

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

BENJAMIN WITTES, et al.,

Plaintiffs,

v.

**OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE,**

Defendant.

Case No. 1:20-cv-02020-CJN

JOINT STATUS REPORT

Pursuant to the Court’s October 22, 2020 Minute Order, Plaintiffs Benjamin Wittes and Scott Anderson and Defendant Office of the Director of National Intelligence (“ODNI”) hereby submit this joint status report in this Freedom of Information Act (“FOIA”) case:

I. The Status of Plaintiffs’ FOIA Requests

Two FOIA requests are at issue in this case. The first FOIA request generally seeks records concerning the results of ODNI’s “Analytic Objectivity and Process Surveys” (AOPS) from 2015 through 2020. *See* Compl., ECF No. 1, ¶ 16. The second FOIA request generally seeks records concerning “the annual intelligence community employee climate surveys” from 2015 through 2020. *See id.* ¶ 17.

Defendant’s statement. Defendant has begun searching for and processing records potentially responsive to both of Plaintiffs’ FOIA requests. Although Defendant may still receive additional, potentially responsive records in response to its search taskings, Defendant has already begun processing records it has received. In addition, on October 29, 2020, Defendant produced five records to Plaintiffs, including documents covering part of Plaintiffs’ requested priority documents.

As a general matter, Defendant notes that its FOIA office, like those of most government agencies, has been short-staffed due to the COVID-19 pandemic, which has resulted in delays in its FOIA processing.

Plaintiffs' statement. Plaintiffs report that, by October 30, the date of the court's deadline for this joint status report, it will have been 118 working days since Defendant received Plaintiffs' requests on May 14, 2020. Counsel for Plaintiffs and Defendant have conferred telephonically four times regarding the status of the requests, beginning on September 24, 2020. Plaintiffs' requests primarily concern a discrete set of identifiable records that Defendant admits it compiles annually and has in some cases publicly released. *See Answer, ECF No. 9, ¶¶ 6–7.*

II. Prioritization

Defendant's statement. In the parties' previous joint status report, Plaintiffs stated that they had requested that Defendant prioritize six documents: "one document each reflecting the final numerical results of the 2018 and 2019 annual climate surveys, and the final numerical results of the 2016, 2017, 2018, and 2019 AOPS surveys." ECF No. 12, at 4. On October 29, 2020, Defendant produced records reflecting the results of the 2015, 2016, 2017, 2018, and 2019 annual climate surveys. After that production, the parties agreed to limit future priority processing to documents related to the AOPS request, described below.

With respect to Plaintiffs' AOPS request, Defendant offered to prioritize the processing of four reports to Congress (one each from 2016, 2017, 2018, and 2019). These reports each include a section discussing the AOPS survey of that year, but also include other sections that are not responsive to Plaintiffs' request. Defendant offered to prioritize processing these documents if Plaintiffs would agree that Defendant could redact the non-responsive sections of the records. Plaintiffs agreed to that proposal, and Defendant will therefore prioritize the processing of these four records.

Plaintiffs' statement. Plaintiffs agree to Defendant's proposal to prioritize for processing and production the four reports to Congress for the years 2016–2019 in the manner described above and request that Defendant produce these redacted AOPS documents by November 20, 2020. On information from Defendant communicated via email on October 28, 2020, Plaintiffs understand that these reports to Congress only contain Intelligence Community-wide data that is not broken down by individual Intelligence Community office, agency, or component. Plaintiffs continue to seek such data for both the AOPS and climate surveys, which they sought as part of their initial FOIA requests. *See* ECF No. 1, Exhibits A and B. Plaintiffs' AOPS request will therefore not yet be fully satisfied by production of the four priority reports to Congress; they retain the right to continue requesting such data after the four priority reports are processed and produced.

Similarly, while Defendant on October 29, 2020 produced responsive documents reflecting the finalized results of the annual climate survey for the years 2015–2019, these documents contain only Intelligence Community-wide data and do not provide data broken down by individual Intelligence Community agency, office, or component as Plaintiffs have requested. Plaintiffs' climate survey request has therefore not been fully satisfied, and they will continue seeking records reflecting the results of the annual climate surveys broken down by individual office, agency, or component for the years 2015–2019.

It is Plaintiffs' understanding, on information and belief, that further responsive documents are held either within the office of Analytic Integrity and Standards (AIS) or within the office of the Assistant Director for Mission Performance, Analysis, and Collection. Similarly, Plaintiffs understand that Dr. Barry Zulauf, who has served in senior roles at ODNI in AIS and other mission-performance supervisory roles, is a custodian of the requested survey results. Moreover, Defendant provides annual reports to Congress on the results of the AOPS survey. This information is consistent with Defendant's admissions that it administers both surveys annually and has publicly disclosed the

results of the climate surveys in prior years. *See* Answer, ECF No. 9, ¶¶ 6–7. As a result, Plaintiffs believe it would be minimally burdensome for Defendant to meet the requested timeline for production of the AOPS-related records. Plaintiffs understand that any free response portions of the survey results may be classified or require additional processing time, and have no objections if these sections are excluded from the initial production.

III. Proposed Next Steps

Defendant’s statement. Pursuant to the parties’ agreement, Defendant will prioritize the processing of the four reports to Congress identified above. However, Defendant is not yet able to provide a date by which it can commit to processing those records. These four documents are all classified and will require careful review before release, and ODNI’s processing capacity is currently substantially reduced because of work limitations stemming from COVID-19. Moreover, these records may need to be sent to other agencies for consultations before release, and those agencies likely also have reduced FOIA processing capability because of the current public health crisis. Accordingly, Defendant believes that it would be inappropriate at this time to set a processing deadline for these documents. Instead, Defendant proposes that the parties file an additional joint status report no later than **December 4, 2020**, at which point the parties can inform the Court whether these documents have been produced or provide an update on the status of their processing.

Plaintiffs instead propose that the parties next file a joint status report and produce the remaining priority records on November 20, 2020. For the reasons discussed above, it would be unreasonable to require Defendant to process the records by November 20, especially since that would be less than a month after Defendant’s last production of Plaintiffs’ priority documents relating to their climate survey request. With respect to Plaintiffs’ request for another joint status report in three weeks, Defendant respectfully suggests that such frequent joint status reports are unnecessary. Defendant has agreed to Plaintiffs’ prioritization request and has already made a

production of some of Plaintiffs' priority documents. Between now and December 4, Defendant will continue to process the remaining priority records, all of which are classified. Defendant believes that a status report in early December, shortly after the Thanksgiving holiday, will be sufficient to keep the Court adequately apprised of the status of this case. Defendant further notes that it is unclear why Plaintiffs believe they are entitled to preferential treatment for these documents. Some of Plaintiffs' "priority" documents were created in past years (going as far back as 2016), and it is unclear why Plaintiffs (in 2020) immediately need documents that they could have requested years ago.

Plaintiffs' statement. Plaintiffs respectfully propose that the parties file a joint status report on November 20, 2020. Plaintiffs note again that on October 30, 2020, 118 working days will have passed since Defendant received Plaintiffs' initial requests. Because Defendant is already in possession of the four documents Plaintiffs are currently prioritizing, and Plaintiffs have agreed to Defendant's request to redact all unresponsive portions of those documents, Plaintiffs expect Defendant to be able to make productions of those documents prior to November 20, and to be able to report as much on November 20, 2020.

Plaintiffs object to Defendant's above characterization of their proposed timing of joint status reports as "unnecessary." Defendant has not agreed to any regular production schedule in this case, has not provided an estimated production date for the four documents it has already identified, and has not provided an anticipated number of responsive documents to Plaintiffs' requests. In lieu of those, Plaintiffs believe a joint status report is an appropriate mechanism to keep the Court apprised of Defendant's progress in responding to Plaintiffs' requests, which it received on May 14, 2020.

Plaintiffs further object to Defendant's characterization of their efforts to obtain their requested documents as seeking "preferential treatment." Plaintiffs note again that the reason they submitted their FOIA requests in May 2020 was to understand and explain to the public how

President Trump's and his allies' targeting of the Intelligence Community over the years 2016–2020 has affected its components' ability to carry out its mission free of political influence and with an energized, confident workforce. *See* Compl., ECF No. 1, ¶ 8. To that end, Plaintiffs expect that the results from both surveys would provide relatively up-to-date information on any changes in Intelligence Community employees' morale and their perceptions of politicization in intelligence assessments. Given the substantive importance of those finalized survey results to the public's ability to understand the Intelligence Community's crucial national security role, on September 24, 2020, Plaintiffs asked Defendant to begin processing and producing records this month.

DATED: October 30, 2020

Respectfully submitted,

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