

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

SEVENTH JOINT STATUS REPORT

A. RECENT EVENTS

The following events have taken place in this case since the issuance of the minute order dated May 24, 2018:

1. Plaintiff Knight First Amendment Institute at Columbia University asked defendants Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE) by email dated May 25, 2018, whether they would be “available next week – perhaps Thursday – for a call to discuss DHS’s search, among other issues.”

2. DHS produced records to plaintiff on May 30, 2018, from the 848 pages it had reviewed during May 2018. These records, and others, were the product of a search of email accounts, covering the six-week period at issue in *Muslim Advocates v. DHS*, No. 1:17-cv-00813-TSC (D.D.C.), conducted by DHS in accordance with the joint status report dated January 16, 2018, ECF No. 26 at 1-3. Two hundred fifty of the 848 pages were released in full; 89 pages were released in part with redactions pursuant to FOIA Exemptions 5 and 6; 414 pages were

withheld in full pursuant to FOIA Exemptions 5 and/or 7(E); 44 pages were withheld because they were non-responsive to plaintiff's request; 14 pages were withheld because they were duplicates; and 37 pages were referred to CBP for review and direct response to plaintiff.

3. CBP produced 279 pages to plaintiff on May 31, 2018. These pages were part of the sample of "2% of the incident-level reports dealing with border searches of electronic devices created during the past 18 months, including their narrative sections," to which the parties had agreed on January 16, 2018, *see* ECF No. 26 at 4, and were produced with redactions pursuant to FOIA Exemptions 6, 7(C), and 7(E).

4. The parties held a conference call on May 31, 2018, as plaintiff had proposed. The following occurred during the conference call:

a. ICE said it understood its next obligation in this case to be the preparation of a *Vaughn* declaration and that it was waiting for plaintiff to identify the reports of investigation that the declaration needed to address. Plaintiff said it would provide that information to ICE.

b. DHS said it had intended the search of email accounts described in the joint status report dated January 16, 2018, ECF No. 26 at 1-3, to supplant the searches it had conducted in or before October 2017, ECF No. 24 at 4-5, because the earlier searches had utilized search strings developed without plaintiff's input and had gathered more than 70,000 pages of potentially-responsive records. DHS said, however, that it was willing to process the records gathered through the earlier searches in lieu of conducting the search of the email accounts described in the joint status report. Plaintiff said that it wanted DHS to conduct the search of the email accounts described in the joint status report but asked, as it had before, whether DHS could determine on a year-by-year basis how many records the search was likely to gather, thereby permitting plaintiff to decide which years it wanted the search to cover. DHS

said, as it had before, that it did not have the capability to determine on a year-by-year basis how many records the search was likely to gather.

c. CBP said that certain of the data fields in the incident-level reports responsive to Item 2(b) of plaintiff's request might contain information that was searchable and that CBP would consider whether any such information might be non-exempt.

d. The parties agreed to conduct another conference call on June 12, 2018.

5. Plaintiff advised defendants of the following by email June 11, 2018, for the purpose of facilitating the discussion during the next day's conference call:

a. Plaintiff said that it was "conducting another review of the records ICE [had] produced and [would] provide the set of documents for which [it] would like a *Vaughn* index by July 13."

b. Plaintiff said it "[might] be willing to abandon an email search beyond the search DHS is conducting for *Muslim Advocates*, so long as we have an opportunity to approve the search for other records before DHS conducts it."

c. Plaintiff said that the data fields for "Race" and "Item Type" that appeared in the incident-level reports produced to date "[did] not seem to offer a reasonable way to restrict the scope of CBP's response to our Item 2(b) request" because "the 'Race' field is often completed 'unknown,' and . . . the 'Item Type' field is often completed 'cel-cellphone/all comm devices.'" Plaintiff therefore proposed that CBP "provide a .csv or Excel file containing the field information for all of the reports responsive to Item 2(b) (excluding the narrative portions of the reports)." Plaintiff also proposed that CBP provide "a 3% random sample of the [incident-level] reports, including the narrative portions," in lieu of the 2% sample that CBP was already providing.

6. The conference call scheduled for June 12, 2018, took place as scheduled. The following occurred during the call:

a. Plaintiff said that the records that it was seeking from DHS were records responsive to the individual items of its request, not necessarily records gathered through the search of the email accounts discussed in the joint status report dated January 16, 2018. DHS said that it would look into the possibility of conducting a search for records tailored more closely to the individual items of plaintiff's request by attempting to identify specific personnel likely to know whether records responsive to those items existed. DHS said as a separate matter that it thus far had limited its production of records responsive to Item 5 of plaintiff's request to the six-week period at issue in *Muslim Advocates*. It therefore asked whether the period for which plaintiff sought those records was limited to the last 18 months. Plaintiff said that the period for which it sought the records extended back to the beginning of 2012. DHS said it would try to determine whether responsive records for the entirety of that period were available on line.

b. Plaintiff said that the .csv or Excel file of which it had spoken in its email dated June 11, 2018, was a file containing information back to the beginning of 2012, not merely information for the last 18 months. Plaintiff also said that it might be acceptable for CBP to state the particular data fields in the incident-level reports containing information that CBP considered to be categorically exempt. CBP said that it was not necessarily inclined to create a .csv or Excel file that did not already exist but that it would consider the idea as a means for resolving this action.

c. The parties agreed to conduct another conference call on June 20, 2018.

7. The conference call scheduled for June 20, 2018, took place as scheduled. The following occurred during the call:

a. Plaintiff said that DHS did not need to expand its search of email accounts beyond the search it had already conducted for the six-week period at issue in *Muslim Advocates* but that it wanted to obtain all of the records obtained from that search that had not yet been produced. DHS said that a search tailored more closely to the individual items of plaintiff's request than a search of the email accounts was possible to conduct; that it had given consideration to which of the offices at DHS Headquarters would be likely to have records responsive to those items; and that it was working to identify personnel to ask about the possible existence of such records. DHS also said that records responsive to Item 5 of plaintiff's request dating back to 2012 were available in its case tracking system.

b. CBP identified "Date," "Gender," "Race," "Inbound-Outbound," and "Report Approval Date" as the data fields in the incident-level reports in which information appeared that was both searchable and non-exempt and said that it was continuing to look into whether a spreadsheet containing such information could be prepared. Plaintiff suggested that the spreadsheet identify each data field contained in every incident-level report but also said, as it had before, that it might be acceptable for CBP to state which of the data fields in the incident-level reports contained information that CBP considered to be categorically exempt. Plaintiff also said that it would seek guidance from the Court if agreement on the production of the information in the data fields could not be reached.

c. The parties agreed to conduct another conference call on June 26, 2018, subject to the availability of CBP on that date.

8. The June 26, 2018, conference call was postponed a day to accommodate the schedule of CBP. The following occurred during the call:

a. DHS confirmed its ability to conduct a search for records tailored to the individual items of plaintiff's request and said that it would inform plaintiffs by email of the offices or personnel within DHS Headquarters likely to have responsive records. DHS also said that it had determined that approximately 230 complaints, responsive to Item 5 of the request, had been submitted to the DHS Office for Civil Rights and Civil Liberties (CRCL) since the beginning of 2012; that it had made this determination by conducting a search of the complaint-summary field in the CRCL case-tracking system; and that it was counsel's understanding that CRCL had provided the DHS Privacy Office with the complaints and the associated investigative records. DHS said it would inform plaintiff by email of the terms CRCL had used to search the complaint-summary field and that it would hold in abeyance any processing of the CRCL records until plaintiff advised it whether it would want DHS to conduct a supplemental search of the complaint-summary field using additional search terms.

b. CBP said that it was prepared for the purpose of satisfying its production requirement in this case to provide plaintiff with a 2% sample of incident-level reports dealing with border searches of electronic devices created during the past 18 months and to create and provide plaintiff with a spreadsheet of the information contained in the non-exempt data fields in all of the incident-level reports dealing with border searches of electronic devices created since the beginning of 2012, i.e., the data fields for "Date," "Gender," "Race," "Inbound-Outbound," and "Report Approval Date," together with a statement advising plaintiff that the identity of certain of the data fields in the reports, the contents of those fields, or both had not been included on the spreadsheet, i.e., that such material would have been redacted pursuant to FOIA

Exemption 6 or 7(C) or pursuant to FOIA Exemption 7(E) from the incident-level reports in which the material appeared. CBP also specified that the contents of the narrative sections of the reports would not be covered by the spreadsheet. Plaintiff agreed that CBP would satisfy its production requirement in this case by providing it with the above spreadsheet and the above statement as well as the above sample but clarified in an email on June 29, 2018, that it would like the statement to specify the exemption or exemptions upon which CBP was relying for each data field the identity or contents of which were being withheld and that it was reserving the right to challenge any or all of CBP's withholdings.

9. DHS advised plaintiff on June 29, 2018, that its production of records on May 30, 2018, had been the final production of the records obtained from its search of the email accounts for the six-week period at issue in *Muslim Advocates* and of the CRCL complaints and associated investigative records for that period.

10. DHS advised plaintiff by email dated June 29, 2018, that it had used the search terms "electronics," "phone," "laptop," and "computer" to search the complaint-summary field in the CRCL case-tracking system for records dating back to the beginning of 2012. Plaintiff responded by email dated June 29, 2018, that it would like DHS to conduct a supplemental search for records responsive to Item 5 of the request using the following additional search terms: "device*" or "mobile" or "cell*" or "smartphone" or "iphone" or "i-phone" or "tablet" or "i-pad" or "ipad" or "jump drive" or "thumb drive" or "hard drive" or "external drive" or "sd-card" or "sd card" or "USB" or "camera" or "social media" or "Facebook" or "Twitter" or "Whatsapp" or "email" or "e-mail."

11. CBP produced 278 pages to plaintiff on June 29, 2018. These pages were part of CBP's 2% sample of incident-level reports and were produced with redactions pursuant to FOIA Exemptions 6, 7(C), and 7(E)

B. THE PARTIES' RECOMMENDATION

The parties recommend that they continue their discussions and that they file another joint status report not later than August 2, 2018.

Respectfully submitted,

By: s/ Scott B. Wilkens (by email authorization)
Scott B. Wilkens, DC Bar 489631
Matthew S. Hellman, DC Bar 484132
Michael E. Stewart, DC Bar 144926
JENNER & BLOCK LLP
1099 New York Avenue, N.W., Suite 900
Washington, D.C. 20001
Tel: (202) 639-6072/Fax (202)639-6066
Email: swilkens@jenner.com

Susan J. Kohlmann, *Pro Hac Vice*
JENNER & BLOCK LLP
919 Third Avenue
New York, New York 10022
Tel: (212) 891-1600/Fax (212) 891-1699

Jameel Jaffer, D.D.C. Bar MI0067
Katherine Fallow, *Pro Hac Vice*
Alex Abdo, *Pro Hac Vice*
Caroline M. DeCell, *Pro Hac Vice*
KNIGHT FIRST AMENDMENT INSTITUTE AT
COLUMBIA UNIVERSITY
475 Riverside Drive, Suite 302
New York, New York 10115
Tel: (646) 745-8500
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 Defendants

Dated: June 29, 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 June 29, 2018.

s/ David M. Glass

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

_____)
KNIGHT FIRST AMENDMENT INSTITUTE)
AT COLUMBIA UNIVERSITY,)
))
Plaintiff,)
))
v.)
))
DEPARTMENT OF HOMELAND)
SECURITY, et al.,)
))
Defendants.)
_____)

No. 1:17-cv-00548-TSC

[PROPOSED] ORDER

The parties are hereby ordered to file another joint status report on or before August 2, 2018.

Dated: _____

UNITED STATES DISTRICT JUDGE