

**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 December 7, 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.** To date, Defendant has made two productions (on October 29 and December 18, 2020) of records that Plaintiffs had identified as priority documents. On December 23, 2020, Plaintiffs requested that Defendant prioritize another set of documents for processing, specifically “records reflecting the climate and AOPS survey results from 2015–2019 broken down

by individual Intelligence Community agency, component, and office.” Plaintiffs indicated that they wanted Defendant to process “a single record for each year compiling the final survey results broken down by unit, e.g., a single spreadsheet for AOPS results from 2019.”

After reviewing the remaining potentially responsive documents to be processed, Defendant does not believe that its search returned documents that meet Plaintiffs’ criteria. Accordingly, Plaintiffs’ most recent prioritization request is unworkable.

Rather than continuing to process piecemeal priority requests, Defendant proposes that it make one more production that includes releasable portions of all remaining records (subject to FOIA) that were returned from Defendant’s search. Specifically, Defendant expects that it will be able to make a final production to Plaintiffs by **April 21, 2021**. Although Defendant cannot guarantee that all documents will be processed by that time, Defendant fully expects and intends to produce any releasable records returned from Defendant’s search by that date, with appropriate redactions.

After Defendant informed Plaintiffs that ODNI does not believe its search returned documents that meet the criteria of Plaintiffs’ third prioritization request, Plaintiffs indicated that they suspect Defendant’s search is inadequate. Plaintiffs propose (*see infra*) that the parties participate in a status conference with the Court to discuss issues related to the search. Defendant respectfully suggests that a status conference is unnecessary at this time. Defendant has already made two priority productions in this case, and expect to finish *all* processing in this case in approximately 90 days. Defendant respectfully suggests that it be allowed to make its final production in this case, and if Plaintiffs are unsatisfied with the production at that point, the parties may attempt to resolve any issues related to the search at that time. Doing so might simply involve Defendant filing a motion for summary judgment that attaches a declaration defending the adequacy of ODNI’s search, as is the typical practice in FOIA cases. *See, e.g., Porter v. CIA*, 778 F. Supp. 2d 60, 66 (D.D.C. 2011) (“To meet its burden, the agency may submit affidavits or declarations that explain in reasonable

detail the scope and method of the agency’s search.”). Moreover, to the extent Plaintiffs’ anticipated disagreement with ODNI’s search and productions deal with the agency’s failure to produce particular documents – as seems to be the case from Plaintiffs’ statement below – Defendant respectfully notes that an “agency’s failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search.” *Wilber v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004) (*per curiam*). In any event, these questions can be reserved for summary judgment briefing, which can commence after Defendant completes its final production, which it expects to do in approximately three months. There is no reason to adopt Plaintiffs’ atypical timeframe and involve the Court prematurely.

**Plaintiffs’ statement.** Plaintiffs report that 165 working days have passed since Defendant received Plaintiffs’ requests on May 14, 2020. Plaintiffs’ requests primarily concern a discrete set of identifiable records that Defendant has compiled annually and has in some cases publicly released. *See Answer*, ECF No. 9, ¶ 6–7.

After receiving Defendant’s most recent production on December 18, 2020, Plaintiffs asked Defendant to prioritize the processing of “records reflecting the climate and AOPS survey results from 2015–2019 broken down by individual Intelligence Community agency, component, and office,” a category of records in which they had previously expressed interest. *See ECF No. 1*, Exs. A and B at 1; *ECF No. 12*, at 4; *ECF No. 15*, at 3. In essence, Plaintiffs seek the underlying data that inform the documents Defendant has produced thus far, which contained the results of the AOPS and climate surveys at the level of the Intelligence Community as a whole from the years 2015–2019. Plaintiffs believe that such underlying data, even if not segregated by Intelligence Community component in a “single spreadsheet,” at least contains data that would allow responses to be identified by component. Indeed, a record reflecting the AOPS results in 2015 that was included in Defendant’s December 18, 2020 production singled out data from the Department of Defense Combatant

Commands. And Defendant has previously released a document reflecting the AOPS results relating to a single, individual Intelligence Community component, namely, those of U.S. Central Command respondents in 2015.<sup>1</sup> Plaintiffs are therefore concerned about the adequacy of Defendant's search given its past tracking of such data broken down by Intelligence Community element.

## II. Proposed Next Steps

**Defendant's statement.** As described above, Defendant expects that it will produce any releasable information contained in the remaining records to be processed by April 21, 2021. Defendant proposes that the parties then submit their next joint status report on May 12, 2021.

**Plaintiffs' statement.** Given Defendant's statements about the contents of the remaining documents to be produced and the component-specific data previously released by Defendant, *see supra*, Plaintiffs believe Defendant's search to be inadequate. Rather than waiting until after Defendant's proposed date for final production to resolve the apparent issues with Defendant's search, Plaintiffs respectfully propose a status conference before the court to discuss Defendant's search and prioritization of Plaintiffs' requests. In the event the court declines to set a date for a status conference, Plaintiffs respectfully propose that the court order Defendant to produce all remaining and releasable information on a rolling basis, with a final deadline of April 21, 2021. Plaintiffs also request that the court require the parties to confer regarding the adequacy of Defendant's search and submit a joint status report on the matter by February 4, 2021.

DATED: January 14, 2021

Respectfully submitted,

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<sup>1</sup> Office of the Dir. of Nat'l Intelligence, Selected CENTCOM Respondent Descriptions from the FY2015 AOPS, <https://www.dni.gov/files/documents/FOIA/DF-2016-00301.pdf>.

*/s/ Joshua C. Abbuhl*

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