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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

Pursuant to the Court’s order dated April 26, 2021, (ECF No. 116), the parties respectfully submit this status report regarding their respective proposed schedules for the Department of Homeland Security (“DHS”) Privacy Office’s search for and processing of records responsive to Plaintiffs’ FOIA request.

Defendant’s Report

DHS’s proposed schedule is contingent upon DHS’s O365 electronic search functionality being operative again by June 11, 2021, and on the total data pull from the revised search being less than 10GB. The electronic search system is currently down, which has prevented DHS from confirming the maximum data amount that DHS will have to transfer and ingest into FOIAXpress based on the proposed revised search discussed below. If the system remains disabled longer

1 than anticipated, if the data pull from the revised search is larger than predicted, or
2 if the parties are unable to agree on further filtering keywords within the time
3 period estimated below, DHS will need to submit a revised proposed schedule.

4 With these contingencies noted, and assuming the conditions described
5 above and further detailed below are met, DHS respectfully submits the following
6 proposed schedule:

7 DHS will complete an updated electronic search by June 11, 2021.

8 DHS will transfer the data from OCIO to the DHS Privacy Office by June
9 18, 2021.

10 Data from the electronic search will be ingested into EDR/FOIAXpress by
11 July 2, 2021.

12 DHS will use further keyword searches to filter this data in order to identify
13 a narrower universe of potentially responsive documents by August 6, 2021.

14 Processing of the narrowed universe of potentially responsive documents
15 will begin by August 9, 2021 and review will be completed at a rate of 250 pages
16 per month. DHS will make its first interim production of responsive, non-exempt
17 records by August 31, 2021.

18 Again, these dates are contingent on the conditions noted above and below,
19 including but not limited to the restoration of the search functionality by June 11.

20 Background

21 For Parts 2, 3, and 5 of Plaintiffs' request (Searches 2 and 3), pursuant to the
22 Court's order (ECF No. 116), DHS last week communicated to Plaintiffs an
23 estimate of the volume of potentially responsive pages in Searches 2 and 3 and
24 information to aid the parties in identifying ways to further adjust search
25 parameters in order to reduce the volume of potentially responsive records to a
26 manageable amount.

27 In analyzing these issues, DHS determined that the term "social media"
28 without any additional modifier—as used in its earlier searches—was adding

1 significantly to the size of the data resulting from the original searches. Therefore,
2 in conferring with Plaintiffs, DHS initially proposed using the same custodians,
3 cutoff dates, and search strings, but made two categories of changes to the search
4 strings: substitution of “social media screening” for “social media” and adjusting
5 some of the connectors in the search strings to more closely align the relationship
6 between the terms in the search. The amount of data decreased significantly based
7 on these changes.

8 DHS considered expanding the search slightly by substituting (“social
9 media” w/in15 (screening)) for “social media screening,” and leaving in the
10 revised connectors, expecting the amount of data to go up, but it went down
11 instead. To get an idea of what was causing this, DHS took the revised searches
12 and scaled them back to “social media” w/in15 (screening), which resulted in just
13 under 1GB of data (down from over 300GB in the current searches 2 and 3).
14 Therefore, it appears that something in the revised connectors in the expanded
15 searches was creating an issue with the search.

16 While DHS was working through the revised searches, Plaintiffs proposed
17 substituting (“social media” w/in [SENTENCE] (screening OR monitoring)) and a
18 revised set of connectors. Because DHS had determined that the connectors in the
19 DHS revised searches likely were creating issues with the search, DHS ran the
20 search for (“social media” w/in15¹ (screening OR monitoring)), and it resulted in
21 approximately 3GB of data. Based on that result, DHS proposed using the search
22 terms (“social media” w/in15 (screening OR monitoring)) for the OCIO searches
23 and ingesting the data into EDR/FOIAXpress to conduct secondary searches more
24 closely tailored to the specific parts of Plaintiffs’ request.

25 The parties met and conferred on Thursday, May 20. Following the parties’
26 conferral, the evening of May 20, Plaintiffs proposed revising the search to (“social
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28 ¹ DHS used “w/in 15” as a proxy for “w/in SENTENCE.”

1 media” w/in [Paragraph] (monitoring or screening), and have reiterated their
 2 request that DHS use the date of the new electronic search as the search cut-off
 3 date. Unfortunately, due to technical difficulties with the electronic search
 4 functionality in Microsoft O365, DHS has been unable to test any revised search
 5 strings since Friday, May 21. When the technical issues with Microsoft O365 are
 6 resolved, DHS will run the proposed revised searches to determine their impact on
 7 data size. Because DHS has not been able to conduct those searches at this time,
 8 the DHS’s analysis of the time needed to conduct the search and subsequent
 9 processing is based on the search (“social media” w/in15 (screening OR
 10 monitoring)).

11 DHS estimates that once the searches are finalized and run it will take
 12 approximately 1 week to transfer the data from OCIO to Privacy and 2 weeks to
 13 ingest the resulting data into EDR/FOIAXpress. Once further keywords can be
 14 finalized, DHS estimates that it will take one month to complete those searches in
 15 EDR/FOIAXpress and move the data to the review log.

16 Once the secondary searches are conducted in EDR/FOIAXpress and the
 17 information is moved to the Review Log, DHS will immediately begin processing
 18 documents to determine the final universe of responsive records, make any
 19 appropriate redactions and withholdings, and commence productions. DHS
 20 proposes reviewing records at a rate of 250 pages per month.

21 DHS will not have a firm estimate until the secondary searches are complete
 22 but based on the initial breakdown of data in the searches, DHS estimates that the
 23 data breaks down by primary data type as follows (excludes images, pictures, text
 24 files, etc. and focuses on document types most likely to be responsive):

25 (From Full Data Set)
 26 Total Document Count: 151,852
 27 Word: (DOC/X 28,714) & (DOTX 15) = 28,729 (18.9%)
 28 E-mail: (EMF - 2054); (MHTML/HTM/MTH - 17,779); & (MSG - 28,460) = 48,316 (31.8%)
 Excel: (XLS/S) = 3972 (2.6%)
 Power Point (PPT/X) 4835 (3.2%)

1 Adobe PDF = (PDF) = 21,965 (14.5%)

2 Applying those percentages to 3GB of data results in:

3 Word: (DOC/X 28,714) & (DOTX 15) = (18.9%) 0.567GB
 4 E-mail: (EMF - 2054); (MHTML/HTM/MTH - 17,779); & (MSG - 28,460) = (31.8%) 0.954GB
 5 Excel: (XLS/S) = (2.6%) 0.078GB
 6 Power Point (PPT/X) (3.2%) 0.096GB
 7 Adobe PDF = (PDF) = (14.5%) 0.435GB

8 LexisNexis has an estimator of pages per GB (available at:
 9 https://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_FS_PagesInAGigabyte.pdf):

DOCUMENT TYPE	AVERAGE PAGES/DOC	AVERAGE PAGES/GIG
Microsoft® Word® Files	9	64,782
Email Files	1.5	100,099
Microsoft® Excel® Files	50	165,791
Lotus® 1-2-3 Files	55	297,317
Microsoft® PowerPoint® Files	14	17,552
Text Files	20	677,963
Image Files	1.4	15,477

10 Word: 0.567GB*64,782=36,768 pages
 11 E-mail: 0.954GB*100,099=95,548 pages
 12 Excel: 0.078GB*165,791=13,010 pages
 13 Power Point (PPT/X) 0.096GB*17,552=1677 pages
 14 Adobe PDF = 0.435GB*

15 Using the chart from Lexis, DHS estimates there will be roughly 147,003
 16 pages (not including Adobe PDF files) before the secondary searches and
 17 responsiveness review in FOIAXpress are complete.

18 Plaintiffs' Report

19 DHS Privacy's proposals are unacceptable to Plaintiffs. The proposals
 20 underscore DHS Privacy's longstanding failure to conduct a search "reasonably
 21 calculated to uncover all relevant documents," *see Zemansky v. Env'tl. Prot.*
 22 *Agency*, 767 F.2d 569, 571 (9th Cir. 1985), and process responsive records in a
 23 timely manner, as FOIA demands.
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1 Setting aside any technical issues that are currently impeding DHS
2 Privacy’s assessment of potentially responsive records, Plaintiffs are at a loss to
3 understand why DHS Privacy could not have utilized the approach it now
4 proposes promptly after receiving Plaintiffs’ FOIA request three years ago, or at
5 the very least after Plaintiffs filed this lawsuit two and a half years ago. As
6 Plaintiffs have described in prior status reports, DHS Privacy for approximately
7 two years has pressed Plaintiffs to agree to ever-narrower search parameters and
8 has cited limitations in its FOIAXpress platform as an explanation for its failure to
9 proceed with processing records, and/or as a reason why the search parameters
10 must be narrowed. *See, e.g.*, ECF Nos. 49 at 4; 55 at 4, 59; 64 at 3-4; 65 at 2; 79 at
11 6-7; 107 at 2-3; 115 at 2-4. Plaintiffs have repeatedly objected that such limitations
12 cannot dictate the scope of their request or the timeliness of DHS Privacy’s
13 processing of the request. *See, e.g.*, ECF Nos. 55 at 5; 79 at 3-4; 115 at 3-4.

14 Now, apparently as a result of the parties’ most recent conferral, DHS
15 Privacy has indicated that it could start with a relatively broad search parameters—
16 for instance, the phrase “social media” within a given number of words of either
17 “screening” or “monitoring”—after which it could conduct “secondary searches
18 more closely tailored to the specific parts of Plaintiffs’ request.” *See supra* at 3.
19 Plaintiffs do not object to this approach in principle and have suggested setting
20 slightly broader initial parameters that would enable more comprehensive results
21 for subsequent filtering. It bears emphasis, however, that nothing should have
22 prevented DHS Privacy from using this two-step approach from the outset. Indeed,
23 DHS Privacy’s current proposal, while potentially productive, only deepens
24 Plaintiffs’ concerns that the chronic delays in DHS Privacy’s search and processing
25 of responsive documents have been unnecessary and unjustifiable.

26 Given the foregoing, it is imperative that DHS Privacy use a cut-off date for
27 its search that corresponds to the date the search is actually conducted. It is
28 Plaintiffs’ understanding the DHS Privacy still intends to use a search cut-off date

1 of January 14, 2020—an arbitrary date that is now nearly 17 months in the past.
2 That is neither fair nor consistent with FOIA. Courts have emphasized that, absent
3 a compelling justification, the cut-off date should be the date of the search itself.
4 *Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 2015 WL 4452136
5 at *10 (N.D. Cal. 2015) (appropriate cut-off date for responsive records “is the day
6 searching began”) (citing cases); *Pub. Citizen v. Dep’t of State*, 276 F.3d 634, 644
7 (D.C. Cir. 2002); *see also* ECF. No. 79 at 3; 107 at 4. This standard rule is of
8 greater importance where, as here, using an earlier cut-off date would effectively
9 reward an agency for chronic, unsupportable delays in conducting the search.
10 Plaintiffs have made clear to DHS Privacy their willingness to discuss the *start*
11 date for the search if doing so would facilitate returning a manageable volume of
12 records.

13 Finally, Plaintiffs cannot agree to DHS Privacy’s near-term scheduling
14 proposal or its proposed processing rate. DHS Privacy offers no explanation why it
15 would need more than two additional months to reach the point where it can
16 “identify a narrower universe of potentially responsive documents” and begin
17 processing them. *See supra* at 2. And it remains Plaintiffs’ position that DHS
18 Privacy’s proposed processing rate of 250 pages per month is grossly inadequate.
19 Plaintiffs submitted their FOIA request to DHS Privacy on this date *three years*
20 *ago*, explaining the urgent need for public access to information about surveillance
21 of online speech and associations. That need has only grown more urgent while
22 DHS Privacy has chronically delayed its search and, until March 31, 2021, avoided
23 producing records altogether. DHS Privacy should process records at a far higher
24 rate. *See, e.g., Clemente v. Fed. Bureau of Investigation*, 71 F. Supp. 3d 262, 268-
25 69 (D.D.C. 2014) (rejecting FBI’s proposed schedule of 500 pages per month and
26 finding 5,000 pages per month “reasonable in light of the importance of” the
27 issue); *Seavey v. Dep’t of Justice*, 266 F. Supp. 3d 241, 242, 244 (D.D.C. 2017)
28 (rejecting 500-pages-per-month processing schedule and ordering FBI to process

1 2,850 pages a month); *Boundaoui v. Fed. Bureau of Investigation*, Case No.
2 1:2017-cv-04782 (N.D. Ill. Sept. 26, 2017) (ECF No. 43) (ordering FBI to process
3 3,500 pages per month); *Ctr. for Media Justice v. Fed. Bureau of Investigation*,
4 Case No. 4:19-cv-01465-DMR (N.D. Cal. Apr. 15, 2020) (ECF No. 72) (ordering
5 the FBI to process 2,000 pages per month).

6 Plaintiffs therefore respectfully request that the Court order DHS Privacy to:
7 (1) use a search cut-off date that corresponds to the date DHS Privacy conducts its
8 search; (2) identify potentially responsive records and begin processing them by
9 July 9, 2021; and (3) process responsive records at a rate of 2,500 pages per month
10 thereafter.

11
12 Respectfully submitted,

13 DATED: May 24, 2021

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