



4. Defendant U.S. Customs and Border Protection (CBP) produced 338 pages responsive to Items 2(b), 4, or 5 of plaintiff's request on March 29, 2018. Portions of these pages were withheld pursuant to FOIA Exemptions 6, 7(C), and 7(E).

5. Defendant Department of Homeland Security (DHS) had asked plaintiff by email dated December 17, 2017, whether "plaintiff would consider DHS to have complied in full with all portions of plaintiff's request other than Item 5" if DHS "use[d] a certain search string to conduct a search within date parameters to be agreed upon by the parties of the email accounts of certain DHS personnel . . . and produced all non-exempt portions of any responsive records that it identified." ECF No. 26 at 1-2. Responding by email dated January 16, 2018,

plaintiff indicated . . . that it would consider DHS to have complied in full with all portions of its request other than Item 5 if it conducted this search and produced all non-exempt portions of any responsive records that it identified but did not indicate the time-parameters for which it proposed that DHS conduct the search.

*Id.* at 3. Asked at the status conference of February 21, 2018, about the "date range" to be covered by DHS' search of the email accounts, plaintiff said: "[T]he FOIA request . . . goes back to 2012 . . . . [W]ith respect to . . . the e-mails, we want those to cover the full period that the FOIA request calls for." Tr. at 7:16, 18-23.

DHS produced material on March 29, 2018, from the 341 pages it had reviewed in March 2018. The 341 pages were the product of a search conducted of the email accounts for the period January 24-March 7, 2017. One of the 341 pages was released in full; 155 were released with redactions pursuant to FOIA Exemptions 5 and 6; 51 were withheld in full pursuant to FOIA Exemption 5; 22 were withheld because they were non-responsive to plaintiff's request; 53 were withheld because they were duplicates; and 59 were referred to CBP for review and direct response to plaintiff.

6. ICE produced 358 pages responsive to Item 2(b) of plaintiff's request on April 23, 2018. Portions of these pages were withheld pursuant to FOIA Exemptions 6, 7(C), and 7(E). This production included material from cases the status of which had changed from "open" to "closed" since December 7, 2017. This production constituted ICE's final production of material in this action.

7. The parties spoke by telephone on April 23, 2018, in response to the request of plaintiff for an update on the status of defendants' production of material in this case. Defendants stated during the call that ICE's final production of material was imminent, if it had not occurred already, and that DHS and CBP anticipated making additional productions of material by the end of April. Defendants asked during the call whether plaintiff continued to want DHS to produce emails and attachments dating back to 2012, or whether it would consider limiting the time period for emails and attachments.

8. Plaintiff asked DHS by email dated April 23, 2018, to provide it by the end of the week with a breakdown by year of the number of responsive documents that its search of the email accounts was likely to yield. Plaintiff also asked whether a call could be set up "with CBP personnel who are familiar with the technical capabilities (and limitations) of the TECS database" in view of "CBP's production in response to Item 2(b) and CBP's claimed inability to utilize search terms."

9. DHS advised plaintiff by email dated April 27, 2018, that it could not provide page counts for emails and attachments on a year-by-year basis due to the limitations of the DHS Privacy Office FOIA processing program/software. DHS advised plaintiff, however, that its search of the email accounts for the period January 24-March 7, 2017, had yielded approximately 80 responsive records totaling approximately 1,239 pages. Extrapolating from those figures,

DHS said: “Although it cannot be known for certain, those results may suggest that a search for emails and attachments covering a year would yield approximately 700 documents totaling more than 10,700 pages and that a search for emails attachments carried back to the beginning of FY 2012 would yield more than 75,000 pages.”

10. Responding to defendants’ email by email of the same date, plaintiff said:

[I]t appears that a search covering the full period of the FOIA request (back to FY 2012) has not yet been conducted [by DHS]. If one has been conducted, can you please advise regarding the total number of potentially responsive documents identified in the search? If one has not been conducted, can you please explain why not, given that this case has been pending for well over a year, and whether/when one will be conducted?

11. CBP produced 277 pages responsive to Items 2(b) or 4 of plaintiff’s request on April 27, 2018. Portions of these pages were withheld pursuant to FOIA Exemptions 6, 7(C), and 7(E).

12. DHS produced material on April 30, 2018, from the 290 pages it had reviewed in April 2018. One hundred ninety-five of the 290 pages were responsive to Items 4(a) and 5 of plaintiff’s request and the other 95 were the product of DHS’ search of the email accounts for the period January 24-March 7, 2017. Sixty of the 290 pages were released in full; 64 were released with redactions pursuant to FOIA Exemptions 5 and 6; 18 were withheld in full pursuant to FOIA Exemption 5; one was withheld because it was non-responsive to plaintiff’s request; eight were withheld because they were duplicates; 22 were referred to the DHS Office of Inspector General for review and direct response to plaintiff; and 117 were referred to CBP for review and direct response to plaintiff.

13. A conference call took place between the parties on May 11, 2018. The following events occurred during the call:

a. DHS said that its search of the email accounts supplanted the searches it had conducted earlier in this action, *see* ECF No. 23 at 3-4, because the search of the email accounts and any resulting productions of material were intended to constitute “compli[ance] in full with all portions of [the] request other than Item 5.” ECF No. 26 at 3. Plaintiff expressed its willingness to consider whether the search of the email accounts needed to be a search back to 2012 but reiterated its desire for information on a year-by-year basis about the number of pages that the search was likely to yield. Plaintiff also asked whether the search could be modified in such a way as to reduce in an acceptable manner the amount of material that the search would yield. DHS agreed to consider the issue.

b. CBP explained that certain of the incident-level reports that it was processing and producing in this case were the same as the incident-level reports that it was processing and producing in *DHS v. Muslim Advocates*, No. 1:17-cv-00813-TSC (D.D.C.), but that others were not. CBP also explained that it was selecting incident-level reports for processing in this case by selecting every 50th incident-level report from a list of reports prepared for purposes of this case. Plaintiff expressed interest in further discussing whether CBP’s methodology produced a representative sample.

c. CBP confirmed that it did not have the ability to conduct word searches of the narrative portions of incident-level reports but stated that certain searches would be possible in the fields of the reports. Plaintiff asked for additional information about the searches that CBP could conduct so that it could determine whether an additional group of reports existed in which it might be interested. Certain of the fields in the reports are subject to applicable exemptions, but CBP agreed to consider what additional information could be provided.

d. Expressing interest in securing its early dismissal from this action, ICE asked whether plaintiff intended to challenge any of ICE's withholdings in this case. Receiving an answer in the affirmative, ICE offered to provide plaintiff with a sample *Vaughn* index. Seeking to facilitate the preparation of the index, ICE asked plaintiff to identify the categories of withholdings that it intended to challenge.

14. Plaintiff advised defendants of the following by email dated May 17, 2018:

a. Plaintiff explained that it had "expected DHS to run the search terms and custodians specified in the January 2018 JSR against the results from the [initial search]" but that, at this point, it "would still like DHS to run the search terms with the custodians as specified in the January 2018 JSR and tell us how many documents result from that search." Plaintiff further explained that it would "consider prioritizing production of those documents (or possibly excluding some)" depending on "the volume of documents for each year" if "a year-by-year breakdown" of the documents could be provided; that it preferred nonetheless "to limit the Request by Item rather than year;" that it understood DHS to have "completed production of records responsive to Item 5 . . . and that [it had] a complete response to Item 3 as well"; and that it "would be willing to exclude Item 2 from DHS's search too."

b. Plaintiff asked "whether CBP could pull all [incident-level] reports with specified criteria in the following fields in the 'Summary Information' and 'Item 01 Details' sections of the reports": Reason for Search, Port Code, Race, Country of Birth, Citizenship, Inbound/Outbound, Notified Traveler of Search, Item Type, and Action. Plaintiff also asked "[in] what ways CBP can export information from the search report module within TECS (e.g. csv? Excel or other formats?)."

c. Plaintiff said that it “would want to review a draft *Vaughn* [index before] deciding what and when to litigate with respect to ICE’s response to the Request”; that it “would agree to accept a *Vaughn* index for a representative sample of the search incident reports responsive to Item 2(b)” but “would want to review the method ICE would use to come up with the sample” before “ICE produce[d] the index”; that it might want to request *Vaughn* entries “for specific search incident reports as well”; and that it wanted “a complete *Vaughn* index for redacted records responsive to all other Items of the Request.”

15. Defendants sent plaintiff a draft of this joint status report by email dated May 18, 2018, and advised plaintiff by that email that they would respond to plaintiff’s email of May 17 after reviewing the email.

16. Plaintiff sent defendants proposed changes to this report by email dated May 21, 2018.

17. Defendants asked plaintiff by email dated May 21, 2018, whether it was correct to infer from plaintiff’s proposed changes to this report that plaintiff did not insist on DHS’ “run[ning] the search terms specified in the January 2018 JSR against the results from the [initial search]” but instead would consider DHS to have “complied in full with all portions of plaintiff’s request other than Item 5” if DHS conducted the search of email accounts described in the January 2018 JSR “within date parameters to be agreed on by the parties . . . and produced all non-exempt portions of any responsive records that it identified.” Defendants also asked whether plaintiff was willing to select the reports of investigation (ROIs) that it wanted ICE to address in its *Vaughn* declaration and to identify the categories of withholdings within the ROIs that it wanted ICE to address in the declaration before ICE began work on the declaration.

18. Plaintiff advised defendants by email dated May 21, 2018, that it was willing to select the ROIs that it wanted ICE to address in its *Vaughn* declaration and to identify the categories of withholdings within the ROIs that it wanted ICE to address in the declaration before ICE began work on the declaration. Plaintiff also said that it continued to agree to the search procedure described in ¶ 14(a), *supra*, in light of DHS's need to run an entirely new search rather than search against its initial search results, and requested a breakdown of responsive records by year in order to consider excluding certain years and thereby alleviate the processing burden on DHS going forward. Plaintiff did not propose to further limit this search by date.

**C. THE PARTIES' RECOMMENDATION**

The parties recommend that the parties' next joint status report be due on or before June 29, 2018, and that the next joint status report cover, at a minimum, (1) the efforts of the parties to define the search that DHS is required to conduct; (2) the scope of CBP's response to Item 2(b), including the sampling methodology utilized and status of the parties' discussions regarding criteria for the identification of additional reports; and (3) the rate at which DHS and CBP will process records in view of the order dated May 14, 2018, in *Muslim Advocates*.

Respectfully submitted,

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Dated: May 21, 2018

### **CERTIFICATE OF SERVICE**

I hereby certify that I served the within report and attached order on all counsel of record by filing them with the Court by means of its ECF system on May 21, 2018.

s/ David M. Glass

**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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**[PROPOSED] ORDER**

It is hereby ordered that the parties’ next joint status report be due on or before June 29, 2018, and that the joint status report cover, at a minimum, (1) the efforts of the parties to define the search that DHS is required to conduct; (2) the scope of CBP’s response to Item 2(b), including the sampling methodology utilized and status of the parties’ discussions regarding criteria for the identification of additional reports; and (3) the rate at which DHS and CBP will process records in view of the order dated May 14, 2018, in *DHS v. Muslim Advocates*, No. 1:17-cv-00813-TSC (D.D.C.).

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

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE