



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street
New York, New York 10007*

August 7, 2019

BY ECF

The Honorable Andrew L. Carter, Jr.
United States District Judge
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: *Knight First Amendment Institute v. U.S. Dep't of Homeland Security et al.*,
No. 17 Civ. 7572 (ALC)

Dear Judge Carter:

I write respectfully on behalf of United States Immigration and Customs Enforcement ("ICE"), a defendant in the above-referenced FOIA action, in response to the Court's Order dated July 31, 2019, directing ICE to submit supplemental information regarding the search conducted by ICE's Office of the Director. Enclosed is the declaration of Alexander Choe, Administrative Specialist in the Office of the Director, as well as the declaration of Eliman Jussara Solorzano, Special Assistant in the Enforcement, Removal and Operations office ("ERO"), the two individuals who conducted the searches within their respective offices for documents responsive to plaintiff's FOIA request. As explained below, ICE includes the declaration of Ms. Solorzano in order to complete and clarify the record before the Court, including by correcting and/or clarifying certain statements I made during the July 31 conference based on information I had obtained that I have since learned was not correct.¹

The FOIA Request

The FOIA request stated that the President, on January 27, 2017, and March 6, 2017, issued Executive Order 13,769 and Executive Order 13,780, directing various agencies "to develop a more robust vetting program for aliens seeking entry into the United States." Dkt. No. 91-1. Plaintiff therefore sought:

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.

¹ I do not have the transcript of that conference.

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[.]*”

Id. (emphases added). As explained in the declarations of Toni Fuentes dated February 26, 2019, and May 3, 2019, Dkt. Nos. 91 and 113, ICE initially searched the Office of Policy and produced in whole or in part 1,666 pages of records. *See* Dkt. No. 113 ¶¶ 6-9. After reviewing that response, ICE directed seven additional offices or components to search for documents responsive to plaintiff’s original, non-narrowed FOIA request; produced to plaintiff or referred to other agencies approximately 1,700 pages responsive to the original FOIA request; re-reviewed the remaining approximately 12,000 pages for documents responsive to plaintiff’s narrowed request; and produced to plaintiff or referred an additional 99 pages of documents. *See id.* ¶¶ 13-25.

Plaintiff asserts, *inter alia*, that two of the seven components, the Office of the Director and ERO, conducted inadequate searches. *See* Dkt. No. 117 at 4. Specifically, plaintiff argues that those components’ search terms were “unduly restrictive,” and notes that ICE did not indicate whether those searches were conducted with quotation marks around the search terms or applied Boolean connectors. *Id.* On July 31, 2019, the Court ordered ICE to address those questions as applied to the search conducted by the Office of the Director.

Office of the Director

As explained in the declaration of Alexander Choe, Special Assistant to the Chief of Staff of the Director of ICE, on or about November 30, 2017, the ICE FOIA Office emailed him a copy of plaintiff's FOIA request. Choe Decl. at ¶ 2. He states that the "ICE FOIA Office did not suggest any particular search terms to employ; as a result, and pursuant to my standard practice, I reviewed the FOIA request to determine where to search for potentially responsive documents and which search terms to use." *Id.* Mr. Choe noted that, in "request numbers 3, 4 and 6, the clauses 'foreign policy provision,' or 'endorse . . . provision,' or 'espouse provision' appear." *Id.* at ¶ 6. Mr. Choe further noted that, "in request numbers 4 and 6, plaintiff sought information concerning the 'application' and 'waiver' of those provisions; in request numbers 1, 2, 3 and 6, plaintiff sought documents concerning 'speech,' 'beliefs,' or 'associations'; and in request numbers 1, 2 and 6, plaintiff sought documents concerning decisions to 'exclude' or 'remove' individuals." *Id.* As a result, Mr. Choe determined that the following terms would be reasonably calculated to retrieve responsive documents: "Exclude," "Remove," "Speech," "Beliefs," "Associations," "Endorse Provision," "Espouse Provision," "Foreign Policy Provision," "Waiver," and "Application." *Id.* at ¶ 5.

Mr. Choe explains that, in the Director's Outlook email system, he "typed each of those words or phrases surrounded by quotation marks." *Id.* at ¶ 7. He explains:

Specifically, for those terms with one word, such as "exclude," I typed "exclude" in the Outlook Search tool, with quotation marks around the word. I understood that such a search would retrieve any document containing the word exclude (or versions of that word, such as "excludes" or "excluded"). For those terms with more one word, such as "endorse provision," I typed the phrase in the Outlook Search tool, with quotation marks around the entire phrase. I understood that such a search would retrieve any document containing that exact phrase; i.e., the words "endorse" and "provision" next to each other in that order.

Id. at ¶¶ 7-8. He conducted the same search in the Director's computer system, typing "those same words or phrases into the Search tool in the exact same way; i.e., with quotation marks around the words and also the phrases." *Id.* at ¶ 9. For those terms with one word, he understood that such a search would retrieve any document containing that word (or versions of the word); and for those terms with more than one word, he understood that such a search would retrieve any document containing that exact phrase; i.e., the words "endorse" and "provision" right next to each other in that order. *Id.* at ¶¶ 10-11. Mr. Choe located responsive documents and provided them to the ICE FOIA Office on November 30, 2017. *Id.* at ¶ 12. Finally, Mr. Choe states he "conducted those searches in a good faith effort to retrieve responsive documents." *Id.* at ¶ 13.

ERO

As explained in the declaration of Eliman Jussara Solorzano, Special Assistant to the Chief of Staff in ERO, on or about November 14, 2017, the ICE FOIA Office emailed her a copy of plaintiff's FOIA request. Solorzano Dec. at ¶ 2. Ms. Solorzano states that the ICE FOIA Office did not suggest any particular search terms to employ; as a result, and pursuant to her standard

practice, she reviewed the FOIA request to determine where to search for potentially responsive documents and which search terms to use. *See id.*

After reviewing the request, she determined the following:

[I]n response to request number 1, I included the email address “WH.gov,” indicating correspondence with the White House, because plaintiffs sought such communications. In response to request numbers 1, 2, 3 and 6, I included terms with “speech,” “belief,” or “association,” each of which connected separately to the term “removal,” because speech, belief and association appear some or all of those requests, and because plaintiff seeks information regarding the removal of individuals based on speech, belief or association. In response to request number 4, I included the term “policies” because that request includes the term policies and sought the agency’s implementation of Executive Orders. In response to all requests, I included the term “terrorist” connected to the term “removal,” because I understood that the policies sought by plaintiffs concern, in part, agency determinations that an individual poses a national security threat. Finally, I included the terms “Executive Order” and “13780” because plaintiffs seek polices promulgated as a result of two Executive Orders, including Executive Order 13,780.

Id. at ¶ 7. Thus, she concluded that the following search terms were reasonably calculated to return responsive documents: “removal policies” (each term of which she also searched for separately), “Removal terrorist” (each term of which she also searched for separately), “Executive Order” (each term of which she also searched for separately), “13780,” “WH.gov,” “Removal speech” (each term of which she also searched for separately), “Removal belief” (each term of which she also searched for separately), and “Removal association” (each term of which she also searched for separately). *Id.* at ¶ 5.

In the Outlook email system of ERO’s Deputy Executive Associate Director, she typed each of those words or phrases surrounded by quotation marks. *See id.* at ¶ 8. Specifically, for those terms with one word, such as “13780,” she typed “13780” in the Outlook Search tool, with quotation marks around those numbers. *Id.* She understood that such a search would retrieve any document containing the term 13780 (or any term encompassing those numbers). *Id.*

For those terms with more than one word, such as “endorse provision,” she conducted two separate searches. *Id.* at ¶ 9. First, she typed the phrase into the Outlook Search tool, with quotation marks around the entire phrase. *Id.* She understood that such a search would retrieve any document containing that exact phrase; i.e., the words “removal” and “policies” next to each other in that order. *Id.* Second, she typed each word separately, with quotations around each word and a space between them (i.e., “removal” “policies”). *Id.* She understood that such a search would retrieve any document containing both of those words, but in any order and in any place within the document (i.e., “removal” could appear on page 1 of a document and “policies” on page 2 of the same document; similarly, the search “removal” “speech” would retrieve documents with both words in the document but not necessarily connected). *Id.* In addition, each term, when typed

separately per the second search, would retrieve documents with any variation of that root term (i.e., “speech” would return “speeches,” “belief” would return “beliefs,” etc.). *Id.*

Ms. Solorzano located documents responsive to those searches, and provided those documents to the ICE FOIA Office on November 14, 2017. *Id.* at ¶ 10. She states, “[A]s I do with every FOIA search that I am asked to perform, I conducted these searches pursuant to my standard operating procedure, which I have developed over my years at ICE and which is designed to conduct searches in a good faith effort to retrieve responsive documents.” *Id.* at ¶ 11.

Regrettably, I also have learned that certain statements I made during a conference on July 31, 2019, based on information that had been provided by ICE personnel in anticipation of the conference, were incomplete or not correct. This letter and the accompanying declarations correct and clarify those statements, which concern the defendant components’ use of quotation marks around search terms used in searching for responsive documents. Before the conference, I had inquired whether ERO and the Office of the Director used quotation marks around any of the search terms, and had been informed by an agency point of contact based on certain internal agency communications that they did not. I so represented during the recent conference. After the conference, my agency point of contact learned that certain agency personnel who performed searches did, in fact, use quotation marks as part of their search. Those searches are described above and in the enclosed declarations, which, to the extent inconsistent with any statement on the record, serve to correct and supplement the record based on additional information I have obtained since the conference. I, as well as ICE, apologize for having inadvertently provided inaccurate information during the July 31 conference.

We understand that the use of quotation marks affects only ICE’s prior description of the search conducted in its Office of the Director. As described by Mr. Choe and Ms. Solorzano, in the electronic systems used by ICE, typing quotation marks around a search term causes the retrieval of documents that contain that specific word and variations of that word. Ms. Solorzano explains that typing quotation marks around one word, followed by a space, and then quotation marks around a second word (such as [“removal” “policies”]) will retrieve documents with both words (and variations of those words) in a document, in any order. Accordingly, within ERO, Ms. Solorzano: (1) searched for specific words and their variations (such as “13780”); (2) searched for exact phrases (such as “removal policies”); and (3) separated the words in each phrase, such that the words could appear in the same document in any order or place (such as “removal” “policies”). Moreover, the words and phrases were reasonably calculated to retrieve responsive documents, because the words appear in the FOIA request itself (such as “Executive Order” and “removal” and “policies”).

Within the Office of the Director, Mr. Choe, like Ms. Solorzano, searched for: (1) specific words and their variations (such as “exclude”); and (2) exact phrases (such as “foreign policy provision”). Unlike Ms. Solorzano, Mr. Choe did not conduct a second search that separated the words in each phrase. But as Mr. Choe explains, he searched for those phrases—“endorse provision,” “espouse provision,” and “foreign policy provision”—because those exact phrases appear in requests numbers 3, 4 and 6, as well as in the portions of the INA cited by plaintiff in

the FOIA request. Indeed, those provisions of the INA are the heart of plaintiff's FOIA request. Accordingly, the words and phrases were reasonably calculated to retrieve responsive documents.

I thank the Court for considering this matter, and, again, ICE representatives and I regret having inadvertently provided inaccurate or incomplete information during the July 31 conference.

Respectfully,

GEOFFREY S. BERMAN
United States Attorney

By: /s/ Ellen Blain
ELLEN BLAIN
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, NY 10007
Tel: (212) 637-2743
Email: ellen.blain@usdoj.gov

Encls.

cc: Counsel for Plaintiff (by ECF)