

1
2
3
4
5
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.*
15
16

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 on September 8, 2020. (ECF No. 73.)

19 During a telephonic hearing on September 8, 2020, Judge Illman addressed
20 disputes raised in previous status reports regarding the processing of Plaintiffs’
21 FOIA Request by the State Department and the Department of Homeland
22 Security’s Privacy Office (“DHS”). Judge Illman directed Plaintiffs to prepare a
23 proposed order, noting any objections from Defendants, to be filed by September
24 14, 2020 for Judge Illman’s review. Defendants raised no objections to Plaintiffs’
25 draft proposed order, which Plaintiffs submitted and the Court entered on
26 September 15, 2020. (ECF No. 77.) That order provided, among other things, that
27 Defendant DHS:
28

- 1 • “[S]hall respond to Plaintiffs’ proposal dated June 29, 2020 regarding the
2 parameters of Defendant’s search, to which Defendant has agreed in
3 principle except as to parameters for a search related to Part 1 of the
4 Request;” and
- 5 • “[S]hall subsequently meet and confer with Plaintiffs as necessary and
6 commence the search, processing, and production of records responsive to
7 the Request by October 2, 2020.” (*Id.*)

8 The Court’s order also directed the State Department to “adopt and
9 communicate to Plaintiffs by October 9, 2020 a written plan for resuming the
10 processing and production of records responsive to the Request in this case within
11 a reasonable timeframe.” (*Id.*)

12 The parties conferred regarding Defendants’ implementation of the court
13 order. On September 21, 2020, Plaintiffs received DHS’s response to Plaintiffs’
14 June 29, 2020 proposal.

15 I. *Plaintiffs’ Report*

16 a. Defendant DHS

17 Defendant’s September 21 response to Plaintiffs’ proposal reflected a
18 reversal of its prior positions and a significant narrowing of parameters on which
19 the parties had previously agreed—part of a pattern of egregious delay and
20 obfuscation by DHS throughout this litigation. *See* ECF Nos. 46 at 4, 53 at 4-5, 55
21 at 5, 67 at 4-5. For instance, on December 16, 2019, after negotiations marked by
22 DHS’s repeated failure to respond promptly to Plaintiffs’ communications, the
23 parties agreed on terms for DHS’s search. As of January 9, 2020, DHS had not
24 even attempted to execute that search (*see* ECF No. 40 at 2), and Defendants’
25 counsel subsequently informed Plaintiffs that DHS no longer agreed to the search
26 parameters due to limitations in the capacity of its FOIA processing software.

27 Following further prolonged conferral, DHS informed Plaintiffs on May 5,
28 2020 that it agreed to Plaintiffs’ proposed revised search terms. *See* ECF No. 53 at

1 2. A month later, however, DHS reversed course again and reported that the
2 revised agreed terms were no longer acceptable, again citing the technical
3 limitations in its FOIA processing system. *See* ECF No. 55 at 4. Plaintiffs agreed to
4 confer directly with DHS’s FOIA personnel regarding search parameters via
5 conference call on June 26, 2020, and Plaintiffs provided a revised proposal to
6 DHS three days later, on June 29. DHS subsequently represented to Plaintiffs and
7 the Court that all but one part of that further revised proposal was acceptable. *See*
8 ECF Nos. 64 at 2-3, 65 at 2-3. And, as noted above, DHS raised no objection to
9 Plaintiffs’ proposed order, which stated, “Defendant has agreed in principle” to
10 Plaintiffs’ June 29 proposal “except as to parameters for a search related to Part 1
11 of the Request.” ECF No. 75.

12 Despite these assurances, and despite having had months to raise any issues
13 with the search parameters, DHS reversed itself *yet again* following entry of the
14 Court’s order. In an email on September 21, 2020, Defendants’ counsel conveyed a
15 response from DHS to Plaintiffs’ June 29 proposal with a set of terms and
16 custodians for Parts 2, 3, and 5 of the Request that differed significantly from the
17 terms to which DHS had previously agreed. Specifically, the response included a
18 search cut-off date of January 14, 2020—an apparently arbitrary date eight months
19 earlier than the previously agreed cut-off date, which was the date the search was
20 to be conducted. *See Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*,
21 2015 WL 4452136 at *10 (N.D. Cal. 2015) (appropriate cut-off date for responsive
22 records “is the day searching began”) (citing cases). DHS’s response also set forth
23 a significantly more restrictive set of search terms than the third set of terms on
24 which the parties had agreed. And yet again, DHS pointed to technical limitations
25 in its FOIA processing technology in justifying the further narrowing of the
26 parameters. Plaintiffs objected to this latest reversal and explained their position as
27 to why DHS’s terms are unduly restrictive. DHS declined to revert to the agreed
28

1 terms, and Plaintiffs understand that DHS commenced the search on October 1.¹

2 It remains Plaintiffs' position that DHS's latest reversal improperly
3 contravenes its prior agreement to the search parameters set forth in Plaintiffs'
4 June 29, 2020 proposal—an agreement memorialized in the Court's order of
5 September 15 (ECF No. 77). DHS's search parameters, including its date
6 limitation, are unreasonably restrictive and are not calculated to locate responsive
7 records consistent with FOIA and the parties' prior conferrals on these parts of the
8 Request. Additionally, any technical limitations in DHS's processing technology—
9 limitations other agencies do not appear to have—cannot dictate the scope of
10 DHS's response to this or any other FOIA Request. DHS's continual reference to
11 those limitations as a reason to further narrow search parameters is at odds with
12 FOIA. *See, e.g., Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (agency must
13 demonstrate “that it has conducted a search reasonably calculated to uncover all
14 relevant documents”).

15 DHS has long been in breach of its FOIA obligations in this case and still
16 has not produced a single page of responsive records. Given the repeated delays
17 and reversals outlined above, Plaintiffs respectfully request that the Court direct
18 DHS to produce all responsive records by January 15, 2021, so that Plaintiffs may
19 seek any necessary further relief from the Court as to the adequacy of DHS's
20 search and production. *See Clemente v. FBI*, 71 F. Supp. 3d 262, 269 (D.D.C.
21 2014) (a court “may use its equitable powers to require the agency to process
22 documents according to a court-imposed timeline”).

23
24 ¹ In its September 21 response, DHS also proposed a set of terms and custodians
25 for Part 1 of the Request. Plaintiffs responded that they could agree to those terms
26 and custodians, provided that DHS was representing, based on internal discussions,
27 that the terms and custodians are reasonably calculated to locate all currently
28 operative policies, guidance, and directives, per Part 1 of the Request. As of the
filing of this status report, DHS has not confirmed that its proposed terms as to Part
1 are in fact so calculated.

1 b. Department of State

2 The State Department has not yet provided the written plan for resuming the
3 processing and production of records responsive to the Request. *See* ECF No. 77.

4 II. *Defendants' Response*

5 a. DHS

6 The DHS Privacy Office (“DHS”) responds as follows:

7 DHS’s search of the Office of Policy using the time frame May 1, 2015
8 through September 8, 2020, and the updated agreed upon key word/filters: “social
9 media AND (collect* OR monitor* OR search)” is reasonably calculated and
10 broad enough to produce the operative policies/directives currently relied upon by
11 DHS related to “the agency’s search, analysis, filtering, monitoring, or collection
12 of content available on any social medial network” of interest to Plaintiffs. This
13 position is based on DHS’s knowledge of the subject matter, substantial expertise
14 and historical knowledge. It is also consistent with DHS’s standard practice.

15 Regarding Part 1 of Plaintiffs’ request, on September 30, 2020, DHS sent the
16 Office of Policy a revised tasking to conduct a targeted search using the
17 keywords/filters suggested by Plaintiffs for this search tasking: “social media AND
18 (collect* OR monitor* OR search)” and the date range of May 1, 2015 through
19 September 8, 2020. This search is ongoing. DHS initially tasked the Office of
20 Policy to conduct a targeted search on September 8, 2020 using different search
21 terms. For this Part 1 search, the Privacy Office must rely on the expertise and
22 knowledge of the Office of Policy to identify the custodians to task. DHS
23 continues to stand by the proposed date range of May 1, 2015 through September
24 8, 2020 as capturing all potentially responsive records given their knowledge of the
25 subject matter. DHS will not agree to update the tasking to request that the Office
26 of Policy search for all policies/directives on the specified topic that are operative
27 as of the date of the search (regardless of when they were first promulgated).
28 Agreeing to Plaintiffs’ request for all operative policies/directives will require

1 DHS to search back potentially 17 plus years to a time that predates the
2 Department, and is therefore overly burdensome.

3 For Parts 2, 3, and 5 of Plaintiffs' request, in a good faith effort to comply
4 with the Court's Order, DHS tasked OCIO to conduct a search on October 1, 2020,
5 using the date parameters January 1, 2018 through January 14, 2020 and the
6 keywords/filters: (1) (Purchase or subscription or acquisition or payment or
7 agreement) AND (Product or service) AND (Immigration Benefits or immigration
8 enforcement or border screening or transportation screening or criminal conduct)
9 AND (social media AND collect*) AND (monitor OR search) and (2) social media
10 AND investigat* AND (risk or illegal or enforce* or target* or predict* or
11 algorithm* or vetting). OCIO has reported that this search returned approximately
12 388 GB of data and is working with the Privacy Office to transfer the data in 30
13 GB increments for ingestion into FOIAXpress. The search returned a volume of
14 data much greater than expected even given the narrowed search and date
15 parameters.

16 DHS stands by its position of September 21 and 25, 2020, that DHS will
17 only agree to conduct one search for Parts 2, 3, and 5 using the time frame January
18 1, 2018 through January 14, 2020 and the keywords/filters: (1) (Purchase or
19 subscription or acquisition or payment or agreement) AND (Product or service)
20 AND (Immigration Benefits or immigration enforcement or border screening or
21 transportation screening or criminal conduct) AND (social media AND collect*)
22 AND (monitor OR search) and (2) social media AND investigat* AND (risk or
23 illegal or enforce* or target* or predict* or algorithm* or vetting). This proposed
24 search tasking includes more "and" limiters in hopes of making the size of the
25 search manageable for EDR to handle and ingest/load. If DHS conducts separate
26 searches for each part of Plaintiffs' request, the resulting data will ultimately need
27 to be consolidated in FOIAXpress for processing and the combined size of the data
28 would exceed the capacity of the system. Based on DHS's limited personnel

1 resources as well as the capacity limits of FOIAXpress, DHS cannot agree to
2 conduct three separate searches. In addition, the searches proposed by DHS were
3 drafted based on the combined expertise of the OCIO and the Privacy Office –
4 knowing how the system works and how best to target the records of interest. The
5 proposed search is likely over-inclusive of parts 2, 3, and 5 of Plaintiff’s request,
6 and reasonably calculated to produce the records of key interest to Plaintiff’s once
7 the results of the search are processed in FOIAXpress.

8 DHS tasked the Office of the Chief Information Officer (OCIO) to conduct a
9 search of 67 custodians in OCIO, Office of Operations, the DHS Privacy Office,
10 the Office of Civil Rights and Civil Liberties, and the Science and Technology
11 Directorate. DHS had previously provided the position titles for the Office of
12 Operations and Coordination and has provided Plaintiffs with a list of the position
13 titles of these custodians by Office. DHS has the discretion to craft its search to
14 meet the reasonableness standard and need not conduct multiple searches if
15 additional searches are unlikely to produce any marginal return. DHS is acting in
16 good faith to conduct a search reasonably calculated to produce the records
17 responsive to all parts of Plaintiffs’ FOIA request based on their substantial
18 experience and expertise.

19 b. State Department

20 In accordance with the order entered by the Court on September 8, *see* ECF
21 No. 77, the State Department intends to provide its written plan for resuming the
22 processing and production of records responsive to Plaintiffs’ FOIA request on
23 October 9, 2020.

24 Respectfully submitted,

25 DATED: October 8, 2020

26 /s/
27 Hugh Handeyside
28 American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004

1 Telephone: 212-549-2500
2 hhandeyside@aclu.org

3 Matthew Cagle
4 American Civil Liberties Union Foundation
5 of Northern California
6 39 Drumm Street
7 San Francisco, CA 94111
8 Telephone: 415-621-2493
9 mcagle@aclunc.org

10 *Attorneys for Plaintiffs*

11 JEFFREY BOSSERT CLARK
12 Acting Assistant Attorney General

13 ELIZABETH J. SHAPIRO (D.C. Bar No.
14 418925)
15 Deputy Branch Director

16 /s/
17 ELIZABETH TULIS (NY Bar)
18 Trial Attorney
19 U.S. Department of Justice,
20 Civil Division, Federal Programs Branch
21 1100 L Street, NW
22 Washington, D.C. 20005
23 Telephone: (202) 514-9237
24 elizabeth.tulis@usdoj.gov

25 *Attorneys for Defendants*
26
27
28