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May 12, 2023

VIA ECF

The Honorable Edgardo Ramos
United States District Court Judge
Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square, Courtroom 619
New York, NY 10007

Re: *Haitian Bridge Alliance et al. v. U.S. Dep't of Homeland Sec. et al.*, No. 1:22-cv-08344-ER

Dear Judge Ramos:

It has now been more than 19 months since Plaintiffs Haitian Bridge Alliance, African Communities Together, and UndocuBlack Network submitted an October 2021 FOIA request relating to the treatment of thousands of predominantly Haitian migrants arriving in Del Rio, Texas. The Government still refuses to even search for multiple categories of key records, necessitating the Court's intervention. Plaintiffs therefore respectfully submit this request for a pre-motion conference on their intended motion for partial summary judgment.

I. Background

1. In September 2021, approximately 15,000 Haitian migrants fleeing danger and instability crossed the Rio Grande River and were sequestered by the U.S. government in an encampment near Del Rio, Texas. They were surrounded by armed guards and given little or no access to basic necessities like food, water, shelter, and medical attention. Dkt. No. 1 (Compl.) ¶¶ 1, 6-7. Government agents harassed and intimidated migrants, including through physical force. *Id.* ¶ 8. The mistreatment was encapsulated in widely circulated images of an encounter between Haitian migrants, who were bringing food and water to their families, and mounted Customs and Border Protection (“CBP”) agents. *Id.* As the migrants attempted to climb onto the U.S. bank of the river, an agent charged his horse toward them, swinging his reins like a whip. *Id.* Secretary of Homeland Security Alejandro Mayorkas acknowledged that the images were “horrificing.” *Id.* ¶ 9. Ultimately, the Government engaged in a mass expulsion of the migrants, forcing many to return to Haiti. *Id.* ¶ 10. The events in Del Rio were front-page news.

2. Alarmed by the mistreatment, Plaintiffs (non-profit organizations which advocate for the rights of migrants and other immigrants) promptly filed FOIA requests with Defendants, seeking records relating to Del Rio, as well as related policies, directives, and investigations. In particular, Plaintiffs filed requests in October 2021 and additional requests in February 2022.

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3. By September 2022, Defendants CBP, Department of Homeland Security (“DHS”), and Immigration and Customs Enforcement (“ICE”) had produced nothing. As a result, Plaintiffs filed this suit. Since initiating litigation, Plaintiffs have attempted to resolve the disputes without the need for the Court’s intervention. These efforts included, on February 10, 2023, proposing a detailed search plan for the October 2021 FOIA request, in response to the Government’s position that clarification was needed. The Government did not respond until seven weeks later.

Despite the significant delay, based on that plan and subsequent correspondence, the parties reached agreement on many aspects of the search for responsive records. Indeed, on April 19, Plaintiffs chose to forgo many of their concerns and accepted the Government’s revised proposal with certain modifications covering key records important to Plaintiffs. *See* Ex. A (Plaintiffs’ April 19, 2023 Redline). The Government responded on May 2, accepting some of the modifications, but continuing to refuse to search for other key records altogether or otherwise imposing unjustified limitations. *See* Ex. B (Defendants’ May 2, 2023 Redline of Plaintiffs’ April 19, 2023 Redline).

4. In short, the parties have agreed on the scope and processing of multiple aspects of the FOIA requests. But certain issues remain with respect to the response of DHS, ICE, and CBP to the October 2021 FOIA request that require resolution.

II. Remaining Disputes¹

The areas in dispute are principally reflected in Exhibit B, which shows the Government’s striking of important records sought by Plaintiffs, including key memos, reports, communications, and data regarding the events at Del Rio:

1. Refusal to Search for DHS Memos and Reports. The Government refuses to search for DHS memoranda and reports (as opposed to ICE and CBP) concerning key issues, including about the death of migrants, the use of force, the provision of basic needs, and the investigation and evaluation of mistreatment. The Government asserts it would be “futile” to even look for such DHS records, but a multitude of public documents demonstrate the extensive involvement of DHS and its leadership in the events of Del Rio. On September 18, 2021, for instance, DHS announced that it was “immediately implementing a new, comprehensive strategy to address the increase in migrant encounters in the Del Rio sector of South Texas.” *DHS Outlines Strategy to Address Increase in Migrants in Del Rio*, <https://tinyurl.com/2p9zxfn7>. Secretary Mayorkas personally visited Del Rio, delivering remarks there stressing the steps that DHS was taking. *Secretary Mayorkas Delivers Remarks in Del Rio, TX*, <https://tinyurl.com/3k3kv9nr>. The White House publicly emphasized the Secretary’s involvement and the “efforts DHS has underway.” *Statement by Senior Advisor and Chief Spokesperson Symone Sanders*, <https://tinyurl.com/2p8uzt68>. Other examples abound. It is meritless to refuse to even search for DHS memos and reports.

¹ Plaintiffs note that additional issues to be raised at this time may include the agencies’ production schedules. Plaintiffs also reserve the right to raise in the future other matters once the Government produces documents. The disputes raised at this juncture relate to the threshold processing of categories of requested documents.

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2. Key Exclusions from Communications and Refusal to Include Search Terms. As reflected in Exhibit A at pdf pages 6-7, Plaintiffs sought documents hitting on specific search terms over specific time periods for a specific group of custodians. The Government *agreed* to perform this search, though it narrowed the search terms and accompanying time periods. Yet after Plaintiffs pushed back against the narrowed search terms and time periods on April 19, the Government responded on May 2 by rejecting Plaintiffs' proposed terms all together, replacing the search terms with a new request that the Government unilaterally crafted, and insisting the search terms must be left fully to the agencies' "discretion." The Government's change in position not only upends a previously agreed-upon approach, it also cuts Plaintiffs out of the negotiation process altogether and rejects searching for communications that hit on specific and clearly relevant terms. The Government should be ordered to perform the search listed in Exhibit A.

The Government also apparently has restricted the time period of its searches to September 1-October 31, 2021. But the search for communications regarding investigations, audits, evaluations, or inspections of the events in Del Rio cannot be so limited, as investigations regarding the events were being conducted months after September 2021.

Finally, after agreeing to search the communications of Chris Magnus, who was CBP Commissioner in the months following the events in Del Rio, the Government has deleted him from the list of custodians. Ex. B at 9. But documents demonstrate that he will have responsive communications, and thus his communications should be searched. *See, e.g.*, U.S. Customs and Border Protection, *CBP Releases Findings of Investigation of Horse Patrol Activity in Del Rio, Texas* (July 8, 2022), <https://tinyurl.com/y5n76mvf> (including Magnus's statement in response to CBP's investigation findings).²

3. Refusal to Search for Key Data and for Key Information Regarding Del Rio. The Government also has wholesale rejected several requests for data and for key information regarding the events in Del Rio listed in Exhibit B at pages 4-6. The requests cover, for example, basic statistics (e.g., the total number of requests made by migrants in Del Rio for basic needs; the numbers of migrants who died, drowned, were pregnant, were hospitalized; etc.), how the agencies tracked such data, and the types of documents collected from migrants in Del Rio in September 2021. They also address, for example, incidents of harassment and the use of force. These requests are distinct and well described. The Government cannot refuse to search for responsive information.

III. Searches Not In Dispute

While these disagreements remain, the parties agree on the vast majority of searches to be conducted. Plaintiffs have requested that Defendants proceed with the agreed-upon searches, as there is no reason for further delay. Yet the Government has not committed to do so. Plaintiffs thus request that the Court order Defendants to process the agreed-upon aspects of Exhibit B.

² Plaintiffs do not object to the other revisions to custodians, including the addition of Jennifer Higgins, who should be a custodian.

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Respectfully submitted,

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