

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

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KNIGHT FIRST AMENDMENT INSTITUTE :
AT COLUMBIA UNIVERSITY, :
:

17 Civ. 7572 (ALC)

Plaintiff, :
:

ECF Case

vs. :
:

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, :

**SECOND DECLARATION
OF PAUL P. COLBORN**

Defendants. :
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I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel (“OLC”) of the United States Department of Justice (the “Department”) and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC’s responses to requests it receives under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. I submit this declaration in support of the Government’s Motion for Summary Judgment. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction.

2. This declaration provides the basis for OLC’s conclusion that that the search it conducted was reasonable as required under the law.

OLC RECEIPT AND PROCESSING OF PLAINTIFF’S FOIA REQUESTS

3. By letter dated August 7, 2017 and received by OLC the following day, Plaintiff submitted a FOIA request to OLC and others seeking six categories of records “concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations.” Plaintiff also requested expedited processing for the request under two standards

pursuant to Department regulations: 28 C.F.R. § 16.5(e)(1)(ii), (iv). A copy of Plaintiff's FOIA request ("FOIA Request") is attached hereto as Exhibit A.

4. By letter dated August 21, 2017 and transmitted by email the same day, I acknowledged receipt of the FOIA Request by OLC and informed Plaintiff that it had been assigned tracking number FY17-275. I further informed Plaintiffs that the request for expedited processing had been denied and the FOIA Request had been placed in OLC's complex processing track. A copy of OLC's acknowledgment letter is attached hereto as Exhibit B.

5. Through negotiations with counsel, Plaintiff narrowed its request with respect to OLC to parts 1-5 and requested that OLC limit its email search to records responsive to part 1.

6. By letter dated May 30, 2018 and transmitted by email the same day, I informed Plaintiff that OLC had partially completed processing of the FOIA request and had withheld 111 pages in full pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), and in part pursuant to Exemption Six, 5 U.S.C. § 552(b)(6). A copy of OLC's first response letter is attached hereto as Exhibit C.

7. By letter dated July 16, 2018 and transmitted by email the same day, I informed Plaintiff that OLC had completed processing of the FOIA request and had withheld 17 additional pages in full pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5). In the same letter, I also informed Plaintiff that the Department of State had referred one record to OLC for processing and direct response, and that OLC had withheld that document in full pursuant to Exemption Five as well. A copy of OLC's second response letter is attached hereto as Exhibit D.

OLC'S SEARCH

Storage of OLC's Records

8. OLC's records are stored in a number of locations. OLC's unclassified records may be located in the paper files of individual OLC employees or stored electronically in two types of electronic systems: a shared central storage system for the office's final unclassified work product and the computer accounts of individual employees. The central storage system consists of documents in their original file format (e.g., Microsoft Office, WordPerfect, PDF) collected in

folders, which are organized by date, on a shared network drive on the Department of Justice electronic file server. It is OLC's practice to save all final unclassified written legal advice to this central storage system; accordingly, if OLC has provided any unclassified written advice or has memorialized any unclassified oral advice in writing, that advice should be accessible through this system. Because OLC attorneys use this database to perform research, it is in OLC's interest to keep the database as complete as possible. OLC uses a search engine called Perceptive Workgroup Search ("Perceptive") to perform keyword searches of this collection of final work product files. Perceptive searches the full text of documents (including PDF files) within this collection of final work product, as opposed to searching only document titles or email subject lines. The keyword searches in Perceptive support wildcards and expanders, but also capture simple variations on the terms used without the need for wildcards or expanders. For example, a search for "belief" would identify results containing "beliefs" and vice versa.

9. By agreement with Plaintiff, only OLC's search for documents responsive to part 1 of the request required searching emails in addition to searching for the types of documents that would be located in the Perceptive database. The Department's unclassified emails may be searched a number of different ways, including most simply through Microsoft Outlook's built-in search functionality.

The Search for Documents Responsive to the FOIA Requests

10. Pursuant to the agreement between the parties narrowing the request, OLC searched for records responsive to parts 1-4 and 6(a) of the FOIA request, with part 1 limited to records dated no earlier than January 19, 2017, parts 2-4 limited to final legal or policy memoranda dated no earlier than May 11, 2005, and part 6(a) limited to records dated no earlier than January 19, 2012. Based on these limitations, OLC searched the Perceptive database for responsive records within each respective date range. This search was designed to be over-inclusive and included the following terms:

- a. endorse w/3 espouse
- b. "potentially serious adverse foreign policy"

- c. (beliefs OR statements OR associations) w/5 "would be lawful"
- d. 8 w/3 1182
- e. 8 w/3 1158
- f. 8 w/3 1225
- g. ("first amendment" OR speech OR belief OR association) w/10 (immigrat* OR exclu* OR remov*)

The results of these searches were then reviewed for responsiveness. OLC's FOIA staff then consulted with subject matter experts to determine whether any responsive classified documents existed, and determined that none did.

11. OLC is a very small component of the Department of Justice, employing approximately twenty to twenty-five attorneys at any one time. Because part 1 of the request also sought email communications, limited to communications after January 19, 2017, OLC's FOIA staff spoke with subject matter experts within OLC to identify possible custodians. Through these conversations, OLC identified a single custodian as the point of contact for potentially responsive communications over that short time period. OLC FOIA staff then searched that custodian's email account and electronic files—using the built-in search functionality of Microsoft Outlook and Microsoft Windows—with variations on the same terms above plus other potentially relevant terms identified in the course of reviewing the records. The results of these searches were then also reviewed for responsiveness.

12. After receiving the one document referred from the Department of State, *see supra* at ¶ 7, OLC FOIA staff revisited the search of Perceptive to ensure that nothing had been missed. Through further investigation, OLC determined that the referred document was likely created by someone outside of OLC memorializing informal OLC legal advice. OLC did not question the Department of State's decision to refer the document to OLC because the document attributed the advice to OLC, but because the document does not appear to have been created within OLC, I do not believe that its appearance in another agency's search results undermines the reasonableness of OLC's search in any way.

Provision of Search Description and Draft Vaughn Index

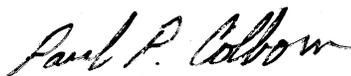
13. By letter dated November 2, 2018 and transmitted by email the same day, I provided Plaintiff with an informal description of the search methodologies described above, along with a draft index of the seven responsive records withheld by OLC. I have been informed that Plaintiff does not challenge the withholdings themselves, so I do not discuss them here. A copy of the letter provided to plaintiffs is attached hereto as Exhibit E.

* * * * *

14. In conclusion, I believe that the searches conducted by OLC were reasonable and well-designed to locate any responsive records.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: February 26, 2019, Washington, D.C.



PAUL P. COLBORN