

DISCUSSION

A. ISSUES THAT HAVE BEEN RESOLVED

The second joint status report was filed on August 14, 2017. The following issues have been resolved since then:

1. One resolved issue involves the DHS Office of Inspector General (DHS OIG). DHS OIG handles its own FOIA requests. *See* 6 C.F.R. Pt. 5, Subpt. A, App. 1. It is not included for that reason in the term “DHS” as used in this report.

The parties have reached agreement since the filing of the second joint status report on the searches to be conducted by DHS OIG to be deemed fully in compliance with plaintiffs’ request. DHS OIG advises that it has conducted all of the searches to which the parties have agreed and that it thus has used the agreed-upon search strings to search its Office of Audits and Office of Inspections to identify records responsive to Items 1, 2, 3, 4(b), and 4(c) of plaintiff’s request¹; has used the same search strings to search the investigative database maintained by its

¹ Items 1, 2, 3, and 4 of plaintiff’s request call 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)”; and (4) “The following documents relating to any reviews of CBP’s or ICE’s policies or practices concerning

Office of Investigations to identify records responsive to Item 5 of plaintiff's request²; and has sent the language of plaintiff's request to the leadership of its Office of Audits, Office of Inspections, and Office of Investigations to ascertain whether those units would possess records responsive to Items 6 and 7 of plaintiff's request.³

DHS OIG further advises that it has produced to plaintiff one record in redacted form; that this record is responsive to Item 5 of plaintiff's request; that it has referred 188 pages of other records potentially responsive to Items 3-4 of plaintiff's request to ICE; that it has identified no other records responsive to Items 1-7 of plaintiff's request; and that it thus considers its response to plaintiff's request to be complete. ICE advises that all of the material referred to it by DHS OIG is material that had been produced to plaintiff previously, is nonresponsive to plaintiff's request, or is publicly-available, i.e., "Privacy Impact Assessment for the Border Searches of Electronic Devices," https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_laptop.pdf.

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." ECF No. 10-1 at 4-6.

² Item 5 of plaintiff's request calls for the following: "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." ECF No. 10-1 at 6.

³ Items 6 and 7 of plaintiff's request call for the following: (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" and (7) "Documents reflecting policies, practices, and procedures concerning CBPs anti-discrimination policy as applied to discretionary device searches." ECF No. 10-1 at 6.

2. The parties have reached agreement since the filing of the second joint status report on the search to be conducted by CBP to be deemed fully in compliance with Item 5 of plaintiff's request. CBP anticipates that it will finish compiling the records and conduct a preliminary responsiveness review by October 31, 2017. The time it will take for CBP to process any non-exempt, responsive records for release depends on the number of responsive records, which is still being determined, and the prioritization of plaintiff's various requests.

3. CBP represented in the second joint status report that it had compiled 103 records, "comprising approximately 66 MB of electronic data, that potentially contain[ed] information responsive to Item 4, but that these records await[ed] further review for responsiveness and, if found responsive, processing for release." ECF No. 23 at 5. CBP advises with respect to those records that it has conducted a preliminary responsiveness review and that it anticipates that it will release non-exempt portions of any responsive records on a rolling basis beginning the week of November 13, 2017.

B. ISSUES THAT HAVE NOT YET BEEN RESOLVED

The following issues have not yet been resolved in this action:

1. DHS represented in the second joint status report that "it [had] completed searches for records responsive to Items 1, 3, 4, and 5 of plaintiff's request" but "[had] not conducted searches for records responsive to Items 2, 6, and 7 of plaintiff's request because Item 2 appears on its face to seek CBP and ICE records and Items 6 and 7 appears on their face to seek CBP records." ECF No. 23 at 3. DHS further represented that "its searches [had] resulted in the identification of more than 70,000 pages of potentially-responsive records but that it [was] unable to state without subjecting itself to undue burden how many [were] responsive to which item or items of plaintiff's request." *Id.* at 3-4.

Plaintiff responded to these representations by “ask[ing] DHS to search for and confirm that [it had] no records responsive to Items 2, 6, and 7.” ECF No. 23 at 3. Plaintiff also responded by questioning the inability of DHS to determine how many pages or records were responsive to which item or items of plaintiff’s request. *Id.* at 4.

DHS has advised plaintiff since the filing of the second joint status report that its search in this case was not limited to any specific item or items within plaintiff’s request but consisted instead of searches of records of its Office of General Counsel, Office of Policy, and Office for Civil Rights and Civil Liberties (DHS CRCL) using the following two search strings:

1. (“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

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

DHS has further advised plaintiff that these searches sought records dating from January 1, 2012, and thus identified tens of thousands of pages of potentially-responsive records; that the searches were separate from the search conducted by DHS CRCL for records responsive to Item 5 of plaintiff’s request; and that the use of search strings to conduct the searches means that DHS cannot determine without going through each of the potentially responsive records which of them is responsive to which item or items of plaintiff’s request. DHS advises as a further matter that it has no reason to believe that records responsive to Items 2, 6, or 7 of plaintiff’s request would be located at any component of DHS.

The parties are at impasse notwithstanding the information provided by DHS concerning the duty of DHS, if any, to determine the number of records responsive to each item of plaintiff’s

request and the duty of DHS, if any, to conduct a separate search for records responsive to Items 2, 6, and 7 of plaintiff's request.

Plaintiff was not advised of the search strings identified above before they were employed by DHS. Plaintiff has advised DHS that it does not view either of these search strings as an adequate means to identify potentially responsive records. The parties are still discussing the possibility of having DHS re-run its search using agreed-upon search strings.

2. Explaining that "processing" means reviewing records "to confirm their responsiveness to a particular FOIA request and to determine which portions, if any, are exempt from release," DHS represented in the second joint status report that "resource constraints limit[ed] its ability to process more than 500 pages of records per month per FOIA request or group of related FOIA requests." ECF No. 23 at 4. Plaintiff responded to this representation by disputing the number of pages that DHS ought to be able to process per month in this case and citing *Seavey v. Department of Justice*, 2017 WL 3112816 (D.D.C. July 20, 2017), in which the court rejected the FBI's proposal to process 500 pages of responsive records per month, ordering the FBI to process 2,850 pages per month instead. *Id.*

DHS has provided plaintiff since the filing of the second joint status report with a declaration, filed in another case on August 10, 2017, in which the Deputy FOIA Officer of DHS discusses the number of FOIA requests DHS receives, the manner in which the requests are handled, and the number of personnel assigned to handle the requests. The parties are at impasse notwithstanding this declaration on whether DHS can or should review more than 500 pages per month in this case.

DHS has begun despite this impasse to process the records it has identified through the search described above. It advised plaintiff on September 29, 2017, that it had completed its

review of more than 900 pages of the records it had identified through the search but that none of those records had anything to do with border searches of electronic devices.

3. ICE represented in the second joint status report that the universe of records responsive to Item 2(b) of plaintiff's request "[might] potentially include thousands of reports of investigation (ROIs) in ICE's Investigative Case Management system." ECF No. 23 at 5. CBP represented likewise that the universe of records responsive to Item 2(b) of plaintiff's request "[might] potentially include 60,000 individual-incident reports." *Id.* at 6.

The parties have been exchanging proposals since the filing of the second joint status report in an attempt to reach agreement on the scope of the obligations of ICE and CBP under Item 2(b). Plaintiff provided ICE and CBP with its most recent set of proposals on October 11, 2017. The parties propose to continue their discussions on this issue.

Respectfully submitted,

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Dated: October 16, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 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

