U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

September 23, 2022

Via ECF
Honorable Katherine Polk Failla
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

Re: *Knight First Amendment Institute at Columbia Univ. v. U.S. Dep't of State et al.*, 22 Civ. 3003 (KPF)

Dear Judge Failla:

This Office represents defendants the U.S. Department of State ("State"), the U.S. Department of Homeland Security ("DHS"), and the Office of the Director of National Intelligence ("ODNI"; collectively with State and DHS, "Defendants" or the "Agencies"), in the above-referenced case brought by plaintiff Knight First Amendment Institute at Columbia University ("Plaintiff") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

I write respectfully on behalf of both parties in advance of the initial conference scheduled in this matter for September 28, 2022, at 12:00 p.m., pursuant to the Court's orders dated May 9, August 4, and September 21, 2022, Dkt. Nos. 16, 21, 24.

The parties respectfully submit the following information, pursuant to the Court's initial conference order:[1]

1. **Brief statement of the nature of the action.** This is an action under FOIA, seeking the production of documents that Plaintiff requested from Defendants in separate FOIA requests dated February 15, 2022, regarding the report ordered in Section 3 of President Biden's Proclamation entitled Ending Discriminatory Bans on Entry to the United States, Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021), and certain other related records.

In processing responsive records, the Agencies have invoked or may invoke FOIA exemptions under 5 U.S.C. § 552(b), including exemption 1, which protects classified information; exemption 5, which protects deliberative and otherwise privileged agency communications; and exemption 6, which protects records and information whose disclosure could invade personal privacy. The Agencies' search for records responsive to the requests and

[1] The Court's order dated August 4, 2022, relieved the parties "of their obligation to submit a proposed case management plan prior to the conference." Dkt. No. 21.

the propriety of FOIA withholdings will likely be the central issues in dispositive motions, if the action is not resolved consensually.

2. **Basis for jurisdiction and venue.** Plaintiff alleges in the complaint that jurisdiction and venue are proper in this Court under 28 U.S.C. § 1331 and 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii). Dkt. No. 1 (Compl.) ¶¶ 7-8.

3. **Deadlines.** There are no deadlines, due dates, or cutoff dates in place at this time.

4. **Motions.** There are no motions outstanding at this time. The Agencies are in the process of reviewing potentially responsive records; once the production of responsive records is completed, the parties anticipate that summary judgment motions concerning the Agencies' response to the Requests and/or assertion of FOIA exemptions may be necessary to resolve the action, if it is not resolved consensually.

5. **Discovery.** No discovery has taken place in this FOIA matter, and the parties do not believe there is any discovery that would be helpful to advance settlement negotiations at this time.

6. **Settlement discussions.** The parties have conferred and agreed upon certain ways to limit the scope of the requests. The parties may engage in further discussions to clarify the scope of the requests, or to discuss Defendants' responses to the requests, as the case proceeds.

7. **Other information.** The parties provide the following update on the status of this matter, and their respective proposals for how this matter will proceed:

Current status:

At this time, two of the Agencies, State and ODNI, have issued initial responses to the request:

(1) State issued an initial response letter regarding the FOIA request on August 15, 2022, and issued a supplemental response on September 15, 2022.

(2) ODNI issued an initial response letter regarding the FOIA request on August 15, 2022, stating that records responsive to the request were processed and sent to other agencies or components for consultation. At this time, ODNI continues to await responses to consultation requests that it sent out previously, and will provide responses regarding those records when possible.

After conferral between the parties, Plaintiff has agreed to narrow the request to exclude drafts of the report that is the primary subject of the FOIA requests. The parties anticipate this exclusion will speed the production process.

Agencies' position:

The Agencies propose the following schedules for further review of records responsive to the requests:

- **DHS:** DHS proposes to review 300 pages per month until it has completed its review of responsive records. DHS anticipates issuing its initial response by September 27, 2022. DHS has located approximately 300 pages of potentially responsive records, other than drafts of the report at issue, which Plaintiff has agreed to exclude. Accordingly, DHS anticipates completing its review by September 27, 2022, subject to any pending referrals or consultations with other agencies or components.

- **ODNI:** ODNI has located a total of approximately 100 pages of potentially responsive records and anticipates reviewing all remaining such records by October 31, 2022. Accordingly, ODNI anticipates completing its review by October 31, 2022, subject to any pending referrals or consultations with other agencies or components.

- **State:** State proposes to review 300 pages per month until it has completed its review of responsive records. State anticipates issuing its next response by October 15, 2022. In that response, State anticipates continuing its review of potentially responsive records from after October 8, 2021—the date of the relevant report—per Plaintiff's request. State has located approximately 1,550 pages of potentially responsive records, other than drafts of the report at issue, which Plaintiff has agreed to exclude. Accordingly, State anticipates completing its review by February 15, 2023, subject to any pending referrals or consultations with other agencies or components.

To the extent Plaintiff contests State's proposed processing rate, the Court should implement the government's proposal of 300 pages per month. State has proposed that Plaintiff further narrow the request by excluding materials that relate to the drafting of the report at issue, which are likely to be withheld in full or substantial part under the deliberative process privilege pursuant to FOIA exemption 5, among other possible grounds for withholding. This would further reduce State's volume of potentially responsive pages to be processed and lead to a shorter processing period. However, Plaintiff has declined that proposal.

Additionally, current resource constraints, including the continuing impact of pandemic-related telework policies, limit the capacity of State's FOIA personnel, who continue to work under pressure to facilitate a large number of FOIA requests in addition to the request at issue here. A number of courts have recognized these limitations, both before and since the onset of the pandemic, in adopting State's proposed processing rate. *See, e.g.*, *Project For Privacy and Surveillance Accountability v. ODNI et al.*, No. 21 Civ. 1217 (D.D.C.), Minute Order dated Apr. 19, 2022 (finding "no reason to order [State] . . . to change [its] proposed processing rate of 300 pages per month" given that "processing rates are tied to limited resources and are consistent with processing rates in other FOIA cases," and denying the plaintiff's request for a 500-page-per-month rate); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of State*, No. 21 Civ. 742 (D.D.C.), Minute Order dated May 19, 2021 (directing State to process "at a rate of

300 pages per month," and rejecting the plaintiff's request for a 500-page-per-month rate); *Citizens for Responsibility & Ethics in Washington v. Office of Mgmt. & Budget et al.*, No. 19 Civ. 3488 (D.D.C.), Minute Order dated Mar. 3, 2020 (directing State to process "at a rate of 300 pages per month" and rejecting the plaintiff's request for a 600-document-per-month rate).

Plaintiff's position:

Plaintiff's position on Defendants' proposal is as follows:

- **DHS:** Plaintiff accepts DHS's proposed processing schedule, except that, to the extent that records remain outstanding on September 27, 2022, due to any pending interagency consultation or referral process, Plaintiff requests that DHS provide an estimated completion date for those records at that time.

- **ODNI:** Plaintiff accepts ODNI's proposed processing schedule, except that, to the extent that records remain outstanding on October 31, 2022, due to any pending interagency consultation or referral process, Plaintiff requests that ODNI provide an estimated completion date for those records at that time.

- **State:** Plaintiff proposes that State process its responsive records at a rate of approximately 500 pages per month, with production to be completed by December 15, 2022.

In contrast to the cases Defendants have cited, a faster processing rate for State's records is warranted here. These records relate to the efficacy of the use of social media identifiers in the visa vetting process. Almost 15 million visa applicants a year are already required to disclose social media identifiers pursuant to a policy put in place during the Trump administration. *See* 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 13,806, 13,806 (Mar. 30, 2018); 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 13,807, 13,807 (Mar. 30, 2018). Dozens of civil society organizations have objected to this requirement, concerned about its chilling effect on online speech and association and the lack of evidence that it actually serves the government's purposes. *See, e.g.*, Letter from Brennan Center for Justice, *et al*., to the Department of State (May 29, 2018), *available at* https://perma.cc/P8DE-WHRL. When President Biden took office, he ordered an assessment of whether the use of social media handles "meaningfully improved screening and vetting," *see* Proclamation on Ending Discriminatory Bans on Entry to The United States, Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021), and the records Plaintiff seeks are related to that assessment.

This FOIA request is particularly urgent because the Biden administration now seeks to expand the Trump-era policy to cover an additional 15 million travelers a year, without releasing any information to the public about the efficacy of the practice. *See* Arrival and Departure Record, Nonimmigrant Visa Waiver Arrival/Departure, Electronic System for Travel Authorization (ESTA), 87 Fed. Reg. 10,223, 10,224 (Feb. 23, 2022). This proposal is currently pending in the Office of Information and Regulatory Affairs, and could be approved any day.

The public needs the information sought through this FOIA request to evaluate the wisdom of this proposal, and time is of the essence.

When courts have found State's and other agencies' standard processing rates to be inadequate, they have frequently ordered them to process records at a rate of 1,000 or more pages per month. *See, e.g.*, Order, *Nat'l Immigr. Project v. U.S. Dep't of Homeland Sec.*, No. 18-cv-659-RA (S.D.N.Y. Apr. 6, 2018), ECF No. 55 (ordering State and DHS to process 1,500 pages per month); *Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec.*, 218 F. Supp. 3d 27, 37 (D.D.C. 2016) (summarizing initial order requiring DHS to process at least 2,000 pages per month); *Open Soc'y Just. Initiative v. CIA*, 399 F. Supp. 3d 161, 168 (S.D.N.Y. 2019) (ordering State to process 5,000 pages per month). Cognizant of State's other pending FOIA matters, Plaintiff does not ask the agency to process this request at such an accelerated rate. Instead, it asks the agency to process responsive records at a rate of approximately 500 pages per month, with production to be completed by December 15, 2022. This schedule will allow the parties to proceed to briefing two months sooner than State's proposal would allow, and is especially warranted given than Plaintiff's FOIA request has been pending for over seven months.

* * *

Thank you for your consideration of this matter.

Respectfully submitted,

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cc: Counsel of record (via ECF)