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January 12, 2022

Via ECF and Electronic Mail

The Honorable Analisa Torres
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Knight First Amendment Institute at Columbia University v. Centers for Disease Control and Prevention and U.S. Department of Health and Human Services*, 20 Civ. 2761 (AT)

Dear Judge Torres,

Pursuant to the Court's December 27, 2021 Order, Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Plaintiff") and Defendants the Centers for Disease Control and Prevention ("CDC") and the U.S. Department of Health and Human Services ("HHS" and, collectively with the CDC, the "Defendants") jointly submit this letter regarding "whether they intend to file renewed motions for summary judgment on the outstanding issues." *See* ECF No. 77. Presently, the remaining dispute between the parties concerns the scope of the CDC's new search for records responsive to parts one and two of the request; however, because the CDC has not completed a new search yet, the parties respectfully submit that renewed motion practice is premature at this time.

A. Issues Resolved Following the Court's September 17, 2021 Summary Judgment Opinion and Order

On September 17, 2021, the Court denied Defendants' motion for summary judgment and granted in part and denied in part

Plaintiff's cross-motion for summary judgment. *See generally* ECF No. 54. In connection with the Court's summary judgment opinion, the Court ordered (1) the CDC to conduct a new search for documents responsive to requests one and two of Plaintiff's FOIA request, and the parties to confer on a search for items responsive to the Court's June 4 order; (2) Defendants to release un-redacted versions of five documents (referred to as "Documents 9, 10, 11, 27, and 28"); (3) Defendants to produce "Document 12" to Plaintiff with all segregable factual material unredacted; and (4) Defendants to submit "Document 12" to the Court under seal for *in camera* review, along with an affidavit describing whether it, or any iteration of Document 12, was ever operative. *See id.* at 36.

On November 10, 2021, Defendants released unredacted versions of Documents 9, 10, 11, 27, and 28 to Plaintiff, fulfilling part (2) of the Court's September 17, 2021 Order. ECF No. 54 at 36; *see also* ECF No. 57 (extending disclosure deadlines until November 17, 2021). In addition, on November 10, 2021, Defendants released a redacted version of Document 12 to Plaintiff, which contained all segregable factual material in unredacted form, with the remainder withheld pursuant to Exemption 5, *see* 5 U.S.C. § 552(b)(5), fulfilling part (3) of the Court's September 17, 2021 Order. ECF No. 54 at 36; *see also* ECF No. 57.

On October 8, 2021, Defendants filed Document 12 under seal for *in camera* review, along with the declaration of Michelle Bonds, explaining that Document 12, along with all iterations and drafts of it, were never operative. *See* ECF Nos. 58, 58-1, 59, 59-1. These filings fulfilled part (4) of the Court's September 17, 2021 Order. ECF No. 54 at 36.[1] Plaintiff, in light of the additional information provided about the nature and function of Document 12 through the agency's supplemental declarations, withdraws its challenge to the remaining withheld portions of Document 12.

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[1] On December 13, 2021, the Court ordered Defendants to provide "a revised supplemental affidavit explaining the particular harm, if any, that would arise from the production of Document 12, see 5 U.S.C. § 552(a)(8)(A)." ECF No. 74. On December 17, 2021, Defendants submitted the declaration of Jamila H. Jones in response to the Court's December 13 Order. See ECF No. 76.

The parties thus respectfully submit that there are no remaining or outstanding issues regarding sections (2), (3), and (4) as detailed on page 36 of the Court's September 17, 2021 Order, and they do not intend to submit renewed motions for summary judgment related to these portions of the Court's Order.

B. The CDC's New Search

As enumerated above, the Court's order concerning the adequacy of the CDC's search had two aspects: (1) compliance with the Court's June 4 Order; and (2) a new search for documents responsive to parts one and two of Plaintiff's FOIA request. ECF No. 54 at 36.

As related to compliance with the Court's June 4 Order, the Court directed the parties to "confer on a search for items responsive to the Court's June 4 order, as discussed in § III.B.2 [of the Court's opinion]." ECF No. 54 at 36. In light of the CDC's representation that the CDC Communication and Media Strategy for the Coronavirus Disease 2019 Response was never operative or implemented, ECF No. 58-1 ¶¶ 1, 6-7, Plaintiff does not request a renewed search for items responsive to the Court's June 4 Order.

As related to the CDC's search for records responsive to parts one and two of Plaintiff's FOIA request, the Court directed the CDC to conduct a new search. ECF No. 54 at 36. Further, the Court directed the parties to "meet and confer and engage in a good faith effort to agree to search terms, initial custodians for the search, and a reasonable timeline for Defendants' production." *Id.* Discussions and negotiations between September and early November did not result in an agreement on the scope of the CDC's new search, and the CDC requested that the parties' end their discussions and submit their respective positions regarding the CDC's new search to the Court, which the parties did on December 8, 2021. *See* ECF No. 72 & ECF Nos. 72-1, 72-2, 73, 73-1, 73-2.

In light of the disagreement regarding the scope of the CDC's new search, the CDC has not yet processed or produced any responsive records. The parties have put their respective proposals before the Court and have each asked the Court to endorse their own proposal. Plaintiff has also asked the Court, in the alternative, to order the parties to continue to meet and confer in an effort to reach an agreement. Because this dispute involves

a question about how the CDC must comply with the Court's September 17, 2021 Order, the parties respectfully submit that renewed motions for summary judgment are inappropriate at this time. Moreover, even if the CDC had begun to process and produce documents, further summary judgment briefing limited to the adequacy of such a search that is still ongoing would result in inefficiencies for the Court, given the possibility that the parties may have future disputes regarding any withholdings resulting from the full processing and production in connection with the CDC's new search.

Accordingly, because the parties have been unable to reach an agreement regarding the scope of the CDC's new search, the parties respectfully request a ruling from the Court regarding the current dispute before engaging in further summary judgment motion practice.

Respectfully submitted,

/s/ Anna Diakun

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