

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

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NBC 7 SAN DIEGO, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 19-1146 (RBW)
	)	
UNITED STATES DEPARTMENT	)	
OF HOMELAND SECURITY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**JOINT STATUS REPORT**

Pursuant to the Court’s Minute Order of August 29, 2019, the Parties hereby submit this status report advising the Court of the status of this Freedom of Information Act (“FOIA”) case. Accordingly, the Parties state as follows:

1. This case concerns five FOIA requests submitted by Plaintiffs NBC 7 San Diego, Tom Jones, and the Reporters Committee for Freedom of the Press (“RCFP”) (collectively, “Plaintiffs”), seeking records from the U.S. Department of Homeland Security (“DHS”) and its component-agencies, Immigration and Customs Enforcement (“ICE”), U.S. Customs and Border Protection (“CBP”), and U.S. Citizenship and Immigration Services (“USCIS”) (collectively, “Defendants”). *See* Compl., ECF No. 1, at ¶¶ 16–17, 23–28. RCFP’s FOIA requests each consist of 12 subparts. *See, e.g.*, ECF No. 1-9 at 5–6.

2. Defendants filed their answer in this case on June 11, 2019, *see* ECF No. 9. Defendants have not completed their responses to Plaintiffs’ FOIA requests.

**CBP**

3. Defendant CBP is currently conducting a search for records potentially responsive to Plaintiffs' requests and has begun processing records identified in CBP's preliminary searches.

4. On November 25, 2019, CBP produced 97 pages containing redactions of information the agency maintains is exempt from disclosure under 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(E). CBP further identified: 10 pages of documents that it maintains may be withheld in full pursuant to 5 U.S.C. § 552(b)(6), (b)(7)(C), and (b)(7)(E); 12 pages of documents it maintains may be withheld in full pursuant to 5 U.S.C. § 552(b)(5); 4 pages of documents that were duplicates of documents already being produced; and 491 pages of e-mail records that the agency determined to be non-responsive to the request. In total, 614 pages were processed for the November 2019 release.

5. CBP has completed a search for records responsive to items 3, 4, 5, 6, and 8 of the RCFP request and has identified two responsive records. As noted in the Parties' October 25, 2019 Joint Status Report (ECF No. 14), CBP reserves its right to supplement these search efforts as necessary.

6. Items 1, 2, 3, 4, 7, and 11 of the RCFP request each seek records relating to "the application(s)/database(s) described in the NBC 7 article and accompanying screenshots/documents" and include a reference to Exhibits B and C to the RCFP request.

7. CBP's additional statement regarding items 1, 2, 3, 4, 7, and 11 of the RCFP request: As noted in the Parties' August 28, 2019 Joint Status Report (ECF No. 13), it is CBP's position that no such "database(s)/application(s)" exist and, therefore, no records responsive to items 1, 2, 3, 4, 7, and 11 exist. CBP objects to Plaintiffs' position that it should simply interpret references to "database(s)/application(s)" in the RCFP's requests as referring to the single

document from which certain screenshots referenced in the NBC 7 report were derived. Simply replacing “database(s)/application(s)” with a reference to the single document depicted in the NBC 7 report would render RCFP’s requests vague at best. However, with regard to items 3 and 4, public-versions of all DHS and CBP Systems of Records Notices (SORNs) are available at <https://www.dhs.gov/system-records-notice-sorns>, and Privacy Impact Assessment (PIAs) are available at <https://www.dhs.gov/privacy-impact-assessments>.

8. CBP objects to establishment of a scheduling for briefing partial summary judgment regarding its response to items 1, 2, 3, 4, 7, and 11 of the RCFP request. *See infra* paragraph [9]. As discussed herein, CBP has recently begun rolling productions of documents and believes that any determination of the sufficiency of its responses would be premature. CBP is open to conferring with Plaintiff regarding its production materials as they are produced.

9. Plaintiffs’ additional statement regarding items 1, 2, 3, 4, 7, and 11 of the RCFP request: CBP is taking the facially unreasonable position that because it does not consider the data described in NBC 7 San Diego’s reporting and referenced in items 1, 2, 3, 4, 7, and 11 of the RCFP request to be from a “database” or “application,” but rather from a “single, multipage electronic document,” it need not conduct a search for responsive records and/or no responsive records exist. Despite extensive meet and confer efforts on the part of Plaintiffs to resolve this issue without Court intervention, CBP maintains its refusal to search for and/or identify records in response to items 1, 2, 3, 4, 7, and 11 of the RCFP request. Accordingly, Plaintiffs respectfully request that the Court set a briefing schedule for partial summary judgment to promptly resolve this important, threshold issue.

To be clear, CBP knows precisely what records the RCFP request is seeking; it simply calls the source of the data reported on by NBC 7 San Diego (screenshots of which were attached to the

RCFP request) something other than a database. As stated in the Parties' last JSR, via email dated October 24, 2019, CBP informed Plaintiffs that "[w]hile the NBC 7 article suggests that the information described in the article is drawn directly from an underlying database or application, this is not accurate. The information described in the NBC article and the accompanying 'screenshots' appear to be drawn from a single, multipage electronic document." ECF No. 14 at ¶5b. On or about November 25, 2019, CBP released to Plaintiffs what appears to be a redacted version of that "single, multipage electronic document" that it asserts is the source of the data referenced in items 1, 2, 3, 4, 7, and 11 of the RCFP request.

CBP's position that because it considers the source of data referenced in items 1, 2, 3, 4, 7, and 11 of the RCFP request to be a "single, multipage electronic document" instead of a "database," it need not conduct a search for and/or identify responsive records is flatly contrary to CBP's obligations under FOIA. Agencies are required to liberally construe FOIA requests, *see, e.g., Truitt v. Dep't of State*, 897 F.2d 540 (D.C. Cir. 1990). A request is sufficiently specific under the Act if the agency is able to determine "precisely what records (are) being requested[.]" *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982) (citation omitted). Here, there is no question that CBP knows exactly what records are being requested; it simply does not want to conduct a search or identify responsive records.

In light of CBP's unreasonable position, Plaintiffs respectfully request that the Court enter the attached proposed order setting a briefing schedule for partial summary judgment on the issue of CBP's response to items 1, 2, 3, 4, 7, and 11 of the RCFP request. Because such briefing can take place while Defendants continue their production of records responsive to the other parts of Plaintiffs' requests, Plaintiffs' proposed briefing schedule will facilitate the efficient and timely resolution of this matter.

10. As stated in the Parties' July 22, 2019 Joint Status Report (ECF No. 12), CBP tasked its Office of Information and Technology with conducting an electronic keyword search implementing the email portions of the NBC 7 San Diego request and items 9 and 10 of the RCFP request. The electronic keyword search covering the email portions of the NBC 7 San Diego request and item 9 of the RCFP request returned approximately 1,900 email records. CBP is currently processing those records.

11. The electronic keyword search covering item 10 of the RCFP request returned over 413,000 email records. On October 18, 2019, CBP, through counsel, advised Plaintiffs of the number of records and suggested narrowing the scope of the keyword search given the impracticability of processing that volume of records in a reasonable amount of time. During subsequent meet and confer discussions, Plaintiffs' counsel requested additional information from Defendants regarding CBP's search capabilities and a breakdown of the number of responsive records for each subpart of items 10 and 12 of the RCFP request. The Parties will continue to meet and confer regarding items 10 and 12 of the RCFP request.

12. As stated in the Parties' August 28, 2019 Joint Status Report (ECF No. 13), CBP has also completed an initial search for non-email records responsive to the NBC 7 San Diego request.

13. The Parties have agreed that CBP will make rolling monthly productions to Plaintiffs and process records at an average rate of 500 pages per month. CBP made its first production on November 25, 2019.

**ICE**

14. Defendant ICE has completed its searches, with the exception of one program office. To date, ICE has located approximately 5,000 pages of records that are potentially

responsive to Plaintiffs' requests. ICE has made four (4) productions to Plaintiffs during the period from August to November 2019, and it anticipates that 958 pages of records have been referred to CBP for direct reply to Plaintiffs. ICE will continue to review and process potentially responsive records at a rate of approximately 500 pages per month and will be making a production in December of 2019.

### **USCIS**

15. Defendant USCIS, after conferring with Plaintiffs, conducted a limited search for records responsive to items 10 and 12 of the RCFP request. Using a limited search scope, USCIS located approximately 2,500 pages for item 10 and just over 180,000 for item 12. USCIS will process the approximately 2,500 pages of records responsive to item 10 of the RCFP request at a rate of no less than 500 pages per month. Previously, the parties had agreed that USCIS would make its first production by December 2, 2019. *See* Joint Status Report, ECF No. 14, ¶ 11. Following additional meet and confer discussions, USCIS will now endeavor to make its first production of records responsive to item 10 of the RCFP request by January 10, 2020 and no later than January 22, 2020. The Parties will continue to meet and confer regarding item 12 of the RCFP request.

### **DHS**

16. As noted in the Parties' last status report (*see* ECF No. 14), Defendant DHS has referred Plaintiff NBC 7 San Diego's FOIA request to ICE and CBP for direct response and has closed out that request. In addition, DHS has conferred with Plaintiffs about DHS's proposal to limit its remaining search to specific custodians at DHS (*i.e.*, DHS's Office of the Secretary, Office of the Deputy Secretary, the Office of Strategy, Policy, and Plans, and the Office of Public Affairs).

17. DHS's additional statement: DHS has completed its formulation of its search with DHS's Office of the Chief Information Officer ("OCIO"). DHS will endeavor to complete the search within 30 days and will confer with Plaintiffs regarding the results of its search efforts.

18. Plaintiffs' additional statement with respect to DHS: In the parties' previous status report on November 25, 2019, DHS represented that it would "endeavor to complete [its] search within 30 days[.]" ECF No. 14 at ¶12a. During subsequent meet and confer discussions between the parties' counsel, Defendants' counsel represented that DHS had not completed its search but did not offer any explanation or reason as to why the agency did not comply with its prior representation. DHS now asks for additional time, but again refuses to commit to any date by which it will complete its searches. Given that RCFP's request to DHS has already been pending for almost *nine months*, its failure at this late date to even complete a search is inexcusable. *Cf.* 5 U.S.C. § 552(a)(6)(a)(i) (requiring agencies to make a determination within 20 working days). As the Court of Appeals for the D.C. Circuit has noted, "unreasonable delays in disclosing non-exempt documents violate the intent and purpose of the FOIA, and the courts have a duty to prevent these abuses." *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988) (citation omitted). Accordingly, without any explanation from DHS as to why it has not completed its search for records, or why it will not commit to a date certain by which it will complete its search, Plaintiffs respectfully request that the Court order DHS to complete its search by January 10, 2020.

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19. The Parties will continue to confer regarding Defendants' searches for potentially responsive records and the processing of responsive records for potential release to Plaintiffs.

20. In light of the above, the Parties respectfully propose that the Court permit the Parties to file another status report by February 13, 2020, further advising the Court regarding the Parties' progress.

21. Plaintiffs also respectfully request that the Court: (1) enter Plaintiffs' concurrently filed proposed scheduling order for partial summary judgment briefing regarding CBP's response to items 1, 2, 3, 4, 7, and 11 of the RCFP request to CBP, and (2) order DHS to complete its search for records responsive to the Reporters Committee's request no later than January 10, 2020.

22. Defendants respectfully oppose as premature Plaintiffs' requests for orders regarding (1) CBP's responses to items 1, 2, 3, 4, 7, and 11 of the RCFP request to CBP and (2) DHS's searches.

Dated: December 13, 2019

Respectfully Submitted,

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