KNIGHT
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June 3, 2021

via email

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Gregory Koch
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Washington, D.C. 20511
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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] submits this request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for a copy of the report referenced in Section 3 of President Biden's Proclamation on Ending Discriminatory Bans on Entry to The United

[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.

States, Proclamation No. 10141, 86 Fed. Reg. 7,005 (Jan. 20, 2021) ("Biden Proclamation").

I. Background

This is a request for a report reflecting the Biden administration's review of the use of social media identifiers by the U.S. Departments of State ("State Department") and Homeland Security ("DHS"), among other aspects of the visa vetting process.

Immediately after taking office, President Biden revoked former President Trump's executive orders and presidential proclamations restricting the entry of individuals from certain Muslim-majority and African countries. Biden Proclamation § 1. The revoked orders and proclamations not only imposed transparently discriminatory travel bans, but also directed the Secretary of State and other Cabinet members to implement procedures for the "enhanced" vetting of applications for visas and other immigration benefits. Executive Order 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 9, 2017) (signed Mar. 6, 2017); *see also* Memorandum for the Secretary of State, the Attorney General, and the Secretary of Homeland Security, 82 Fed. Reg. 16,279, 16,279 (Apr. 3, 2017) (signed Mar. 6, 2017). Pursuant to former President Trump's "enhanced" vetting directive, the State Department adopted new rules requiring nearly all visa applicants to register with the government all social media identifiers they have used on at least twenty specified platforms over the preceding five years (the "Registration Requirement"). *See* 60-Day Notice of Proposed Information Collection: Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 13,806 (Mar. 30, 2018); 60-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 13,807 (Mar. 30, 2018). Related policies provided that the State Department and DHS could retain the collected information indefinitely, share it broadly among federal agencies, and disclose it, in some circumstances, to foreign governments. *See, e.g.*, U.S. Dep't of State, Privacy Impact Assessment for Consular Consolidated Database 1–2, 12–13 (Oct. 2018); U.S. Dep't of Homeland Security, DHS/CBP/PIA-006(e), Privacy Impact Assessment Update for the Automated Targeting System 1 (Jan. 13, 2017); U.S. Dep't of Homeland Security, Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556, 43,557–58, 43,562 (Sept. 18, 2017).

In the same proclamation revoking former President Trump's travel bans, President Biden directed the Secretaries of State and Homeland Security, in consultation with the Director of National Intelligence, to conduct a review of current visa vetting procedures and to complete a report of that review by May 20, 2021. *See* Biden Proclamation § 3. In particular, he ordered a "review of the current use of social media identifiers in the screening and vetting process, including an assessment of whether this use has meaningfully improved screening and vetting, and recommendations in light of this assessment." Biden Proclamation § 3(d).

II. Records requested

The Knight Institute requests a copy of the report ordered in Section 3 of the Biden Proclamation, as well as any cover letter, transmittal email, or document attached thereto.

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). Alternatively, please provide the records electronically in a text-searchable, static-image format (e.g., PDF), in the best 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 document sought because the information it contains 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 Institute is "primarily engaged in disseminating information" within the meaning of FOIA. 5 U.S.C. § 552(a)(6)(E)(v)(II).

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.[2] 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").

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 report relates to the government's mass collection, indefinite retention, and broad dissemination of visa applicants' social media information. Moreover, it bears on ongoing litigation challenging those policies on constitutional and procedural grounds.

The Registration Requirement and related policies are the subject of a legal challenge dating to December 2019, which the court stayed pending completion of the Biden administration's review. Minute Order, Doc Society v. Blinken, No. 19 Civ. 3632 (D.D.C. Mar. 23, 2021). In that case, Plaintiffs argue that the collection,

[2] 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.

retention, and dissemination of visa applicants' social media information chills their online speech and deters them from coming to the United States, thereby depriving U.S. residents of opportunities to hear from and engage with those individuals, in violation of the First Amendment. Plaintiffs also argue that the Registration Requirement exceeds the State Department's statutory authority and are arbitrary and capricious, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2). Noting the revocation of the executive order underlying the Registration Requirement and the review ordered by President Biden, the court stayed the case pending completion of that review and ordered the government to file a status report "indicating whether it anticipates taking any action that moots the case." Minute Order, Doc Society v. Blinken, No. 19-cv-3632 (D.D.C. Mar. 23, 2021). The government filed its status report on May 28, 2021, stating only that it did not anticipate taking action that would moot the case. Status Report, Doc Society v. Blinken, No. 19-cv-3632 (D.D.C. May 28, 2021), ECF No. 51.

Thus, it appears that the Biden administration intends to retain the Registration Requirement and related policies providing for dragnet social media surveillance of millions of visa applicants each year. Given the significant First Amendment concerns surrounding those policies, the public has a right to know how the State Department and DHS are using social media identifiers in the visa vetting process and whether this use has "meaningfully improved" that process. Biden Proclamation § 3(d). The requested report is urgently needed to understand the government's justification, if any exists, for the continued collection and use of that information, notwithstanding President Biden's revocation of the executive order upon which it is premised.

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 record 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 record 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. 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, 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/ Carrie DeCell

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