

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

THE PROTECT DEMOCRACY PROJECT, INC.

Plaintiff

vs.

DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION

Defendants.

17-cv-02202-RDM

PLAINTIFF'S STATUS REPORT

Plaintiff The Protect Democracy Project, Inc., by and through its undersigned counsel, reports as follows the status of this Freedom of Information Act ("FOIA") case.¹

Plaintiff initiated this action on October 24, 2017 in connection with FOIA requests that Plaintiff submitted to Defendants in August 2017.

Following a status conference on October 29, 2018, the Court ordered that Defendant Customs and Border Protection ("CBP") provide a description of the searches that the agency has conducted for the Tucson and Yuma Sectors by November 5, 2018. CBP also was ordered to provide hit counts for the Yuma Sector no later than November 12, 2018. As to Defendant The Department of Homeland Security ("DHS"), the Court ordered that DHS meet and confer with Plaintiff on or before November 5, 2018 to discuss Plaintiff's request for an explanation of the agency's redactions. *See* Minute Order (Oct. 29, 2018).

¹ Plaintiff provided counsel for Defendants with a draft of this status report on November 14, 2018.

Overview of Current Status — CBP

Defendant CBP provided a description of the searches conducted for the Tucson and Yuma Sectors on November 1, 2018. CBP provided hit counts for the Yuma Sector on November 16 (*i.e.*, the day of this filing and not, as ordered, November 12). Concurrently, CBP provided updated hit counts for the Tucson Sector. The updated hit counts are materially different — by more than an order of magnitude — from those previously provided by CBP on October 26, 2018, and no explanation has been offered for the discrepancy. Plaintiff has requested a telephone conference with CBP to discuss CBP's hit counts.

Overview of Current Status — DHS

Plaintiff contacted counsel for DHS on October 31 and November 1 with Plaintiff's availability to meet and confer on or before November 5, 2018, per the Court's order. DHS did not respond and also did not respond to further attempts by Plaintiff to meet and confer, including on November 7 and November 12, 2018. Finally, on November 16 (*i.e.*, on the day of this filing), DHS contacted Plaintiff to schedule a telephone conference, and the parties accordingly plan to speak on November 19, 2018.

DHS's failure to even coordinate on a time to discuss Plaintiff's request until the day of this filing — and until after DHS received a draft of this status report describing its failure to meet and confer — demonstrates that DHS continues to be unwilling to cooperate reasonably with Plaintiffs, except when specifically required to do so by this Court.

In view of that fact, Plaintiff renews its request that the Court order DHS to provide Plaintiff with an informal explanation of its redactions and withholdings to date, in substantially the same format as provided by CBP in Case No. 2118. Since July 5, 2018, Plaintiff has repeatedly raised concerns with DHS and the Court about the fact that DHS has redacted and

withheld approximately 96% of the pages in its productions. DHS has never provided a meaningful response to Plaintiff's concerns.

As described in Plaintiff's prior status report, the appropriate timing for a *Vaughn* index or other summary of an agency's redactions is left to the court's discretion. *See generally* Plaintiff's Supplemental Status Report (ECF No. 27). In particular, as multiple cases recognize, courts hearing FOIA cases exercise their discretion to order a *Vaughn* index or declaration prior to summary judgment based on the equities of each particular case. *See Providence Journal Co. v. U.S. Dep't of Army*, 769 F. Supp. 67, 68-69 (D.R.I. 1991) (citing *Hansen v. U.S. Dep't of Air Force*, Case No. 91-0099, 1991 WL 199748, *1 (D.D.C. Apr. 15, 1991)) (granting plaintiff's motion to compel a *Vaughn* index prior to summary judgment and "find[ing] defendant's argument that this Court should wait until [defendant] files a dispositive motion insufficient and sterile"); *People ex rel. Brown v. E.P.A.*, Case No. 07-02055, 2007 WL 2470159, *2 (N.D. Cal. Aug. 27, 2007); *Keeper of Mountains Foundation v. U.S. Dep't of Justice*, *3 Case No. 06-00098, 2006 WL 1666262 (S.D.W. Va. June 14, 2006).

Here, the equities militate in favor of granting Plaintiff's request that DHS provide an explanation of its redactions and withholdings. It has been over a year since Plaintiff initiated this action and approximately six months since the Court set an initial production schedule for DHS.² During this time period, DHS has produced a total of 492 pages of records. Of the 492 produced pages, approximately 472 pages (*i.e.*, 96%) were redacted or withheld in full. DHS has

² At the May 2018 status conference, the Court ordered DHS to produce a total of 500 pages per month across both cases. *See* Minute Order (May 14, 2018). Following the September 2018 status conference, the Court ordered DHS to increase its pace of production to 350 pages per month in each case. *See* Minute Order (Sept. 10, 2018). Even using the initial, lower production schedule established by the Court as a benchmark, DHS should have produced a total of 3,000 pages across both cases. To date, however, the agency only has produced 1,137 pages.

represented in the cover letters accompanying its productions that these pages are being redacted or withheld pursuant to Sections 552(b)(5) and (b)(6) of the FOIA, but the agency has not provided any further details despite repeated requests from Plaintiff for such information. The fact that only 4% of the records that the agency has produced are unredacted raises concerns about the scope and propriety of the agency's redactions.

As Plaintiff explained at the prior status conference, the information that Plaintiff is seeking from DHS will materially reduce the litigation burden on Plaintiff, the Court, and DHS itself, by permitting Plaintiff to assess the reasonableness of DHS's redactions and begin negotiating with DHS to narrow the issues that will need to be briefed at summary judgment. The information also will allow Plaintiff to determine whether the agency's redactions are delaying the release of information that is of significant ongoing public interest.³

Separately, plaintiff notes that DHS has not yet made a production in this case for the month of November. Under the Court's order of September 10, DHS is required to produce a further 350 pages in the month of November.

³ Plaintiff's requests relate to interactions between armed civilian militia and the government on the U.S.-Mexico border, an issue that has again come to the fore in connection with the so-called "migrant caravans" approaching the border. *See, e.g.,* Mary Papenfuss, *Armed Militia Groups Head to the Border, Sparking Military Concerns*, Huffington Post (Nov. 5, 2018), https://www.huffingtonpost.com/entry/american-militias-head-to-the-border-sparking-military-concerns_us_5bdfae33e4b04367a87ddc1f; Mary Lee Grant and Nick Miroff, *U.S. militia groups head to border, stirred by Trump's call to arms*, Wash. Post (Nov. 3, 2018), https://www.washingtonpost.com/world/national-security/us-militia-groups-head-to-border-stirred-by-trumps-call-to-arms/2018/11/03/ff96826c-decf-11e8-b3f0-62607289efee_story.html?utm_term=.94150d088a05; Michael D. Shear and Thomas Gibbons-Neff, *Trump Sending 5,200 Troops to the Border in an Election-Season Response to Migrants*, N.Y. Times (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html>.

Conclusion

For the reasons set forth above, Plaintiff respectfully requests that the Court enter an order directing that:

1. Defendant DHS provide Plaintiff with a summary of the basis for its redactions and withholdings and an explanation for its failure to respond to Plaintiff's request to meet and confer until eleven days after the Court-ordered deadline; and
2. The parties submit a further status report on or before November 30, 2018.

Respectfully submitted,

/s/ Nikhil V. Gore

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CERTIFICATE OF SERVICE

I, NIKHIL V. GORE, certify that on November 16, 2018, true and correct copies of Plaintiff's Status Report were served electronically on all registered counsel of record via ECF.

Dated: November 16, 2018

/s/ Nikhil V. Gore

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