

**KNIGHT
FIRST AMENDMENT
INSTITUTE**

at Columbia University

July 18, 2018

Via ECF and Email

The Honorable Andrew L. Carter, Jr.
United States District Court
Southern District of New York
40 Foley Square, Room 435
New York, NY 10007

Re: *Knight First Amendment Institute v. U.S. Department of Homeland Security, et al., Case No. 17-CV-7572 (ALC)*

Dear Judge Carter:

The Knight First Amendment Institute at Columbia University (the “Knight Institute” or “Institute”) respectfully submits this letter requesting clarification that the Court’s orders setting production schedules for Defendants U.S. Department of State (“DOS”) and U.S. Immigration and Customs Enforcement (“ICE”) require the agencies to complete their productions of all responsive documents forthwith.

The Freedom of Information Act (“FOIA”) request underlying this action (the “Request”), ECF No. 42-2, seeks records necessary to inform the public debate surrounding significant developments in the Trump Administration’s “Extreme Vetting” program. Earlier in this litigation, the Court ordered DOS and ICE to “complete [their] processing and production of *all responsive documents* no later than” June 28, 2018 and July 3, 2018, respectively. Order 4, May 18, 2018 (“DOS Order”), ECF No. 63 (emphasis added); Order 1, June 26, 2018 (“ICE Order”), ECF No. 71 (emphasis added). Both DOS and ICE made productions by their respective deadlines, but those productions were incomplete, as they did not include documents that DOS and ICE had referred to other agencies for review. Thus, neither Defendant has complied with its Court-ordered deadline. The Knight Institute therefore respectfully requests that the Court clarify that, pursuant to its previous orders, DOS and ICE must complete their production of responsive records forthwith.

BACKGROUND

The Knight Institute submitted the Request to DOS and ICE, along with the other Defendants named in this action, on August 7, 2017. The Request seeks, among other things, information about any new policies for vetting individuals seeking to enter or remain in the United States and about

the government's understanding of its authority to base immigration decisions on individuals' speech, beliefs, or associations. The Knight Institute filed suit on October 4, 2017, to ensure the timely release of the requested records, which are necessary to inform the ongoing public debate surrounding the Administration's Extreme Vetting program.

In April, the parties disputed the appropriate production deadlines for DOS and ICE. *See* Joint Status Report ¶¶ 33–34, Apr. 9, 2018, ECF No. 48; Joint Letter to Court 1, Apr. 13, 2018, ECF No. 50. The parties filed letter briefs addressing their positions, ECF Nos. 52, 55, and the Court held a status conference on May 14, 2018, *see* Order 1, May 14, 2018, ECF No. 57. After subsequent filings, the Court ordered DOS and ICE to “complete [their] processing and production of *all responsive documents* no later than” June 28, 2018 and July 3, 2018, respectively. DOS Order 4 (emphasis added); ICE Order 1 (emphasis added). Neither has done so.

A. DOS Productions

On June 28, 2018, the Knight Institute received its first production from DOS. Decl. of Carrie DeCell ¶ 7, July 18, 2018 (“DeCell Decl.”). In its response letter, DOS stated that it was releasing 216 records in whole or in part, withholding 16 records in full, and referring 11 records to other agencies for review and response. *Id.*

On July 6, 2018, the Knight Institute emailed Defendants' counsel to ask when the eleven records that had been referred to other agencies would be released. DeCell Decl. ¶ 8. On July 11, 2018, Defendants' counsel informed the Knight Institute that the eleven records that had been referred to other agencies corresponded to thirty-nine pages and that DOS hoped the production of those records would be completed by July 27, 2018. DeCell Decl. ¶ 9.

On July 12, 2018, the Knight Institute received one page, corresponding to one record, from the Department of Justice's National Security Division (“DOJ-NSD”). DeCell Decl. ¶ 10. The response letter accompanying the production indicated that DOS sent the record to the Department of Justice's Office of Legal Counsel (“DOJ-OLC”) by email on June 28, 2018, and that DOJ-OLC had referred it to DOJ-NSD for review and response. *Id.* The record was withheld in full. *Id.* On July 16, 2018, DOJ-OLC indicated that DOS sent one record to DOJ-OLC on June 28, 2018, for DOJ-OLC's review and response. DeCell Decl. ¶ 11. DOJ-OLC withheld that record in full. *Id.*

Thus, the Knight Institute is still awaiting the release of nine records, totaling fewer than thirty-eight pages, from DOS.

B. ICE Productions

To date, ICE has made four productions of responsive records. On September 28, 2017, ICE made its first production, having referred no documents to other agencies. DeCell Decl. ¶ 12. On March 7, 2018, ICE made its second production and indicated in the accompanying response letter that it had referred eighty-seven pages to other agencies for review. DeCell Decl. ¶ 13. On April 30, 2018, ICE made its third production and indicated that it had referred 728 pages to other agencies for review. DeCell Decl. ¶ 14. On June 29, 2018, ICE made its fourth production and indicated it had referred forty-nine pages to other agencies for review. DeCell Decl. ¶ 16.

On July 6, 2018, the Knight Institute emailed Defendants' counsel to ask when the 864 pages that had been referred to other agencies would be released. DeCell Decl. ¶ 18. On July 16, 2018, Defendants' counsel informed the Knight Institute that ICE would complete its production of responsive records, including those referred to other agencies, within the next six to eight weeks, or by the end of August 2018. DeCell Decl. ¶ 19.

To the Knight Institute's knowledge, none of the records that ICE referred to other agencies has been released. DeCell Decl. ¶ 17. Thus, the Knight Institute is still awaiting the release of 864 pages from ICE.

ARGUMENT

The Court's previous orders set clear and unambiguous production deadlines for DOS and ICE, and both agencies are currently in violation of those orders.

DOS and ICE had an obligation to ensure that the records they referred to other agencies were produced by the Court-ordered production deadlines in this case. *See Brennan Ctr. for Justice v. Dep't of State*, 300 F. Supp. 3d 540, 549 (S.D.N.Y. 2018) (stating that a "[d]efendant cannot evade responsibility for failing to produce the requested records by referring the request to . . . other Executive Branch components for review"). Indeed, it is "well-settled" that a "referring agency is ultimately responsible for processing responsive records in its custody and control at the time of the FOIA request, and that a referral of records could constitute an improper withholding" if the referral impairs a requester's ability to obtain records in a timely manner. *Id.* (alterations and quotation marks omitted) (quoting *Plunkett v. Dep't of Justice*, 924 F. Supp. 2d 289, 305 (D.D.C. 2013)); *see also Hall v. CIA*, 881 F. Supp. 2d 38, 56 (D.D.C. 2012) (calling the CIA's position that it had fulfilled its obligation under FOIA when it referred records to other agencies "baffling" and holding that failure to produce referred records "amount[ed] to an improper withholding"); *Grove v. Dep't of Justice*, 802 F. Supp. 506, 518 (D.D.C. 1992) (holding an agency "cannot

avoid its own obligation to respond” to FOIA requests by referring records to other agencies). As discussed above, neither DOS nor ICE has lived up to this obligation.

FOIA provides that “the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.” 5 U.S.C. § 552(a)(4)(B). The Court has already done so in this case. DOS Order 4; ICE Order 1. Further, the Court has plenary power to regulate the proceedings before it in a fair and efficient manner. *See, e.g., Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (indicating courts have inherent power “to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants”). As a result, the Court has the authority to require that DOS and ICE ensure the prompt processing and production of all responsive records found in their searches.

CONCLUSION

For the foregoing reasons, the Knight Institute respectfully requests that the Court clarify that, pursuant to its previous orders, DOS and ICE must complete their productions of all responsive documents forthwith.

Respectfully,

/s/ Carrie DeCell

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