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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

Case No. 19-CV-00290-EMC

JOINT STATUS REPORT

The parties jointly submit this status report pursuant to the Court’s order of February 23, 2021 (ECF No. 103), to set forth the parties’ agreed-upon proposed schedule for the State Department to complete its processing of records in this case, and the parties’ agreed-upon proposed schedule for the DHS Privacy Office (“DHS”) to complete its processing of records responsive to Part 1 of the request. The parties have not reached agreement on the proper approach at this point with respect to DHS’s processing of Parts 2, 3, and 5 of the request and have set out their respective positions below.

I. State Department

The parties have agreed that the State Department will continue making rolling productions of responsive records. They have also agreed that the State

1 Department will complete its productions by September 1, 2021, and that there will
2 be no minimum page processing requirement per production.

3 II. DHS Privacy Office

4 The parties have agreed that DHS will begin rolling monthly productions of
5 records responsive to Part 1 of the Request by March 31, 2021, and will process a
6 minimum of 250 pages per month. The parties disagree regarding Parts 2, 3, and 5:

7 A. DHS's Proposal

8 DHS intends to complete ingestion of data associated with Part 2 of the
9 Request into the FOIAXpress processing system on a timeline sufficient to begin
10 making monthly rolling productions of records related to Part 2 by July 30, 2021.
11 DHS proposes to begin ingesting data located in its electronic searches for Parts 3
12 and 5 after ingestion of Part 2 is complete. DHS will continue ingestion of Parts 3
13 and 5 while processing and production of records responsive to Part 2 are ongoing.
14 At this point, however, DHS cannot provide a timeline for completing ingestion of
15 the records located in the electronic searches for Parts 3 and 5 of the Request,
16 because any such timeframe would be speculative given the multiple variables in
17 play:

18 DHS currently has 118 litigation cases that are open, 21 of which we are
19 making monthly productions. Two of the cases in litigation, like this one, involve
20 exceptionally large amounts of data. One has approximately 399 GB with rolling
21 production beginning at the end of March. Similar to this case, DHS will be
22 continuing to ingest data while producing on parts that have been ingested. The
23 other matter has approximately 250 GB and DHS is in the process of ingesting that
24 data.

25 In this case, DHS currently has approximately 348 GB of data total
26 remaining to be ingested for Parts 2, 3, and 5. DHS has already begun ingesting
27 data related to Part 2. DHS ingests data into DHS's FOIA processing system,
28 FOIAXpress, in 10 GB increments, which due to system limitations is the largest

1 size of increment that can be ingested by FOIAXpress at any one time. Because the
2 FOIAXpress platform can facilitate the ingestion of no more than one 10 GB
3 increment at a time—across all of DHS’s FOIA cases—and in view of competing
4 demands in other FOIA cases in litigation, it is not possible at this point to provide
5 further estimates on when ingestion for Parts 3 and 5 will be complete.

6 The uncertainty in future projections should in no way be taken to mean that
7 DHS will not continue in good faith to ingest and process records. DHS loads 10
8 GB increments across the various cases and moves to the next chunk of 10 GB on
9 a continuous basis. Thus, for example, after it completes ingestion of data related
10 to Part 2, it will move on to ingesting the 10 GB chunks related to Part 3 and will
11 do so while also processing and producing records responsive to Part 2. Once DHS
12 completes ingestion of Part 3, it will move on to ingesting data related to Part 5,
13 even if it is at the same time still processing and producing records responsive to
14 Part 2. In other words, DHS will not delay the ingestion process while producing
15 on any one part of the Request.

16 DHS can update Plaintiffs and the Court when it has more information
17 regarding a timeline for completing ingestion of data related to Parts 3 and 5.

18 B. Plaintiffs’ Proposal

19 Plaintiffs submitted their FOIA Request nearly three years ago and filed this
20 lawsuit more than two years ago. Over one year ago, Plaintiffs noted DHS
21 Privacy’s unexplained failure to conduct a search for records, or even to
22 communicate that failure. *See* ECF Nos. 40, 46 at 4. Since then, Plaintiffs have
23 repeatedly called attention to DHS Privacy’s chronic delays and its continued
24 failure to proceed with a search and set forth a reasonable schedule for the timely
25 processing and production of records in response to the Request. *See* ECF Nos. 99,
26 91, 87, 80, 79, 67, 55, 53. These delays, regardless of their cause, are at odds with
27 FOIA’s clear command to make records “promptly available.” *See* 5 U.S.C. §
28 552(a)(3)(A); *see also* Long v. IRS, 693 F.2d 907, 910 (9th Cir. 1982) (concluding

1 that an agency’s unreasonable delay in disclosing documents violated the FOIA
2 and that “courts have a duty to prevent these abuses”).

3 Plaintiffs respectfully submit that any next steps vis-à-vis DHS Privacy must
4 account for this pattern of long-term delinquency. Accepting DHS Privacy’s
5 proposal of open-ended “ingestion” of potentially responsive material would
6 permit what would amount to a fresh start—latitude to which DHS Privacy simply
7 is not entitled.

8 Plaintiffs’ position is that DHS Privacy should have completed its search and
9 begun processing responsive records years ago. That it inexplicably has not done
10 so does not constitute cause for months—or more—of further delay. Rather, DHS
11 Privacy should immediately complete the ingestion of the material potentially
12 responsive to Parts 2, 3, and 5, promptly evaluate that material for responsiveness,
13 and propose a timetable by March 31, 2021 for the processing of responsive
14 documents and completion of the production. The parties could then confer
15 regarding DHS Privacy’s proposal and submit a further joint status report by April
16 16, 2021.

17 Because of DHS Privacy’s multi-year failure to search for and produce
18 responsive records, it has been and remains Plaintiffs’ position that DHS Privacy
19 should process and produce records created on or before the date it conducts, or
20 conducted, its most recent search for records responsive to Parts 2, 3, and 5, and
21 after January 1, 2018. *Pub. Citizen v. Dep’t of State*, 276 F.3d 634, 644 (D.C. Cir.
22 2002) (absent compelling justification, defendant should have applied date-of-
23 search cut-off for responsive records).

24
25 Respectfully submitted,

26 DATED: March 2, 2021

/s/ Hugh Handeyside

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