

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

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<b>KNIGHT FIRST AMENDMENT INSTITUTE</b>		)	
<b>AT COLUMBIA UNIVERSITY,</b>		)	
		)	
	<b>Plaintiff,</b>	)	
		)	
	<b>v.</b>	)	<b>No. 1:17-cv-00548-TSC</b>
		)	
<b>DEPARTMENT OF HOMELAND</b>		)	
<b>SECURITY, <i>et al.</i>,</b>		)	
		)	
	<b>Defendants.</b>	)	
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**SECOND JOINT STATUS REPORT**

**INTRODUCTION**

By minute order dated June 8, 2017, the Court directed plaintiff Knight First Amendment Institute at Columbia University and defendants Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) to file a joint status report, their second, by August 14, 2017. This document constitutes the parties' report. The parties propose to file another joint status report on or before October 16, 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 directing DHS, ICE, and CBP to comply with a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for the following:

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.

2. 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: (a) a list of the TECS data field categories used to record and track each electronic device search conducted by CBP or ICE; and (b) all information contained in the TECS system used to record and track electronic device searches, detentions, retentions, and/or sharings.

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 polices 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.

6. Documents reflecting policies, practices, or procedures concerning how CBP officers handle "privileged or other sensitive material," including "work-related information carried by journalists," as referenced in § 5.2 of the CBP Directive.

7. Documents reflecting policies, practices, and procedures concerning CBPs anti-discrimination policy as applied to discretionary device searches.

ECF No. 10 ¶ 2; ECF No. 10-1 at 4-6. DHS, ICE, and CBP have represented to plaintiff that plaintiff's request presents them with a number of issues, identified below. The parties have taken the preliminary steps identified below to resolve those issues and 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, ICE, and CBP to undue burden.<sup>1</sup>

**A. DHS**

DHS represents that it has completed searches for records responsive to Items 1, 3, 4, and 5 of plaintiff's request, including records of the DHS Office for Civil Rights and Civil Liberties responsive to Item 5, but that it has not conducted searches for records responsive to Items 2, 6, or 7 of plaintiff's request because Item 2 appears on its face to seek CBP and ICE records and Items 6 and 7 appear on their face to seek CBP records. Plaintiff has asked DHS to search for and confirm that DHS has no records responsive to Items 2, 6, and 7. DHS further represents that it has not conducted a search for records of civil actions in which the authority of the government to conduct border searches of electronic devices has been challenged or for records of criminal actions in which motions to suppress evidence obtained through border searches of electronic devices have been filed. Plaintiff has asked DHS to conduct such a search.

DHS represents that its searches have resulted in the identification of more than 70,000 pages of potentially-responsive records but that it is unable to state without subjecting itself to

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<sup>1</sup> Plaintiff also seeks an order directing defendants to grant plaintiff's request for expedited handling of its FOIA request. ECF No. 10 ¶ 1. DHS and ICE have granted plaintiff's request for expedited handling of its FOIA request, ECF No. 18-5 at 1; ECF No. 18-12 at 2, and CBP represents that it has been handling plaintiff's FOIA request as if it had done so.

undue burden how many are responsive to which item or items of plaintiff's request. Plaintiff questions the inability of DHS to obtain such information.

DHS also represents that resource constraints limit its ability to process more than 500 pages of records per month per FOIA request or group of related FOIA requests, i.e., to review more than 500 pages per month to confirm their responsiveness to a particular FOIA request and to determine which portions, if any, are exempt from release. Plaintiff disputes on the strength of *Seavey v. Department of Justice*, 2017 WL 3112816 (D.D.C. July 20, 2017), the representation of DHS that it cannot process more than 500 pages of records per month per FOIA request or group of related FOIA requests. DHS does not concede the applicability of *Seavey* to its FOIA processing capabilities or this case.

None of the pages identified through the searches referred to above has been processed for release to date. Plaintiff has asked DHS to begin processing and releasing them and to provide a timeline for the releases.<sup>2</sup>

## **B. ICE**

ICE represents that it has completed searches for records responsive to Items 1, 2(a), 3, 4, and 5 of plaintiff's request and has produced all non-exempt portions of the records it has identified but that it has not conducted searches for records responsive to Items 6 or 7 of plaintiff's request because Items 6 and 7 appear on their face to seek CBP records. ICE has produced a list of civil actions of which it is aware in which its authority to conduct border

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<sup>2</sup> The discussion in this report does not apply to the DHS Office of Inspector General (DHS OIG), which operates independently of other components of DHS. DHS OIG has conducted a search for records responsive to Item 4(a) of plaintiff's request because Item 4(a) seeks records of DHS OIG. DHS OIG has advised plaintiff that the records it has identified are exempt from production. Plaintiff's view is that DHS OIG should conduct a search for all items in the request, indicate whether or not responsive records have been identified, and produce any responsive records. DHS OIG acknowledged receipt of the request on June 13, 2017.

searches of electronic devices has been challenged and represents that it does not maintain a system that tracks motions to suppress in criminal cases. Plaintiff has asked ICE to conduct a search for such motions to suppress.

ICE represents with respect to Item 2(b) that the universe of responsive records may potentially include thousands of reports of investigation (ROIs) in ICE's Investigative Case Management system. ICE has therefore submitted a proposal to plaintiff to limit the number of ROIs that ICE shall be required to process. Plaintiff is in the process of reviewing the search terms covered by ICE's proposal and will shortly identify additional search terms that, in its judgment, should be used. ICE has also provided plaintiff with a sample of ROIs responsive to Item 2(b).

**C. CBP**

CBP represents that it has completed searches for records responsive to all of the items of plaintiff's request, except Item 2(b), and that it has produced all non-exempt portions of the records it has identified except one record responsive to Item 1, three records responsive to Item 4, and one record responsive to Items 4 and 7. These records await the completion of processing. Plaintiff has asked when these records will be processed and released. Also awaiting the completion of processing are 47 records responsive to Item 5 that the Transportation Security Administration (TSA) has referred to CBP. Plaintiff has also asked when these records will be processed and released. CBP further represents that it has compiled 103 additional records, comprising approximately 66 MB of electronic data, that potentially contain information responsive to Item 4, but that these records await further review for responsiveness and, if found responsive, processing for release. Plaintiff has asked when the review for responsiveness will

be complete and when these records will be processed and released. Plaintiff has asked CBP to process and release all of the above records promptly.

CBP represents that it has not conducted a search for records of civil actions in which its authority to conduct border searches of electronic devices has been challenged or for records of criminal actions in which motions to suppress evidence obtained through border searches of electronic devices have been filed. Plaintiff has asked CBP to conduct such a search.

CBP represents with respect to Item 5 that the system in which it maintains complaints cannot be searched by electronic word searches. It therefore represents that it cannot search that system by “electronic device” or other term and pull responsive records in that manner. It also represents that it is coordinating with other components of DHS that maintain records regarding complaints to produce responsive records about CBP inspections, such as the 47 records that TSA has referred to CBP. The parties propose to engage in further discussions about CBP and Item 5.

CBP represents with respect to Item 2(b) that the universe of responsive records may potentially include 60,000 individual-incident reports. CBP has provided plaintiff with a sample of responsive reports. Plaintiff has responded to the sample that CBP has provided by proposing that CBP omit the narrative sections from the responsive reports as they are produced initially. CBP is considering plaintiff’s proposal but has not yet formulated a counterproposal. Plaintiff has asked CBP for the date by which it will formulate its counterproposal and has asked CBP to formulate its counterproposal promptly. The parties are prepared to work together to try to narrow the scope of Item 2(b) insofar as it applies to CBP.

## CONCLUSION

The parties propose, as stated above, to file another joint status report on or before October 16, 2017, 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 14, 2017

**CERTIFICATE OF SERVICE**

I hereby certify that on August 14, 2017, I served the within report and proposed order on all counsel of record by filing it with the Court by means of its ECF system.

*s/ David M. Glass*

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

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**Plaintiff,** )  
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**v.** )  
) )  
**DEPARTMENT OF HOMELAND** )  
**SECURITY, et al.,** )  
) )  
**Defendants.** )  
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**No. 1:17-cv-00548-TSC**

**[PROPOSED] ORDER**

It is hereby ordered in view of the joint status report dated August 14, 2017, that the parties shall file another joint status report on or before October 16, 2017, advising the Court of the progress made, if any, toward resolving the issues identified in that report.

Dated: \_\_\_\_\_

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UNITED STATES DISTRICT JUDGE