UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF HOMELAND SECURITY, and OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants.

Civil Action No. 1:22-cv-03003

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. On his first day in office, President Biden ordered the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence to conduct a review of the current use of social media identifiers in the visa vetting process. *See* Proclamation on Ending Discriminatory Bans on Entry to the United States, Proclamation No. 10141, 86 Fed. Reg. 7,005 § 3(d) (Jan. 20, 2021) ("Biden Proclamation" or "Proclamation"). This lawsuit under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeks the expedited processing and immediate release of records relating to that review.

2. Beginning in 2017, then–President Trump issued a number of executive orders and proclamations instituting discriminatory travel bans and calling for the development of what he had previously described as "extreme vetting" initiatives. Pursuant to one of President Trump's orders, the Department of State began requiring an estimated 14.7 million visa applicants a year to

disclose to the government all social media identifiers that they had used over the previous five years on any of twenty designated platforms.

3. Civil society organizations and others expressed concern that this social media registration requirement would chill online speech and association, invade visa applicants' privacy, and discourage people from traveling to the United States. They also warned that this dragnet collection of information would be both ineffective and inefficient, given the difficulty of understanding social media communications shorn of context.

4. When President Biden took office, he issued a proclamation calling for a review of the current use of social media identifiers in visa screening and vetting, and for a report summarizing this review to be completed within 120 days. Biden Proclamation § 3. More than a year later, however, the Biden administration has not publicly released that report. Instead, without any explanation, it has quietly continued the Trump-era State Department requirement.

5. To help the public learn more about the Biden administration's review, Plaintiff the Knight First Amendment Institute at Columbia University ("Plaintiff" or "Knight Institute") submitted identical FOIA requests (the "Request") to the State Department, the Department of Homeland Security, and the Office of the Director of National Intelligence on February 15, 2022.

6. The Knight Institute files this action because Defendants have denied its request for expedited processing and have failed to process and release records responsive to the Request within the timeline mandated by FOIA. The Knight Institute seeks the injunctive relief necessary to ensure Defendants' timely compliance with FOIA's requirements.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii), and 28 U.S.C. § 1331.

8. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. The Knight First Amendment Institute at Columbia University is a New York not-for-profit corporation based at Columbia University that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education. Public education is essential to the Knight Institute's mission. Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Knight Institute was established to conduct. The Knight Institute is a "person" within the meaning of 5 U.S.C. § 551(2).

10. Defendant Department of State ("State Department") is a department of the executive branch of the U.S. government and is an "agency" within the meaning of 5 U.S.C. § 552(f). The State Department has possession and control over requested records.

11. Defendant Department of Homeland Security ("DHS") is a department of the executive branch of the U.S. government and is an "agency" within the meaning of 5 U.S.C. § 552(f). DHS has possession and control over requested records.

12. Defendant Office of the Director of National Intelligence ("ODNI") is an independent agency established within the executive branch of the U.S. government and is an "agency" within the meaning of 5 U.S.C. § 552(f). ODNI has possession and control over requested records.

FACTUAL ALLEGATIONS

Background

13. In March 2017, then–President Trump signed an executive order that restricted the entry of individuals from certain Muslim-majority and African countries. In an accompanying memorandum, President Trump also ordered the Secretaries of State and Homeland Security to "implement protocols and procedures" that would "enhance" visa application vetting and

screening. *See* Memorandum for the Secretary of State, the Attorney General, the Secretary of Homeland Security, 82 Fed. Reg. 16,279, 16,279 (Apr. 3, 2017) (signed Mar. 6, 2017). These orders were President Trump's second attempt to enact the "Muslim ban" promised during his campaign, when he called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." *See* Jessica Taylor, *Trump Calls for 'Total and Complete Shutdown of Muslims Entering' U.S.*, NPR (Dec. 7, 2015), https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s.

14. Pursuant to these orders, the State Department issued rules requiring nearly all immigrant and nonimmigrant visa applicants to register their social media identifiers with the government (the "Registration Requirement"). This Registration Requirement extends to all social media identifiers applicants have used during the preceding five years on any of twenty specified platforms, including pseudonymous handles used to protect applicants and their families from reprisals by state and private actors for speaking about controversial issues online.

15. Under related policies, the State Department and DHS may retain information acquired through the Registration Requirement indefinitely, as well as share it broadly with other federal agencies and, in some circumstances, with foreign governments.

16. The State Department issued these rules even though civil society organizations, in comments filed in response to the agency's proposal, had warned that the mass collection, indefinite retention, and broad dissemination of visa applicants' social media information would infringe upon applicants' privacy and freedom of speech. They explained that the Registration Requirement would chill online speech and deter individuals from applying for visas to travel to the United States. In turn, these effects of the Registration Requirement would deprive U.S.

residents of opportunities to hear from and engage with those individuals in person and online, raising significant First Amendment concerns. Civil society organizations also pointed to the difficulty of understanding the significance of social media communications across languages and cultural contexts, and warned that social media surveillance was an unreliable way of assessing visa eligibility or threats to national security.

17. Immediately after taking office, President Biden issued a proclamation revoking President Trump's executive order and related proclamations restricting the entry of individuals from certain Muslim-majority and African countries. Biden Proclamation § 1. The Biden Proclamation also directed the Secretaries of State and Homeland Security, in consultation with the Director of National Intelligence, to conduct a review of current visa vetting procedures and to provide the president with a report of that review by May 20, 2021. *See* Biden Proclamation § 3. As relevant here, the Biden Proclamation asked for an assessment of whether "the current use of social media identifiers in the screening and vetting process . . . has meaningfully improved screening and vetting, and recommendations in light of this assessment." *See* Biden Proclamation § 3(d).

18. To date, the Biden administration has not revoked or otherwise revised the Registration Requirement in response to the agency review. To the contrary, on February 11, 2022, as part of a lawsuit challenging the Registration Requirement, the government informed the court that, after "several months reviewing certain policies related to the collection and use of social media identifiers in screening and vetting visa applicants," it had decided to continue with the Registration Requirement. *See* Defendants' Notice Regarding Policy Review and Response to Plaintiffs' Notice of Supplemental Authority at 1, *Doc Society v. Blinken*, No. 19 Civ. 3632

(D.D.C. Feb. 11, 2022) ("Defendants do not anticipate any imminent changes to the Department of State policy at issue in this litigation.").

19. As long as the Registration Requirement remains in effect, more and more people will be compelled to hand over sensitive and expressive information to the government. Given the significant First Amendment and privacy concerns surrounding the Registration Requirement, the public urgently needs the results of the Biden administration's review, including the agencies' assessment of whether and how the use of social media identifiers has "meaningfully improved" the visa vetting process. Biden Proclamation § 3(d). To bring this information to light, the Knight Institute filed the Request at issue here.

The FOIA Request

20. On February 15, 2022, the Knight Institute submitted the Request to the State Department, DHS, and ODNI, seeking the following records:[1]

a. A copy of the report ordered in Section 3 of the Biden Proclamation, as well as any cover letter, transmittal email, or document attached thereto; and

b. All records relating to the review ordered in Section 3(d) of the Biden Proclamation.

21. The Knight Institute requested expedited processing of the Request on the ground that it is an organization "primarily engaged in disseminating information" and there is a "compelling need" for the records sought because they contain information "urgent[ly]" needed "to inform the public concerning actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

22. The Knight Institute requested a waiver of document search, review, and duplication fees on the grounds that (a) disclosure of the requested records is in the public interest and is "likely to contribute significantly to public understanding of the operations or activities of

[1] A true and correct copy of the Request is attached hereto as Exhibit A.

the government and is not primarily in the commercial interest of the requester," *id.* § 552(a)(4)(A)(iii); (b) the Knight Institute is a "representative of the news media" within the meaning of FOIA and the records are not sought for commercial use, *id.* § 552(a)(4)(A)(ii)(II); and (c) the Knight Institute is an "educational . . . institution" whose purposes include "scholarly . . . research" and the records are not sought for commercial use, *id.*

Agency Responses

State Department

23. By email dated February 23, 2022, the State Department acknowledged receipt of the Request. The State Department noted that the Request was "similar to a previous request [the Knight Institute] submitted on June 3, 2021," and that "[t]he main difference in this new submission is the inclusion of Item 2." In light of this, the State Department asked if the Knight Institute would like the agency to treat the Request as a separate case or instead aggregate the submission with the previous request.

24. On March 3, 2022, Knight Institute attorney Carrie DeCell responded via email that the Knight Institute would like the State Department to treat the new submission as a separate case.

25. On March 3, 2022, following the Knight Institute's response, the State Department informed the Knight Institute by email that it had assigned the Request reference number F-2022-04927. It acknowledged that it had received the Request on February 15, 2022, and placed the Request in the "complex processing track." The State Department denied the Knight Institute's request for expedited processing but granted the Knight Institute's request for a fee waiver. The State Department also informed Plaintiff that "[t]his Office will not be able to respond within the 20 days provided by the statute due to 'unusual circumstances,'" namely "the need to search for and collect requested records from other Department offices or Foreign Service posts."

26. To date, the State Department has not released any records responsive to the Request or adequately explained its failure to do so.

DHS

27. By letter dated March 11, 2022, DHS acknowledged that it had received the request on February 15, 2022, and assigned it reference number 2022-HQFO-00721. DHS denied the Knight Institute's request for expedited processing but "conditionally grant[ed]" the Institute's request for a fee waiver. DHS also "invoke[d] a 10-day extension for [the Knight Institute's] request pursuant to 6 C.F.R. Part 5 § 5.5(c)."

28. To date, DHS has not released any records responsive to the Request or adequately explained its failure to do so.

ODNI

29. By letter dated February 24, 2022, ODNI acknowledged that it had received the Request on February 16, 2022, and assigned it reference number DF-2022-00153. ODNI denied the Knight Institute's request for expedited processing but granted the Knight Institute's request for a fee waiver.

30. To date, ODNI has not released any records responsive to the Request or adequately explained its failure to do so.

* * *

31. Under FOIA, an agency has twenty working days to respond to a request. *See* 5 U.S.C. § 552(a)(6)(A)(i). The agency "may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester." *Id.* § 552(a)(6)(A)(ii)(I). In addition, if there are "unusual circumstances," an agency may extend the time limit by no more than ten working days. *Id.* § 552(a)(6)(B)(i). More

than 38 working days have passed since the Knight Institute filed the Request. Thus, these statutory time periods, taking into account any applicable tolling period, have elapsed.

32. Plaintiff has exhausted all administrative remedies because Defendants have failed to comply with the time limit for responding to the Request under FOIA.

CAUSES OF ACTION

33. Defendants' failure to grant Plaintiff's request for expedited processing violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.

34. Defendants' failure to process the Request as soon as practicable violates FOIA, 5 U.S.C. § 552(a)(6)(E)(iii), and Defendants' corresponding regulations.

35. Defendants' failure to make and communicate a determination whether to comply with the Request within the statutory time limit violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and Defendants' corresponding regulations.

36. Defendants' failure to make records responsive to the Request promptly available violates FOIA, 5 U.S.C. § 552(a)(3)(A), (a)(6)(A), and Defendants' corresponding regulations.

37. Defendant DHS's failure to unconditionally grant Plaintiff's request for a waiver of search, review, and duplication fees violates FOIA, 5 U.S.C. § 552(a)(4)(A), and Defendant DHS's corresponding regulations.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

A. Order Defendants to conduct a thorough search for records responsive to the Request;

B. Order Defendants to immediately process and release any responsive records;

C. Enjoin Defendant DHS from charging Plaintiff search, review, or duplication fees for the processing of the Request;

D. Award Plaintiff its reasonable costs and attorney's fees incurred in this action; and

E. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ *Anna Diakun*

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April 12, 2022