

**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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**FOURTH JOINT STATUS REPORT**

**A. INTRODUCTION**

Plaintiff Muslim Advocates seeks compliance in this action with its March 7, 2017, request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for records maintained by defendant Department of Homeland Security (DHS) and by U.S. Customs and Border Protection (CBP), a component of DHS. *See* ECF No. 1 ¶ 1. Plaintiff’s request seeks 16 categories of 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 “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.” *Id.* ¶ 13; *see* ECF No. 1-1 at 2-5.

This report sets forth the events that that have occurred in this case since the status conference of November 28, 2017, and presents the recommendations of the parties concerning future events in the case. Plaintiff recommends, as discussed below, that the Court convene a

status conference, or if it deems appropriate, order summary-judgment briefing to accelerate the resolution of the three issues discussed in Section C. As laid out in more detail in Section C, those issues are: (1) Based on its estimated completion date of production, CBP would be processing at a rate of approximately 175 pages per month, a rate Plaintiff believes does not comply with CBP's statutory obligation to make records "promptly available"; (2) Plaintiff believes CBP can produce more than 250 responsive incident-level reports – the maximum CBP has offered to produce – without being subjected to an undue burden; and (3) DHS has still not provided Plaintiff with an estimate regarding the completion date of its production though it was required by this Court to do so by December 19, 2017.

DHS and CBP believe, for the reasons set forth in Section C, that the positions of Plaintiff with respect to CBP's processing and production of incident-level reports and DHS' providing Plaintiff with an estimated completion date for its production of responsive records are unwarranted and that no reason therefore exists for another status conference to be convened or for motions for summary judgment to be filed. They recommend instead that the parties continue their negotiations with a view toward resolving all outstanding issues in this case and that the parties file another joint status report on or before March 15, 2018.

**B. EVENTS OCCURRING SINCE THE STATUS CONFERENCE OF NOVEMBER 28, 2017**

1. The parties were directed during the status conference "to engage in meaningful communication, trying to narrow the scope of the searches, trying to reduce the burden on the government but also comply with [Plaintiff's] responses." Tr. at 27-28. The government was directed "to provide to [Plaintiff] an estimate regarding its completion date of production . . . [and] inform [Plaintiff] of the searches or search queries it has conducted or will be conducting" by December 19, 2017. *Id.* at 19, 20. The parties were directed to file a status report on January

19, 2018, “that indicates that everyone’s working in good faith to try and get this case moving.”  
*Id.* at 30.

2. DHS and CBP proposed to Plaintiff during a conversation occurring immediately after the status conference that a conference call among counsel take place on December 5, 2017.

3. Seeking “to facilitate a productive discussion” during the proposed conference call, Plaintiff advised DHS and CBP by email dated November 29, 2017, of “where we believe we currently stand with respect to each of the items in our requests for both DHS and CBP.” The discussion in the email was organized under the following headings, each of which referred to one or more items of Plaintiff’s request: “DHS 1(a)-(i),” “DHS 1(o) consumer complaints,” “DHS 1(j)-(n) – incident level reports,” “CBP 1(a)-(j), (l),” “CBP 1(p) – email search,” “CBP 1(k)-(n) (incident level reports),” and “CBP 1(o) consumer complaint.” The discussion under each of these headings chronicled from Plaintiff’s perspective the outstanding proposals that Plaintiff had made to DHS or CBP and the current status of the parties’ negotiations with respect to those proposals. Plaintiff confirmed in the email that the records that it sought from DHS and CBP were “records created on or after January 24, 2017 through the date of the request, March 7, 2017.”

4. The Court directed DHS and CBP by minute order dated November 30, 2017, to “(1) provide Plaintiff with an estimate regarding the completion date of its production and (2) inform Plaintiff of the search queries it has conducted or will conduct by December 19, 2017.” The Court directed the parties by the same minute order to “file another Joint Status Report on January 19, 2018.”

5. The proposed conference call took place as scheduled on December 5, 2017.

Participants in the call included attorneys from DHS and attorneys from CBP. The following events occurred during the call:

a. Plaintiff had proposed to DHS by email dated October 2, 2017, that DHS use the following search string to search for records responsive to Items 1(a)-(i) of the request:

("search\*" or "review\*" or "request\*" or "collect\*" or "seiz\*" or "retention" or "retain\*" or "duplic\*" or "copy") and ("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 represented during the conference call that many of its emails were likely to end with the phrase "Sent from my iPhone." Plaintiff responded by agreeing to remove the term "iPhone" from the proposed search string. It also reiterated its willingness to agree upon custodians in the DHS Office of General Counsel, Office of Policy, Office for Civil Rights and Civil Liberties (CRCL), Privacy Office, and Office of Public Affairs whose records would have to be searched for records responsive to Items 1(a)-(i). DHS agreed to take the search string as modified "back to the agency to determine whether [its use] would yield a huge number of results." Email Parker to Glass (Dec. 6, 2017).

b. DHS had represented in the joint status report dated November 3, 2017, that it had conducted a search within the CRCL for complaint summaries responsive to Item 1(o) of the request containing the terms "electronics," "phone," "laptop," or "computer." It represented during the conference call that the search would have captured complaint summaries containing the term "cellphone" or other terms in the form "prefix + phone." Plaintiff proposed that DHS conduct a search within CRCL for complaint summaries containing the terms "facebook," "twitter," "password," "iPad," "device," and "cell." DHS stated that it did not "anticipate any

problems” conducting such a search but would advise Plaintiff “if that [was] not the case.”

Email Parker to Glass (Dec. 6, 2017).

c. DHS had represented in the joint status report dated November 3, 2017, that “it [was] unlikely to have records responsive to Items 1(j)-(n) of [Plaintiff’s] request because it [did] not maintain databases of information encompassed by [those items] and because records containing such information, if they exist[ed], would be maintained by CBP.” ECF No. 23 at 6-7. Plaintiff responded during the conference call by agreeing not to seek records from DHS responsive to Items 1(j)-(n) in light of those representations.

d. CBP had represented to Plaintiff by email dated August 18, 2017, that “its FOIA office [had] referred Items 1(a)-(j) and (l) to the office within its Office of Field Operations [OFO] that reviews and disseminates nationwide policies regarding border searches of electronic devices” and that “personnel within that office had reviewed those items individually to identify responsive records, if any, based on their responsibility and knowledge of this area of CBP operations and the related policies, practices and procedures.” Plaintiff asked CBP during the conference call to make a referral to the CBP Office of Public Affairs to permit personnel within that office to identify any records of which they might have personal knowledge that were responsive to Item 1(a) of the request, either by itself or as read in the light of Item 2 of the request. It also reserved the right to ask that CBP make similar referrals to other headquarters components of CBP “should future document productions reveal that personnel at Headquarters may hold responsive records apart from the records produced to us in September 2017.” Email Parker to Glass (Dec. 6, 2017). CBP agreed to make the requested referral to the Office of Public Affairs.

e. CBP had proposed to Plaintiff by email dated September 15, 2017, that it comply with Item 1(p) of the request by searching the email accounts of the Executive Assistant Commissioner and Deputy Executive Assistant Commissioner of OFO and the Assistant Commissioner and Deputy Assistant Commissioner of the CBP Office of Intelligence (OI) “for emails dated on or after January 27, 2017, containing both the terms border search and any of such terms listed in Item 1(p) that the parties may agree to include.” The terms listed in Item 1(p) were “electronic device,” “smartphone,” “tablet,” “laptop,” “password,” “e-mail account,” “social media,” “facebook,” “twitter,” and “cloud.” ECF 1-1 at 5.

Plaintiff agreed by email to CBP dated September 16, 2017, to “start with” the email accounts of the Executive Assistant Commissioner and Deputy Executive Assistant Commissioner of OFO and the Assistant Commissioner and Deputy Assistant Commissioner of OI but reserved the right to “ask that searches be conducted in additional accounts” and asked that the search string used to conduct the search consist of the following, assuming that CBP was able to use proximity connectors to conduct the search:

(“search!” or “review!” or “request!” or “collect!” or “seiz!” or retention!” or “retain!” or “duplic!” or “copy”) /30 (any of the terms listed in Item 1(p))

CBP agreed by email dated September 29, 2017, to the search string proposed by Plaintiff but Plaintiff proposed by email dated October 2, 2017, that the following search string be used instead:

(“search\*” or “review\*” or “request\*” or “collect\*” or “seiz\*” or “retention” or “retain\*” or “duplic\*” or “copy”) /30 (“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”)

Plaintiff confirmed during the conference call that the period covered by Item 1(p) was the period January 24-March 7, 2017. CBP agreed to discuss with its IT personnel the feasibility of using the search string proposed by Plaintiff by email of October 2, 2017, to search the email accounts of the Executive Assistant Commissioner and Deputy Executive Assistant Commissioner of OFO and the Assistant Commissioner and Deputy Assistant Commissioner of OI.

f. CBP represented during the conference call that 3,500 incident-level reports responsive to Items 1(k)-(n) of the request would be captured by a search limited to the period January 27-March 7, 2017. Plaintiff responded by agreeing to send CBP “a proposal for narrowing the incident reports to a smaller subset, which might include limiting the search to a narrower range of dates within the January 27, 2017 to March 7, 2017 time frame.” Email Parker to Glass (Dec. 6, 2017). CBP agreed to consider any such proposal; acknowledged that limiting the search to a narrower range of dates might be one way to reduce the number of incident-level reports that would have to be processed; asked whether Plaintiff would consider a sampling approach to the incident-level reports; and offered to provide Plaintiff with a sample of six reports that already had been processed to help Plaintiff formulate its proposal.

g. CBP had represented in the joint status report dated November 3, 2017, that “complaints responsive to Item 1(o) of [Plaintiff’s] request [were] reasonably expected to be maintained in CBP’s centralized complaint system and that [it] was conducting a search of that system for responsive records.” ECF No. 23 at 8. CBP represented during the conference call that the above search had sought records containing the terms “electronic,” “phone,” “laptop,” “device,” “cell,” “ipad,” or “computer” and that it believed, but was not sure, that the search would not have captured records containing terms in the form “prefix + phone.” Plaintiff

responded by asking CBP to search the centralized complaint system for records related to incidents occurring during the period January 27-March 7, 2017, containing the terms “smartphone,” “facebook,” “twitter,” “password,” “iphone,” or “cellphone.” CBP agreed to consider the request.

6. CBP provided Plaintiff by email dated December 5, 2017, with the sample of six incident-level reports to which it had referred during the conference call. Four of the reports in the sample were two pages long and two of them were two-and-a-half pages long.

7. Plaintiff “memorialized [its] understanding of what the parties agreed to” during the conference call by email to DHS and CBP dated December 6, 2017.

8. Plaintiff proposed by email to CBP dated December 11, 2017, that the scope of Items 1(k)-(n) be narrowed to include only those incident-level reports concerning incidents occurring during the periods January 27-February 17, 2017, and February 27-March 5, 2017.

9. A second conference call among counsel for both sides took place at the request of DHS on December 18, 2017. Attorneys from DHS participated in the call. The following events occurred during the call:

a. DHS agreed to use the search string

(“search\*” or “review\*” or “request\*” or “collect\*” or “seiz\*” or “retention” or “retain\*” or “duplic\*” or “copy”) and (“device\*” or “laptop\*” or “mobile” or “cellular phone” or “cell phone” or “cellphone” or “cell-phone” 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”)

to search for records responsive to Items 1(a)-(i) of the request; agreed to provide Plaintiff by December 20, 2017, with a list of the custodians whose records it proposed to search; and represented that the search would require approximately three weeks to conduct once agreement had been reached on the list of custodians and an additional two weeks to evaluate the results of



the search in order to provide an estimated date for the completion of production. It also agreed to conduct a search within CRCL for complaint summaries containing the terms “facebook,” “twitter,” “password,” “iPad,” “device,” and “cell.”

b. Referring to “the Court’s order that the government ‘provide Plaintiff with an estimate regarding the completion date of its production’ by tomorrow,” Plaintiff asked DHS, notwithstanding the above representations, “for an estimated completion date of its searches.” Email Parker to Glass (Dec. 18, 2017). Plaintiff stated that it “did not assent to [DHS’] failing to provide an estimate in accordance with the Court’s order”; that it “remain[ed] hopeful that DHS provides us with an estimate as soon as possible”; and that it “agreed to maintain the current January 19, 2018 status report deadline ordered by the Court.” *Id.*

10. Plaintiff “memorialized [the] call” by email to DHS dated December 18, 2017.

11. A third conference call among counsel for both sides took place at the request of CBP on December 19, 2017. An attorney from CBP participated in the call. The following events occurred during the call:

a. CBP represented with respect to Items 1(a)-(j) and (l) of the request that it had made the referral to the Office of Public Affairs that Plaintiff had requested but that the referral had not resulted in the identification of any additional responsive records.

b. CBP represented with respect to Item 1(o) of the request that it had searched its centralized complaint system for records containing the terms “device,” “cell,” “phone,” “laptop,” “computer,” “iPad,” “password,” or “electronic”; that the search had captured approximately 11 records for the period covered by Item 1(o); that those records were undergoing review; and that CBP anticipated their production by the end of December 2017. CBP also represented that it had searched the centralized complaint system for records

containing the terms “electronics,” “iphone,” “cellphone,” “password,” “smartphone,” “facebook,” or “twitter”; that its rough estimate was that the search had captured between 10 and 25 records for the period covered by Item 1(o); that the records still required review; and that it anticipated producing any responsive records by the end of February 2018.

c. CBP represented with respect to Item 1(p) of the request that it had conducted two preliminary searches of the email accounts of the Executive Assistant Commissioner and Deputy Executive Assistant Commissioner of OFO and the Assistant Commissioner and Deputy Assistant Commissioner of OI; that one search had used CBP’s latest proposed search string and one had used Plaintiff’s latest proposed search string; that available information indicated that one search had captured 13,000 records and the other had captured 15,000 records; that it could not confirm whether the searches had used the/30 proximity connector that Plaintiff had proposed but would look into the issue; that it would examine the records captured by the searches to determine whether the number requiring processing could be reduced, perhaps by excluding those that did not deal with border searches of electronic devices; that it would make a proposal to Plaintiff based on its examination of the records; and that it was difficult to estimate how long it would take it to complete its production of records responsive to Item 1(p) in view of the parties’ continued discussions regarding the scope of the search. Plaintiff reiterated that it “would like an estimate of completion date as soon as possible” in view of the provision of the minute order dated November 30, 2017, requiring CBP to “‘provide Plaintiff with an estimate regarding the completion date of its production’ by December 19, 2017.” Email Parker to Glass (Dec. 20, 2017).

d. CBP represented with respect to Items 1(k)-(n) of the request that it had conducted a search for incident-level reports for the periods January 17-February 17, 2017, and

February 27-March 5, 2017; that it had identified approximately 2,400 reports by doing so; and that the processing of 2,400 reports would be an unduly-burdensome task. Plaintiff disagreed that the processing of 2,400 reports would be an unduly-burdensome task but expressed its willingness to narrow further the periods for which the production of reports would be required. It also asked CBP to indicate the absolute number of reports the processing of which, in its view, would not be unduly burdensome. CBP agreed to consult internally and provide an absolute number.

12. Plaintiff “memorialized [its] understanding of what the parties agreed to” during the conference call by email to CBP dated December 6, 2017. Though disclaiming the need to do so, Plaintiff said in the email that it “would agree to further narrow the date range” of the incident-level reports that it sought pursuant to Items 1(k)-(n) of the request to reports covering incidents occurring during the periods January 27-February 12, 2017 and March 2-5, 2017. Plaintiff also “reiterated [its] hope” in the email “that the government will provide an estimated date for the completion of production as soon as possible.”

13. DHS proposed by email to Plaintiff dated December 20, 2017, that the email accounts of the following individuals be searched for the period January 24-March 7, 2017, for records responsive to Items 1(a)-(i) of the request:

1. *Office of General Counsel.* Acting General Counsel; Chief of Staff; Associate General Counsel for Litigation; Associate General Counsel of the Operations and Enforcement Law Division (OELD); three Attorney Advisors from OELD.

2. *CRCL.* Section Chief, Security Intelligence and Information Policy; Senior Advisor, Security Intelligence and Information Policy; Director of Programs; Senior Advisor; Director of Compliance; Deputy Director of Compliance.

3. *Privacy Office.* Acting Chief Privacy Officer; Senior Director of Privacy Policy.

4. *Office of Policy*. Assistant Secretary of Policy; Deputy Assistant Secretary of Policy; Chief of Staff; Screening Coordination Office (all employees); Office of Immigration and Border Security (all employees).

DHS also proposed in its email dated December 20, 2017, that the search string used to search the email accounts of the above individuals be the search string that Plaintiff had proposed by email dated October 2, 2017, as modified by Plaintiff during the conference call of December 5, 2017, i.e.,

("search\*" or "review\*" or "request\*" or "collect\*" or "seiz\*" or "retention" or "retain\*" or "duplic\*" or "copy") and ("device\*" or "laptop\*" or "mobile" or "cellular phone" or "cell phone" or "cellphone" or "cell-phone" 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").

14. Plaintiff agreed by email dated December 21, 2017, to the search for records that DHS had proposed in its email to Plaintiff dated December 20, 2017, but asked that the email accounts of the following individuals be searched as well:

1. *CRCL*. Head of the Antidiscrimination Group.
2. *CBP*. Chief Counsel.
3. *U.S. Immigration and Customs Enforcement (ICE)*. Principal Legal Advisor.
4. *Office of Inspector General (OIG)*. Inspector General; Deputy Inspector General; OIG Chief of Staff.

Plaintiff also reserved the right "to add additional custodians to search should future productions reveal such additional custodians are likely to possess records responsive to our Request."

15. Twelve records responsive to Item 1(o) of the request were produced to Plaintiff by CBP on December 22, 2017.

16. DHS agreed by email dated December 28, 2017, to add the Section Chief of the CRCL Anti-Discrimination Group to the list of individuals whose email accounts would be searched for records responsive to Items 1(a)-(i) of the request but represented that its Privacy Office did not process FOIA requests for CBP, ICE, OIG, or any of the other operational components of DHS; that those components were in charge of their own FOIA offices; and that DHS could not search the email accounts of the individuals from CBP, ICE, and OIG that Plaintiff had asked be added to the search list.

17. Plaintiff asked DHS by email dated December 29, 2017, to refer its FOIA request to OIG and to ask OIG to conduct a search of the email accounts of the Inspector General, Deputy Inspector General, and OIG Chief of Staff similar to the searches of the other email accounts that DHS had agreed to conduct.

18. OIG agreed by email dated January 9, 2018, to conduct the search of the email accounts of the Inspector General, Deputy Inspector General, and OIG Chief of Staff that Plaintiff had requested, provided that Plaintiff agreed that “OIG’s conducting the search and producing any responsive records [would] not cause it to be treated as a defendant in this action.” DHS represented in the same email that its Privacy Office had given CRCL a deadline of January 17, 2018, to return to that office any potentially-responsive records captured by conducting a search within CRCL for complaint summaries created during the period January 24-March 7, 2017, containing the terms “facebook,” “twitter,” “password,” “iPad,” “device,” and “cell.”

19. Plaintiff expressed the view by email dated January 10, 2018, that “OIG [was] part of DHS and thus need not be separately named as a defendant” but “agree[d] not to use OIG’s production in this instance to prejudice OIG’s ability to argue that it is separate from DHS down the road.” Plaintiff clarified in the same email that it wanted the search within CRCL for

complaint summaries containing the terms “facebook,” “twitter,” “password,” “iPad,” “device,” and “cell” to be a search for complaint summaries involving incidents occurring during the period January 24-March 7, 2017, rather than a search for complaint summaries created during that period.

20. A fourth conference call among counsel for both sides took place at the request of CBP on January 11, 2018. Attorneys from CBP participated in the call. The following events occurred during the call:

a. CBP represented with respect to Item 1(p) of the request that the searches of the email accounts of the Executive Assistant Commissioner and Deputy Executive Assistant Commissioner of OFO and the Assistant Commissioner and Deputy Assistant Commissioner of the OI upon which it had reported during the conference call of December 19, 2017, had captured between 13,000 and 15,000 records apiece because the searches appeared to have disregarded the proximity connectors contained in the search strings used to conduct the searches; that it had run the searches again using the search string

(“search\*” or “review\*” or “request\*” or “collect\*” or “seiz\*” or “retention” or “retain\*” or “duplic\*” or “copy”) /25 (“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”);

that it had captured 1,300 records by doing so; that it had not reviewed the records for responsiveness; and that it considered the search to be a reasonable one. Plaintiff asked CBP to run the search again, this time using the proximity connector /30 that Plaintiff had proposed in its emails dated September 16 and October 2, 2017, instead of the proximity connector /25. CBP asked whether Plaintiff would consider a search using the proximity connector /30 to be one that met the requirements of Item 1(p) of the request. Plaintiff said that it would, subject to the

reservation of its right to ask CBP to search the email accounts of additional personnel, if it became apparent that those personnel might have potentially responsive records. CBP agreed to run the search again, this time using the proximity connector /30.

b. CBP represented with respect to Item 1(o) of the request that further review of the search it had conducted within the centralized complaint system for records containing the terms “electronics,” “cellphone,” “password,” “iphone,” “smartphone,” “facebook,” or “twitter” had identified four responsive records for the period covered by Item 1(o) and that it anticipated producing those records by January 26, 2018.

c. CBP represented with respect to Items 1(k)-(n) of the request that it had not looked into the number of incident-level reports that would be returned for the further-narrowed time frame of January 27-February 12 and March 2-5, 2017, that Plaintiff had proposed by email dated December 6, 2017, but that the processing of incident-level reports was a laborious and time-consuming task in view of the sensitive law-enforcement information and personal-privacy information that they contain; that it was prepared to process a maximum of 250 incident-level reports; that it estimated that it would be able to finish processing those reports by September 2018 if it was also required to process 1,300 emails under Item 1(p) of the request; and that processing incident-level reports takes significantly more time than processing emails. Plaintiff reiterated its position that reviewing 2,400 reports would not be unduly burdensome and requested again that CBP consider its proposal of December 20, 2017, to limit the production of incident-level reports under Items 1(k)-(n) of the request to those dealing with incidents occurring during the periods January 27-February 12 and March 2-5, 2017.

21. Plaintiff “memorialized [its] understanding of what the parties agreed to” during the conference call by email to CBP dated January 12, 2018.

22. OIG reiterated its willingness by email dated January 12, 2018, to conduct the search of the email accounts of the Inspector General, Deputy Inspector General, and OIG Chief of Staff that Plaintiff had proposed but reserved the right to oppose any attempt to treat it as a defendant in this action. OIG represented in reserving that right that it was an independent and objective audit, inspection, and investigative body and was independent of DHS though part of DHS; that it performed oversight of components of DHS by conducting audits investigations, inspections, and other reviews and that it thus made recommendations to improve the programs and operation of DHS; that it administered FOIA as separate entity from DHS; and that FOIA requests for OIG records properly should be addressed to OIG. DHS advised Plaintiff by the same email that the search within CRCL for complaint summaries containing the terms facebook,” “twitter,” “password,” “iPad,” “device,” and “cell” would be a search for summaries describing incidents alleged to have occurred during the period January 24-March 7, 2017, rather than a search for summaries prepared during that period.

23. Confirming that the parties had reached agreement on the searches to be conducted for records responsive to Items 1(a)-(i) of the request, Plaintiff asked DHS and OIG by email dated January 12, 2018, to “provide an estimate regarding the completion date of [their] productions” of such records.

24. Plaintiff moved without opposition on January 19, 2018, for an order extending the deadline for the filing of this report through January 23, 2018, or, in the case of a government shutdown, through January 26, 2018. Granting Plaintiff’s motion by minute order dated January 23, 2018, the Court directed the parties to file this report and a proposed order by January 29, 2018.



25. DHS and OIG advised Plaintiff by email dated January 24, 2018, that the inclusion of the term “mobile” in the search string that both were using to conduct the searches of the email accounts to which the parties had agreed captured large numbers of emails that contained the term “mobile” in the senders’ signature blocks but did not have anything to do with border searches of electronic devices and asked whether the term “mobile” might be deleted from the search string. Plaintiff agreed to the deletion of the term by email dated January 24, 2018.

26. OIG advised Plaintiff by email dated January 29, 2018, that it had completed the search of email accounts requested by plaintiff and found no responsive records.

27. The four records responsive to Item 1(o) to which CBP had referred during the January 11 conference call were produced to Plaintiff on January 29, 2018.

## **C. THE PARTIES’ RECOMMENDATIONS**

### **1. PLAINTIFF’S RECOMMENDATION**

Plaintiff believes, as reflected in the previous section, that the parties have made progress in our negotiations since the last status conference, particularly in terms of coming to agreements with DHS and CBP on searches, search terms, and custodians. Nonetheless, there are three areas where the parties have been unable to come to an agreement. Plaintiff believes it is critically important that those areas of disagreement be resolved promptly given how long this case has been pending. Namely:

(1) CBP has estimated that it will take until September 2018 to complete its production of 4 consumer complaints, up to 1,300 emails, and 250 incident-level reports<sup>1</sup>. Plaintiff does not believe processing that volume of records at the rate estimated – which would result in

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<sup>1</sup> Sample incident reports CBP provided Plaintiff were all either two or two-and-a-half pages long.

production being completed well over a year after the filing of the Complaint in this case – complies with CBP’s statutory obligation to make responsive records “promptly available.” 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i). Assuming each record is 2 pages, CBP would be processing at a rate of approximately 175 pages per month.

(2) Plaintiff believes CBP can produce more than 250 responsive incident-level reports – the maximum CBP has offered to produce – without being subjected to an undue burden. As described in more detail in the previous section, Plaintiff has repeatedly narrowed the date range of incident-level reports it seeks and believes that it would not be unduly burdensome for CBP to review and produce 2,400 incident-level reports (though Plaintiff has proposed to narrow the date range further which Plaintiff expects would lower that number).

(3) DHS has still not provided Plaintiff with an estimate regarding the completion date of its production, even though it was required to do so by December 19, 2017 per the Court’s November 30, 2017 minute order.

In light of the above, Plaintiff proposes that the Court convene another status conference or, if the Court deems it appropriate, order summary judgment briefing to accelerate the resolution of these issues.

## **2. THE RECOMMENDATIONS OF DHS AND CBP**

Plaintiff continues to ignore the relative burden imposed by its request for the incident-level reports, which contain information pertaining to specific travelers and privileged law-enforcement techniques. The presence of that information means that the reports will require painstaking review before any of them can be produced. It also means that coordination with other agencies may be necessary before certain reports can be produced. Plaintiff also makes assumptions regarding the amount of material to be produced by CBP – estimating that all of the

records that CBP may produce will average just two pages in length – but that assumption is based on a small sample of one type of record and ignores the fact that the emails sought by Plaintiff are of varying lengths and include attachments, which can be quite lengthy. Plaintiff’s position with respect to the processing and production of the incident-level reports is therefore unwarranted.

Plaintiff also ignores the efforts that DHS is making at the current time to conduct the complex search to which the parties have recently agreed. That search needs to go forward before meaningful discussions can take place about the number of records that the search is likely to capture and the speed with which any responsive records should be produced. Plaintiff’s position with respect to DHS’ providing it with an estimated completion date for its production of responsive records is therefore unwarranted as well.

No reason therefore exists for another status conference be convened at this time, much less for motions for summary judgment be filed. The better course, in light of the events described in this report, is for the parties to continue their efforts to resolve all outstanding issues. DHS and CBP therefore recommend that the parties continue those efforts and that another joint status report be filed on or before March 15, 2018.

Respectfully submitted,

By: s/ Amir H. Ali (by email authorization)

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Dated: January 29, 2018

### **CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2018, I served the within report and proposed orders on all counsel of record by filing them with the Court by means of its ECF system.

s/ David M. Glass

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

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

**[PLAINTIFF’S PROPOSED] ORDER**

It is hereby ordered in view of the joint status report dated January 29, 2018, that a Status Conference be set for February 21, 2018. In addition to the U.S. Attorney defending the action, counsel from the agency shall also appear at the Status Conference.

Dated: \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE

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

<hr/>		)	
<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>	)	
<hr/>		)	

**[DEFENDANTS' PROPOSED] ORDER**

It is hereby ordered in view of the joint status report dated January 29, 2018, that the parties file another joint status report on or before March 15, 2018, advising the Court of the progress made, if any, toward resolving the unresolved issues in this case.

Dated: \_\_\_\_\_  
UNITED STATES DISTRICT JUDGE