

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

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

INTRODUCTION

Plaintiff Knight First Amendment Institute at Columbia University seeks to compel defendants Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) to comply with its request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for seven categories of records dealing with “suspicionless searches of individuals’ electronic devices at the nation’s borders.” ECF No. 10 ¶ 2; *see* ECF No. 10-1 at 4-6. The parties have been directed by minute order dated August 17, 2017, to “file another joint status report and proposed order by October 16, 2017, and every 45 days thereafter.” This joint status report, the parties’ fourth, is filed pursuant to that order. The parties propose to file another joint status report on or before January 16, 2018, and at subsequent intervals of 45 days. To the extent the parties cannot reach a resolution of the outstanding issues in a timely manner, plaintiff reserves the right to seek summary judgment.

DISCUSSION

A. RECENT DEVELOPMENTS

Defendants advise of the following developments since the filing on October 16, 2017, of the third joint status report:

1. DHS represented in the second joint status report that its searches in this case had resulted in the identification of more than 70,000 pages of potentially-responsive records. DHS advised plaintiff on September 29, 2017, that it had completed its review of more than 900 of those pages but that none of them had anything to do with border searches of electronic devices.

DHS now advises that, as of November 13, 2017, it has completed processing 624 pages of potentially-responsive records not processed previously; that it anticipates releasing all non-exempt portions of 351 of those pages to plaintiff on or about December 1, 2017; that it has referred 135 of the 624 pages to other agencies for processing; and that the rest of the 624 pages are duplicates of other pages (41) that it has processed or are non-responsive (237) to the request in this case.

2. CBP advises that it has conducted a search for records responsive to Item 5 of plaintiff's request in accordance with the agreement of the parties concerning that search; that it has conducted a preliminary responsiveness review of the records it has identified through the search; and that it has determined that approximately 175 of the records are responsive to Item 5. CBP anticipates that an initial release of a portion of these records will be made by December 22, 2017.

3. CBP advises that the non-exempt portions of 195 pages of additional records responsive to Item 4 of plaintiff's request were released to plaintiff on November 14, 2017. *See* ECF No. 24 at 4 (discussion of the additional records in the third joint status report). CBP

anticipates that another release of the additional records responsive to Item 4 will take place on or before December 22, 2017.

B. ISSUES THAT HAVE NOT YET BEEN RESOLVED

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

1. The issues pertaining to DHS that are characterized as unresolved in the third joint status report remain unresolved. DHS proposes an early conference call among plaintiff's counsel, defendants' undersigned counsel, and DHS' in-house counsel to discuss those issues.

2. The parties continue to exchange proposals on the scope of the obligation of ICE under Item 2(b) of plaintiff's request. ICE's latest proposal was presented to plaintiff on November 21, 2017.

3. The parties continue to exchange proposals on the scope of the obligation of CBP under Item 2(b) of plaintiff's request. CBP's latest proposal was presented to plaintiff on November 27, 2017.

C. PLAINTIFF'S CONCERNS AND REQUEST FOR A COURT CONFERENCE

Plaintiffs have several concerns that they would like to raise with the Court at a conference at the Court's earliest convenience.

1. Plaintiff remains concerned, as expressed in prior Joint Statute Reports, that DHS is willing to review at most 500 pages of potentially responsive records per month. At this anemic pace, it could take well over a year for DHS to complete its production.

2. Plaintiff is also concerned that CBP's proposal regarding the scope of its obligations under Item 2(b) is inadequate. Under the latest proposal, which does not materially improve on prior proposals, CBP would review and produce only *one percent* of the incident-level reports dealing with border searches of electronic devices that were created during the period April 1,

2016 to September 30, 2017. Plaintiff has been warned that the production of even this small fraction of responsive records could take a long (unspecified) period of time.

3. More generally, Plaintiffs are concerned that DHS and its components are proceeding without any production deadlines, such that how quickly they review and produce responsive records is entirely a matter of their discretion.

Plaintiffs believe that the parties would benefit from explaining their positions to the Court and seeking the Court's guidance. Accordingly, Plaintiffs request a Court conference at the Court's earliest convenience.

D. DEFENDANTS' RESPONSE TO PLAINTIFF'S CONCERNS

1. Plaintiff derides DHS' processing of records at the rate of 500 pages per case per month but that mischaracterizes the monthly processing DHS is doing. DHS processes 500 pages per month per case, and is therefore processing a total of over 6,500 pages per month for its various litigations. DHS accomplishes this feat even though it has but nine FOIA processors, of whom but four are dedicated to litigation. The processing of 500 pages per case per month is not "anemic" when viewed in that context.

2. The parties do not appear to be far apart, from defendants' perspective, with respect to the incident-level reports dealing with border searches of electronic devices that CBP needs to process in order to be in compliance with Item 2(b) of plaintiff's request. CBP proposed by email dated September 22, 2017, that it process 3% of the incident-level reports created during the past 18 months and that it produce all non-exempt portions of each report processed except the report's narrative field. CBP explained in making that proposal that it would need to conduct detailed reviews of the narrative sections if they were to be included among the material to be

processed and that processing the narrative sections would thus increase substantially the amount of time and effort needed to process the reports.

Plaintiff responded on October 11, 2017, by proposing that CBP process 3% of the incident-level reports created during the past 18 months, including their narrative sections, as well as all incident level reports created during the past 18 months that contain certain specified search terms. CBP replied on November 27, 2017, by proposing that the number of incident-level reports that it be required to process be limited to 1% of those created during the past 18 months if the narrative sections were to be processed. CBP also advised plaintiff that it could not conduct the word searches that plaintiff had proposed because the system containing the incident-level reports did not have a search function that permitted general word searches to be conducted.

CBP believes that the issue concerning the incident-level reports to be processed by CBP can be resolved without the intervention of the Court and pledges to work with plaintiff to resolve that issue. A production schedule for the reports can be worked out once the issue has been resolved.

3. The parties have been engaged in discussions concerning the Reports of Investigation (ROIs) to be processed by ICE under Item 2(b) of plaintiff's request and appear, from defendants' perspective, to be close to agreement. ICE advised plaintiff by email dated November 21, 2017, that it anticipated being able to download all of the ROIs that the parties had been discussing by December 15, 2017; that it then planned to upload the ROIs to Relativity in order to search them using the search terms to which the parties had agreed; and that it expected to have a better idea by the beginning of next year how long it would take its FOIA Office to begin reviewing for possible release the ROIs determined to be responsive to Item 2(b). ICE thus believes that a

production schedule for the ROIs can be worked out at an early date without the intervention of the Court.

Respectfully submitted,

By: s/ Scott B. Wilkens (by email authorization)

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Dated: November 30, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 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

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Defendants.)	
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[PROPOSED] ORDER

It is hereby ordered as follows in view of the minute order dated August 17, 2017, and the joint status report dated November 30, 2017:

1. The parties shall file another joint status report on or before January 16, 2018, 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