UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, Plaintiff, v. U.S. DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS AND BORDER PROTECTION, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF JUSTICE, and U.S. DEPARTMENT OF STATE, Defendants.	No. 1:17-cv-07572-ALC

JOINT STATUS REPORT

1. Pursuant to the Court's Order of July 27, 2022, *see* ECF No. 197, the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") and Defendants U.S. Department of Homeland Security ("DHS"), U.S. Customs and Border Protection ("CBP"), U.S. Immigration and Customs Enforcement ("ICE"), U.S. Citizenship and Immigration Services ("USCIS"), U.S. Department of Justice ("DOJ"), and U.S. Department of State ("State") (collectively, "Defendants"), respectfully submit this Joint Status Report to update the Court regarding the parties' proposed next steps in this litigation.

Background

2. This case concerns the Institute's August 2017 Freedom of Information Act ("FOIA") request, seeking six categories of "records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations." FOIA Request,

ECF No. 42-2. DHS, CBP, USCIS, DOJ, and State completed their searches for and processing of responsive records in November 2020. *See* December 11, 2020 Joint Status Report ("Dec. 11 JSR"), ECF No. 171, ¶¶ 3–4. As outlined below, ICE continues to process and produce records responsive to the request.

3. In orders issued on September 13, 2019, September 23, 2019, and September 14, 2020, this Court granted in part and denied in part the parties' cross motions for summary judgment with regard to the adequacy of ICE's search and the propriety of certain withholdings by ICE, State, and USCIS. *See* ECF Nos. 140, 141, 158. In the September 13, 2019, Order, and as relevant here, the Court: (1) directed ICE to conduct another search for potentially responsive documents; and (2) concluded that State failed to logically and plausibly justify its withholding of certain sections in the Foreign Affairs Manual ("FAM") under exemption 7(E). ECF No. 140, at 2. In the September 23, 2019, Order, as relevant here, the Court concluded: (1) that USCIS failed to logically and plausibly justify its withholding of certain information ("TRIG Questions") under exemption 7(E); and (2) that ICE failed to demonstrate that one document ("the Foreign Policy Provision Memo") was pre-decisional under exemption 5, and directed ICE "to disclose reasonably segregable portions of the Foreign Policy Provision Memo that reflect current immigration policy." ECF No. 141, at 9–10.

4. After ICE, USCIS, and State filed a notice of appeal, *see* ECF Nos. 165, 166, this Court stayed production of the FAM sections and TRIG Questions pending disposition of the appeal. *See* Dec. 11 JSR ¶ 13.

5. Following briefing and oral argument, on April 6, 2022, the Second Circuit issued a decision. *See Knight First Amendment Inst. v. U.S. Citizenship & Immigration Servs.*, 30 F.4th 318 (2d Cir. 2022). The Second Circuit reversed the portions of this Court's orders requiring the

disclosure of FAM and the TRIG Questions, finding that State and USCIS had properly invoked FOIA exemption 7(E). *Id.* at 322. Regarding ICE's Foreign Policy Provision Memo, the Circuit noted:

> Although the district court concluded that the ICE memo did not fall within Exemption 5 because it was not pre-decisional, . . . it did not order immediate disclosure of the memo. Rather, it directed ICE to "re-assess its applied exemptions" using the district court's opinion as a guide "and disclose all responsive non-exempt materials that can reasonably be segregated from exempt materials." The record does not reveal whether or when ICE conducted the ordered segregability analysis.

Id. at 334 (citations omitted). Accordingly, the Circuit concluded, "Because we cannot determine whether ICE complied with the district court's direction to conduct a segregability analysis, we remand to the district court to allow the parties to develop the record. On remand, if it has not already done so, ICE must conduct a segregability analysis and communicate its position with respect to the ICE memo to Knight." *Id.*

ICE's New Searches and Rolling Productions

6. As explained in the August 25, 2021, Joint Status Report, ICE conducted new searches for potentially responsive documents; thereafter, the parties conferred to attempt to narrow the search criteria for these records and, on July 12, 2012, reached agreement on revised search terms. *See* ECF No. 188, ¶ 4. These narrowed search terms resulted in a total of 2,925 potentially responsive documents (not pages). *Id.* ¶ 5.

7. After conferring as to a processing rate, the parties filed opposing letter briefs on September 1, 2021, in which the Knight Institute requested a processing rate of 1,000 pages per month, *see* ECF No. 191, while ICE requested a processing rate of 700 pages per month, *see* ECF No. 192. Those letter briefs remain pending.

8. The parties subsequently conferred, agreeing that while their letter briefs regarding ICE's processing rate remained pending, ICE would process responsive records at a rate of approximately 700 pages per month. ICE has made such productions on a monthly basis since October 26, 2021; to date, ICE has processed 17,114 pages of potentially responsive pages identified in the new search, and 39,726 pages of potentially responsive documents remain to be processed. Given the number of pages remaining, the parties are meeting and conferring in an attempt to further narrow the universe of potentially responsive pages.

Segregability Analysis

9. Following the Court's September 13, 2020, Order clarifying and denying reconsideration of the September 2019 Orders, the parties conferred regarding this obligation.

10. After the Second Circuit remanded this case to allow the parties to build the record on this issue, the parties began conferring again on whether ICE has conducted the required analysis.

11. **The Institute's Position.** The Institute's position is that ICE has not fulfilled its obligation to conduct a complete segregability analysis of the Foreign Policy Provision Memo and to produce all non-exempt materials as ordered by this Court. In the September 23, 2019 Order, the Court concluded that ICE had failed to demonstrate that the Foreign Policy Provision Memo was pre-decisional and therefore subject to the deliberative process privilege under Exemption 5. ECF No. 141, at 9. Accordingly, the Court required ICE to "re-assess its applied exemptions to [this] record[] . . . and disclose all responsive non-exempt materials that can reasonably be segregated from exempt materials." *Id.* at 26. Following the September 2020 Order, ICE reviewed the Foreign Policy Provision Memo and concluded that "the document neither constitutes nor contains working law." As the Institute communicated to ICE on November 16, 2020, it disagreed

that whether the document contained working law was the relevant inquiry and noted its position that a further segregability analysis was needed to comply with this Court's orders. Because the Institute understands ICE's obligation to be broader—to review the Foreign Policy Provision Memo for *all* responsive non-exempt material, not only working law, and to produce it—the Institute maintains that a further segregability analysis is still required.

12. **ICE's Position.** Following the Court's September 2020 Order clarifying the September 2019 Orders, ICE conducted a segregability analysis of the Foreign Policy Provision Memo for "portions of the Foreign Policy Provision Memo that reflect current immigration policy," as the Court directed. ECF No. 141 at 10*; see also id.* at 7 (describing "working law" as "existing policy"). As ICE communicated to the Knight Institute on November 3, 2020, ICE determined that the Memo contained no working law as defined by the Second Circuit in *New York Times v. DOJ*, 939 F.3d 479, 493 (2d Cir. 2019), and *ACLU v. NSA*, 925 F.3d 576, 594-95, 599 (2d Cir. 2019). Accordingly, ICE has already conducted a segregability analysis as directed by the Court, but ICE is currently evaluating its position with regard to any further segregability analysis, and will so inform the Knight Institute by August 31, 2022.

Next Steps

13. Following the completion of productions by ICE and a conferral process to resolve or narrow any disagreements as to withholdings, the parties anticipate a third and final round of summary judgment briefing on any remaining issues in need of judicial resolution.

14. Therefore, the parties respectfully restate their positions outlined in their letter briefs of September 1, 2021 regarding ICE's processing rate. They also respectfully and jointly propose filing a joint status report on October 17, 2022, providing the Court with a status update.

Dated: August 17, 2022

Sincerely,

/s/ Carrie DeCell

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