

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

MUSLIM ADVOCATES, AMERICANS
UNITED FOR SEPARATION OF
CHURCH AND STATE, and
SOUTHERN POVERTY LAW CENTER,

Plaintiffs,

v.

U.S. DEPARTMENT OF STATE,
U.S. DEPARTMENT OF HOMELAND
SECURITY, and
U.S. CUSTOMS AND BORDER
PROTECTION,

Defendants.

No. 1:17-cv-02080-TSC

Hon. Tanya S. Chutkan

SIXTEENTH JOINT STATUS REPORT

In accordance with the Court’s January 28, 2019 Order, the parties respectfully submit this Sixteenth Joint Status Report. The parties report as follows:

1. Plaintiffs initiated this action under the Freedom of Information Act (“FOIA”) on October 5, 2017. (ECF No. 1). This action involves FOIA requests dated June 27, 2017, submitted to the United States Department of State (“DOS”), United States Department of Homeland Security (“DHS”), and United States Customs and Border Protection (“CBP”) (collectively, “Defendants”). Defendants answered the complaint on January 26, 2018. (ECF No. 8). The parties filed a joint status report on February 20, 2018, (ECF No. 11), a second joint status report on April 15, 2018 (ECF No. 12), a third joint status report on June 3, 2018 (ECF No. 13), a fourth joint status report on August 14, 2018 (ECF No. 15), a fifth joint status report on September 28, 2018 (ECF No. 19), a sixth joint status report on October 26, 2018 (ECF No. 20), a seventh joint status report

on November 29, 2018 (ECF No. 21), an eighth joint status report on February 4, 2019 (ECF No. 24), a ninth joint status report on April 5, 2019 (ECF No. 25); a tenth joint status report on June 4, 2019 (ECF No. 26); an eleventh joint status report on August 5, 2019 (ECF No. 27); a twelfth joint status report on October 3, 2019 (ECF No. 30); a thirteenth joint status report on December 3, 2019 (ECF No. 31); a fourteenth joint status report on February 3, 2020 (ECF No. 33); and a fifteenth joint status report on April 3, 2020 (ECF No. 34).

2. Defendants have concluded their searches for records that are potentially responsive to Plaintiffs' FOIA requests. Defendant DOS made a first production of responsive, non-exempt records to Plaintiffs on March 23, 2018; a second production on April 30, 2018; a third production on May 31, 2018; a fourth production on July 13, 2018; a fifth production on August 10, 2018; a sixth production on September 14, 2018; a seventh production on October 22, 2018; an eighth production on November 27, 2018; a ninth production on December 21, 2018; a tenth production on February 20, 2019; an eleventh production on March 21, 2019; a twelfth production on April 23, 2019; a thirteenth production on May 21, 2019; a fourteenth production on June 25, 2019; a fifteenth production on July 23, 2019; a sixteenth production on August 21, 2019; a seventeenth production on September 20, 2019; an eighteenth production on October 23, 2019; a nineteenth production on November 22, 2019; a twentieth production on December 23, 2019; a twenty-first production on January 21, 2020; a twenty-second production on February 21, 2020; and a twenty-third production on March 25, 2020. Defendant CBP made its first production on August 14, 2018, and second production on September 28, 2018. Defendant DHS released a first production of responsive, non-exempt records on October 29, 2018; a second production on November 29, 2018; a third production on February 13, 2019; a fourth production on March 13, 2019; a fifth production on April 18, 2019; a sixth production on May 13, 2019; a seventh production on

June 13, 2019; an eighth production on August 9, 2019; a ninth production on October 17, 2019; a tenth production on November 21, 2019; an eleventh production on February 11, 2020; a twelfth production on February 28, 2020; a thirteenth production on April 16, 2020; and anticipates that it will release a fourteenth production by June 5, 2020.

3. Defendants' Position: As reported in the parties' Fifteenth Joint Status Report, due to COVID-19-related operational restrictions, Defendant DOS is currently unable to process any additional documents for production in response to Plaintiffs' request. DOS is providing Plaintiffs with monthly updates regarding the status of its processing capabilities until such time as that document processing resumes. In accordance with the Court's April 16, 2020 order, DOS has attached the supporting affidavit of Eric F. Stein, Director of DOS's Office of Information Programs and Services, which explains DOS's present inability to process records in response to Plaintiffs' request. In summary, the potentially responsive documents to Plaintiffs' request reside in a system that is maintained on a classified network that cannot be accessed remotely, and the individuals responsible for processing Plaintiffs' request are exclusively teleworking pursuant to Executive Branch guidance. As a result, DOS remains unable to process any additional documents for production at this time. Prior to filing this report, the parties conferred in good faith about the attached affidavit and Plaintiffs' position is set forth below. Defendants disagree with Plaintiffs' characterization of the Stein Declaration. Specifically, the Stein Declaration sets forth in detail the steps that DOS is taking to resume work on many of its FOIA cases to the greatest extent practicable under the circumstances, and why those developments do not allow DOS to resume processing documents in response to Plaintiffs' request. *See* Stein Decl. ¶¶ 17-18.

4. Plaintiffs' Position: Defendant DOS's position, as reflected in the declaration of Eric F. Stein, is that there will be no more processing of documents in response to Plaintiffs' FOIA request

and there's nothing anyone can do about it. Missing from Mr. Stein's declaration is any explanation about why provisions cannot be made to permit individuals to review documents on a different, remotely accessible, network. Mr. Stein's declaration also explains that most of DOS's review of documents in response to FOIA requests is carried out by retired Foreign Service Officers, or REAs, many of whom are in higher age groups, which are at increased risk for complications from COVID-19. But the Stein Declaration does not identify what steps, if any, DOS has taken or is taking to ensure that some individuals will be available to process FOIA requests, either in the short term or as the pandemic eases. Defendants' position instead seems to be that there may not be any processing of Plaintiffs' request unless and until the pandemic has ended completely. The COVID-19 pandemic unquestionably requires shared sacrifice, and many in the legal profession, including the undersigned counsel for Plaintiffs, have transitioned to working from home. Plaintiffs submit that DOS should likewise be expected, going forward, to make whatever accommodations are necessary to meet the demands of the new normal so that the government can fulfill its statutory obligations under FOIA.

Per the Court's April 16, 2020 Order, the parties will file another joint status report by August 3, 2020.

Dated: June 2, 2020

Respectfully submitted,

/s/ David J. Weiner

David J. Weiner (D.C. Bar # 499806)

Charles A. Blanchard (D.C. Bar # 1022256)

ARNOLD & PORTER

KAYE SCHOLER LLP

601 Massachusetts Ave., NW

Washington, DC 20001

(202) 942-5000

(202) 942-5999 (fax)

david.weiner@apks.com

charles.blanchard@apks.com

Emily Newhouse Dillingham
ARNOLD & PORTER
KAYE SCHOLER LLP
70 West Madison Street
Chicago, IL 60602
(312) 583-2300
(312) 583-2360 (fax)
emily.dillingham@apks.com

Andrew D. Bergman (D.D.C. Bar # TX0147)
ARNOLD & PORTER
KAYE SCHOLER LLP
700 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 576-2400
(713) 576-2499 (fax)
andrew.bergman@apks.com

Nimra H. Azmi (D.C. Bar #1614977)
MUSLIM ADVOCATES
P.O. Box 34440
Washington, DC 20043
(202) 897-2564
nimra@muslimadvocates.org

Richard B. Katskee (D.C. Bar # 474250)
AMERICANS UNITED FOR
SEPARATION OF CHURCH AND
STATE
1310 L Street, NW, Suite 200
Washington, DC 20005
(202) 466-3234
(202) 466-3353 (fax)
katskee@au.org

Counsel for Plaintiffs

JOSEPH H. HUNT
Assistant Attorney General

ELIZABETH J. SHAPIRO
Deputy Branch Director

/s/ Dena M. Roth
DENA M. ROTH (DC Bar # 1001184)

Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW, Room 11204
Washington, D.C. 20005
Tel: (202) 514-5108
Facsimile: (202) 616-8460
Email: dena.m.roth@usdoj.gov

Counsel for Defendants

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U.S. DEPARTMENT OF STATE,

Defendant.

No. 1:17-cv-02080-TSC

DECLARATION OF ERIC F. STEIN

Pursuant to 28 U.S.C. § 1746, I, Eric F. Stein, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department” or “State”) and have served in this capacity since January 22, 2017. Previously, I served as the Acting Director since October 16, 2016, and as the Acting Co-Director since March 21, 2016. I am the State official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other records access provisions. As the Director of IPS, I have original classification authority and am authorized to classify and declassify national security information. Prior to serving in my current capacity, I worked directly for State’s Deputy Assistant Secretary (“DAS”) for Global Information Services (“GIS”) and served as a senior advisor and deputy to the DAS on all issues related to GIS offices and programs, which include IPS.

2. I am familiar with the efforts of Department personnel to process the FOIA request that is the subject of this litigation, and I am in charge of coordinating the agency's search and processing efforts with respect to that request. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties.

3. Throughout the course of the COVID-19 pandemic, the Department has continued limited operations to process FOIA requests to the maximum extent practicable under these extraordinary circumstances. In particular, IPS has successfully transitioned its full-time litigation and non-litigation FOIA employees to full-time telework (with the exception of employees currently on leave). This successful transition has allowed IPS employees to continue receiving and acknowledging new FOIA requests, to conduct searches of agency records on unclassified systems to fulfill new FOIA requests, to update its website to inform the public about how the pandemic has affected State's FOIA operations, and to post thousands of pages of records to the Department's public FOIA website, among other things.

4. The purpose of this declaration is to describe the ways in which the Department's FOIA processing capabilities have been seriously compromised by the COVID-19 pandemic. In short, the Department has made significant efforts to continue processing certain FOIA litigation cases despite these extraordinary and unprecedented circumstances. However, because of the grave impact of the COVID-19 pandemic that has limited Executive Branch work in the office workplace to mission-critical functions, the inaccessibility from outside of Department worksites of the systems the Department uses to process certain FOIA cases, and the Department's paramount concern for the safety of its employees, the Department is unable to continue processing documents in response to the request in this case.

I. Executive Branch Guidance

5. On March 13, 2020, President Trump declared that the COVID-19 outbreak in the United States constitutes a national emergency.

6. The United States Office of Personnel Management (“OPM”) has been issuing guidance to address how the Federal Government can implement measures to protect its workforce and the American public. Specifically, on March 7, 2020, OPM recommended the “incorporation of telework and “social distancing” in COOP [Continuity of Operations] and emergency planning [to] allow the Federal Government to continue functioning efficiently and effectively, while ensuring the health and safety of employees.” Further, on March 15, 2020, the Acting Director of the Office of Management and Budget (“OMB”) issued guidance to Federal agencies in the National Capital Region to implement maximum telework flexibilities. OMB’s guidance asked agencies “to offer maximum telework flexibilities to all current telework eligible employees, consistent with operational needs of the departments and agencies as determined by their heads.”

7. On March 17, 2020, OMB issued a memorandum to the heads of all departments and agencies with the subject line “Federal Agency Operational Alignment to Slow the Spread of Coronavirus (COVID-19).”

8. The OMB memorandum recognized that Executive Branch agencies are working “to balance the needs of mission-critical work and greater social distancing,” and accordingly directed Executive Branch agencies to “take appropriate steps to prioritize all resources to slow the transmission of COVID-19, while ensuring our mission-critical activities continue.”

9. The OMB memorandum further directed Executive Branch agencies to “[r]educe and re-prioritize non-mission-critical services to free up capacity for critical services,” to

“[m]aximize telework across the nation for the Federal workforce,” and to “immediately adjust operations and services to minimize face-to-face interactions.”

10. On April 20, 2020, OPM directed that plans for ramping back up Federal Government operations will follow the national guidelines for *Opening Up America Again*. Those guidelines include a phased approach for the resumption of normal activities, which can begin only after certain epidemiological “gating criteria” are met for a particular locality.

11. The Department is implementing these guidelines to protect its employees and their communities, and to ensure that it can continue to perform mission-critical functions during this national emergency.

II. Staffing

12. IPS currently employs retired Foreign Service Officers (Reemployed Annuitants or “REAs”) to review and process documents in response to FOIA requests to leverage these individuals’ knowledge of the Department.

13. REAs are an indispensable part of the FOIA litigation process. In each FOIA litigation case, IPS assigns documents to an REA or a team of REAs with appropriate clearance and subject matter expertise to process a particular set of documents. REAs perform a line-by-line review of each document to determine whether the document is responsive to the request, whether it contains any classified information, information subject to one of the nine FOIA statutory exemptions, or information belonging to other equity holders, such as other federal agencies and third parties. During this process, REAs consult other Department employees (including, for example, employees in regional bureaus or attorneys) as appropriate. These consultations often occur more than once in the review process and inform the Department’s determination about the applicability of any FOIA exemption. Additionally, if REAs determine

that a document originated with the Department, but contains another federal agency's information (or "equities"), an IPS employee will send that document to the relevant federal agency for consultation. After completing the internal and external consultation processes, REAs redact any information pursuant to FOIA exemptions and mark documents that the Department will release in full or in part with the required stamps, which indicate the release determinations and FOIA exemptions applied. If REAs completing this process are relatively inexperienced, their work undergoes a second-level review by a senior reviewer—also an REA—to ensure that the original reviewer properly applied FOIA exemptions and consulted with relevant Department bureaus and federal agencies. As the primary and secondary reviewers of potentially responsive documents, REAs are an indispensable part of the FOIA litigation process.

14. REAs are no longer able to access their State Department offices for two reasons. First, the processing of FOIA cases is not a mission-critical function, and it does not fit within the mission-critical exceptions noted in the most recent OMB Circular (i.e., "Exceptions may be needed when continued operations and services are necessary to protect public health and safety, including law enforcement and criminal-justice functions."). In addition, because REAs are retired Foreign Service Officers, many of them are within the age groups identified by the CDC as being at higher risk for serious illness from COVID-19. In light of Executive Branch guidance, my paramount concern for the safety of IPS employees, and the non-mission-critical determination, I temporarily paused the scheduling of REAs working in Department offices, effective March 19, 2020. Since then, and as described in greater detail in Part III, the Department has made significant efforts toward resuming its FOIA operations to the greatest extent practicable during this pandemic. Beginning on May 18, 2020, IPS was able to resume

scheduling for telework-ready REAs working on FOIA litigation cases that can be processed remotely on unclassified Department systems. However, despite these efforts, REAs are presently unable to advance any work in response to Plaintiffs' request in this case due to the fact that the potentially responsive documents reside in a software system maintained on a classified network that cannot be accessed remotely.

III. Document Review Systems

15. The potentially responsive records that have been collected in response to Plaintiffs' FOIA request are stored and processed in a document review system known as "FREEDOMS 2." The Department has used the FREEDOMS 2 system to process all of its FOIA cases brought between 2012 and late 2019. The FREEDOMS 2 system is operated exclusively on a Department classified computer network, ClassNet.

16. ClassNet is accessible only from a Department workplace. Thus, it is inaccessible to any Department employees who are teleworking or otherwise not physically present at a Department worksite.

17. Some other FOIA litigation cases—generally those filed this fiscal year—are processed in a document review platform called FOIAXpress, which is partially accessible via telework. FOIAXpress was first implemented for FOIA litigation cases in late 2019 and will fully replace FREEDOMS 2.¹

¹ The Department is in the process of transferring all of its FOIA cases from FREEDOMS 2 to FOIAXpress. Nevertheless, cases currently in FREEDOMS 2, like this case, will continue to be processed on a classified network after the transfer. This is because classified documents associated with a case in FREEDOMS 2 are intermingled with unclassified documents, and there is no efficient way to separate classified from unclassified documents before a case is transferred to FOIAXpress. Accordingly, even after the documents for this case are transferred to FOIAXpress, they will be accessible only on ClassNet and therefore will be inaccessible to Department employees who are teleworking or are otherwise not physically present at a

18. Over the past several weeks, IPS has been working diligently to resume processing FOIA cases in FOIAXpress. While REAs cannot be compelled to telework, IPS has identified approximately 32 REAs (more than half of all FOIA Litigation REAs) who are willing to telework and who have sufficient technological resources to do so. State has also evaluated which of its active FOIA litigation cases can be processed via telework, as compared to those for which all documents are stored on classified systems, and has worked toward adjusting case assignments such that REAs previously assigned to cases that cannot be processed via telework can be reassigned to cases that can be processed via telework. We have conducted trainings for REAs on general telework practices and on processing documents remotely. We are also examining how we can leverage non-REA employees and contract staff to assist in processing cases remotely. All of these steps have enabled the Department to resume work on many of its FOIA cases that are being processed in FOIAXpress. Although these developments with respect to FOIAXpress will not allow us to resume processing in this case because the documents for this case are in FREEDOMS 2, they are significant steps toward resuming the Department's FOIA operations to the greatest extent practicable under the circumstances.

IV. Consultations

19. As noted above, the review process for many documents necessitates consultations with other Department components. IPS has been informed by several Department components that, for the foreseeable future, changes in staffing patterns in response to the COVID-19 pandemic will make it difficult for them to respond to FOIA consultations in a timely manner.

Department worksite.

20. In addition, the review process for many documents necessitates consultations with other components of the Executive Branch. Much like the internal Department components, other components of the Executive Branch have informed IPS that, for the foreseeable future, changes in staffing patterns in response to the COVID-19 pandemic may make it difficult for them to respond to FOIA consultations in a timely manner.

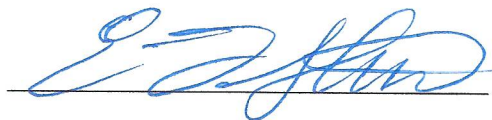
21. If IPS does not receive consultation responses from internal Department components or external Executive Branch components, per State Department FOIA procedures, the Department does not release documents in response to FOIA requests.

V. Conclusion

22. In sum, because the potentially responsive records for this case are stored and processed on a document review platform that is inaccessible to employees who are teleworking, and because all full-time IPS employees responsible for processing documents in FOIA are all teleworking in accordance with Executive Branch and Department guidance, the Department cannot currently resume processing of documents for this case.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 2nd day of June 2020, Washington, D.C.



Eric F. Stein