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December 6, 2021

VIA EMAIL

Crime Records Center
Attn: CICR-FP
Russell Knox Building
27130 Telegraph Road,
Quantico, VA 22134-2253

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] submits this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records pertaining to the U.S. Army Criminal Investigation Division's ("CID") use of services provided by Clearview AI, Inc. ("Clearview").

I. Background

Public participation in the "vast democratic forums of the Internet," *Reno v. ACLU*, 521 U.S. 844, 868 (1997), produces a massive amount of data that can reveal individuals' beliefs and associations, from the intimately personal to the overtly political. Private companies can now collect, aggregate, and analyze this data on an unprecedented scale, using the information to create facial-recognition software and other tools that they market to law enforcement. Government use of these tools chills First Amendment–protected activity and invades the privacy of millions of people.

Clearview AI is perhaps the most prominent example of this technology. Its founder, Hoan Ton-That, recently announced that Clearview had aggregated over ten billion images from social media platforms and other

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

websites, using that data in its facial-recognition software.[2] Law enforcement and other entities across the country use this technology, and at least one federal agency—the U.S. Postal Inspection Service—used Clearview to identify individuals during the summer 2020 Black Lives Matter protests sparked by the murder of George Floyd.[3]

The U.S. Army Criminal Investigation Division has publicly acknowledged using Clearview's technology,[4] though little is known about the nature and extent of this use. As of at least January 2020, CID began soliciting companies for a tool that would support the "ability to quickly unlock the value of social media and big data to assess risk, respond to threats, and discover actionable intelligence."[5] The agency specified that it was looking for a service with the ability to "search against all social media that allows public access, such as Twitter, Facebook, Instagram, VK, LinkedIn, Discord, Gab, Telegram, SoundCloud, Myspace, Google+," and more.[6] It further specified that it needed a service capable of "geospatial search[ing]" and "face enrollment, matching, [and] alerting," while providing "persistent access to data sources."[7] The solicitation also allowed for the possibility that either CID or the vendor could retain any obtained data.[8]

In July 2020, a CID memorandum identified Clearview as a preferred software, given its capability to "provide[] image-based searches of publicly available material, instant links to publicly available online websites based on the results of their image-based searches and the ability to manage data inside the system in order to easily catalog investigative products in a case."[9] The memorandum also noted that CID "ha[d] been using this tool on a trial

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[2] Will Knight, *Clearview AI Has New Tools to Identify You in Photos*, WIRED (Oct. 4, 2021), https://www.wired.com/story/clearview-ai-new-tools-identify-you-photos.

[3] See Radhamely De Leon, *Six Federal Agencies Used Facial Recognition on George Floyd Protestors,* Vice (June 30, 2021), https://www.vice.com/en/article/3aqpmj/six-federal-agencies-used-facial-recognition-on-george-floyd-protestors.

[4] *See* Caroline Haskins, *The US Army Is Using a Controversial Facial-Recognition Technology that Uses Images from Social Media to Identify People, Documents Show*, Business Insider (Aug. 23, 2021), https://www.businessinsider.com/clearview-ai-facial-recognition-us-army-cid-criminal-command-tech-2021-8 [hereinafter "Haskins, *Controversial Facial-Recognition Technology*"].

[5] U.S. Army, Crim. Investigation Div., Statement of Work for Software-as-a-Service (SaaS) Solution for Social Media Exploitation Services 2 (Jan. 16, 2020), https://govtribe.com/file/government-file/w15qkn20q0002-attachment-0001-statement-of-work-dot-pdf.

[6] *Id.*

[7] *Id.* at 3.

[8] *Id.* at 3 ("Vendor shall state whether or not they will be retaining the data or they are going to allow CID to do it."). It is unclear from the Statement of Work and the later-issued contract with Clearview who is retaining acquired data.

[9] Dep't of the Army, Memorandum for Record, (July 16, 2020), https://s3.documentcloud.org/documents/21046039/updated_sole-source20memo20clearview_redacted.pdf.

basis" for "identifying potential subject, victims, and witnesses in possible crimes."[10] CID has declined to provide any further details on when it began its trial with Clearview or how it has used the tool.[11] CID decided to continue using Clearview, contracting for fifteen Clearview licenses beginning on September 28, 2020.[12]

While CID's use of Clearview's services is public,[13] information about the division's reliance on the facial-recognition technology is sparse. Though reporting suggests that CID "had run more than 1,300 searches as of February 2020,"[14] the precise nature of the services CID obtains from Clearview remains unclear. Given that CID's frequent use of Clearview only heightens concerns about the broad aggregation and analysis of First Amendment–protected activity, this information is of utmost public concern. To help the public learn more, the Knight Institute submits this FOIA request.

II. Records requested

The Knight Institute seeks the following records:

1. All requests for proposals, responses to requests for proposals, contracts, and formal or informal agreements related to services provided by Clearview AI, Inc., pertaining to:

    a. The contract awarded on September 27, 2020, with contract number W9124820A 0017,[15]

    b. The renewal of contract number W9124820A 0017, and

    c. Any other contract or agreement currently in effect.

We ask that you 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. *See* 5 U.S.C. § 552(a)(3)(B). If the records are not producible in that format, please provide the records electronically in a text-searchable, static-image format (*e.g.*, PDF), in the best

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[10] *Id.*

[11] Haskins, *Controversial Facial-Recognition Technology*, *supra* note 4.

[12] *See* Dep't of the Army, Standard Form 1449, Contract No. W9124820A 0017, at 3 (Sept. 27, 2020), https://s3.documentcloud.org/documents/21046040/w91248-20-f-0345-_redacted.pdf; *see also* Haskins, *Controversial Facial-Recognition Technology*, *supra* note 4.

[13] Haskins, *Controversial Facial-Recognition Technology*, *supra* note 4.

[14] Ryan Mac, Caroline Haskins, Brianna Sacks & Logan McDonald, *Surveillance Nation* (Apr. 6, 2021) https://www.buzzfeednews.com/article/ryanmac/clearview-ai-local-police-facial-recognition (last updated Apr. 9, 2021).

[15] *See* Dep't of the Army, Standard Form 1449, Contract No. W9124820A 0017, at 3 (Sept. 27, 2020), https://s3.documentcloud.org/documents/21046040/w91248-20-f-0345-_redacted.pdf.

image quality in the agency's possession, and in separate, Bates-stamped files.

III. Application for expedited processing

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

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

The Knight First Amendment Institute was established at Columbia University to defend and strengthen the freedoms of speech and the press in the digital age. Research and public education are essential to the Institute's mission.[16] Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Institute performs. *See ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit 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") (quoting *Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).[17]

For example, the Institute disseminates information about government activity—including information about government activity obtained under FOIA—through a variety of means, including its website,[18] Twitter account,[19] press releases,[20] blog posts,[21] op-eds,[22] and regular engagement with the

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[16] 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.

[17] *See About the Knight Institute*, Knight First Amendment Inst., https://perma.cc/8UYT-RUUZ (explaining that a priority of the Knight Institute's work is "ensuring access to information necessary for self-government").

[18] *See* Knight First Amendment Inst., https://knightcolumbia.org (last visited Jul. 22, 2021).

[19] *See* Knight First Amendment Inst. (@knightcolumbia), Twitter, https://perma.cc/4KXK-7MC4 (Knight Institute account with over 13,000 followers).

[20] *Knight Institute Calls on DOJ's Executive Office for Immigration Review to Suspend Policy Silencing Immigration Judges*, (Jan. 6, 2020), https://perma.cc/GT69-A8SC (describing an agency policy obtained through FOIA).

[21] *See, e.g.*, Anna Diakun, *Redactions in CDC Communications Policies Leave Key Questions Unanswered*, Knight First Amendment Inst. (June 12, 2020),

press.[23] The Institute also publishes records obtained through FOIA in "Reading Rooms" on the Institute's website, which allows the public to search, filter, and view the records.[24]

Through its research program, the Institute has published multiple influential essay series, including one focused on reimagining the First Amendment in the digital age, one addressing the technology giants' power to shape public discourse, and another on the relationship between big data and self-government.[25] In addition, the Institute has convened four research symposia—drawing practitioners, lawyers, academics, and journalists—to debate, discuss, and reflect on key issues in First Amendment doctrine and free speech theory. The first, "A First Amendment for All? Free Expression in an Age of Inequality," was held in March 2018;[26] the second, "The Tech Giants, Monopoly Power, and Public Discourse," was held in November

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https://perma.cc/GQX3-WKCN; Stephanie Krent, *Recently Released OLC Opinions from 1974 Shed Light on Current Legal Debates*, Knight First Amendment Inst. (May 18, 2020), https://perma.cc/34N2-UAQ3.

[22] *See, e.g.*, Anna Diakun & Trevor Timm, *For the Biden Administration, Who Counts as News Media?*, Colum. Journalism Rev. (June 9, 2021), https://perma.cc/PR7T-75FQ; Jameel Jaffer & Ramya Krishnan, *We May Never See John Bolton's Book*, N.Y. Times (Jan. 30, 2020), https://perma.cc/HGY9-638T.

[23] *See* Cora Currier, *Government Can Spy on Journalists in the U.S. Using Invasive Foreign Intelligence Process*, Intercept (Sept. 17, 2018, 11:43 AM), https://perma.cc/YQ7F-NZ5R (reporting on DOJ rules obtained by the Knight Institute under FOIA); Jessica Jerreat, *CDC Media Guidance Blacklists VOA Interview Requests,* VOA News (June 14, 2020, 7:59 PM), https://perma.cc/2KVX-WGYR (reporting on CDC email obtained by the Knight Institute under FOIA); Ellen Nakashima, *U.S. Spy Agencies Sued for Records on Whether They Warned Khashoggi of Impending Threat of Harm*, Wash. Post (Nov. 20, 2018, 8:57 PM), https://perma.cc/C6CW-TSDA (describing FOIA lawsuits); Charlie Savage, *U.S. Government Went Through These People's Phones at the Border. Read Their Stories.*, N.Y. Times (Dec. 22, 2017), https://perma.cc/H7P2-RK2T (describing and publishing several hundred complaints obtained by the Knight Institute about warrantless searches of electronic devices at the border).

[24] *See, e.g.*, *The OLC's Opinions*, Knight First Amendment Inst., https://knightcolumbia.org/reading-room/olc-opinions (last visited Jul. 22, 2021).

[25] *See Research*, Knight First Amendment Inst., https://perma.cc/TVD9-39RK.

[26] *A First Amendment for All? Free Expression in an Age of Inequality*, Knight First Amendment Inst. (Mar. 23, 2018, 8:30 AM); https://perma.cc/DM59-74KG.

2019;[27] the third, "Data and Democracy," was held in October 2020;[28] and the fourth, "Reimagine the Internet," was held virtually in May 2021.[29]

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

The records sought are urgently needed to inform the public about actual or alleged government activity. *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). Specifically, the requested records relate to CID's technical capability to collect information through social media surveillance.

The nature and extent of federal law enforcement's ability to collect information through social media surveillance has been the object of persistent public attention in recent months. In June 2021, the U.S. Government Accountability Office published a report noting that twenty different federal agencies used facial-recognition technology, and that fourteen of those agencies used the technology "to support criminal investigations."[30] Six agencies reported using the technology "on images of the unrest, riots, or protests" following the murder of George Floyd, and at least three agencies used the technology for criminal investigations following the January 6, 2021 attack on the U.S. Capitol.[31] The Army was involved in investigating the Capitol attack, reviewing at least one officer's actions.[32] It is unclear whether the Army used facial-recognition technology in its investigation, which only underscores the urgent need for more information regarding CID's use of such technology. The disclosure of this information is especially timely given that CID has recently undertaken restructuring efforts following scrutiny concerning "overworked agents" and "poorly handled criminal cases,"[33] and given that CID's initial contract with Clearview was recently up for renewal.[34]

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[27] *Leading Legal Scholars, Economists, and Technologists to Headline Fall Symposium*, Knight First Amendment Inst. (Jan. 8, 2020), https://perma.cc./86DE-TPQS.

[28] *Data and Democracy*, Knight First Amendment Inst., https://knight-columbia.org/events/data-and-democracy (last visited Jul. 22, 2021).

[29] *Reimagine the Internet*, Knight First Amendment Inst., https://knightcolumbia.org/events/reimagine-the-internet?mc_cid=263ee459e6&mc_eid=UNIQID (last visited Jul. 30, 2021).

[30] U.S. Gov't Accountability Off., GAO-21-518, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks* 17 (2021).

[31] *Id*. at 17–18.

[32] Jake Bleiberg, Sarah Blake Morgan & James Laporta, *Army Investigating Officer Who Led Group to Washington Rally*, Associated Press (Jan. 11, 2021), https://apnews.com/article/emily-rainey-army-investigation-capitol-5e3cd1ed9fc23269ce3b74ae55664d90.

[33] *See* Kyle Rempfer, *CID Overhaul: A Civilian Director Will Oversee Criminal Probes; Officers to Become Special Agents* (May 6, 2021),

Disclosure of the requested records will shed light on the extent to which CID's use of these tools is likely to burden Americans' exercise of their First Amendment rights of free speech and association, as well as their privacy online.

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

IV. Application for waiver or limitation of fees

The Knight Institute requests a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest and that disclosure is "likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

For the reasons explained above, disclosure of the records would be in the public interest. Moreover, disclosure would not further the Knight Institute's commercial interest. The Institute will make any information disclosed 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." *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

The Knight Institute also requests a waiver of search and review fees on the grounds that it qualifies as an "educational . . . institution" whose purposes include "scholarly . . . research" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Institute has a substantial educational mission. Situated within a prominent academic research university, the Institute performs scholarly research on the application of the First Amendment in the digital era. As described above, the Institute's research program brings together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It publishes that commentary in many forms, including in scholarly publications and in short-form essays.

The Knight Institute also requests a waiver of search and review fees on the grounds that it is a "representative[] of the news media" within the meaning of FOIA and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

The Institute meets the statutory definition of a "representative of the news media" because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Nat'l Sec. Archive v. DOD*, 880 F.2d 1381,

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https://www.armytimes.com/news/your-army/2021/05/06/cid-overhaul-a-civilian-director-will-oversee-criminal-probes-officers-to-become-special-agents/.

[34] Haskins, *Controversial Facial-Recognition Technology*, *supra* note 4.

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 the FOIA); *accord Serv. Women's Action Network v. DOD*, 888 F. Supp. 2d 282 (D. Conn. 2012); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011); *ACLU*, 321 F. Supp. 2d at 30 n.5. Courts have found other non-profit organizations, whose mission of research and public education is similar to that of the Knight Institute, to be "representatives of the news media." *See, e.g.*, *Cause of Action v. IRS*, No. 13-0920, 2015 WL 5120863 (D.C. Cir. Aug. 28, 2015); *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 10–15 (finding non-profit group that disseminated an electronic newsletter and published books was a "representative of the news media" for purposes of the FOIA); *Nat'l Sec. Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch, self-described as a "public interest law firm," a news media requester).

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

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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 it.

/s/ Anna Diakun

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