UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FREEDOM OF THE PRESS FOUNDATION and KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

- against -

DEPARTMENT OF JUSTICE, NATIONAL SECURITY AGENCY, CENTRAL INTELLIGENCE AGENCY, and OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE,

Defendants.

No. 17 Civ. 9343 (JGK)

DECLARATION OF GAIL BRODFUEHRER

I, Gail Brodfuehrer, declare the following to be a true and correct statement of facts:

1. I am an Attorney in the Freedom of Information Act ("FOIA")/Privacy Act ("PA") Unit of the Office of Enforcement Operations in the Criminal Division of the United States Department of Justice (the "Criminal Division"). I have held this position since November of 2013. Prior to that time I was employed as an Attorney with the Criminal Appeals and Tax Enforcement Policy Section of the Tax Division of the United States Department of Justice from 1986 to 1994. I am a member of the bar of the State of Virginia.

2. The FOIA/PA Unit is responsible for processing FOIA/PA requests seeking information from the Criminal Division.[1] FOIA/PA Unit staff determine whether the Criminal

[1] The Criminal Division is comprised of seventeen Sections: the Office of the Assistant Attorney General, the Appellate Section, the Computer Crimes and Intellectual Property Section, the Capital Case Section, the Child Exploitation and Obscenity Section, the Fraud Section, the Human Rights and Special Prosecutions Section, the International Criminal Investigative Training Assistance Program, the Money Laundering and Asset Recovery

Division maintains records responsive to FOIA requests, and if so, whether they can be released in accordance with the FOIA/PA. In processing such requests, the FOIA/PA Unit consults with personnel in the other Sections of the Criminal Division, and when appropriate, with other components within the Department of Justice ("DOJ"), as well as with other Executive Branch agencies.

3. In my capacity as an Attorney in the FOIA/PA Unit, and in conjunction with the Chief and Deputy Chief of the FOIA/PA Unit, I assist in supervising the handling of FOIA and PA requests processed by the FOIA/PA Unit. I am responsible for providing litigation support and assistance to Assistant United States Attorneys and Civil Division Trial Attorneys who represent the DOJ in lawsuits filed in federal court under the FOIA, 5 U.S.C. § 552, and the PA, 5 U.S.C. § 552a, stemming from requests for Criminal Division records.

4. In providing such support and assistance, I review and process files compiled in response to FOIA/PA requests received by the Criminal Division to determine whether searches were properly conducted and whether decisions to withhold or release Criminal Division records were in accordance with the FOIA, the PA, and DOJ regulations at 28 C.F.R. §§ 16.1 *et seq*. and §§ 16.40 *et seq*. If searches are incomplete and/or records have not been processed, I ensure that searches are completed, and/or records are processed. Then, I take the lead in the completion of any pending searches or processing of Criminal Division documents. I regularly consult with the Chief and Deputy Chief of the FOIA/PA Unit, Government Information Specialists, and other members of the Unit about the Criminal Division's searches and processing of FOIA/PA requests. I also consult with officials and employees in Criminal Division Sections where

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Section, the Narcotic and Dangerous Drug Section, the Organized Crime and Gang Section, the Office of Enforcement Operations, the Office of International Affairs, the Office of Overseas Prosecutorial Development, Assistance and Training, the Office of Policy and Legislation, the Office of Administration, and the Public Integrity Section.

responsive records are located and in other DOJ components that have equities in responsive records.

5. Due to the nature of my official duties, I am familiar with the procedures followed by the Criminal Division in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the PA, 5 U.S.C. § 552a. Specifically, I am familiar with the FOIA request submitted by plaintiffs, Freedom of the Press Foundation and Knight First Amendment Institute at Columbia University to the Department of Justice, National Security Agency, Central Intelligence Agency, and Office of the Director of National Intelligence.

6. The statements that follow are made on the basis of my review of the Criminal Division's official files and records, my personal knowledge, and on information I acquired in the course of performing my official duties in the FOIA/PA Unit.

Plaintiffs' FOIA Request and the FOIA/PA Unit's Responses

7. Plaintiffs submitted a Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. The request was submitted to the following Department of Justice offices: Office of Legal Counsel; Office of Information Policy; and Federal Bureau of Investigation. A copy of plaintiffs' FOIA request is attached hereto as Exhibit 1.

8. On December 15, 2017, the Criminal Division was notified by the Office of Information Policy ("OIP") that plaintiffs had filed a complaint regarding their request (Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.) (See Docket No. 1.)). As one of the responsibilities of the Criminal Division is to analyze requests from Department

attorneys for Department authorization to use, or consultation about, numerous investigative tools or prosecutorial actions, including matters pertaining to the news media policy guidelines, OIP forwarded the request to the Criminal Division to search for responsive records and respond directly to the requester.

9. On March 22, 2018, the parties filed a stipulation setting forth the parties' agreements regarding document searches and processing. (Id. at Docket Nos. 25, 26.) Pursuant to the search stipulation, a proposed production schedule endorsed by the Court (id. at Docket No. 28), and further communications between the parties, the Criminal Division made interim releases to plaintiffs on October 1, 2018, October 31, 2018, November 30, 2018, December 21, 2018, and February 22, 2019. Copies of the FOIA/PA Unit's interim release letters to plaintiffs, with attachments omitted, are attached hereto as Exhibit 2.

10. In its October 1, 2018, release, relating to all request packages and a sample of fifteen inquiry packages (based on the parties' agreed sampling parameters) under the Department's Media Guidelines, 28 C.F.R. § 50.10, and the Privacy Protection Act, 42 U.S.C. 2000aa, plaintiffs were notified that the Criminal Division had located approximately 5,600 pages of responsive records and that those records are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), (5), (6), (7)(A), (7)(C), (7)(D), (7(E), and 7(F). In its October 31, 2018, release, plaintiffs were notified that 939 pages of records had been reviewed and of the 264 pages of responsive records located, thirty-five pages are appropriate for release in full, one page is appropriate for release in part pursuant to 5 U.S.C. § 552(b)(6), and 228 pages are exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5), (6), and (7)(C). In its November 30, 2018, release, plaintiffs were notified that 687 pages of records had been reviewed and of the six pages of responsive records located, two pages of records are appropriate for release in full, and three

pages are appropriate for release in part and one page is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(5), (6), and (7)(C). In its December 21, 2018, release, plaintiffs were notified that 1,691 pages of records had been reviewed and of the twenty-eight pages of responsive records located, twenty-seven pages are appropriate for release in full and one page may be released in part pursuant to 5 U.S.C. § 552(b)(6). In its February 22, 2019, release, plaintiffs were notified that 1,713 pages of records had been reviewed and that none of those records are responsive to plaintiffs' request. See Exhibit 2.

11. On November 14, 2018, the Criminal Division provided a draft Vaughn Index to plaintiffs, describing 5,318 pages of records outlined in the October 1, 2018, interim response, that had been withheld in full pursuant to Exemptions 3, 5, 6, 7(C), 7(A), and 7(D). On April 19, 2019, plaintiffs responded with questions regarding the draft Vaughn Index and Criminal Division productions. On June 27, 2019, the Criminal Division responded with answers to those questions, and with a supplemental release of 157 pages. A second supplemental release of thirty-six pages was made on July 11, 2019.

12. On October 2, 2019, the Criminal Division provided a Draft Supplemental Vaughn Index with additional information regarding some of the draft Vaughn Index entries, as well as responses to additional questions. On October 31, 2019, the Criminal Division provided a second supplemental draft Vaughn Index with additional information regarding some of the draft Vaughn Index entries.

13. In a letter dated November 6, 2019, plaintiffs notified defendants regarding the issues and withholdings they intend to challenge. As to the Criminal Division, plaintiffs reiterated their challenges to certain withholdings pertaining to the Criminal Division's interim

productions. The Criminal Division provided plaintiffs with a final Vaughn Index on January 14, 2020.

14. Plaintiffs also stated that they would be challenging the Criminal Division's withholding of certain pages of records from the Criminal Division's October 31, 2018, and November 30, 2018, interim productions and its June 27, 2019, supplemental production. Following an additional release of two pages by the Criminal Division on January 14, 2020, plaintiffs are now challenging only a one-page record withheld in full pursuant to Exemption 5, and a one-page record withheld in part pursuant to Exemption 5.

Description of Record Withheld in Full and Record Released in Part

15. The two pages of records being challenged by plaintiffs relate to the function of the Policy and Statutory Enforcement Unit of the Criminal Division to analyze requests from Department attorneys for Department authorization to use, or consultation about, numerous investigative tools or prosecutorial actions, pursuant to 28 C.F.R. § 50.10, which provides regulations concerning obtaining information from, or records of, members of the news media, and regarding questioning, arresting and charging members of the news media. DOJ attorneys make requests for legal process pursuant to Section 50.10 as part of ongoing investigations and prosecutions. The two records contain information constituting internal guidelines and recommendations pertaining to interim steps in the authorization process.

16. The one-page record withheld in full is a slide from a power point presentation titled News Media Policy, which contains hypothetical scenarios requiring authorization pursuant to Section 50.10, and information relating to authorization decisions.

17. The one-page record released in part is a template form entitled "News Media Policy Consultation," an online form which is completed by DOJ attorneys consulting with the

Criminal Division pursuant to 28 C.F.R. § 50.10. The portion of the record withheld relates to consultations regarding whether an individual or entity is a member of the news media and provides recommendations regarding the types of legal analyses to be considered by DOJ attorneys in making their consultation requests.

The Criminal Division Properly Withheld Exempt Information

18. The Criminal Division is withholding a one-page record and a portion of a second page of records pursuant to FOIA Exemption 5. Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify for withholding under Exemption 5, a document's source must be a Government agency and the documents or information must be normally privileged in the civil discovery context. The records withheld in this instance are inter-agency documents prepared by Department of Justice attorneys and exchanged within the Department and, accordingly, satisfy the threshold requirement of Exemption 5.

19. The deliberative process privilege, relied upon by the Criminal Division to withhold the information contained in the two pages of records, falls within the ambit of a privilege against discovery covered by Exemption 5. To qualify for the deliberative process privilege, an agency record must be both "pre-decisional" and "deliberative." Information is predecisional if it is prepared to assist agency decision makers prior to the decision about which it pertains. Information is deliberative if it reflects the opinions, recommendations and deliberations that are part of the give and take by which the decisions are made. The deliberative process privilege is intended to protect the decision making processes of government agencies from public scrutiny in order to enhance the quality of agency decisions.

20. The two records consist of internal agency guidelines relating to requests for authorization to use certain law enforcement tools pursuant to Section 50.10, as well as recommendations regarding information to be considered in making consultation requests pursuant to Section 50.10. These guidance documents are intended to assist DOJ attorneys in making well-formulated and properly supported requests for legal process pursuant to Section 50.10. The protected information reflects preliminary assessments by DOJ attorneys about issues on which they have been asked to make recommendations and give advice. The information contained in the power point presentation slide expresses the author's opinions and recommendations regarding various hypothetical situations involving requests for authorization pursuant to Section 50.10. It precedes decisions by the Criminal Division regarding approval of requests made pursuant to Section 50.10. The information withheld on the "News Media Policy Consultation" form contains recommendations regarding what facts and circumstances the requesting DOJ attorneys should evaluate and consider when making their consultation requests to the Criminal Division. It is preliminary to consultation requests submitted by DOJ attorneys to the Criminal Division. Consequently, the FOIA/PA Unit determined that the information withheld in the two pages of records is both pre-decisional and deliberative.

21. Release of the information contained in these records, which reflects advisory opinions, recommendations, and deliberations about how Department attorneys should formulate requests for legal process pursuant to Section 50.10, would create a foreseeable harm. Disclosure of the information would reveal assessments of hypothetical facts and scenarios deemed significant in the decision making process regarding authorization requests and consultations made pursuant to Section 50.10. Release of the information in these records would result in public confusion or erroneous information about interim steps in the Section 50.10

authorization process. Because the information contained in these documents contributes to the decision making process, disclosure of this information also would chill the free and open discussions of Department attorneys regarding their opinions on the appropriate information to be included in the authorization and consultation requests and the appropriate authorization path. This lack of free and open discussion would seriously impair the Department's ability to foster the forthright, internal discussions necessary for making the appropriate decisions regarding requests for authorization and consultation requests by Department attorneys, ultimately harming the ability of Department attorneys to conduct thorough, comprehensive investigations and prosecutions.

22. All reasonably segregable, non-exempt information has been released. During the FOIA/PA Unit's review of all the records responsive to plaintiffs' request, FOIA/PA Unit personnel carefully reviewed the documents to determine whether any additional information could be segregated for release. Specifically, other slides which were part of the News Media Policy power point presentation were released, and only the deliberative portion of the News Media Policy Consultation form was withheld. In each instance where information was withheld pursuant to Exemption 5, only that information which is protected by the deliberative process privilege was withheld, and it is reasonably foreseeable that disclosure of this information would harm the interests protected by Exemption 5.

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

Executed this 23d day of January, 2020.

Gail Brodfuehrer

KNIGHT
FIRST AMENDMENT
INSTITUTE
at Columbia University

RECEIVED
OCT 11 2017
Office of Information Policy

October 10, 2017

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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")[1] and the Freedom of the Press Foundation[2] ("FPF") submit this request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records concerning restrictions on government surveillance targeting members of the news media or otherwise implicating the First Amendment.

I. Background

Various statutes authorize government searches, seizures, and other forms of surveillance that implicate core First Amendment freedoms, including the freedoms of speech, association, and the press. Cognizant of these implications, Congress has prohibited the government from relying on many of these statutes to conduct surveillance based solely on activity protected by the First Amendment. *See, e.g.*, 12 U.S.C. § 3414(a)(5)(B); 18 U.S.C. § 2709(b). Based on the same concerns, the Department of Justice ("DOJ") and other federal agencies have adopted policy or regulatory constraints, such as those set forth in the DOJ's "Media Guidelines," on the use of law enforcement investigative authorities to obtain records and information from members of the news media. 28 C.F.R. 50.10.[3] Yet other investigative authorities, such as the government's authority to obtain records and information from third parties by secretly issuing national security letters ("NSLs"), 18 U.S.C. § 2709, do not appear to be subject to any such statutory or regulatory limitations.[4]

The Knight Institute and Freedom of the Press Foundation seek to inform the public about the scope of the government's investigative powers and the limitations placed on those powers to protect the freedoms of

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[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] The Freedom of the Press Foundation is a non-profit organization based in San Francisco that works to preserve and strengthen the rights guaranteed to the press under the First Amendment through crowdfunding, digital security and internet advocacy.

[3] See U.S. Dep't of Justice, Updated Policy Regarding Obtaining Information From, or Records of, Members of the News Media, and Regarding Questioning, Arresting, or Charging Member[s] of the News Media, Jan. 14, 2015, *available at* https://perma.cc/C5FV-L7F6; U.S. Dep't of Justice, Report on Review of News Media Policies, July 12, 2013, *available at* https://perma.cc/HV4P-W77K.

[4] See Trevor Timm, *New Documents Shed Light on the Justice Dept's Secret Rules for Targeting Journalists with National Security Letters*, Freedom of the Press Found. (Jan. 8, 2016), https://perma.cc/7NA5-XH65.

speech, association, and the press. Recent reports of government investigations into journalists, political dissenters, and political protesters call into question the adequacy of those protections. For example, earlier this year the DOJ demanded that the web host for a website called DisruptJ20.org, which organized protests on the day of President Trump's inauguration, turn over the website's visitor logs and other user information.[5] The DOJ narrowed its demand only after widespread opposition on First Amendment grounds.[6] Additionally, on August 4, 2017, the DOJ announced that it had tripled the number of active investigations into leaks of government information since President Trump took office, and that it would be "reviewing policies affecting media subpoenas" in connection with those investigations.[7] Given this acknowledged increase in government investigations into activities that may be protected by the First Amendment, the need to inform the public of the limitations on the government's authority to conduct such investigations is particularly pressing.

II. Records Requested

The Knight Institute and Freedom of the Press Foundation request the following documents[8] created on or after May 1, 2013:

1. All documents concerning any limitations on investigative activities, including the use of law enforcement and national security investigative authorities,[9] to target, acquire, retain, disseminate, or use records or information of or about members of the news media.[10] This request includes but is not limited to:

    a. All documents concerning the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, and/or the DOJ's Media Guidelines, 28 C.F.R. 50.10;

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[5] Robinson Meyer, *Can the U.S. Government Seize Anti-Trump Website's Visitor Logs?* (Aug. 15, 2017), https://perma.cc/X2WY-RWEB.

[6] Morgan Chalfant, *DOJ Drops Request for IP Addresses from Trump Resistance Site*, The Hill (Aug. 22, 2017), https://perma.cc/9GZB-GX7W.

[7] News Release, U.S. Dep't of Justice, Attorney General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security (Aug. 4, 2017), *available at* https://perma.cc/NQQ8-82F2.

[8] As used herein, the term "documents" includes but is not limited to directives, policies, procedures, memoranda, guidance, training material, presentations, and emails.

[9] As used herein, the term "national security investigative authorities" includes but is not limited to NSLs, "exigent letters," and Foreign Intelligence Surveillance Act ("FISA") orders or directives.

[10] As used herein, the term "members of the news media" broadly includes journalists, reporters, bloggers, and other members of media, press, and news organizations.

b. All targeting, minimization, and/or other procedures adopted by the Federal Bureau of Investigation ("FBI"), National Security Agency ("NSA"), Central Intelligence Agency ("CIA"), and/or the National Counterterrorism Center ("NCTC") regarding the use of law enforcement and/or national security investigative authorities to obtain records or information of or about members of the news media;

c. All reports prepared by the DOJ Office of Inspector General ("OIG"), the NSA OIG, and/or the CIA OIG regarding the use of law enforcement and/or national security investigative authorities to obtain records or information of or about members of the news media; and

d. All requests or statistical information concerning requests to the DOJ National Security Division General Counsel and/or the Executive Assistant Director of the DOJ National Security Branch for approval to issue NSLs for the acquisition of records or information of or about members of the news media.

2. All documents concerning the limitations imposed upon any of the government's investigative authorities by the First Amendment. This request includes but is not limited to all documents concerning the following provisions, each of which limits governmental investigative authority on the basis of the First Amendment:

a. 5 U.S.C. § 552a(e)(7);

b. 12 U.S.C. § 3414(a)(5)(A);

c. 15 U.S.C. § 1681u(a)–(c);

d. 18 U.S.C. § 2709(b);

e. 50 U.S.C. § 1805(a)(2)(A);

f. 50 U.S.C. § 1824(a)(2)(A);

g. 50 U.S.C. § 1842(a)(1), (c)(2);

h. 50 U.S.C. § 1843(a), (b)(1);

i. 50 U.S.C. § 1861(a)(2)(B); and

j. 80 F.R. 9,355, at 9,356.

3. All portions of the current version of the FBI Domestic Investigations and Operations Guide ("DIOG") that discuss any limitations on any investigative activities, including the use of law enforcement and national security investigative authorities, to target, acquire, retain, disseminate, or use records or information of or about members of the news media, and/or any other limitations on those investigative activities imposed by the First Amendment. This request includes but is not limited to:

   a. All documents discussing the scope of, or setting forth any exceptions to, the portions of the current FBI DIOG described above;

   b. All portions of the current FBI DIOG that update or otherwise correspond to the following portions of the version of the FBI DIOG dated October 15, 2011:

      i. Appendices G and Q; and

      ii. Sections 2.84, 3.3.1.3–3.3.1.4, 3.5–3.6, 4.1–4.2, 4.4.4, 5.1, 5.3, 5.6.3.4.4.1, 5.7.1, 6.3, 6.10.1, 7.3, 7.10.1, 8.3, 8.8.1, 9.3, 9.10.1, 10.1.2.2.5, 10.1.3, 10.2.3, 16.1.3, 16.2.3, 16.2.3.5, 16.3.1.4.2, 16.3.1.5.3, 16.9.3, 18.2, 18.5.6.1, 18.5.6.4.8, 18.6.4.3.4.3, 18.6.5.3.5.1, 18.6.6.3.4, 18.6.6.3.7.4, 18.6.8.4.2.7, 18.6.9.5.1.1, and 19.10.

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).

III. Application for Expedited Processing

The Knight Institute and Freedom of the Press Foundation request 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 organizations 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 and Freedom of the Press Foundation are primarily engaged in disseminating information in order to inform the public about actual or alleged government activity.

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

The Knight 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.[11] 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").

The Freedom of the Press Foundation is a non-profit organization established under the laws of the State of California, with its primary office in San Francisco, California. The mission of FPF is to advocate for government transparency and accountability by preserving the rights guaranteed to the press under the First Amendment and fortifying the public's right to know. As a core part of that mission, FPF educates the public about government protocols and procedures involving the press and uses FOIA to obtain and publish documents detailing government activities that impinge on press freedom. Like the Knight Institute, therefore, FPF is "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II).

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 possible government intrusion on freedoms of speech, association, and the press, including the government's investigations into DisruptJ20.org visitors and into suspected leakers of government information.[12] Indeed, Attorney General Jeff Sessions recently announced

[11] 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.

[12] Robinson Meyer, *Can the U.S. Government Seize Anti-Trump Website's Visitor Logs?* (Aug. 15, 2017), https://perma.cc/X2WY-RWEB; News Release, U.S. Dep't of Justice, Attorney

an increase in FBI resources devoted to leak cases and the creation of a new counterintelligence unit to manage these cases, along with a review of policies "that impact leak investigations," including policies regarding media subpoenas.[13]

Moreover, the scope of the government's authority to conduct investigations into activities protected by the First Amendment, and in a manner that may otherwise violate the First Amendment, has become a matter of widespread debate and increasing public interest.[14] For instance, the recent publication of actual NSLs by companies such as Google, Yahoo, and the Internet Archive has generated significant public interest.[15] Yet lack of broader transparency with respect to current policies and practices stymies meaningful debate over the scope of the government's authority to obtain records and information of and about members of the press without their consent and often without their knowledge.

The public's interest in the records sought is even greater because current practices may violate constitutional rights. The First Amendment safeguards individuals' rights to anonymous speech and private association. As the Supreme Court has explained, "[p]rosecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. Identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley v. California*, 362 U.S. 60, 64 (1960). The Supreme Court has similarly recognized that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The First Amendment further guarantees the freedom of the press from unjustified intrusion into the newsgathering process. Courts therefore "apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by [a] search." *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978). At present, the public can neither determine the degree to which freedoms of speech,

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General Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security, (Aug. 4, 2017), *available at* https://perma.cc/NQQ8-82F2.

[13] News Release, U.S. Dep't of Justice, Attorney Jeff Sessions Delivers Remarks at Briefing on Leaks of Classified Materials Threatening National Security, (Aug. 4, 2017), *available at* https://perma.cc/NQQ8-82F2.

[14] *See, e.g.*, Laura Wamsley, *DOJ Demands Files on Anti-Trump Activists, and a Web Hosting Company Resists*, NPR (Aug. 15, 2017), https://perma.cc/4LB5-VDTF; Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump, Sessions Says*, N.Y. Times (Aug. 4, 2017), https://perma.cc/C3YD-82PJ.

[15] Richard Salgado, *Sharing National Security Letters with the Public*, Google (updated Aug. 10, 2017), https://perma.cc/Q5S6-S7GW; *see* Rachel Revesz, *Google Publishes Secret FBI Customer Information Requests Two Months After Gag Order Is Lifted*, Independent (Dec. 19, 2016), https://perma.cc/N7KU-V5LR; Chris Madsen, *Yahoo Announces Public Disclosure of National Security Letters*, Yahoo! (June 1, 2016), *available at* https://perma.cc/AK9D-VVAE.

association, and the press are being abridged under existing policies, nor assess how proposed policies could further curtail those freedoms.

For these reasons, the Knight Institute and Freedom of the Press Foundation are entitled to expedited processing of this request.

IV. Application for Waiver or Limitation of Fees

The Knight Institute and Freedom of the Press Foundation request 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 or FPF's commercial interests. The Institute and FPF 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 and Freedom of the Press Foundation request a waiver of search and review fees on the ground that each 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 and FPF qualify as "representative[s] of the news media" because each 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 Institute and FPF 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).

Finally, 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 Knight Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute performs scholarly research on the application of the First Amendment in the digital era. The Institute has recently inaugurated a research program bringing 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.

For these reasons, the Knight Institute and Freedom of the Press Foundation are 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/ Carrie DeCell

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U.S. Department of Justice

Criminal Division

Office of Enforcement Operations *Washington, D.C. 20530*

VIA Electronic Mail

October 1, 2018

Ms. Carrie DeCell
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Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.)

Dear Ms. DeCell, Mr. Abdo, and Mr. Timm:

This responds to your Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. Pursuant to a Search Stipulation filed on March 22, 2018, and further communications between our offices, this production letter relates to all request packages and a sample of fifteen inquiry packages (based on the parties' agreed sampling parameters) under the Department's Media Guidelines, 28 C.F.R. § 50.10, and the Privacy Protection Act, 42 U.S.C. 2000aa. Your request is currently in litigation, Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.). You should refer to this number in any future correspondence with this Office.

Criminal Division personnel searched the sections most likely to maintain records responsive to your request and located approximately 5,600 pages of records which are responsive to this portion of your request. After a review of the records, I have determined that they are exempt from disclosure pursuant to:

> 5 U.S.C. § 552(b)(3), which concerns matters specifically exempted from release by statute (in this instance, Rule 6(e), Fed. R. Crim. P., which pertains to grand jury material);

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege and the attorney work-product privilege;

5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties;

5 U.S.C. § 552(b)(7)(A), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to interfere with enforcement proceedings;

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties;

5 U.S.C. § 552(b)(7)(D), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to disclose the identities of confidential sources and information furnished by such sources;

5 U.S.C. § 552(b)(7)(E), which concerns records or information compiled for law enforcement purposes the release of which would disclose techniques and procedures for law enforcement investigations or prosecutions**;** and

5 U.S.C. § 552(b)(7)(F), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

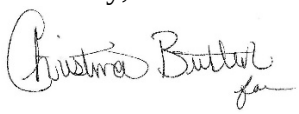
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Assistant United States Attorney Jean-David (J.D.) Barnea by phone at (212) 637-2679, by email at Jean-David.Barnea@usdoj.gov, or by mail at the United States Attorney's Office for the Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007, for any further assistance and to discuss any aspect of your request.

Although your request is the subject of litigation, I am required by statute to inform you that if you are not satisfied with my response to this request, 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 you 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,



Amanda Marchand Jones
Chief
FOIA/PA Unit

cc: Jean-David (J.D.) Barnea
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U.S. Department of Justice

Criminal Division

Office of Enforcement Operations — *Washington, D.C. 20530*

VIA Electronic Mail

October 31, 2018

Ms. Carrie DeCell
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Mr. Trevor Timm
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Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.)

Dear Ms. DeCell, Mr. Abdo, and Mr. Timm:

This is the Criminal Division's second production regarding your Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. Your request is currently in litigation, Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.). You should refer to this number in any future correspondence with this Office.

Criminal Division personnel searched the sections most likely to maintain records responsive to your request and we are continuing to review and process potentially responsive records. After careful review of 939 pages of records in accordance with the Stipulation and Order Regarding Document Searches and Processing, filed on March 22, 2018, I have determined that there are 264 pages of responsive records: thirty-five pages of records are appropriate for release in full; one page is appropriate for release in part pursuant to 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties; and 228 pages are exempt from disclosure pursuant to:

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege and the attorney work-product privilege;

5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

Per your discussion with AUSA J.D. Barnea, we will be providing the Vaughn Index describing the records outlined in our October 1, 2018, production letter separately, within the next two weeks.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Assistant United States Attorney Jean-David (J.D.) Barnea by phone at (212) 637-2679, by email at Jean-David.Barnea@usdoj.gov, or by mail at the United States Attorney's Office for the Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007, for any further assistance and to discuss any aspect of your request.

Although your request is the subject of litigation, I am required by statute to inform you that if you are not satisfied with my response to this request, 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 you 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,

Amanda Marchand Jones
Chief
FOIA/PA Unit

cc: AUSA Jean-David (J.D.) Barnea
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U.S. Department of Justice

Criminal Division

Office of Enforcement Operations *Washington, D.C. 20530*

VIA Electronic Mail

November 30, 2018

Ms. Carrie DeCell
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Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.)

Dear Ms. DeCell, Mr. Abdo, and Mr. Timm:

This is the Criminal Division's third production regarding your Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. Your request is currently in litigation, Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.). You should refer to this number in any future correspondence with this Office.

Criminal Division personnel searched the sections most likely to maintain records responsive to your request and we are continuing to review and process potentially responsive records. After careful review of 687 pages of records in accordance with the Stipulation and Order Regarding Document Searches and Processing, filed on March 22, 2018, I have determined that there are 6 pages of responsive records. Two pages of records are appropriate for release in full. Three pages are appropriate for release in part and one page is exempt from disclosure pursuant to:

5 U.S.C. § 552(b)(5), which concerns certain inter- and intra-agency communications protected by the deliberative process privilege and the attorney work-product privilege;

5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Assistant United States Attorney Jean-David (J.D.) Barnea by phone at (212) 637-2679, by email at Jean-David.Barnea@usdoj.gov, or by mail at the United States Attorney's Office for the Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007, for any further assistance and to discuss any aspect of your request.

Although your request is the subject of litigation, I am required by statute to inform you that if you are not satisfied with my response to this request, 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 you 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,

Amanda Marchand Jones
Chief
FOIA/PA Unit

cc: AUSA Jean-David (J.D.) Barnea
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U.S. Department of Justice

Criminal Division

Office of Enforcement Operations *Washington, D.C. 20530*

VIA Electronic Mail

December 21, 2018

Ms. Carrie DeCell
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Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.)

Dear Ms. DeCell, Mr. Abdo, and Mr. Timm:

This is the Criminal Division's fourth production regarding your Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. Your request is currently in litigation, Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.). You should refer to this number in any future correspondence with this Office.

Criminal Division personnel searched the sections most likely to maintain records responsive to your request and we are continuing to review and process potentially responsive records. After careful review of 1,691 pages of records in accordance with the Stipulation and Order Regarding Document Searches and Processing, filed on March 22, 2018, I have determined that there are twenty-eight pages of responsive records. Twenty-seven pages are appropriate for release in full and one page may be released in part pursuant to 5 U.S.C. § 552(b)(6), which concerns material the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This

response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Assistant United States Attorney Jean-David (J.D.) Barnea by phone at (212) 637-2679, by email at Jean-David.Barnea@usdoj.gov, or by mail at the United States Attorney's Office for the Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007, for any further assistance and to discuss any aspect of your request.

Although your request is the subject of litigation, I am required by statute to inform you that if you are not satisfied with my response to this request, 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 you 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,



Amanda Marchand Jones
Chief
FOIA/PA Unit

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U.S. Department of Justice

Criminal Division

Office of Enforcement Operations — *Washington, D.C. 20530*

VIA Electronic Mail

February 22, 2019

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Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.)

Dear Ms. DeCell, Mr. Abdo, and Mr. Timm:

This serves as the Criminal Division's final production regarding your Freedom of Information Act request dated October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press between May 1, 2013, and March 22, 2018. Your request is currently in litigation, Freedom of the Press Foundation, et al. v. DOJ, et al., No. 17-cv-9343 (S.D.N.Y.). You should refer to this number in any future correspondence with this Office.

Criminal Division personnel searched the sections most likely to maintain records responsive to your request and after careful review of the final 1,713 pages of potentially responsive records in accordance with the Stipulation and Order Regarding Document Searches and Processing, filed on March 22, 2018, I have determined that we have no remaining records responsive to your request.

For additional publicly available information, we are providing here for your convenience a link to Section 9-13.400 of the Justice Manual, "Obtaining Information From, or Records of, Members of the News Media; and Questioning, Arresting, or Charging Members of the News Media": https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.400.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact Assistant United States Attorney Jean-David (J.D.) Barnea by phone at (212) 637-2679, by email at Jean-David.Barnea@usdoj.gov, or by mail at the United States Attorney's Office for the Southern District of New York, 86 Chambers Street, 3rd Floor, New York, NY 10007, for any further assistance and to discuss any aspect of your request.

Although your request is the subject of litigation, I am required by statute to inform you that if you are not satisfied with my response to this request, 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 you 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,

Amanda Marchand Jones
Chief
FOIA/PA Unit

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