UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Civil Action No. 18-1860 (RDM)

ORDER

Plaintiffs the Brennan Center for Justice and Professor Charles Kurzman brought this suit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking the docket numbers for court cases that the Department of Justice categorizes in its Legal Information Office Network System ("LIONS") database as related to terrorism. The Court has issued several prior opinions in this case. *See Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ*, No. 18-cv-1860, 2020 WL 1189091 (D.D.C. Mar. 12, 2020) ("*Brennan I*"); *Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ*, No. 18-cv-1860, 2020 WL 7685612 (D.D.C. Aug. 19, 2020) ("*Brennan II*"); *Brennan Ctr. for Just. at N.Y. Univ. Sch. of L. v. DOJ*, No. 18-cv-1860, 2021 WL 2711765 (D.D.C. July 1, 2021) ("*Brennan III*"). The parties now dispute what the Department must do to implement the Court's decision in *Brennan III*. *See* Dkt. 46; Dkt. 48.

The Court begins by briefly summarizing the history of this litigation, as relevant to resolving the present disagreement. In *Brennan I*, the Court held, in keeping with a pair of D.C. Circuit decisions addressing similar issues, that the Department needed to disclose the docket

numbers for cases designated as terrorism-related in the LIONS database that resulted in a conviction or guilty plea but could withhold docket numbers for cases that ended in acquittal or dismissal. The Court explained that a criminal defendant possesses only a "minimal" privacy interest in information related to a public conviction. *Brennan I*, 2020 WL 1189091, at *8. The Court noted that, "[f]or those prosecutions that have resulted in convictions, it is unlikely that the case and the government's allegations have previously avoided public attention." *Id.* at *6. Terrorism cases do not usually fly under the radar, the Court reasoned, because they "are likely to generate more press coverage and greater public attention than the average case." *Id.*

The Department moved for reconsideration, raising an argument that it could have, but did not, raise before the Court entered judgment. Dkt. 32. In particular, it argued that the privacy interests at stake were far more significant than it had previously indicated because prosecutors categorize each case in the LIONS database at an early stage in an investigation and because those categorizations are rarely updated as a case develops. As a result, a terrorism-related designation in the LIONS database does not necessarily reflect the nature of the charges that ultimately led to conviction. In other cases, moreover, a terrorism-related designation might have been entered in error or for unknown reasons. For those cases, publicly associating the docket number with a terrorism-related LIONS category might reveal, for the first time, that the Department had at some point designated the case as terrorism-related.

In *Brennan II*, the Court denied in part the Department's motion for reconsideration with respect to cases involving "a conviction or plea for an international terrorism offense that has a clear public connection to terrorism." *Brennan II*, 2020 WL 7685612, at *2. Because the connection to terrorism in such cases would be evident on its face, revealing the docket numbers would raise no additional privacy concerns. *Id.* The Department subsequently agreed to disclose

the docket numbers associated with convictions under more than thirty statutes that it represented were related to international terrorism. Dkt. 40-1 at 2 (Krebs Decl. ¶ 4). With respect to the remaining cases, the Court ordered the Department to produce a *Vaughn* index for a sample of 100 cases, so that the Court could assess the scope of the privacy concerns that the Department raised in its motion for reconsideration. *Brennan II*, 2020 WL 7685612, at *2.

Following the production of that sample, the Court in *Brennan III* granted in part and denied in part the remainder of the Department's motion for reconsideration. Although litigants are typically precluded from raising arguments in a post-judgment motion for reconsideration that they could have raised (but did not raise) at an earlier stage of the litigation, the Court exercised its discretion to consider the Department's untimely arguments, at least to the extent those arguments implicated the privacy interests of third parties. *Brennan III*, 2021 WL 2711765, at *8. Still, under the standard governing post-judgment motions for reconsideration, the Court could grant relief only if the privacy interests at issue were so weighty that disclosure would constitute a "manifest injustice." *Id.* at 9. The Court concluded that disclosure of some, but not all, of the remaining docket numbers would result in such an injustice. The Department had identified a weighty third-party privacy interest for cases that had been categorized as terrorism-related based on (1) an error, (2) a connection to terrorism in the investigation but not the prosecution, or (3) the Department's internal designation that had not been publicly disclosed or acknowledged. With respect to those cases, disclosing the docket numbers could reveal, for the first time, that the Department may have (at least at one time or, perhaps, mistakenly) considered the case to be connected to terrorism. For those cases, the privacy interest to be protected outweighed the public interest in disclosure. The Court thus granted the Department's motion for reconsideration, in part, as to those records. *Id.* at *15.

But the privacy interest was not as strong for other docket numbers. In particular, the Court concluded that no manifest injustice would result from the disclosure of docket numbers associated with (1) offenses that bear a self-evident connection to domestic terrorism or (2) cases that the Department has identified in a public statement or filing as connected to terrorism. *Id.* For those cases, disclosing the docket numbers would not publicly reveal the connection to terrorism for the first time, and the Court thus denied the motion for reconsideration, in part, as to those records. This left the Department with "more work to do"—and, perhaps, more work than the Court would have required had the Department raised questions regarding the currency and accuracy of the LIONS database in a timely manner. *Id.* As the Court explained, "[t]he Department must first identify those cases in the database involving a conviction or plea for an offense that bears a self-evident public connection to domestic terrorism and disclose those docket numbers." *Id.* Next, the Department "must then sort through the remaining cases and disclose the docket numbers for any cases that have been publicly identified as relating to terrorism in a press release, charging document, sentencing memorandum, or the like." *Id.* Finally, the Court ordered the parties to file a joint status report addressing next steps in the case. *Id.*

In their joint status report, the parties could not agree on a path forward. Dkt. 46. The Department argued that there are no statutes that bear a self-evident connection to domestic terrorism. Dkt. 46 at 2. This is so, the Department explained, because there are no statutes under which a conviction would necessarily meet the statutory definition of "domestic terrorism" found in 18 U.S.C. § 2331(5). *Id.* at 3. The joint status report—filed after the Court had already resolved the Department's post-judgment motion for reconsideration—was the first time in the litigation that the Department relied on this statutory definition. And the Department's position

was in some tension with its earlier acknowledgment that numerous statutes bear a self-evident connection to international terrorism. At that earlier stage in the litigation, the Department seemed to have little difficulty identifying a variety of statutes that relate to international terrorism, some of which included no explicit reference to terrorism.[1] Dkt. 40-1 at 2 (Krebs Decl. ¶ 4). Plaintiffs, for their part, identified a list of seventy statutes that, in their view, self-evidently relate to domestic terrorism. *See* Dkt. 46-1. But Plaintiff's list was overbroad. It included, for instance, 18 U.S.C. § 922, a statute used to prosecute many gun crimes that have nothing to do with terrorism. *Id.* at 6.

In light of the parties' divergent views, the Court held a status conference. Dkt. 47. After hearing argument from the parties, the Court directed them to trim Plaintiffs' list of seventy statutes down to fifty. Dkt. 47 at 39. But, at the same time, the Court declined to require the Department categorically to disclose the docket numbers associated with convictions under those statutes. Instead, given the Department's own invocation of the statutory definition of domestic terrorism, the Court explained that the Department should review the convictions under the fifty priority statutes case-by-case to see whether any of the successful prosecutions brought under

[1] To be sure, the Department's exact position with respect to the international terrorism offenses has been somewhat difficult to pin down. Following *Brennan II*, the Department identified as bearing a self-evident relationship to international terrorism "any case where the individual was convicted or pleaded guilty under at least one of the following statutes: 18 U.S.C. §§ 32, 42, 112, 878, 1116, 1201(a)(4), 175, 175b, 229, 831, 2332a, 175c, 832, 956, 1203, 1993, 2332, 2332b, 2332f, 2332g, 2332h, 2339, 2339A, 2339B, 2339C, 2339D; 21 U.S.C. § 1010A; 42 U.S.C. § 2884; 49 U.S.C. § 46502; 50 U.S.C. § 1705(b)." Dkt. 40-1 at 2 (Krebs Decl. ¶ 4). In the joint status report, however, the Department seemed to change its tune. The Department argued that "the elements of only four offenses, 18 U.S.C §§ 2332, 2339B, 2339C, and 2339D would allow one to state categorically that a conviction under the offense is necessarily, thus self-evidently, a conviction meeting the statutory definition for either [international or domestic] terrorism" and "all four of those statutes apply only to international terrorism." Dkt. 46 at 2–3. Given this history of the litigation, it is too late for the Department to relitigate that issue.

those statutes meet that statutory definition. For convictions that fall within the definition, the Court "assum[ed] . . . that the government would release those docket numbers," because the third-party privacy interest in a conviction meeting the definition would be minimal. *Id.* But, again, the Court did not preclude the Department from raising specific privacy concerns even with respect to that limited universe of cases. Rather, even when a case resulted in a conviction *and* that conviction was under a statute that Plaintiffs contend bears a self-evident link to domestic terrorism *and* the Department admits that the conviction meets the definition of domestic terrorism, which the Department now invokes, the Court *still* offered the Department an opportunity to seek in camera review if a particular docket number raised specific privacy concerns. The Court directed the parties to meet and confer to iron out the remaining details about how the Department would process the records and release the nonexempt docket numbers. *Id.*

Unfortunately, even with this guidance, the parties still disagree about the path forward. Dkt. 48. Although both parties suggest that their positions are consistent with the Court's instructions at the status conference, neither of their proposals precisely captures what the Court directed them to do. To avoid further confusion, the Court **ORDERS** the Department to process the roughly 3,400 remaining docket numbers for cases designated as terrorism-related convictions or guilty pleas in the LIONS database as follows:

The Department should begin its review with docket numbers associated with convictions under the fifty statutes that Plaintiffs have identified. For those records, as for the sample *Vaughn* index that the Department prepared following *Brennan II*, the Department shall determine for each case whether a press release was issued connecting the case to terrorism; whether the charging documents included any reference to terrorism; whether the sentencing

memorandum included any reference to terrorism; or whether a sentencing enhancement was sought or imposed under § 3A1.4 of the Sentencing Guidelines.[2] If the answer to any of those questions is yes, the Department shall disclose the docket number. If the answer to all of those questions is no, the Department shall determine whether the facts supporting the conviction or guilty plea meet the statutory definition of domestic terrorism in 18 U.S.C. § 2331(5). If the answer is yes, the Department shall disclose the docket number—unless the Department believes that disclosure would nonetheless result in an undue intrusion on the privacy interest of a third party, in which case the Department shall submit that docket number for in camera review. The Department shall then prepare a *Vaughn* index in the same format as the prior sample index but with an additional column for the statutory definition. Upon reviewing the *Vaughn* index, Plaintiffs may challenge the Department's withholding of up to twenty docket numbers, which the Court will review in camera to confirm that they were properly withheld.

For docket numbers associated with convictions under statutes other than the fifty that Plaintiffs identified, the Department shall determine for each case whether a press release was issued connecting the case to terrorism; whether the charging documents included any reference to terrorism; whether the sentencing memorandum included any reference to terrorism; or whether a sentencing enhancement was sought or imposed under § 3A1.4 of the Sentencing Guidelines. If the answer to any of those questions is yes, the Department shall disclose the docket number. With respect to those cases, however, the Department need not consider the

[2] The Court will leave it to the Department to identify the relevant search terms in the first instance, but the Department should consider searching for terms other than just "terrorism," given that references to terms like "domestic extremism" might also constitute a public connection to terrorism.

statutory definition of domestic terrorism. Upon completion of its review, the Department shall then prepare a *Vaughn* index in the same format as the earlier sample.

In the joint status report, the Department offered to make rolling productions of docket numbers while it manually reviews the cases. Dkt. 48 at 8. The parties should meet and confer to discuss a schedule, which they should then submit to the Court for consideration and, if appropriate, approval.

CONCLUSION

It is hereby **ORDERED** that the Department shall process the remaining 3,400 docket numbers pursuant to the procedures outlined above. It is further **ORDERED** that the parties shall file a joint status report on or before September 2, 2021, proposing a processing schedule for compliance with this order.

SO ORDERED.

/s/ Randolph D. Moss
RANDOLPH D. MOSS
United States District Judge

Date: August 8, 2021