

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

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

THIRD JOINT STATUS REPORT

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. The records sought by plaintiff consist of 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.

The minute order dated October 12, 2017, directs the parties to “file another joint [status] report by October 31, 2017, along with a proposed order moving forward with this case.” This joint status report, the parties’ third, and alternative proposed orders are filed pursuant to that

order. Plaintiffs' views and those of DHS and CBP are set forth separately. Plaintiff proposes that the Court order the government to complete its production to Plaintiff by December 15, 2017 and set a briefing schedule for summary judgment in accordance with the dates set forth in Plaintiff's proposed order. DHS proposes that the parties file another joint status report on or before December 15, 2017, 42 days from the date of this report, and at subsequent intervals of 45 days.

DISCUSSION

I. PLAINTIFF'S VIEWS

In the second joint status report, the Government made numerous representations that it would be willing to continue to negotiate terms that satisfy Plaintiff's FOIA requests. ECF. No. 20, at 10-12. Since the filing of that report, Plaintiff has made numerous efforts to have such negotiations, but the Government has refused to discuss any of the outstanding issues that were raised in the report. The details of Plaintiff's efforts and the Government's unwillingness to engage in discussions are described below.

On October 12, 2017, the same day this Court ordered the parties to file another joint status report on October 31, 2017, Plaintiff sent an email to the Government containing eight inquiries that had been raised in the parties' report, and which the Government represented it would be willing to discuss. Among other questions, Plaintiff asked the Government:

- Whether the Government would honor the search terms that it agrees to with Plaintiff, independent of any third party approval (the Government had previously indicated to Plaintiff that any terms agreed upon by the parties would be contingent on approval by a third party to this litigation).

- Whether the Government maintains the position that that any searches targeted to Plaintiff's FOIA request would be "premature" because it is currently running searches it negotiated with a third party, devised without Plaintiff's involvement.
- Whether the Government would run the search query Plaintiff proposed to the Government for Items 1(a) to (o) of Plaintiff's requests, which was outlined for this Court in the second joint status report. ECF No. 20, at 4-5 (Oct. 6, 2017).
- With respect to Items 1(k), (m), or (n), whether it is possible to run an electronic search of the 14,000 incident-level reports the Government alleges exist, and whether there are any databases, systems, reports or internal policies that relate to the information sought in these Items.
- With respect to Item 1(o), whether CBP's complaint management system contains documents regarding, but created by CBP prior to or in response to, a complaint.
- With respect to Item 1(p), in light of the Government's refusal to agree to Plaintiff's modification of the Government's narrowed search query proposal, as described in detail in the second joint status report (ECF. No. 20, at 8-10), to specify the number of documents that would be returned by the original 1(p) query proposed by plaintiff as well as each of the modified searches proposed by the Government and Plaintiff. Plaintiff asked the Government to advise Plaintiff whether the government plans to so specify and, if so, when.

On October 13, 2017, the Government responded that it would "use [Plaintiff's] questions as guidance in preparing a draft of [the Government's] October status report." The same day, Plaintiff proposed that parties instead "use the period between status reports to attempt to make progress on the outstanding issues" surrounding Plaintiff's FOIA requests given the

Government's failure to (a) respond to several outstanding search proposals and (b) commit to actually conducting the searches Plaintiff and the government agree upon rather than conditioning the search queries on approval by a third party. Plaintiff further requested that the Government let Plaintiff know if it changed its position, represented to Plaintiff and this Court, that it would be willing to engage in discussions concerning the issues raised in Plaintiff's October 12, 2017 email.

That same day, October 13, the Government stated by phone that it would "make a proposal."

The Government never made such a proposal. On October 17, 2017, the Government telephoned Plaintiff to clarify whether the capitalization of "OR" in the search terms proposed by Plaintiff on page 6 of the parties' second joint status report was intended to have a different meaning from a lowercase "or." Plaintiff responded the same day that it did not intend the capitalization of "or" to have any different meaning.

On October 24, 2017, Plaintiff emailed the Government to advise that Plaintiff had not yet received a response to any of the questions it had sent on October 12 and asked the Government to advise given that the present joint status report was due a week from that day. The Government answered that it "anticipat[ed] including the answers in our section of the next joint status report" and the "goal" was "to provide [Plaintiff] with [the Government's] section of the next joint status report by COB" that Friday, October 27, two business days before the third joint status report was due.

The Government did not supply a draft status report on Friday, October 27. Instead, the Government indicated that it would send the Government's section of the report on Monday, October 30, one day before the status report was due. Upon receiving that information,

Plaintiff's counsel called Government counsel on Friday, October 27, and requested that the parties at least discuss the Government's position on the outstanding issues between the parties and raised in Plaintiff's October 12 email. The Government refused to engage in any discussion, stating that the Government's views would be reflected in the draft status report it would be providing Plaintiff one day before the report was due to the Court.

The Government has, accordingly, engaged in no negotiations with Plaintiff after the filing of the parties' second joint status report despite Plaintiff's repeated efforts to discuss the outstanding issues raised in that report. Instead, as reflected in the Government's section in this Report, the Government (1) never responds to Plaintiff's inquiry whether it would even honor search terms negotiated by the parties; (2) simply reiterates its prior position that it would be premature to run any search queries agreed to by the parties until it completes its review of documents returned by a search agreed upon by the Government and a third party without Plaintiff's involvement; (3) indicates to Plaintiff, for the first time, that "no proposal is currently under consideration," suggesting that it has rejected, without any discussion, the search terms that Plaintiff proposed in its last email; and (4) continues to assert that certain search queries would be an "undue burden" without providing any indication of the basis for that assertion (such as the number of documents that would be returned).

The Government has refused to engage in negotiations with Plaintiff to facilitate the prompt search for and processing of responsive documents in this case, and the Government has apparently unilaterally abandoned the past six months of negotiations between the parties. In light of these facts and in light of the fact that nearly 8 months have passed since Plaintiff's request; that, in response, the Government has only produced a link to a two-page public document and 15 pages of redacted documents, several of which were redacted in their entirety;

and that the Government has not asked for an *Open America* stay, Plaintiff proposes that this Court order the Government to inform Plaintiff of the searches or search queries it has conducted or will be conducting no later than November 10, 2017, to complete the productions it intends to complete on its own accord by the deadline of December 15, 2017 and to produce a draft *Vaughn* index no later than December 22, 2017. Plaintiff further proposes that the Court order the summary judgment briefing schedule set forth in Plaintiff's proposed order.

II. THE VIEWS OF DHS AND CBP

DHS and CBP provide the following information in response to questions raised by plaintiff:

1. DHS confirms that it considers the search described in the second joint status report, ECF No. 20 at 12, to meet the requirements of this case and that it considers any request for additional searches to be premature until it has an opportunity to review fully the results of that search.
2. DHS confirms that the parties engaged in discussions about a proposal made by DHS on September 11, 2017, concerning the search in this case but that, as of this time, no proposal is currently under consideration.
3. DHS advises that the search conducted by the DHS Office for Civil Rights and Civil Liberties for records responsive to Item 1(o) of plaintiff's request was a search within Entellitrak for complaint summaries containing the terms "electronics," "phone," "laptop," or "computer."
4. DHS advises that it is unlikely to have records responsive to Items 1(j)-(n) of plaintiffs' request because it does not maintain databases of the information encompassed by

Items 1(j)-(n) and because records containing such information, if they exist, would be maintained by CBP.¹

5. CBP advises that a search string proposed by plaintiff to identify records responsive to Items 1(a)-(o) of plaintiff's request appears to assume either that records responsive to Items 1(a)-(o) are contained in a single, searchable database or that CBP may perform a complex electronic search across all databases in which records responsive to Items 1(a)-(o) are reasonably likely to reside; that neither of these assumptions is correct; and that CBP thus cannot use this search string without subjecting itself to undue burden.

6. CBP advises with respect to Items 1(k), (m), and (n) of plaintiff's request that it is able to query the system that contains incident-level reports to identify reports that contain specific types of information in certain data fields. CBP further advises that the system does not have a search function that permits CBP to conduct general word searches.

7. CBP advises that the individual-incident reports that potentially are responsive to Items 1(k), (m), or (n) of plaintiff's request are maintained in TECS; that TECS is described in the applicable System of Records Notice, 73 Fed. Reg. 77778 (Dec. 19, 2008); that information regarding border searches of electronic devices performed by CBP is contained in the applicable Privacy Impact Assessment, *Border Searches of Electronic Devices* (Aug. 25, 2009), available at https://www.dhs.gov/sites/default/files/publications/privacy_pia_cbp_laptop.pdf; and that policies regarding border searches of electronic devices are contained in CBP Directive No.

¹ The DHS Privacy Office handles FOIA requests directed to the following components of DHS: Office of the Secretary, Citizenship and Immigration Services Ombudsman, Domestic Nuclear Detection Office, Office of the Executive Secretary, Office of Intergovernmental Affairs, Management Directorate, Office of Policy, Office of the General Counsel, Office of Health Affairs, Office of Legislative Affairs, Officer of Public Affairs, and Privacy Office. See 6 C.F.R. Pt. 5, Subpt. A, App. 1. All other components of DHS, including CBP, handle FOIA requests separately.

3340-049, *Border Search of Electronic Devices Containing Information* (Aug. 20, 2009), available at https://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf. CBP further advises that the records produced to plaintiff by CBP on September 14, 2017, also contain responsive reports and policies.

8. CBP advises that complaints responsive to Item 1(o) of plaintiff's request are reasonably expected to be maintained in CBP's centralized complaint system and that CBP is conducting a search of that system for responsive records. CBP further advises that it will consider whether any additional searches may be appropriate.

9. CBP advises that providing certain requested information concerning the number of hits generated through the use of alternative search strings to identify records responsive to Item 1(p) of plaintiffs' request would require an estimated 4-6 weeks of search time and that it thus cannot obtain the requested information without subjecting its limited e-discovery resources to undue burden.

Respectfully submitted,
By: s/ Amir H. Ali (by email authorization)
Amir H. Ali, DC Bar 1019681
THE RODERICK & SOLANGE MACARTHUR
JUSTICE CENTER
718 7th Street, N.W.
Washington, D.C. 20001
Tel: (202) 869-3434

Joshua M. Parker, DC Bar 1019515
Kelly M. Morrison, DC Bar 1046293
JENNER & BLOCK LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
Tel: (202) 637-6380/Fax (202) 639-6066
Email: jparker@jenner.com

Johnathan Smith, DC Bar 1029373
Sirine Shebaya, DC Bar 1019748
Juvaria Khan, *Pro Hac Vice*
MUSLIM ADVOCATES
P.O. Box 66408
Washington, D.C. 20035
Tel: (202) 656-4788
Attorneys for Plaintiff

CHAD A. READLER
Acting Assistant Attorney General

JESSIE K. LIU
United States Attorney

ELIZABETH J. SHAPIRO
Deputy Director

s/ David M. Glass
DAVID M. GLASS, DC Bar 544549
Senior Trial Counsel
Department of Justice, Civil Division
20 Massachusetts Ave., N.W., Room 7200
Washington, D.C. 20529
Tel: (202) 514-4469/Fax: (202) 616-8470
E-mail: david.glass@usdoj.gov
Attorneys for Defendant

Dated: November 3, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 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

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

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

[PLAINTIFF'S PROPOSED] ORDER

It is hereby ordered in view of the joint status report dated November 3, 2017, that DHS and CBP inform Plaintiff of the searches or search queries it has conducted or will be conducting no later than November 10, 2017, complete its productions to Plaintiff no later than December 15, 2017, and shall produce a draft *Vaughn Index* no later than December 22, 2017. It is further ordered that parties subsequently file cross-motions for summary judgment pursuant to below briefing schedule:

- Defendant's Motion for Summary Judgment shall be due on January 5, 2017;
- Plaintiff's Cross-Motion for Summary Judgment and Opposition to Defendant's Motion shall be due on February 2, 2017; and
- Government's Reply Brief shall be due on February 22, 2017.

Dated: _____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

[DEFENDANTS' PROPOSED] ORDER

It is hereby ordered as follows in view of the joint status report dated November 3, 2017:

1. The parties shall file another joint status report on or before December 15, 2017, advising the Court of the progress made, if any, toward resolving the unresolved issues in this case.
2. The parties shall file additional joint status reports at subsequent intervals of 45 days.

Dated: _____

UNITED STATES DISTRICT JUDGE