



March 23, 2023

VIA EMAIL—GILDFOIAAppeals@ice.dhs.gov

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

FOIA Appeal of ICE FOIA Case Number 2022-ICFO-10071

Dear FOIA Appeal Officer:

On April 4, 2022, America First Legal Foundation (“AFL”) submitted a Freedom of Information Act (“FOIA”) request to U.S. Immigration and Customs Enforcement (“ICE”) seeking, among other things, communications regarding the phrase “immigration court backlog”; proposals to allow EOIR judges to administratively close, dismiss, terminate, or otherwise dispose of cases pending before them other than through adjudication on the merits; and other related records. The request listed nine records custodians who work in the following five ICE offices or components: the Office of the Director, the Office of the Principal Legal Advisor (“OPLA”), the Office of Regulatory Affairs and Policy (“ORAP”), Enforcement and Removal (“ERO”), and the Office of Immigration Program Evaluation (“OIPE”). Attached as Exhibit 1 is a copy of that letter, which contains a complete list of the requested items. This request was assigned tracking number 2022-ICFO-10071.

In ICE’s final response, dated January 24, 2023 (and attached as Exhibit 2), Supervisory Paralegal Specialist K. Small wrote, “ICE has conducted a search of the ICE Enforcement and Removal Operations (ERO) for records responsive to your request and no records responsive to your request were found.”¹ ICE provided no justification, however, for why it only conducted a search of ERO and not of the other four ICE offices involved in the FOIA request.

DHS regulations establish that a FOIA requester may file an appeal to “question[] the adequacy of the ... search for responsive records.”² This letter serves as AFL’s appeal of ICE’s failure to provide any responsive documents to FOIA Request 2022-ICFO-10071 because ICE’s search was inadequate.

¹ Exhibit 2 at 1.

² 6 C.F.R. § 5.8(a).

I. ICE's Search Was Inadequate.

FOIA creates a “strong presumption in favor of disclosure” that “places the burden on the agency to justify the withholding of any requested documents.”³ “[D]isclosure, not secrecy, is the dominant objective of the Act, consistent with the Act’s goal of broad disclosure....”⁴

“As a general rule, courts require agencies to conduct a search that is ‘reasonably calculated to uncover all relevant documents.’”⁵ Courts also review the reasonableness of an agency’s search on whether the agency properly determined where responsive records were likely to be found and searched those locations, or whether the agency improperly limited its search.⁶

A federal “agency has the burden of establishing the adequacy of its search.”⁷ To do this, the agency must explain its search process in a way that is “‘relatively detailed’ and nonconclusory.”⁸

A one-sentence explanation that “ICE has conducted a search of the ICE Enforcement and Removal Operations (ERO) for records responsive to your request and no records responsive to your request were found,”⁹ does not meet this standard for two reasons.

First, ICE only conducted a search of ERO, or only one out of the five relevant offices or components at which the document custodians are employed. Thus, by ICE’s own account, its search was only twenty percent compliant with the FOIA request.

Second, widely reported news stories in well-known media outlets confirm that responsive records *do* exist. For example, according to the New York Times, “[i]n a memo dated Sunday, [ICE] directed its lawyers to review cases and try to clear those considered low priority under enforcement guidelines that the administration established last year.”¹⁰ That same article goes on to report that ICE “would not provide an estimate of how many cases would be cleared under the directive or how long it would take” and that “[a]n ICE official, *authorized by the agency to speak publicly without being identified*, said lawyers would review each case before the

³ *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

⁴ *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (cleaned up).

⁵ U.S. DEPT OF JUST., Guide to the Freedom of Information Act Procedural Requirements at 42 (Aug. 20, 2021), <https://bit.ly/3ytafVq> (citing *Campbell v. SSA*, 446 F. App’x 477, 480 (3d Cir. 2011) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

⁶ See *Callaway v. Dep’t of the Treasury*, No. 08-5480, 2009 WL 10184495, at *1 (D.C. Cir. June 2, 2009).

⁷ *Havemann v. Colvin*, 629 F. App’x 537, 539 (4th Cir. 2015), see also *Aguilar v. Drug Enf’t Admin.*, 865 F.3d 730, 738 (D.C. Cir. 2017).

⁸ *Goland v. CIA*, 607 F.2d 339, 352 (D.C. Cir. 1978).

⁹ Exhibit 2 at 1.

¹⁰ Eileen Sullivan, *ICE Lawyers Directed to Clear Low-Priority Immigration Cases*, N.Y. TIMES, (Apr. 4, 2022), <https://tinyurl.com/p726huea>.

court to see if it met the administration's priorities for enforcement...."¹¹ Thus, if the New York Times is to be believed, the newspaper was in direct contact with ICE, and ICE confirmed the existence of the policy memo. Yet, even though the policy memo seems to exist, ICE not only failed to produce the memo itself, but any of the other attendant communications and documents that would also almost certainly exist.

II. Conclusion

Because ICE's search was wholly inadequate, we respectfully request that ICE promptly conduct a new search and release the records in full.

Thank you for your consideration of this appeal.

Sincerely,

/s/ James K. Rogers

James K. Rogers

America First Legal Foundation

¹¹ *Id.*

Exhibit 1



April 4, 2022

VIA ONLINE PORTAL

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009

Freedom of Information Act Request: Immigration Enforcement

Dear Sir or Madam:

America First Legal Foundation (“AFL”) is a national, nonprofit organization. AFL works to promote the rule of law in the United States, prevent executive overreach, ensure due process and equal protection for all Americans, and promote knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. Our mission includes promoting government transparency and accountability by gathering official information, analyzing it, and disseminating it through reports, press releases, and media, including social media platforms, to educate the public and to keep government officials accountable for their duty to faithfully execute, protect, and defend the Constitution and laws of the United States.

I. Custodians

- A. Michael P. Davis
- B. Kerry E. Doyle
- C. Jason Houser
- D. Tae D. Johnson
- E. Christopher S. Kelly
- F. Patrick J. Lechleitner
- G. Corey A. Price
- H. John D. Tresvina
- I. Claire Trickler-McNulty

II. Records Request

The timeframe for each request is July 1, 2021, to the date this records request is processed.

- A) All calendar items that contain the terms “DPC” or “Domestic Policy Council” and “Immigration”.
- B) All records containing the phrases “immigration court backlog”, “EOIR court backlog”, or “low priority”.
- C) All records of e-mail communications with any email domain ending in “usdoj.gov” mentioning or relating to either proposed changes in EOIR processes or identification/prioritization of cases.
- D) All records mentioning or relating to “immigration court backlog” or “low priority” cases.
- E) All records related to any proposal to allow EOIR judges to administratively close, dismiss, terminate, or otherwise dispose of cases pending before them other than through adjudication on the merits.
- F) All records related to any proposal to amend or change the process by which EOIR judges are assigned cases, to include any plan or proposal to establish new dockets or allow judges to select the individual cases over which they want to preside.

III. Redactions

Redactions are disfavored as the FOIA’s exemptions are exclusive and must be narrowly construed. *Am. Immigration Lawyers Ass’n v. Exec. Office for Immigration Review (AILA)*, 830 F.3d 667, 676-79 (D.C. Cir. 2016). If a record contains information responsive to a FOIA request, agencies must disclose the entire record; a single record cannot be split into responsive and non-responsive bits. *Id.*; *see also Parker v. United States DOJ*, 278 F. Supp. 3d 446, 451 (D.D.C. 2017). Consequently, agencies should produce email attachments.

In connection with this request, and to comply with your legal obligations:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please construe the term “record” in the broadest possible sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek all records, including electronic records, audiotapes, videotapes, and photographs, as well as texts, letters, emails, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions.

- Our request includes any attachments to those records or other materials enclosed with a record when transmitted. If an email is responsive to our request, then our request includes all prior messages sent or received in that email chain, as well as any attachments.
- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA. It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; AFL has a right to records contained in those files even if material has not yet been moved to official systems or if officials have, by intent or through negligence, failed to meet their obligations.
- Please use all tools available to your agency to conduct a complete and efficient search for potentially responsive records. Agencies are subject to governmentwide requirements to manage agency information electronically, and many agencies have adopted the National Archives and Records Administration (“NARA”) Capstone program, or similar policies. These systems provide options for searching emails and other electronic records in a manner that is reasonably likely to be more complete than just searching individual custodian files. For example, a custodian may have deleted a responsive email from his or her email program, but your agency’s archiving tools may capture that email under Capstone. At the same time, custodian searches are still necessary; you may not have direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts.
- If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release.
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

IV. Fee Waiver Request

Per 5 U.S.C. § 552(a)(4)(A)(iii), AFL requests a waiver of all search and duplication fees associated with this request.

First, AFL is a qualified non-commercial public education and news media requester. AFL is a new organization, but it has already demonstrated its commitment to the public disclosure of documents and creation of editorial content through regular substantive analyses posted to its website. For example, its officials routinely appear on national television and use social media platforms to disseminate the information it has obtained about federal government activities. In this case, AFL will make your records and your responses publicly available for the benefit of citizens, scholars, and others. The public's understanding of your policies and practices will be enhanced through AFL's analysis and publication of the requested records. As a nonprofit organization, AFL does not have a commercial purpose and the release of the information requested is not in AFL's financial interest. This has previously been recognized by the Departments of Defense, Education, Energy, Interior, and Homeland Security, and the Office of the Director of National Intelligence.

Second, waiver is proper as disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

V. Request for Expedited Processing

AFL requests expedited processing of this request. In support thereof, AFL certifies its compelling need for expedited processing under 5 U.S.C. § 552(a)(6)(E) and 6 C.F.R. § 5.5(e), which provides in relevant part:

(e) *Expedited processing.* (1) Requests and appeals will be processed on an expedited basis whenever the component determines that they involve: ... (ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person who is primarily engaged in disseminating information; ... or (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

As the Department of Homeland Security, and other federal agencies, have acknowledged in granting AFL expedited processing, AFL is primarily engaged in disseminating information. Additionally, there is an urgency to inform the public regarding the circumstances surrounding the government's planned systematic closure of cases as a means of circumventing the Immigration and Nationality Act and the rule of law. This is a matter of pressing national importance as once it is done, it cannot be undone.

Our request also meets the Department's regulatory test for expedited processing based on a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence. As already discussed, both requirements are met here, because there has been extensive public interest in the border, and because the government's ability to maintain a sovereign border as required by law clearly impacts the confidence of the public in the government's integrity. The government's deliberate choices to throw the border open and its refusal to enforce the law as written drastically undermine the confidence of the public in the integrity of the government. This request seeks to expose these circumstances to public inspection, before irreparable harm is done to the nation's interests, in violation of the law.

AFL is an organization engaged in gathering, analyzing, and disseminating information, and there is great urgency to inform the public concerning events of intense public interest. Moreover, the allegations at hand go directly to public confidence in the government's ability to remain a sovereign. For these reasons, our expedited processing request should be granted.

VI. Production

To accelerate release of responsive records, AFL welcomes production on an agreed rolling basis. If possible, please provide responsive records in an electronic format by email. Alternatively, records in native format or in PDF format on a USB drive. Please send any responsive records being transmitted by mail to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

VII. Conclusion

If you have any questions about how to construe this request for records or believe further discussions regarding search and processing would facilitate a more efficient production of records of interest to AFL, please do not hesitate to contact me at FOIA@aflegal.org. Finally, if AFL's request for a fee waiver is not granted in full, please contact us immediately upon making that determination.

Sincerely,

/s/ Reed D. Rubinstein
Reed D. Rubinstein
America First Legal Foundation

Exhibit 2

U.S. Department of Homeland Security
500 12th St., SW
Washington, D.C. 20536



U.S. Immigration
and Customs
Enforcement

January 24, 2023

Reed Rubinstein
America First Legal Foundation
611 Pennsylvania Ave SE, #231
Washington, DC 20003

RE: ICE FOIA Case Number 2022-ICFO-10071

Dear Mr. Rubinstein:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated April 04, 2022. You have requested records related to plans to reduce the immigration court backlog by administratively closing low priority cases.

ICE has considered your request under both the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Information about an individual that is maintained in a Privacy Act system of records may be accessed by that individual¹ unless the agency has exempted the system of records from the access provisions of the Privacy Act.²

ICE has conducted a search of the ICE Enforcement and Removal Operations (ERO) for records responsive to your request and no records responsive to your request were found.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist

While an adequate search was conducted, you have the right to appeal this determination that no records exist within ERO that would be responsive to your request. Should you wish to do so, you must send your appeal and a copy of the original response letter, within 90 days of the date of the letter following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. You may submit your appeal electronically at GILDFOIAAppeals@ice.dhs.gov or via regular mail to:

¹ 5 U.S.C. § 552a(d)(1).

² 5 U.S.C. §§ 552a(d)(5), (j), and (k).

U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
U.S. Department of Homeland Security
500 12th Street, S.W., Mail Stop 5900
Washington, D.C. 20536-5900

Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Provisions of FOIA allow DHS to charge for processing fees, up to \$25, unless you seek a waiver of fees. In this instance, because the cost is below the \$25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office and refer to FOIA case number **2022-ICFO-10071**. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Fernando Pineiro Jr., in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Small", with a stylized flourish at the end.

K. Small
Supervisory Paralegal Specialist