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

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

11 *Plaintiffs,*

12 v.

13 DEPARTMENT OF JUSTICE, *et al.*,

14 *Defendants.*  
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Case No. 19-CV-00290-EMC

**JOINT STATUS REPORT**

17 The parties jointly submit this status report pursuant to the order issued by  
18 the Court following the status conference held on September 5, 2019.

19 I. *Defendants' Report*

20 A. *Status of Plaintiffs' Request to FBI.*

21 The FBI continues to process Plaintiffs' FOIA Request, at a rate of 500  
22 pages reviewed per month, and has made several productions to Plaintiffs.  
23 Approximately 5700 pages remain to be processed. Accordingly, the FBI estimates  
24 that it will be able to complete processing of FBI documents by November 2020,  
25 after which an additional two months will be needed for consultations with other  
26 government agencies. Therefore, taking into account anticipated referrals and  
27 consultation, the FBI estimates that its productions will be complete by January  
28

1 2021.

2 B. *Status of Plaintiffs' Request to DHS.*

3 The parties reached agreement on the scope of a search by the DHS Privacy  
4 Office. The DHS Privacy Office has not yet initiated its search, but is in the  
5 process of gathering the custodian information necessary to do so. The search will  
6 be conducted by the Office of Chief Information Officer (OCIO), and the DHS  
7 Privacy Office estimates that it will task the search to OCIO by the end of this  
8 week. The Privacy Office cannot at this time estimate how long the search will  
9 take, as the search timeline is affected by a number of factors, but it generally takes  
10 OCIO 2 to 4 weeks to complete a FOIA search.

11 In addition, following negotiations between the parties, the DHS Privacy  
12 Office agreed to refer the FOIA Request to DHS's Office of Intelligence &  
13 Analysis ("I&A"). Although the DHS Privacy Office previously informed the  
14 undersigned government counsel that the referral to I&A had been made, that  
15 information was incorrect. The DHS Privacy Office made the formal referral to  
16 I&A on January 8, 2020. I&A estimates that it will require one month to complete  
17 its search. I&A will process documents located in the search at a rate of 250 pages  
18 per month, which is its normal rate, and anticipates that it will make its first  
19 production in February 2020.

20 In response to Plaintiffs' statements below, the government notes that I&A  
21 is only involved in this litigation as a result of post-Complaint negotiations  
22 between the parties and DHS's willingness to take action not required by FOIA in  
23 order to narrow the disputes for the Court's resolution.

24 FOIA requires that requesters submit their FOIA requests in accordance with  
25 rules and regulations promulgated by the applicable agency. *See* 5 U.S.C. §  
26 552(a)(3)(A). "DHS has a decentralized system for responding to FOIA requests,  
27 with each component designating a FOIA office to process records from that  
28 component," 6 CFR § 5.3(a)(1), and DHS regulations direct requesters to "write

1 directly to the FOIA office of the component that maintains the records being  
2 sought,” *id.* Plaintiffs did not submit their FOIA Request to I&A—though they did  
3 direct their Request to several other DHS components, including CBP, USCIS, and  
4 ICE. FOIA requesters who are uncertain as to which component would maintain  
5 responsive records may instead submit their request to the DHS Privacy Office.  
6 *See id.* § 5.3(a)(2). However, the Privacy Office in such cases is only obligated to  
7 forward the request to the component or components “that it determines to be most  
8 likely to maintain the records that are sought,” not to every component that *might*  
9 possess such records. *Id.*

10 Thus, the Privacy Office was under no obligation in this case to forward or  
11 refer Plaintiffs’ request to I&A.<sup>1</sup> Nonetheless, as part of the ongoing attempts by  
12 the parties to resolve as many issues as possible without the Court’s intervention,  
13 the DHS Privacy Office agreed to make such a referral. Until I&A is able to  
14 complete its search and determine the universe of potentially responsive  
15 documents, I&A cannot estimate the date by which its processing and productions  
16 will be complete. Contrary to Plaintiffs’ suggestion, no Defendant has  
17 “conced[ed]” that I&A “plainly has numerous responsive records.” Indeed, while  
18 I&A anticipates that it will locate responsive documents, I&A cannot confirm that  
19 it has responsive records, or determine how many such records it has, until it  
20 completes its search.

21 C. *Status of Plaintiffs’ Request to OIP.*

22 After meetings and conferral between the parties, Plaintiffs agreed to narrow the  
23 universe of documents that they seek from DOJ, and, based on that agreement,  
24 DOJ’s Office of Information Policy (“OIP”) is now completing an updated  
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26 <sup>1</sup> The case cited by Plaintiffs below, *New Orleans Workers’ Center for Racial*  
27 *Justice v. U.S. Immigration & Customs Enforcement*, 373 F. Supp. 3d 16 (D.D.C.  
28 2019), is inapposite because unlike I&A in this case, all the DHS offices at issue in  
that case were part of (and fell within search purview of) the component to which  
the plaintiffs had submitted their FOIA request, namely, ICE. *See id.* at 36.

1 responsiveness review of documents located in its search so that it can determine  
2 the universe of responsive documents.. Even taking into account Plaintiffs'  
3 agreement to narrow the time period for which they are seeking records, OIP still  
4 must review over 25,000 *documents* (not pages) located in its initial search for  
5 responsiveness. OIP will then process documents determined to be responsive. OIP  
6 is attempting to complete its responsiveness review within six months. OIP's plan  
7 to complete this review within six months will require review of over 4200  
8 documents per month, which exceeds the normal rate at which OIP is able to  
9 complete such reviews. Once OIP has determined the universe of responsive  
10 documents, it will be able to determine an estimated processing timeline.

11 *D. Status of Plaintiffs' Request to the State Department*

12 The State Department has made three productions so far. It continues to  
13 review and process documents located in its search, at a rate of approximately 450  
14 pages every six weeks. As of December, over 4,000 pages remained to be  
15 processed.

16 *E. Status of Plaintiffs' Request to the Remaining Defendants.*

17 ICE has now completed its productions to Plaintiffs, with the exception of  
18 certain records that were referred to government contractors for review. ICE has  
19 received some of those records back but is still waiting on records from one  
20 additional government contractor. Upon receipt of the additional records, ICE will  
21 complete its processing and productions to Plaintiffs. CBP and USCIS have  
22 completed their productions.

23  
24 *Plaintiffs' Response*

25 In light of Defendants' report, Plaintiffs maintain that several Defendant  
26 components are not moving expeditiously enough to process Plaintiffs' Request  
27 and produce responsive documents.

28 The DHS Privacy Office, DHS's Office of Intelligence & Analysis, and the

1 Department of Justice have yet to produce a single document in response to the  
2 Request—which Plaintiffs submitted in May 2018—notwithstanding Plaintiffs’  
3 agreement to narrow the scope of the Request vis-à-vis the DHS Privacy Office  
4 and DOJ’s OIP. DHS’s I&A, which is the component within DHS that exercises  
5 overall responsibility for policies related to social media surveillance, did not even  
6 *receive* the Request for processing until January 8, 2020 because DHS did not  
7 transmit the Request to I&A.

8 DHS has provided no valid explanation for its failure to ensure that I&A  
9 received and processed the Request as required by FOIA and DHS’s implementing  
10 regulations. Those regulations state that a FOIA request may be submitted to the  
11 DHS Privacy Office, which “will forward the request to the component(s) that it  
12 determines to be most likely to maintain the records that are sought.” 6 CFR 5.3.  
13 Plaintiffs did so here, in compliance with the regulation. *See also New Orleans*  
14 *Workers’ Center for Racial Justice v. Immigration & Customs Enf’t*, 373 F. Supp.  
15 3d 16, 36-39 (D.D.C. 2019) (discussing DHS’s responsibility to search any and all  
16 components it has reason to know possess responsive records). As Defendants  
17 appear to concede, I&A plainly has numerous responsive records. Indeed,  
18 documents already produced in this lawsuit show that the head of I&A was  
19 designated the chair of the DHS Social Media Vetting Task Force. Other  
20 documents obtained separately through FOIA set forth I&A’s policy on collection,  
21 analysis, and retention of information on social media platforms.

22 In light of these delays and the inexplicable failure to include I&A in DHS’s  
23 search, Plaintiffs request that the Court set a firm timetable for the DHS Privacy  
24 Office, I&A, and OIP to complete the search, processing, and production of  
25 responsive documents by August 31, 2020. “Unreasonable delays in disclosing  
26 non-exempt documents violate the intent and purpose of the FOIA, and the courts  
27 have a duty to prevent [such] abuses.” *Payne Enters. v. United States*, 837 F.2d  
28 486, 494 (D.C. Cir. 1988). A court “may use its equitable powers to require the



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