

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

**DECLARATION OF CARRIE DECELL IN SUPPORT OF PLAINTIFF'S CROSS-
MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUMMARY JUDGMENT**

Pursuant to 28 U.S.C. § 1746, I, Carrie DeCell, declare and state as follows:

1. I am a staff attorney at the Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute"). I have served in this role since July 31, 2017.
2. Along with my colleagues, I submitted identical Freedom of Information Act ("FOIA") requests (the "Request") to the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), Immigration and Customs Enforcement ("ICE"), U.S. Citizenship and Immigration Services ("USCIS"), Department of Justice ("DOJ"), and Department of State ("DOS") (collectively, "Defendants") on August 7, 2017. The Request sought, among other things, agency records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations, and records concerning any new policies for "vetting"

individuals on these grounds.

3. The Knight Institute requested expedited processing of the Request on the ground that the records sought were urgently needed to inform the public about government activity, particularly with respect to the “extreme vetting” program President Trump has ordered federal agencies to develop.

4. Seeking the immediate release of all agency records responsive to the Request, as required by FOIA, 5 U.S.C. § 552, the Knight Institute filed a complaint in this Court on October 4, 2017. The Institute filed an amended complaint on March 14, 2018.

5. I represent the Knight Institute in this action and have served as the primary contact for Defendants’ counsel since the beginning of the litigation.

6. The purpose of this declaration is to provide the Court with information regarding the parties’ negotiations over the scope of the Request and Defendants’ responses to the Request.

Communications Relating to Narrowing the Request

7. On January 25, 2018, I spoke with Defendants’ counsel by phone to discuss provisional modifications to the Request and a processing schedule for Defendants. My co-counsel, Megan Graham, and two students of the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law (“Samuelson Clinic”) joined the call. During the call, the Knight Institute agreed to narrow the Request on a provisional basis as follows:

- **Item 1:** Defendants’ counsel asked whether Defendants could search for responsive records on White House systems alone, rather than searching each Defendant’s systems for communications received from the White House. We agreed to this proposal, provided Defendants’ counsel gave assurances that the records produced from the White House systems were comprehensive of all records responsive to

Item 1 of the Request. Defendants' counsel agreed to provide an explanation of the White House record retention policy so we could assess the comprehensiveness of Defendants' response to this Item of the Request.

- **Items 2–5:** We provisionally agreed to narrow these Items of the Request to final policy memoranda and equivalent records. We agreed that Defendants would not have to conduct an email search for records responsive to these Items of the Request.
- **Item 6:** Defendants' counsel had previously explained that USCIS would have to conduct a manual search of individual Alien Files (“A-Files”) for records responsive to certain parts of Item 6. We provisionally agreed to narrow this Item to subparts (a) and (e), explaining that we were most interested in obtaining statistical information, not information from individual A-Files. We agreed to limit the Defendants' initial searches for material responsive to Item 6(a) to records created on or after January 19, 2012. We agreed that for Item 6(e), initially only DOS and DHS would search for responsive records.

8. On a February 6, 2018 call with Defendants' counsel, joined by Ms. Graham and the Samuelson Clinic students, I provisionally agreed that Defendants could search for records responsive to Item 5 of the Request on DOS systems alone. We declined to narrow the search for records responsive to Item 6(a) to USCIS systems alone.

9. To date, I have not received an explanation of the White House record retention policy, or any assurance from Defendants' counsel that the records Defendants processed in response to Item 1 of the Request are comprehensive of all records responsive to that Item of the Request.

Communications Relating to ICE's Response to the Request

10. On September 29, 2017, ICE sent the Knight Institute a "final response" to the Request "for 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 exclude¹ [sic] or remove individuals from the United States (please see request for more details)." *See* First Am. Compl. Ex. C, ECF No. 42-3, at 3. Because the letter mentioned no other Item of the Request and contained no other indication that it constituted a response to the entire Request, I understood the letter as a response to Item 1 of the Request alone. Along with the letter, ICE released 1,666 pages of records responsive to the Request but withheld 1,653 of those pages in full, claiming FOIA exemptions.

11. During a call on December 21, 2017, Defendants' counsel informed me of ICE's position that the Knight Institute had failed to exhaust its administrative remedies with respect to ICE's September 29, 2017 response. That same day, out of an abundance of caution, I submitted an administrative appeal requesting review of ICE's response to Item 1 of the Request, on the view that ICE had responded only as to that Item.

12. In ICE's December 28, 2017 letter to the Court indicating its intent to pursue a motion to dismiss, ICE characterized its September 29, 2017 response as a final response to the entire Request. Based on that characterization, I amended the Knight Institute's administrative appeal by letter dated January 5, 2018, to request review of ICE's response to the entire Request.

13. Rather than litigate a motion to dismiss ICE from this action, the Knight Institute negotiated with Defendants' counsel a stipulation of voluntary dismissal without prejudice of ICE. The parties filed the stipulation of voluntary dismissal on January 11, 2018, and the Court

dismissed ICE from the action without prejudice on January 16, 2018.

14. During the January 25, 2018 call on which the parties negotiated significant modifications to the Request as a whole, Defendants' counsel stated that she would confirm whether ICE was processing the Knight Institute's administrative appeal as of the date of dismissal. I therefore understood that Defendants' counsel continued to represent ICE with respect to its handling of the Request and believed that she would inform ICE of the ways in which we had provisionally agreed to narrow the Request.

15. On February 6, 2018, I received ICE's response to the Knight Institute's amended administrative appeal, in which ICE denied our challenge to the withholdings in its September 29, 2017 response but agreed to conduct a new or modified search, remanding the Request to ICE's FOIA Office for further processing and retasking.

16. Also on February 6, 2018, during my call with Ms. Graham, the Samuelson Clinic students, and Defendants' counsel, Defendants' counsel informed us that ICE had already remanded the appeal to the FOIA Office, completed its new search, and located approximately 14,000 pages of potentially responsive records. Defendants' counsel further informed us that ICE had begun to process the records and scheduled an initial production for March 7, 2018, and that ICE proposed to process the records at a rate of 500 pages per month and make productions on the seventh day of each month thereafter.

17. On February 13, 2018, I received an email from ICE confirming that it had located approximately 14,000 pages of potentially responsive documents, and that it would commit to processing at least 500 pages per month. ICE indicated that the first production would be made on March 7, 2018, with subsequent productions on the seventh day of each month thereafter.

18. By letter dated March 7, 2018, ICE informed me that it had processed 560 pages of

records and referred eighty-seven of those pages to other agencies. Along with the letter, ICE released 463 pages, redacting certain pages and withholding others in their entirety on the basis of FOIA Exemptions 5, 6, 7(C), and 7(E).

19. With the consent of ICE and the other Defendants, the Knight Institute filed an amended complaint on March 14, 2018, in which it challenged the timeliness and comprehensiveness of ICE's response to the Request.

20. On April 11, 2018, Ms. Graham and I spoke with Defendants' counsel to discuss the possibility of modifying the scope of the Request in order to expedite ICE's processing. Defendants' counsel explained that ICE had conducted its new search based on the original Request, not the Request as modified on the January 25, 2018 call. I responded that the Knight Institute would provisionally agree to accept ICE's response to the modified Request, or to narrow the scope of the potentially responsive records it had already located on an Item-by-Item basis.

21. By letter dated April 30, 2018, ICE informed me that it had processed an additional 1,124 pages for release and referred 728 of those pages to other agencies. Along with the letter, ICE released 395 pages, redacting certain of those pages and withholding others in their entirety on the basis of FOIA Exemptions 5, 6, 7(C) and 7(E).

22. In May 2018, Defendants' counsel and I reached an agreement allowing ICE to conduct a "re-review" of the records it had identified post-remand as responsive to the initial Request to determine which of those records were responsive to the provisionally narrowed Request. ICE would then process only those records responsive to the provisionally narrowed Request.

23. By letter dated June 29, 2018, ICE informed me that following its re-review, it had identified only ninety-nine pages of records responsive to the provisionally narrowed Request. ICE

referred forty-nine pages to other agencies for processing and released fifty pages to the Knight Institute, redacting certain of those pages on the basis of FOIA Exemptions 5, 6, 7(C) and 7(E).

24. During a call with Defendants' counsel on August 16, 2018, and as reflected in a follow-up email that day, I requested that Defendants provide draft search descriptions and *Vaughn* indices, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), to enable the Knight Institute to narrow possible challenges to Defendants' responses to the Request and to streamline any remaining litigation.

25. By email dated October 4, 2018, Defendants' counsel informed me that ICE had agreed to produce a draft *Vaughn* index by December 4, 2018. By email dated October 12, 2018, Defendants' counsel sent me ICE's draft search description.

26. By email dated December 5, 2018, Defendants' counsel informed me that ICE's FOIA review database had "a technical issue" that made producing a draft *Vaughn* index "rather difficult if not impossible," and asked whether the Knight Institute could provide CD copies of all productions ICE had made in this matter. With the help of the Knight Institute's paralegal, I sent Defendants' counsel the requested CD copies by overnight FedEx on December 7, 2018, and received confirmation that they were delivered on December 10, 2018. Nonetheless, ICE never produced the requested draft *Vaughn* index to the Knight Institute.

Communications Relating to OLC's Response to the Request

27. By letter dated May 30, 2018, OLC informed me that it had processed 111 pages of responsive records but had withheld all 111 pages in full on the basis of FOIA Exemptions 5 and 6.

28. By letter dated July 16, 2018, OLC informed me that it had identified an additional seventeen pages of responsive records but had withheld all seventeen pages in full on the basis of

FOIA Exemption 5.

29. By email dated November 2, 2018, Defendants' counsel sent me OLC's draft search description and draft *Vaughn* index.

Communications Relating to DOS's Response to the Request

30. By letter dated June 28, 2018, DOS informed me that it had located 243 records responsive to the Request. Along with the letter, DOS released ninety records in full, withholding 126 records in part and sixteen records in full on the basis of FOIA Exemptions 1, 3, 5, 6, and 7(E). DOS further informed me that it had referred eleven records to other agencies for review.

31. By email dated November 9, 2018, Defendants' counsel sent me a supplemental release from DOS. The accompanying response letter explained that, upon further review of forty-nine records, DOS had determined that additional information could be released, and that additional exemptions applied to some portions of records that had previously been withheld.

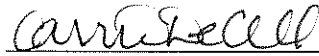
32. Attached hereto as Exhibit A is a true and correct copy of one record contained in DOS's November 9, 2018 supplemental release, titled "Action Memo for the Secretary" (C06569352).

33. Attached hereto as Exhibit B is a true and correct copy of another record contained in DOS's November 9, 2018 supplemental release, titled "9 FAM 302.6" (C06533909).

34. By email dated February 26, 2019, Defendants' counsel sent me another supplemental release from DOS. The accompanying response letter explained that, upon further review of twenty-nine records, DOS had determined that additional information could be released, that law enforcement information had previously been inadvertently released in eighteen records, and that additional exemptions applied to some portions of records that had previously been withheld.

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

Executed: March 28, 2019


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