

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

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KNIGHT FIRST AMENDMENT	)	
INSTITUTE	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case Number: 17-cv-07572
UNITED STATES DEPARTMENT OF	)	
HOMELAND SECURITY, ET AL.	)	
	)	
Defendants.	)	

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**DECLARATION OF ERIC F. STEIN**

Pursuant to 28 U.S.C. § 1746, I, Eric F. Stein, declare and state as follows:

1. I am the Director of the Office of Information Programs and Services (“IPS”) of the United States Department of State (the “Department”) and have served in this capacity since January 22, 2017. Previously, I was the Acting Director since October 16, 2016, and Acting Co-Director since March 21, 2016. I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (the “FOIA”), 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, and other applicable records access provisions. Prior to serving in this capacity, from April 2013, I worked directly for the Department’s Deputy Assistant Secretary (“DAS”) for Global Information Services (“GIS”) and served as a senior advisor and deputy to the DAS on all issues related to GIS’ offices and programs, which includes IPS. As the IPS Director, I have original classification authority and am authorized to classify

and declassify national security information. I make the following statements based upon my personal knowledge, which in turn is based upon information furnished to me in the course of my official duties. I am familiar with the efforts of Department personnel to process the subject request, and I am in charge of coordinating the agency's search and recovery efforts with respect to that request.

2. The core responsibilities of IPS include: (1) responding to records access requests made by the public (including under the FOIA, the Privacy Act, and the mandatory declassification review requirements of the Executive Order governing classified national security information), by members of Congress, by other government agencies, and those made pursuant to judicial process such as subpoenas, court orders, and discovery requests; (2) records management; (3) privacy protection; (4) national security classification management and declassification review; (5) corporate records archives management; (6) research; (7) operation and management of the Department's library; and (8) technology applications that support these activities.

3. This declaration explains the Department's search for records responsive to the Plaintiff's FOIA request and describes the types of withholdings the Department claims on those records.<sup>1</sup> A *Vaughn* index (Exhibit 1) provides a detailed description of the information withheld and the justifications for those withholdings.

### **I. ADMINISTRATIVE PROCESSING OF PLAINTIFF'S REQUEST**

4. On August 7, 2017 (Exhibit 2), Knight First Amendment Institute ("Plaintiff") submitted a FOIA request to the Department seeking:

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<sup>1</sup> Plaintiff is not challenging any of the Exemption 6 redactions, so documents where the Department relied on Exemption 6 as a basis for all redactions are not included in this Declaration and *Vaughn*.

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)

Through discussions with Plaintiff to clarify the request, Plaintiff agreed to eliminate the italicized portions of the request. Plaintiff's request covered the time period from May 11, 2005, to present.

5. By letter dated August 15, 2017 (Exhibit 3), IPS acknowledged receipt of Plaintiff's FOIA request and assigned it Case Control Number F-2017-14346.

6. By letter dated June 28, 2018 (Exhibit 4), the Department produced responsive documents to Plaintiff. The Department processed 243 responsive documents, releasing 90 in full, withholding 126 in part, denying 16 in full, and referring 11 to other U.S. Government agencies for direct reply. By letters dated November 9, 2018 (Exhibit 5), and February 26, 2019 (Exhibit 6), the Department issued re-releases of documents where it was determined that additional information could be released, additional exemptions applied to portions previously withheld, or where law enforcement sensitive information was inadvertently released that should have been redacted.

7. By letter dated July 31, 2018 (Exhibit 7), the Department made a supplemental production of two of the documents that were sent to other federal agencies for direct reply to Plaintiff.

## **II. THE SEARCH PROCESS**

8. When the Department receives a FOIA request, IPS evaluates the request to determine which offices, overseas posts, or other records systems within the Department may

reasonably be expected to contain the records requested. This determination is based on the description of the records requested and requires a familiarity with the holdings of the Department's records systems, applicable records disposition schedules, and the substantive and functional mandates of numerous Department offices and Foreign Service posts and missions.

9. After reviewing Plaintiff's request, IPS determined that the following offices or records systems were reasonably likely to have documents responsive to Plaintiff's request: the Bureau of Consular Affairs, the Office of the Legal Adviser, the Executive Secretariat, and the Bureau of Administration. A description of these components and their record systems, and how they were searched, is provided below. IPS concluded that no other offices or records systems were reasonably likely to maintain documents responsive to Plaintiff's request.

10. When conducting a search in response to a FOIA request, the Department relies on the knowledge and expertise of the employees of each bureau/office/post to determine the files and locations reasonably likely to house responsive records and the best means of locating such records, as these employees are in the best position to know how their files are organized. Likewise, those employees are also in the best position to determine which search terms would yield potentially responsive records, because they are most knowledgeable about the organization of the records systems in use. In this case, wherever possible, the Department relied on the expertise of individuals with knowledge about the communications of the Department's principal officers.

#### **Bureau of Consular Affairs**

11. The Bureau of Consular Affairs ("CA") is responsible for the welfare and protection of U.S. citizens abroad, for the issuance of passports and other documentation to citizens and nationals, and for the protection of U.S. border security and the facilitation of

legitimate travel to the United States. The Office of Visa Services in the Bureau of Consular Affairs (“CA/VO”) manages all aspects of visa services for foreign nationals who wish to enter the United States. The CA/VO Special Assistant, who was knowledgeable of both the FOIA request and of CA/VO’s records systems, determined that the only CA/VO components reasonably likely to contain responsive records were the CA Office of Legal Affairs and the Office of Screening, Analysis and Coordination.

### **CA Office of Legal Affairs**

12. The Bureau of Consular Affairs’ Office of Legal Affairs (“CA/VO/L”) provides specific guidance on matters of visa law and regulations. CA/VO/L renders advisory opinions to U.S. Embassies and Consulates abroad on questions involving proper visa classification, specific grounds of visa ineligibility, and other legal issues concerning immigrant and nonimmigrant visa classifications, including diplomatic visas. It consists of two divisions: the Legislation and Regulations Division (“CA/VO/L/R”) and the Advisory Opinions Division (“CA/VO/L/A”). The Legislation and Regulations Division reviews and prepares for publication all visa regulations and general instructions (including revisions to the Department’s Foreign Affairs Manual), interprets those provisions of the Immigration and Nationality Act (“INA”) relating to issuance and refusal of visas, and recommends and analyzes proposed amendments to existing immigration laws.

13. The CA/VO/L Deputy Director searched his electronic files and emails using the following keywords: “endorse,” “espouse,” “speech,” or “3C.” No date restrictions were applied to this search.

14. The CA/VO/L/R Division Chief is responsible for revisions to the Department’s Foreign Affairs Manual (“FAM”), specifically sections of chapter 9 of the FAM. The FAM is

organized by volume, chapter, subchapter, and number. The Division Chief manually searched a shared electronic database that contains current and archived FAMs. The time period searched was January 2005 through February 2018, the date of the first search. She also searched her email records using the search terms “endorse” or “espouse.” No date restrictions were applied to this search.

### **Office of Screening, Analysis, and Coordination**

15. The Office of Screening, Analysis, and Coordination within the Office of Visa Services (“CA/VO/SAC”) is CA’s primary interlocutor with other U.S. Government agencies involved in the national security screening of foreign travelers. The office responds to all security investigation requests, coordinating with law enforcement and intelligence agencies, Department bureaus, and other U.S. Government partners on visa matters involving national security, technology transfer, counterintelligence, human rights violations, and U.S. sanctions. The office also provides guidance and recommendations on visa policy related to national security exclusions, and represents CA on U.S. Government steering groups related to screening, tracking, and watchlisting.

16. The CA/VO/SAC Counterterrorism Division Chief searched a classified SharePoint site containing memos related to INA(a)(3)(B) dated late 2012 to present, as well as the Digital Asset Management System (“DAMS”), which CA uses to route memos for signature. DAMS contains final, signed memos related to INA(a)(3)(B). She used the search terms “endorsing,” “espousing,” “espouses,” “endorses.” No date restrictions were applied to these searches.

### **The Office of the Legal Adviser**

17. The Office of the Legal Adviser (“L”) furnishes advice on all legal issues, domestic and international, arising in the course of the Department’s work. This includes

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assisting Department principals and policy officers in formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of those policies. The Office is organized to provide direct legal support to the Department's various bureaus, including both regional and geographic offices (those which focus on specific areas of the world) and functional offices (those which deal with specific subject matters such as economics and business, international environmental and scientific issues, or internal management). A paralegal, who was knowledgeable of both the FOIA request at issue and L's records systems, determined that based on the subject of the request the only L component reasonably likely to maintain responsive records was the Office of Consular Affairs ("L/CA").

18. L/CA provides legal advice and representation relating to the performance of consular functions by the Department of State. These functions include: adjudication and revocation of visas and passports; the protection of U.S. nationals and their property abroad; loss or acquisition of U.S. nationality; passport, visa and terrorism-related information sharing; international children's issues; and enforcement and administration of immigration laws. L/CA's roles include negotiation and implementation of international agreements on consular relations; working on proposed immigration-related legislation; drafting Department regulations and guidance; and participating in interagency initiatives.

19. The L/CA Office Management Specialist searched the unclassified office shared drive, which includes the archived email files of 23 Attorney-Advisers who work or previously worked in L/CA, using the following phrases or search terms: "endorse and espouse," "endorse or espouse," "espouse and endorse," "espouse or endorse," "1st Amendment," "First Amendment," "would have potentially serious adverse foreign policy consequences," "freedom



of speech,” “freedom of belief,” “freedom of association,” “freedom of expression,” or “protected speech.” The time period searched was May 11, 2005, through March 27, 2018.

20. An L/CA Attorney-Adviser searched her unclassified and classified email records using the search terms “speech,” “express,” “belief,” “member,” or “association.” No date restrictions were applied to this search.

21. A second L/CA Attorney-Adviser searched his unclassified email records using the search terms “potentially serious adverse” or “serious adverse foreign.” He searched his classified email records using the search terms: “potentially serious adverse,” “serious adverse foreign,” “First Amendment,” or “1st Amendment.” The time period searched was May 11, 2005, to March 6, 2018.

22. He and another Attorney-Adviser conducted a manual search of the office’s paper files, which are organized by subject. They searched files with subjects likely to include responsive records, specifically: 3B, 3C, 3D, 212f, incitement, interpretation, application, serious adverse consequences, party membership, Application/Interpretation, and 212(a)(3)(B). No date restrictions were applied to this search.

23. A third L/CA Attorney-Adviser searched her unclassified and classified email records, specifically the folders labeled “Visa Inadmissibilities” and “Visa Sanctions.” She manually reviewed each of the emails located in the unclassified “Visa Inadmissibilities” folder for any documents responsive to Plaintiff’s FOIA request, and searched the classified “Visa Inadmissibilities” folder using the search terms: “endorse,” “espouse,” “First Amendment,” or “1st Amendment.” She also searched the unclassified and classified “Visa Sanctions” folders using the search terms “association” or “waiver.” No date restrictions were applied to these searches.

**Bureau of Administration**

24. The Bureau of Administration (“A Bureau”) provides support programs to the Department of State and U.S. embassies and consulates. These programs include: procurement; supply and transportation; diplomatic pouch and mail services; official records, publishing, and library services; language services; setting allowance rates for U.S. Government personnel assigned abroad and providing support for Department assisted overseas schools; domestic real property and facilities management; domestic emergency management; support for White House travel abroad; and logistical support for special conferences.

25. The Office of Global Information Services in the A Bureau (“A/GIS”) is responsible for the Department’s information access and management programs. A/GIS, which is comprised of Directives Management (“DIR”), Global Publishing Solutions (“GPS”), the Privacy Office (“PRV”), and the Office of Information Programs and Services (“IPS”), offers a variety of products and services to the Department, the U.S. Government, and the public. The responsibilities of A/GIS include, among others: ensuring that statutes, executive orders, delegations of authority and other agencies’ directives are reflected appropriately in Department policy and procedures; providing design, print, and copier management services to the Department domestically and abroad; administering the Department’s records management, privacy, classification, declassification, and public access programs; and serving as the primary point of contact for anyone seeking access to Department records and responding to requests from the foreign affairs and national security community, the Congress, the courts, foreign governments, and the public.

26. An IPS Paralegal, who was knowledgeable of both the request and the relevant records systems and collections of materials, conducted a search of the Department’s internal website for all Foreign Affairs Manuals and Foreign Affairs Handbooks using the search terms:

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“endorse or espouse,” “serious adverse foreign policy consequences,” “INA 212(a)(3)(B),” and “INA 212(a)(3)(C).” No date restrictions were applied to this search.

**Office of the Executive Secretariat**

27. The Executive Secretariat Staff (“S/ES-S”) is responsible for the coordination of the work of the Department internally, serving as the liaison between the Department’s bureaus and the offices of the Secretary, the Deputy Secretary, and the Under Secretaries. It is generally responsible for coordinating search responses for the Office of the Secretary of State (“S”), the Office of the Deputy Secretary of State (“D”), the Office of the Under Secretary for Political Affairs (“P”), and the Counselor of the Department (“C”).

28. An S/ES-S Management Analyst, who was knowledgeable of both the FOIA request and the S/ES records systems, conducted searches of the Secretariat Tracking and Retrieval System (“STARS”)<sup>2</sup> and Everest<sup>3</sup> using the following search terms: “beliefs statements or associations,” “endorse or espouse,” “endorses or espouses,” “8 U.S.C. § 1182(a)(3)(C)(i),” “8 U.S.C. § 1182(a)(3)(C)(iii),” “8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb),” “8 U.S.C. § 1182(a)(3)(B)(i)(VII),” and “8 U.S.C. § 1182(d)(3)(B)(ii).” The time period searched was January 1, 2005, through March 5, 2018.

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<sup>2</sup> STARS is an automated system used to track, control, and record documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretary of State, the Under Secretaries of State, and the Counselor of the Department. Original documents are indexed, scanned, and stored as images in STARS. For searches of STARS, the search terms are applied to a descriptive abstract attached to each document. Each abstract is created by a Technical Information Specialist when the document is added to the database; this abstract is designed to capture the subject matter of the related document. The abstracts are the only portion of STARS database whose text can be searched. Information in STARS covers the period January 1, 2002 through December 31, 2015.

<sup>3</sup> Everest is a Microsoft SharePoint based enterprise system used to track, control, and archive documents containing substantive foreign policy information passing to, from, and through the offices of the Secretary of State, the Deputy Secretaries of State, and other Department principal officers. The documents in Everest are full-text searchable. Everest includes all information found in STARS for the period 2002-2015, and information not in STARS for the period 2015 to the present.

### **III. FOIA EXEMPTIONS CLAIMED**

#### **FOIA Exemption 1 – Classified Information**

29. 5 U.S.C. § 552(b)(1) states that the FOIA does not apply to matters that are:

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . .

30. The Department withheld certain information under FOIA Exemption 1, 5 U.S.C. § 552(b)(1), pursuant to E.O. 13526 sections 1.4(b), (c), (d), and (e). Section 1.4 provides that:

Information shall not be considered for classification unless . . . it pertains to one or more of the following: (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology; (d) foreign relations or foreign activities of the United States, including confidential sources; [or] (e) scientific, technological, or economic matters relating to the national security, including defense against transnational terrorism

31. The withheld information includes information classified at the SECRET and CONFIDENTIAL levels. Section 1.2 of E.O. 13526 states:

“Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

“Confidential” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

32. Section 6.1(l) of E.O. 13526 defines “damage to the national security” as follows:

“Damage to the national security” means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, taking into consideration such aspects of the information as the sensitivity, value, utility, and provenance of that information.

33. The information withheld under Exemption 1, 5 U.S.C. § 552(b)(1), continues to meet the classification criteria of E.O. 13526 and the Department has not previously authorized or officially acknowledged public release of this information.

**Section 1.4(b) – Foreign Government Information**

34. The Department withheld foreign government information. Section 6.1(s) of E.O. 13526 defines “foreign government information” as follows:

“Foreign government information” means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States Government pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence

....

35. Section 1.1(d) of E.O. 13526 states:

The unauthorized disclosure of foreign government information is presumed to cause damage to the national security.

36. The ability to obtain information from foreign governments is essential to the formulation and successful implementation of U.S. foreign policy. Release of foreign government information provided in confidence, either voluntarily by the Department or by order of a court, would cause foreign officials to believe that U.S. officials are not able or willing to observe the confidentiality expected in such interchanges. Governments could reasonably be expected to be less willing in the future to furnish information important to the conduct of U.S. foreign relations, and in general less disposed to cooperate with the United States in the achievement of foreign policy objectives of common interest. In view of the important

relationship between the United States and the foreign governments identified in the responsive documents, protecting foreign government information (including in some cases protecting even the fact that information has been provided or the source of information), is important to our international relationships and conduct of foreign relations. Information withheld in this case is currently and properly classified pursuant to Section 1.4(b) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA Exemption 1.

**Section 1.4(c) – Intelligence Activities and Intelligence Sources and Methods**

37. The Department also withheld certain information that relates directly to intelligence activities, sources, or methods. Disclosure of this information could enable foreign governments or persons or entities opposed to United States foreign policy objectives to identify U.S. intelligence activities, sources, or methods and to undertake countermeasures that could frustrate the ability of the U.S. Government to acquire information necessary to the formulation and implementation of U.S. foreign policy. Because disclosure “reasonably could be expected to result in damage to the national security”, information withheld in these documents is currently and properly classified pursuant to Section 1.4(c) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA Exemption 1.

**Section 1.4(d) – Foreign Relations or Foreign Activities of the United States**

38. The Department withheld information that, if released, reasonably could be expected to cause damage to U.S. foreign relations. Diplomatic exchanges are premised upon, and depend upon, an expectation of confidentiality. Mutual trust between governments in this realm is vital to U.S. foreign relations. The inability of the United States to maintain confidentiality in its diplomatic exchanges would inevitably chill relations with other

governments, and could reasonably be expected to damage U.S. national security by diminishing our access to vital sources of information.

39. Some of the withheld information is classified and concerns both confidential sources and sensitive aspects of U.S. foreign relations, including, in particular, issues relating to identifying potential threats to U.S. national security. Release of this classified information has the potential to inject friction into, or cause damage to, a number of our bilateral relationships with countries whose cooperation is important to U.S. national security, including some in which public opinion might not currently favor close cooperation with the United States. Release of information revealing confidential sources reasonably could be expected to risk the safety of those confidential sources. Failure to preserve the expected confidentiality could jeopardize future access not only to the sources of the withheld information, but also to others who might provide sensitive information to U.S. officials that is important to U.S. national security interests. For these reasons, the Department withheld certain information in this case that is currently and properly classified pursuant to Section 1.4(d) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA Exemption 1.

**Section 1.4(e) -- Scientific, Technological, or Economic Matters  
Relating to the National Security;**

40. The Department withheld certain information that relates to scientific, technological, or economic matters, the release of which “reasonably could be expected to result in damage to the national security.” The withheld information relates to economic matters, and specifically, details about acts of public corruption and the methods by which certain types of sanctions are determined. Information withheld in these documents is currently and properly classified pursuant to Section 1.4(e) of E.O. 13526 and is, therefore, exempt from disclosure under FOIA Exemption 1.

**FOIA Exemption 3 – Exempt by Statute**

41. 5 U.S.C. § 552(b)(3) states that the FOIA does not apply to matters that are:

specifically exempted from disclosure by statute (other than Section 552(b) of this title), provided that such statute—(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the Open FOIA Act of 2009, specifically cites to this paragraph.

**Section 222(f) – Immigration and Nationality Act**

42. The Department withheld certain information under FOIA Exemption 3 as required by Section 222(f) of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1202(f), which states in pertinent part:

The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that - (1) in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court. (Emphasis added).

Section 222(f) of the INA qualifies as a withholding statute under FOIA Exemption 3, 5 U.S.C. § 552(b)(3).<sup>4</sup> “Under section 222(f) the Secretary of State has no authority to disclose material to the public. In that sense the confidentiality mandate is absolute; all matters covered by the statute ‘shall be considered confidential.’” *Medina-Hincapie v. Dep’t of State*, 700 F.2d 737, 742 (D.C. Cir. 1983). Section 222(f) applies not only to the information supplied by the visa

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<sup>4</sup> See *Medina-Hincapie v. Dep’t of State*, 700 F.2d 737, 741-42 (D.C. Cir. 1983); see also *Beltranena v. U.S. Dep’t of State*, 821 F. Supp. 2d 167, 177 (D.D.C. 2011).



applicant, but also applies to any “information revealing the thought-processes of those who rule on the application.” *Id.* at 744.

**Section 3024(i) – National Security Act of 1947**

43. The Department withheld certain information under Exemption 3 as required by the National Security Act of 1947, 50 U.S.C. § 3024(i)(1), because the information withheld, if released, could reasonably be expected to lead to the unauthorized disclosure of intelligence sources and methods. Documents contain currently and properly classified information pertaining to intelligence activities, sources and methods; and foreign relations and foreign activities of the United States. Information pertaining to intelligence sources and methods is protected by statute, 50 U.S.C.A. § 3024(i)(1).

**FOIA Exemption 5**

44. The Department withheld certain information under 5 U.S.C. § 552(b)(5), which states that the FOIA does not apply to:

inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency....

45. FOIA Exemption 5, 5 U.S.C. § 552(b)(5), protects from disclosure information that is normally privileged in the civil discovery context, including information that is protected by the deliberative process privilege, attorney-client privilege, attorney work product privilege, and Presidential communications privilege. All of the information withheld under Exemption 5 exists in inter- or intra-agency documents that have not been disseminated outside of the executive branch.

**Deliberative Process Privilege**

46. The deliberative process privilege protects the confidentiality of candid views and advice of U.S. Government officials in their internal deliberations related to policy formulation and administrative direction. For example, certain information withheld in this case reflects the internal exchange of ideas and recommendations when Department officials are formulating a strategy for official action. Disclosure of material containing the details of internal discussions held in the course of formulating a policy could reasonably be expected to chill the open and frank exchange of comments and opinions that occurs between Department officials at these critical times. In addition, disclosure of these details would severely hamper the ability of responsible Department officials to formulate and carry out executive branch programs. The Department has withheld information in a number of documents in this case, as detailed in the attachment, on the basis of this exemption pursuant to the deliberative process privilege. Disclosure of this information, which is pre-decisional and deliberative, and contains selected factual material intertwined with opinion, would inhibit candid internal discussions and the expression of recommendations and judgments regarding current problems and preferred courses of action by Department personnel. The withheld information is, accordingly, exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the deliberative process privilege.

**Attorney-Client Privilege**

47. The Department has also withheld certain information pursuant to the attorney-client privilege that reflects consultations undertaken in confidence between government attorneys and other executive branch officials for the purpose of obtaining legal advice. In each instance where such information was withheld, the withheld information reflects the two-way confidential communications that occur between attorneys and their clients when seeking and providing legal advice, and includes facts divulged to one or more of the attorneys for the

purposes of obtaining legal advice, as well as opinions given by the attorneys based upon and reflecting those facts. The withheld information reflects confidential communications with government attorneys who are providing legal advice to executive branch officials, and that confidentiality has been maintained. For these reasons, portions of the withheld information are exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the attorney-client privilege.

#### **Attorney Work-Product Privilege**

48. The Department withheld material prepared in anticipation of litigation, pursuant to the attorney work-product privilege. The work product doctrine protects both deliberative and factual materials prepared in anticipation of litigation. In the one document the Department withheld under this privilege, Department attorneys assessed ongoing litigation and the effect of policy options on that litigation and potential future litigation. Release of the document would chill Department counsel who defend the Department's legal position in litigation in the future. For these reasons, portions of the withheld information are exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the attorney work-product privilege.

#### **Presidential Communication Privilege**

49. The Department withheld information in six documents pursuant to the Presidential communications privilege to protect communications between the President's advisors and their staff and State officials, and communications between close advisors preparing information or advice for potential presentation to the President. The communications were authored by, or solicited and received by, senior presidential advisors and staff with broad and significant responsibility for gathering information in the course of preparing advice for potential presentation to the President in matters that implicate the President's decisions concerning

foreign policy or national security concerns. In this case, disclosure of the information withheld under the presidential communications privilege would reveal the process by which the President receives national security advice from close advisors. For these reasons, the withheld information is exempt from release under Exemption 5, 5 U.S.C. § 552(b)(5), pursuant to the presidential communications privilege.

**FOIA Exemption 7 – Law Enforcement Information**

50. The Department withheld certain information under FOIA Exemption 7, which protects from disclosure all “records or information compiled for law enforcement purposes” that could reasonably be expected to cause one of the six harms outlined under 5 U.S.C. § 552(b)(7). Before an agency can invoke exemptions pertaining to the specific harms enumerated in FOIA Exemption 7, it must first demonstrate that the records or information at issue were compiled for law enforcement purposes.

51. The law to be enforced for FOIA Exemption 7 purposes includes administrative, regulatory, civil, and criminal law. Records pertaining to routine agency activities can qualify for FOIA Exemption 7 protection when those activities involve a law enforcement purpose. Although the records must be created for some law enforcement purpose, there is no requirement that the matter culminate in actual administrative, regulatory, civil, or criminal enforcement proceedings. In this case, the harm that could reasonably be expected to result from disclosure concerns revealing sensitive law enforcement techniques and procedures related to enforcement of the Immigration and Nationality Act (“INA”).

52. The Department is on the front line of enforcing the U.S. Government’s immigration laws and regulations. The Department interprets and applies immigration laws and regulations, and acts as a point of contact for the public. The Department also liaises with the Department of Homeland Security and other U.S. Government agencies with roles in

administration and enforcement of U.S. immigration laws. The Department routinely uses non-public law enforcement databases to support its core duties of enforcing U.S. immigration laws.

**FOIA Exemption 7(E) – Law Enforcement Techniques and Procedures**

53. 5 U.S.C. § 552(b)(7)(E), states in relevant part that the FOIA does not apply to records or information that “would disclose techniques and procedures for law enforcement investigations or prosecution, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law . . . .”

54. The Department has asserted FOIA Exemption 7(E), 5 U.S.C. § 552(b)(7)(E), to protect from disclosure details of investigative techniques, procedures, and guidelines used during the course of the certain investigations and law enforcement activities. In this case, the Department withheld certain techniques used to investigate visa applicants, details regarding the use of certain law enforcement databases used to assist the Department in issuing or denying visas, codes used in connection with investigating potential security threats, and procedures for finding and evaluating sources of information. While the protection of Exemption 7(E) is generally limited to techniques and procedures that are not well known to the public, even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness. The release of information about the techniques at issue in this case could enable terrorists and other bad actors to avoid detection or develop countermeasures to circumvent the ability of the Department to effectively use these important law enforcement techniques, thereby allowing circumvention of the law.

55. The Department withheld portions of documents under FOIA Exemption 7(E), because disclosure could reveal investigative techniques related to the visa process. For each of these withholdings, the Director determined that release of the requested information would risk

circumvention of the law. Accordingly, the Department properly withheld this information pursuant to Exemption 7(E), 5 U.S.C. § 552(b)(7)(E).

**V. CONCLUSION**

56. In summary, the Department conducted thorough searches of all Department locations that were reasonably likely to contain records responsive to Plaintiff's FOIA request. The Department has carefully reviewed all of the documents addressed herein for reasonable segregation of non-exempt information and has implemented segregation when possible. Otherwise, the Department determined that no segregation of meaningful information in the documents could be made without disclosing information warranting protection under the law.

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 26<sup>th</sup> day of February 2019, Washington, D.C.

A handwritten signature in blue ink, appearing to read "Eric F. Stein", is written over a horizontal line.

Eric F. Stein