IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, 535 West 116th Street 314 Low Library New York, NY 10027, Plaintiff v. UNITED STATES DEPARTMENT OF HOMELAND SECURITY, 245 Murray Lane, SW Washington, DC 20528, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, 500 12th Street, SW Washington, DC 20536, and UNITED STATES CUSTOMS AND BORDER PROTECTION, 1300 Pennsylvania Avenue, NW Washington, DC 20229, Defendants.	Civil Action No. 17-cv-548-TSC

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff Knight First Amendment Institute at Columbia University (the "Knight Institute"), by and through its attorneys, hereby complains as follows for its Amended Complaint against

Defendants United States Department of Homeland Security ("DHS"), United States Immigration and Customs Enforcement ("ICE"), and United Stated Customs and Border Protection ("CBP"):

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for injunctive and other appropriate relief requiring Defendants to grant expedited review of the FOIA Request (the "Request") submitted by the Knight Institute to DHS and ICE on March 15, 2017, and to CBP on March 22, 2017.

2. The Request seeks disclosure of records concerning suspicionless searches of individuals' electronic devices at the nation's borders.

3. Directives issued in 2009 purport to authorize officers of CBP and ICE to search travelers' electronic devices—including cell phones, tablets, and laptop computers—at the U.S. border without individualized suspicion, and to detain those devices indefinitely. Under the directives, CBP and ICE officers have seized and searched the electronic devices of thousands of individuals, including U.S. citizens, without individualized suspicion. The number of searches of electronic devices at the border has risen sharply since 2015, with a marked increase in the first six months of 2017.

4. Among the individuals whose electronic devices have been seized and searched are several journalists whose communications with confidential sources were subject to government review. For example, CBP officers reportedly detained and interrogated French–American photojournalist Kim Badawi while searching the contents of his cell phone, including his private photos and his WhatsApp messages with a Syrian refugee source.

5. Additionally, news reports indicate that border officials appear to be targeting Muslims, including U.S. citizens who are Muslim, for searches of their electronic devices at the border.

6. The indiscriminate search of Americans' electronic devices at the border raises serious constitutional questions under both the First and Fourth Amendment. People today store their most intimate information on their electronic devices, reflecting their thoughts, explorations, activities, and associations. Subjecting that information to unfettered government scrutiny invades the core of individual privacy and threatens free inquiry and expression. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (noting that a cellphone may contain "the sum of an individual's private life" and holding that police cannot search a cellphone in a search incident to arrest without first obtaining a warrant based on probable cause).

7. The Request seeks information necessary for the public to fully understand the government's policies and practices relating to searches of electronic devices at the border. Specifically, it seeks statistical, policy, and assessment records regarding the government's searches. Moreover, the Request seeks expedited processing, given the urgency of the ongoing public debate.

8. On March 28, 2017, ICE granted the Knight Institute's request for expedited processing of its FOIA request.

9. On March 31, 2017, DHS denied the Knight Institute's request for expedited processing.

10. CBP failed to respond to the Knight Institute's request within the ten days required by FOIA, 5 U.S.C. § 552(a)(6)(E)(ii)(I).

11. All Defendants have failed to produce records or information, and indeed have failed to make any substantive response to the Request.

12. Injunctive relief is appropriate to ensure Defendants' timely compliance with FOIA's requirements.

JURISDICTION AND VENUE

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

14. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B).

PARTIES

15. The Knight First Amendment Institute 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. Research and public education are 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 5 U.S.C. § 551(2).

16. DHS is an "agency" within the meaning of 5 U.S.C. § 552(f). ICE and CBP are components of DHS. DHS and these components have possession and control over some or all of the requested records.

FACTUAL ALLEGATIONS

17. On March 15, 2017, the Knight Institute submitted identical versions of the Request to DHS and one of its components, ICE.

18. The Knight Institute submitted an identical version of the same Request to CBP, another DHS component, on March 22, 2017.[1]

19. On or around March 28, 2017, ICE referred the Request to DHS's FOIA Office and to CBP, and indicated that information responsive to the Request is "under the purview" of the DHS FOIA Office and CBP.

20. On or around March 31, 2017, DHS referred the Request to its Office of the Inspector General ("OIG"), and to the Transportation Security Administration ("TSA"), another DHS component.

21. The Request seeks the following records:[2] 1) records from Defendants' TECS database containing information about the number and reasons for each search, detention, retention, or sharing of individuals' electronic devices or the information accessible on them since fiscal year 2012; 2) documents relating to each instance since fiscal year 2012 in which CBP or ICE searched, detained, retained, or shared an electronic device or the information accessible on it; 3) revisions of or documents supplementing or superseding the CBP and ICE Directives concerning border searches of electronic devices; 4) certain documents relating to any reviews of CBP's or ICE's policies or practices concerning electronic device searches; 5) documents concerning or relating to complaints filed by individuals or organizations about CBP's or ICE's search, review, retention, or sharing of the information on travelers' electronic devices; 6) documents reflecting policies, practices, or procedures concerning how CBP officers handle "privileged or other sensitive materials," including "work-related information carried by

[1] Although identical versions of the Request were submitted to DHS, CBP and ICE on March 15, 2017, the Request submitted to CBP may not have been received by the responsible FOIA Officer. Out of an abundance of caution, the Knight Institute resubmitted the Request to CBP on March 22, 2017.

[2] A copy of the Request is attached hereto as Exhibit A.

journalists" as described in the CBP Directive concerning border searches of electronic devices; and 7) documents reflecting policies, practices, and procedures concerning CBP's anti-discrimination policy as applied to discretionary electronic device searches.

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

23. Since the beginning of the year, reports of suspicionless searches of electronic devices at U.S. borders and international airports have abounded, with a significant increase under the new administration. Certain of those reports detail instances in which CBP officers exerted pressure or outright force to obtain electronic devices and passcodes.

24. The public has been denied the information necessary to fully understand the government's searches of electronic devices at the border. These records are urgently needed to inform the ongoing debate over the wisdom and lawfulness of those searches.

AGENCY RESPONSES AND ADMINISTRATIVE APPEALS

25. By email dated March 24, 2017, CBP acknowledged receipt of the Request. CBP did not communicate any decision regarding the Knight Institute's request for expedited processing.

26. By email dated March 28, 2017, ICE acknowledged receipt of the Request and granted expedited processing of the Request.

27. By email and letter dated March 31, 2017,[3] DHS denied expedited processing of the Request. It did not explain its rationale for denying expedited processing even though ICE had granted the request for expedited processing.

28. DHS's response further stated that "unusual circumstances" existed to excuse its failure to produce records for an additional ten days under 5 U.S.C. § 552(a)(6)(B). However, DHS's stated reason for invoking this section—that the Request "seeks documents that will require a thorough and wide-ranging search" —does not constitute "unusual circumstances" as defined by 5 U.S.C. § 552(a)(6)(B)(iii).

29. On or around March 31, 2017, DHS referred the Request to TSA, which acknowledged receipt of the Request and denied expedited processing on April 4, 2017. TSA did not explain its rationale for denying expedited processing despite ICE's grant of the request for expedited processing.

30. TSA's response further stated that "unusual circumstances" existed to excuse its failure to produce records for an additional ten days under 5 U.S.C. § 552(a)(6)(B). However, TSA did not specify the "unusual circumstances" for invoking this section, and its letter merely set forth the statutory definition of "unusual circumstances" without stating which, if any, of these circumstances applied to the Request.

31. No records responsive to the Request have been released by DHS, CBP, ICE, or TSA.

32. No substantive response regarding the production of records or information responsive to the Request has been made by DHS, CBP, ICE, or TSA.

[3] DHS initially acknowledged receipt of the Request by email dated March 16, 2017, but it did not at that point communicate any decision regarding the Knight Institute's request for expedited processing.

33. The Knight Institute's requests for expedited processing to DHS and CBP are ripe for adjudication in this Court, because each of these defendants has taken "action to deny or affirm denial of a request for expedited processing" or failed "to respond in a timely manner to such a request." 5 U.S.C. § 552(a)(6)(E)(iii). DHS denied the Knight Institute's request for expedited processing on March 31, 2017. CBP did not respond to the Knight Institute's request for expedited processing within ten days after the March 22, 2017 date of the request, as required by 5 U.S.C. § 552(a)(6)(E)(ii)(I).

FIRST CAUSE OF ACTION – FAILURE TO GRANT EXPEDITED PROCESSING

Against DHS and CBP

34. The Knight Institute repeats and incorporates herein by reference the allegations of Paragraphs 1 through 33.

35. DHS's and CBP's denials of expedited processing of the Request or failure to respond to the Knight Institute's request for expedited processing violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.

36. Injunctive relief is appropriate to remedy DHS's and CBP's failures to grant expedited processing of the Request.

SECOND CAUSE OF ACTION – FAILURE TO PRODUCE RECORDS

Against All Defendants

37. The Knight Institute repeats and incorporates herein by reference the allegations of Paragraphs 1 through 36.

38. Defendants' failure to process the Request and to make responsive records available "as soon as practicable" violates FOIA, 5 U.S.C. § 552(a)(6)(E)(iii), and Defendants'

corresponding regulations. Defendants' failure to process the Request "promptly," *id.* § 552(a)(3)(A), also violates FOIA as well as Defendants' corresponding regulations.

39. Injunctive relief is appropriate to remedy Defendants' failure to process the Request in a timely manner, as required by FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Knight First Amendment Institute at Columbia University respectfully requests that judgment be entered against Defendants United States Department of Homeland Security, United States Immigrations and Customs Enforcement, and United States Customs and Border Protection, and that this Court:

A. Order DHS and CBP to grant expedited processing of the Request;

B. Order all Defendants immediately to release to the Knight Institute the records sought in the Request;

C. Retain jurisdiction of this action to ensure no agency records are wrongfully withheld, and order Defendants to disclose any wrongfully withheld records;

D. Award the Knight Institute its reasonable costs and reasonable attorneys' fees incurred in this action; and

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

Dated: April 19, 2017

Respectfully submitted,

By: /s/ *Matthew S. Hellman*

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