IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, et al. Defendants.	Civil Action No. 1:17-CV-07572-ALC

SECOND DECLARATION OF TONI FUENTES
IN SUPPORT OF THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

I, Toni Fuentes, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the Deputy Officer of the U.S. Immigration and Customs Enforcement ("ICE") Freedom of Information Act ("FOIA") Office. I have held this position since September 30, 2018, and am the ICE official immediately responsible for supervising ICE responses to requests for records under the Freedom of Information Act, 5 U.S.C. § 552 (the FOIA), the Privacy Act, 5 U.S.C. § 552a (the Privacy Act), and other applicable records access statutes and regulations. Prior to this position, I have held numerous FOIA positions over the past 20 years, including: FOIA Director for the National Protection and Programs Directorate ("NPPD") at the U.S. Department

of Homeland Security ("DHS"); Government Information Specialist for Department of Justice, U.S. Marshal's Service, Office of General Counsel; Government Information Specialist for the Department of Defense, Office of the Inspector General's FOIA Office; FOIA Officer, Paralegal Specialist for Department of the Navy, NAVAIR/NAWCAD's Office of Counsel; Management and Program Analyst for Department of Homeland Security, Customs and Border Protection's FOIA Office; and FOIA Paralegal Specialist for the National Aeronautics and Space Administration's Office of Chief Counsel.

2. The ICE FOIA Office is responsible for processing and responding to all FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. The ICE FOIA Office mailing address is 500 12th Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

3. My official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office. The ICE FOIA Office is responsible for the receipt, processing, and response to all FOIA and Privacy Act requests received at ICE. I manage and supervise a staff of ICE FOIA Paralegal Specialists, who report to me regarding the processing of FOIA and Privacy Act requests received by ICE. Due to my experience and the nature of my official duties, I am familiar with ICE's procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act. In that respect, I am familiar with ICE's processing of the FOIA request dated August 7, 2017, that the Knight First Amendment Institute at Columbia University ("Knight Institute" or "Plaintiff") submitted to ICE, which is the subject of this litigation.

4. I make this declaration in my official capacity in support of ICE's motion for partial summary judgment in the above-captioned action. The statements contained in this declaration

are based upon my personal knowledge, my review of records kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties. The documents attached hereto are kept by ICE in the ordinary course of its business activities.

5. This declaration, in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), provides a description of how ICE withheld portions of the records located in response to the Plaintiff's FOIA request and an explanation of the basis for withholding portions of pages, in part or in whole, pursuant to Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E) of the FOIA.

II. PLAINTIFF'S FOIA REQUEST

6. As explained in my First Declaration, dated February 26, 2019, in a letter dated August 7, 2017, Knight Institute submitted the following request:

> 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.
>
> 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 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).
>
> . . . .

III. ICE'S RESPONSE TO THE REQUEST

7. Also as described in my First Declaration, in an email to Knight Institute, dated August 23, 2017, the ICE FOIA Office acknowledged receipt of the FOIA request and stated that due to increasing number of FOIA requests, there may some delay in processing the request. The email assigned an ICE FOIA case number to Knight Institute's FOIA request ("2017-ICFO-43023").

8. On October 4, 2017, Knight Institute filed a complaint in the United States District Court for the Southern District of New York. Dkt. 1, Compl.

9. Through discussions with plaintiff, ICE began producing documents responsive to the FOIA request, which consisted of policy documents, correspondence and accompanying attachments to and from employees in ICE's Office of the Principal Legal Advisor ("OPLA"), Enforcement and Removal Operations ("ERO"), the Office of Policy ("Policy"), and the Office of the Director. *See* Dkt. No. 48 at ¶ C(g).

10. In June 2018, Knight Institute agreed to narrow the scope of records to only final policy guidance or memoranda and to exclude all email correspondence (the "Narrowed Request"), and ICE agreed to re-review the collected documents to identify materials responsive to the Narrowed Request. *See* Dkt. No. 64. As a result of that re-review, ICE determined that 99 pages of documents were responsive to the Narrowed Request; ICE released 50 pages in whole or in part

on July 3, 2018, and referred 49 pages to other agencies, which were released on whole or in part on August 3, 2018. *See* Dkt. No. 77.

11. In total, the ICE FOIA Office reviewed the collected documents and released four productions, concluding in July 2018, resulting in a total of 2,574 pages produced to Knight Institute responsive both to the original FOIA request and the Narrowed Request, applying withholdings pursuant to FOIA Exemptions 5, 6, 7(C), and 7(E). Records that were referred to other agencies were also produced to Knight Institute.

IV. ORGANIZATION OF THE VAUGHN INDEX

12. The enclosed *Vaughn* Index, attached as Exhibit A, encompasses production releases in September 2017, and in March, April, and July of 2018, which provides a description of specified redactions and correlates each redaction to the corresponding exemption applied.

13. Each record has been assigned a Document Identification number (or bates stamp number, located at the bottom right hand side of every page) associated with that record. This number is located in the first column of the *Vaughn* Index. The second column identifies whether the records were redacted in full or in part. Column three is titled "Description of Records and Redactions, and Reasons for Redactions." Within this column, the Plaintiff will find a description of the record, a description of the type of information that was redacted, and the reason for the redaction. Specifically, this column highlights the personal privacy and/or law enforcement interests found within the record and the harm that could occur, should the record be released. Finally, the fourth column of the *Vaughn* Index contains the statutory exemption(s) applied to the redaction(s) within the record(s).

14. A *Vaughn* Index is provided for Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). *A true and correct copy of Defendant's Vaughn Index is attached at Exhibit A.*

A. Description of Records Released to the Plaintiff by ICE

15. The two thousand five hundred and seventy-four (2,574) pages of records released to the Plaintiff originated from the ICE Office of Enforcement and Removal Operations (ERO), the ICE Office of Policy, the ICE Office of the Principal Legal Advisor (OPLA), and the ICE Director's Office. A complete description of these documents, and the bases for the withholding of information in said documents, is detailed in ICE's *Vaughn* Index.

V. WITHHOLDINGS ASSERTED BY ICE PURSUANT TO FOIA EXEMPTIONS

A. 5 U.S.C. § 552 EXEMPTION 5

16. Exemption 5 of the FOIA allows the withholding of inter- or intra-agency records that are normally privileged in the civil discovery context. Pursuant to Exemption (b)(5), the three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege.

17. ICE applied FOIA Exemption (b)(5) to protect from disclosure documentation subject to the deliberative process privilege and attorney-client privilege. Specifically, ICE withheld internal discussions consisting of comments and proposed edits of draft memoranda and legislations, and discussion among ICE employees regarding ICE policy statements.

18. The aforementioned, withheld communications and records are non-final and pre-decisional in nature; these communications contemplate: (1) potential immigration enforcement actions, (2) content of employee guidance, (3) details of agreements with state and local entities,

and (4) possible content of public statements regarding official ICE positions and policies. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, preliminary conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel. This would result in a chilling effect on intra- and inter-agency communications. ICE employees must be able to discuss proposed agency action freely. Further, if draft, un-finalized responses to media inquiries, and draft information regarding agency policies and enforcement actions were released, the public could potentially become confused regarding ICE's mission, priorities, and enforcement activities.

19. Specifically, emails originating from OPLA regarding draft, proposed responses to inquiries from federal agencies involve communications between subordinate and supervisory employees at ICE. These communications set forth the questions posed to ICE, proposed answers, and summaries of internal meetings, for consideration in evaluating draft responses. The pre-decisional emails also involve deliberation between supervisory employees representing different offices or divisions within ICE. These emails provided non-final opinions regarding the appropriate ICE response to questions posed by federal agencies.

20. Emails originated by OPLA containing substantive comments regarding policy considerations and enforcement guidance, as well as status updates to supervisory ICE employees inform the appropriate decision maker(s) within ERO and the Director's Office regarding the merits of the proposed memoranda and legislation. In the responsive documents, supervisory employees additionally provided feedback and questions to subordinates regarding their proposed

comments. The withheld email contents are protected by the deliberative process privilege, as release of these communications would expose ICE's decision-making process in such a way as to inhibit the free exchange of information among agency personnel.

21. The attorney-client privilege applies to a category of records that contains confidential communications between an ICE attorney and his/her client (employees in ERO and the Director's Office) relating to a legal matter for which the client has sought professional advice. This privilege applies to facts that are divulged to the attorney and encompasses the opinions given by the attorney based upon, and thus reflecting, those facts. Attorney-client communications are shielded from disclosure in order to encourage a full and frank discussion between the client and his legal advisor. The attorney-client privilege recognizes that sound legal advice or advocacy depends upon a lawyer being fully informed by his client. If these communications, as covered by the attorney-client privilege, were disclosed, this could result in a chilling effect on interactions and communications between agency employees and their legal counsel.

22. Furthermore, certain information has been withheld pursuant to the work product privilege, which protects documents and other memoranda prepared by an attorney in contemplation of litigation. The redacted portions contain material prepared by agency attorneys concerning pending or possible litigation in immigration and federal court. Disclosure of this information would release specific legal notes, guidance, analysis and strategy involving pending or anticipated litigation.

B. 5 U.S.C. § 552 EXEMPTION 6

23. Exemption 6 of the FOIA allows the withholding of personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of

personal privacy. Records that apply to or describe a particular individual, including investigative records, qualify as "personnel," "medical," or "similar files" under Exemption 6. When applying this exemption to responsive documentation, the agency must balance the individual's personal privacy interest against the public need for the information.

24. ICE applied FOIA Exemption (b)(6) to protect from disclosure the names, phone numbers, email addresses, physical work locations, and other personally identifiable information (PII) of ICE law enforcement officers, and other ICE employees (such as, employees in ERO, OPLA or the Office of Policy). With respect to aliens and third parties (such as, family members of aliens or witnesses), PII such as names, dates of birth, home addresses, social security numbers, alien numbers, driver's license numbers, and passport numbers were redacted from the responsive documentation. In some instances, redacted information related to an individual's immigration application(s) and corresponding documentation submitted to DHS/ICE, the release of which would reveal the individual's identity, as well as to PII pertaining to their family members and protected information (i.e. information regarding asylum applications). For a complete listing of all material withheld pursuant to FOIA Exemption (b)(6), please see Defendant's Vaughn index at Exhibit A.

25. The disclosure of such sensitive PII to the public could subject law enforcement officers and other government personnel to harassing telephone calls and unwarranted hostility, which could disrupt and impede official law enforcement activity. Law enforcement officers handle a myriad of tasks relating to the enforcement of federal immigration law, including the investigation of noncitizens who may be illegally present in the United States. Law enforcement officers, federal government employees, and state government employees have a privacy interest

in not being targeted by individuals who may begrudge them for ICE affiliation. The privacy interests of law enforcement officers and government personnel in the information contained in the records outweighs any minimal public interest in the disclosure of the information. The disclosure of this PII serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. Further, Plaintiff has not articulated a public interest or public need to justify release of this information.

26. Similarly, the disclosure of alien and third-party information to the public could constitute an unwarranted invasion of personal privacy and subject the individuals to embarrassment, harassment, and undue public attention. Aliens and third-party individuals have a colorable privacy interest in protecting and controlling their personally identifiable information. The individuals' privacy interest in the information contained in the record outweighs any minimal public interest in the disclosure of the information. Plaintiff has not articulated a sufficient public interest or public need to justify release of this information. Moreover, the aliens and third parties referenced in the records have not consented to the release of their PII.

C. 5 U.S.C. § 552 EXEMPTION 7 THRESHOLD

27. Exemption 7 establishes a threshold requirement, which must be met in order for certain information in the records subject to this litigation to be withheld on the basis of subparts (b)(7)(A), (b)(7)(C), and (b)(7)(E). Specifically, the redactions at issue must be contained within a record of information compiled for a law enforcement purpose.

28. The information for which FOIA Exemption (b)(7) has been asserted in the instant matter satisfies this threshold requirement. Pursuant to the Immigration and Nationality Act, codified under Title 8 of the U.S. Code, the Secretary of Homeland Security is charged with the

administration and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. See 8 U.S.C. § 1103. ICE is the largest investigative arm of DHS, and is responsible for identifying and eliminating vulnerabilities within the nation's borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. The records at issue in this matter pertain to ICE's immigration enforcement actions and information sharing with state entities in support of ICE's mission.

D. 5 U.S.C. § 552 (B)(7)(C)

29. 5 U.S.C § 552 (b)(7)(C) is applied to protect from disclosure records or information compiled for a law enforcement purpose, to the extent that release of the information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Prior to asserting this exemption, consideration was given to the strength and nature of any third-party privacy interests in ICE's law enforcement files. Having determined that the records at issue were compiled for law enforcement purposes, and third-party privacy interests existed in the documentation, the ICE FOIA Office then considered whether release of the information served to inform the public about ICE's performance of its statutory mission.

30. ICE applied Exemption (b)(7)(C) to withhold the names, signatures, phone numbers, email addresses, physical work locations, and ICE employees (such as, employees in OPLA, ERO, or the Office of Policy). The disclosure of such sensitive PII could subject ICE employees to harassing telephone calls and unwarranted hostility, which could disrupt and impede official law enforcement activity. Law enforcement officers handle a myriad of tasks relating to the enforcement of federal immigration law, including the investigation of noncitizens who may

be illegally present in the United States. Law enforcement officers have a privacy interest in not being targeted by individuals who may begrudge them for ICE affiliation. Plaintiff failed to articulate a public interest or public need for the release of data such as names, phone numbers, email addresses, and physical work locations of federal and state government employees. The disclosure of this PII serves no public benefit and would not assist the public in understanding how ICE is carrying out its statutory responsibilities.

31. With respect to aliens and third parties, names, dates of birth, home addresses, social security numbers, alien numbers, and passport numbers were redacted from the responsive documentation. Additionally, large amounts of text were withheld; this redacted information relates to an individual's immigration application(s) and supporting documentation submitted to DHS/ICE, the release of which would reveal the individual's identity. For a complete listing of all material withheld pursuant to FOIA Exemption (b)(7)(C), please see Defendant's Vaughn index.

32. The disclosure of alien and third-party information could constitute an unwarranted invasion of personal privacy and subject the individuals to embarrassment, harassment, and undue public attention. Such information, if disclosed to the public or to a third-party requester without the permission of the individual alien, could expose the alien to identity theft and may reasonably lead to unwanted contact from persons that might seek to harm the individual alien (or his or her relatives, including minor children) due to the individual's immigration status in the United States.

33. Furthermore, aliens and third-party individuals have a recognized privacy interest in not being publicly associated with law enforcement investigations through the release of records compiled for law enforcement purposes. The identities of persons named in law enforcement files

(whether or not the named individual is the target of investigations or law enforcement actions) are properly withheld under FOIA Exemptions (b)(6) and (b)(7)(C) in recognition of the stigmatizing connotation carried by the mere mention of individuals in law enforcement files. The individuals' privacy interest in the information contained in the record outweighs any minimal public interest in the disclosure of the information. Plaintiff has not articulated a sufficient public interest or public need to justify release of this information. The disclosure of this PII serves no public benefit and would not assist the public in understanding how ICE is carrying out its statutory responsibilities. Finally, the aliens and third-parties mentioned in the law enforcement records did not consent to the disclosure of their PII.

E. 5 U.S.C. § 552 (b)(7)(E)

34. This exemption protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," or where it would "disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

35. ICE applied FOIA Exemption (b)(7)(E) to protect from disclosure investigative techniques and law enforcement procedures including the following: internal URLs, IP addresses, passcodes, internal acronyms, access codes to law enforcement teleconferences, the names of internal data sharing systems, computer codes and commands, and case numbers. FOIA Exemption (b)(7)(E) was asserted to withhold internal identifying numbers that did not originate from ICE (such as, FBI case numbers). For a complete listing of all material withheld pursuant to FOIA Exemption (b)(7)(E), please see Defendant's Vaughn index at Exhibit A.

36. Disclosure of internal computer codes, commands, acronyms, and access codes could assist unauthorized parties in deciphering the meaning of the codes, commands, or acronyms, gaining improper access to law enforcement databases, and assist in the unauthorized party's navigation of the law enforcement database. Disclosure of these techniques and practices for navigating law enforcement databases could permit people seeking to violate or circumvent the law to take proactive steps to counter operational and investigative actions taken by ICE during enforcement operations.

37. Law enforcement database codes, to include administrative and computer codes, serve a dual purpose. The codes are not only used for the purposes of indexing, storing, locating, and retrieving information, but also serve to provide information about the investigation. Specifically, this information could identify the type and location of the case, the scope and size of the investigation, agency resources utilized for the investigation, type of activity under investigation, and location of investigative efforts. The disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is executing its statutory responsibilities.

38. Disclosure of the internal processes for law enforcement to access and utilize the agency's databases could assist unauthorized parties in gaining improper access to the database and assist in the unauthorized party's navigation of the database. If an unauthorized party obtains access to a database where law enforcement records are housed, he or she could modify data in circumvention of law enforcement efforts.

VI. SEGREGABILITY

39. 5 U.S.C. § 552(b) requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."

40. My staff, under my supervision, has reviewed each record line-by-line to identify information exempt from disclosure or for which a discretionary waiver of exemption could be applied.

41. With respect to the records that were released in part, all information not exempted from disclosure pursuant to the FOIA exemptions specified above was correctly segregated and non-exempt portions were released.

VII. JURAT CLAUSE

42. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Signed this 15th day of March 2019.

Toni Fuentes, Deputy FOIA Officer
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