

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

KNIGHT FIRST AMENDMENT INSTITUTE  
AT COLUMBIA UNIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY, et al.

Defendants.

Civil Action No. 1:17-CV-07572-ALC

**DECLARATION OF TONI FUENTES**  
**IN SUPPORT OF THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S**  
**MOTION FOR PARTIAL SUMMARY JUDGMENT**

**I. INTRODUCTION**

I, Toni Fuentes, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Officer of the U.S. Immigration and Customs Enforcement ("ICE") Freedom of Information Act ("FOIA") Office. I have held this position since September 30, 2018, and am the ICE official immediately responsible for supervising ICE responses to requests for records under the Freedom of Information Act, 5 U.S.C. § 552 (the FOIA), the Privacy Act, 5 U.S.C. § 552a (the Privacy Act), and other applicable records access statutes and regulations. Prior to this position, I have held numerous FOIA positions over the past 20 years, including: FOIA Director for the National Protection and Programs Directorate ("NPPD") at the U.S. Department of Homeland Security ("DHS"); Government Information Specialist for Department of Justice, U.S. Marshal's Service, Office of General Counsel; Government Information Specialist for the

Department of Defense, Office of the Inspector General's FOIA Office; FOIA Officer, Paralegal Specialist for Department of the Navy, NAVAIR/NAWCAD's Office of Counsel; Management and Program Analyst for Department of Homeland Security, Customs and Border Protection's FOIA Office; and FOIA Paralegal Specialist for the National Aeronautics and Space Administration's Office of Chief Counsel.

2. The ICE FOIA Office is responsible for processing and responding to all FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. The ICE FOIA Office mailing address is 500 12th Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

3. My official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office. The ICE FOIA Office is responsible for the receipt, processing, and response to all FOIA and Privacy Act requests received at ICE. I manage and supervise a staff of ICE FOIA Paralegal Specialists, who report to me regarding the processing of FOIA and Privacy Act requests received by ICE. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act. In that respect, I am familiar with ICE's processing of the FOIA request dated August 7, 2017, that the Knight First Amendment Institute at Columbia University ("Knight Institute" or "Plaintiff") submitted to ICE, which is the subject of this litigation.

4. I make this declaration in my official capacity in support of ICE's motion for partial summary judgment in the above-captioned action. The statements contained in this declaration are based upon my personal knowledge, my review of records kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official

duties. The documents attached hereto are kept by ICE in the ordinary course of its business activities.

5. This declaration provides a description of how ICE searched for records in response to Plaintiff's FOIA request.

## **II. PLAINTIFF'S FOIA REQUEST**

6. In a letter dated August 7, 2017, attached as Ex. 1, Knight Institute submitted the following request:

1. All directives, memoranda, guidance, emails, or other communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude or remove individuals from the United States.
2. All memoranda concerning the legal implications of excluding or removing individuals from the United States based on their speech, beliefs, or associations.
3. All legal or policy memoranda concerning the endorse or espouse provisions, or the foreign policy provision as it relates to "beliefs, statements or associations."
4. All records containing policies, procedures, or guidance regarding the application or waiver of the endorse or espouse provisions or the foreign policy provision. Such records would include policies, procedures, or guidance concerning the entry or retrieval of data relevant to the endorse or espouse provisions or the foreign policy provision into or from an electronic or computer database.
5. All Foreign Affairs Manual sections (current and former) relating to the endorse or espouse provisions or the foreign policy provision, as well as records discussing, interpreting, or providing guidance regarding such sections.
6. All records concerning the application, waiver, or contemplated application or waiver of the endorse or espouse provisions to

exclude or remove individuals from the United States, or the application, waiver, or contemplated application or waiver of the foreign policy provision to exclude or remove individuals from the United States based on “beliefs, statements or associations,” including:

- a. Statistical data or statistical reports regarding such application, waiver, or contemplated application or waiver;
- b. Records reflecting the application, waiver, or contemplated application or waiver of the endorse or espouse provisions or foreign affairs provision by an immigration officer, a border officer, a Department of Homeland Security official, or a Department of Justice official;
- c. Records concerning any determination made by the Attorney General pursuant to 8 U.S.C. § 1225(c) regarding the admissibility of arriving aliens under the endorse or espouse provisions or the foreign policy provision;
- d. Department of Homeland Security and Department of Justice records concerning consultation between the Secretary of State, the Secretary of Homeland Security, and/or the Attorney General (or their designees) relating to any waiver or contemplated waiver of the endorse or espouse provisions pursuant to 8 U.S.C. §§ 1158(b)(2)(v), 1182(d)(3)(A), or 1182(d)(3)(B)(i); and
- e. Notifications or reports from the Secretary of Homeland Security or the Secretary of State concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. §1182(d)(3)(B)(ii)[.]

### **III. ICE’S RESPONSE TO THE REQUEST**

7. In an email to Knight Institute, dated August 23, 2017, the ICE FOIA Office acknowledged receipt of the FOIA request and stated that due to increasing number of FOIA

requests, there may some delay in processing the request. The email assigned an ICE FOIA case number to Knight Institute's FOIA request ("2017-ICFO-43023").

8. On October 4, 2017, Knight Institute filed a complaint in the United States District Court for the Southern District of New York. Dkt. 1, Compl.

9. Through discussions with plaintiff, ICE began producing documents responsive to the FOIA request, which consisted of policy documents, correspondence and accompanying attachments to and from employees in ICE's Office of the Principal Legal Advisor ("OPLA"), Enforcement and Removal Operations ("ERO"), the Office of Policy ("Policy"), and the Office of the Director. *See* Dkt. No. 48 at ¶ C(g).

10. In June 2018, Knight Institute agreed to narrow the scope of records to only final policy guidance or memoranda and to exclude all email correspondence (the "Narrowed Request"), and ICE agreed to re-review the collected documents to identify materials responsive to the Narrowed Request. *See* Dkt. No. 64. As a result of that re-review, ICE determined that 99 pages of documents were responsive to the Narrowed Request; ICE released 50 pages in whole or in part on July 3, 2018, and referred 49 pages to other agencies, which were released on whole or in part on August 3, 2018. *See* Dkt. No. 77.

11. In total, the ICE FOIA Office reviewed the collected documents and released four productions over five months, concluding in July 2018, resulting in a total of 1,054 pages produced to Knight Institute responsive both to the original FOIA request and the Narrowed Request. Records that were referred to other agencies were also produced to Knight Institute.

**IV. ICE'S STANDARD PROCEDURE FOR INITIATING SEARCHES IN RESPONSE TO FOIA REQUESTS**

12. Each program office within ICE has a designated point of contact (“POC”) who is the primary person responsible for communications between that program office and the ICE FOIA Office. Each POC is a person with detailed knowledge about the operations of his or her particular program office. When the ICE FOIA Office receives a FOIA request, its first step is to identify which program offices within ICE, based on ICE FOIA Office’s experience and knowledge of ICE’s program offices, are reasonably likely to possess records responsive to that request (if any) and to initiate searches within those program offices. Once the ICE FOIA Office determines the appropriate program offices for a given request, it provides the POCs within each of those program offices a copy of the FOIA request and instructs them to conduct a search for responsive records. The POCs then review the FOIA request, along with any case-specific instructions that may have been provided, and, based on their experience and knowledge of their program office practices and activities, forward the request and instructions to the individual employee(s) or component office(s) within the program office that they believe are reasonably likely to have responsive records, if any. Per the ICE FOIA Office’s instructions, the individuals and component offices are directed to conduct searches of their file systems, including both paper files and electronic files, which, in their judgment and based on their knowledge of the manner in which they routinely keep records, are reasonably likely to contain responsive documents. Once those searches are completed, the individuals and component offices provide any potentially responsive records to their program office’s POC, who in turn provides the records to the ICE FOIA Office. The ICE FOIA Office then reviews the collected records for responsiveness.

13. ICE employees maintain records in several ways. ICE program offices use various systems to maintain records regarding the operation of ICE programs and administrative records. ICE employees may store electronic records on their individual computer hard drives, their program office's shared drive (if the office uses one), DVDs, CDs, or USB storage devices. The determination as to how to conduct searches in response to a particular FOIA tasking is necessarily based on the manner in which each employee maintains his or her files.

14. Additionally, all ICE employees have access to email. ICE uses the Microsoft Outlook email system. Each ICE employee stores his or her files in the way that works best for that particular employee. ICE employees use various methods to store their Microsoft Outlook email files: some archive their files monthly, without separating by subject; others archive their email by topic or by program; still others may create PST files of their emails and store them on their hard drive or shared drive.

15. Individual employees archive their own emails according to their individual work-related needs. Individual archives of emails are searched by the individual employees who have identified individual archives containing potentially responsive documents.

**V. PROGRAM OFFICES TASKED WITH SEARCHING FOR RECORDS IN RESPONSE TO KNIGHT INSTITUTE'S FOIA REQUEST**

16. ICE is the principal investigative arm of DHS and the second largest investigative agency in the federal government. Created in 2003 through a merger of the investigative and interior enforcement elements of the U.S. Customs Service and the Immigration and Naturalization Service, ICE now has more than 20,000 employees and offices in 50 states and 48 foreign countries.

17. Upon receipt and review of Knight Institute's FOIA request, the ICE FOIA Office determined that OPLA and Policy were the offices reasonably likely to have records responsive to the request. The ICE FOIA Office instructed OPLA and Policy to conduct a comprehensive search for records and to provide all records located during that search to the ICE FOIA Office for review and processing. After an administrative appeal on December 21, 2017, the Government Information Law Division remanded the request back to the ICE FOIA Office on February 6, 2018, and recommended that ERO, the Office of the Director, and additional components in OPLA also be tasked with the search for responsive records. Ex. 2.<sup>1</sup>

**A. OPLA'S SEARCH FOR RESPONSIVE RECORDS**

18. OPLA provides a full range of legal counsel and services to all ICE offices and programs. OPLA's primary responsibilities include, among other things, representing the Department in all exclusion, deportation, and removal proceedings; arguing administrative appeals before the Board of Immigration Appeals; providing direction and support to U.S. Attorney's Offices nationwide; counseling ICE clients on removal order reinstatements, administrative removal orders, and expedited removals; reviewing legislative and regulatory proposals; and providing legal training and ethics guidance to all ICE personnel. OPLA is the largest legal program in the Department of Homeland Security, providing legal advice, training, and services in cases related to the ICE mission.

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<sup>1</sup> The components determined that paper files were not likely to contain responsive documents because the FOIA request seeks legal and policy memoranda that are not likely to exist in only paper form, as such documents are necessarily shared among ICE employees, who communicate with each other via electronic means



19. The ICE FOIA Office instructed OPLA to conduct a comprehensive search for responsive records and to provide all records located during that search to the ICE FOIA Office for review and processing. Upon receipt of Knight Institute's request, a POC within OPLA reviewed the request and, based on the POC's experience and knowledge of the office's practices and activities, the POC instructed the Immigration Law and Practice Division ("ILPD"), National Security Law Section ("NSLS"), Enforcement and Removal Operations Law Division ("EROLD"), Field Legal operations ("FLO"), and Deputy Principal Legal Advisor ("DPLA") to conduct searches for responsive documents.

20. Between October and November 2017, ILPD tasked their division to search for responsive records. ILPD attorneys and staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts, using electronic search terms, a manual search, or both. Some of the searches located potentially responsive records, which were provided to ICE FOIA in November 2017.

21. In October 2017, NSLS tasked their division to search for responsive records. NSLS staff searched their government computers (including personal and shared drives) and Outlook e-mail accounts. Some located responsive records, which were provided to ICE FOIA.

22. In October 2017, the Acting Chief and a deputy chief of EROLD responded to the FOIA office stating that EROLD is not likely to have any documents responsive to the FOIA request.

23. Within FLO, the Special Counsel conducted searches on November 13 and 14, 2017. The Special Counsel searched her government computer (including personal and shared drives) and Outlook e-mail account, using the following search terms: "Association," Foreign

Affairs Manual,” “Gang Association,” “Foreign Policy Provision,” “Beliefs,” “Speech,” “Memorandum,” “waiver,” “White House,” and “ICE Policy.” The documents found to be responsive were provided to ICE FOIA on December 6, 2017.

24. The DPLA conducted searches on January 5, 2018. Special Counsel to the DPLA conducted the searches by searching the DPLA’s government computer (including personal and shared drives) and Outlook e-mail account, using the following search terms: “endorse,” “espouse,” and “eop.gov.” The documents found to be responsive were provided to ICE FOIA on January 5, 2018.

#### **B. POLICY’S SEARCH FOR RESPONSIVE RECORDS**

25. Policy identifies, develops and communicates ICE's organizational priorities and policies to internal and external stakeholders. The Office of Policy executes strategic policy initiatives on behalf of ICE leadership that advance ICE's priorities, including projects that require coordination with DHS headquarters and interagency partners; identifies, develops, drafts, and communicates agency priorities and policies; and oversees the ICE regulatory process.

26. After receipt of the FOIA request from the ICE FOIA Office, a FOIA POC in Policy reviewed the request and, based on her experience and knowledge of her office’s practices and activities, tasked a Policy Analyst to search for potentially responsive documentation. The Policy Analyst conducted a search on the ICE Policy Manual Database, as well as her government computer (including personal and shared drives), using the following search terms: “speech,” “beliefs,” “determinations,” “endorse,” “espouse,” “exclude,” and “remove.” The Policy Analyst also searched Outlook as well as the shared network drive using the search terms “speech,” “beliefs,” and “White House.” The Policy Analyst did not locate any responsive records.

### **C. OFFICE OF THE DIRECTOR'S SEARCH FOR RESPONSIVE RECORDS**

27. ICE was created to more effectively enforce our immigration and customs laws and to protect the United States against terrorist attacks. The Office of the Director is in charge of managing ICE's day-to-day operations, approximately 20,000 personnel assigned to more than 400 domestic and international offices, and a budget of almost \$6 billion.

28. After receipt of the FOIA request from the ICE FOIA Office, a Policy analyst was tasked to search for potentially responsive records. The analyst searched the ICE Director's government computer, including the Director's personal and shared drives, and Outlook e-mail account, using the following search terms: "Exclude," "Remove," "Speech," "Beliefs," "Associations," "Endorse Provision," "Espouse Provision," "Foreign Policy Provision," "Waiver," and "Application." The documents found to be responsive were provided to ICE FOIA on November 30, 2017.

### **D. ERO'S SEARCH FOR RESPONSIVE RECORDS**

29. ERO enforces the nation's immigration laws. ERO identifies and apprehends removable aliens, detains these individuals when necessary, and removes illegal aliens from the United States. ERO prioritizes the apprehension, arrest, and removal of convicted criminals, those who pose a threat to national security, fugitives, and recent border entrants. ERO transports removable aliens from point to point, manages aliens in custody or in an alternative to detention program, provides access to legal resources and representatives of advocacy groups, and removes individuals from the United States who have been ordered to be deported. ERO comprises seven headquarters divisions and 24 Field Offices, and more than of 7,600 employees.

30. After receipt of the FOIA request from the ICE FOIA Office, an ERO FOIA POC received and reviewed the request and, based on the contact's knowledge of the program offices' activities within ERO, the POC determined that the searches for potentially responsive records should be conducted at ERO's Executive Associate Director's (EAD) level. ERO's Deputy EAD received the FOIA request and reviewed its substance, and, based on his experience and knowledge of ERO's practices and activities, determined that his correspondence was likely to contain responsive documents because, during the relevant time frame, he represented ERO leadership in correspondence with other agencies and components. The Deputy EAD's assistant searched the Deputy's government computer (including personal and shared network drive) and Outlook e-mail account on November 14, 2017, using the following search terms: "Removal policies," "Removal terrorist," "Executive Order," "13780," "WH.gov," "Removal speech," "Removal belief," and "Removal association." The assistant located responsive records, which were provided to ICE FOIA.

I declare under penalty of perjury that the forgoing is true and correct to the best of my knowledge and belief. Signed this 26<sup>th</sup> day of February, 2019.



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Toni Fuentes, Deputy FOIA Officer  
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