U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
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May 15, 2018

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 Defendant the United States Department of State ("State") in response to Plaintiffs' letter dated May 14, 2018. As explained below, Plaintiffs both misconstrue the number of responsive documents State may potentially be required to review in this matter, and prematurely ask the Court for a ruling. That is because – by Thursday, May 17 – State can identify the precise number of responsive pages it must review for necessary withholdings of FOIA-exempt content, allowing the parties (and if necessary, the Court) to determine a production schedule based on concrete numbers.

A. As of May 14, 2018, State Had Conducted an Initial Review of More Than 27,809 Pages Out of an Unknown Number That Must Be Reviewed for Responsiveness

As indicated in the parties' April 9, 2018 Joint Status Report, after its initial search, State identified 850 potentially responsive emails and 674 pages of other potentially responsive records. Joint Status Report ¶ 19, Dkt. No. 48. These numbers reflect State's preliminary estimates of the documents retrieved in searches. Each of those documents must first be reviewed to assess whether they are responsive to Plaintiffs' FOIA Request, and then uploaded into State's software system for more detailed processing to identify and withhold any documents or portions of documents that fall within one or more statutory exemptions from FOIA's disclosure requirements.[1]

During yesterday's status conference, in response to the Court's request for an update since the parties' last submissions to the Court, the government stated that State had thus far

[1] In the course of further reviewing the documents, it also may be determined that some are duplicates or, upon further inspection, are not actually responsive to Plaintiffs' FOIA Request.

reviewed 475 records for responsiveness to the Knight Institute's FOIA request, which totaled 27,809 pages. As the government stated, this confirms that one document does not necessarily equal one page.[2]

State conducted this initial review to try to eliminate any non-responsive documents, which State believed could comprise the vast majority of retrieved documents because Plaintiffs' FOIA request was so broad.[3] This responsiveness review means that Plaintiffs will receive relevant records much more quickly than Plaintiffs would otherwise because (a) State will have fewer documents to review for processing; and (b) only material that is more likely responsive will be ingested into the document review software, thus speeding the upload time.

Immediately after the status conference, the parties began conferring as ordered by the Court. Counsel for Plaintiffs asked for an index of the 27,809 pages; the government stated that Plaintiffs may not need that, because State has determined that 39 of those 475 records (constituting 990 pages out of the 27,809 total) are potentially responsive to the Knight Institute's FOIA Request. Therefore, out of this set of documents that had been initially reviewed for responsiveness, State must conduct further review of only 990 pages (39 documents) for potential redactions of FOIA-exempt portions before production.

B. State Can Determine the Number Of Responsive Pages by May 17, 2018

As discussed at the conference, State is uploading documents into its review software to determine the precise number of pages at issue. State can determine that number by May 17, 2018. Accordingly, State respectfully submits that Plaintiffs' submission is premature.

In addition, State has determined that most of these documents contain classified material, and it is highly likely that a significant percentage of these records contain inter-agency information, necessitating coordination with other federal agencies for their review for FOIA-exempt content. These additional layers of review will add anywhere from several weeks to a few months to the processing time required for this volume of records.

For those reasons and for reasons set forth in State's prior submission, *see* Dkt. No. 52, reviewing the entire universe of responsive pages by June 15 (as Plaintiffs now propose) is not practicable. Instead, State respectfully requests that the Court endorse State's proposed schedule, requiring it to perform 300 pages of FOIA processing per month.

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[2] To the extent Plaintiffs argue that the government indicated that State still had to process those 475 records, or 27,809 pages, for responsiveness, the government disagrees and believes that Plaintiffs misunderstood the Government's explanation; the initial responsiveness review of those documents is complete, but full FOIA processing of the subset of responsive documents is not.

[3] Moreover, as of today, State has completed reviewing all retrieved records for responsiveness. Therefore, and as noted below, State is now uploading documents that are most likely responsive into its review software.

We thank the Court for considering this request.

Respectfully,

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