

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

KNIGHT FIRST AMENDMENT INSTITUTE
AT COLUMBIA UNIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, U.S. CUSTOMS AND BORDER
PROTECTION, U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES, U.S. DEPARTMENT OF
JUSTICE, and U.S. DEPARTMENT OF
STATE,

Defendants.

No. 1:17-cv-07572-ALC

SECOND JOINT STATUS REPORT

A. Introduction

On August 7, 2017, Plaintiff Knight First Amendment Institute at Columbia University (the “Knight Institute”) submitted a multi-item request (the “Request”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to Defendants, the U.S. Department of Homeland Security (“DHS”), U.S. Customs and Border Protection (“CBP”), U.S. Immigration and Customs Enforcement (“ICE”), U.S. Citizenship and Immigration Services (“USCIS”), U.S. Department of Justice (“DOJ”),¹ and U.S. Department of State (“DOS”), for records concerning any new policies for vetting individuals seeking to enter or remain in the United States and records concerning the

¹ Specifically, the Knight Institute submitted the Request to the DOJ Office of Public Affairs (“DOJ-OPA”), Office of Information Policy (“DOJ-OIP”), and Office of Legal Counsel (“DOJ-OLC”).

government's understanding of its authority to base immigration decisions on individuals' speech, beliefs, or associations. ECF No. 42-2 at 2-3.

After a status conference held on February 23, 2018, the Court endorsed the parties' agreements as to DHS, CBP, USCIS, DOJ, and DOS, ordered those agencies or components² to "complete their searches for responsive documents by March 30, 2018," and directed the parties to file a joint status report on April 9, 2018. Order ("Feb. 26 Order"), ECF No. 39. On April 9, 2018, the parties filed a joint status report summarizing their negotiations over the processing schedules for each Defendant and alerting the Court to disputes over the appropriate processing schedules for DOS and ICE. Joint Status Report ("Apr. 9 JSR"), ECF No. 48; *see also* ECF No. 50. The parties set forth their respective positions more fully in subsequent letter briefs. Defs. DOS & ICE's Letter Br. ("Defs.' Letter Br."), ECF No. 52; Pl.'s Letter Br., ECF No. 55. On May 14, 2018, the Court held a status conference to address the disputes, *see* ECF No. 57, and ultimately ordered the parties to confer and to file a joint status report by May 21, 2018, providing an update on their continued negotiations over the appropriate processing schedules for DOS and ICE, as well as any other issues that require the Court's attention at this point. *Id.*

After conferring, the parties filed letters with the Court concerning the volume of records DOS had determined were actually responsive to the Request and their proposed processing schedules for DOS. *See* Pl.'s Letter, ECF No 58; DOS Letter, ECF No. 59; DOS Status Report, ECF No. 62. On May 21, 2018, the Court ordered DOS to complete production of all responsive records by June 28, 2018, and to produce those records on a rolling basis. Order ("May 21 Order"), ECF No. 63.

² At the time, ICE was not a defendant in the case.

The parties also conferred regarding the appropriate processing schedules for ICE and OLC. Regarding ICE: they have agreed that ICE will review the records found in its initial search for responsiveness to the provisionally narrowed Request, *see* Apr. 9 JSR ¶ 2, and proceed to process only records responsive to the provisionally narrowed Request going forward. They disagree, however, over the processing schedule for those records. Regarding DOJ-OLC: the parties disagree over the processing schedule for DOJ-OLC, which recently confirmed that it has identified 221 pages of responsive records.

B. ICE

a. Summary of Negotiations

1. As noted in a letter filed with the Court on April 13, 2018, ECF No. 50, the parties had failed to reach an agreement on an appropriate processing schedule for ICE. They set forth their respective positions in their subsequent letter briefs to the Court. ICE proposed to process potentially responsive records at a rate of 750 pages per month, which would result in completion of the production in approximately 18 months. Defs. Letter Br. 6. The Knight Institute proposed that ICE produce responsive records on a rolling basis, to be completed by August 31, 2018. Pl.'s Letter Br. 12.

2. During a call between the parties on May 17, 2018, Counsel for Defendants informed Counsel for the Knight Institute that, for its May production, ICE proposed to process only those records that are responsive to the provisionally narrowed Request. Counsel for the Knight Institute accepted that proposal and explained that the Knight Institute would be willing to allow ICE to review the records it had already identified for responsiveness to the provisionally narrowed Request, so long as that responsiveness review did not result in an extended production delay, and

to process only records that are responsive to the provisionally narrowed Request going forward, thus alleviating the processing burden on ICE.

3. During a call between the parties on May 18, 2018, Counsel for Defendants informed Counsel for the Knight Institute that ICE would need three to five weeks to conduct a responsiveness review based on the provisionally revised Request, following which it would continue its interim productions. Counsel for Defendants further stated that ICE believed that it could complete such productions by December 2018. During a call between the parties on May 21, 2018, Counsel for Defendants confirmed that ICE's monthly productions would resume three to four weeks after ICE completed that responsiveness review.

4. During additional calls between the parties on May 21, 2018, the parties agreed to the following: (a) ICE will complete its responsiveness review within two to four weeks ("Responsiveness Completion Date"); (b) on the Responsiveness Completion Date, ICE will provide the Knight Institute with a page count of likely responsive documents; and (c) ICE will make a first production within two to three weeks of the Responsiveness Completion Date. The parties did not, however, agree on a processing schedule for ICE.

b. The Knight Institute's Position

5. The Knight Institute has maintained that it would provisionally agree to narrow the Request with respect to ICE on the same terms as the other Defendants. Now, it appears ICE has determined a way to identify records responsive to the provisionally narrowed Request without conducting a new search. It is clear that once ICE conducts its responsiveness review based on the provisionally narrowed Request, it will need to review far fewer pages of responsive records for redaction and production.

6. In light of the Knight Institute’s continued efforts to modify the Request with respect to ICE, and for the reasons set forth in its letter brief, Pl.’s Letter Br. at 6–12, the Institute renews its request that the Court enter an order requiring ICE to complete its production by August 31, 2018.³

c. ICE’s Position

7. As outlined above, ICE has agreed to conduct a responsiveness review of the remaining pages it gathered in response to Plaintiff’s original FOIA Request, applying the narrowed criteria in the modified Request; to complete that process within two to four weeks; and to begin production within two to three weeks thereafter. ICE respectfully requests that the Court endorse a scheduling order setting a production deadline of December 31, 2018 – three months later than Plaintiff’s requested completion date but almost a year earlier than ICE’s estimated production completion date based on the original FOIA request. In the alternative, ICE respectfully requests that it provide a status report to the Court and Plaintiff once it determines the number of pages remaining after the responsiveness review, and either the parties (or if necessary, the Court) can then set a production deadline based on the universe of remaining pages.

³ The Knight Institute noted ICE’s “Extreme Vetting Initiative” in its May 4, 2018 letter brief. Pl.’s Letter Br. at 5–6. ICE has renamed that initiative the “Visa Lifecycle Vetting program,” and recent reports indicate that it now plans to enter a labor contract for 180 human personnel, rather than a technology contract for an artificial-intelligence system with a 10,000-lead quota. Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of ‘Extreme Vetting’ Software That Could Predict Whether a Foreign Visitor Would Become a Terrorist*, Wash. Post (May 17, 2018), <https://perma.cc/EQ3D-YWQ6>. ICE still intends to monitor the social media activity of visa holders and has not indicated that it plans to postpone implementation of this monitoring scheme.

C. DOJ-OLC

a. Summary of Negotiations

8. As noted in the parties' April 9 Joint Status Report, on an April 4, 2018 phone call, Counsel for Defendants indicated that DOJ-OLC had found approximately 150 potentially responsive records during its initial search. Apr. 9 JSR ¶ 16.

9. The April 9 Joint Status report further reflects the parties' agreement that DOJ-OLC would "complet[e] its responsiveness review by April 30, 2018" and, by the same date, would provide the Knight Institute with "an initial count of how many pages of responsive documents were found and propose a specific processing rate and/or production deadline." Apr. 9 JSR ¶¶ 17–18. Additionally, DOJ-OLC committed to complete an initial production by May 30, 2018. Apr. 9 JSR ¶¶ 18, 32.

10. DOJ-OLC did not provide the Knight Institute with an initial page count of responsive records by April 30.

11. Counsel for the Knight Institute emailed Counsel for Defendants on May 2, 2018 regarding the status of DOJ-OLC's responsiveness review. Counsel for Defendants responded on May 3, 2018, indicating that she would respond with an update as soon as possible. Counsel for the Knight Institute responded the morning of May 11, 2018, again requesting information regarding the volume of responsive records DOJ-OLC had identified and the processing schedule it proposed. That evening, Counsel for Defendants responded that DOJ-OLC's further responsiveness review had resulted in 221 pages of potentially responsive records, which DOJ-OLC would "likely need" an additional 90 days to process.

12. On the May 17 call between the parties, Counsel for Defendants confirmed that DOJ-OLC had completed its responsiveness review and identified 221 pages of responsive records, not “potentially responsive” records.

13. On the May 18 call between the parties, Counsel for Defendants stated that DOJ-OLC would process an unspecified number of pages and complete an initial production by May 30, 2018.

b. The Knight Institute’s Position

14. DOJ-OLC has failed to issue a determination for nearly nine months on the Knight Institute’s appeal of the office’s denial of the Institute’s request for expedited processing, *see* Am. Compl. ¶ 39, ECF No. 42, but the agencies that have issued determinations have uniformly granted the Institute’s request, *see* Am. Compl. ¶¶ 25, 35, 38, 41; Answer ¶¶ 35, 38, 41; Decl. of Katrina Pavlik-Keenan ¶ 8, ECF No. 54.

15. As defined in FOIA, “the term ‘search’ means to review, manually or by automated means, agency records for the purpose of locating those records which are *responsive to a request*.” 5 U.S.C. § 552(a)(3)(D) (emphasis added); *see also Charles v. Office of Armed Forces Med. Exam’r*, 730 F. Supp. 2d 205, 213 (D.D.C. 2010) (“The FOIA establishes that agency determinations regarding document responsiveness are part of the search process.” (citing 5 U.S.C. § 552(a)(3)(D))). The Knight Institute therefore expected DOJ-OLC and other Defendants to have determined which records are actually responsive to the Request by March 30, per the Court’s February 26, 2018 order. Feb. 26 Order.

16. DOJ-OLC did not complete its search and the constituent responsiveness review until May 11—over ten months after receiving the Request, over two months after the Court ordered it to

complete its search, and nearly two weeks after DOJ-OLC itself agreed to determine the number of pages of responsive records. DOJ-OLC has offered no explanation for its delay.

17. In any event, DOJ-OLC has identified a small number of responsive records, constituting a small number of pages for redaction and any inter-agency consultation. DOJ-OLC's request for 60 days to complete its review and production is unreasonable.

18. The Knight Institute requests that the Court order DOJ-OLC to complete its production of responsive records by June 15, 2018—25 days from the date of this filing, and 46 days from the date by which OLC committed to completing its responsiveness review, and 77 days from the date by which the Court ordered OLC to complete its search.

c. DOJ-OLC's Position

19. OLC conducted a search for records responsive to Plaintiff's FOIA Request and received documents that were potentially responsive. It then conducted a further review to determine how many of those potentially responsive pages are, in fact, responsive to the Request. Although OLC has identified a limited range of documents responsive to Plaintiff's FOIA Request, OLC requires at least 60 days to review and process those pages. That is because the material Plaintiff has requested is by definition highly sensitive as it relates to pre-decisional deliberative legal advice provided by OLC, as well as communications from the White House. As a result, OLC requires sufficient time to review each line, make a determination regarding applicable FOIA exemptions, consult with equity holders about the sensitivity of the information, and review each page to ensure that exempt information is properly marked and protected. Because the harms to the public resulting from a rushed review of this highly sensitive material could be substantial, OLC respectfully requests that the Court set a production deadline of 60 days. In the alternative, OLC

respectfully requests that the Court permit OLC to submit a declaration, by May 28, 2018, explaining in more detail the bases for its proposed production schedule.

D. Other Defendants

20. **DHS:** The parties agreed that DHS would complete production of responsive records by May 15, 2018. Apr. 9 JSR ¶ 4. The Knight Institute received DHS’s “final release” on May 21, 2018, consisting of 88 pages—all of which DHS withheld in full, claiming FOIA Exemption 5.

21. **CBP:** CBP has indicated that it has completed its search for and production of responsive records. Apr. 9 JSR ¶¶ 5–6.

22. **USCIS:** The parties have agreed that USCIS will complete production of responsive records found during its initial search by May 30, 2018. Apr. 9 JSR ¶ 30. USCIS will complete its subsequent searches by May 30, 2018, and will produce the responsive records found during those searches by June 30, 2018. Apr. 9 JSR ¶ 30.

23. **DOJ-OIP:** The parties have agreed that DOJ-OIP will complete production of responsive records by May 30, 2018. Apr. 9 JSR ¶ 31.

24. **DOJ-OPA:** The parties have agreed that DOJ-OPA will endeavor to produce any responsive records from DOJ-OPA by May 30, 2018, but in no event later than June 15, 2018. Apr. 9 JSR ¶ 31.

25. **DOS:** The Court has ordered DOS to produce responsive records on a rolling basis and to complete production by June 28, 2018. May 21 Order at 4.

E. Summary of Proposals

a. The Knight Institute’s Proposals

26. The Knight Institute proposes that ICE produce responsive records on a rolling basis, to be completed by August 31, 2018.

27. The Knight Institute proposes that DOJ-OLC complete production of responsive records by June 15, 2018.

b. Defendants’ Proposals

28. ICE proposes to produce responsive records on a rolling basis, to be completed by December 31, 2018. In the alternative, ICE proposes to submit a status update to the Court and Plaintiff following the responsiveness review, providing the number of responsive pages remaining for processing, and proposing a production deadline based on that updated number.

29. OLC proposes to complete processing and production of responsive documents within 60 days, and to submit a declaration in support of its request by May 28, 2018.

F. Conclusion

30. The parties jointly and respectfully request that the Court endorse the parties’ agreement with respect to ICE’s responsiveness review and subsequent production, and that the Court enter a processing schedule in for ICE and DOJ-OLC in this case.

Dated: May 21, 2018

Respectfully,

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