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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND SUMMARY JUDGMENT

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Plaintiff the Knight First Amendment Institute at Columbia University (the "Knight Institute" or "Institute") respectfully submits this memorandum of law in support of its cross-motion for partial summary judgment against Defendants Immigration and Customs Enforcement ("ICE") and the Office of Legal Counsel ("OLC") within the Department of Justice ("DOJ"), and for summary judgment against Defendant the Department of State ("DOS"). It also submits this memorandum in opposition to ICE and OLC's motion for partial summary judgment and DOS's motion for summary judgment.[1]

PRELIMINARY STATEMENT

This Freedom of Information Act ("FOIA") lawsuit seeks records relating to the government's authority to exclude or remove individuals from the United States based on their speech, beliefs, or associations—including its authority to conduct the kind of extreme ideological vetting President Trump threatened during his 2016 presidential campaign[2] and delivered shortly after taking office. Declaring that only individuals who "want to love our country" should be admitted into the United States,[3] the President has ordered the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to develop a more robust vetting program for visa applicants and refugees seeking entry into the United States, involving, among other things, "collection of all information necessary for a rigorous evaluation

[1] The Knight Institute wishes to thank the students at the Samuelson Law, Technology & Public Policy Clinic at UC Berkeley School of Law who have provided invaluable assistance in litigating this matter to this point: Hanna Evensen, Kimberly Fong, Brittany Johnson, and Benjamin Pollak.

[2] *See* Karen DeYoung, *Trump Proposes Ideological Test for Muslim Immigrants and Visitors to the U.S.*, Wash. Post (Aug. 15, 2016), http://wapo.st/2byUG6o (reporting on the then-candidate's calls for an "extreme, extreme vetting" program akin to a Cold War–era "ideological screening test").

[3] *Trump Defends Immigration Restrictions, Wants People "Who Love Our Country,"* Chi. Trib. (Feb. 6, 2017), http://trib.in/2vIQeuw.

of all grounds of inadmissibility." Exec. Order No. 13,780, 82 Fed. Reg. 13,209, 13,215 (Mar. 6, 2017); *see also* Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017).

To inform the public about the implementation of the President's extreme ideological vetting program, and about various agencies' policies and practices under relevant provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, the Knight Institute filed identical FOIA requests (the "Request") with the Department of Homeland Security ("DHS"), Customs and Border Protection ("CBP"), ICE, U.S. Citizenship and Immigration Services ("USCIS"), DOJ,[4] and DOS (collectively, "Defendants") seeking several categories of records concerning the exclusion or removal of individuals from the United States based on their speech, beliefs, or associations.

In response to the Request and as a result of this litigation, Defendants have collectively released thousands of pages of records, providing some insight into immigration decisions based on these grounds. Despite the Knight Institute's good faith efforts to narrow the scope of the Request, however, some agencies failed to conduct adequate searches, and some agencies have inappropriately withheld responsive records. As relevant to the present cross-motions for partial summary judgment and summary judgment, ICE and OLC have failed to establish the adequacy of their searches for responsive records, and DOS has failed to justify its withholding of responsive records pursuant to FOIA Exemptions 5 and 7(E), 5 U.S.C. §§ 552(b)(5), (b)(7)(E).[5]

[4] Within DOJ, the Request was sent to the Office of Information Policy ("OIP"), the Office of Public Affairs ("OPA"), and OLC. OIP processed the Request on behalf of OPA.

[5] On further review of DOS's productions, the Knight Institute has decided not to challenge DOS's withholdings pursuant to FOIA Exemptions 1 and 3, 5 U.S.C. §§ 552(b)(1), (3). The Knight Institute does not concede that these withholdings were appropriate, but it has determined that the underlying records are likely less relevant to the concerns at the core of the Request.

FACTUAL BACKGROUND

A. Consideration of speech, beliefs, and associations in immigration decisions.

The INA establishes grounds on which individuals are ineligible to enter or remain in the United States, while setting forth criteria on which specified government officials can waive determinations of ineligibility. *See, e.g.*, 8 U.S.C. § 1182. Certain INA provisions permit or require government officials to assess an individual's eligibility for a visa (or admissibility) on the basis of her speech, beliefs, and associations—regardless of whether her speech, beliefs, or associations would be protected under the First Amendment.

The two sets of INA provisions relevant here make inadmissible any individual who "endorses or espouses terrorist activity" or whose presence in the United States would pose unspecified foreign policy concerns. Specifically, the INA provides that "[a]ny alien who . . . endorses or espouses terrorist activity or persuades others to endorse or espouse terrorist activity or support a terrorist organization," 8 U.S.C. § 1182(a)(3)(B)(i)(VII), or who "is a representative of . . . a political, social, or other group that endorses or espouses terrorist activity," 8 U.S.C. § 1182(a)(3)(B)(i)(IV)(bb), is inadmissible. *See also* 8 U.S.C. § 1225(c) (expedited removal of arriving aliens on same grounds); 8 U.S.C. § 1227(a)(4)(B) (removal of admitted aliens on same grounds); 8 U.S.C. § 1158(b)(2)(A)(v) (removal of refugees otherwise qualified for asylum on similar grounds) (collectively, the "endorse or espouse provisions" of the INA). Furthermore, the INA provides that any "alien whose entry or proposed activities in the United States . . . would have serious adverse foreign policy consequences . . . is inadmissible," even when that determination is based on "beliefs, statements or associations [that] would be lawful within the United States." 8 U.S.C. §§ 1182(a)(3)(C)(i), (a)(3)(C)(iii); *see also* 8 U.S.C. §§ 1225(c)(1), 1227(a)(4)(C) (removal on same grounds) (together, the "foreign policy provisions" of the INA).

In certain circumstances, the Attorney General, Secretary of Homeland Security, or Secretary of State can waive these provisions. *See* 8 U.S.C. § 1182(d)(3) (allowing temporary admission despite an initial finding of inadmissibility under the endorse or espouse provisions); 8 U.S.C. § 1182(d)(1) (allowing the Attorney General to waive the application of the endorse or espouse and foreign policy provisions if it is "in the national interest to do so").

Against the backdrop of these INA provisions, and pursuant to the President's extreme vetting orders, various agencies have introduced policies for examining visa applicants' and visa holders' beliefs and associations, including policies for the collection, monitoring, and retention of their social media information. *See, e.g.*, 30-Day Notice of Proposed Information Collection: Application for Nonimmigrant Visa, 83 Fed. Reg. 43,951 (Aug. 28, 2018) (DOS proposed collection of social media information from non-immigrant visa applicants); 30-Day Notice of Proposed Information Collection: Electronic Application for Immigrant Visa and Alien Registration, 83 Fed. Reg. 43,952 (Aug. 28, 2018) (same for immigrant visa applicants and alien registration); Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556, 43,557 (Sept. 18, 2017) (DHS retention of social media information in "Alien Files" or "A-Files"); Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants, 82 Fed. Reg. 20,956, 20,957 (May 4, 2017) (DOS collection of social media information from Electronic System for Travel Authorization ("ESTA") applicants).[6] These policies appear to contemplate the exclusion or removal of individuals from the United States based on constitutionally protected expression and association.

[6] *See also* Drew Harwell & Nick Miroff, *ICE Just Abandoned Its Dream of "Extreme Vetting" Software that Could Predict Whether a Foreign Visitor Would Become a Terrorist*, Wash. Post (May 17, 2018), https://perma.cc/LQ72-RG2H; George Joseph, *Extreme Digital Vetting of Visitors to the U.S. Moves Forward Under a New Name*, ProPublica (Nov. 22, 2017), https://perma.cc/SF4Q-4H5A (reporting ICE plans to monitor visa holders' social media activity).

These policies implicate not only the free expression and free association of non-citizens abroad, but also the First Amendment rights of U.S. citizens and residents to communicate and associate with those who are deemed inadmissible because of their expression or associations. The public is entitled to know how the government makes these inadmissibility determinations, particularly given the current administration's intent to exclude individuals who do not "want to love our country."[7] Without more information about the government's current consideration of speech, beliefs, and associations in making immigration decisions, the public cannot determine the degree to which existing policies abridge First Amendment rights, or assess how proposed policies could further burden those rights.

B. The Request.

This action arises from the Request, which seeks information about any new vetting policies and the government's understanding of its authority to base immigration decisions on individuals' speech, beliefs, or associations. The Knight Institute submitted the Request to DHS, CBP, ICE, USCIS, DOJ, and DOS on August 7, 2017. First Am. Compl. Ex. B, at 2–3, ECF No. 42-2. The Knight Institute initially sought six categories of information relating to the Trump administration's extreme vetting policies, as well as the government's past and ongoing reliance on the endorse or espouse and the foreign policy provisions of the INA. *See id.* at 3–5. After negotiations with Defendants, however, the Knight Institute provisionally narrowed the Request to seek the following information:

> **Item 1:** All directives, memoranda, guidance, emails, or other communications sent by the White House to any federal agency since January 19, 2017, regarding consideration of individuals' speech, beliefs, or associations in connection with immigration determinations, including decisions to exclude or remove individuals from the United States;

[7] *Trump Defends Immigration Restrictions*, *supra* note 3.

> **Item 2:** All final memoranda written since May 11, 2005 concerning the legal implications of excluding or removing individuals from the United States based on their speech, beliefs, and associations;
>
> **Item 3:** All final legal or policy memoranda written since May 11, 2005 concerning the endorse or espouse provisions or the foreign policy provisions of the INA as they relate to "beliefs, statements or associations";
>
> **Item 4:** All final records created since May 11, 2005 containing policies, procedures, or guidance regarding the application or waiver of the endorse or espouse provisions or the foreign policy provisions as they relate to "beliefs, statements or associations";
>
> **Item 5:** All final Foreign Affairs Manual sections (current and former, created since May 11, 2005) relating to the endorse or espouse provisions or the foreign policy provisions as they relate to "beliefs, statements or associations," as well as records discussing, interpreting, or providing guidance regarding such sections;
>
> **Item 6(a):** All statistical data or statistical reports created since January 19, 2012, regarding the application, waiver, or contemplated application or waiver of the endorse or espouse provisions, or of the foreign policy provisions as they relate to "beliefs, statements or associations," to exclude or remove individuals from the United States; and
>
> **Item 6(e):** All notifications or reports created since May 11, 2005 from the Secretary of Homeland Security or the Secretary of State concerning waivers of the endorse or espouse provision pursuant to 8 U.S.C. § 1182(d)(3)(B)(ii).

See Joint Status Report ("Apr. 9 JSR") ¶ 2, ECF No. 48; Decl. of Carrie DeCell ("DeCell Decl.") ¶¶ 7–8, Mar. 28, 2019. The parties agreed that all of the Defendants would search for records responsive to each item, with the following exceptions: Defendants would search only White House systems for records responsive to Item 1, providing "an explanation of the White House record retention policy so the Knight Institute could assess the comprehensiveness of the response to this Item of the Request," Apr. 9 JSR ¶ 2(a);[8] only DOS would conduct a search for records

[8] The Knight Institute did not agree to a search of "only OLC systems" for records responsive to Item 1, as Defendants state in their opening brief, Defs.' Mem. in Supp. of ICE and OLC Mot. for Partial Summ. J. and DOS Mot. for Summ. J., at 3, ECF No. 90, and the Knight Institute has not yet received an explanation of the White House record retention policy. DeCell Decl. ¶ 9.

responsive to Item 5; and only DHS and DOS would search their respective Office of the Secretary systems for records responsive to Item 6(e). *Id.* ¶ 2.

C. Defendants' responses.

Defendants largely completed their productions of responsive records by July 2018. In mid-August 2018, the Knight Institute requested that Defendants provide draft search descriptions and *Vaughn* indices, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). *See* Pl.'s Letter Requesting Pre-Mot. Conf. 1, ECF No. 79; DeCell Decl. ¶ 24. As relevant to the present cross-motions, Defendants provided the following responses:

ICE: On September 29, 2017, ICE sent the Knight Institute a "final response" letter that quoted the language of Item 1. First Am. Compl. Ex. C, ECF No. 42-3. Along with its letter, ICE released 1,666 pages of records but withheld 1,653 of those pages in full. *See id.* Following an administrative appeal, ICE determined that "new search(s) or modifications to the existing search(s) . . . could be made," and remanded the Request to ICE's FOIA Office for further processing and retasking. First Am. Compl. Ex. F, at 3, ECF No. 42-6; *see also* DeCell Decl. ¶¶ 10–15. By email dated February 13, 2018, ICE informed the Knight Institute that ICE had located approximately 14,000 pages of "potentially responsive documents," First Am. Compl. Ex. G, ECF No. 42-7, based on the initial, non-narrowed Request. On March 7, 2018, ICE informed the Knight Institute that it had processed 560 pages for release. First Am. Compl. Ex. H, ECF No. 42-8. ICE referred eighty-seven of those pages to other agencies for processing and released the remaining 463 pages with redactions. *See* Apr. 9 JSR ¶ 25. On April 30, 2018, ICE informed the Knight Institute that it had processed an additional 1,124 pages of responsive records. It released 395 pages in full or in part, and it referred 728 pages to other agencies. DeCell Decl. ¶ 21.

To expedite ICE's processing of the remaining records, the Knight Institute agreed that ICE could process only records responsive to the provisionally narrowed Request. DeCell Decl. ¶ 22. Following a re-review of the records ICE had identified as responsive to the initial Request, ICE identified ninety-nine pages of records as responsive to the narrowed Request. *See* DeCell Decl. ¶ 23. ICE referred forty-nine of those pages to DHS and USCIS, both of which withheld all referred pages in full, and released an additional fifty pages in part or in full to the Knight Institute. *See* Defs.' Letter Regarding ICE Status Report, ECF No. 77.

In total, ICE produced 2,677 pages of responsive records, withholding most of those pages in part or in full. *See* Pl.'s Letter Regarding Case Status ("Case Status Letter") 2, ECF No. 78. In October 2018, ICE sent the Knight Institute a draft search description and agreed to produce a draft *Vaughn* index by December 4, 2018. DeCell Decl. ¶ 25. On December 5, 2018, Defendants' counsel notified the Knight Institute that ICE had confronted a technical issue that made producing a draft *Vaughn* index "rather difficult if not impossible," and asked whether the Knight Institute could provide copies of the CDs containing all productions ICE had made in this matter. DeCell Decl. ¶ 26. The Knight Institute sent Defendants' counsel copies of those CDs by overnight mail on December 7, 2018, but never received a draft *Vaughn* index from ICE in return. *Id.*

DOJ: OLC identified 128 pages of records responsive to the Request but withheld all 128 pages in full, invoking FOIA Exemption 5. It did not refer any pages to other agencies for review. *See* Case Status Letter 2; *see* DeCell Decl. ¶¶ 27–28. OLC produced a draft search description and draft *Vaughn* index on November 2, 2018. DeCell Decl. ¶ 29.

DOS: DOS identified 243 records, totaling 1,719 pages, responsive to the Request. It released 90 records in full, withheld 126 records in part, and withheld 16 records in full, invoking FOIA Exemptions 1, 3, 5, 6, and 7(E). It referred eleven records to other agencies for review. *See*

Decl. of Eric F. Stein ("Stein Decl.") ¶ 6, Feb. 26, 2019, ECF No. 93.[9] On November 9, 2018, and February 26, 2019, DOS re-released documents, explaining that it had determined that additional information could be released, additional exemptions could be applied to portions previously withheld, and certain information had been inadvertently released. *Id.*; *see* DeCell Decl. ¶¶ 31, 34. Of relevance to the present cross-motions, DOS withheld numerous records in full or in part under Exemptions 5 and Exemption 7(E). *See* Stein Decl. ¶¶ 44, 50.

LEGAL STANDARD

Congress enacted FOIA "to ensure an informed citizenry, vital to the functioning of a democratic society, needed . . . to hold the governors accountable to the governed." *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). The statute was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Accordingly, defending agencies bear the burden of demonstrating that their searches were adequate and that any withheld documents or redactions fall within the claimed FOIA exemptions. 5 U.S.C. § 552(a)(4)(B); *Ray*, 502 U.S. at 173; *Carney v. U.S. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994).

To carry this burden on summary judgment, agencies must submit affidavits that are "detailed, nonconclusory and submitted in good faith." *Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005) (citing *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999)). The affidavits must provide a "logical and plausible" justification for invoking FOIA exemptions, *Wilner v. NSA*, 592 F.3d 60, 73 (2d Cir. 2009) (citation omitted), and they must be "adequate on

[9] The parties stated slightly different record counts in the October 5, 2018 status update to the Court, *see* Case Status Letter 2–3, but the Knight Institute accepts the numbers provided by DOS in support of its motion for summary judgment.

their face," *Carney*, 19 F.3d at 812. Here, therefore, Defendants' affidavits must be sufficiently detailed to establish the adequacy of searches and the validity of withholdings, as set forth below.

ARGUMENT

I. ICE and OLC conducted inadequate searches.

An agency bears the burden to "show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enf't Agency*, 877 F. Supp. 2d 87, 95 (S.D.N.Y. 2012) (citation omitted); *see also Carney*, 19 F.3d at 812 (burden of establishing the adequacy of a search is on the agency). To show that a search was adequate, an agency must submit affidavits that are "relatively detailed and nonconclusory." *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 488–89 (2d Cir. 1999) (citation omitted). "This means, for instance, that an agency affidavit or declaration must describe in reasonable detail the scope of the search and the search terms or methods employed." *Gelb v. Fed. Reserve Bank of N.Y.*, No. 1:12-cv-4880-ALC, 2014 WL 4402205, at *4 (S.D.N.Y. Sept. 5, 2014) (quoting *Davis v. U.S. Dep't of Homeland Sec.*, No. 11-cv-203-ARR-VMS, 2013 WL 3288418, at *6 (E.D.N.Y. June 27, 2013)). The search must be "reasonably calculated to uncover *all* relevant documents, not most relevant documents." *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 102 (citation and internal quotation marks omitted). Further, a search is inadequate where "the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory." *Id.* at 96 (citation and internal quotation marks omitted)). "Where an agency has not satisfied its burden, a showing of bad faith is not necessary in order to defeat a motion for summary judgment." *Id.* (citation and internal quotation marks omitted).

A. ICE

The affidavit ICE submitted in support of its motion fails to establish that it conducted an adequate search. The affidavit is flawed because it does not include sufficiently detailed information about certain offices' searches, lacks information about steps ICE took after remanding the Request for additional searches, and fails to explain the narrowing process the agency conducted in June 2018. Further, the search terms used in searches of ICE's Office of the Director and Enforcement and Removal Operations ("ERO") are not reasonably calculated to uncover all relevant documents.[10]

First, for certain offices, the affidavit fails to include enough information about the searches the government conducted. *See Gelb*, 2014 WL 4402205, at *4 (explaining that an agency's affidavit "must describe in reasonable detail the scope of the search and the search terms or methods employed"). Specifically, ICE provided no description of the search terms used by custodians in the Immigration Law and Practice Division and National Security Law Section. Decl. of Toni Fuentes ("Fuentes Decl.") ¶¶ 20–22, Feb. 26, 2019, ECF No. 91. The affidavit also states that the Enforcement and Removal Operations Law Division ("EROLD") did not conduct a search, based on a determination that the component was not likely to have responsive records, without explaining the basis for that determination. *Id.* ¶ 22.

Second, the affidavit lacks any information whatsoever about searches ICE conducted after granting the Knight Institute's administrative appeal and remanding the Request for further

[10] In addition to the four major deficiencies highlighted below, the affidavit contains other indicia that it was not drafted with sufficient attention to detail and completeness. For example, as the parties have previously informed the Court, ICE sent the Knight Institute a "final response" to the request on September 29, 2017, along with 1,666 pages of records, nearly all of which were redacted in full. Apr. 9 JSR ¶ 21; *see also* DeCell Decl. ¶ 10. However, ICE's affidavit asserts that "a total of 1,054 pages [were] produced to Knight Institute responsive both to the original FOIA request and the Narrowed Request." Decl. of Toni Fuentes ¶ 11, Feb. 26, 2019, ECF No. 91.

queries. As ICE's affidavit indicates, on February 6, 2018, the Knight Institute's administrative appeal was remanded to the ICE FOIA Office for subsequent searches of ERO, the Office of the Director, and additional components in ICE's Office of the Principal Legal Advisor ("OPLA"). Fuentes Decl. ¶ 17; *see also* DeCell Decl. ¶ 16. The ICE affidavit provides no information, however, about any search conducted after the remand. *See generally* Fuentes Decl.; *see also id.* ¶ 24 (describing search run on January 5, 2018). Given that ICE informed the Knight Institute it had found roughly 14,000 additional pages in post-remand searches, DeCell Decl. ¶ 17, ICE appears to have conducted post-remand searches. But ICE has informed neither the Knight Institute nor the Court about the offices that ran those searches or the search terms used.

Third, the affidavit contains no information about how the agency went about re-reviewing those 14,000-odd pages for responsiveness to the narrowed Request. *See* Fuentes Decl. ¶ 10. ICE somehow narrowed those search results to ninety-nine pages, but it has provided no clear explanation of how it did so. *See* DeCell Decl. ¶ 23. Without details about how the agency narrowed its results, the Knight Institute and the Court have no way to assess the adequacy of the search.

Finally, the searches run by the Office of the Director and ERO were too restrictive to be reasonably calculated to uncover all responsive records. *See Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 95. Specifically, the Office of the Director's use of the terms "endorse provision" and "espouse provision," Fuentes Decl. ¶ 28, was unreasonable because those are not necessarily the terms ICE would use in its communications about the relevant parts of the INA. A more reasonable approach would be to search for "endorse" or "espouse" without the word "provision" narrowing the search, as other ICE offices did. *See, e.g.*, *id.* ¶¶ 24, 26. ERO's search is similarly unreasonable because its search terms did not include keywords—like "endorse" and "espouse"—

from the relevant statutory text. *See generally id.* ¶ 30. Further, ERO's use of terms like "removal policies," "removal terrorist," "removal speech," "removal belief," and "removal association" are not reasonably calculated to return relevant records. The deficiency of ERO's search terms is especially obvious when compared to the terms used by DOS and OLC (with the notable exception of the inadequacy described below). *See* Stein Decl. ¶¶ 19, 22–23; 2d Decl. of Paul P. Colborn ("Colborn Decl.") ¶ 10, Feb. 26, 2019, ECF No. 92.

The agency bears the burden of establishing that its search was adequate. *See Carney*, 19 F.3d at 812. ICE's affidavit fails to do that by omitting key details about the search terms used, how the agency handled the administrative remand, and how the agency narrowed its search results. It is "patently incomplete." *See Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96 (citation and internal quotation marks omitted). Additionally, the searches run by the Office of the Director and ERO were not calculated to uncover all of the relevant documents as required by FOIA. *See id.* at 95.

B. OLC

The Knight Institute's challenge to the adequacy of OLC's search is limited to the search the agency conducted for records responsive to Item 1 of the Request. That search was "patently incomplete" because it was not directed at the systems the parties agreed would be searched. *See id.* at 96.

As discussed in the parties' April 9, 2018 Joint Status Report, the Knight Institute agreed that OLC would conduct a "[s]earch [of] only *White House* systems for the records sought, as Counsel for Defendants indicated that searching each recipient agency would be a slower and duplicative process." Apr. 9 JSR ¶ 2(a) (emphasis added); *see also* DeCell Decl. ¶ 7. Defendants' memorandum in support of their motion for partial summary judgment incorrectly asserts that the

Knight Institute agreed that "only OLC systems" should be searched related to Item 1. Defs.' Mem. in Supp. of ICE and OLC Mot. for Partial Summ. J. and DOS Mot. for Summ. J. 3, ECF No. 90; *see also* Colborn Decl. ¶ 11–12 (describing search of one OLC custodian's email account for records responsive to Item 1 of the request). That is not what the parties agreed to, nor does it conform with the search the parties described to the Court. Apr. 9 JSR ¶ 2(a); *see* DeCell Decl. ¶ 7. OLC's search was inadequate because it was "patently incomplete" and wholly failed to target the systems the parties agreed would be searched. *Nat'l Day Laborer Org. Network*, 877 F. Supp. 2d at 96.

* * *

For these reasons, ICE's and OLC's searches were inadequate. The Court should deny partial summary judgment to those agencies on that basis and order them to conduct new searches on terms to be agreed upon by the Knight Institute.

II. DOS improperly withheld information from responsive records.

The Court reviews agency withholdings *de novo*. 5 U.S.C. § 552(a)(4)(B); *Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 601 F.3d 143, 147 (2d Cir. 2010). The availability of FOIA exemptions should not obscure "the basic policy that disclosure, not secrecy, is the dominant objective of [the Act]." *Id.* at 150 (quoting *Rose*, 425 U.S. at 361). Exemptions must therefore be "narrowly construed with all doubts resolved in favor of disclosure." *Grand Cent. P'ship*, 166 F.3d at 478 (quoting *Local 3, Int'l Broth. of Elec. Workers, AFL-CIO v. NLRB*, 845 F.2d 1177, 1180 (2d Cir. 1988)). Additionally, even where portions of a record fall within a FOIA exemption, "[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt." 5 U.S.C. § 552(b); *see also N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100, 117 (2d Cir. 2014).

To justify its decision to withhold responsive records, an agency must provide "reasonably detailed explanations why any withheld documents fall within an exemption." *Carney*, 19 F.3d at 812. In other words, "agency affidavits . . . must describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure—conclusory assertions are insufficient." *N.Y. Times Co. v. CIA*, 314 F. Supp. 3d 519, 525 (2018). Agencies typically provide that information in a *Vaughn* index, which "requires agencies to itemize and index the documents requested, segregate their disclosable and non-disclosable portions, and correlate each non-disclosable portion with the FOIA provision which exempts it from disclosure." *Brennan Ctr. for Justice v. U.S. Dep't of State*, 300 F. Supp. 3d 540, 547 (S.D.N.Y. 2018) (quotation omitted); *see also ACLU v. U.S. Dep't of Justice*, 844 F.3d 126, 129 n.4 (2d Cir. 2016) (stating that *Vaughn* index should identify documents "by number, title, and description"); *Vaughn v. Rosen*, 484 F.2d at 827–28. The purposes of a *Vaughn* index are (1) to "permit [the opposing party] to contest the affidavit in adversarial fashion," and (2) to "permit a reviewing court to engage in effective *de novo* review of the [government's] redactions." *Halpern v. FBI*, 181 F.3d 279, 293 (2d Cir. 1999). Therefore, "[c]onclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not carry the government's burden." *Intellectual Prop. Watch v. U.S. Trade Representative*, 134 F. Supp. 3d 726, 745 (S.D.N.Y. 2015) (quoting *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009)).

A. DOS improperly withheld information under FOIA Exemption 5.

DOS improperly withheld responsive records concerning relevant agency policy under Exemption 5,[11] which applies to "inter-agency or intra-agency memorandums or letters which

[11] Specifically, DOS has failed to establish the applicability of Exemption 5 to the following records: "Inadmissibility Based on Endorsing or Espousing Terrorist Activity: First Amendment Concerns" ("First Amendment Concerns") (C06534021), Stein Decl. Ex. 1 ("*Vaughn* Index") 8–

would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption encompasses evidentiary privileges available to the government in civil discovery. *Tigue v. U.S. Dep't of Justice*, 312 F.3d 70, 76 (2d Cir. 2002). Here, the government invokes the deliberative process privilege, the presidential communications privilege, the attorney-client privilege, and the attorney work product privilege. As explained below, however, DOS has failed to establish that these privileges apply to the records at issue. Its *Vaughn* index provides insufficient information to allow the Knight Institute to contest the application of these privileges to those records "in adversarial fashion," and to permit this Court to "engage in effective *de novo* review" of DOS's withholdings. *Halpern*, 181 F.3d at 293.

1. DOS has failed to establish that the deliberative process privilege applies to the records at issue.

"An inter- or intra-agency document may be withheld pursuant to the deliberative process privilege if it is: (1) predecisional, *i.e.*, prepared in order to assist an agency decisionmaker in arriving at his decision, and (2) deliberative, *i.e.*, actually related to the process by which policies are formulated." *Nat'l Council of La Raza v. Dep't of Justice*, 411 F.3d 350, 356 (2d Cir. 2005) (internal quotation marks and citations omitted). A document qualifies as "predecisional" if "the preparer was not the final decisionmaker and . . . the contents confirm that the document was originated to facilitate an identifiable final agency decision." *Brennan Ctr. for Justice v. Dep't of Justice*, 697 F.3d 184, 202 (2d Cir. 2012) (citation omitted). A document qualifies as "deliberative" if "it formed an essential link in a specific consultative process, reflects the personal opinions of

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9, ECF No. 93-1; "Travel Sanctions Against Persons Who Participate in Serious Human Rights Violations and other Abuses" ("Travel Sanctions") (C06569352, C06569349, C06569347), *Vaughn* Index 9–10; "Informal Legal Opinion on Section 212(d)(3)(B)(i)" ("Section 212(d)(3)(B)(i)") (C06568577), *Vaughn* Index 21; "Memorandum for Acting Assistant Secretary" (C06570336), *Vaughn* Index 21–22. With the exception of one record, *see* DeCell Decl. Ex. A, DOS withheld all of these records in full.

the writer rather than the policy of the agency, and if released, would inaccurately reflect or prematurely disclose the views of the agency." *Id.* The deliberative process privilege does not apply to records that constitute the "working law" of an agency. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152–53, 161 (1975). A record that "is more properly characterized as an opinion or interpretation which embodies the agency's effective law and policy" is considered "working law" and, given "a strong congressional aversion to secret agency law" and "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law," is not privileged. *Brennan Ctr.*, 697 F.3d at 195, 196 (internal quotation marks, alterations, and citations omitted).

DOS has not adequately supported its application of the deliberative process privilege, at least with respect to the four sets of records challenged here. Its *Vaughn* index (1) does not adequately establish that these records "originated to facilitate an identifiable final agency decision"; (2) does not sufficiently counter the likelihood that some of the records constitute "working law"; and (3) does not provide meaningful information regarding the segregability of factual information contained in the records.

First, DOS's *Vaughn* index does not adequately establish that the records are predecisional, in that they "originated to facilitate an identifiable final agency decision." *See Brennan Ctr.*, 697 F.3d at 202 (internal quotation marks omitted). For example, the *Vaughn* entries for "Section 212(d)(3)(B)(i)" (C06568577) and "Memorandum for Acting Assistant Secretary" (C06570336) are conclusory and provide no description whatsoever of the records' contents, including how and to what part of a decisionmaking process they relate. *See Vaughn* Index 21–22 (stating only that "[r]elease of this information would reveal the authors' preliminary thoughts and ideas regarding what policy to pursue" with respect to "a policy on waiving inadmissibilities in certain situations"

and "a proposed exemption from the INA terrorism-related inadmissibility grounds," respectively). Likewise, the *Vaughn* entry for the "First Amendment Concerns" memorandum (C06534021) describes the relevant decisionmaking process only in vague terms of "what policy to pursue with respect to the 'endorse or espouse' provision," *Vaughn* Index 9, failing to specify a particular policy initiative or other "identifiable final agency decision" the memorandum was meant to facilitate.[12] The government has thus failed to explain what agency decision these records were meant to further, leaving the Knight Institute and the Court unable to evaluate whether the deliberative process privilege applies. *See Brennan Ctr.*, 697 F.3d at 202.

Second, some of the records at issue appear to constitute "working law," which must be released. *See id.* at 195, 196 (citing *Sears*, 421 U.S. at 153). Indeed, the "Action Memorandum" from the "Travel Sanctions" records (C06569352) indicates that this set of records received final approval by the then-Secretary of State. *See* DeCell Decl. Ex. A, at 1. The DOS *Vaughn* index does not indicate whether these records went through any further decisionmaking processes, suggesting they do indeed represent a final agency decision. *See Vaughn* Index 9–10. If they received final approval, those records likely represent "the agency's effective law and policy," or "working law," and are therefore subject to disclosure. *Brennan Ctr.*, 697 F.3d at 202 (quoting *Sears*, 421 U.S. at 153). Furthermore, if these records—dated 2011—received final approval at that time, there is no risk that "if released, [the records] would inaccurately reflect or prematurely disclose the views of the agency." *Id.* (internal quotation marks and citation omitted).

[12] In contrast, the *Vaughn* entry for "Action Memorandum on Proposed Legislative Policy for Group(s)" details with greater particularity "an interagency proposal to exempt (from the INA's terrorism-related inadmissibility grounds) some groups that were and/or are considered Tier III undesignated terrorist organizations." *Vaughn* Index 14–15.

Finally, DOS does not provide any meaningful information regarding the segregability of factual information contained in the records. Each entry contains the same boilerplate language: "The Department conducted a thorough, line-by-line review of this withholding and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released." *See Vaughn* Index 8–10, 21–22. But the sweeping nature of these withholdings suggests there may be reasonably segregable information that has been improperly withheld along with purportedly privileged content. To the extent the withheld records contain both factual and deliberative information, DOS must release the purely factual information unless it is "inextricably intertwined with the deliberative or policymaking functions of the agency." *Title Guarantee Co. v. NLRB*, 534 F.2d 484, 492 n.15 (2d Cir. 1976) (internal quotation marks omitted).

2. DOS has failed to establish that the presidential communications privilege applies to the records at issue.

The presidential communications privilege "protects communications in performance of a President's responsibilities, of his office, and made in the process of shaping policies and making decisions." *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 522 (S.D.N.Y. 2010) (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (internal quotation marks and alterations omitted). Many courts have explained that "this privilege should be construed narrowly." *ACLU v. NSA*, No. 13-cv-9198, 2017 WL 1155910, at *13 (S.D.N.Y. Mar. 27, 2017) (internal quotation marks, citations, and alterations omitted). Accordingly, courts have construed the privilege to extend only to communications involving senior presidential advisors, and even then, only so long as the communications in question are closely held. *See In re Sealed Case*, 121 F.3d 729, 752 (D.C. Cir. 1997) ("Not every person who plays a role in the development of presidential advice, no matter how remote and removed from the President, can qualify for the privilege. In particular, the privilege should not extend to staff outside the White House in executive branch agencies.");

ACLU v. Dep't of Justice, No. 15-cv-1954, 2016 WL 889739, at *4 (S.D.N.Y. Feb. 25, 2016) (explaining that "the circle within which the presidential communications privilege extends has a narrow diameter, and that the transmittal of a document to persons who are unlikely to be in a position to give advice to the President waives the privilege"). Moreover, the "widespread dissemination of documents, to persons well beyond the circle of close presidential advisors, will eviscerate the presidential communications privilege even if the document in question was created by the President or at his behest." *ACLU v. Dep't of Justice*, 2016 WL 889739, at *5.

DOS has not adequately supported its invocation of the presidential communications privilege to withhold three sets of records directly responsive to the Request.[13] Its *Vaughn* index (1) does not indicate which "senior presidential advisors" solicited these records; (2) does not demonstrate that the records are sufficiently related to presidential decisionmaking; and (3) does not provide enough information to determine whether the government has waived the privilege through widespread dissemination of these records.

First, with one exception, DOS has not indicated which "senior presidential advisors" solicited these records. *See* DeCell Decl. Ex. A, at 1; *Vaughn* Index 9–10. Because the communications at issue are not directly to or from the President, DOS must show that the communications involved "senior presidential advisors," not including "staff outside the White House in executive branch agencies." *See In re Sealed Case*, 121 F.3d at 752. Without the identities of the advisors or, at least, their specific titles, the Knight Institute and this Court cannot determine whether they qualify as "senior presidential advisors." If the withheld and redacted records were

[13] "First Amendment Concerns" (C06534021), *Vaughn* Index 8–9; "Travel Sanctions" (C06569352, C06569349, C06569347), *Vaughn* Index 9–10; "Section 212(d)(3)(B)(i)" (C06568577), *Vaughn* Index 21.

not solicited by "senior presidential advisors" within the White House, the presidential communications privilege would not apply. *See id.*

Second, even assuming the records were solicited by senior presidential advisors, DOS has not established that the records are sufficiently related to presidential decisionmaking. The presidential communications privilege is "specific to the President" and may not be used to "shield communications on which the President has no intention of relying . . . for the sole purpose of raising the burden for those who seek their disclosure." *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1114, 1118 (D.C. Cir. 2004). Therefore, to demonstrate that a record is indeed a presidential communication and not merely an executive branch communication, DOS must indicate the particular presidential advisory or decisionmaking process to which the memorandum relates. *See Carney*, 19 F.3d at 812 (requiring "reasonably detailed explanations").

DOS has failed to do so with respect to "First Amendment Concerns" (C06534021) in particular. The *Vaughn* entry for this memorandum states merely that it was "solicited by senior presidential advisors to use in the context of a high-level, inter-agency meeting involving lawyers, discussing visa policy," in the course of preparing advice for "*potential* presentation" to the President with respect to unspecified "foreign policy and national security concerns." *Vaughn* Index 9 (emphasis added). There is no evidence that this "inter-agency" meeting was held to discuss matters of visa policy for which the President is responsible, rather than the agencies themselves. *See Amnesty Int'l*, 728 F. Supp. 2d at 522 (citing *Nixon*, 433 U.S. at 449) (noting that the communication must relate to the President's responsibilities and must be made in a presidential decisionmaking process); *Judicial Watch*, 365 F.3d at 1113–14 (noting that unlike the deliberative process privilege, the presidential communications privilege does not apply to the executive branch in general).

Indeed, the *Vaughn* entry states only that the memorandum concerns "what policy to pursue with respect to the 'endorse or espouse' provision," without any indication that this decisionmaking extended beyond the agency. *Vaughn* Index 9. Moreover, "potential presentation" to the President is too attenuated from the presidential decisionmaking process this privilege was designed to protect. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec.*, 592 F. Supp. 2d 111, 119 (D.D.C. 2009) (stating that presidential communications privilege "should never serve as a means of shielding information regarding governmental operations that do not call ultimately for *direct* decisionmaking by the President" (emphasis added) (internal quotation marks and citation omitted)). If "potential presentation" to the President sufficed to justify the presidential communications privilege, it would dramatically expand the privilege's narrow scope by allowing agencies to claim that any document could potentially be presented to the President. For this reason, "potential presentation" to the President is insufficient to justify this privilege for "Section 212(d)(3)(B)(i)" (C06568577), *Vaughn* Index 21, as well.

Third, DOS has not provided enough information to determine whether the government has waived the privilege through widespread dissemination of any of these records. As noted above, the "widespread dissemination of documents, to persons well beyond the circle of close presidential advisors, will eviscerate the presidential communications privilege . . . ." *ACLU v. Dep't of Justice*, 2016 WL 889739, at *5. For "First Amendment Concerns" (C06534021), the "Travel Sanctions" records (C06569352, C06569349, C06569347), and "Section 212(d)(3)(B)(i)" (C06568577), DOS claims some variant of the following: "This is an internal government document that has not been disseminated outside of the government." *Vaughn* Index 9; *see id.* at 10 (adding that records were "not disseminated widely"); *id.* at 21 (adding that record "was not widely disseminated within the executive branch"). That claim is insufficient to establish that the

records were closely held, as required for invocation of the presidential communications privilege. Indeed, although DOS asserts the "inter-agency" meeting was "high-level," the fact that "First Amendment Concerns" was distributed to multiple agencies as well as individual participants of unknown status and number, *see Vaughn* Index 9, suggests waiver of the privilege. Even if these records remained within the government, dissemination to non-advisory agencies or to individuals outside of White House senior presidential advisors would waive the privilege. To carry its burden, then, DOS must identify the recipients of these records, or at the very least, provide a concrete assurance that they were not disseminated "beyond the circle of close presidential advisors." *ACLU v. Dep't of Justice*, 2016 WL 889739, at *5.

3. DOS has failed to establish that the attorney-client privilege applies to the records at issue.

"The attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011); *see also Brennan Ctr.*, 697 F.3d at 207–08. An agency invoking the attorney-client privilege to withhold documents sought under FOIA bears "[t]he burden . . . to demonstrate that confidentiality was expected in the handling of these communications and that it was reasonably careful to keep this confidential information protected from general disclosure." *Amnesty Int'l*, 728 F. Supp. 2d at 519. To meet this requirement, the agency must generally submit a *Vaughn* index that—"[m]uch like . . . a privilege log in civil litigation"—states, among other things, "the subject matter, number of pages, author, date created, and the identities of all persons to whom the original or any copies of the document were shown or provided." *Id.* (internal quotation marks and citation omitted).

DOS has failed to provide this information. Most egregiously, the *Vaughn* entry for "Section 212(d)(3)(B)(i)" (C06568577) does not state so much as the subject matter of the record.

See Vaughn Index 21. DOS also neglected to provide the number of pages, date the record was created, or the identities of all who were shown or provided with the record. *See id.*

Indeed, DOS has failed to list the identities of all who received the records in each of the *Vaughn* entries at issue. It is critical that DOS provide this information in order to carry its burden of demonstrating that it kept the records confidential, *i.e.*, between DOS attorneys acting in a representative capacity and federal agency employees seeking advice of counsel. *See Amnesty Int'l*, 728 F. Supp. 2d at 519. As noted above, for "First Amendment Concerns" (C06534021), the "Travel Sanctions" records (C06569352, C06569349, C06569347), and "Section 212(d)(3)(B)(i)" (C06568577), DOS states that the records were not disseminated outside of the government and, with respect to the latter two, that they were not "widely" disseminated within the government. *See Vaughn* Index 9–10, 21. But those assertions do not establish that the records were kept confidential. Even if the records were not distributed outside of the government, they could have been shared with other government employees not within the attorney-client relationship DOS claims exists. This may well have been the case with the "First Amendment Concerns" memorandum, which was distributed for an inter-agency meeting, the participants of which DOS has not identified. *See id.* at 9. Nor has DOS provided any information about whether and to whom the memorandum may have been disseminated within the government. Thus, despite its conclusory assertion that "confidentiality has been maintained," Stein Decl. ¶ 47, DOS has failed to carry its burden to demonstrate that "the communications between client and attorney were made in confidence and have been maintained in confidence." *Brennan Ctr.*, 697 F.3d at 207 (internal quotation marks and citation omitted); *see also Amnesty Int'l*, 728 F. Supp. 2d at 519 ("The burden is on the agency to demonstrate that confidentiality was expected in the handling of these

communications and that it was reasonably careful to keep this confidential information protected from general disclosure.").

4. DOS has failed to establish that the work product privilege applies to the "First Amendment Concerns" memorandum.

The work product privilege protects "the files and the mental impressions of an attorney," *Hickman v. Taylor*, 329 U.S. 495, 510 (1947), but only when they are "prepared in anticipation of litigation," Fed. R. Civ. P. 26(b)(3). A document is "prepared in anticipation of litigation" if, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (internal quotation marks and citation omitted). The privilege does not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of litigation." *Id.*

DOS's *Vaughn* index fails to support application of the work product privilege to "First Amendment Concerns" (C06534021), because the index is conclusory, merely stating that the record was prepared by attorneys "in anticipation of litigation" and that it "specifically discusses both ongoing litigation and the likelihood of future litigation." *Vaughn* Index 9. Based on the title of this record, however, it could have been made in the process of policymaking, not specifically "*because of* the prospect of litigation," as is required for this privilege to apply. *See Adlman*, 134 F.3d at 1202. DOS has also failed to allege facts to show the record "would not have been prepared in substantially similar form but for the prospect of that litigation," *id.* at 1195, or that the record was prepared "with a specific claim supported by concrete facts which would likely lead to litigation in mind," *N.Y. Times v. U.S. Dep't of Justice*, 101 F. Supp. 3d 310, 319 (S.D.N.Y. 2015) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)); *see also State of Maine v. U.S. Dep't of Interior,* 298 F.3d 60, 69 (1st Cir. 2002) (holding that "mere

relation of documents to litigation does not automatically endow those documents with privileged status," and that agency's "conclusory" statements had failed to "make the [requisite] correlation between each withheld document and the litigation for which the document was created"). Without more information about the nature of the record, the names of ongoing cases, and factual descriptions of anticipated litigation, it is impossible for this Court and the Knight Institute to evaluate the application of this privilege. *See Halpern*, 181 F.3d at 293.

* * *

DOS has thus failed to justify its reliance on Exemption 5 in withholding information that is directly responsive to the Request. At the very least, DOS should submit more detailed *Vaughn* index descriptions to enable the Knight Institute and the Court to evaluate the propriety of its withholdings. *See Amnesty Int'l*, 728 F. Supp. 2d at 530. Additionally, because DOS withheld the majority of these records in full without providing sufficient information to evaluate the application of these privileges, *in camera* review is appropriate to further the objectives of FOIA and to correct the "asymmetrical distribution of knowledge that characterizes FOIA litigation." *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987); *see* 5 U.S.C. § 552(a)(4)(B); *ACLU v. U.S. Dep't of Justice*, 210 F. Supp. 3d 467, 485–86 (S.D.N.Y. 2016) ("If the agency fails to provide a sufficiently detailed explanation to enable the district court to make a *de novo* determination of the agency's claims of exemption, the district court then has several options, including inspecting the documents *in camera*, requesting further affidavits, or allowing the plaintiff discovery."). *In camera* review of the limited number of records the Knight Institute has highlighted here should not be overly burdensome for the Court.

B. DOS improperly withheld information under FOIA Exemption 7(E).

DOS has failed to justify its invocation of Exemption 7(E) in withholding several sections of the Foreign Affairs Manual ("FAM") that appear to contain only definitions, interpretations of law, and statements of policy—not the kind of law enforcement information the exemption was meant to protect.[14]

Exemption 7(E) applies to two categories of information "compiled for law enforcement purposes": (1) "techniques and procedures for law enforcement investigations or prosecutions," and (2) "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *see also Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010). To fall within Exemption 7(E), the withheld information must first meet the threshold requirement that it was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *Pub. Emps. for Envtl. Resp. v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 202–03 (D.C. Cir. 2014). "Law enforcement purposes" entail "proactive steps designed to prevent criminal activity and to maintain security." *Milner v. Dep't of the Navy*, 562 U.S. 562, 582 (2011) (Alito, J., concurring). Where an agency has "both law enforcement and administrative functions," courts will "scrutinize with some skepticism the particular purpose claimed." *Tax Analysts v. IRS*, 294 F.3d 71, 77 (D.C. Cir. 2002) (internal quotation marks and citation omitted). A "mixed-function" agency must demonstrate that its purpose in compiling a particular document

[14] Specifically, DOS has failed to establish the applicability of Exemption 7(E) to withholdings in the following records: "Foreign Affairs Manual 9 FAM 302.6" (C06533909, C06533920, C06533941, C06533947, C06533951, C06533970, C06534007, C06571131), *Vaughn* Index 1–2; "Foreign Affairs Manual 9 FAM 40.32" (C06533937), *Vaughn* Index 3–4; "Foreign Affairs Manual 9 FAM 302.14" (C06571135), *Vaughn* Index 4–5. *See* DeCell Decl. Ex. B ("Foreign Affairs Manual 9 FAM 302.6" (C06533909)).

"fell within its sphere of enforcement authority." *Fine v. U.S. Dep't of Energy*, 823 F. Supp. 888, 907 (D.N.M. 1993).

Once the threshold requirement is met, the information must fall into one of the two categories protected by Exemption 7(E). The first category, "techniques and procedures," encompasses information on "how law enforcement officials go about investigating a crime." *Allard K. Lowenstein,* 626 F. 3d at 682. A technique or procedure must be truly "specialized" and "calculated" to qualify under Exemption 7(E), meaning it is "technical" or involves some "special method or skills." *ACLU v. Dep't of Homeland Sec.*, 243 F. Supp. 3d 393, 403–04 (S.D.N.Y. 2017). The second category, law enforcement "guidelines," covers information providing "an indication or outline of future policy or conduct" implicating "resource allocation." *Allard K. Lowenstein*, 626 F.3d at 682; *see Schwartz v. DEA*, No. 13-cv-5004, 2016 WL 154089, at *9 (E.D.N.Y. Jan. 12, 2016). Guidelines are exempt "from disclosure only if public access to such guidelines would risk circumvention of the law." *Allard K. Lowenstein*, 626 F.3d at 681.

DOS has improperly claimed Exemption 7(E) in withholding significant sections of Volume 9 of the FAM. As a threshold matter, it is not clear that the FAM was "compiled for law enforcement purposes," even if some sections of the FAM may serve those purposes. DOS is properly considered a "mixed-function" agency, with administrative as well as enforcement responsibilities. *See* 22 U.S.C. § 2651a (charging the Secretary of State with "administer[ing], coordinat[ing], and direct[ing] the Foreign Service of the United States and the personnel of the Department of State); *cf. ACLU of S. Cal. v. USCIS*, 133 F. Supp. 3d 234, 242 (D.D.C. 2015) (concluding that USCIS was a "mixed-function" agency).

Accordingly, DOS must show that it compiled the FAM for specific law enforcement purposes. Under DOS's own description, however, the FAM generally consists of "policy." The

FAM and the associated Handbooks ("FAHs") are authoritative sources of DOS "organization structures, policies, and procedures."[15] As described by DOS, "[t]he FAM (generally policy) and the FAHs (generally procedures) together convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates."[16] Mere descriptions of codified law and policy, even those including "interpretation and application of immigration laws and regulations," *Vaughn* Index 1, are not protected under Exemption 7(E). To be "compiled for law enforcement purposes," the information must go a step further and describe "proactive steps" for preventing criminal activity and maintaining security. *Milner*, 562 U.S. at 582 (Alito, J., concurring).

DOS has failed to satisfy its burden of showing that the withheld FAM sections do so. For example, DOS appears to have withheld definitions and interpretations of certain INA provisions as "techniques and procedures." Under "9 FAM 302.6-2(B)(3)"—titled "Definitions"—DOS withheld information relating to the endorse or espouse provisions in subsections c.(2) and d (C06533909). *See* DeCell Decl. Ex. B, at 7. DOS characterizes these sections as "identify[ing] the situations that trigger the process of checking for terrorism-related ineligibilities and reveal the techniques used during that process to determine whether an individual is ineligible to receive visas because of their involvement with terrorist activities." *Vaughn* Index 1. But DOS released information under parallel subsections addressing a similar provision regarding "incitement of terrorism" without any redactions. *See* DeCell Decl. Ex. B, at 9–11. The disclosed information about the "incitement" provision identifies situations that seem likely to trigger a process for checking for terrorism-related ineligibilities and, in the form of example scenarios, reveals

[15] *Foreign Affairs Manual and Handbook*, U.S. Dep't of State, https://fam.state.gov.

[16] *Id.*

situations in which an individual would be ineligible to receive a visa because of her involvement with terrorist activities. This information is conveyed at a high, non-technical level, however, and thus would not qualify as a "technique or procedure" subject to withholding under Exemption 7(E). *See ACLU v. Dep't of Homeland Sec.*, 243 F. Supp. 3d at 403–04. To the extent the subsections addressing the endorse or espouse provisions contain information of a similar nature, they are not subject to withholding under Exemption 7(E), either.

DOS similarly withheld information in other sections of the FAM containing what appears to be largely definitional or interpretive information, this time characterizing it as "guidelines." For example, DOS withheld a section under "9 FAM 302.6-3(B)" (C06533909) titled "Not a Permanent Bar," *see* DeCell Decl. Ex. B at 44, describing it as "guidelines for situations in which an individual may cease to be inadmissible," *Vaughn* Index 2. While DOS claims, in language repeated throughout the *Vaughn* Index, that "terrorists and other bad actors could use [this information] to conceal derogatory information, provide fraudulent information, or otherwise circumvent the security checks put in place to ensure that terrorists and other bad actors cannot gain visas to enter into the United States," *id*. at 3, it is unclear how elaboration on what would not constitute grounds for inadmissibility—essentially a legal interpretation—could risk circumvention of the law in these ways. DOS fails to explain how disclosure of legal interpretations could risk circumvention of the law, except in the sense that knowledge of the law always enables individuals to avoid committing a crime.

Finally, DOS has failed to establish that all "segregable factual portions" not falling within Exemption 7(E) have been released. *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks and citation omitted). As with its Exemption 5 withholdings, DOS offers only boilerplate language regarding its segregation efforts: "The Department conducted a thorough, line-by-line review of

this withholding and determined that there is no additional meaningful, non-exempt information that can be reasonably segregated and released." *Vaughn* Index 3; *see id.* at 4–5. Certain of its withholdings are so sweeping, however, that it is unlikely they do not contain segregable, factual information. For example, the withholdings in "FAM 302.6-2(C)" (C06533909) span seven pages, including section headings. *See* DeCell Decl. Ex. B at 34–40. Therefore, the Knight Institute respectfully requests *in camera* review of DOS's Exemption 7(E) withholdings to determine whether they contain segregable information. *See Iraqi Refugee Assistance Project v. U.S. Dep't of Homeland Sec.*, No. 12-cv-3461, 2017 WL 1155898, at *3 (S.D.N.Y. Mar. 27, 2017) ("Although the *Vaughn* Index provides accurate and good-faith descriptions of the redacted contents, it discusses them in broad terms . . . . Absent *in camera* review, the Court would be unable to make adequate findings as to the . . . claimed FOIA exemptions and whether the discussions contain segregable factual content.").

CONCLUSION

For the reasons stated above, ICE and OLC have not established the adequacy of their searches, and DOS has not justified its withholdings in the records at issue. Accordingly, this Court should grant partial summary judgment with respect to ICE and OLC, and summary judgment with respect to DOS, in favor of the Knight Institute. Specifically, the Knight Institute respectfully asks the Court to order ICE and OLC to conduct new searches for responsive records on terms agreed upon by the Knight Institute. The Knight Institute further requests that the Court order DOS to release records it has improperly withheld under FOIA Exemptions 5 and 7(E), or to submit a more detailed *Vaughn* index justifying the withholding of those records. Alternatively, the Knight Institute respectfully asks the Court to conduct an *in camera* review of those records to determine

the propriety of DOS's withholding decisions and to identify any segregable sections for prompt production to the Knight Institute.

Dated: March 28, 2019

Respectfully submitted,

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