsive to the request in *Knight*.<sup>1</sup> DHS believes that the records it has identified as responsive to the request in *Knight* include the

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<sup>1</sup> The searches that DHS has completed in *Knight* cover Items 1, 3, 4, and 5 of the request in that case. Those items seek:

- (1) Any document containing statistical information concerning the search, detention, retention, or sharing of electronic devices or information of individuals at the border (or functional equivalent of the border) since FY2012 including, but not limited to, documents reflecting: (a) the number of travelers whose electronic devices or information were searched, detained, retained, or shared; (b) the number or portion of those travelers who are U.S. citizens; (c) the number or portion of those travelers who are lawful permanent residents or green card holders; (d) the number or portion of those travelers by country of origin; (e) the number or portion of those travelers by gender, race, ethnicity, nationality, and/or country of birth; (f) the number or portion of those travelers by port of entry; and (g) the number or portion of those travelers by watchlist, lookout, and/or other selectee status.

records that Plaintiff seeks from DHS in this case. DHS thus believes that compliance with the request in this case does not require any searching beyond the searches it has completed in *Knight*. At this time, DHS has not indicated the number of documents responsive to Plaintiff's request or the anticipated date of release of documents by DHS to Plaintiff.

DHS has represented that its searches in *Knight* have identified more than 70,000 pages of responsive records. It further represents that resource constraints with respect to FOIA requests limit the ability of DHS to process more than 500 pages per month per request or group of related requests, i.e., to review more than 500 pages per month to determine which portions, if any, are exempt from release. DHS has thus represented that it will be unable to comply with the request in *Knight* and the request in this case without tying up its processing resources for years.

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(3) Revisions of or documents supplementing or superseding: (a) CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information* (Aug. 20, 2009); or (b) ICE Directive No. 7-6.1, *Border Searches of Electronic Devices* (Aug. 18, 2009).

(4) The following documents relating to any review of CBP's or ICE's policies or practices concerning electronic device searches: (a) any audits, impact assessments, or other reviews of CBP's or ICE's policies or practices concerning electronic device searches, including any such reports by the Office for Civil Rights and Civil Liberties, DHS's OIG, and CBP's Office of Internal Affairs, Management Inspection Division; (b) any policies, practices, procedures, and/or training materials adopted as a result of any audits, impact assessments, or other reviews of how CBP and ICE conduct electronic device searches; and (c) any documents reflecting annual or semi-annual examinations by CBP or ICE of electronic device searches by port of entry, as adopted in response to the 2011 Impact Assessment.

(5) Documents, including tear sheets and TRIP records, containing or relating to complaints filed by individuals or organizations about CBP's and/or ICE's search, review, retention or sharing of the information on travelers' electronic devices.

*Knight*, ECF No. 10-1 at 4-6.

DHS therefore proposes that the parties engage in discussions in *Knight* and in this case in order to try to narrow substantially the requests in the two cases insofar as they apply to DHS.

Plaintiff disputes DHS's contention that it is only able to process 500 pages per month per request or group of related requests. Indeed, the same contention was recently rejected in a different case in this court with respect to the FBI's ability to process records requested through FOIA. *See Seavey v. Dep't of Justice*, Case No. 15-1303, ECF No. 67 (D.D.C. July 20, 2017).

Further, although Plaintiff agrees that the request it submitted is, as a general matter, more limited in scope than the request submitted in *Knight*, Plaintiff does not believe that the topics of its request are completely subsumed within the *Knight* request. At this time, the parties have not had sufficient opportunity for discussion that would allow Plaintiff to confirm whether documents exist that are responsive to its request but not responsive to the *Knight* request. Plaintiff believes that DHS's production in response to its request should be separately identified from production of documents responsive to the *Knight* request. Plaintiff also believes that Defendant should not delay production in response to its request simply because it must also respond to the *Knight* request.

The parties are prepared to work together to attempt to resolve these issues and to come up with a schedule for the production of documents responsive to Plaintiff's request.

#### **B. CBP'S ALLEGED ISSUES**

CBP represents that it has completed its search for records responsive to the request in this case, except as stated below. Six responsive records comprising 17 pages have been located. The parties have not yet had an opportunity to discuss the specific searches that were conducted to obtain these documents. Plaintiff wishes to confer regarding such searches to determine whether they were adequate in light of Plaintiff's request.

The records for which CBP has not conducted searches consist of the following:

1. CBP has not conducted a search for records responsive to Item 2 of the request in this case because CBP considers Item 2 to be duplicative of Item 1.<sup>2</sup> Plaintiff states that Item 2 is intended to ensure that the topics provided in Item 1 are not limited in scope to those pertaining to the January 27, 2017 Executive Order, but, rather, also include documents related to the March 6, 2017 Executive Order. Provided that CBP's search for Item 1 would not exclude any documents pertaining to the March 6, 2017 Executive Order, Plaintiff would be comfortable with CBP's decision not to conduct a separate search. The parties will confer to ensure that they are in agreement and will attempt to work out any concerns.

2. CBP has not conducted a search for records responsive to Item 1(o) of the request in this case because CBP represents that records regarding complaints are not maintained in a manner that permits a search to be conducted for records specifically involving electronic device searches.<sup>3</sup> At this time, Plaintiff has not received sufficient information from CBP to evaluate CBP's representation. However, Plaintiff agrees to confer with CBP on this issue and, if appropriate, determine whether there is an alternative means of searching for this information that would satisfy Plaintiff's request.

3. CBP has not conducted a search for records responsive to Item 1(p) of the request in this case because CBP believes that compliance with Item 1(p) would require CBP to conduct a search of the emails of tens of thousands of CBP employees for emails containing any of 10

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<sup>2</sup> Item 2 seeks: "Any and all records created on or after February 27, 2017 that pertain to Executive Order II [defined in the request letter as the March 6, 2017 Executive Order] and are otherwise responsive to Request 1 above." ECF No. 1-1 at 5.

<sup>3</sup> Item 1(o) seeks: "Records regarding complaints filed on or after January 27, 2017 by individuals or organizations affected by CBP's policies or practices related to the search, review, retention, or dissemination of travelers' information." ECF No. 1-1 at 5.

common terms and would also require CBP to process and produce the emails it identifies regardless of whether they have anything to do with “CBP’s search, review, retention, and dissemination of information located on or accessed through electronic devices in the possession of individuals who are encountered by CBP at the border, functional equivalent of the border, or extended border,” the ostensible subject of Plaintiff’s interest in this case.<sup>4</sup> ECF No. 1 ¶ 13. CBP does not wish to conduct a resource-prohibitive search and processing of records that will result in the production of records well beyond the subject matter of Plaintiff’s stated interest in this case. It therefore urges Plaintiff to narrow substantially the list of terms and the definition of individuals to be searched under Item 1(p).

Plaintiff has not received any indication from Defendant regarding the number of CBP documents that would be responsive to Plaintiff’s request 1(p). In the event that the search leads to a burdensome number of documents, Plaintiff is amenable to finding ways to narrow the terms or personnel covered by the search in a manner that will satisfy Plaintiff’s request.

4. CBP has not conducted a search for records responsive to Items 1(k), (m), or (n) of the request in this case because Items 1(k), (m), and (n) may be read as seeking the individual incident-level reports for each electronic-device search conducted by CBP since January 27, 2017.<sup>5</sup> CBP represents that more than 14,000 such reports exist. CBP does not believe that it

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<sup>4</sup> Item 1(p) seeks: “E-mail communications among, between, or cc’ing CBP personnel at Headquarters, Office of Field Operations and/or Office of Intelligence, sent or received on or after January 24, 2017 containing any of the following words or terms: ‘electronic device,’ ‘smartphone,’ ‘tablet,’ ‘laptop,’ ‘password,’ ‘e-mail account,’ ‘social media,’ ‘facebook,’ ‘twitter,’ and ‘cloud.’” ECF No. 1-1 at 5.

<sup>5</sup> Items 1(k), (m), and (n) seek:

(k) Records reflecting the race, ethnicity, country of origin, citizenship, and gender of individuals who have had the information stored on or accessed through their electronic devices searched, reviewed, retained, and/or disseminated on or after January 27, 2017.

reasonably can be required to locate and process all of those reports. At this time, Plaintiff does not have sufficient information from CBP that would allow it to evaluate this representation. However, Plaintiff is willing to confer with CBP about whether this portion of the request may pose an undue burden.

CBP believes that a similar issue exists in *Knight*, though even greater in magnitude. Item 2(b) of the request in *Knight* seeks the individual incident-level reports for each electronic-device search conducted by CBP since October 1, 2011.<sup>6</sup> CBP has responded in view of the tens of thousands of reports potentially responsive to Item 2(b) by providing the plaintiff in *Knight* with a sample of responsive reports. See *Knight*, ECF No. 21 at 4. CBP has provided the sample of responsive reports to the plaintiff in *Knight* in the hope that the parties can agree on a volume

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. . . .

(m) Records regarding the retention of electronic devices, or information accessed from or through electronic devices, by CBP on or after January 27, 2017, including the number of documents or electronic devices, retained, the length of retention, the reasons for retention, and the ultimate disposition of retained material.

(n) Records regarding the dissemination of electronic devices, or information accessed from or through electronic devices, to other components of DHS, other government agencies, or persons or entities outside the government on or after January 27, 2017.

ECF No. 1-1 at 5.

<sup>6</sup> Item 2(b) seeks:

Documents relating to each instance since FY2012 in which CBP or ICE searched, detained, retained, or shared an electronic device or the information accessible on it, including, but not limited to . . . all information contained in the TECS system used to record and track electronic device searches, detentions, retentions, and/or sharings.

*Knight*, ECF No. 10-1 at 2.

of reports that would be reasonable for CBP to identify and process. Preliminary discussions have taken place. CBP has not provided Plaintiff in this case with any sample of responsive reports. CBP urges Plaintiff in this case to join those discussions.

Plaintiff does not have sufficient information to determine whether there are documents other than individual incident reports that would be responsive to requests in 1(k), (m), and (n), and is willing to confer with Defendant to determine whether other such records exist. With respect to individual incident reports, Plaintiff is amenable to discussions regarding how to narrow the number of documents produced and is also amenable to joining the discussions with the Parties in *Knight* regarding that topic.

**C. OTHER MATTERS**

Unresolved issues will be resolved in this case by motion for summary judgment or other appropriate motion but it is too early to say what motion or motions will be necessary or when they will be filed. DHS does not intend at this time to move for an *Open America* stay, either on its own behalf or on behalf of CBP. The parties will discuss whether a *Vaughn* index will be required.

**CONCLUSION**

The parties propose, as stated above, to file another joint status report on or before October 4, 2107, advising the Court of the progress made, if any, toward resolving the issues identified in this report.



Respectfully submitted,

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Dated: August 4, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on August 4, 2017, I served the within report and proposed order on all counsel of record by filing them with the Court by means of its ECF system.

*s/ David M. Glass*

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