

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

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MUSLIM ADVOCATES,)	
)	
	Plaintiff,)	
)	
v.)	No. 1:17-cv-00813-TSC
)	
DEPARTMENT OF HOMELAND SECURITY,)	
)	
	Defendant.)	
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SECOND JOINT STATUS REPORT

INTRODUCTION

Plaintiff Muslim Advocates seeks to compel compliance in this action with Plaintiffs’ request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. ECF No. 1, Prayer ¶ C. Plaintiff’s request seeks 16 categories of records, maintained by Defendant Department of Homeland Security (DHS) and its component, U.S. Customs and Border Protection (CBP), that were “created on or after January 24, 2017 [and are] 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.” *Id.* ¶ 13; *see* ECF No. 1-1 at 2-5. Plaintiff’s request also seeks “records created on or after February 27, 2017 that pertain to [Executive Order No. 13780 of March 6, 2017] and are otherwise responsive to the first request.” ECF No. 1 ¶ 13.

The parties were directed by minute order dated August 7, 2017, to “file another joint status report by October 4, 2017 advising the Court of the progress made, if any, toward resolving the issues relating to Plaintiff’s FOIA request.” This document constitutes the parties’ report. Plaintiff’s views and those of CBP and DHS are set forth separately. Plaintiff is concerned about the lack of progress and continuing disputes between the parties, and proposes that the parties be directed to file another joint status report on or before October 31, 2017. DHS proposes on behalf of itself and CBP that the parties be directed to file another joint status report on or before November 20, 2017, 45 days from the date of this report, and at subsequent intervals of 45 days.

DISCUSSION

I. PLAINTIFF’S VIEWS

A. Preliminary Issue Regarding The Government’s Obligation To Respond To Plaintiff’s FOIA Requests.

Plaintiff believes a significant, preliminary issue in the parties’ discussions to date has been the Government’s unwillingness to confirm that it will honor and carry out the search queries that the parties have negotiated. Since the start of this litigation, the Government has represented that it is in the process of negotiating FOIA requests submitted by a third party, the Knight Institute (“Knight”), and has refused to honor Plaintiffs’ repeated request to proceed under the terms of Plaintiffs’ *own* FOIA request, and not a third party’s. Instead, the Government repeatedly states that it will respond to Plaintiff’s FOIA requests only insofar as those requests are subsumed by terms agreed to by the third party, Knight.

Plaintiff has repeatedly informed the Government that Plaintiff submitted distinct FOIA requests, which are different in temporal terms—Plaintiff’s requests cover only a span of months, as opposed to several years—and in the categories of documents sought. Plaintiff’s

position is that the government should come to the table to negotiate and commit to mutually agreeable terms that satisfy Plaintiffs' FOIA requests, and not a third party's. Plaintiff is not aware of any authority that allows Defendants to respond to a FOIA request only insofar as the request is subsumed by or acceptable to third parties who have submitted separate requests that are not the subject of Plaintiff's negotiations with Defendants.

Notwithstanding Plaintiff's concerns, the Government's position has been that (1) DHS will not conduct *any* searches agreed to with Plaintiff until it has conducted searches agreed to with the third-party Knight Institute; and (2) even the search terms it is presently negotiating with Plaintiff (discussed further below) are contingent upon being accepted by the third-party Knight Institute. The Government previously indicated that the searches it has agreed to with Knight (and which it asserts would be reviewed before any searches agreed to with Plaintiff) may take years to complete. ECF No. 18 at 3. In the meantime, Plaintiff would receive documents only insofar as they happen to be subsumed by search queries that were created without Plaintiff's involvement and without specific regard to Plaintiff's request.

Plaintiff believes it is unreasonable for the government to refuse to conduct any search queries targeted to Plaintiff's requests until the government completes the Knight searches, which will be both under- and over-inclusive of Plaintiff's requests. Plaintiff has also indicated to the Government that it frustrates the parties' discussions to suggest that the terms being negotiated may be withdrawn subject to a third party's discretion. Plaintiff has sought confirmation from the Government that it will honor the terms agreed to by the parties, Muslim Advocates and the Government. To date, the Government has not provided such confirmation.

B. Status Of Discussions Specific To MA's FOIA Requests

i. Items (a)-(o)

In the parties' prior JSR, the government represented for the first time that CBP had conducted searches for Items (a)-(j), and (l)¹ of Plaintiff's FOIA requests. ECF No. 18 at 4. Because this search was conducted without any consultation with Plaintiff, on August 11, 2017, Plaintiff sought further information as to how this search was conducted. On August 18, 2017, CBP indicated that these documents were located by consulting potentially a single custodian in CBP's Office of Field Operations that is in charge of nationwide policies. CBP later produced a link to a two-page public document and 15 pages, all of which are redacted and several of which are redacted in their entirety. Plaintiff does not believe the Government's limited inquiry or the documents produced are sufficient to satisfy Plaintiff's Items (a)-(j) and (l), because of, among

¹ Items 1(a)-(j), and (l) call for the production of "[r]ecords related to CBP's implementation of Executive Order I with respect to CBP's search, review, retention, and dissemination of information located on or accessed through electronic devices"; "[r]ecords reflecting revisions of, or documents superseding, the August 25, 2009 'Privacy Impact Assessment for the Border Searches of Electronic Devices' and CBP Directive CD 3340-049, 'Border Search of Documents and Electronic Devices Containing Information' (August 20, 2009)"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 regarding criteria for selecting individual travelers whose electronic information will be searched, reviewed, or retained, or will be disseminated"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 regarding search, review, retention, or dissemination of information located on or accessed through electronic devices"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 on the questioning of travelers targeted for search of electronic devices, including policies, practices, and procedures"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 on the information given to travelers targeted for electronic-device search regarding CBP's authority to search, review, retain, and disseminate information stored on or accessed through electronic devices"; "[d]ocuments . . . given on or after January 27, 2017 to travelers targeted for electronic-device search regarding CBP's authority to search, review, retain, and disseminate information stored on or accessed through electronic devices, travelers' rights to refuse to consent to such CBP actions, travelers' rights to access legal counsel before consenting to such CBP actions, travelers' rights to limit the scope of their consent, . . . and CBP's authority to continue to detain travelers if they deny CBP access"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 regarding requesting travelers' passwords to their email accounts, social media accounts, cloud accounts, and other internet-based accounts"; "[p]olicies, practices, and procedures that went into effect on or after January 24, 2017 regarding providing travelers targeted for electronic-device search access to interpreters, including policies, practices, and procedures regarding the information given to such travelers regarding their rights to access interpreters"; [r]ecords reflecting the number 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"; "[r]ecords reflecting the number of foreign nationals denied entry into the United States by CBP for refusing to consent to CBP search, review, retention, and/or dissemination of their electronic devices and/or information stored on or accessed through their electronic devices."

other things, the absence of any electronic search by CBP of documents that may be responsive. Plaintiff proposes that the same electronic search query it has proposed that DHS conduct for Items (a) to (o), discussed below, be conducted by CBP.

In the prior JSR, the government represented that CBP had not conducted a search for Items (k), (m) or (n) because they may require a search of incident-level reports, of which 14,000 exist.² ECF No. 18 at 6-7. Plaintiff is willing to negotiate a resolution that allows CBP to satisfy Items (k), (m) and (n).

In the prior JSR, the Government represented that CBP cannot conduct a search for Item (o) because “records regarding complaints are not maintained in a manner that permits a search to be conducted for records specifically involving electronic device searches.”³ ECF No. 18 at 5. On October 4, 2017, CBP first advised Plaintiff that CBP does have the ability to conduct a search of its own for records responsive to that item, using single-term searches to search its complaint management system. The Government advised that it had already negotiated and reached agreement to search terms for the complaint management system with Knight, and proposed that Plaintiff accept those search terms. Plaintiff has informed the Government that the search terms created for Knight’s request are unlikely to satisfy Plaintiff’s Item 1(o), and sent additional inquiries to the Government to determine the scope of documents retained in the

² Items 1(k), (m), and (n) call for the production “[r]ecords 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”; “[r]ecords 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”; and “[r]ecords 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.

³ Item 1(o) calls for “[r]ecords 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.

complaint management system. Upon obtaining the requested information, Plaintiff proposes to discuss single-term searches of the complaint management system that would be compliant with Item 1(o).

With respect to DHS, the parties have been discussing an electronic search string that would satisfy Items (a)-(o). In the parties' most recent discussions, DHS proposed the following search string:

[("search*" or "review*" or "request*" or "collect*" or "seiz*" or "retention" or "retain*" or "duplic*" or "copy") and ("electronic device" or "smartphone" or "tablet" or "laptop" or "password" or "e-mail account" or "social media" or "facebook" or "twitter" or "cloud")].

DHS also proposed that it only produce documents after reviewing them and determining that they are "records dealing with the government's search, review, retention, or sharing of information on travelers' electronic devices."

Plaintiff has agreed to allow DHS to review and limit documents produced in response to Items 1(a)-(o) to those 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. Moreover, Plaintiff agreed to narrow its proposed search query using the additional terms proposed by the Government, but proposed that the second clause of the query include the following terms to be more comprehensive: "device*" or "laptop*" or "mobile" or "cellular phone" or "cell phone" or "cellphone" or "cell-phone" or "iPhone" or "I phone" or "i-phone" or "tablet" or "i-pad" or "iPad" or "I pad" OR "jump drive" or "thumb drive" or "smartphone" or "smart phone" or "hard drive" or "external drive" or "sd-card" or "Sd card."

DHS has not indicated whether it accepts the counter proposal above. As indicated previously, DHS continues to take the position that even if it agrees to this search, it will not be

conducted (1) until it completes review of the Knight searches it created without Plaintiff's involvement; and (2) unless the third-party Knight Institute also accepts the above search. Plaintiff believes that DHS's insistence that it will not run searches targeted to Plaintiff's requests until it completes a third-party's request, and its conditioning of the instant case parties' negotiations as to Plaintiff's requests on acceptance by a third party, are unreasonable and have greatly frustrated the parties' negotiations.

On October 4, 2017, DHS has advised Plaintiff that it is unlikely to have records responsive to Items 1(j)-(n)⁴ of Plaintiff's request and that it thus will defer to CBP for those portions of the request. DHS also advised that its Office for Civil Rights and Civil Liberties has conducted a separate search of its complaint system for records responsive to Item 1(o) of Plaintiff's request.⁵ At this time, Plaintiff lacks information to determine whether DHS is likely to have records responsive to Items 1(j)-(n) and (p), and is willing to discuss a separate search by the Office of Civil Rights and Civil Liberties to ensure that it is adequate as a response to Item 1(o).

⁴ Items 1(j)-(n) call for the production of "[r]ecords relating to the number 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"; "[r]ecords 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"; "[r]ecords reflecting the number of foreign nationals denied entry into the United States by CBP for refusing to consent to CBP search, review, retention, and/or dissemination of their electronic devices and/or information stored on or accessed through their electronic devices"; "[r]ecords 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"; and "[r]ecords 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.

⁵ Item 1(o) calls for the production of "[r]ecords 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.

ii. Item (p)

Item 1(p) calls for the production of “[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.

In the parties’ first joint status report, the Government expressed concern that compliance with Item 1(p) would require CBP to conduct “a resource-prohibitive search and processing of records that [would] result in the production of records well beyond the subject matter of Plaintiff’s stated interest in this case.” ECF No. 18 at 6. Despite Plaintiff’s request, the Government has not indicated the number of documents that would be returned by Plaintiff’s proposed search query or any other basis that led it to conclude the search would be “resource-prohibitive.” Plaintiff nonetheless expressed its “amenab[ility] to finding ways to narrow the terms or personnel covered by the search in a manner that will satisfy Plaintiff’s request.” *Id.*

Based on the Government’s representation that the search query proposed by Plaintiff in Item 1(p) would be too burdensome, the parties have been exchanging proposals for a replacement search query. The Government proposed that Item 1(p) be narrowed by adding an additional clause that requires the presence of the following terms, in addition to the ones that were in Plaintiff’s original request: (“search*” or “review*” or “request*” or “collect*” or “seiz*” or “retention” or “retain*” or “duplic*” or “copy”). The Government further proposed that it would produce all non-exempt portions of any record identified through the above search

that deals with CBP's search, review, retention, or sharing of information on travelers' electronic devices.

Plaintiff has agreed to allow CBP to review and limit documents produced in response to Items 1(a)-(o) to those 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. Moreover, based on the government's representation that 1(p) would be too onerous as originally drafted, Plaintiff indicated it was willing to narrow 1(p) by adding the additional clause proposed by the Government. In order to ensure that the effect of the Government's proposed additional clause did not unduly sacrifice documents that would have otherwise been captured in its original request, however, Plaintiff proposed that the list of electronic-device-related terms be modified to include: "device*" or "laptop*" or "mobile" or "cellular phone" or "cell phone" or "cellphone" or "cell-phone" or "iPhone" or "I phone" or "i-phone" or "tablet" or "i-pad" or "iPad" or "I pad" OR "jump drive" or "thumb drive" or "smartphone" or "smart phone" or "hard drive" or "external drive" or "sd-card" or "Sd card."

The Government now takes the position that Plaintiff is asking CBP to use search terms in conducting its search that go beyond the search terms listed in Item 1(p). Plaintiff believes that negotiating in the abstract has frustrated the parties' discussions: When Plaintiff has accepted the Government's additional clauses that appear to substantially narrow its original proposed query, and counter-proposed modest additional terms, the Government has rejected the counter-proposal on the basis that the new terms are not within the original FOIA requests. In order to make the parties' discussions more productive, Plaintiff requests that the Government provide

information regarding the number of records that would be returned with the original Item 1(p), as well as the proposed modified searches above.

As indicated above, the Government has asserted that it will honor any terms agreed to with respect to 1(p) only insofar as these are also accepted by the third-party Knight Institute. Plaintiff believes that conditioning the parties' negotiations as to Plaintiff's requests on acceptance by a third party is unreasonable and has greatly and repeatedly frustrated the parties' negotiations.

II. THE VIEWS OF CBP AND DHS

The following issues exist in this case, from the standpoint of CBP and DHS⁶:

1. DHS represented in the first joint status report on behalf of CBP that compliance with Item 1(p) of plaintiff's request would require CBP to conduct "a resource-prohibitive search and processing of records that [would] result in the production of records well beyond the subject matter of Plaintiff's stated interest in this case." ECF No. 18 at 6. The parties have been exchanging proposals since the filing of the first joint status report in an attempt to reach agreement on the scope of CBP's obligation under Item 1(p). CBP cannot agree to plaintiff's most recent proposal because the proposal asks CBP to use search terms in conducting its search that go beyond the search terms listed in Item 1(p). CBP is prepared to continue discussions with plaintiff to try to reach agreement on the scope of its obligation under Item 1(p).⁷

⁶ CBP is a component of DHS, 6 U.S.C. § 211(a), but CBP and DHS maintain separate records and respond separately to FOIA requests.

⁷ Plaintiff advised CBP on October 5, 2017, that the scope of Item 1(p) was limited to records that contain those search terms to which the parties agree and are 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. Plaintiff's so advising CBP facilitates the efforts of the parties to reach agreement with respect to Item 1(p).

2. DHS represented in the first joint status report on behalf of CBP that CBP could not conduct a search for records responsive to Item 1(o) of plaintiff's request because records regarding complaints were not maintained by CBP in a manner that permitted a search to be conducted for records specifically involving electronic device searches. ECF No. 18 at 5. Upon further examination undertaken in *Knight First Amendment Institute at Columbia University v. DHS*, No. 1:17-cv-00548-TSC (D.D.C.), a case related to this one, CBP determined subsequently that it could use single-term searches to search its complaint management system. Because of oversight, it did not so advise plaintiff until October 4, 2017.

The parties have begun discussions to determine the scope of CBP's obligation under Item 1(o). CBP is prepared to continue those discussions. CBP has never insisted that any agreement that the parties reach with respect to the obligation of CBP under Item 1(o) be contingent upon its acceptance by the plaintiff in *Knight*.

3. DHS represented in the first joint status report on behalf of CBP that CBP had completed its search for records responsive to Items 1(a)-(j) and (l) of plaintiff's request and located six responsive records comprising 17 pages. ECF No. 18 at 4. Plaintiff did not advise CBP until October 5, 2017, that it questioned the adequacy of CBP's search. Plaintiff has proposed that CBP conduct an additional search. CBP will consider plaintiff's proposal.

4. DHS represented in the first joint status report on behalf of CBP that CBP had not conducted a search for records responsive to Items 1(k), (m), and (n) of plaintiff's request because Items 1(k), (m), and (n) could be read as seeking the individual incident-level reports for each electronic-device search conducted by CBP since January 27, 2017, and because more than 14,000 of those reports existed as of the date of the first joint status report. ECF No. 18 at 6.

Plaintiff proposes to conduct discussions with respect to the obligation of CBP under Items 1(k), (m), and (n). CBP is prepared to engage in such discussions.

5. DHS expressed the view in the first joint status report that “[its] compliance with the request in this case [did] not require any searching beyond the searches it [had] completed in *Knight*.” ECF No. 18 at 3. The parties have been exchanging proposals on this topic since the filing of the first joint status report but have been unable to reach agreement about the need for or scope of further searches at this time. DHS advises that it is unlikely to have records responsive to Items 1(j)-(n) and (p) of plaintiffs’ request and that it thus will defer to CBP for those portions of the request. DHS also advises that its Office for Civil Rights and Civil Liberties has conducted a separate search of its complaint system for records responsive to Item 1(o) of plaintiff’s request. DHS further advises that the search it conducted consisted of two separate searches, one using the search string

(“searching” or “reviewing” or “collection” or “seizure” or “sharing” or “retention”) and (“electronic devices” or “communication devices” or “laptop” or “Cellphone” or “i-phone” or Tablet” or “I-pad” or “sd-card” or “Jump drive” or external drive”) and (“border” or “point of entry”)

and one using the search string

“CBP Directive 3340-049” or “ICE Directive 7-6.1” or “Border Search of Electronic Devices Containing Information” or “Border Searches of Electronic Devices.”

The search that DHS conducted thus was not limited to any specific item within the *Knight* request or the request in this case but instead was targeted towards retrieving potentially responsive records on matters within the contemplation of both requests, i.e., electronic border-searching and the collection of material from electronic border searches broadly. DHS advises that the above search identified approximately 8,300 records, of which approximately 1,675 are

dated January 24, 2017, and forward. Until DHS has an opportunity to fully review the results of that search, it advises of its view that a request for additional searches as premature.

Respectfully submitted,
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Dated: October 6, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2017, I served the within report on all counsel of record by filing it with the Court by means of its ECF system.

s/ David M. Glass
