UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY,	)	
Plaintiff,	)	
v.	)	**No. 1:17-cv-00548-TSC**
DEPARTMENT OF HOMELAND SECURITY, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT PURSUANT TO LCvR 7(h)(1)

Defendants Department of Homeland Security (DHS), U.S. Customs and Border Protection (CBP) and U.S. Immigrations and Customs Enforcement (ICE) respond as follows to the numbered paragraphs and footnotes of plaintiff's statement pursuant to LCvR 7(h)(1):

1. In 2009, CBP and ICE both issued directives purporting to authorize suspicionless searches of travelers' electronic devices – including cell phones, tablets, and laptop computers – at the border. *See* Answer at Ex. A ("CBP Border Search Directive"), ECF No. 18-2; Answer Ex. B ("ICE Border Search Directive"), ECF No. 18-3.

2. Specifically, the CBP Border Search Directive stated that CBP officers "may" search electronic devices "with or without individualized suspicion." CBP Border Search Directive § 5.1. It further permitted CBP officers to seize electronic devices without individualized suspicion for the time necessary to search the devices. *Id.* at § 5.3.

3. Similarly, the ICE Border Search Directive stated that ICE Special Agents "may search, detain, seize, retain, and share electronic devices, or information contained therein, with or without individualized suspicion." ICE Border Search Directive § 6.1.

4. The number of border searches of electronic devices increased dramatically from 2015 to 2017. Border officers reportedly conducted 5,000 device searches in 2015. *See* Am. Compl. Ex. A ("Request"), ECF No. 10-1 (citing Cynthia McFadden, et al., *American Citizens: U.S. Border Agents Can Search Your Cell Phone*, NBC News (Mar. 13, 2017), https://perma.cc/69P7-RPXR). According to publicly available CBP statistics, that number jumped to 19,051 searches in Fiscal Year 2016 and 30,200 searches in Fiscal Year 2017. CBP Public Affairs, *CBP Releases*

Updated Border Search of Electronic Devise Directive and F417 Statistics, US Customs and Border Protection, (January 5, 2018), https://perma.cc/NV2F-BGTG.

5. News reports during this time raised concerns that border officers were targeting journalists and Muslims for searches of their electronic devices. *See* Request 3-4. For example, border officers reportedly subjected Isma'il Kushkush, a former acting bureau chief of the *New York Times* in East Africa, to an electronic device search January 2016 while interrogating him regarding his reporting on refugees. *Id.* (citing Alexandra Ellerbeck, *Security Risk for Sources as U.S. Border Agents Stop and Search Journalists*, Committee to Protect Journalists (Dec. 9, 2016), https://perma.cc /Q3HA-Y AZ3). Border officers reportedly detained Maria Abi-Habib, a reporter for the *Wall Street Journal*, and attempted to confiscate her cell phones, which contained confidential source information, in July 2016. *Id.* (citing Mazin Sidahmed, *Department of Homeland Security Detains Journalist Returning from Beirut*, The Guardian (Jul. 21, 2016), https://perma.cc /3JVS-693T). And in 2017, the Florida Branch of the Council for American-Islamic Relations filed ten complaints with CBP on behalf of Muslim-American travelers who were targeted for electronic devices at the border. *Id.* (citing Press Release, *CAIR-FL Files 10 Complaints with CBP After the Agency Targeted and Questioned American-Muslims About Religious and Political Views*, CAIR Florida (Jan. 18, 2017), https://perma.cc/5R5M-A8UD).

Response: Defendants are not required to respond to these paragraphs because the alleged facts, regardless of whether true, are not material to the resolution of plaintiff's cross motion for summary judgment. "Material facts" are those facts which, under the governing substantive law, "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); Fed. R. Evid. 401(b) (stating that "[e]vidence is relevant if . . . the fact is of consequence in determining the action"). None of the purported facts in the above paragraphs has any bearing on the outcome of this action under the Freedom of Information Act, 5 U.S.C. § 552, under applicable law. Since parties must identify genuine issues only with respect to "material" facts, Fed. R. Civ. P. 56(a), LCvR 7.1(h), defendants are not required to respond to those paragraphs.

6. Seeking to inform the public about the government's suspicionless searches of electronic devices at the nation's borders, on March 15, 2017, the Knight Institute submitted identical requests pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), and Customs and Border Patrol ("CBP") (the "Request"). Out of an abundance of caution, the

Knight Institute resubmitted the Request to CBP on March 22, 2017. *See* Am. Compl. ¶¶ 17-18, ECF No. 10.

Response: Defendants have no information concerning plaintiff's motivations and thus dispute this paragraph.

7. The Request sought seven sets of records: 1) records from Defendants' TECS database containing information about the number and reasons for each search, detention, retention, or sharing of individuals' electronic devices or the information accessible on them since fiscal year 2012; 2) documents relating to each instance since fiscal year 2012 in which CBP or ICE searched, detained, retained, or shared an electronic device or the information accessible on it; 3) revisions of or documents supplementing or superseding the CBP and ICE Directives concerning border searches of electronic devices; 4) certain documents relating to any reviews of CBP's or ICE's policies or practices concerning electronic device searches; 5) documents concerning or relating to complaints filed by individuals or organizations about CBP's or ICE's search, review, retention, or sharing of the information on travelers' electronic devices; 6) documents reflecting policies, practices, or procedures concerning how CBP officers handle "privileged or other sensitive materials," including "work-related information carried by journalists" as described in the CBP Directive concerning border searches of electronic devices; and 7) documents reflecting policies, practices, and procedures concerning CBP's anti-discrimination policy as applied to discretionary electronic device searches. Am. Compl. ¶ 21; *see* Request 4-6.

Response: Defendants dispute this paragraph because the paragraph is a paraphrase of the request, not the request itself. The request is set forth in the letter from Katherine Fallow to James V.M.L. Holzer, *et al.* (Mar. 15, 2017), ECF No. 1-1, at 4-6

7 n.1. The TECS database stores the electronic media reports ("EMRs") created to document electronic device searches at the border. 1st Joint Stat. Report at 3, ECF No. 21.

Response: Defendants dispute this footnote because the footnote does not accurately reflect the text of the referenced joint status report (JSR). The JSR states: "A record is created in TECS each time CBP conducts a border search of an electronic device." 1st JSR at 3.

8. The Knight Institute sought expedited processing of the Request and a waiver or limitation of fees. Request 7- 9.

Response: Defendants do not dispute this paragraph.

9. CBP acknowledged receipt of the Request on March 24, 2017, but did not respond to the Knight Institute's request for expedited processing. Compl. ¶ 21, ECF No. 1; Answer Ex. H, ECF No. 18.

Response: Defendants do not dispute this paragraph.

10. The Knight Institute filed an initial Complaint on March 27, 2017, alleging that the agencies violated FO IA by failing to respond to its request for expedited processing and by failing to process the Request "as soon as practicable." Compl. ¶¶ 25-26.

Response: Defendants do not dispute this paragraph.

11. ICE and DHS responded to the Request on March 28, 2017 and March 31, 2017, respectively. Answer Ex. D, ECF No. 18-5; Answer Ex. E, ECF No. 18-6. ICE granted the Institute's request for expedited processing, Answer Ex. D, while DHS denied the request, Answer Ex. E.

Response: Defendants do not dispute this paragraph.

12. DHS also referred the Request to the Transportation Security Administration ("TSA") and DHS's Office of the Inspector General ("OIG"). *Id.* On April 4, 2017, TSA acknowledged receipt of the Request and denied expedited processing. *Id.* at Ex. J, ECF No. 18-11. OIG acknowledged receipt of the Request on June 13, 2017. 2d Joint Stat. Report at 4 n.2, ECF No. 23.

Response: Defendants do not dispute this paragraph.

13. The Knight Institute filed an Amended Complaint on April 19, 2017. Am. Compl., ECF No. 10.

Response: Defendants do not dispute this paragraph.

14. Following the initiation of the lawsuit, the parties entered into negotiations regarding the terms and timing of the agencies' searches for records responsive to Request. *See, e.g.*, 3rd Joint Stat. Report at 2-4, ECF No. 24; 4th Joint Stat. Report at 1, 4, ECF No, 25.

Response: Defendants do not dispute this paragraph.

15. After conducting a search, CBP identified no records containing a list of the TECS data field categories, which the Knight Institute had requested under Item 2(a) of the Request. 1st Joint Stat. Report at 4, ECF No. 21.

Response: Defendants do not dispute this paragraph.

16. CBP processed and produced to the Knight Institute a six-record sample of the electronic media reports ("EMRs") stored in TECS to facilitate negotiations regarding CBP's

response to Item 2(b) of the Request. *Id.* at 34. On January 16, 2018, the Knight Institute and CBP agreed that CBP would process a random two-percent sample of EMRs created in the eighteen-month period between July 16, 2016 and January 16, 2018. 5th Joint Stat. Report at 4, ECF No. 26. The parties subsequently agreed that CBP would produce a spreadsheet displaying field entry data from all EMRs created between fiscal year 2012 and December 31, 2017, except for those data fields CBP considered exempt under FOIA. The parties further agreed that CBP would advise the Knight Institute as to which data fields it was withholding and which FOIA exemptions it considered applicable to those fields. 7th Joint Stat. Report at 6-7, ECF No. 30.

Response: Defendants do not dispute this paragraph.

17. On June 6, 2017, CBP responded to Item 3 of the Request by stating that the CBP Border Search Directive had not been revised, replaced, or superseded. 1st Joint Stat. Report at 4. Six months later, however, CBP revised the Border Search Directive. CBP, *Border Search of Electronic Devices*, CBP Directive No. 3340-049A (Jan. 4, 2018), https://perma.cc/3QKY-MPGR.

Response: Defendants do not dispute this paragraph. Defendants note that CBP took no action to mislead or deceive plaintiff.

18. On September 27, 2017, the parties agreed that CBP would search its complaint management system for records dating from January 1, 2012, relating to the CBP Office of Field Operations, frequent searches or delays, CBP's procedures and policies, and CBP's search authority using the following search terms: "electronic device," "phone," "cellphone," "laptop," "iPad," "mobile device," "computer," "cellular device," "tablet," "mobile phone," and "PDA." Decl. of Matthew Hellman in Supp. of Pl.'s Cross-Mot. for Summ. J. ("Hellman Decl.") Ex. R; *see* 3rd Joint Stat. Report at 4.

Response: Defendants do not dispute this paragraph. Defendants note that plaintiff agreed to "consider CBP to have complied fully with Item 5 of its request" if CBP conducted the above search. Email Wilkens to Glass (Oct. 4, 2017 4:18 p.m.) in email chain among Glass, Wilkens, Stewart, DeCell, Fallow (Sept. 15-Oct. 10, 2017), ECF No. 50-23, at 1.

19. Between May 26, 2017 and April 28, 2018, CBP released 969 pages of records responsive to Items 1, 2(b), 4, 5 and 7 of the Request. CBP withheld information from many of those pages, invoking Exemptions 6, 7(C), and 7(E). 1st Joint Stat. Report at 2; 4th Joint Stat. Report at 2-3; 6th Joint Stat. Report at 2, 4, ECF No. 29; Hellman Decl. Ex. Q; Hellman Decl. Ex. S.

Response: Defendants dispute this paragraph because CBP released 1,164 pages during the period May 26, 2017-April 28, 2018, exclusive of referrals from other agencies. 1st JSR at 2

(3 pp.); Letter Hoskins to Fallow (June 23, 2017), ECF No. 50-22, at 2 (3 pp.); Letter Hoskins to Fallow (Sept. 15, 2017), ECF No. 50-24, at 2 (178 pp.); 4th JSR at 2 (195 pp.); 5th JSR at 3 (170 pp.); 6th JSR at 2 (338 pp.) & 4 (277 pp.). Defendants note that none of CBP's withholdings was unwarranted.

20. Between May 31, 2018 and November 1, 2018, CBP produced 1,611 pages of EMRs to fulfill the two-percent sample agreed to by the parties on January 16, 2018. CBP withheld information from those pages, invoking FOIA Exemptions 6, 7(C), and 7(E). 7th Joint Stat. Report at 2, 8; 8th Joint Stat. Report at 5, ECF No. 31; 9th Joint Stat. Report at 2-3, ECF No. 32; 10th Joint Stat. Report at 1, ECF No. 34. CBP also produced the spreadsheet, consisting of 1,424 pages of the data fields that CBP did not consider exempt from all EMRs created from the beginning of fiscal year 2012 through December 31, 2017. 9th Joint Stat. Report at 2-3.

Response: Defendants do not dispute this paragraph.

21. Between November 1, 2018 and December 21, 2018, CBP produced 543 pages responsive to Items 4 and 5 of the Request. 10th Joint Stat. Report at 1-2; 11th Joint Stat. Report at 1, ECF No. 39. CBP withheld information from many of those pages, invoking Exemptions 5, 6, 7(C), and 7(E). *Id.* CBP also withheld an additional two pages, invoking Exemption 3. 11th Joint Stat. Report at 1.

Response: Defendants do not dispute this paragraph. Defendants note that none of CBP's withholdings was unwarranted.

22. Between March 15, 2019 and September 23, 2019, CBP produced an additional 482 pages of documents that had been referred to it by DHS and TSA. 11th Joint Stat. Report at 4; 14th Joint Stat. Report at 1, ECF No. 43; 15th Joint Stat. Report 1, ECF No. 44. CBP withheld information from many of those pages, invoking Exemptions 3, 5, 6, 7(C), and 7(E). *Id.* CBP also withheld an additional 492 pages, invoking Exemptions 3, 5, 6, 7(C), and 7(E). *Id.*

Response: Defendants dispute this paragraph because all of the referenced pages were referred to CBP by DHS. 11th JSR at 4-5; 14th JSR at 1-2; *see* 15th JSR at 1. Defendants note that none of CBP's withholdings was unwarranted.

23. As of June 2017, ICE represented that it did not have a mechanism to track border searches of electronic devices; nonetheless, it began developing search terms that would allow it to search its Investigative Case Management database for records responsive to Item 2(b) of the Request. 1st Joint Stat. Report at 4. In August 2017, ICE provided the Knight Institute with four sample reports of investigation ("ROIs") to facilitate negotiations regarding search terms. 2nd Joint Stat. Report at 5, ECF No. 23. On December 7, 2017, the Knight Institute agreed on the

searches ICE would conduct to comply with Item 2(b) of the Request. 5th Joint Stat. Report at 1. ICE agreed to process all ROIs that were part of closed cases and had been generated in the last eighteen months that contained the term "border search" and one or more of the following: "computer," "cell phone," "cellular device," "laptop," "electronic device," "tablet," "iPad," "mobile phone," "mobile device," "hand-held phone," "hand-held device," and "PDA." *See* Defs.' Motion for Summary Judgment ("Defs.' MSJ") Ex. I, ECF No. 46-10. ICE also agreed to process all ROIs meeting those search criteria that were part of open cases as of December 7, 2017, but closed before the date of ICE's final production. *Id.*

Response: Defendants do not dispute this paragraph.

24. ICE responded to Item 3 of the Request by stating that the ICE Border Search Directive had not been superseded. 1st Joint Stat. Report at 5.

Response: Defendants do not dispute this paragraph.

25. On June 16, 2017, ICE produced 108 pages and seven excel spreadsheets responsive to Items 1 and 4 of the Request. Hellman Decl. Ex. T. ICE withheld information from many of those pages, invoking Exemptions 5, 6, 7(C), and 7(E). 2nd Joint Stat. Report at 4-5; Hellman Decl. Ex. T.

Response: Defendants do not dispute this paragraph. Defendants note that none of ICE's withholdings was unwarranted.

26. Between February 22, 2018 and April 23, 2018, ICE produced 1,386 pages responsive to Item 2(b) of the Request. 6th Joint Stat. Report at 1, 3. ICE withheld information from many of those pages, invoking Exemptions 5, 6, 7(C), and 7(E). 6th Joint Stat. Report at 1.

Response: Defendants do not dispute this paragraph. Defendants note that none of ICE's withholdings was unwarranted.

27. Between February 9, 2019 and October 4, 2019, ICE produced 276 pages of documents that had been referred to it by DHS and CBP. 10th Joint Stat. Report at 2; 13th Joint Stat. Report at 2, ECF No. 41; 15th Joint Stat. Report at 1. ICE withheld information [from] many of those pages, invoking Exemptions 5, 6, 7(A), 7(C), and 7(E). *Id.*

Response: Defendants dispute this paragraph because the production of the referenced pages took place during the period February 6-October 4, 2019. *See* 11th JSR at 2. Defendants also dispute this paragraph because ICE has not made any withholdings pursuant to FOIA Exemption 7(A), Decl. of Toni Fuentes (Jan. 16, 2020), ECF No. 46-7, ¶ 19, prior statements to

the contrary notwithstanding. Defendants note that none of ICE's withholdings was unwarranted.

28. On May 11, 2018, ICE offered to provide the Knight Institute with a sample *Vaughn* index. 6th Joint Stat. Report at 6. On July 13, 2018, the Knight Institute identified 74 documents for ICE to include in its sample *Vaughn* index. 8th Joint Stat. Report at 1. ICE produced the sample *Vaughn* index on September 20, 2018. 9th Joint Stat. Report at 3.

Response: Defendants do not dispute this paragraph.

29. On October 25, 2019, the Knight Institute informed counsel for ICE that it expected to challenge ICE's withholdings under Exemptions 5, 6, 7(A), 7(C), and 7(E). 15th Joint Stat. Report at 1-2.

Response: Defendants do not dispute this paragraph.

30. The *Vaughn* index submitted by ICE to the Court in this case is incomplete. It does not include entries explaining its withholdings for the following documents: 2017-ICLI-00011 1, 2017-ICLI-00011 37-51, 2017-ICLI-00011 53-61, 2017-ICLI-00011 65, 2017-ICLI-00011 83-92, 2017-ICLl-00011 109-20, 20l7-ICLI-00011 124-42, 2017-ICLI-00011 147-494, 2017-ICLI-00011 507-833, 2017-ICLI-00011 837-1009, 2017-ICLI-00011 1016-53, 2017-ICLI-00011 1056-59, 2017-ICLI-00011 1066- 92, 2017-ICLI-00011 1102-03, 2017-ICLI-00011 1115-37, 2017-ICLI-00011 1141-54, 2017-ICLI-00011 1158-354, 2017-ICLI-00011 1374-390, 2017-ICLI-00011 1395-674, 2017-ICLI-00011 1677- 92, 2017-ICLI-00011 1700-800, 2017-ICLI-00011 1803-49, 2017-ICLI-00011 1852-65, 2017-ICLI-00011 1868-69, 2017-ICLI-00011 1877-99, 2017-ICLI-00011 1917-2026, 2017-ICLl-00011 2033-58, 2017-ICLI-00011 2069-143, 2017-ICLI-00011 2145-308. *See, e.g.*, Hellman Decl. Ex. T; Hellman Decl. Ex. BB.

Response: Defendants dispute this paragraph because ICE's *Vaughn* index is a suitable sample index and thus is not "incomplete."

31. On August 14, 2017, DHS represented that it had completed searches for records responsive to Items 1, 3, 4, and 5 of the Request. 2nd Joint Stat. Report at 3. DHS later explained that it had not conducted searches specific to any item of the Request, and instead searched the records of its Office of General Counsel ("OGC"), Office of Policy, and Office of Civil Rights and Civil Liberties ("CRCL") using two sets of search terms:

> a. ("searching" or "reviewing" or "collection" or "seizure" or "sharing" or "retention") and ("electronic devices" or "communication devices" or "laptop" or "Cellphone" or "i-phone" or "tablet" or "i-pad" or "sd-card" or "jump drive" or "external drive") and ("border" or "point of entry"); and

> b. "CBP Directive 3340-049" or "ICE Directive 7-6.l" or "Border Search of Electronic Devices Containing Information" or "Border Searches of Electronic Devices."

3d Joint Stat. Report at 5, ECF No. 24.

Response: Defendants do not dispute this paragraph. Defendants note that the paragraph misnames CRCL. CRCL is the Office for Civil Rights and Civil Liberties. 6 U.S.C. § 345(a).

32. Over the next several months, the parties negotiated search terms more tailored to the individual items of the Request.

Response: Defendants do not dispute this paragraph.

33. On July 31, 2018, the parties agreed that DHS would ask the following components to search for records responsive to Items 1, 4, 6, and 7 of the Request: the Threat Prevention and Security Policy component of the Office of Strategy, Policy, and Plans (OSPP), the Operations and Enforcement Law Division of OGC, the Office of Privacy, and the Security and Information Policy Section and the Antidiscrimination Group of CRCL. 8th Joint Stat. Report at 3.

Response: Defendants do not dispute this paragraph. Defendants note that the citation at the end of the paragraph should be "8th Joint Stat. Rep. at 4," not "8th Joint Stat. Rep. at 3."

34. The parties also agreed that for Item 5, DHS would ask CRCL to conduct a search of complaint summaries in Entellitrak, CRCL's case-tracking system, using the search terms ("electronics" or "phone" or "laptop" or "computer" or "device*" or "mobile" or "cell*" or "smartphone" or "iphone" or "i-phone" or "tablet" or "i-pad" or "ipad" or "jump drive" or "thumb drive" or "hard drive" or "external drive" or "sd-card" or "USB" or "camera" or "social media" or "Facebook" or "Twitter" or "Whatsapp" or "email" or "e-mail"). 7th Joint Stat. Report at 7; 8th Joint Stat. Report at 2.

Response: Defendants do not dispute this paragraph. Defendants note that the list of agreed-upon search terms included the term "sd card" as well as the term "sd-card." 7th JSR at 7.

35. DHS did not identify which of the records it produced were responsive to which items of [the] Request. Overall, between December 1, 2017 and May 10, 2019, DHS produced 2,649 pages of documents. 6th Joint Stat. Report at 2, 4; 7th Joint Stat. Report at 1-2; 9th Joint Stat. Report at 3; 10th Joint Stat. Report at 1-2; 12th Joint Stat. Report at 3, ECF No. 40; Hellman Decl. Ex. U. DHS withheld information from 1,696 of those pages, invoking Exemptions 5 and 6. *Id.* DHS also withheld an additional 1,759 pages, invoking FOIA Exemptions 3, 5, and 7(E). *Id.*

Response: Defendants dispute this paragraph because DHS generally provided information making it clear how particular productions related to the request. *E.g.*, 6th JSR at 4 ("DHS produced material on April 30, 2018, from the 290 pages it had reviewed in April 2018. One hundred ninety-five of the 290 pages were responsive to Items 4(a) and 5 of plaintiff's request and the other 95 were the product of DHS' search of the email accounts for the period January 24-March 7, 2017"); 11th JSR at 3 ("DHS advised plaintiff by email of is undersigned counsel dated February 12, 2019 . . . that the actions it had taken on November 30, 2018, with respect to the pages it had processed in November 2018 . . . marked the completion of its processing of records in this case except records of [CRCL] responsive to Item 5 of the request").

Defendants also dispute this paragraph because the following JSRs indicate that DHS produced 3,879 pages during the period March 29, 2018-May 10, 2019, and further indicate that DHS relied on the following exemptions in withholding material from those pages. 6th JSR at 2 (March 29, 2018, production; one page produced in full, 155 pages produced with redactions (Exemptions 5 & 6), and 51 pages withheld in full (Exemption 5)) & *id.* at 4 (April 30, 2018, production; 60 pages produced in full, 64 pages produced with redactions (Exemptions 5 & 6), and 18 pages withheld in full (Exemption 5)); 7th JSR at 1-2 (May 30, 2018, production; 250 pages produced in full, 89 pages produced with redactions (Exemptions 5 & 6), and 414 pages withheld in full (Exemptions 5 & 7(E)); 9th JSR at 3 (September 28, 2018, production; 14 pages produced in full, 283 pages produced with redactions (Exemption 5), and 9 pages produced with redactions (Exemptions 5 & 6)); 10th JSR at 2 (November 30, 2018, production; 64 pages produced in full, 22 pages produced with redactions (Exemptions 5 & 6), and 980 pages withheld in full (Exemption 5)); 12th JSR at 3 (May 10, 2019, production; 424 pages produced in full, 940

pages produced with redactions (Exemptions 5 & 6), and 41 pages withheld in full (Exemption 5)).

35 n.2. Although DHS's cover letter accompanying its May 30, 2018 production did not identify Exemption 3 as a basis for withholding, DHS withheld DHS-00l-513-000351-632 in full pursuant to Exemption 3. Hellman Decl. Ex. Z.

Response: Defendants dispute this footnote because the referenced page states on its face that the page was "[w]ithheld pursuant to exemption (b)(3) 49 U.S.C. § 114(r)." ECF No. 50-31. Withholdings pursuant to Exemption 3 and § 114 are withholdings by or on behalf of the Transportation Security Administration. *See* Decl. of Douglas E. Blair (Dec. 19, 2019), ECF No. 46-6, ¶ 8.

36. The *Vaughn* index submitted by DHS in this case is incomplete. It does not include entries explaining its withholdings for the following documents: DHS-001-00513-000001-262, DHS-001-00513-000-268-70, DHS-001-00513-000281-98, DHS-001-00513-000303-07, DHS-001-00513-000351-715, DHS-001-00513-000739-752, DHS-001-00513-000978-1103, DHS-001-00548-00592, DHS-001-00585-001972-2051, DHS-001-00585-002105-06, DHS-001-00585-002111-14, DHS-001-00585-002116-23, DHS-001-00585-002125-33, DHS-001-00585-002141-45, DHS-001-00585-002147-51, DHS-001-00585-002155, DHS-001-00585-002273, DHS-001-00585-002283, DHS-001-00585-002490. *See, e.g.*, Hellman Decl. Ex. CC; Hellman Decl. Ex. V; Hellman Decl. Ex. DD.

Response: Defendants dispute this paragraph because the *Vaughn* index submitted by DHS in this case is not "incomplete." *See* Supp. Decl. of James V.M.L. Holzer (June 11, 2020) ¶¶ 7-10.

37. On June 27, 2017 OIG informed the Knight Institute that it had searched for records responsive to Item 4(a) of the Request and that the records it identified were exempt from production pursuant to Exemption 5. Hellman Decl. Ex. W.

Response: Defendants do not dispute this paragraph.

38. On September 5, 2017, the Knight Institute and OIG agreed on the search OIG would conduct to comply with each of the items of the Request. 3rd Joint Stat. Report at 2-3; Hellman Decl. Ex. W. The parties agreed on search terms and agreed that for Items 1, 2, 3, 4(b), and 4(c), OIG would search for records within its Office of Audits and Office of Inspections. 3rd Joint Stat. Report at 2-3. For Item 5, OIG agreed to use the same search terms to search a database maintained by the Office of Investigations. *Id.* OIG also sent the language of the Request to the

leadership of all three offices and asked if any unit possessed records responsive to Items 6 and 7 of the Request.

Response: Defendants do not dispute this paragraph. Defendants note that the last sentence should bear the citation "*Id.*"

39. On September 21, 2017, OIG produced a one-page spreadsheet in response to Item 5 of the Request. OIG withheld information from that spreadsheet, invoking Exemptions 6 and 7(C). 3rd Joint Stat. Report at 3; Hellman Decl. Ex. W.

Response: Defendants dispute this paragraph because the referenced page is described in the letter by which it was produced as "containing complaint narratives responsive to item 5 of your request," not as a spreadsheet. Letter Lavine to DeCell (Sept. 21, 2017), ECF No. 50-28, at 1.

40. On May 28, 2019, OIG produced 39 pages that had been referred to it by DHS. OIG withheld information from 26 of those pages, invoking FOIA Exemptions 6, 7(C), and 7(E). 13th Joint Stat. Report at 1.

Response: Defendants do not dispute this paragraph. Defendants note that the citation at the end of the paragraph should include the following: "Decl. of Drew Lavine (Jan. 13, 2020) (Lavine Decl.), ECF No. 46-8, ¶ 6."

40 n.3. Although OIG's cover letter accompanying its May 28, 2019 production did not identify Exemption 7(E) as a basis for withholding, OIG later explained that the document was also withheld pursuant to Exemption 7(E). *See* Defs.' MSJ Ex. G (Decl. of Drew Lavine) ¶ 6.

Response: Defendants dispute this footnote because OIG "properly marked FOIA exemption 7(E) withholdings within the record set" despite its "not identify[ing] FOIA exemption 7(E) in its final response letter." Lavine Decl. ¶ 6.

41. OIG's declaration justifying its withholdings in this case only discusses documents from its May 28, 2019 production. *See* Defs.' MSJ Ex. G (Decl. of Drew Lavine) 5-6, ECF No. 46-8. OIG's declaration is therefore incomplete, because it has not attempted to justify its withholding of responsive information from the spreadsheet it produced on September 21, 2017.

Response: Defendants are not required to respond to this paragraph because plaintiff does not challenge the withholdings of OIG. Pl. Corrected Mem. Supp. Cross Mot. Summ. J. & Opp'n Def. Mot. Summ. J. (Pl. Mem.), ECF No. 50-1, at 1 n.1. The alleged facts, regardless of whether true, are not material to the resolution of plaintiff's cross motion for summary judgment.

42. On June 6, 2017, TSA stated that it had received an estimated 400 complaints responsive to Item 5 of the Request. 1st Joint Stat. Report at 6. On July 14, 2017, TSA produced 938 pages responsive to Item 5 of the Request. Hellman Decl. Ex. X. TSA withheld information from those pages, invoking Exemptions 6 and 7(C). *Id.*

Response: Defendants do not dispute this paragraph.

43. On September 19, 2019, TSA produced twelve pages that had been referred to it by DHS. CBP withheld information from those pages, invoking Exemptions 3 and 6. 14th Joint Stat. Report at 3.

Response: Defendants dispute this paragraph because the paragraph conflates two productions. TSA took the following actions on September 19, 2019, with respect to certain pages referred to it by CBP: produced 12 pages with redactions pursuant to FOIA Exemptions 3 and/or 6 and referred two pages back to CBP. 14th JSR at 3. CBP produced the above two pages on September 23, 2019, with redactions pursuant to FOIA Exemptions 5, 6, 7(C) and/or 7(E). 15th JSR at 1

44. On May 21, 2019, the Department of Health and Human Services ("HHS") produced seven pages that had been referred to it by DHS. HHS withheld information from those pages, invoking FOIA Exemption 6. 12th Joint Stat. Report at 4.

Response: Defendants do not dispute this paragraph.

45. On July 19, 2017, the State Department produced five documents that had been referred to it by TSA. Hellman Decl. Ex. Y. The State Department withheld information from those documents, invoking Exemption 6.

Response: Defendants do not dispute this paragraph. Defendants note that the referenced letter does not identify the exemption or exemptions pursuant to which the withholdings from the documents were made.

46. On October 25, 2019, the Knight Institute informed the government that it was considering challenging TSA's withholdings only with respect to Exemption 3. 15th Joint Stat. Report at 2. The Knight Institute also informed the government that it did not anticipate raising any challenges to the withholdings made by HHS and the State Department. *Id.*

Response: Defendants do not dispute this paragraph

Respectfully submitted,

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