UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiff, vs. 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.	17 Civ. 7572 (ALC) ECF Case **DECLARATION OF PAUL P. COLBORN**

I, Paul P. Colborn, declare as follows:

1. I am a Special Counsel in the Office of Legal Counsel ("OLC") of the United States Department of Justice (the "Department") and a career member of the Senior Executive Service. I joined OLC in 1986, and since 1987 I have had the responsibility, among other things, of supervising OLC's responses to requests it receives under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. I submit this declaration in support of the Government's proposed production schedule. The statements that follow are based on my personal knowledge, as well as on information provided to me by OLC attorneys and staff working under my direction, and by others with knowledge of the documents at issue in this case.

2. The purpose of this declaration is to "explain[] in more detail the bases for [OLC's] proposed production schedule." *See* ECF No. 65, at 1.

3. This declaration provides the basis for OLC's conclusion that Plaintiffs' requested production deadline would be exceedingly burdensome, impracticable, and not feasible to adhere to without severely compromising OLC's ability to meet existing FOIA litigation deadlines and directly disadvantaging other FOIA requesters, as well as OLC's ability to perform its duties as

legal adviser to the President and the Executive Branch. For the reasons set forth below, OLC simply does not currently maintain the resources to achieve Plaintiffs' proposed deadline to complete processing of its FOIA request without adversely impacting these other obligations, including other FOIA requests that have been granted expedited processing or are in litigation.

OLC RECEIPT OF PLAINTIFFS' FOIA REQUESTS

4. By letter dated August 7, 2017 and received by OLC the following day, Plaintiffs submitted a FOIA request to OLC and others seeking six categories of records "concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations." Plaintiffs also requested expedited processing for the request under two standards pursuant to Department regulations: 28 C.F.R. § 16.5(e)(1)(ii), (iv). A copy of Plaintiff's FOIA request ("FOIA Request") is attached hereto as Exhibit A.

5. By letter dated August 21, 2017 and transmitted via email the same day, I acknowledged receipt of the FOIA Request by OLC and informed Plaintiff that it had been assigned tracking number FY17-275. I further informed Plaintiffs that the request for expedited processing had been denied and the FOIA Request had been placed in OLC's complex processing track. A copy of OLC's acknowledgment letter is attached hereto as Exhibit B.

6. Through negotiations with counsel, Plaintiff narrowed its request with respect to OLC to parts 1-5 and requested that OLC limit its email search to records responsive to part 1.

OLC'S LEGAL ADVICE ROLE AND ITS PROCESSING OF FOIA REQUESTS

7. The principal function of OLC is to assist the Attorney General in his role as legal adviser to the President of the United States and to departments and agencies of the Executive Branch. OLC provides advice and prepares opinions addressing a wide range of legal questions involving the operations of the Executive Branch.

8. OLC is a very small component of the Department of Justice, employing approximately 18 to 25 attorneys at any one time, although staffing levels have varied as a result of vacancies and fiscal circumstances. During the past year, the Office has had eight to twelve line attorneys (Attorney-Advisers), as well as four more senior attorneys with the title of Senior

Counsel or Special Counsel, and four Deputy Assistant Attorneys General. Additionally, OLC's Assistant Attorney General was confirmed by the Senate and began supervising OLC on November 13, 2017. Since 2015, OLC has also employed one attorney at the line attorney level having the title FOIA and Records Management Attorney (the "FOIA Attorney"). OLC also employs four paralegals, with one having the title of Supervisory Paralegal and one having the title of Lead Paralegal.

9. With the exception of the FOIA Attorney, the primary responsibility of the Office's attorneys, including its Attorney-Advisers, is to assist in the preparation of the Office's legal advice to the President, the Attorney General, and the agencies and departments of the Executive Branch. The work of processing and responding to FOIA requests directed or referred to OLC, as well as the work of coordinating OLC's FOIA litigation matters with the Department's litigating components, is carried out by the FOIA Attorney, under my supervision and with the assistance of OLC's paralegals. The paralegals likewise have a number of other important duties, including research and cite-checking assistance in connection with the Office's legal advice; processing the Department's interactions with the Federal Register; maintaining records relating to Attorney General orders and Department regulations; and assisting with litigation or congressional oversight in connection with which the Office is playing a role, including FOIA litigation.

10. Over the previous several years, on average OLC has received between 75 and 125 FOIA requests per fiscal year. Despite the limited resources available to OLC for processing FOIA requests, over the last five years OLC has processed the substantial majority of requests received, reduced a significant outstanding FOIA processing backlog, and maintained a relatively small backlog. In Fiscal Year 2012 (October 1, 2011 – September 30, 2012), OLC received 130 FOIA requests and had a year-end backlog of 23 requests. In FY2013, OLC received 86 FOIA requests and had a year-end backlog of 34 requests. In FY2014, OLC received 91 FOIA requests and had a year-end backlog of 35 requests. In FY2015, OLC received 111 FOIA requests and had a year-end backlog of 49 requests. In FY2016, OLC

received 111 FOIA requests and had a year-end backlog of 60 requests. In total over the course of those five years, OLC received 529 FOIA requests and processed 503 FOIA requests, notwithstanding the limited resources of the Office, the sequester, the Department's hiring freeze, and the government shutdown.

11. In contrast, in FY2017 (October 1, 2016 – September 30, 2017), OLC received 284 FOIA requests. This represents more than two and a half times the average number of requests received per year over the previous five years, imposing a considerable additional burden on OLC's ability to meet its FOIA obligations. This increased burden has continued during this fiscal year. Since October 1, 2017, OLC has received 130 new FOIA requests, putting it on pace to once again receive over 200 requests in FY2018.

EXPEDITED PROCESSING

12. In processing requests, OLC acts pursuant to the Department's FOIA regulations, which state that "[c]omponents ordinarily will respond to requests according to their order of receipt." 28 C.F.R. § 16.5(a). OLC uses multitrack processing, as permitted by 28 C.F.R. § 16.5(b), and designates all requests into the Expedited, Simple, or Complex processing tracks. Accordingly, OLC's general practice is to assign requests to begin search and processing within each track according to their order of receipt. Typically, an initial search is conducted at that time, usually by searching OLC's internal database of final legal advice and/or by inquiring with OLC's attorneys to determine whether responsive records are likely to exist. Subsequent searching, including the identification of custodians and development of keywords for electronic searches, is then carried out as needed based on the results of that initial search. These subsequent searches are prioritized by processing track, date of receipt, and available resources.

13. Because some requests are by their nature less complicated than others—including because records responsive to some requests may be easier to locate and identify, easier to process, or require less intra- or inter-agency consultation—the processing of requests may be completed out of order, notwithstanding the order of their assignment for processing. For example, although the expedited track is not further subdivided by complexity, the nature of

this process is such that a simple or narrowly-targeted expedited request can often be closed fairly quickly if the initial search identifies few or no potentially responsive records.

14. In the absence of a court order establishing deadlines that require a later-received request to be processed out of order ahead of earlier-received requests, OLC's policy is to process FOIA requests in order according to Department regulations—that is, in the order of receipt within their respective queue—even where a request is the subject of litigation, so as not to unfairly favor more litigious requesters over other members of the public who have made FOIA requests but lack the interest, resources, or expertise to engage in litigation regarding OLC's response to their FOIA request. This policy is intended to ensure that OLC's limited resources for FOIA processing are allocated and prioritized in a manner that is fair to all FOIA requesters.

15. When OLC received the FOIA Request on August 8, 2017, OLC had 234 pending FOIA requests. In addition, since receiving plaintiff's request, OLC has granted expedited processing to 12 additional, later-received requests.

16. OLC has since been able to close some of these other pending requests. Accordingly, there are currently 208 earlier-received requests in OLC's queue, and 11 later-received expedited requests.

17. Many of these earlier-received or expedited FOIA requests are no less complicated than Plaintiff's request, and seek records on issues that are similarly high-profile. For example, FY13-056 seeks records "regarding all programs of warrantless mass or dragnet surveillance that operate by impact and effect to collect information and date on United States Persons"; FY14-042 seeks multiple categories of records "concerning the policies and procedures governing the acquisition, retention, dissemination, and use of information gathered as part of various government surveillance programs"; FY14-088 seeks any records "that helped provide the legal basis for the Obama administration's determination that the 2001 Authorization for Use of Military Force against al Qaida and the Taliban and the 2002 AUMF against Iraq now allow the U.S. military to conduct air strikes, drone missile attacks and other military actions

against Islamic State (aka the Islamic State of Iraq and the Levant) forces in both Iraq and Syria." Several expedited requests seek records relating to the various Executive Orders titled "Protecting the Nation from Foreign Terrorist Entry into the United States."

18. The average processing time for complex requests closed by OLC in FY2016 was approximately 210 business days, or 10.5 months. Despite the massive increase in incoming requests, the average processing time for complex requests closed in FY2017 was approximately 155 business days, or nearly 8 months.

OLC'S FOIA LITIGATION DOCKET

19. In addition to a substantial FOIA request processing workload, OLC has increasingly become the subject of FOIA litigation, as requesters turn to the courts more often and more quickly than in prior years.

20. Including this case, there are more than 35 active lawsuits seeking OLC records in which OLC is currently a named defendant or one of the relevant DOJ components in a suit in which the Justice Department is a named defendant. Of these cases, more than 20 were—like this one—filed within calendar year 2017 and seek responses to requests that were also filed in calendar year 2017. These attempts to bypass the ordinary FOIA processing queue by seeking court-ordered production deadlines far in advance of the ordinary course do significant damage to OLC's ability to complete its FOIA processing in a fair and orderly manner. Every time OLC must allocate its sparse FOIA resources to defending these cases or attempting to meet a court-ordered production deadline, the result is further delay suffered by all other requesters.

21. A non-exhaustive list of OLC's current litigation obligations with court-ordered deadlines between now and the end of July is as follows:

Case	Action Required	Due date(s) before 7/31/2018
Leopold v DOJ, SDNY No. 16-cv-001	Rolling quarterly production	5/29/2018
Make the Road New York v. DHS, et al., EDNY No. 18-cv-2445	Answer complaint	5/29/2018

Case	Action Required	Due date(s) before 7/31/2018
American Oversight v. DOJ, DDC No. 18-cv-224	File joint status report	5/30/2018
Cora Currier v. DHS et al., NDCal No. 17-cv-01799	Rolling monthly production	5/31/2018 6/30/2018 7/31/2018
Protect Democracy Project v. DOJ, DDC No. 17-cv-00815	Rolling monthly production	5/31/2018 6/30/2018 7/31/2018
James Madison Project v. DOJ, DDC No. 17-cv-390	Rolling monthly production	5/31/2018 6/30/2018 7/31/2018
Judicial Watch v. DOJ, DDC No. 18-cv-722	File status report	6/8/2018
Freedom of the Press Foundation et al. v. DOJ, et al., SDNY No. 17-cv-3943	Complete search and file status report	6/8/2018
Democracy Forward Found. v. DOJ, DDC No. 18-cv-641	File status report	6/11/2018
Democracy Forward Found. v. DOJ, DDC No. 18-cv-376	Complete search	6/18/2018
NYT & Savage v. DOJ, SDNY No. 17-cv-1946	Rolling production	7/23/2018

OLC'S PROCESSING OF PLAINTIFF'S FOIA REQUEST

22. OLC has been working diligently to provide a final response to Plaintiff's FOIA request as soon as practicable.

23. OLC has already completed an initial electronic search for records that may be responsive to Plaintiff's FOIA request, and conducted a first review for responsiveness. Although many documents identified so far as potentially responsive may ultimately be determined not be responsive to the request, this first review has identified over 200 potentially responsive pages.

24. The nature of the request and a cursory review of the potentially responsive records identified to date has made clear that the vast majority contain material exempt from mandatory disclosure under the FOIA, particularly under Exemption Five, 5 U.S.C. §552(b)(5).

This includes material that is subject to the attorney-client, deliberative process, and presidential communication privileges. The records will require close inspection to avoid inadvertently releasing exempt material, and may also require consultation with other government entities with equities in the documents. It is not possible for OLC to make release determinations on behalf of these other entities, and consultation is required before any release determination may be made, pursuant to practice and regulation. *See* 28 U.S.C. § 16.4(d).

25. OLC has been processing, and continues to process, Plaintiff's FOIA request as quickly as practicable. For the reasons discussed above, it would be unduly burdensome, impracticable, and infeasible to complete the processing of Plaintiff's FOIA request within the abbreviated time frame it seeks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed: May 25, 2018, Washington, D.C.

Paul P. Colborn

PAUL P. COLBORN

Exhibit A

17-275 Rec'd 8/8/17

KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

CAROLINE M. DECELL
Staff Attorney

August 7, 2017

Dr. James V.M.L. Holzer
Deputy Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW
STOP-0655
Washington, DC 20528-0655
Email: foia@hq.dhs.gov

FOIA Officer
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Room 3.3D
Washington, DC 20229

FOIA Officer
U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW
STOP-5009
Washington, DC 20536-5009
Email: ice-foia@dhs.gov

FOIA Officer
U.S. Citizenship and Immigration Services
National Records Center, FOIA/PA Office
P. O. Box 648010
Lee's Summit, MO 64064-8010
Email: uscis.foia@uscis.dhs.gov

Director of Public Affairs
Office of Public Affairs
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Laurie Day
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue NW
Washington, DC 20530-0001

Melissa Golden
Lead Paralegal and FOIA Specialist
Office of Legal Counsel
Department of Justice
Room 5511, 950 Pennsylvania Avenue NW
Washington, DC 20530-0001

FOIA Officer
U. S. Department of State
Office of Information Programs and
Services
A/GIS/IPS/RL
SA-2, Suite 8100
Washington, DC 20522-0208

Re: Freedom of Information Act Request
Expedited Processing Requested

To Whom It May Concern:

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") submits this request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations.[1]

I. Background

During his 2016 presidential campaign, then-candidate Donald Trump evoked a Cold War–era "ideological screening test" for admission into the United States and proclaimed that a "new screening test" involving "extreme, extreme vetting" was overdue.[2] A week after his inauguration,

[1] The Knight First Amendment Institute is a New York not-for-profit organization based at Columbia University that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education.

[2] Karen DeYoung, *Trump Proposes Ideological Test for Muslim Immigrants and Visitors to the U.S.*, Wash. Post (Aug. 15, 2016), https://perma.cc/G9SC-EPHT.

President Trump issued Executive Order 13,769, declaring that the United States "must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles" and "cannot, and should not, admit those who do not support the Constitution." Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

The President issued a revised order on March 6, 2017. It directed the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to develop a more robust vetting program for aliens seeking entry into the United States, involving, among other things, "collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017).

The Knight Institute seeks to inform the public about any new vetting policies and about the government's understanding of its authority to base immigration decisions on individuals' speech, beliefs, or associations. It also seeks to report on the government's use of existing statutory provisions, including the "endorse or espouse provisions"[1] and the "foreign policy provision,"[2] to exclude or remove individuals from the United States on these grounds.

II. Records Requested

The Knight Institute requests the following records created on or after May 11, 2005:

1. All directives, memoranda, guidance, emails, or other communications sent by the White House[3] to any federal agency

---

[1] Any alien who "endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(VII), as well as any alien who is a representative of "a political, social, or other group that endorses or espouses terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb) (together, the "endorse or espouse provisions") is deemed inadmissible. The endorse or espouse provisions provide a basis for removal as well. *See* 8 U.S.C. § 1225(c) (expedited removal of arriving aliens); 8 U.S.C. § 1227(a)(4)(B) (removal of admitted aliens); *see also* 8 U.S.C. § 1158(b)(2)(A)(v) (removal of refugees otherwise qualified for asylum on similar grounds).

[2] Any "alien whose entry or proposed activities in the United States . . . would have potentially serious adverse foreign policy consequences" is inadmissible, 8 U.S.C. § 1182(a)(3)(C)(i), even, under certain circumstances, where the determination of inadmissibility is based on "beliefs, statements or associations [that] would be lawful within the United States," 8 U.S.C. § 1182(a)(3)(C)(iii). *See also* 8 U.S.C. §§ 1225(c)(1), 1227(a)(4)(C) (providing for expedited removal and removal on the same grounds).

[3] The term "White House" includes, but is not limited to, the Executive Office of the President, the Office of the President, the White House Office, the Office of Counsel to the President, the National Security Council, the Office of the Vice President, the Cabinet, as well as any government officer who directly advises the President or the Vice President as to the legality of, or authority to undertake, any executive action.

since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude[1] or remove individuals from the United States.

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," including:

   a. Statistical data or statistical reports regarding such application, waiver, or contemplated application or waiver;

   b. Records reflecting the application, waiver, or contemplated application or waiver of the endorse or espouse provisions or foreign affairs provision by an immigration officer, a border officer, a Department of Homeland Security official, or a Department of Justice official;

   c. Records concerning any determination made by the Attorney General pursuant to 8 U.S.C. § 1225(c) regarding

[1] As used herein, the term "exclude" includes denying a visa, revoking a visa, or otherwise deeming inadmissible for entry into the United States.

the admissibility of arriving aliens under the endorse or espouse provisions or the foreign policy provision;

d. Department of Homeland Security and Department of Justice records concerning consultation between the Secretary of State, the Secretary of Homeland Security, and/or the Attorney General (or their designees) relating to any waiver or contemplated waiver of the endorse or espouse provisions pursuant to 8 U.S.C. §§ 1158(b)(2)(v), 1182(d)(3)(A), or 1182(d)(3)(B)(i); and

e. Notifications or reports from the Secretary of Homeland Security or the Secretary of State concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. § 1182(d)(3)(B)(ii).

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please disclose all segregable portions of otherwise exempt records. *See* 5 U.S.C. § 552(b).

We also ask that you provide responsive electronic records in their native file format or a generally accessible electronic format (*e.g.*, for tabular data, XLS or CSV). *See* 5 U.S.C. § 552(a)(3)(B). Alternatively, please provide the records electronically in a text-searchable, static-image format (*e.g.*, PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

III. Application for Expedited Processing

The Knight Institute requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). There is a "compelling need" for the records sought because the information they contain is "urgent[ly]" needed by an organization primarily engaged in disseminating information "to inform the public about actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II).

A. The Knight Institute is primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

The Knight Institute is "primarily engaged in disseminating information" within the meaning of FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II).

The Institute is a newly established organization at Columbia University dedicated to defending and strengthening the freedoms of speech and the

press in the digital age. Research and public education are central to the Institute's mission.[1] Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and the public are among the core activities the Institute was established to perform. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding public interest group that "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience" to be "primarily engaged in disseminating information").

B. The records sought are urgently needed to inform the public about actual or alleged government activity.

The requested records are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). The records sought concern the government's exclusion and removal of individuals from the United States based on their speech, beliefs, or associations. Such activity is ongoing, and the President has promised "strong programs" to ensure that the only individuals allowed in the United States are those who "want to love our country."[2] To this end, the President has mandated more robust vetting standards for all immigration programs, and has directed the Secretary of Homeland Security to report periodically on the development of these standards from now until October 2, 2017. Exec. Order No. 13,780, 82 Fed. Reg. at 13,215.

President Trump's executive orders on immigration have already been the subject of widespread debate,[3] and the development of new vetting policies will ensure continued public interest in the issue. Yet, lack of transparency with respect to current policies and practices stymies

---

[1] Mike McPhate, *Columbia University To Open a First Amendment Institute*, N.Y. Times (May 17, 2016), https://perma.cc/YC9M-LUAD; James Rosen, *New Institute Aspires To Protect First Amendment in Digital Era*, McClatchy DC (May 20, 2016), https://perma.cc/ZS2K-FPED.

[2] *Trump Defends Immigration Restrictions, Wants People 'Who Love Our Country,'* Chi. Trib. (Feb. 6, 2017), http://trib.in/2vIQeuw.

[3] *See, e.g.*, Mark Berman, *To Argue for Stricter Vetting of Immigrants, Trump Invokes Attacks Carried Out by U.S. Citizens*, Wash. Post (Feb. 28, 2017), https://perma.cc/PA4P-9KPP; Lauren Gambino & Tom McCarthy, *Trump Pressing Ahead with 'Extreme Vetting' in Spite of Court Battles*, The Guardian (June 6, 2017), https://perma.cc/Q6WT-XCRX; Jonathan E. Meyer, *The Consequences of Extreme Vetting*, Politico (May 5, 2017), https://perma.cc/9F5P-65PQ; S.A. Miller & Dave Boyer, *Trump Signs New Extreme Vetting Order*, Wash. Times (Mar. 6, 2017), https://perma.cc/2XME-QKFH; Michael Price, *Does the President's Immigration Order Violate the Rule Against Ideological Exclusion?*, Lawfare (Feb. 1, 2017), https://perma.cc/9BKA-X86L; Yeganeh Torbati, *State Department Proposes Collecting Immigrants' Social Media Handles in Move Toward 'Extreme Vetting,'* Bus. Insider (May 4, 2017), https://perma.cc/H4Q9-648S; *Trump Administration's Threat To Impose Ideological Test for Immigrants Evokes Dark Chapter in U.S. History, Says PEN America*, PEN America (Jan. 27, 2017), https://perma.cc/BVS8-8AV4.

meaningful debate over the form that the new "extreme vetting" policies may take.

The public's interest in the records is even greater because current practices may violate constitutional rights. The First Amendment encompasses the right "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences," *Red Lion Broad. v. FCC*, 395 U.S. 367, 390 (1969), and this "right to receive information" is implicated where the government excludes a non-citizen from the United States based on her speech or beliefs, *Kleindiest v. Mandel*, 408 U.S. 753, 763–65 (1972). At present, the public can neither determine the degree to which its First Amendment rights are being abridged under existing policies, nor assess how proposed policies could further curtail these rights moving forward.

For these reasons, the Knight Institute is entitled to expedited processing of this request.

IV. Application for Waiver or Limitation of Fees

The Knight Institute requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further the Knight Institute's commercial interest. The Institute will make any disclosed information available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA to ensure "that it be liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (citation omitted).

In addition, the Knight Institute requests a waiver of search and review fees on the ground that it qualifies as an "educational . . . institution" whose purposes include "scholarly . . . research" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute will perform scholarly research on the application of the First Amendment in the digital era. The Institute is in the midst of inaugurating a research program that will bring together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It will publish that commentary in many forms — in scholarly publications, in long-form reports, and in short-form essays.

Finally, the Knight Institute requests a waiver of search and review fees on the ground that it is a "representative of the news media" within the

meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute qualifies as a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that gathers information, exercises editorial discretion in selecting and organizing documents, "devises indices and finding aids," and "distributes the resulting work to the public" is a "representative of the news media" for purposes of FOIA); *Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282, 287–88 (D. Conn. 2012); *ACLU*, 321 F. Supp. 2d at 30 n.5. Courts have found other non-profit organizations with research and public education missions similar to that of the Knight Institute to be representatives of the news media. *See, e.g.*, *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 10–15 (D.D.C. 2003) (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).

For these reasons, the Knight Institute is entitled to a fee waiver.

* * *

Thank you for your attention to our request. We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of the request or, where reasonable, to narrow it.

I certify that the foregoing is true and correct.

Sincerely,

/s/ Caroline M. DeCell

Caroline M. DeCell
Knight First Amendment Institute at
Columbia University
314 Low Library
535 West 116th Street
New York, NY 10027
carrie.decell@knightcolumbia.org
(212) 854-9600

Exhibit B

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 21, 2017

Caroline M. DeCell
Knight First Amendment Institute at
Columbia University
carrie.decell@knightcolumbia.org

Re: FOIA Tracking No. FY17-275

Dear Ms. DeCell:

This letter acknowledges receipt of your August 7, 2017 Freedom of Information Act ("FOIA") request to the Office of Legal Counsel ("OLC"), among others, in which you sought six categories of "records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations," since January 19, 2017 for category (1), and for "records created on or after May 11, 2005" for categories (2) through (6). We received your request on August 8, 2017, and your request has been assigned tracking number **FY17-275.** Based on our preliminary review of your request, and pursuant to 28 C.F.R. § 16.5(b), your request has been tentatively assigned to the "complex" processing track. If you would like to narrow your request so that it can be transferred to the "simple" track and processed more quickly, please contact Melissa Golden at the address and phone number provided below.

You have requested expedited treatment of your request on the ground that the documents sought are "urgently needed to inform the public about actual or alleged government activity." *See* 5 U.S.C. § 552(a)(6)(E); 28 C.F.R. § 16.5(e)(1)(ii). Department of Justice regulations set forth the basis for expedited processing, providing for expedited treatment when a request involves "[a]n urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information." 28 C.F.R. § 16.5(e)(1)(ii).

I have determined that your request for expedited processing under 28 C.F.R. § 16.5(e)(1)(ii) should be denied. While you have stated that "[o]btaining information about government activity, analyzing that information, and publishing and disseminating it to the press and the public are among the core activities the Institute was established to perform," you have not established that the Institute is "primarily engaged in disseminating information." Courts have held that to qualify under this standard, an organization must be "primarily, and not just incidentally, engaged in information dissemination." *Landmark Legal Found. v. EPA*, 910 F. Supp. 2d 270, 276 (D.D.C. 2012). Put another way, information dissemination must be "*the* main activity" of the requestor, and not merely "*a* main activity." *ACLU of N. Cal. v. DOJ*, No. 04-4447, 2005 WL 588354, at *14 (N.D. Cal. Mar. 11, 2005). Accordingly, courts have upheld the denial of requests for expedited processing from such legal policy advocacy organizations as the American Civil Liberties Union of Northern California and the Landmark Legal Foundation.

See Landmark Legal Found., 910 F. Supp. 2d at 275-76; *ACLU of N. Cal.*, 2005 WL 588354, at *14. As you state in your letter, "The Knight First Amendment Institute is a New York not-for-profit organization based at Columbia University that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education." Therefore, because information dissemination is not the Institute's main activity, you have not satisfied this standard.

Because of the considerable number of FOIA requests received by OLC before your request, our staff has not yet been able to complete a search to determine whether there are documents within the scope of your request. Please note that it also is likely that we will be unable to respond to your request within the twenty-day statutory deadline. I regret the necessity of this delay, but I assure you that your request will be given priority and processed as soon as practicable. In the meantime, if you have any questions or wish to discuss your request, you may contact Melissa Golden, our Lead Paralegal and FOIA Specialist, at (202) 514-2053, or at Office of Legal Counsel, United States Department of Justice, 950 Pennsylvania Avenue, N.W., Room 5511, Washington, DC 20530.

We have not yet made a decision on your request for a fee waiver. We will do so after we determine whether fees will be assessed for this request.

You have the right to an administrative appeal. You may administratively appeal by writing to the Director, Office of Information Policy ("OIP"), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or yo u may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: https://foiaonline.regulations.gov/foia/action/public/home. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn

Paul P. Colborn
Special Counsel