

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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KNIGHT FIRST AMENDMENT INSTITUTE )  
AT COLUMBIA UNIVERSITY, )  
535 West 116th Street )  
314 Low Library )  
New York, NY 10027, )

Civil Action No. 17-cv-548-TSC

Plaintiff

v.

UNITED STATES DEPARTMENT OF )  
HOMELAND SECURITY, )  
245 Murray Lane, SW )  
Washington, DC 20528, )

UNITED STATES IMMIGRATION )  
AND CUSTOMS ENFORCEMENT, )  
500 12th Street, SW )  
Washington, DC 20536, )

and )

UNITED STATES CUSTOMS AND BORDER )  
PROTECTION, )  
1300 Pennsylvania Avenue, NW )  
Washington, DC 20229, )

Defendants.

\_\_\_\_\_

**AMENDED COMPLAINT FOR INJUNCTIVE RELIEF**

Plaintiff Knight First Amendment Institute at Columbia University (the “Knight Institute”),  
by and through its attorneys, hereby complains as follows for its Amended Complaint against

Defendants United States Department of Homeland Security (“DHS”), United States Immigration and Customs Enforcement (“ICE”), and United States Customs and Border Protection (“CBP”):

### **INTRODUCTION**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief requiring Defendants to grant expedited review of the FOIA Request (the “Request”) submitted by the Knight Institute to DHS and ICE on March 15, 2017, and to CBP on March 22, 2017.

2. The Request seeks disclosure of records concerning suspicionless searches of individuals’ electronic devices at the nation’s borders.

3. Directives issued in 2009 purport to authorize officers of CBP and ICE to search travelers’ electronic devices—including cell phones, tablets, and laptop computers—at the U.S. border without individualized suspicion, and to detain those devices indefinitely. Under the directives, CBP and ICE officers have seized and searched the electronic devices of thousands of individuals, including U.S. citizens, without individualized suspicion. The number of searches of electronic devices at the border has risen sharply since 2015, with a marked increase in the first six months of 2017.

4. Among the individuals whose electronic devices have been seized and searched are several journalists whose communications with confidential sources were subject to government review. For example, CBP officers reportedly detained and interrogated French–American photojournalist Kim Badawi while searching the contents of his cell phone, including his private photos and his WhatsApp messages with a Syrian refugee source.

5. Additionally, news reports indicate that border officials appear to be targeting Muslims, including U.S. citizens who are Muslim, for searches of their electronic devices at the border.

6. The indiscriminate search of Americans' electronic devices at the border raises serious constitutional questions under both the First and Fourth Amendment. People today store their most intimate information on their electronic devices, reflecting their thoughts, explorations, activities, and associations. Subjecting that information to unfettered government scrutiny invades the core of individual privacy and threatens free inquiry and expression. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (noting that a cellphone may contain "the sum of an individual's private life" and holding that police cannot search a cellphone in a search incident to arrest without first obtaining a warrant based on probable cause).

7. The Request seeks information necessary for the public to fully understand the government's policies and practices relating to searches of electronic devices at the border. Specifically, it seeks statistical, policy, and assessment records regarding the government's searches. Moreover, the Request seeks expedited processing, given the urgency of the ongoing public debate.

8. On March 28, 2017, ICE granted the Knight Institute's request for expedited processing of its FOIA request.

9. On March 31, 2017, DHS denied the Knight Institute's request for expedited processing.

10. CBP failed to respond to the Knight Institute's request within the ten days required by FOIA, 5 U.S.C. § 552(a)(6)(E)(ii)(I).

11. All Defendants have failed to produce records or information, and indeed have failed to make any substantive response to the Request.

12. Injunctive relief is appropriate to ensure Defendants' timely compliance with FOIA's requirements.

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. § 1331.

14. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B).

### **PARTIES**

15. 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. Research and public education are essential to the Knight Institute's mission. Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Knight Institute was established to conduct. The Knight Institute is a "person" within the meaning 5 U.S.C. § 551(2).

16. DHS is an "agency" within the meaning of 5 U.S.C. § 552(f). ICE and CBP are components of DHS. DHS and these components have possession and control over some or all of the requested records.

### **FACTUAL ALLEGATIONS**

17. On March 15, 2017, the Knight Institute submitted identical versions of the Request to DHS and one of its components, ICE.

18. The Knight Institute submitted an identical version of the same Request to CBP, another DHS component, on March 22, 2017.<sup>1</sup>

19. On or around March 28, 2017, ICE referred the Request to DHS's FOIA Office and to CBP, and indicated that information responsive to the Request is "under the purview" of the DHS FOIA Office and CBP.

20. On or around March 31, 2017, DHS referred the Request to its Office of the Inspector General ("OIG"), and to the Transportation Security Administration ("TSA"), another DHS component.

21. The Request seeks the following records:<sup>2</sup> 1) records from Defendants' TECS database containing information about the number and reasons for each search, detention, retention, or sharing of individuals' electronic devices or the information accessible on them since fiscal year 2012; 2) documents relating to each instance since fiscal year 2012 in which CBP or ICE searched, detained, retained, or shared an electronic device or the information accessible on it; 3) revisions of or documents supplementing or superseding the CBP and ICE Directives concerning border searches of electronic devices; 4) certain documents relating to any reviews of CBP's or ICE's policies or practices concerning electronic device searches; 5) documents concerning or relating to complaints filed by individuals or organizations about CBP's or ICE's search, review, retention, or sharing of the information on travelers' electronic devices; 6) documents reflecting policies, practices, or procedures concerning how CBP officers handle "privileged or other sensitive materials," including "work-related information carried by

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<sup>1</sup> Although identical versions of the Request were submitted to DHS, CBP and ICE on March 15, 2017, the Request submitted to CBP may not have been received by the responsible FOIA Officer. Out of an abundance of caution, the Knight Institute resubmitted the Request to CBP on March 22, 2017.

<sup>2</sup> A copy of the Request is attached hereto as Exhibit A.

journalists” as described in the CBP Directive concerning border searches of electronic devices; and 7) documents reflecting policies, practices, and procedures concerning CBP’s anti-discrimination policy as applied to discretionary electronic device searches.

22. The Knight Institute requested expedited processing of the Request on the ground that there is a “compelling need” for the documents because they contain information “urgent[ly]” needed by the Knight Institute, an organization “primarily engaged in disseminating information,” in order to “inform the public concerning actual or alleged Federal Government Activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

23. Since the beginning of the year, reports of suspicionless searches of electronic devices at U.S. borders and international airports have abounded, with a significant increase under the new administration. Certain of those reports detail instances in which CBP officers exerted pressure or outright force to obtain electronic devices and passcodes.

24. The public has been denied the information necessary to fully understand the government’s searches of electronic devices at the border. These records are urgently needed to inform the ongoing debate over the wisdom and lawfulness of those searches.

#### **AGENCY RESPONSES AND ADMINISTRATIVE APPEALS**

25. By email dated March 24, 2017, CBP acknowledged receipt of the Request. CBP did not communicate any decision regarding the Knight Institute’s request for expedited processing.

26. By email dated March 28, 2017, ICE acknowledged receipt of the Request and granted expedited processing of the Request.

27. By email and letter dated March 31, 2017,<sup>3</sup> DHS denied expedited processing of the Request. It did not explain its rationale for denying expedited processing even though ICE had granted the request for expedited processing.

28. DHS's response further stated that "unusual circumstances" existed to excuse its failure to produce records for an additional ten days under 5 U.S.C. § 552(a)(6)(B). However, DHS's stated reason for invoking this section—that the Request "seeks documents that will require a thorough and wide-ranging search" —does not constitute "unusual circumstances" as defined by 5 U.S.C. § 552(a)(6)(B)(iii).

29. On or around March 31, 2017, DHS referred the Request to TSA, which acknowledged receipt of the Request and denied expedited processing on April 4, 2017. TSA did not explain its rationale for denying expedited processing despite ICE's grant of the request for expedited processing.

30. TSA's response further stated that "unusual circumstances" existed to excuse its failure to produce records for an additional ten days under 5 U.S.C. § 552(a)(6)(B). However, TSA did not specify the "unusual circumstances" for invoking this section, and its letter merely set forth the statutory definition of "unusual circumstances" without stating which, if any, of these circumstances applied to the Request.

31. No records responsive to the Request have been released by DHS, CBP, ICE, or TSA.

32. No substantive response regarding the production of records or information responsive to the Request has been made by DHS, CBP, ICE, or TSA.

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<sup>3</sup> DHS initially acknowledged receipt of the Request by email dated March 16, 2017, but it did not at that point communicate any decision regarding the Knight Institute's request for expedited processing.

33. The Knight Institute’s requests for expedited processing to DHS and CBP are ripe for adjudication in this Court, because each of these defendants has taken “action to deny or affirm denial of a request for expedited processing” or failed “to respond in a timely manner to such a request.” 5 U.S.C. § 552(a)(6)(E)(iii). DHS denied the Knight Institute’s request for expedited processing on March 31, 2017. CBP did not respond to the Knight Institute’s request for expedited processing within ten days after the March 22, 2017 date of the request, as required by 5 U.S.C. § 552(a)(6)(E)(ii)(I).

**FIRST CAUSE OF ACTION – FAILURE TO GRANT EXPEDITED PROCESSING**

*Against DHS and CBP*

34. The Knight Institute repeats and incorporates herein by reference the allegations of Paragraphs 1 through 33.

35. DHS’s and CBP’s denials of expedited processing of the Request or failure to respond to the Knight Institute’s request for expedited processing violates FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants’ corresponding regulations.

36. Injunctive relief is appropriate to remedy DHS’s and CBP’s failures to grant expedited processing of the Request.

**SECOND CAUSE OF ACTION – FAILURE TO PRODUCE RECORDS**

*Against All Defendants*

37. The Knight Institute repeats and incorporates herein by reference the allegations of Paragraphs 1 through 36.

38. Defendants’ failure to process the Request and to make responsive records available “as soon as practicable” violates FOIA, 5 U.S.C. § 552(a)(6)(E)(iii), and Defendants’



corresponding regulations. Defendants' failure to process the Request "promptly," *id.* § 552(a)(3)(A), also violates FOIA as well as Defendants' corresponding regulations.

39. Injunctive relief is appropriate to remedy Defendants' failure to process the Request in a timely manner, as required by FOIA.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Knight First Amendment Institute at Columbia University respectfully requests that judgment be entered against Defendants United States Department of Homeland Security, United States Immigrations and Customs Enforcement, and United States Customs and Border Protection, and that this Court:

- A. Order DHS and CBP to grant expedited processing of the Request;
- B. Order all Defendants immediately to release to the Knight Institute the records sought in the Request;
- C. Retain jurisdiction of this action to ensure no agency records are wrongfully withheld, and order Defendants to disclose any wrongfully withheld records;
- D. Award the Knight Institute its reasonable costs and reasonable attorneys' fees incurred in this action; and
- E. Grant such other and further relief as the Court may deem just and proper.

Dated: April 19, 2017

Respectfully submitted,

By: /s/ Matthew S. Hellman

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# **EXHIBIT A**

**KNIGHT  
FIRST AMENDMENT  
INSTITUTE**

at Columbia University

**KATHERINE FALLOW**  
Senior Staff Attorney

March 15, 2017

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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”) submits this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records concerning suspicionless searches of individuals’ electronic devices at the nation’s borders.<sup>1</sup>

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<sup>1</sup> 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.

## I. Background

Directives issued in 2009 authorize officers of U.S. Customs and Border Protection (“CBP”) and Immigration and Customs Enforcement (“ICE”) to search and detain travelers’ electronic devices—including cell phones, tablets, and laptop computers—without individualized suspicion. CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information* (Aug. 20, 2009), <https://perma.cc/8JKP-P73Z>; ICE Directive No. 7-6.1, *Border Searches of Electronic Devices* (Aug. 18, 2009), <https://perma.cc/9455-Z2AX>. CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information* (Aug. 20, 2009), <https://perma.cc/8JKP-P73Z>.

The CBP Directive, for example, broadly authorizes CBP officers to search electronic devices “with or without individualized suspicion.” CBP Directive § 5.1. It further permits CBP officers to seize electronic devices without individualized suspicion for the time necessary to search them, *id.* § 5.3, and to share and indefinitely retain information on devices if, after reviewing the information on a device, CBP officers determine that there is probable cause to believe that it “contains evidence of or is the fruit of a crime that CBP is authorized to enforce,” *id.* § 5.4.1.1. The Directive also allows sharing and indefinite retention—even in the absence of probable cause—of “terrorism-related information,” *id.* § 5.4.1.4, and of “information relating to immigration, customs, and other enforcement matters if such retention is consistent with the privacy and data protection standards of the system of records in which such information is retained,” *id.* § 5.4.1.2.

Though it broadly authorizes invasive searches of sensitive data, the CBP Directive contains few privacy protections. Even for especially sensitive data, the Directive appears to require little more than consultation before searching. For legally privileged material, for example, the Directive provides “special handling procedures” that require CBP officials to “seek advice . . . before conducting a search of the material.” *Id.* § 5.2.1. For medical and journalistic records, the Directive requires consultation and that the records “be handled in accordance with any applicable federal law and CBP policy,” *id.* § 5.2.2, without specifying what that applicable law or policy might be.

CBP and ICE officials have searched the electronic devices of thousands of individuals, including U.S. citizens, without individualized suspicion. Those searches increased dramatically over the past year: officers reportedly conducted 25,000 searches in 2016 as compared to

5,000 searches in 2015.<sup>2</sup> In February 2017 alone officers conducted 5,000 searches of electronic devices.<sup>3</sup>

Over the past year, CBP has searched and, in some instances, seized information stored on the electronic devices of journalists, despite their objections to the forced disclosure of confidential source information. According to press reports:

1. CBP officers detained and interrogated French–American photojournalist Kim Badawi while searching the contents of his cell phone, including his private photos and his WhatsApp messages with a Syrian refugee source.<sup>4</sup>
2. Isma'il Kushkush, a former acting bureau chief of the *New York Times* in East Africa, likewise reported that officers had interrogated him about his reporting on refugees while searching his electronic devices.<sup>5</sup>
3. Canadian photojournalist Ed Ou was denied entry into the United States after refusing to provide CBP officers the passwords to his electronic devices. During Ou's six-hour detention, officers read his journal despite their acknowledgment that Ou was a journalist. Additionally, Ou suspected that they may have removed the SIM cards from his devices before returning them to him.<sup>6</sup>
4. Wall Street Journal reporter Maria Abi-Habib was detained at the Los Angeles International Airport after refusing to turn her cell phones over to CBP officers. She was released only after the officers consulted their supervisors.<sup>7</sup>

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<sup>2</sup> Cynthia McFadden, et al., *American Citizens: U.S. Border Agents Can Search Your Cell Phone*, NBC News (Mar. 13, 2017), <http://www.nbcnews.com/news/us-news/american-citizens-u-s-border-agents-can-search-your-cellphone-n732746> [hereinafter "NBC News, *American Citizens*"].

<sup>3</sup> *Id.*

<sup>4</sup> Alexandra Ellerbeck, *Security Risk for Sources as U.S. Border Agents Stop and Search Journalists*, Committee to Protect Journalists (Dec. 9, 2016), <https://www.cpj.org/blog/2016/12/security-risk-for-sources-as-us-border-agents-stop.php>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Mazin Sidahmed, *Department of Homeland Security detains journalist returning from Beirut*, The Guardian (Jul. 21, 2016), <https://www.theguardian.com/media/2016/jul/21/homeland-security-journalist-maria-abi-habib-detained>; Noah Feldman, *Your Privacy Doesn't Matter at the Border*, Bloomberg View (Aug. 28, 2016),

Additionally, since President Trump's Executive Order 13,769 took effect, CBP appears to be targeting Muslims, including U.S. citizens who are Muslim, for electronic device searches at the border.<sup>8</sup> These suspicionless searches and seizures of Americans' electronic devices raise serious constitutional questions. To help the public better understand the government's policies and the way they are being implemented, the Knight Institute files this FOIA request.

## II. Records requested

The Knight Institute requests the following documents:

1. Any document containing statistical information concerning the search, detention, retention, or sharing of electronic devices or information of individuals at the border (or functional equivalent of the border) since FY2012, including, but not limited to, documents reflecting:
  - a. the number of travelers whose electronic devices or information were searched, detained, retained, or shared;

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<https://www.bloomberg.com/view/articles/2016-08-28/your-privacy-doesn-t-matter-at-the-border>.

<sup>8</sup> Press Release, *CAIR-FL Files 10 Complaints with CBP After the Agency Targeted and Questioned American-Muslims About Religious and Political Views*, CAIR Florida (Jan. 18, 2017), <https://www.cairflorida.org/newsroom/press-releases/720-cair-fl-files-10-complaints-with-cbp-after-the-agency-targeted-and-questioned-american-muslims-about-religious-and-political-views.html>; NBC News, *American Citizens* (describing incidents where Akram Shibly, a Muslim American of Syrian descent, was twice stopped by CBP while traveling between the U.S. and Canada and asked to turn over cell phone and password); Daniel Victor, *What Are Your Rights if Border Agents Want to Search Your Phone?*, N.Y. Times (Feb. 14, 2017), [https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html?\\_r=0](https://www.nytimes.com/2017/02/14/business/border-enforcement-airport-phones.html?_r=0); Kaveh Waddell, *A NASA Engineer Was Required to Unlock His Phone at the Border*, The Atlantic (Feb. 13, 2017), <https://www.theatlantic.com/technology/archive/2017/02/a-nasa-engineer-is-required-to-unlock-his-phone-at-the-border/516489/>; see Kaveh Waddell, *A Stand Against Invasive Phone Searches at the U.S. Border*, The Atlantic (Feb. 21, 2017), <https://www.theatlantic.com/technology/archive/2017/02/ron-wyden-border-searches/517353/>; Joshua Kopstein, *Travelers Affected By Trump Ban Forced to Unlock Phones, Computers*, Vocativ (Jan. 30, 2017), <http://www.vocativ.com/397897/travelers-affected-by-trump-ban-forced-to-unlock-phones-computers/>; see also Sophia Cope, *Fear Materialized: Border Agents Demand Social Media Data from Americans*, Electronic Frontier Foundation (Jan. 25, 2017), <https://www.eff.org/deeplinks/2017/01/fear-materialized-border-agents-demand-social-media-data-americans>.

- b. the number or portion of those travelers who are U.S. citizens;
  - c. the number or portion of those travelers who are lawful permanent residents or green card holders;
  - d. the number or portion of those travelers by country of origin;
  - e. the number or portion of those travelers by gender, race, ethnicity, nationality, and/or country of birth;
  - f. the number or portion of those travelers by port of entry; and
  - g. the number or portion of those travelers by watchlist, lookout, and/or other selectee status.
2. Documents relating to each instance since FY2012 in which CBP or ICE searched, detained, retained, or shared an electronic device or the information accessible on it, including, but not limited to:
- a. a list of the TECS data field categories used to record and track each electronic device search conducted by CBP or ICE; and
  - b. all information contained in the TECS system used to record and track electronic device searches, detentions, retentions, and/or sharings.<sup>9</sup>

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<sup>9</sup> In 2011, the Department of Homeland Security's Office for Civil Rights and Civil Liberties ("CRCL") issued an Impact Assessment concerning the border searches of electronic devices. DHS, Office for Civil Rights and Civil Liberties, *Impact Assessment: Border Searches of Electronic Devices* (Dec. 29, 2011), <https://perma.cc/P4FZ-BY6G> ("2011 Impact Assessment"). The 2011 Impact Assessment noted that CBP records the fact of each device search and other information about it in the TECS system, but that the monitoring had been found to be "inadequate." *Id.* at 8. The 2011 Impact Assessment noted that CBP's Office of Internal Affairs had proposed that CBP improve its tracking of device searches through "a new TECS module" or by "enhanc[ing] existing modules." *Id.* CBP agreed with this recommendation, *id.*, and according to the Executive Summary issued by CRCL in 2013, CBP "implemented this change beginning in FY2012." DHS, Office for Civil Rights/Civil Liberties, *Impact Assessment: Border Searches of Electronic Devices* (Jan. 29, 2013), <https://perma.cc/TRW2-CRCR>. This portion of our request seeks all data in the TECS system (or any module, software, or database designed to take its place) since



3. Revisions of or documents supplementing or superseding:
  - a. CBP Directive No. 3340-049, *Border Search of Electronic Devices Containing Information* (Aug. 20, 2009); or
  - b. ICE Directive No. 7-6.1, *Border Searches of Electronic Devices* (Aug. 18, 2009).
4. The following documents relating to any reviews of CBP's or ICE's policies or practices concerning electronic device searches:
  - a. any audits, impact assessments, or other reviews of CBP's or ICE's policies or practices concerning electronic device searches, including any such reports by the Office for Civil Rights and Civil Liberties, DHS's OIG, and CBP's Office of Internal Affairs, Management Inspection Division;
  - b. any policies, practices, procedures, and/or training materials adopted as a result of any audits, impact assessments, or other reviews of how CBP and ICE conduct electronic device searches; and
  - c. any documents reflecting annual or semi-annual examinations by CBP or ICE of electronic device searches by port of entry, as adopted in response to the 2011 Impact Assessment.
5. Documents, including tear sheets and TRIP records, containing or relating to complaints filed by individuals or organizations about CBP's and/or ICE's search, review, retention or sharing of the information on travelers' electronic devices.
6. Documents reflecting policies, practices, or procedures concerning how CBP officers handle "privileged or other sensitive material," including "work-related information carried by journalists," as referenced in § 5.2 of the CBP Directive.
7. Documents reflecting policies, practices, and procedures concerning CBP's anti-discrimination policy as applied to discretionary device searches.

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FY2012. We request that the data be provided in electronic format. *See* 5 U.S.C. § 552(a)(3)(B).

Where a document contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request. Please 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 or a generally accessible electronic format (e.g., for tabular data, XLS or CSV). *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.

Finally, we ask that you process our request on a rolling basis, giving priority to categories 1 and 2.

### **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 documents sought because the information they contain 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 is a newly established organization at Columbia University dedicated to defending and strengthening the freedoms of speech and the press in the digital age. Research and public education are essential to the Institute’s mission.<sup>10</sup> 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 was established to perform. *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

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<sup>10</sup> 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>.

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 documents 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). The records sought have generated intense public interest. Since the beginning of this year alone, reports of suspicionless searches of electronic devices at U.S. borders and international airports have abounded.<sup>11</sup> Certain of those reports detail instances in which CBP officers exerted pressure or outright force to obtain electronic devices and passcodes.<sup>12</sup> The public has thus far been denied the benefit of complete records revealing the number of searches conducted, the individuals subjected to such searches, and the circumstances surrounding such searches. Those records are urgently needed to understand the scope and lawfulness of the searches conducted pursuant to the CBP and ICE Directives.

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 records 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 records 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).

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<sup>11</sup> NBC News, *American Citizens*; *see, e.g.,* Victor, *supra* note 8; Waddel, *A NASA Engineer Was Required to Unlock His Phone at the Border*, *supra* note 8; Waddell, *A Stand Against Invasive Phone Searches at the U.S. Border*, *supra* note 8; Kopstein, *supra* note 8; *see also* Cope, *supra* note 8.

<sup>12</sup> *See* NBC News, *American Citizens*; Victor, *supra* note 8; Waddel, *A NASA Engineer Was Required to Unlock His Phone at the Border*, *supra* note 8.

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 will perform scholarly research on the application of the First Amendment in the digital era. The Institute is in the midst of inaugurating a research program that will bring together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It will publish that commentary in many forms—in scholarly publications, in long-form reports, 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 or, where reasonable, to narrow our request.

Sincerely,

/s/ Katherine Fallow

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