

Exhibit D



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September 27, 2017

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VIA EMAIL

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**Re: *Wagafe et al. v. Donald Trump et al.*
United States District Court No. 17-cv-00094-RAJ**

Dear Counsel:

We write in response to your September 22, 2017 letter discussing, among other things, Defendants' proposed six-month timeline to produce documents responsive to Plaintiffs' First Set of Requests for Production of Documents ("RFPs"), Custodians from whom Defendants propose to collect documents, and proposed search terms for custodial sources. We write to address some of our ongoing concerns with your positions regarding these issues.

We also write to confirm that the parties are at an impasse on the following four issues: (1) Defendants' refusal to produce a list or other documents sufficient to identify the members of each class and documents regarding why Named Plaintiffs have been subject to CARRP; (2) Defendants' refusal to review classified documents and produce a privilege log of any such documents they seek to withhold; (3) Defendants' refusal to produce documents relating to the First and Second Executive Orders; and (4) Defendants' refusal to produce responsive documents that are not of "national applicability." As stated on our September 19, 2017 meet and confer call, Plaintiffs will file a motion to compel on these issues.

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1. Proposed Six-Month Timeline

On our meet-and-confer call on September 19, 2017, we requested that Defendants provide an explanation for their proposed six-month timeline to produce documents responsive to Plaintiffs' First Set of RFPs, including a proposed discovery schedule would include dates certain by which Defendants plan to produce documents within that six-month timeframe and a summary of which categories of documents will be produced on each date. We also requested that Defendants provide an estimate of the number of potentially responsive documents, at least for the FDNS ECN site which you have identified as the best source of discoverable information.

Your response continues to fail to explain your six-month timeframe and failed to provide the information we requested. Your letter vaguely states, without explanation, that "after discussing the collection, review, and production timeframe with USCIS, Defendants and counsel continue to believe that a production timeline of less than six months is unrealistic." You note that "Defendants commenced the review of the CARRP documents contained on the FDNS ECN site," but fail to provide an approximate number of the documents contained in that review. With respect to the FDNS ECN site, it is especially unclear why you should need six months to produce these documents. You informed us that everything in this database is responsive. Therefore, it is our understanding that the only work required to produce these documents is a privilege review.

You further note that "[o]nce Defendants have loaded the documents contained in all of the noncustodial sources listed in the ESI Disclosures into the review platform, Defendants may be in position (sic) to re-assess the six month production timeline," but fail to provide a date by which the documents will be loaded. Finally, you indicate that Defendants intend to produce documents on a rolling basis, and prioritize first the FDNS ECN site, then the remaining non-custodial sources listed in the ESI Disclosures, and then, it appears, the eight Custodians you have identified. However, you fail to explain why review and production of these sources cannot be done simultaneously or to provide internal deadlines as to when these categories of documents will be produced.

Because you acknowledge the difficulty that your proposed six-month timeframe creates for follow up discovery requests and depositions before the court-ordered discovery deadline, you propose that the parties agree to a joint motion to extend the discovery period (and all other associated dates). Plaintiffs cannot agree to your request. In the Joint Status Report and Discovery Plan, Defendants agreed with Plaintiffs that "fact discovery can be completed by May 18, 2018," and only indicated a potential extension of that deadline "if the Supreme Court's decision in *Hawaii* materially alters the scope of discovery in this case." Dkt. 78 at 13. Based on the parties' agreement, the Court ordered the current May 29, 2018 deadline. Dkt. 79 at 1. At that time, Defendants should have been aware of the scope of their discovery obligations in this case, and have failed to provide any justification for extending the deadline.

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For these reasons, we again request, by October 2, that Defendants provide us with the following information so that Plaintiffs may be able to assess your requested six-month timeframe for responding to Plaintiffs' First Set of RFPs:

- A production schedule, including dates certain by which Defendants will produce documents on a rolling basis and a summary of which categories of documents will be produced on each date.
- The number of documents contained in the review of the FDNS ECN site.
- The number of documents to be loaded into the review platform for all of the noncustodial sources listed in the ESI Disclosures, or, at least, a date certain by which those documents will be loaded.

If you fail to provide this information, we will assume that the parties are at an impasse regarding the timeline to respond to Plaintiffs' First Set of RFPs and will, therefore, need to seek relief from the Court.

2. Custodians

Regarding discovery from custodial sources, we continue to have the following concerns.

First, your letter provides no explanation for your proposed prioritization of the eight Custodians identified in Defendants' ESI Disclosures. For example, you indicate that "Ronald A. Atkinson was the chief of the National Security Adjudications Unit within the National Security Branch of FDNS when CARRP was developed, and was involved in planning its operational implementation," but list him fourth for prioritization purposes. By October 2, please provide an explanation for your proposed prioritization, including a summary of the responsibilities of each individual vis-à-vis the CARRP program. Only then will we be able to assess your proposed prioritization.

Second, we continue to object to your position that only eight Custodians need to be searched for documents responsive to Plaintiffs' First Set of RFPs. As acknowledged in your letter, Mr. Atkinson has identified at least one meeting invitation from January 2008 with the subject "CARRP policy memo" that has 20 invitees. Thus, all 20 of these individuals likely have documents responsive to Plaintiffs' First Set of RFPs and would only not be appropriate custodians if their roles were minor. By October 2, please produce this meeting invitation and the underlying "CARRP policy memo," because they are responsive to, at least, RFP Nos. 1-3, and will help us determine whether additional Custodians are needed. Please also provide information about the role of each person on the invite, and an explanation as to why you do not

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believe searching all of the 20 invitees is necessary to provide an adequate response to Plaintiffs' First Set of RFPs.

Third, we continue to object to your position that e-mail messages older than August 1, 2014 would be unduly burdensome and disproportionate to search. You acknowledge that some "Custodians may currently have access to e-mail messages older than August 1, 2014, dependent on how individual Custodians maintained their e-mail messages." However, you fail to identify which of the eight Custodians listed in your ESI Disclosures this applies to and whether those individuals have maintained *all* of their e-mail messages older than August 1, 2014 or only a subset of their e-mail messages. You also have not explained, in anything more than bald assertions, why accessing e-mail messages on the back-up tapes would be burdensome. You have provided Plaintiffs with no explanation as to what work would be involved and why restoration of these e-mail messages would be so laborious. For Plaintiffs to accurately understand your alleged burden of producing e-mail messages, please identify by October 2:

- (1) which Custodians only have e-mail messages older than August 1, 2014 on back-up tapes;
- (2) which Custodians currently have access to their e-mail messages older than August 1, 2014 and, of those, how far back in time they maintained those e-mail messages, and whether they have maintained all or only a subset of their e-mail messages from that time period; and
- (3) for those Custodians whose e-mail messages are only stored on back-up tapes, please provide more information on what would be required to access emails saved in this manner.

3. Search Terms

Finally, with regard to your request to discuss proposed search terms regarding the search of the custodial sources, we request that, by October 2, Defendants provide us a list of proposed search terms for, at least, the eight Custodians that you have identified in your ESI Disclosures. We will review your proposed terms and provide our proposed changes to them.

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We appreciate your prompt consideration of the issues identified in this letter.

Very truly yours,

A handwritten signature in blue ink, appearing to be 'NPG', written in a cursive style.

Nicholas P. Gellert

cc: Jennie Pasquarella
Sameer Ahmed
David Perez
Laura Hennessey