KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

August 14, 2019

Via ECF and Email

The Honorable Andrew L. Carter, Jr.
United States District Court
Southern District of New York
40 Foley Square, Room 435
New York, NY 10007

Re: ***Knight First Amendment Institute v. U.S. Department of Homeland Security, et al.,*** **Case No. 17-CV-7572 (ALC)**

Dear Judge Carter:

Per the Court's order, *see* Min. Entry (July 31, 2019), the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") respectfully submits this letter in response to the letter and declarations filed on behalf of Defendant U.S. Immigration and Customs Enforcement ("ICE") on August 7, 2019, addressing ICE's searches for records responsive to the Institute's Freedom of Information Act ("FOIA") request ("the Request"). *See* Def. ICE's Ltr. to the Court, Aug. 7, 2019, ECF No. 132; Decl. of Alexander Choe ("Choe Decl."), ECF No. 133; Decl. of Eliman Jussara Solorzano ("Solorzano Decl."), ECF No. 134.

These supplemental filings confirm that the searches conducted by ICE's Office of the Director and ICE's Enforcement and Removal Operations component ("ERO") were unduly restrictive and not reasonably calculated to locate all relevant records. ICE has thus failed to meet its burden to establish the adequacy of those searches. *See Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 102 (S.D.N.Y. 2012) ("FOIA . . . requires that agencies conduct a search reasonably calculated to uncover *all* relevant documents, not most relevant documents." (quotation marks omitted) (emphasis in original)).

Outlook Searches

As an initial matter, neither of ICE's August 7th declarations conclusively states how ICE's Outlook search tools *actually* work, nor do they provide the basis for the declarants' understanding of those tools. Based on their descriptions, the declarants seem to believe that a word in quotation marks functions as a limited wildcard (e.g., a search for *"exclude"* will locate records containing the words *exclude*, *excludes*, or *excluded*, but not *excluding*). *See* Choe Decl. ¶ 7; Solorzano Decl. ¶ 9. Furthermore,

ERO's declarant seems to believe that a search for multiple words, each in separate quotation marks, functions as if the search included an "AND" Boolean operator (e.g., a search for the words *"removal" "policies"* will locate records containing the words *removal* AND *policies* anywhere and in any order in the record). *See* Solorzano Decl. ¶ 9. Neither declarant states the basis of these beliefs, however, and they appear at odds with publicly available explanations of Outlook's search tools.[1] Given the declarants' failure to explain precisely how Outlook executes searches, or even to explain the basis for their understandings, ICE cannot establish the adequacy of its searches. *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 108 ("[T]he government will not be able to establish the adequacy of its FOIA searches if it does not record and report the search terms that it used, *how it combined them*, and whether it searched the full text of documents." (emphasis added)).

Nonetheless, even accepting that ICE's declarants accurately describe Outlook's search tools, ICE still fails to establish the adequacy of the searches conducted by the Office of the Director and ERO.

Office of the Director Searches

ICE's declaration regarding the Office of the Director's searches underscores the Knight Institute's concerns that the search terms used were unlikely to locate all relevant records. Because the Request identifies numerous relevant statutory provisions, the Knight Institute used its own defined shorthand phrases—specifically, the "endorse or espouse provisions" and the "foreign policy provision"—to refer to them collectively throughout the Request. *See* ECF No. 42-2, at 3; *id.* at 3 nn.1–2. The Knight Institute did not borrow those phrases from ICE or other government records, and it has no reason to believe that ICE or other agencies use these phrases in referring to the relevant provisions. Nor has ICE stated that it does, in fact, use these phrases. To the contrary, ICE appears to have used the term "212(a)(3)(C)" to refer to the provision the

[1] Microsoft's guidelines for Outlook searches suggest that quotation marks do not serve as wildcards, and that searches for multiple words in separate quotation marks do not include an implicit "AND" Boolean operator. *See* Microsoft, *Learn to Narrow Your Search Criteria for Better Searches in Outlook*, https://perma.cc/E6D8-LNBR (last visited Aug. 13, 2019) (explaining that the Outlook search tool uses "prefix matching"; that an Outlook search for a word in quotation marks, e.g., *"bob"*, will locate "items containing the exact phrase and *not* the variations," such as "*bobby* or *bobbin*" (emphasis added); and that a search for multiple words without the connecting term "AND" will locate emails and attachments that contain *either* word). Thus, it appears that a search for *"exclude"* would not locate records containing the word *excluding*, or even the words *excludes* or *excluded*. While the Knight Institute's own experience conducting searches in Outlook largely aligns with the ICE declarants' understandings—indicating that a search for *"exclude"* would locate records containing the words *exclude*, *excludes*, or *excluded*, but not *excluding*—ICE bears the burden of providing the basis of those understandings against Microsoft's contrary explanations.

Knight Institute referred to as the "foreign policy provision." *See* ICE, "ICE Ability to Use 212(a)(3)(C) Foreign Policy Charge," ECF No. 109-2 at 35–38 (apparently discussing use of the foreign policy provision to exclude individuals from the United States). And the Office of the Director's search using the phrases "endorse provision" and "espouse provision" would, at best, be underinclusive. It would leave out, for example, any records discussing the exclusion or removal of an individual who purportedly endorsed or espoused terrorist activity, but that did not explicitly mention the "endorse provision" or "espouse provision." Therefore, searches using the Knight Institute's shorthand phrases verbatim are not reasonably calculated to uncover all relevant documents. Because the Office of the Director failed to search for terms the agency itself would have used in referring to the relevant statutory provisions, ICE has not established the adequacy of these searches.

ERO Searches

Similarly, ICE's declaration regarding the ERO searches confirms that the search terms used were not reasonably calculated to uncover all relevant records. As mentioned in the Knight Institute's opening brief, the ERO searches omitted key statutory terms like "endorse," "espouse," terms from relevant portions of the foreign policy provision, and appropriate variants of those terms. ECF No. 101 at 12–13. ERO's searches further omitted the term "exclude" and its variants. ERO did include the term "removal" in its searches, but even then, it omitted the term "remove" and its variants. *See* Solorzano Decl. ¶ 7. Ultimately, it appears that ERO's searches were limited to records containing both the terms "terrorist" and "removal," and that ERO's searches for records responsive to Item 4 of the Request were limited to records containing the term "policies," drastically reducing the scope of the search results. ERO's searches thus omitted, for example, discussions of the relevant statutory provisions that do not contain the word "terrorist" or "terrorists" (e.g., discussions about terror or terrorism, or discussions that fail to mention those words all together), and even discussions of policies for the exclusion of individuals who endorse or espouse terrorism that fail to mention the word "removal." Similarly, ERO's searches for records responsive to Item 4 omitted relevant records discussing a singular policy, rather than "policies." Finally, as ERO concedes, it searched for discussions of only the second of two relevant Executive Orders—using the term "13780"—while offering no rationale for omitting the first, Executive Order 13,769. *See* Solorzano Decl. ¶ 7.

* * *

ICE's recent filings validate the Institute's concerns regarding ICE's searches, as addressed in more depth in the Knight Institute's summary judgment briefing. *See* ECF No. 101, at 11–13; ECF No. 117, at 2–5. Even taken together, ICE's multiple declarations fail to establish the adequacy of

its searches. The Knight Institute therefore respectfully reiterates its request that the Court grant partial summary judgment in favor of the Institute and order ICE to conduct a new search for records responsive to the provisionally narrowed request based on agreed-upon terms.

We thank the Court for its attention to this matter.

Respectfully,

/s/ Carrie DeCell

Carrie DeCell (CD-0731)
Adi Kamdar (*pro hac vice*)
Jameel Jaffer (JJ-4653)
Alex Abdo (AA-0527)
Knight First Amendment Institute at Columbia University
475 Riverside Drive, Suite 302
New York, NY 10115
carrie.decell@knightcolumbia.org
(646) 745-8500

Counsel for Plaintiff

/s/ Megan Graham

Megan Graham (*pro hac vice*)
Catherine Crump (CC-4067)
Samuelson Law, Technology & Public Policy Clinic
U.C. Berkeley School of Law
353 Boalt Hall
Berkeley, CA 94720-7200
mgraham@clinical.law.berkeley.edu
(510) 664-4381

Counsel for Plaintiff

cc: Ellen Blain, Esq. (via Email)