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13 AMERICAN CIVIL LIBERTIES UNION
14 IMMIGRANTS' RIGHTS PROJECT and CENTER
15 FOR GENDER & REFUGEE STUDIES AT THE
16 UNIVERSITY OF CALIFORNIA HASTINGS
17 COLLEGE OF THE LAW

18 UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO DIVISION

21 AMERICAN CIVIL LIBERTIES UNION
22 IMMIGRANTS' RIGHTS PROJECT &
23 CENTER FOR GENDER & REFUGEE
24 STUDIES AT THE UNIVERSITY OF
25 CALIFORNIA HASTINGS COLLEGE
26 OF THE LAW,

27 Plaintiffs,

28 v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, an agency of the
Department of Homeland Security,

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Freedom of Information Act, 5 U.S.C. § 552

I. INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552,
to shed light on the federal government's treatment of asylum seekers at our borders. Plaintiffs

1 seek to enforce the public's right to information regarding the federal government's detention of
2 thousands of asylum seekers who recently arrived in the United States, despite an existing agency
3 directive providing for their release in most cases.

4 2. In October 2015, Plaintiffs Immigrants' Rights Project of the American Civil
5 Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University
6 of California Hastings College of the Law (hereinafter, "Plaintiffs") requested information from
7 U.S. Immigration and Customs Enforcement ("ICE") regarding the detention of asylum seekers
8 who arrive in the United States via a port of entry or interdiction at sea—or "arriving aliens," *see*
9 8 C.F.R. §1.2—and are found to have a credible fear of persecution.

10 3. Under a 2009 ICE Directive, arriving asylum seekers who establish a credible fear
11 should *not* be detained if they meet specified criteria. Plaintiffs filed the instant FOIA requests to
12 enable the public to evaluate whether ICE detention practices contravene the public interest,
13 ICE's own Directive, and the constitutional rights of asylum seekers. Plaintiffs sought expedited
14 processing of their requests due to the severe deprivations of liberty suffered by individuals in
15 ICE detention, the heightened debate around the treatment of asylum seekers arriving at our
16 borders, and the immediate need to educate the public about ICE's apparent violation of its own
17 Directive. Plaintiffs specifically asked for records that ICE is required to maintain pursuant to the
18 Directive as well as related policy documents and agency communications that are indisputably in
19 ICE's possession. Yet more than *one year* since the requests were filed, ICE has provided only a
20 fraction of these records. Having exhausted administrative remedies, Plaintiffs now bring this
21 action to compel disclosure of information to which the public is entitled.

22 **II. PARTIES**

23 4. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with the
24 mission of protecting civil liberties from government incursions, safeguarding basic constitutional
25 rights, and advocating for open government. It is the largest civil liberties organization in the
26 country, with offices in the fifty states and over 500,000 members. In support of its mission, the
27 ACLU uses its communications department to disseminate to the public information relating to its
28 mission free of charge, through its website, newsletters, and other publications. The Immigrants'

1 Rights Project (“IRP”) of the ACLU is specifically dedicated to expanding and enforcing the civil
2 liberties and civil rights of immigrants—including asylum seekers—and to combating public and
3 private discrimination against them. The ACLU-IRP has offices in both San Francisco, California
4 and New York, New York.

5 5. Plaintiff CGRS, based at the University of California Hastings College of the Law,
6 is an educational and advocacy organization that works to protect the fundamental human rights
7 of refugees, with a focus on women and children. CGRS engages in litigation, scholarship,
8 research, and development of policy recommendations, in addition to providing in-depth training
9 and technical assistance. Its attorneys are authors of scholarly works, experts who advise in
10 asylum cases, and seasoned practitioners who represent asylum seekers throughout the United
11 States. CGRS is a nationally-recognized leader in the dissemination of legal theories, practice
12 advisories, and human rights reporting. The CGRS website offers a trove of resources for
13 researchers and organizations interested in issues surrounding refugees and asylum.
14 Acknowledging its value to the public, the Library of Congress recently selected CGRS’s website
15 for its Library Archive Project, describing the website as an important part of the historical
16 record. CGRS is based in the state of California and has its sole office in San Francisco,
17 California.

18 6. Defendant ICE is a component of the U.S. Department of Homeland Security. ICE
19 is an agency within the meaning of 5 U.S.C. § 552(f). ICE has its headquarters in Washington,
20 D.C., and field offices all over the country, including San Francisco.

21 **III. JURISDICTION**

22 7. This Court has federal subject matter jurisdiction over this action and personal
23 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). Because this action arises under
24 FOIA against an agency of the United States, this Court also has jurisdiction pursuant to 28
25 U.S.C. §§ 1331 and 1346.

26 **IV. VENUE**

27 8. Venue lies in this district pursuant to 28 U.S.C. § 1402 and 5 U.S.C. §
28 552(a)(4)(B). Plaintiffs reside or have their principal places of business in this district.

1 **V. INTRADISTRICT ASSIGNMENT**

2 9. Assignment of this action to the San Francisco Division of this Court is warranted
3 pursuant to Civil L.R. 3-2. Plaintiff CGRS is based in San Francisco, California and Plaintiff
4 ACLU-IRP is based, in part, in San Francisco, California. The field office of ICE that is
5 responsible for immigrant detention and removal activities in Northern California is located in
6 San Francisco, California.

7 **VI. BACKGROUND**

8 **A. The Federal Government's Treatment of Asylum Seekers is a Matter of**
9 **Significant Public Interest**

10 **i. The 2009 Parole Directive**

11 10. Many detained asylum seekers are “arriving aliens,” or noncitizens who are
12 arrested upon arrival at a port of entry or who are interdicted at sea. *See* 8 C.F.R. §1.2. Under the
13 Immigration and Nationality Act, arriving noncitizens who lack facially valid documents or are
14 inadmissible due to fraud are immediately returned to their countries of origin through the
15 “expedited removal” process, “unless the alien indicates . . . a fear of persecution.” 8 U.S.C.
16 1225(b)(1)(A)(i). Such persons are referred for an interview with an asylum officer to determine
17 if they have a “credible fear”—that is, a “significant possibility” that they are eligible for asylum,
18 withholding of removal, or relief under the Convention Against Torture. 8 U.S.C. §
19 1225(b)(1)(A)(ii); (B)(iii), (B)(v); 8 C.F.R. § 208.30(e). Noncitizens who establish a credible fear
20 are then referred for a full removal hearing before an Immigration Judge inside the United States
21 to adjudicate their claims for protection. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 1235.6(a)(1).

22 11. By regulation, “arriving aliens” in removal proceedings are not eligible for a bond
23 hearing before an Immigration Judge, 8 C.F.R. § 1003.19(h)(2)(i), and are instead limited to
24 seeking discretionary release from ICE on parole. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 235.3(c).
25 Thus, unless ICE grants parole, arriving asylum seekers who establish a credible fear must litigate
26 their immigration cases from detention, in many cases for months or even years.

27 12. Immigration detention is civil, and not criminal in nature, and thus may not have a
28 punitive purpose. Rather, the purpose of immigration detention is to ensure the individual's

1 appearance for removal proceedings and also to prevent risk to public safety. *See Zadvydas v.*
 2 *Davis*, 533 U.S. 678, 690 (2001).

3 13. For years, ICE routinely detained arriving asylum seekers despite their having
 4 established a credible claim to asylum and posing no danger or flight risk warranting their
 5 imprisonment. ICE held many of these individuals—who have often suffered severe persecution
 6 and trauma—in harsh, prison-like conditions. Human rights reports have widely documented the
 7 serious harms resulting from such detention, including interference with the ability to obtain
 8 counsel and litigate asylum claims effectively; lack of access to medical treatment; and severe
 9 harm to asylum seekers’ mental health.

10 14. ICE faced widespread public criticism for its detention policies. In particular, a
 11 2005 governmental study by the U.S. Commission on International Religious Freedom
 12 (“USCIRF”)—an independent, federal, bipartisan commission—determined that prison-like
 13 confinement of asylum seekers was both inappropriate and unnecessary. Moreover, USCIRF
 14 found that ICE was not making fair, consistent, or accurate parole decisions for asylum seekers.
 15 USCIRF recommended significant reforms to ICE’s detention practices, including the
 16 codification of ICE’s parole standards into regulations and creation of standardized forms and
 17 national review procedures to ensure fair decision-making.¹

18 15. ICE did not meaningfully act on USCIRF’s recommendations until December
 19 2009, when it issued ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible
 20 Fear of Persecution or Torture (“the Parole Directive”).² The Parole Directive instructs that
 21 “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or
 22 her identity and that he or she presents neither a flight risk nor danger to the community, [ICE]
 23 should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her
 24 continued detention is not in the public interest.” *Id.* ¶¶ 6.2, 8.3. The Directive also established

25
 26 ¹ *See USCIRF, Report on Asylum Seekers in Expedited Removal, Vol. I: Findings &*
Recommendations 60-62, 67-68 (Feb. 2005),

27 http://www.uscirtf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

28 ² [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf)
[parole_of_arriving_alien_found_credible_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf).

1 procedures for documenting, reviewing, and reporting on parole decisions. *Id.* ¶¶ 8.4-8.12.

2 16. The Directive reflects the agency's recognition that there is no public interest in
3 detaining *bona fide* asylum seekers who have credible claims to asylum and present no danger to
4 the community or flight risk that warrants their imprisonment.

5 17. After the Directive went into effect in January 2010, large numbers of arriving
6 asylum seekers were paroled from detention. Indeed, ICE touted the Directive as one of its major
7 "Detention Reform Accomplishments."³

8 **ii. ICE's Abandonment of the Parole Directive**

9 18. However, since 2014, ICE has abruptly changed course and returned to its practice
10 of routinely denying parole to asylum seekers, even when they meet the Parole Directive's
11 criteria.

12 19. For example, in fiscal year ("FY") 2012, ICE reported that 80% of arriving asylum
13 seekers who established a credible fear were granted parole.⁴ However, the limited data that ICE
14 released to Plaintiffs reflects that, in the first nine months of 2015, only 47% of arriving asylum
15 seekers found to have a credible fear were granted parole—despite no change in the Directive's
16 criteria for release. In some jurisdictions, over 80% of individuals seeking parole were denied
17 release.

18 20. At present, ICE imprisons asylum seekers at a much higher rate than in past years.
19 In FY 2014, ICE reported detaining 44,270 asylum seekers, a nearly three-fold increase from
20 2010.

21 21. Although ICE has never acknowledged, much less justified, its change in detention
22 policy, there is strong evidence that ICE has abandoned the Parole Directive based on improper
23 considerations.

24
25 ³ See ICE, *Detention Reform*, Jan. 2010, <https://www.ice.gov/detention-reform#tab1>.

26 ⁴ USCIRF, *Special Report: Assessing the U.S. Government's Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* 9-10 (Apr. 2013)
27 [http://www.uscirf.gov/sites/default/files/resources/](http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf)
28 [ERS-detention%20reforms%20report%20April%202013.pdf](http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf).

1 22. In particular, ICE has routinely denied parole to arriving asylum seekers based on
2 a November 2014 memorandum from the Secretary of Homeland Security identifying individuals
3 “apprehended at the border or ports of entry while attempting to unlawfully enter the United
4 States” as a top priority for detention and removal. *See* Memorandum re Policies for the
5 Apprehension, Detention and Removal of Undocumented Immigrants (hereinafter “Priorities
6 Memo.”) from Jeh Johnson, Secretary of Homeland Security at 3 (Nov.20, 2014).⁵ This is so
7 even though seeking asylum is not an unlawful act under domestic and international law, and
8 individuals who present themselves at ports of entry to seek asylum are not in fact attempting to
9 unlawfully enter.

10 23. ICE’s statistical reports for FY 2015 show that the enforcement priorities served as
11 a basis for denying at least hundreds of parole requests by “arriving alien” asylum seekers who
12 had established a credible fear of persecution.

13 24. ICE’s categorical detention of asylum seekers based on the 2014 enforcement
14 priorities suggests that, in many cases, the agency is not making parole decisions based on an
15 individualized determination of flight risk danger, in violation of asylum seekers’ due process
16 rights. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marczak v. Greene*, 971 F.2d 510, 515 (10th
17 Cir. 1992); *Diaz v. Schiltgen*, 946 F. Supp. 762, 764-65 (N.D. Cal. 1996).

18 25. For example, “Maria” fled Mexico with her husband and two adult children after
19 receiving death threats—accompanied by assaults against her son and daughter—from a
20 transnational criminal organization. In December 2015, the family presented at a port of entry at
21 the southern border and requested protection. Maria was separated from her family and sent to a
22 detention facility in Arizona. Maria was denied parole despite establishing a credible fear and
23 submitting a sponsor letter from her U.S. citizen daughter-in-law; evidence that a pro bono
24 attorney in Virginia had committed to take her case; evidence of her husband’s dialysis treatment
25 and her role as his primary caregiver; and evidence of her own medical heart condition and
26

27 ⁵ [https://www.dhs.gov/sites/default/files/publications/](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf)
28 [14_1120_memo_prosecutorial_discretion.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

1 hypertension. Maria also established her identity and that she had no criminal history.
 2 Nonetheless, ICE denied Maria's parole request on the grounds that she was an "enforcement
 3 priority." Maria submitted a second parole request that was summarily denied. Maria was
 4 detained nearly seven months, at which point she ultimately won release at bond hearing held
 5 pursuant to *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015).⁶

6 26. ICE's shift in detention policy also raises serious fiscal concerns. Detaining
 7 asylum seekers is far more expensive than supervising them through alternatives to detention—
 8 such as supervised release programs—which have been proven highly effective in ensuring
 9 appearance for court proceedings. The average cost of detention per day in FY 2013 for U.S.
 10 taxpayers, not including expenditures toward agency-wide overhead, was \$158 per person. By
 11 contrast, the average daily cost of supervision through ICE's alternatives to detention program
 12 was \$10.55.

13 27. The public continues to manifest heightened concern over the treatment of asylum
 14 seekers at our borders, including over detention practices.

15 28. For these reasons, immediate disclosure of the records requested is critical to
 16 ensure a full public accounting of the government's shift in detention policy.

17 **VII. FACTS AND PROCEDURAL HISTORY**

18 29. On October 5, 2015, Plaintiffs sent ICE two FOIA requests seeking the disclosure
 19 of records pertaining to enforcement of the Parole Directive. *See* Exhibit A.

20 30. The first request sought policy documents and agency communications related to
 21 the impact of the November 2014 Priorities Memo. on parole decisions (hereinafter "Policy
 22 Request"):

- 23 a. Any internal memoranda, guidelines, worksheets, training materials, reports, or
 24 other agency communications on how the following civil enforcement
 25 priorities are applied in parole decisions for noncitizens found to have a

26 _____
 27 ⁶ Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 21
 28 (July 2016), <http://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>.

1 credible fear of persecution or torture:

- 2 i. Priority 1: “aliens apprehended at the border or ports of entry while
- 3 attempting to unlawfully enter the United States;”
- 4 ii. Priority 2: “aliens apprehended anywhere in the United States after
- 5 unlawfully entering or re-entering the United States and who cannot
- 6 establish to the satisfaction of an immigration officer that they have been
- 7 physically present in the United States continuously since January 1,
- 8 2014.” Priorities Memo. at 3-4.

9 b. Any internal memoranda, guidelines, worksheets, training materials, reports, or

10 other agency communications on how the following directive in the Priorities

11 Memo. is applied in parole decisions for noncitizens found to have a credible

12 fear of persecution or torture: “[a]bsent extraordinary circumstances or the

13 requirement of mandatory detention, field office directors should not expend

14 detention resources on aliens ... whose detention is ... not in the public

15 interest.” *See id.* at 5.

16 c. Any internal memoranda, guidelines, worksheets, training materials, reports, or

17 other agency communications regarding the effect of the Priorities Memo. on

18 parole decisions made pursuant to the Parole Directive.

19 *See* Exhibit A, at 4.

20 31. The second request sought statistical reports, for the period between January 2010

21 to the present date, that the Parole Directive requires ICE to maintain (hereinafter “Data

22 Request”):

- 23 a. Monthly reports by the ICE Field Office Directors detailing the number of
- 24 parole adjudications; the result of those adjudications; and the basis for
- 25 granting or denying parole. *See* Parole Directive ¶ 8.11.
- 26 b. All analyses of these monthly reports and of random samplings of individual
- 27 case information by the Assistant Director for Operations or his or her
- 28 designee. *See id.* ¶ 8.11.

c. All quality assurance reports by the Assistant Director for Operations or his or her designee. *See id.* ¶ 8.12.

32. Plaintiffs also sought a full fee waiver and expedited processing of both requests on the grounds that there was a “compelling need” for such treatment: namely, an “urgency to inform the public concerning . . . actual or alleged Federal Government activity.” *See* Exhibit A, at 7; *see also* 5 U.S.C. § 552(a)(4)(A)(iii) & (a)(6)(E)(i)(I).

33. On October 13, 2015, ICE denied Plaintiffs’ requests for a fee waiver and expedited processing for both requests. Plaintiffs timely appealed. *See* Exhibits B & C.

34. On November 5, 2015, ICE granted Plaintiffs’ appeal of its fee waiver denial for both requests, but reaffirmed its denial of expedited processing for both requests. *See* Exhibit D.

35. For requests that do not receive expedited processing, the FOIA requires that the agency make a “determination” on any FOIA request within 20 working days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). ICE invoked a 10 working day extension of this time period to conduct its search for responsive records. *See* 5 U.S.C. § 552(a)(6)(B).

A. ICE’s Inadequate and Untimely Response to Plaintiffs’ Policy Request (2016-ICFO-01568)

36. ICE did not provide a “final” response to Plaintiffs’ Policy Request until December 17, 2015—more than two months after the request was filed. *See* Exhibit E.

37. ICE failed to respond adequately to Plaintiffs’ Policy Request. ICE produced only three policy-related documents in response to the Policy Request: (1) a copy of the Parole Directive, which is already publicly available on ICE’s website; (2) a lesson plan on noncitizens in the custody of state and local law enforcement; and (3) a lesson plan on prosecutorial discretion.

38. In addition to these three policy documents, ICE produced nine Excel workbooks containing parole decision data from January to September 2015. These spreadsheets make clear that the 2014 enforcement priorities served as a basis for at least hundreds of parole denials. These denials raise a substantial—if not more serious—doubt that there are at least *some* “internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications”

1 on how the November 2014 enforcement priorities are applied in parole decisions. Yet ICE failed
2 to produce any such records.

3 39. ICE also withheld portions of the records produced pursuant to several FOIA
4 exemptions: 5 U.S.C. §§ 552(b)(2) (internal agency rules), (6) (personal privacy), (7)(C)
5 (personal privacy for law enforcement records), and (7)(E) (law enforcement techniques and
6 procedures). However, ICE provided no explanation of how its claimed exemptions meet the
7 applicable legal standards, but merely recited those standards in boilerplate form. *See* Exhibit E.

8 40. On February 11, 2016, Plaintiffs timely appealed ICE's inadequate search for
9 records and improper invocation of the FOIA exemptions. *See* Exhibit F.⁷ Under the FOIA, an
10 agency must make a "determination" on any appeal within 20 working days of receipt. 5 U.S.C. §
11 552(a)(6)(A)(ii).

12 41. ICE did not make a determination on Plaintiffs' appeal until more than six weeks
13 later, on March 31, 2016. ICE granted Plaintiffs appeal, finding that "information previously
14 withheld may be releasable" and remanding the requests to the ICE FOIA office for a new search
15 for records and re-processing for release of any non-exempt information. *See* Exhibit H at 2.
16 ICE's March 31, 2016 letter did not provide any justification for any of the asserted FOIA
17 exemptions.

18 42. To date ICE has failed to provide a new response to Plaintiffs' request for policy
19 documents—notwithstanding the fact that it granted Plaintiffs' appeal nearly seven months ago,
20 and more than one year has passed since Plaintiffs' filed their original request. *See* Exhibit I, at 2.
21 Nor has it explained the withholdings under the FOIA exemptions in its December 2015 response.

22 43. ICE's 20 business days to make a "determination" on Plaintiffs' Policy Request
23 following remand elapsed on April 27, 2016. *See* 5 U.S.C. §552(a)(6)(A)(ii); *Coleman v. Drug*
24

25 ⁷ Because ICE's December 2015 response included statistical reports, Plaintiffs—in an abundance
26 of caution—appealed the response as an inadequate as to both their Policy Request and their Data
27 Request. *See* Exhibit F. ICE later clarified in September 2016 that its December 2015 response
28 related *only* to the Policy Request, and that ICE did not provide a final response to Plaintiffs' data
request until June 2016. *See* Exhibit G, at 2; *see also id.* at 1 n.1 (acknowledging that the
December 2015 response "seem[ed] to contain records responsive to [the data] request").

1 *Enft Admin.*, 714 F.3d 816, 823-24 (4th Cir. 2013). Accordingly, Plaintiffs have exhausted their
2 administrative remedies with respect to their Policy Request.

3 **B. ICE's Inadequate and Untimely Response to Plaintiffs' Data Request (2016-**
4 **ICFO-01574)**

5 44. ICE failed to provide a final response to Plaintiffs' Data Request until June 23,
6 2016—over eight months after Plaintiffs filed the original FOIA request. *See* Exhibit J.

7 45. ICE's search for statistical records and resulting production was clearly
8 inadequate. The Parole Directive specifically requires the creation of (1) monthly reports by the
9 ICE Field Office Directors on parole decisions; (2) related analyses by the Assistant Director for
10 Operations, and (3) quality assurance reports by the Assistant Director for Operations. *See* Parole
11 Directive ¶¶ 8.11, 8.12. Plaintiffs sought all three categories of documents created from January
12 2010 to the present. Although ICE did produce monthly field office reports for January to
13 September 2015, it produced no such reports created prior to January 2015. Nor did it produce
14 any analyses or quality assurance reports.

15 46. Additionally, the monthly reports that ICE provided did not include any index,
16 lookup table, key or glossary of terms, or unique identifiers for individual cases, thereby
17 preventing Plaintiffs from conducting meaningful data analysis.

18 47. The June 2016 response, which consisted of nine Excel workbooks and a nine-
19 page PDF, provided no new information regarding the Parole Directive outside of what had
20 already been produced by ICE in December 2015 in response to Plaintiffs' Policy Request.

21 48. Plaintiffs' appeal of the earlier response included detailed explanation for why the
22 December 2015 spreadsheets would not be adequately responsive to their Data request. *See*
23 Exhibit F; note 8, *supra*. Nevertheless, the nine "new" Excel workbooks were substantially
24 identical to the nine original spreadsheets ICE sent in December 2015, appearing to contain no
25 new entries or data. Moreover, ICE withheld portions of the "new" statistical records pursuant to
26 FOIA exemptions (b)(6) and (b)(7)(C) with only boilerplate explanation for its withholdings.

3 50. On September 21, 2016, ICE granted Plaintiffs' appeal with respect to the
4 inadequacy of its search for statistical reports, remanding the request once again for re-processing
5 by the FOIA Office. *See* Exhibit G. However, ICE denied Plaintiffs' appeal of its withholdings of
6 names and alien numbers under exemptions (b)(6) and (b)(7)(C).

7 51. ICE’s 20 business days to make a “determination” on Plaintiffs’ statistical request
8 following agency remand elapsed on October 19, 2016. *See* 5 U.S.C. §552(a)(6)(A)(i); *Coleman*,
9 714 F.3d at 823-24. Therefore, Plaintiffs have exhausted their administrative remedies for their
10 Data Request.

12 **Violation of the Freedom of Information Act, 5 U.S.C. § 552**

13 52. Plaintiffs re-allege and incorporate, as fully set forth herein, each and every
14 allegation contained in the above paragraphs.

53. ICE has failed to conduct an adequate search, has wrongfully withheld agency records requested by Plaintiffs under the FOIA, and has failed to comply with the statutory time for the processing of FOIA requests.

18 54. ICE has wrongfully denied Plaintiffs' request for expedited processing.

19 55. Plaintiffs have exhausted the applicable administrative remedies with respect to
20 wrongful withholding of the requested records.

21 56. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure
22 of the requested documents because ICE continues to improperly withhold agency records in
23 violation of FOIA. The Plaintiffs will suffer irreparable injury from, and have no adequate legal
24 remedy for, ICE's illegal withholding of government documents pertaining to the subject of

25 ⁸ Because the records ICE produced in June 2016 were responsive to both Plaintiffs' Data and
26 Policy Requests, Plaintiffs again appealed the response as inadequate as to both requests. *See*
27 Exhibit K. ICE later clarified that the March 2016 remand of the Policy Request was still pending
at the FOIA Office. *See* Exhibit I. at 2.

Plaintiffs' FOIA requests.

57. Plaintiffs are entitled to declaratory relief because an actual controversy exists regarding ICE's failure to meet its obligations under FOIA.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against ICE as follows:

a. For declaratory relief declaring that ICE's failure to disclose the records requested by Plaintiffs violates FOIA, 5 U.S.C. § 552;

b. For injunctive relief ordering ICE to expeditiously conduct an adequate search for all records responsive to Plaintiffs' FOIA requests; and to expeditiously and appropriately disclose, as soon as practicable, all responsive, non-exempt records;

c. For Plaintiffs' reasonable attorney fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

d. For such other relief as the Court may deem just and proper.

Dated: October 20, 2016

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12 AMERICAN CIVIL LIBERTIES UNION
13 IMMIGRANTS' RIGHTS PROJECT and
14 CENTER FOR GENDER & REFUGEE
15 STUDIES AT THE UNIVERSITY OF
16 CALIFORNIA HASTINGS COLLEGE
17 OF THE LAW

16 4813-4372-5627, v. 1

EXHIBIT A

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



October 5, 2015

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

**RE: FOIA Request for Records Related to Parole Decisions For
Arriving Aliens Found to Have a Credible Fear of Persecution**

Dear Freedom of Information Officer:

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
IMMIGRANTS'
RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 13TH FL
NEW YORK, NY 10006-7200
77212 549 2640
67322 549 2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN H. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

This letter is a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law. The ACLU and CGRS seek records from U.S. Immigration and Customs Enforcement ("ICE") pertaining to parole decisions for arriving aliens found to have a credible fear of persecution. Specifically, we seek the periodic reports and analyses of such parole decisions created pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009). The ACLU and CGRS also seek the expedited processing of this request and a fee waiver. *See* 5 U.S.C. §§ 552(a)(6)(E), 552(a)(4)(A)(iii).

There is a compelling and urgent need to inform the public about these issues. ICE Directive 11002.1 provides that "when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should"—absent "exceptional, overriding factors"—"parole the alien on the basis that his or her continued detention is not in the public interest." ICE Directive 11002.1, ¶¶ 6.2, 8.3. The Directive reflects the agency's recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. It was issued, in part, in response to widespread criticism that ICE was subjecting many asylum seekers to unnecessary detention under its overly restrictive parole policies.¹ The Directive thus represents a critical reform to the government's detention practices. Indeed, after ICE Directive 11002.1 went into effect in January

¹ *See, e.g., Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison 6* (2009), available at <https://www.humanrightsfirst.org/wp-content/uploads/pd7090429-RP-hrf-asylum-detention-report.pdf>.

2010, large numbers of noncitizens who satisfied the Directive were paroled from detention.²

However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive's criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for immigration law enforcement.³ ICE's apparent denial of parole based on arriving aliens' recency of entry or other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.⁴ Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.⁵

Media attention to the detention of recently-arrived asylum seekers—many of whom are arriving aliens found to have a credible fear of persecution or torture—demonstrates the public's heightened concern with decisions to detain or release individuals seeking refugee protection.⁶ Moreover, high

² See U.S. Comm'n on Religious Freedom, *Assessing the U.S. Government's Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* 9-10 (Apr. 2013) available at <http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf>, (noting that, in FY2012, ICE granted parole to 80 percent of asylum seekers found to have a credible fear).

³ See Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").

⁴ See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *Nadarajah v. Holder*, *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006).

⁵ See *RILR v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015); see also *Diaz v. Schlitten*, 946 F. Supp. 762, 765-66 (N.D. Cal. 1996) (holding that deterrence is not an individualized reason to deny parole).

⁶ See e.g., Perla Triviso, *Report calls for immediate release of immigrant women, children*, ARIZONA DAILY STAR (Sept. 17, 2015), available at http://tucson.com/news/local/border/report-calls-for-immediate-release-of-immigrant-women-children/article_9d9a7505-504d-5b60-b7a9-e50e8524cad8.html; Aaron Morrison, *Immigration Reform 2015: Immigrant Detention Centers Violate Civil Rights Of Detainees, US Commission Says*, INTERNATIONAL BUSINESS TIMES (Sept. 18, 2015), available at <http://www.ibtimes.com/immigration-reform-2015-immigrant-detention-centers-violate-civil-rights-detailees-us-2103651>; Elise Foley, *Backlash Against Mass Family Immigrant Detention Grows As Senate Democrats Pile On*, HUFFINGTON POST (June 2, 2015), http://www.huffingtonpost.com/2015/06/02/family-immigrant-detention_n_7495282.html.

profile public figures including Pope Francis⁷ and hundreds of members of Congress⁸ have recently weighed in on the proper treatment of asylum seekers arriving at our borders.

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty; the interference that such detention has on the ability of individuals to litigate their asylum claims effectively;⁹ and the severe harm that such detention causes asylum seekers' mental health.¹⁰ For these reasons, the government's parole practices warrant prompt and immediate review.

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UNION FOUNDATION

RECORDS REQUESTED¹¹

We seek the following records¹² prepared, received, transmitted, collected and/or maintained by ICE:

⁷ Dara Lind, *Pope Francis's powerful condemnation of how America treats immigrants*, VOX, (Sept. 24, 2015), available at <http://www.vox.com/2015/9/24/9392213/pope-francis-immigration-congress>; Pope Francis, *Immigration and the Golden Rule* (editorial), CHICAGO TRIBUNE (Sept. 24, 2015), available at <http://www.chicagotribune.com/news/opinion/editorials/ct-pope-immigration-congress-edit-0925-20150924-story.html>.

⁸ See Letter to Secretary Johnson from Members of the Senate (June 1, 2015), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/Senate_FamilyDetentionLtr_DH_S_2015_06_01.pdf; Letter to Secretary Johnson from Members of the House of Representatives (May 27, 2015), available at https://hofgren.house.gov/uploadedfiles/family_detention.pdf.

⁹ See, e.g., N.Y. Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011) (reporting that between 2005 and 2010 in New York City immigration courts, non-detained immigrants with lawyers had successful outcomes 74 percent of the time, while detained immigrants without counsel prevailed only 3 percent of the time).

¹⁰ See, e.g., Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2003); Allen Keller et al., *Mental Health of Detained Asylum Seekers*, 362 LANCET 1721 (2003); Ctr. for Victims of Torture et al., *Tortured & Detained: Survivor Stories of U.S. Immigration Detention* (2013).

¹¹ The ACLU and CGRS are filing this request simultaneously with a separate request for the periodic reports and analyses of such parole decisions created pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009). We have filed the two requests separately because the latter request does not require a complex search by the agency and should be resolved promptly.

¹² The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies.

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(1) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture:

- Priority 1: "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States"
- Priority 2: "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014"

Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").

(2) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following directive in the Priorities Memo is applied in parole decisions for noncitizens found to have a credible fear of persecution or torture: "absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens . . . whose detention is . . . not in the public interest." *Id.* at 5.

(3) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications regarding the effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).

THE REQUESTERS

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the fifty states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

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The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues, addresses civil liberties issues that are currently in the news, and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through FOIA.¹³ The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; and releases information via social media platforms such as Facebook and Twitter.

The Center for Gender & Refugee Studies ("CGRS") based at the University of California Hastings College of the Law works to protect the fundamental human rights of refugees, with a focus on women and children. CGRS engages in litigation, scholarship, research, and development of policy recommendations, in addition to providing in-depth training and technical assistance. Its attorneys are authors of scholarly works, experts who advise in asylum cases, and practicing attorneys who represent asylum seekers throughout the United States. CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and informational materials free-of-charge. The Library of Congress recently selected CGRS's website for its Web Archive Project, recognizing CGRS's site as "an important part of [its public policy] collection and the historical record."¹⁴

In addition, CGRS is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive

¹³ See, e.g., <http://www.aclu.org/safefree/torture/torturefoia.html>; <https://www.aclu.org/patriot-foia>.

¹⁴ See University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project (Sept. 15, 2015), at <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

studies documenting the treatment of women and child asylum seekers in the United States.¹⁵

Accordingly, the ACLU and CGRS are both organizations whose “main professional activity or occupation is information dissemination.” 6 C.F.R. § 5.5(d)(3). The ACLU and CGRS are also “representative[s] of the news media” within the meaning of the statute and applicable regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (defining a representative of the news media as an entity that “gathers information of potential interest to a segment of the public” and “uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience”); *see also National Sec. Archive v. Department of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (nonprofit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that nonprofit requestors who are not traditional news media outlets can qualify as representatives of the news media for the purposes of the FOIA, including after the 2007 amendments to the FOIA. *See ACLU of Washington v. Dep’t of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (D. Wash. Mar. 10, 2011) (finding that the ACLU qualifies as a “representative of the news media”).

In addition, CGRS, based at the University of California Hastings College of the Law, qualifies as an educational institution and seeks requested information to further its scholarly aims. *See* 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for “an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research”); 6

¹⁵ *See, e.g.,* Center for Gender & Refugee Studies and National University of Lanús, eds., *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015), available at <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>; CGRS & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), available at <http://cgrs.uchastings.edu/sites/default/files/Treacherous%20Journey%20Executive%20Summary.pdf>; Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, Harvard International Review (2014); Center for Gender & Refugee Studies, *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdiction: A resource for U.S. Attorneys* (2014); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107 (2013); Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265 (2013); Lisa Frydman and Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12–10 IMMIGR. BRIEFINGS (2012).

C.F.R. § 5.11(b)(4) (defining "educational institution" as "an institution of professional education . . . that operates a program of scholarly research").

EXPEDITED PROCESSING

The ACLU and CGRS request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E). As set forth above, there is a "compelling need" for expedited processing of this request, *see* 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an "urgency to inform the public concerning the actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). The ACLU and CGRS are therefore entitled to expedited processing of this request.

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FEE WAIVER

The ACLU and CGRS also seek a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii). As set forth above, this request aims at furthering public understanding of government conduct: i.e., how the government is making parole decisions for arriving aliens found to have a credible fear of persecution. To the Requestors' knowledge, the information requested regarding such parole decisions is not currently available to the public. Thus, the records' disclosure by definition will contribute significantly to the public's understanding of how the government is deciding parole requests. Moreover, neither the ACLU nor CGRS have any commercial interest in the records' disclosure. In this respect, the request strongly resembles the many previous instances in which the government waived all fees associated with responding to FOIA requests by the ACLU and CGRS.¹⁶

¹⁶ For example, in September 2014, the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation regarding cases of individuals detained at the T. Don Hutto Residential Center. In August 2014, the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation concerning court handling of immigrant juvenile cases. In April 2013, the DOJ National Security Division granted an ACLU fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted an ACLU fee waiver request regarding a FOIA request for documents related to national security letters issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a

In any event, as discussed *supra*, the ACLU and CGRS are both "representative[s] of the news media" and do not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

* * *

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Thank you for your consideration of this request. If this request is denied in whole or in part, we ask that the government justify all redactions by reference to specific FOIA exemptions. We expect the government to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. We look forward to your response to our request for expedited processing within 10 business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within 20 business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

Please respond to Michael Tan, Staff Attorney, ACLU Immigrants' Rights Project. Also, please notify us in advance if the cost of photocopying the documents requested exceeds \$100.00.

* * *

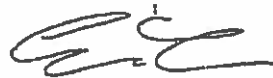
Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION



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LEGAL DEPARTMENT
IMMIGRANTS'
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October 5, 2015

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

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Arriving Aliens Found to Have a Credible Fear of Persecution**

Dear Freedom of Information Officer:

AMERICAN CIVIL LIBERTIES
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RIGHTS PROJECT

PLEASE RESPOND TO:
NATIONAL OFFICE
215 BROAD STREET, 18TH FL
NEW YORK, NY 10004-2400
212/549-0500
212/549-1634
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
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This letter is a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law. The ACLU and CGRS seek records from U.S. Immigration and Customs Enforcement ("ICE") pertaining to parole decisions for arriving aliens found to have a credible fear of persecution. Specifically, we seek the periodic reports and analyses of such parole decisions created pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009). The ACLU and CGRS also seek the expedited processing of this request and a fee waiver. *See* 5 U.S.C. §§ 552(a)(6)(E), 552(a)(4)(A)(iii).

There is a compelling and urgent need to inform the public about these issues. ICE Directive 11002.1 provides that "when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should"—absent "exceptional, overriding factors"—"parole the alien on the basis that his or her continued detention is not in the public interest." ICE Directive 11002.1, ¶¶ 6.2, 8.3. The Directive reflects the agency's recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. It was issued, in part, in response to widespread criticism that ICE was subjecting many asylum seekers to unnecessary detention under its overly restrictive parole policies.¹ The Directive thus represents a critical reform to the government's detention practices. Indeed, after ICE Directive 11002.1 went into effect in January

¹ *See, e.g., Human Rights First, U.S. Detention of Asylum Seekers: Seeking Protection, Finding Prison 6* (2009), available at <https://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

2010, large numbers of noncitizens who satisfied the Directive were paroled from detention.²

However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive's criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for immigration law enforcement.³ ICE's apparent denial of parole based on arriving aliens' recency of entry or other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.⁴ Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.⁵

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² See U.S. Comm'n on Religious Freedom, *Assessing the U.S. Government's Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* 9-10 (Apr. 2013) available at <http://www.uscirtf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf>, (noting that, in FY2012, ICE granted parole to 80 percent of asylum seekers found to have a credible fear).

³ See Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").

⁴ See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marcsak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *Nadarajah v. Holder*, *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006).

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profile public figures including Pope Francis⁷ and hundreds of members of Congress⁸ have recently weighed in on the proper treatment of asylum seekers arriving at our borders.

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty; the interference that such detention has on the ability of individuals to litigate their asylum claims effectively;⁹ and the severe harm that such detention causes asylum seekers' mental health.¹⁰ For these reasons, the government's parole practices warrant prompt and immediate review.

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

RECORDS REQUESTED¹¹

The ACLU and CGRS seek the following reports created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present:

- Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the

⁷ Dara Lind, *Pope Francis's powerful condemnation of how America treats immigrants*, VOX, (Sept. 24, 2015), available at <http://www.vox.com/2015/9/24/9392213/pope-francis-immigration-congress>; Pope Francis, *Immigration and the Golden Rule* (editorial), CHICAGO TRIBUNE (Sept. 24, 2015), available at <http://www.chicagotribune.com/news/opinion/editorials/ct-pope-immigration-congress-edit-0925-20150924-story.html>.

⁸ See Letter to Secretary Johnson from Members of the Senate (June 1, 2015), available at http://immigrantjustice.org/sites/immigrantjustice.org/files/Senate_FamilyDetentionLtr_DH_S_2015_06_01.pdf; Letter to Secretary Johnson from Members of the House of Representatives (May 27, 2015), available at https://lofgren.house.gov/uploadedfiles/family_detention.pdf.

⁹ See, e.g., N.Y. Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings* 3 (2011) (reporting that between 2005 and 2010 in New York City immigration courts, non-detained immigrants with lawyers had successful outcomes 74 percent of the time, while detained immigrants without counsel prevailed only 3 percent of the time).

¹⁰ See, e.g., Physicians for Human Rights & Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2003); Allen Keller et al., *Mental Health of Detained Asylum Seekers*, 362 *Lancet* 1721 (2003); Ctr. for Victims of Torture et al., *Tortured & Detained: Survivor Stories of U.S. Immigration Detention* (2013).

¹¹ The ACLU and CGRS are filing this request simultaneously with a request for records pertaining to the effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1. We have filed the instant request separately because the records requested can be readily identified without a complex search by the agency; therefore, the instant request should be resolved promptly.

result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.

- All analyses of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.11.
- All quality assurance reports by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.12.

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THE REQUESTERS

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, and nonpartisan organization dedicated to protecting civil rights and civil liberties in the United States. It is the largest civil liberties organization in the country, with offices in the fifty states and over 500,000 members. The ACLU is dedicated to holding the U.S. government accountable to principles of due process and the U.S. Constitution in general, including those principles that bear on detention and other significant deprivations of liberty.

The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, and law students and law faculty—for either no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues, addresses civil liberties issues that are currently in the news, and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through FOIA.¹² The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; and releases information via social media platforms such as Facebook and Twitter.

The Center for Gender & Refugee Studies ("CGRS") based at the University of California Hastings College of the Law works to protect the fundamental human rights of refugees, with a focus on women and children. CGRS engages in litigation, scholarship, research, and development of policy recommendations, in addition to providing in-depth training and technical assistance. Its attorneys are authors of scholarly works, experts

¹² *See, e.g.*, <http://www.aclu.org/safefree/torture/torturefoia.html>; <https://www.aclu.org/patriot-foia>.

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who advise in asylum cases, and practicing attorneys who represent asylum seekers throughout the United States. CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and informational materials free-of-charge. The Library of Congress recently selected CGRS's website for its Web Archive Project, recognizing CGRS's site as "an important part of [its public policy] collection and the historical record."¹³

In addition, CGRS is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.¹⁴

Accordingly, the ACLU and CGRS are both organizations whose "main professional activity or occupation is information dissemination," 6 C.F.R. § 5.5(d)(3). The ACLU and CGRS are also "representative[s] of the news media" within the meaning of the statute and applicable regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (defining a representative of the news media as an entity that "gathers information of potential interest to a segment of the public" and "uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience"); *see also National Sec.*

¹³ *See* University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project (Sept. 15, 2015), at <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

¹⁴ *See, e.g.,* Center for Gender & Refugee Studies and National University of Lanús, eds., *Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges* (2015), available at <http://cgrs.uchastings.edu/Childhood-Migration-HumanRights>; CGRS & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), available at <http://cgrs.uchastings.edu/sites/default/files/Treacherous%20Journey%20Executive%20Summary.pdf>; Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, Harvard International Review (2014); Center for Gender & Refugee Studies, *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdiction: A resource for U.S. Attorneys* (2014); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN'S L.J. 107 (2013); Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 HASTINGS RACE & POVERTY L.J. 265 (2013); Lisa Frydman and Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS (2012).

AMERICAN CIVIL LIBERTIES
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Archive v. Department of Defense, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (nonprofit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that nonprofit requestors who are not traditional news media outlets can qualify as representatives of the news media for the purposes of the FOIA, including after the 2007 amendments to the FOIA. See *ACLU of Washington v. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (D. Wash. Mar. 10, 2011) (finding that the ACLU qualifies as a "representative of the news media").

In addition, CGRS, based at the University of California Hastings College of the Law, qualifies as an educational institution and seeks requested information to further its scholarly aims. See 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research"); 6 C.F.R. § 5.11(b)(4) (defining "educational institution" as "an institution of professional education . . . that operates a program of scholarly research").

EXPEDITED PROCESSING

The ACLU and CGRS request Track 1 expedited treatment for this FOIA request. This request qualifies for expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E). As set forth above, there is a "compelling need" for expedited processing of this request, see 5 U.S.C. § 552(a)(6)(E)(i)(I), namely, an "urgency to inform the public concerning the actual or alleged Federal Government activity." 5 U.S.C. § 552(a)(6)(E)(v)(II). The ACLU and CGRS are therefore entitled to expedited processing of this request.

FEE WAIVER

The ACLU and CGRS also seek a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii). As set forth above, this request aims at furthering public understanding of government conduct: i.e., how the government is making parole decisions for arriving aliens found to have a credible fear of persecution. To the Requestors' knowledge, the information requested regarding such parole decisions is not currently available to the public. Thus, the records' disclosure by definition will

contribute significantly to the public's understanding of how the government is deciding parole requests. Moreover, neither the ACLU nor CGRS have any commercial interest in the records' disclosure. In this respect, the request strongly resembles the many previous instances in which the government waived all fees associated with responding to FOIA requests by the ACLU and CGRS.¹⁵

In any event, as discussed *supra*, the ACLU and CGRS are both "representative[s] of the news media" and do not seek the records requested for commercial use. Accordingly, should the government assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

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* * *

Thank you for your consideration of this request. If this request is denied in whole or in part, we ask that the government justify all redactions by reference to specific FOIA exemptions. We expect the government to release all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny expedited

¹⁵ For example, in September 2014, the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation regarding cases of individuals detained at the T. Don Hutto Residential Center. In August 2014, the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation concerning court handling of immigrant juvenile cases. In April 2013, the DOJ National Security Division granted an ACLU fee waiver request with respect to a request for documents relating to the FISA Amendments Act. Also in April 2013, the DOJ granted an ACLU fee waiver request regarding a FOIA request for documents related to national security letters issued under the Electronic Communications Privacy Act. In August 2013, the FBI granted the fee waiver request related to the same FOIA request issued to the DOJ. In June 2011, the DOJ National Security Division granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request for documents relating to the detention, interrogation, treatment, or prosecution of suspected terrorists. Likewise, in December 2008, the DOJ granted the ACLU a fee waiver with respect to the same request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006. In May 2005, the Department of Commerce granted a fee waiver to the ACLU with respect to its request for information regarding the radio-frequency identification chips in United States passports. In March 2005, the Department of State granted a fee waiver to the ACLU on a request regarding the use of immigration laws to exclude prominent non-citizen scholars and intellectuals from the country because of their political views, statements, or associations.

processing or a waiver of fees. We look forward to your response to our request for expedited processing within 10 business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within 20 business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

Please respond to Michael Tan, Staff Attorney, ACLU Immigrants' Rights Project. Also, please notify us in advance if the cost of photocopying the documents requested exceeds \$100.00.

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* * *

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.



Michael K.T. Tan
Staff Attorney
ACLU Immigrants' Rights Project
125 Broad Street, 18th floor
New York, New York. 10004
212-519-7848
mtan@aclu.org



Eunice Lee
Co-Legal Director
Center for Gender & Refugee Studies
UC Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102
(415) 581-8836
leeeunice@uchastings.edu

EXHIBIT B

Mishan Wroe

From: Michael Tan <mtan@aclu.org>
Sent: Wednesday, September 21, 2016 10:04 AM
To: Mishan Wroe
Cc: Lee, Eunice; asalceda@aclunc.org
Subject: Fw: ICE FOIA Request 2016-ICFO-01568

From: ice-foia@dhs.gov <ice-foia@dhs.gov>
Sent: Tuesday, October 13, 2015 10:35 AM
To: Michael Tan
Subject: ICE FOIA Request 2016-ICFO-01568

October 13, 2015

Michael Tan
ACLU Immigrants' Rights Project
125 Broad St., 18th FL.
New York, NY 10004

RE: ICE FOIA Case Number 2016-ICFO-01568

Dear Mr. Tan:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated October 05, 2015, and to your request for expedited treatment and a waiver of all assessable FOIA fees. Your request was received in this office on October 13, 2015. Specifically, you requested the following records prepared, received, transmitted, collected and/or maintained by ICE: 1.) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture: • Priority 1: "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States" • Priority 2: "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who AMERICAN CIVIL LIBERTIES cannot establish to the satisfaction of an immigration officer that UNION FOUNDATION they have been physically present in the United States continuously since January 1, 2014" Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo"). (2) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following directive in the Priorities Memo is applied in parole decisions for noncitizens found to have a credible fear of persecution or torture: "absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens ... whose detention is ... not in the public interest." Id. at 5. (3) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications regarding the effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).

Your request for expedited treatment is hereby denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(d)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(d)(1)(ii). Requesters seeking expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(d)(3).

Your request for expedited processing is denied because you do not qualify for either category under 6 C.F.R. § 5.5(d)(1). You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

As it pertains to your request for a fee waiver, after thoroughly reviewing your letter, ICE has determined that you have not presented a convincing argument that **ACLU Immigrants' Rights Project** is entitled to a blanket waiver of applicable fees.

The DHS FOIA Regulations at 6 CFR § 5.11(k)(2) set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

As a requester, you bear the burden under FOIA of showing that the fee waiver requirements have been met. Based on my review of your October 05, 2015 letter and for the reasons stated herein, I have determined that your fee waiver request is deficient because your request has failed to satisfy factors 4, 5, and 6. Since your request for a fee waiver has failed to satisfy each of the required factors, I am denying your fee waiver request.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters. As a non-commercial requester, you will be charged 10 cents per page for duplication; the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate (\$4.00 for clerical personnel, \$7.00 for professional personnel, \$10.25 for managerial personnel) of the searcher. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any further fees are accrued.

You have the right to appeal the determination to deny your request for expedited treatment and a fee waiver. Should you wish to do so, please send your appeal following the procedures outlined in the DHS regulations at 6 Code of Federal Regulations § 5.9 and a copy of this letter to:

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

Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Freedom of Information Act (FOIA) | Homeland Security

www.dhs.gov

FOIA promotes government openness and accountability by giving the public the right to request copies of records in the possession of federal executive branch agencies, exclusive of nine exemptions and three special law enforcement provisions.

ICE has queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2016-ICFO-01568**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit <http://www.dhs.gov/foia-status>. Please note that to check the status of a request, you must enter the 2015-ICFO-XXXXX or 2016-ICFO-XXXXX tracking number. You may contact this office at (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia

Mishan Wroe

From: Michael Tan <mtan@aclu.org>
Sent: Wednesday, September 21, 2016 10:04 AM
To: Mishan Wroe
Cc: Lee, Eunice; asalceda@aclunc.org
Subject: Fw: ICE FOIA Request 2016-ICFO-01574

From: ice-foia@dhs.gov <ice-foia@dhs.gov>
Sent: Tuesday, October 13, 2015 10:49 AM
To: Michael Tan
Subject: ICE FOIA Request 2016-ICFO-01574

October 13, 2015

Michael Tan
ACLU Immigrants' Rights Project
125 Broad St., 18th FL.
New York, NY 10004

RE: ICE FOIA Case Number 2016-ICFO-01574

Dear Mr. Tan:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated October 05, 2015, and to your request for expedited treatment and a waiver of all assessable FOIA fees. Your request was received in this office on October 13, 2015. Specifically, you requested the following reports created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present: • Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. See ICE Directive 11002.1 8.11. • All analyses of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. See ICE Directive 11002.1 8.11. • All quality assurance reports by the Assistant Director for Operations or his or her designee. See ICE Directive 11002.1 8.12.

Your request for expedited treatment is hereby denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(d)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(d)(1)(ii). Requesters seeking expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(d)(3).

Your request for expedited processing is denied because you do not qualify for either category under 6 C.F.R. § 5.5(d)(1). You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10-day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

As it pertains to your request for a fee waiver, after thoroughly reviewing your letter, ICE has determined that you have not presented a convincing argument that **ACLU Immigrants' Rights Project** is entitled to a blanket waiver of applicable fees.

The DHS FOIA Regulations at 6 CFR § 5.11(k)(2) set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

As a requester, you bear the burden under FOIA of showing that the fee waiver requirements have been met. Based on my review of your October 05, 2015 letter and for the reasons stated herein, I have determined that your fee waiver request is deficient because your request has failed to satisfy factors 4, 5, and 6. Since your request for a fee waiver has failed to satisfy each of the required factors, I am denying your fee waiver request.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters. As a non-commercial requester, you will be charged 10 cents per page for duplication; the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate (\$4.00 for clerical personnel, \$7.00 for professional personnel, \$10.25 for managerial personnel) of the searcher. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any further fees are accrued.

You have the right to appeal the determination to deny your request for expedited treatment and a fee waiver. Should you wish to do so, please send your appeal following the procedures outlined in the DHS regulations at 6 Code of Federal Regulations § 5.9 and a copy of this letter to:

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

Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Freedom of Information Act (FOIA) | Homeland Security

www.dhs.gov

FOIA promotes government openness and accountability by giving the public the right to request copies of records in the possession of federal executive branch agencies, exclusive of nine exemptions and three special law enforcement provisions.

ICE has queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2016-ICFO-01574**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit <http://www.dhs.gov/foia-status>. Please note that to check the status of a request, you must enter the 2015-ICFO-XXXXX or 2016-ICFO-XXXXX tracking number. You may contact this office at (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009,

Washington, D.C. 20536-5009.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia

EXHIBIT C

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



October 15, 2015

SENT VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

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

**RE: FOIA APPEAL
2016-ICFO-01574**

To Whom It May Concern:

Pursuant to 6 C.F.R. § 5.9, the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies at the University of California Hastings College of Law ("CGRS") appeal U.S. Immigration and Customs Enforcement's ("ICE") decision to deny us expedited processing and a fee waiver; its failure to grant us fee status as "representative[s] of the news media;" and its failure to grant CGRS fee status as "an educational or noncommercial scientific institution."

Our request seeks records pertaining to parole decisions for arriving aliens found to have a credible fear of persecution—specifically, the periodic reports and analyses created pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).¹ In an email dated October 13, 2015, ICE denied our requests for expedited processing and a fee waiver, completely ignored our request for fee status as a "representative of the news media," and ignored CGRS' request for fee status as an educational institution. Indeed, ICE ignored CGRS' requests altogether, referring only to the ACLU in its email.²

ICE's decisions are plainly inconsistent with the FOIA, unnecessarily delay the processing of our request, and should be immediately reversed. In particular, ICE's decision resembles its prior decisions denying fee waivers to the ACLU—decisions that were all ultimately reversed by ICE on appeal, including an appeal that was just decided last week, on October 5, 2015.³

¹ See FOIA Request, dated October 5, 2015 (hereinafter, "the Request"), attached as Ex. A.

² See Email from the ICE FOIA Office, dated Oct. 13, 2015, attached as Ex. B.

³ See *infra* (citing, *inter alia*, 2015-ICAP-00685, 2015-ICFO-95304).

I. The ACLU and CGRS Are Entitled to Expedited Processing

The ACLU and CGRS are entitled to expedited processing. The FOIA provides that, “with respect to a request made by a person primarily engaged in disseminating information,” a “compelling need” for expedited processing exists where there is an “urgency to inform the public concerning actual or alleged Federal Government activity.”⁴ In its letter denying expedited processing, ICE states:

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You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public’s right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.⁵

This boilerplate denial is plainly incorrect.⁶ As set forth in the Request, there is a compelling and urgent need to inform the public about the subject-matter of the Request that is distinct from the public’s interest in government activity in general.⁷ ICE Directive 11002.1 provides that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her continued detention is not in the public interest.”⁸ The Directive reflects the agency’s recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive’s criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for immigration law enforcement.⁹ ICE’s apparent denial of parole based on arriving aliens’ recency of entry or

⁴ 5 U.S.C. § 552(a)(6)(E)(v)(II); see also 6 C.F.R. § 5.5(d)(1)(ii) (same).

⁵ Ex. B.

⁶ Notably, ICE has used this language verbatim to respond to other recent requests for expedited processing regarding entirely different issues. See, e.g., Email from the ICE FOIA Office re. 2016-ICFO-01558, dated Oct. 13, 2015.

⁷ See Ex. A at 2-3.

⁸ ICE Directive 11002.1, ¶¶ 6.2, 8.3.

⁹ See Memorandum from Jeh Johnson, Sec’y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014).

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other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.¹⁰ Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.¹¹

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty. For these reasons, the government's parole practices warrant immediate review, and expedited processing should be granted.

II. The Fee Waiver Should Be Granted

The ACLU and CGRS are also entitled to a fee waiver. The public interest fee waiver provision of FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). The public interest fee waiver provision furthers the overall aims of FOIA: namely, “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 105 (D.D.C. 2006) (analyzing purposes of FOIA in assessing public interest fee waiver) (quoting *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1309 (D.C. Cir. 2003)). Shedding light on governmental actions that deny the fundamental liberty of persons, including arriving aliens whose continued detention is not in the public interest, advances these core purposes.

There is no serious dispute that disclosure of the records requested is “likely to contribute significantly to public understanding of the operations of the government and is not primarily in the commercial interest of the requestor.” 5 U.S.C. § 552(a)(4)(A)(iii). Notably, ICE apparently did not even consider CGRS’ request for a fee waiver under the FOIA, as its email mentions only

¹⁰ See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006).

¹¹ See *RILR v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015); see also *Diaz v. Schiltgen*, 946 F. Supp. 762, 765-66 (N.D. Cal. 1996) (holding that deterrence is not an individualized reason to deny parole).

the ACLU.¹² Moreover, in denying the fee waiver, ICE states in boilerplate and without explanation or analysis that the Request failed to satisfy the following factors:

(4) Whether the contribution to public understanding of government operations or activities will be “significant”;

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

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Ex. B. ICE concedes that the information sought concerns “operations or activities of the government”; that the disclosure would be “meaningfully informative” about governmental operations and activities; and that information will “contribute to the understanding of the public at large,” as opposed to a narrow segment of interested persons.¹³

ICE’s conclusion as to the remaining factors is incorrect, as both the ACLU and CGRS easily meet them:

First, disclosure of the requested records would contribute significantly to the public’s knowledge of ICE’s custody practices. “In determining whether disclosure of records will contribute significantly to the public’s understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information.” *Carney v. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The “FOIA does not require that a requester be able to reach a ‘wide audience.’” *Cause of Action v. FTC*, — F.3d —, 2015 WL 5009388, at *6 (D.C. Cir. 2015). Rather, “the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney*, 19 F.3d at 815.

To our knowledge, there is currently no publicly available data that provides a detailed description of ICE’s parole decisions for arriving aliens found to have a credible fear of persecution since ICE Directive 11002.1 went into effect in 2010. Accordingly, disclosure of the records requested will

¹² See Ex. B.

¹³ See Ex. B (listing factors under 6 CFR § 5.11(k)(2))

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significantly enhance the public's understanding of these issues. *See Carney*, 19 F.3d at 815 (weighing favorably "evidence in the administrative record that very little has been written" regarding subject matter of request); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) (finding public interest standard met where information sought would "increase the limited information currently written regarding the subject matter of the plaintiff's FOIA request"). Moreover, as set forth *infra*, the ACLU and CGRS are clearly capable of disseminating the information disclosed in response to its Request.

Second, it is perplexing, to say the least, that ICE denied a fee waiver based on an alleged commercial interest. The ACLU and CGRS obviously do *not* have a commercial interest in disclosure. *See* 6 C.F.R. § 5.11(b)(1) (defining a "[c]ommercial use request" as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation").¹⁴ Indeed, ICE appears to recognize this lack of a commercial interest in treating the ACLU as a non-commercial requestor for billing purposes.¹⁵

As set forth in its Request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. Information disclosed by the ACLU as a result of the Request will be available to the public at no cost. The Request details the kinds of publications and kinds of channels—including newsletters, web pages, blogs, and news briefings—that the ACLU uses to disseminate information to the public.¹⁶

Likewise, CGRS is a nonprofit institution that works to protect the fundamental human rights of refugees, with a focus on women and children. Information disclosed by CGRS as a result of the Request will be available to the public at no cost, through the various channels described in the Request, including its public website, <http://cgrs.uchastings.edu>.¹⁷

¹⁴ *See also* Office of Mgmt. & Budget, Uniform FOIA Fee Schedule & Guidelines, 52 Fed. Reg. 10,012, 10,017-18 (Mar. 27, 1987) (interpreting "commercial use" in 5 U.S.C. § 552(a)(4)(A)(ii) as a use that "furthers the commercial, trade or profit interests of the requester").

¹⁵ *See* Ex. B.

¹⁶ *See* Ex. A at 4.

¹⁷ *See* Ex. A at 4-5.

Finally, because the ACLU and CGRS have *no* commercial interest in disclosure, any public interest in disclosure is sufficiently large in comparison with that nonexistent interest.

For these reasons, a fee waiver would fulfill Congress's legislative intent when it amended the FOIA in 1987. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requestors.'" (citation omitted)); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) ("[FOIA's] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers." (internal quotation marks and citation omitted)).

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Indeed, ICE's decision to deny a fee waiver ignores the numerous cases in which courts found that nonprofits engaged in public interest advocacy, litigation, and public education, like the ACLU and CGRS, do not have "commercial interests" implicated by their FOIA requests and were granted fee waivers. *See, e.g., FedCURE*, 602 F. Supp. 2d at 201 (public interest waiver ordered for nonprofit organization that advocates for federal inmate population and their families); *Chr. For Medicare Advocacy, Inc. v. HHS*, 557 F. Supp. 2d 221 (D.D.C. 2008) (public interest waiver ordered for nonprofit that educates and advocates for Medicare beneficiaries). As explained in the Request, the ACLU and CGRS have not been charged fees associated with FOIA requests on many occasions.¹⁸ The same should be done here. Indeed, this request strongly resembles prior instances in which ICE has reversed the denial of a fee waiver to the ACLU on appeal—including an appeal that was just decided last week, on October 5, 2015.¹⁹

¹⁸ See Ex. A at 7 n.15 (citing examples).

¹⁹ See, e.g., Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00685, 2015-ICFO-95034 (July 6, 2015), at 2 (reversing denial of fee waiver based on factors 4, 5, and 6); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00436, 2015-ICFO-7415 (July 6, 2015), at 2 (same); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00536, 2015-ICFO-80352, at 2 (Aug. 5, 2015) (reversing denial of fee waiver based on, *inter alia*, factor 3); Letter from Catrina M. Pavlik-Keenan, FOIA Officer, ICE, re. 2011FOIA4894, at 1 (Mar. 28, 2012) (reversing fee waiver denial based on ACLU of Southern California's ability to disseminate information to the public and its putative commercial interest in the records requested). Notably, ICE reversed its fee waiver denial in 2011FOIA4894 only after the ACLU of Southern California filed suit to challenge its decision. *See Complaint, ACLU of Southern California v. U.S. Immigration and Customs Enforcement*, CV11-10148 (C.D. Cal. filed Dec. 7, 2011).

III. In the Alternative, the ACLU and CGRS Should Be Granted Fee Status as a "Representative of the News Media," and CGRS Should Be Granted Fee Status as an Educational Institution.

In addition, ICE wholly ignored the ACLU and CGRS's request for fee status as a "representative of the news media." However, as set forth in the instant Request, there is no question that we are entitled to this fee status.²⁰

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The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, nonprofit groups, and law students and law faculty—at no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through FOIA.²¹ The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; publishes information via social media platforms such as Facebook and Twitter; and works with influential creative artists in film, television, music, and comedy to educate the public.²² In mid-August 2015 alone, the combined number of followers for our active social media accounts (ACLU Nationwide Facebook, @ACLU and @ACLUlive Twitter accounts, and Instagram) was 885,248. The ACLU website receives more than 38,000 unique visits and nearly 70,000 page views a day. Over the last two years, the ACLU's blogs have averaged 12,000 visits per day, with some receiving more than 100,000 visits over that time span.

CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and informational materials free-of-charge. The Library of Congress recently selected CGRS's website for its Web Archive Project, recognizing CGRS's

²⁰ See Ex. A at 4-5.

²¹ See, e.g., ACLU, <https://www.thetorturedatabase.org/>; ACLU, PATRIOT FOIA, <https://www.aclu.org/patriot-foia>.

²² See ACLU Ambassador Project, <https://www.aclu.org/feature/aclu-ambassador-project>.

site as "an important part of [its public policy] collection and the historical record."²³

These characteristics clearly make the ACLU and CGRS "representative[s] of the news media" for purpose of FOIA. *See National Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting a requester is a representative of the news media where it "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") (construing 5 U.S.C. § 552(a)(4)(A)(iii)); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10 (D.D.C. 2003) ("any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'").

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In addition, CGRS, based at the University of California Hastings College of the Law, is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.²⁴ Thus, CGRS qualifies as an educational institution and seeks the requested information to further its scholarly aims. *See* 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research"); 6 C.F.R. § 5.11(b)(4) (defining "educational institution" as "an institution of professional education . . . that operates a program of scholarly research").

For the foregoing reasons, the appeal should be granted. I look forward to receiving your prompt response.

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

²³ *See* University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project (Sept. 15, 2015), at <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

²⁴ *See* Ex. A at 5 n.14 (citing examples).

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LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



October 16, 2015

SENT VIA CERTIFIED U.S. MAIL WITH RETURN RECEIPT

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

**RE: FOIA APPEAL
2016-ICFO-01568**

To Whom It May Concern:

Pursuant to 6 C.F.R. § 5.9, the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies at the University of California Hastings College of Law ("CGRS") appeal U.S. Immigration and Customs Enforcement's ("ICE") decision to deny us expedited processing and a fee waiver; its failure to grant us fee status as "representative[s] of the news media;" and its failure to grant CGRS fee status as "an educational or noncommercial scientific institution."

Our FOIA request (hereinafter, "the Request") seeks records regarding how the Department of Homeland Security's ("DHS") decision to prioritize recent arrivals for immigration enforcement applies to parole decisions for arriving aliens found to have a credible fear of persecution.¹ In an email dated October 13, 2015, ICE denied our requests for expedited processing and a fee waiver, completely ignored our request for fee status as a "representative of the news media," and ignored CGRS' request for fee status as an educational institution. Indeed, ICE ignored CGRS' requests altogether, referring only to the ACLU in its email.²

ICE's decisions are plainly inconsistent with the FOIA, unnecessarily delay the processing of the Request, and should be immediately reversed. In particular, ICE's decision resembles its prior decisions denying fee waivers to the ACLU—decisions that were all ultimately reversed by ICE on appeal, including an appeal that was just decided last week, on October 5, 2015.³

¹ See FOIA Request, dated October 5, 2015, attached as Ex. A.

² See Email from the ICE FOIA Office, dated Oct. 13, 2015, attached as Ex. B.

³ See *infra* (citing, *inter alia*, 2015-ICAP-00685, 2015-ICFO-95304).

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PLEASE RESPOND TO:
NATIONAL OFFICE
125 BROAD STREET, 16TH FL.
NEW YORK, NY 10004-2400
71717 549 2660
71717 549 2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUJAN M. HERMAN
PRESIDENT

ANTHONY D. POWER
EXECUTIVE DIRECTOR

I. The ACLU and CGRS Are Entitled to Expedited Processing

The ACLU and CGRS are entitled to expedited processing. The FOIA provides that, “with respect to a request made by a person primarily engaged in disseminating information,” a “compelling need” for expedited processing exists where there is an “urgency to inform the public concerning actual or alleged Federal Government activity.”⁴ In its letter denying expedited processing, ICE states:

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You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public’s right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.⁵

This boilerplate denial is plainly incorrect.⁶ As set forth in the Request, there is a compelling and urgent need to inform the public about the subject-matter of the request that is distinct from the public’s interest in government activity in general.⁷ ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), provides that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her continued detention is not in the public interest.”⁸ The Directive reflects the agency’s recognition that there is no public interest in detaining *bona fide* asylum seekers who present no danger to the community and no flight risk that warrants their imprisonment. However, since at least November 2014, advocates have reported the widespread denial of parole to asylum seekers even when they meet the Directive’s criteria. In at least some cases, these denials appear to be related to the new memorandum from the Secretary of Homeland Security identifying recent entrants as a priority for

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⁶ Notably, ICE has used this language verbatim to respond to other recent requests for expedited processing regarding entirely different issues. See, e.g., Email from the ICE FOIA Office re. 2016-ICFO-01558, dated Oct. 13, 2015.

⁷ See Ex. A at 1-3.

⁸ ICE Directive 11002.1, §§ 6.2, 8.3.

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immigration law enforcement.⁹ ICE's apparent denial of parole based on arriving aliens' recency of entry or other categorical, class-based criteria suggests that ICE may not be providing individualized parole decisions that are based on facially legitimate and bona fide reasons, as required by law.¹⁰ Advocates have also raised concerns that arriving asylum seekers are being detained on deterrence grounds—and a federal court earlier this year ruled that the government could not rely on such grounds in deciding to detain asylum seekers apprehended in the interior of the country.¹¹

Unnecessary detention raises serious human and civil rights concerns regarding the unlawful deprivation of individual liberty. For these reasons, the government's parole practices warrant immediate review, and expedited processing should be granted.

II. The Fee Waiver Should Be Granted

The ACLU and CGRS are also entitled to a fee waiver. The public interest fee waiver provision of FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)). The public interest fee waiver provision furthers the overall aims of FOIA: namely, "'to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health & Human Servs.*, 481 F. Supp. 2d 99, 105 (D.D.C. 2006) (analyzing purposes of FOIA in assessing public interest fee waiver) (quoting *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1309 (D.C. Cir. 2003)). Shedding light on governmental actions that deny the fundamental liberty of persons, including arriving aliens whose continued detention is not in the public interest, advances these core purposes.

⁹ See Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014).

¹⁰ See, e.g., *Jean v. Nelson*, 472 U.S. 846, 857 (1985); *Marczak v. Greene*, 971 F.2d 510, 515 (10th Cir. 1992); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1082 (9th Cir. 2006).

¹¹ See *RJR v. Johnson*, 80 F. Supp. 3d 164, 188-90 (D.D.C. 2015); see also *Diaz v. Schiltgen*, 946 F. Supp. 762, 765-66 (N.D. Cal. 1996) (holding that deterrence is not an individualized reason to deny parole).

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Notably, ICE apparently did not even consider CGRS' request for a fee waiver under the FOIA, as its email mentions only the ACLU.¹² Moreover, there is no serious dispute that disclosure of the records requested is "likely to contribute significantly to public understanding of the operations of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii). In denying the fee waiver, ICE states in boilerplate and without explanation or analysis that the Request failed to satisfy the following factors:

(4) Whether the contribution to public understanding of government operations or activities will be "significant";

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

Ex. B. ICE concedes that the information sought concerns "operations or activities of the government"; that the disclosure would be "meaningfully informative" about governmental operations and activities; and that information will "contribute to the understanding of the public at large," as opposed to a narrow segment of interested persons.¹³

ICE's conclusion as to factors (4)-(6) is incorrect, as both the ACLU and CGRS easily meet them:

First, disclosure of the requested records would contribute significantly to the public's knowledge of ICE's custody practices. "In determining whether disclosure of records will contribute significantly to the public's understanding of the operation or activities of the government, it is relevant to consider the subject matter of the requests and the ability of the requester to disseminate the information." *Carney v. Dep't of Justice*, 19 F.3d 807, 812 (2d Cir. 1994). The "FOIA does not require that a requester be able to reach a 'wide audience.'" *Cause of Action v. FTC*, --- F.3d ---, 2015 WL 5009388, at *6 (D.C. Cir. 2015). Rather, "the relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney*, 19 F.3d at 815.

¹² See Ex. B.

¹³ See Ex. B (listing factors under 6 C.F.R. § 5.11(k)(2))

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To our knowledge, there is currently no publicly available data that provides a detailed description of the impact of DHS' law enforcement priorities on ICE's parole decisions for arriving aliens found to have a credible fear of persecution. Accordingly, disclosure of the records requested will significantly enhance the public's understanding of these issues. *See Carney*, 19 F.3d at 815 (weighing favorably "evidence in the administrative record that very little has been written" regarding subject matter of request); *Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) (finding public interest standard met where information sought would "increase the limited information currently written regarding the subject matter of the plaintiff's FOIA request"). Moreover, as set forth *infra*, the ACLU and CGRS are clearly capable of disseminating the information disclosed in response to the Request.

Second, it is perplexing, to say the least, that ICE denied a fee waiver based on an alleged commercial interest. The ACLU and CGRS obviously do *not* have a commercial interest in disclosure. *See* 6 C.F.R. § 5.11(b)(1) (defining a "[c]ommercial use request" as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation").¹⁴ Indeed, ICE appears to recognize this lack of a commercial interest in treating the ACLU as a non-commercial requestor for billing purposes.¹⁵

As set forth in the Request, the ACLU is a nationwide, nonprofit, nonpartisan organization dedicated to protecting civil rights in the United States. It is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. Information disclosed by the ACLU as a result of the Request will be available to the public at no cost. The Request details the kinds of publications and kinds of channels—including newsletters, web pages, blogs, and news briefings—that the ACLU uses to disseminate information to the public.¹⁶

Likewise, CGRS is a nonprofit institution that works to protect the fundamental human rights of refugees, with a focus on women and children. Information disclosed by CGRS as a result of the Request will be available

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to the public at no cost, through the various channels described in the Request, including its public website, <http://cgrs.uchastings.edu>.¹⁷

Finally, because the ACLU and CGRS have *no* commercial interest in disclosure, any public interest in disclosure is sufficiently large in comparison with that nonexistent interest.

For these reasons, a fee waiver would fulfill Congress's legislative intent when it amended the FOIA in 1987. *See Judicial Watch*, 326 F.3d at 1312 ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requestors.'" (citation omitted)); *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Educ.*, 593 F. Supp. 2d 261, 268 (D.D.C. 2009) ("[FOIA's] purpose . . . is to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers." (internal quotation marks and citation omitted)).

Indeed, ICE's decision to deny a fee waiver ignores the numerous cases in which courts found that nonprofits engaged in public interest advocacy, litigation, and public education, like the ACLU and CGRS, do not have "commercial interests" implicated by their FOIA requests and were granted fee waivers. *See, e.g., FedCURE*, 602 F. Supp. 2d at 201 (public interest waiver ordered for nonprofit organization that advocates for federal inmate population and their families); *Ctr. For Medicare Advocacy, Inc. v. HHS*, 557 F. Supp. 2d 221 (D.D.C. 2008) (public interest waiver ordered for nonprofit that educates and advocates for Medicare beneficiaries). As explained in the Request, the ACLU and CGRS have not been charged fees associated with FOIA requests on many occasions.¹⁸ The same should be done here. Indeed, this request strongly resembles prior instances in which ICE has reversed the denial of a fee waiver to the ACLU on appeal—including an appeal that was just decided last week, on October 5, 2015.¹⁹

¹⁷ *See* Ex. A at 5-6.

¹⁸ *See* Ex. A at 7 n.16 (citing examples).

¹⁹ *See, e.g.,* Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00685, 2015-ICFO-95034 (Oct. 5, 2015), at 2 (reversing denial of fee waiver based on factors 4, 5, and 6); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00436, 2015-ICFO-7415 (July 6, 2015), at 2 (same); Letter from Debbie Seguin, ICE Office of the Principal Legal Advisor, re. 2015-ICAP-00536, 2015-ICFO-80352, at 2 (Aug. 5, 2015) (reversing denial of fee waiver based on, *inter alia*, factor 3); Letter from Catrina M. Pavlik-Keenan, FOIA Officer, ICE, re. 2011FOIA4894, at 1 (Mar. 28, 2012) (reversing fee waiver denial based on ACLU of Southern California's ability to disseminate information to the public and its putative commercial interest in the records requested). Notably, ICE reversed its fee waiver denial in 2011FOIA4894 only after the ACLU of Southern California filed suit to challenge its decision. *See* Complaint, ACLU

III. In the Alternative, the ACLU and CGRS Should Be Granted Fee Status as a "Representative of the News Media," and CGRS Should Be Granted Fee Status as an Educational Institution.

In addition, ICE wholly ignored the ACLU and CGRS's request for fee status as a "representative of the news media." However, as set forth in the Request, there is no question that we are entitled to this fee status.²⁰

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The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are widely disseminated to the public. These materials are made available to everyone—including tax-exempt organizations, nonprofit groups, and law students and law faculty—at no cost or for a nominal fee. The ACLU also disseminates information through its high-traffic website, <http://www.aclu.org>, which provides in-depth information on a range of civil liberties issues; addresses civil liberties issues that are currently in the news; and contains hundreds of documents relating to the ACLU's work. The website specifically features information obtained through FOIA.²¹ The ACLU also publishes an electronic newsletter, which is distributed to subscribers via email; airs regular podcasts; maintains several blogs at <https://www.aclu.org/blog>; publishes information via social media platforms such as Facebook and Twitter; and works with influential creative artists in film, television, music, and comedy to educate the public.²² In mid-August 2015 alone, the combined number of followers for our active social media accounts (ACLU Nationwide Facebook, @ACLU and @ACLUlive Twitter accounts, and Instagram) was 885,248. The ACLU website receives more than 38,000 unique visits and nearly 70,000 page views a day. Over the last two years, the ACLU's blogs have averaged 12,000 visits per day, with some receiving more than 100,000 visits over that time span.

CGRS is a nationally-recognized leader in dissemination of legal theories, practice advisories, and human rights reporting. CGRS conducts nation-wide trainings and webinars attended by hundreds of attorneys, and in the past year, it provided technical assistance in over 1,500 cases involving asylum and related relief. CGRS maintains a public website, <http://cgrs.uchastings.edu>, through which it distributes educational and

of *Southern California v. U.S. Immigration and Customs Enforcement*, CV11-10148 (C.D. Cal. filed Dec. 7, 2011).

²⁰ See Ex. A at 4-6.

²¹ See, e.g., ACLU, <https://www.thetorturedatabase.org/>; ACLU, PATRIOT FOIA, <https://www.aclu.org/patriot-foia>.

²² See ACLU Ambassador Project, <https://www.aclu.org/feature/aclu-ambassador-project>.

informational materials free-of-charge. The Library of Congress recently selected CGRS's website for its Web Archive Project, recognizing CGRS's site as "an important part of [its public policy] collection and the historical record."²³

These characteristics clearly make the ACLU and CGRS "representative[s] of the news media" for purpose of FOIA. *See National Security Archive v. Dep't of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (noting a requester is a representative of the news media where it "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") (construing 5 U.S.C. § 552(a)(4)(A)(iii)); *Elec. Privacy Info. Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5, 10 (D.D.C. 2003) ("any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'").

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In addition, CGRS, based at the University of California Hastings College of the Law, is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.²⁴ Thus, CGRS qualifies as an educational institution and seeks the requested information to further its scholarly aims. *See* 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research"); 6 C.F.R. § 5.11(b)(4) (defining "educational institution" as "an institution of professional education . . . that operates a program of scholarly research").

For the foregoing reasons, the appeal should be granted. I look forward to receiving your prompt response.

Under penalty of perjury, I certify, to the best of my knowledge and belief, that the above information is true and correct.

²³ *See* University of Hastings College of the Law, CGRS Website To Be Included in Library of Congress Web Archive Project (Sept. 15, 2015), <http://www.uchastings.edu/news/articles/2015/09/CGRS-LOC.php>.

²⁴ *See* Ex. A at 6 n.15 (citing examples).

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UNION FOUNDATION



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ACLU Immigrants' Rights
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mtan@aclu.org



Eunice Lee
Co-Legal Director
Center for Gender & Refugee
Studies
UC Hastings College of the
Law
200 McAllister Street
San Francisco, CA 94102
(415) 581-8836
leeunice@uchastings.edu

EXHIBIT D

U.S. Department of Homeland Security
500 12th St. SW; STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

November 5, 2015

Michael Tan
ACLU Immigrant's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

RE: 2016-ICAP-00031, 2015-ICFO-99765

Dear Mr. Tan:

This is in response to your letter dated October 1, 2015, received on October 8, 2015, requesting reconsideration of the denial of the Freedom of Information Act (FOIA) fee waiver request you filed with the U.S. Immigration and Customs Enforcement's (ICE) FOIA Office.

Your original September 10, 2015 FOIA request sought data related to ICE's mandatory and non-mandatory detention population for September 2014-September 2015, for each ICE Area of Responsibility (AOR). You requested the number of individuals subject to certain mandatory detention categories and sub-categories. In your September 10th correspondence, you also requested a full fee waiver, or, in the alternative, that the ACLU be labeled a news media requestor for fee assessment purposes.

In correspondence dated September 21, 2015, the ICE FOIA Office denied your request for a full fee waiver, citing failure of factors 4, 5, and 6 of the DHS FOIA Regulations located at 6 CFR § 5.11(k)(2). The ICE FOIA Office labeled the ACLU a non-commercial requestor for fee assessment purposes.

In your letter appealing the fee waiver determination, received on October 8, 2015, you state disclosure of the records in question is in the public interest because it is likely to significantly contribute to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester, and state ACLU satisfies the factors set forth at 6 C.F.R. § 5.11(k) for receiving a fee waiver.

As stated in ICE FOIA's correspondence dated September 21, 2015, the DHS FOIA Regulations at 6 C.F.R. § 5.11(k) set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. These factors are:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow

Michael Tan
2016-ICAP-00031, 2015-ICFO-99765
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- segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
 - (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
 - (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

On appeal, ICE completes a *de novo* review of the fee assessment and fee waiver request. As a requester, you bear the burden under FOIA of showing that the fee waiver requirements have been met.

As to the first requirement, the requested information likely concerns the operations or activities of the government related to mandatory detention and non-mandatory detention under the Immigration and Nationality Act (INA).

The second requirement requires that the disclosure "likely contribute" to the understanding of the public at large regarding specific government operations or activities. With respect to your request, the requested information will likely contribute to an understanding of government operations or activities related to mandatory detention and non-mandatory detention.

The third requirement mandates the disclosure of the requested information contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons. Moreover, a requestor must establish an ability to disseminate the information to the public at large. See *Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 158 (D.D.C. 2013) (requester must specifically demonstrate its intent and ability to disseminate the requested information to the public); *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (requester bears burden to demonstrate intent and ability to disseminate the information to the public). In your appeal, you argue there is no publically available data that provides a detailed description of ICE's mandatory and non-mandatory detention population for the past year (September 2014-September 2015). With respect to your request, the requested information will likely contribute to the understanding of the public at large. Moreover, the ACLU has established the ability and intent to disseminate the requested information to the public, through publications such as news briefings and newsletters, as well as on blogs and web pages.

The fourth requirement mandates the disclosure and subsequent contribution to public understanding of government operations or activities be "significant." To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question must be likely to be enhanced by the disclosure to a significant extent. With respect to your request, the information would likely contribute a significant public understanding of ICE's mandatory and non-mandatory detention population, and the specific classifications of those subject to mandatory detention.

The fifth and sixth requirements consider whether the requester has a commercial interest that would be furthered by the requested disclosure; and whether the magnitude of any identified commercial

Michael Tan
2016-ICAP-00031, 2015-ICFO-99765
Page 3 of 3

interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. In your appeal, you state that the ACLU is a nationwide, non-profit, non-partisan organization dedicated to protecting the civil liberties of individuals residing within the United States and the ACLU intends to disseminate work product and information gleaned from this FOIA request to the public at no cost. With respect to your request, you have established that any potential commercial interest is outweighed by the public interest and that the primary interest in disclosure is the public interest.

Upon a complete review of the administrative record, your request for a fee waiver in case 2015-ICFO-99765 is granted. As ICE is granting ACLU's request for a full fee waiver, addressing ACLU's classification as a representative of the news media is not necessary.

Should you have any questions regarding this appeal adjudication, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal," your appeal numbers, which are 2016-ICAP-00031, and the FOIA case number, which is 2015-ICFO-99765.

Sincerely,

A handwritten signature in black ink, appearing to read "Debbie Seguin", with a long horizontal flourish extending to the right.

Debbie Seguin
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
U.S. Department of Homeland Security

cc: The ICE FOIA Office

EXHIBIT E

Freedom of Information Act Office

U.S. Department of Homeland Security
500 12th St SW, Stop 5009
Washington, DC 20536



U.S. Immigration
and Customs
Enforcement

December 17, 2015

MICHAEL TAN
ACLU IMMIGRANTS' RIGHTS PROJECT
125 BROAD ST, 18TH FL
NEW YORK, NY 10004

RE: ICE FOIA Case Number 2016-ICFO-01568

Mr. Tan:

This is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE) dated October 05, 2015, for records pertaining to parole decisions for non-citizens found to have a credible fear of persecution.

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

A search for records produced nine Excel workbooks and 60 pages that are responsive to your request. After a review of the documents, ICE has determined that 16 pages will be released in their entirety. Portions of the nine Excel workbooks and 44 pages will be withheld pursuant to exemptions of the FOIA as described below:

FOIA Exemption 2 protects information related solely to the internal personnel rules and practices of an agency.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are

¹ 5 U.S.C. § 552a(d)(1).

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

suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. I have determined that disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

You have the right to appeal ICE's determination and should you wish to do so, please send your appeal following the procedures outlined in the DHS regulations at 6 Code of Federal Regulations § 5.9 and a copy of this letter to:

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

Your appeal must be received within 60 days of the date of this letter. 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 the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.³

If you need to contact the FOIA office about this matter, please call (866) 633-1182 and refer to FOIA case number **2016-ICFO-01568**.

³ 6 CFR § 5.11(d)(4).

Sincerely,

A handwritten signature in blue ink that reads "Catrina Pavlik-Keenan". The signature is written in a cursive, flowing style.

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): 9 Excel workbooks and 60 page(s)

EXHIBIT F

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



February 11, 2016

FREEDOM OF INFORMATION ACT APPEAL

VIA HAND-DELIVERY

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

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS
RIGHTS PROJECT

PLEASE RESPOND TO:
CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111
4805
T/415 343 0770
F/415 395 0950

125 BROAD STREET, 18TH FL
NEW YORK, NY 10004-2400
T/212 549 2660
F/212 549 2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

Associate General Counsel (General Law)
Department of Homeland Security
FOIA Appeals
Washington, DC 20528

**RE: FOIA Appeal re Parole Decisions for Arriving Aliens Found to
Have a Credible Fear of Persecution or Torture**

**FOIA Reference Numbers: 2016-ICFO-01568 and
2016-ICFO-01574**

Dear Sir or Madam:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (a)(6)(A)(ii) and 6 C.F.R. § 5.9. This appeal is on behalf of the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law (together referred to as "Requesters"). This appeal is timely filed.

Specifically, the Requesters appeal the adequacy of the agency's searches for and responses to both request 2016-ICFO-01568 and request 2016-ICFO-01574, and the agency's assertion of Exemptions 2, 6, 7(C), and 7(E) in both requests. The Requesters ask that the agency conduct new searches for records responsive to both requests, provide information concerning data disclosed, and disclose the portions of the records withheld under each exemption.

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BACKGROUND

On October 5, 2015, Requesters submitted two requests to U.S. Immigration and Customs Enforcement ("ICE") for records pertaining to parole decisions for arriving aliens found to have a credible fear of persecution or torture. The first request, **2016-ICFO-1574**, sought the following reports created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present:

1. Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.
2. All analyses of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See id.*
3. All quality assurance reports by the Assistant Director for Operations or his or her designee. *See id.* at ¶ 8.12.

The second request, **2016-ICFO-1568**, sought internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on:

1. How the U.S. Department of Homeland Security's ("DHS") civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture.
2. How the following directive is applied in such parole decisions: "absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens . . . whose detention is . . . not in the public interest." Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").
3. The effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1.

Copies of the FOIA Requests are attached as Exhibits A and B.

The requests reasonably and specifically described the records sought, which are not otherwise publicly available. The first request, after defining the terms used, sought three subcategories of information which were

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delineated by bullet points: namely, “monthly reports,” “all analyses,” and “all quality assurance reports.” *See* Exh. B at 3-4. All these records are specifically identified in ICE Directive 11002.1 ¶¶ 8.11-8.12. Moreover, the request specifically requested records created from January 2010 to the present.

Similarly, after defining the terms used, the second request sought three subcategories of information which were enumerated 1-3. *See* Exh. A at 3-4. Each subcategory requested a broad range of types of records—namely, any “internal memoranda, guidelines, worksheets, training materials, reports or other agency communications”—on specific topics within the jurisdiction of ICE.

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On October 13, 2015, ICE acknowledged receipt of the FOIA requests and denied the requests for a fee waiver and expedited processing. On October 15 and 16, 2015, Requesters filed timely appeals of the denials of a fee waiver and expedited processing. On November 3, 2015, the FOIA office reversed its prior decisions and granted the fee waivers but determined the agency’s denials of the requests for expedited processing were proper.

On December 17, 2015, ICE provided a final response to the FOIA requests.¹ *See* Exh. C (Cover Letter). The response consisted of 9 Excel workbooks and a 60-page PDF, much of which included documents already publicly available on ICE’s website. ICE also withheld some portions of the records pursuant to FOIA exemptions (b)(2), (b)(6) and (b)(7).

On February 4, 2016, Eunice Lee, counsel for Requesters, called the ICE FOIA office and spoke to a FOIA office associate, Ms. Rebecca Seele, in an effort to clarify the contents of the Excel workbooks.² Ms. Seele was not

¹ The final response from ICE only references Case Number 2016-ICFO-01568. For the purposes of this appeal, and based on the documents provided, the Requesters assume this is the agency’s final response to Case Number 2016-ICFO-01574 as well.

² Specifically, Requesters asked: (1) whether unique identifiers could be assigned to each individual case reflected in the reports; (2) whether the spreadsheets reflect multiple parole determinations for a given individual or the most recent parole determination for an individual; (3) what the field office codes and DCO codes mean, and whether ICE could provide an index or look-up table for all the codes in the reports; (4) why there are discrepancies in the number of entries in the “Summary” versus “Cumulative” tabs in the spreadsheets; (5) why the credible fear finding column sometimes says “N/A”; (5) why certain categories of information requested were not provided; and (6) how spreadsheets were generated and who generated them.

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able to provide substantive answers to any of Requesters' questions, and suggested raising these issues in an appeal.³

The Requesters hereby appeal ICE's response and search for records as insufficient, as well as ICE's assertion of several FOIA Exemptions, in both request 2016-ICFO-01568 and request 2016-ICFO-01574. As part of this appeal, the Requesters also challenge ICE's failure to address and provide information as requested for each of the issues raised in Requesters' February 4, 2016 call with the FOIA office. Finally, we further appeal the denial of expedited processing insofar as it affects the timing of any additional search and any future production of documents as herein requested.⁴

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I. THE AGENCY'S SEARCH AND RESPONSE WERE INADEQUATE

In response to a FOIA request, an agency must "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3)(D). A record includes:

- (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including electronic format; and
- (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 552(f)(2).

The agency must conduct a search reasonably calculated to uncover all

³ Ms. Scele additionally suggested emailing the FOIA email address for clarification of some of Requesters' questions. Requesters sent an email to ICE-FOIA@dhs.gov on Tuesday, February 9, 2016. *See* Exh. D. That same day, Requesters received an automated response from ICE which did not provide clarification on our questions. *See* Exh. E.

⁴ The Requesters herein incorporate by reference our arguments on Expedited Processing in our appeal letters dated October 15, 2015 and October 16, 2015. *See* Exh. F. These letters explain that expedited processing is warranted because there is an "urgency to inform the public about an actual or alleged government activity," and the request is made by organizations "primarily engaged in disseminating information." *See* 5 U.S.C. § 552(a)(6)(E)(v)(II). We do not dispute that the request for expedited processing is moot with respect to documents that have already been produced; however, to the extent that a grant of expedited processing would affect the speed of the additional search herein demanded or the production of any additional documents, the issue is not moot.

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AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

relevant documents. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770-71 (9th Cir. 2015). The adequacy of an agency's search is measured by a "standard of reasonableness," and is "dependent on the circumstances of the case." *Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (citations omitted). In particular, courts have found that searches may be inadequate where "a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials." *Hamdan*, 797 F.3d at 771. Agency searches have been deemed inadequate based on evidence that responsive documents exist but were not produced. *See Tarullo v. U.S. Dep't of Def.*, 170 F. Supp. 2d 271, 275 (D. Conn. 2001); *Kronberg v. U.S. Dep't of Justice*, 875 F. Supp. 861, 869-71 (D.D.C. 1995). Moreover, although "[a]n agency has discretion to conduct a standard search in response to a general request," it "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999); *see also Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 109-11 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

The agency's search was inadequate in both request 2016-ICFO-01568 and request 2016-ICFO-01574. Review of the record raises substantial doubt about ICE's search and reveals the existence or likely existence of responsive documents that were not produced.

A. First Request (2016-ICFO-1574): ICE Did Not Release Records Created Pursuant to Its Own Directive

The first request (2016-ICFO-1574) sought records and information that ICE is required to create under its own directive, but that were not released in the Response. Such information should have been released as part of the Response. *Kronberg*, 875 F. Supp. at 869-71.

As set forth above, ICE Directive 11002.1 specifically requires the creation of three categories of documents (1) monthly reports by the ICE Field Office Directors on parole decisions; (2) related analyses by the Assistant Director for Operations, and (3) quality assurance reports by the Assistant Director for Operations. *See* ICE Directive 11002.1 ¶¶ 8.11, 8.12.

Requesters sought all three categories of documents created from January 2010 to the present. Although ICE did produce monthly field office reports created between January and September 2015, it produced no such reports created prior to January 2015. Nor did it produce any analyses or quality assurance reports. Thus, Requesters ask that ICE respond to its *entire*

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request and produce all relevant records created from January 2010 to the present.

B. First Request (2016-ICFO-1574): The Monthly Reports Produced are Insufficient

Furthermore, the monthly reports that ICE did produce are inadequate for several reasons. First, ICE included no index, lookup table, key, or glossary of terms. Therefore the Requesters have no way to read numerous entries on the reports.⁵ Second, the monthly reports do not provide any other unique identifier to each individual case. As a result, it is impossible to analyze the data provided. Third, there are numerous discrepancies and ambiguities in the data that prevents even the most simple data analysis. *See supra* n.2; Exh. C.

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Requesters seek supplemental information such as a lookup table or index and unique identifiers to facilitate analysis of the data produced. They also seek clarification and information on all matters raised in their February 4, 2016 phone call and February 8, 2016 email communication with the ICE FOIA office. *See supra* n.3; Exh. D. This supplemental information is well within the scope of the original request as it is necessary to interpret the monthly reports.⁶

C. Second Request (2016-ICFO-1568): ICE Did Not Produce Responsive Documents Evidenced or Referenced in its Response.

ICE's search for the policy documents requested was inadequate. In response to request 2016-ICFO-1568, ICE disclosed a 60-page PDF that included (1) a copy of ICE Directive 11002.1 (which is already publicly available online); (2) a lesson plan on noncitizens in the custody of state and local law enforcement; and (3) a lesson plan on prosecutorial discretion. *See* Exh. I.

Clearly there is "substantial"—if not more serious—doubt that ICE conducted a reasonably adequate search. *Hamdan*, 797 F.3d at 771. First,

⁵ For example, without a lookup table, Requesters cannot reliably identify the code for each ICE field office; the reports also do not explain what "DCO" refers to, or why certain entries are listed as "N/A."

⁶ For example, Requesters have received unique identifiers and look-up tables in order to facilitate statistical analysis in other FOIA requests without compromising the responsive agency's concerns regarding privacy and other issues. *See* Exh. G; Exh H.

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ICE's own monthly reports list "enforcement priority" or "recent entrant/enforcement priority" or "enforcement priority 1" as a reason for hundreds denials of parole. *See* Exh. J. This strongly suggests that there are at least some "internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications" on how the enforcement priorities are applied in parole decisions. Yet no such documents were produced.

Moreover, it is highly unlikely that ICE does not have any other responsive records, given the breadth of the ICE Directive 11002.1—which governs all ICE enforcement personnel—the fact that the Directive was issued more than four years ago, the scope of the Priorities Memo—which applies to all DHS personnel—and the scope of the FOIA Request. *See Ctr. for Nat. Sec. Studies*, 215 F. Supp. 2d at 109-11. In *Ctr. for Nat. Sec. Studies*, the plaintiffs challenged the adequacy of the Department of Justice's search for documents responsive to their request for "all policy directives and guidance issued to officials about making public statements or disclosures" about persons detained after Sept. 11, 2001 or about "sealing judicial or immigration proceedings." In response to that request, the DOJ had released only two documents: a two-page document from DOJ entitled "draft talking points" for the Attorney General; and (2) a memorandum via electronic mail from Chief Immigration Judge. The district court found that this response was inadequate on several grounds. As the court reasoned:

it is simply not credible that no other documents are responsive to Plaintiffs' request. Somehow all United States Attorneys Offices, all FBI offices, all INS offices, and all DOJ offices throughout the United States were told that matters related to those apprehended in connection with September 11, were to remain secret. How was this directive communicated? The Government never explains how widespread notification was accomplished without the use of a single document produced under FOIA.

For the foregoing reasons, the Court concludes that the Government's search of "all policy directives and guidance issued to officials about making public statements or disclosures" with respect to the detainees or about "sealing judicial or immigration proceedings" was inadequate. The Government must conduct another search.

Ctr. for Nat. Sec. Studies, 215 F.Supp.2d at 110-11.

Similarly in this case, it is highly likely there are additional "internal memoranda, guidelines, worksheets, training materials, reports, or other

February 11, 2016
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agency communications” on how the civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear. Nonetheless, ICE disclosed only 60 pages of information, much of which is publicly available on ICE’s website.

We therefore ask that ICE conduct another search for additional documentation in response to the request.

II. ICE IMPROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTIONS 2, 6, 7(C), AND 7(E)

Finally, ICE withheld portions of the records produced in response to both requests pursuant to 5 U.S.C. §§ 552(b)(2), (6), (7)(C), and (7)(E). *See* Exh. C. This is improper because ICE merely asserts, without explanation, that certain information and/or records meet the standards outlined in 5 U.S.C. §552(b). It is well-settled that FOIA’s “exemptions ‘must be narrowly construed.’” *ACLU of N. Cal. v. FBI*, No. C 12-03728 SI, 2014 WL 4629110 (N.D. Cal. Sept. 16, 2014), at *2 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989)). “The government agency bears the ultimate burden of proving that a particular document or redaction falls within one of the nine statutory exemptions to the disclosure requirement.” *Id.* at *3. Furthermore, in claiming a law enforcement exemption, the government must “establish a ‘rational nexus’ between enforcement of a federal law and the document for which an exemption is claimed.” *Church of Scientology v. U.S. Dep’t of Army*, 611 F.2d 738, 748 (9th Cir. 1980).

In particular, ICE’s assertion of Exemption 7(E) is improper. Indeed, ICE has entirely failed to establish the rational nexus between enforcement of federal law and the documents withheld required to claim Exemption 7(E). The exemption “requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law,” *ACLU*, 2014 WL 4629110, at *11, supported by specific, “non-conclusory” facts. *Feshbach v. SEC*, 5 F.Supp.2d 774, 787 (N.D. Cal. 1997). Thus, to justify the use of Exemption 7(E), ICE must cite the specific law it is enforcing and the specific unlawful activity it reasonably expects to result from release of the withheld records. In addition, ICE must show that the law enforcement rules they seek to withhold are not well known to the public. *See Rosenfeld v. U.S. Dep’t of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). However, ICE’s has completely failed to make any of these showings here.

For these reasons, Requesters ask that ICE disclose the portions of the records withheld pursuant to the FOIA Exemptions or, at a minimum, explain why its assertion of the Exemptions is proper and narrowly construed.

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Thank you for your consideration and prompt attention to this request.

Sincerely,



Michael K.T. Tan
Staff Attorney
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, New York 10004
212-519-7848
mtan@aclu.org

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION



Eunice Lee
Co-Legal Director
Center for Gender & Refugee Studies
UC Hastings College of the Law
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San Francisco, CA 94102
415-581-8836
leeunice@uchastings.edu

SF321757879.2

EXHIBIT G



U.S. Immigration and Customs Enforcement

September 21, 2016

Michael Tan, Esq.
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, New York 10004

Re: 2016-ICAP-00632, 2016-ICFO-01574

Dear Mr. Tan:

This is in response to your most recent letter, dated August 22, 2016, and received on August 23, 2016, appealing U.S. Immigration and Customs Enforcement's (ICE) response to your October 5, 2016 Freedom of Information Act/Privacy Act (FOIA/PA) request. Your October 5, 2015, FOIA/PA request to ICE asked for "reports created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present" for the following:

- "Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.
- All analysis of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.11.
- All quality assurance reports by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.12."

Although the ICE FOIA Office had not yet responded to your request, your February 11, 2016, letter appealed both the adequacy of the search undertaken pursuant to your request and also the withholdings that were applied with respect to the records that were released to you in response to a separate request.¹

¹ A review of the administrative record reflects that some of the records provided to you in ICE FOIA's response to your request 2016-ICFO-01568, dated December 17, 2015, may seem to contain records responsive to this request as well. However, your appeal of the ICE FOIA's Office's response to 2016-ICFO-01568 is being addressed a under that appeal number and separate cover.

Michael Tan, Esq.

Page 2

On March 31, 2016, ICE assigned the identification number 2016-ICAP-00405 to your appeal of the ICE FOIA Office's *perceived* response to your FOIA/PA request 2016-ICFO-01574.² After a review of the administrative record, ICE remanded your appeal to ICE FOIA for processing of the responsive records for release directly to you of any non-exempt information, and for processing and tasking to the appropriate agency/office(s) to obtain any responsive documents.

In the ICE FOIA Office's June 23, 2016, response to you, it noted that nine (9) Excel workbooks and 9 pages of records that were responsive to your request would be released to you. The 9 pages of records were released to you in their entirety, and portions of the 9 Excel workbooks were withheld pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). Your August 22, 2016, letter appeals both the adequacy of the search undertaken pursuant to your request and also the withholdings that were applied with respect to the records that were released to you. ICE is now assigning the number 2016-ICAP-00632 to your appeal of the ICE FOIA Office's *actual* response to your request 2016-ICFO-01574.

In your appeal you argue that ICE's withholdings are "improper because ICE merely asserts, without explanation, that certain information and/or records meet the standards outlined in 5 U.S.C. §552(b). It is well-settled that FOIA's 'exemptions 'must be narrowly construed.'" (citation omitted). "Furthermore, in claiming a law enforcement exemption, the government must 'establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed.'" (citation omitted).

As was explained in the ICE FOIA Office's decision letter, ICE has applied FOIA Exemptions (b)(6) and (b)(7)(C) to protect from disclosure the names of third parties contained within the record. Both Exemption (b)(6) and Exemption (b)(7)(C) require a balancing of the relevant privacy interests and public interests.

There is a particularly strong interest of individuals in not being unwarrantably associated with criminal activity and expressing a fear of removal to another country. In this case, there is a particularly strong interest in not publicizing a compilation of factors that determine whether an individual was granted parole into the United States. Individuals who had undergone a credible fear review have a strong interest in avoiding any embarrassment or retaliation that may be caused by the Government's publicly identifying them as (1) illegal aliens, (2) fearful of removal, and in some cases (3) dangers to the community or flight risks. In your request, you have not articulated a public interest sufficient to outweigh the strong privacy interest of the individuals whose names you requested.

Upon a complete review of the information withheld by ICE in the initial determination on your FOIA/PA request, the withholding of this information was proper in all respects, and the information is exempt from disclosure under the applicable provisions of 5 U.S.C. § 552 cited above. The decision of the ICE FOIA Office to withhold the names and alien numbers from the spreadsheets provided in response to your request is affirmed.

² See note 1, *supra*.

2016-ICAP-00632, 2016-ICFO-01574

Michael Tan, Esq.

Page 3

With respect to the search, after a review of the administrative record, ICE has determined that a new search or modifications to the existing search for both requests could be made. ICE is therefore remanding your appeal to ICE FOIA for processing and re-tasking to the appropriate agency/office(s) to obtain responsive documents, if any. The ICE FOIA Office will respond directly to you.

Should you have any questions regarding this appeal remand, please contact ICE at ice-foia@dhs.gov. In the subject line of the email, please include the word "appeal," your appeal number and the FOIA case number, which are **2016-ICAP-00632** and **2016-ICFO-01574** respectively.

Sincerely,

A handwritten signature in cursive script, appearing to read "Debbie Seguin".

Debbie Seguin
Chief
Government Information Law Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

cc: The ICE FOIA Office

EXHIBIT H

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th Street, SW; MS 5900
Washington, DC 20024



U.S. Immigration and Customs Enforcement

March 31, 2016

Michael Tan, Esq.
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, New York 10004

**Re: 2016-ICAP-00320, 2016-ICFO-01568
2016-ICAP-00405, 2016-ICFO-01574**

Dear Mr. Tan:

This is in response to your most recent letter, dated February 11, 2016, and received on February 12, 2016, appealing U.S. Immigration and Customs Enforcement's (ICE) response to your October 5, 2016 Freedom of Information Act/Privacy Act (FOIA/PA) request. Your October 5, 2016 FOIA/PA request to ICE asked for "records prepared, received, transmitted, collected and/or maintained by ICE" pertaining to the following:

"(1) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture:

- Priority 1: "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States"
- Priority 2: "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014"

Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").

(2) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following directive in the Priorities Memo is applied in parole decisions for noncitizens found to have a credible fear of persecution or torture: "absent

2016-ICAP-00320, 2016-ICFO-01568

2016-ICAP-00405, 2016-ICFO-01574

Michael Tan

Page 2

extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens ... whose detention is ... not in the public interest.” *Id.* at 5.

(3) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications regarding the effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).”

Additionally, your February 11, 2016 appeal referenced another request you submitted to ICE FOIA, which was given the reference number 2016-ICFO-01574. This request was also dated October 5, 2015, and requested “reports created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present” for the following:

- “Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.
- All analysis of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.11.
- All quality assurance reports by the Assistant Director for Operations or his or her designee. *See* ICE Directive 11002.1 ¶ 8.12.”

A review of the administrative record does not reflect that ICE FOIA provided you with a response to 2016-ICFO-01574, though some of the records provided to you in ICE FOIA’s response, dated December 17, 2015, seem to pertain to records you requested under 2016-ICFO-01574. To ensure ICE maintains appropriate administrative records, ICE is applying a separate appeal number to this request – 2016-ICAP-00405. Please refer to this appeal number for all future correspondence relating to 2016-ICFO-01574.

In ICE FOIA’s December 17, 2015 response to you, it noted that nine Excel workbooks and 60 pages that were responsive to your request would be released to you, with 16 pages released to you in their entirety. Portions of the nine Excel workbooks and of the remaining 44 pages were withheld pursuant to FOIA Exemptions (b)(2), (b)(6), (b)(7)(C), and (b)(7)(E). Your February 11, 2016 letter appeals both the adequacy of the search undertaken pursuant to your requests and also the withholdings that were applied with respect to the records that were released to you.

With respect to the withholdings, after a review of the administrative record, ICE has determined that information previously withheld may be releasable to you under FOIA. ICE is therefore remanding your appeal to ICE FOIA for re-processing of the responsive records for release directly to you of any non-exempt information.

EXHIBIT I



U.S. Immigration and Customs Enforcement

September 21, 2016

Michael Tan, Esq.
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, New York 10004

Re: 2016-ICAP-00320, 2016-ICFO-01568

Dear Mr. Tan:

This is in response to your most recent letter, dated August 22, 2016, and received on August 23, 2016, appealing U.S. Immigration and Customs Enforcement's (ICE) response to your October 5, 2016 Freedom of Information Act/Privacy Act (FOIA/PA) request. Your October 5, 2015, FOIA/PA request to ICE asked for "records prepared, received, transmitted, collected and/or maintained by ICE" pertaining to the following:

"(1) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture:

- Priority 1: "aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States"
- Priority 2: "aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014"

Memorandum from Jeh Johnson, Sec'y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, "Priorities Memo").

(2) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications on how the following directive in the Priorities Memo is applied in parole decisions for noncitizens found to have a credible fear of persecution or torture: "absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens ... whose detention is ... not in the public interest." *Id.* at 5.

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Michael Tan, Esq.

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(3) Any internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications regarding the effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009)."

In ICE FOIA's December 17, 2015, response to you regarding 2016-ICFO-01568, it noted that nine Excel workbooks and 60 pages that were responsive to your request would be released to you, with 16 pages released to you in their entirety. Portions of the nine Excel workbooks and of the remaining 44 pages were withheld pursuant to FOIA Exemptions (b)(2), (b)(6), (b)(7)(C), and (b)(7)(E). Your February 11, 2016, letter appealed both the adequacy of the search undertaken pursuant to your requests and also the withholdings that were applied with respect to the records that were released to you. On March 31, 2016, after a review of the administrative record, ICE determined that information previously withheld may be releasable to you under FOIA, and that a new search or modifications to the existing search for both requests could be made. ICE then remanded your appeal to ICE FOIA for re-processing of the responsive records for release directly to you of any non-exempt information, and for processing and re-tasking to the appropriate agency/office(s) to obtain any additional responsive documents.

ICE considers your letter of August 22, 2016, to be a request for a reconsideration of the appeal determination of March 31, 2016. As the ICE FOIA Office has not yet responded to you regarding this remand, the March 31, 2016, appeal determination remains in effect. This office will ask the ICE FOIA Office to effectuate the previous remand. The ICE FOIA Office will respond directly to you.

Should you have any questions regarding this appeal remand, please contact ICE at ice-foia@dhs.gov. In the subject line of the email, please include the word "appeal," your appeal number and the FOIA case number, which are **2016-ICAP-00320** and **2016-ICFO-01568** respectively.

Sincerely,

A handwritten signature in black ink, appearing to read "Debbie Seguin" followed by a stylized flourish.

Debbie Seguin
Chief
Government Information Law Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

cc: The ICE FOIA Office

2016-ICAP-00320, 2016-ICFO-01568

2016-ICAP-00405, 2016-ICFO-01574

Michael Tan

Page 3

With respect to the search, after a review of the administrative record, ICE has determined that a new search or modifications to the existing search for both requests could be made. ICE is therefore remanding your appeal to ICE FOIA for processing and re-tasking to the appropriate agency/office(s) to obtain responsive documents, if any. The ICE FOIA Office will respond directly to you.

Should you have any questions regarding this appeal remand, please contact ICE at ice-foia@dhs.gov. In the subject line of the email, please include the word "appeal," your appeal number and the FOIA case number, which are **2016-ICAP-00320, 2016-ICFO-01568** and **2016-ICAP-00405, 2016-ICFO-01574** respectively.

Sincerely,

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

Debbie Seguin
Chief
Government Information Law Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

cc: The ICE FOIA Office

EXHIBIT J

Freedom of Information Act Office

U.S. Department of Homeland Security
500 12th St SW, Stop 5009
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

June 23, 2016

Michael Tan
ACLU Immigrants' Rights Project
125 Broad St, 18th FL.
New York, NY 10004

RE: ICE FOIA Case Number 2016-ICFO-01574

Dear Mr. Tan:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated October 05, 2015. You have requested statistical data and reports pertaining to parole decisions for arriving aliens found to have a credible fear of persecution.

ICE has considered your request under the FOIA, 5 U.S.C. § 552.

A search of the ICE Office of Enforcement and Removal Operations (ERO) for records responsive to your request produced 9 pages of records and 9 Excel spreadsheets that are responsive to your request. After review of those documents, ICE has determined that 9 pages will be released in their entirety and portions of 9 Excel Spreadsheets will be withheld pursuant to Exemptions of the FOIA as described below.

ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure names and other personal information pertaining to third party individuals contained within the documents.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong

Freedom of Information Act Office

U.S. Department of Homeland Security
500 12th St SW, Stop 5009
Washington, DC 20536



**U.S. Immigration
and Customs
Enforcement**

privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, ICE has determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have the right to appeal ICE's determination and should you wish to do so, please send your appeal following the procedures outlined in the DHS regulations at 6 Code of Federal Regulations § 5.9 and a copy of this letter to:

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

Your appeal must be received within 60 days of the date of this letter. 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 the FOIA and Privacy Act allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.¹

If you need to contact the FOIA office about this matter, please call (866) 633-1182 and refer to FOIA case number 2016-ICFO-01574.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley E. White".

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): 9 pages and 9 Excel Spreadsheets.

¹ 6 CFR § 5.11(d)(4).

EXHIBIT K

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



August 22, 2016

FREEDOM OF INFORMATION ACT APPEAL

VIA HAND-DELIVERY

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

Associate General Counsel (General Law)
Department of Homeland Security
FOIA Appeals
Washington, DC 20528

**RE: FOIA Appeal re Parole Decisions for Arriving Aliens Found to
Have a Credible Fear of Persecution or Torture**

**FOIA Reference Numbers: 2016-ICFO-01568 and
2016-ICFO-01574
FOIA Appeal Number: 2016-ICAP-00405**

Dear Sir or Madam:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (a)(6)(A)(ii) and 6 C.F.R. § 5.9. This appeal is on behalf of the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law (together referred to as "Requesters"). This appeal is timely filed.

Specifically, the Requesters file their *second* appeal of the adequacy of U.S. Immigration and Customs Enforcement's ("ICE") searches for and responses to the above-referenced requests, and the agency's assertion of Exemptions 2, 6, 7(C) and 7(E).¹ ICE's second production of records in June

¹ Although Requesters made two separate requests – 2016-ICFO-01568 and 2016-ICFO-01574, ICE responded with reference to only one request number, 2016-ICFO-01574. Then, in March 2016 when Requesters first appeal was granted, ICE assigned a separate appeal number to the request – 2016-ICAP-00405. For purposes of this second appeal, we have

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PLEASE RESPOND TO:
CALIFORNIA OFFICE
39 DRUMM STREET
SAN FRANCISCO, CA 94111-
4805
T/415 343 0770
F/415 395 0950

125 BROAD STREET, 18TH FL
NEW YORK, NY 10004-2400
T/212 549 2660
F/212 549 2654
WWW.ACLU.ORG

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

2016 entirely fails to address the concerns raised in Requesters' original appeal, which ICE granted to conduct a new search for responsive records. Instead, the spreadsheets and PDF that ICE produced largely *duplicates* information in the spreadsheets ICE previously released, and contain both the *same* fields of information, as well as the *same* total number of entries. Moreover, as with the original spreadsheets, ICE withheld portions of the new spreadsheets pursuant to the FOIA exemptions without any explanation.

ICE's response is plainly inadequate and has only further delayed the processing of the FOIA Requests, which were filed more than ten months ago. The second response fails to address the substance of *any* of the issues raised by Requesters' appeal. Therefore, the Requesters once again ask that the agency conduct new searches for records responsive to both requests, provide information concerning data disclosed, and disclose the portions of the records withheld under each exemption.

BACKGROUND

On October 5, 2015, the Requesters submitted two requests to ICE for records pertaining to parole decisions for arriving aliens found to have a credible fear of persecution or torture. The first request, **2016-ICFO-1574**, sought the following reports and analyses created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present:

1. Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.
2. All analyses of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See id.*
3. All quality assurance reports by the Assistant Director for Operations or his or her designee. *See id.* at ¶ 8.12.

The second request, **2016-ICFO-1568**, sought internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications (hereinafter, "policy documents") on:

1. How the U.S. Department of Homeland Security's ("DHS") civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture.

referenced all three request numbers.

2. How the following directive is applied in such parole decisions:
“absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens . . . whose detention is . . . not in the public interest.”
Memorandum from Jeh Johnson, Sec’y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, “Priorities Memo”).
3. The effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1.

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Copies of the FOIA Requests are attached as Exhibits A and B.

The requests reasonably and specifically described the records sought, which are not otherwise publicly available. The first request, after defining the terms used, sought three subcategories of information which were delineated by bullet points: “monthly reports,” “all analyses,” and “all quality assurance reports.” *See* Exh. B at 3-4. All these records are specifically identified in ICE Directive 11002.1 ¶¶ 8.11-8.12. Moreover, the request specifically requested records created from January 2010 to the present.

Similarly, after defining the terms used, the second request sought three enumerated subcategories of information and a broad range of types of records: any “internal memoranda, guidelines, worksheets, training materials, reports or other agency communications.” *See* Exh. A at 3-4.

On October 13, 2015, ICE acknowledged receipt of the FOIA requests and denied the requests for a fee waiver and expedited processing. On October 15 and 16, 2015, the Requesters filed timely appeals of these decisions. On November 3, 2015, the FOIA office reversed and granted the fee waivers but upheld the denials of expedited processing.

On December 17, 2015, ICE provided a final response to the FOIA requests (hereinafter, “December 2015 response”). *See* Exh. C (Cover Letter). The response consisted of nine Excel workbooks and a 60-page PDF, much of which included documents already publicly available on ICE’s website. ICE also withheld portions of the records pursuant to FOIA exemptions (b)(2), (b)(6), and (b)(7).

On February 4, 2016, Eunice Lee, counsel for the Requesters, called the ICE FOIA office and spoke to a FOIA office associate, Rebecca Seele, to clarify the contents of the Excel workbooks.² Ms. Seele was unable to provide

² Specifically, Requesters asked: (1) that unique identifiers be assigned to each individual case

substantive answers to any of the Requesters' questions, and suggested raising these issues in an appeal.³

On February 11, 2016, the Requesters filed a timely appeal. *See* Exh. J. The Requesters appealed ICE's response and search for records as insufficient, as well as ICE's assertion of several FOIA Exemptions and the denial of expedited processing insofar as it affects the timing of any additional search and production of documents. On March 31, 2016, ICE granted the Requesters' appeal, stating "ICE has determined that information previously withheld may be releasable to you under FOIA" and "remanding . . . for re-processing of the responsive records for release directly to you of any non-exempt information." *See* Exhibit K. Additionally, ICE granted the Requesters' appeal with respect to the adequacy of the search stating "ICE has determined that a new search or modifications to the existing search for both requests could be made" and "remanding . . . for processing and re-tasking to the appropriate agency/office(s) to obtain responsive documents, if any." *Id.*

On June 23, 2016 ICE sent its second "final response" (hereinafter, "June 2016 response") (cover attached as Exh. L.) This response consisted of nine Excel workbooks and a nine-page PDF. This second "final" response fails to address the issues raised by Requesters' appeal. Instead, the new spreadsheets largely *duplicate* the information in the original spreadsheets and contain the *same* fields of information, as well as the *same* total number of entries.⁴ The June 2016 spreadsheets appear to differ only by differently

reflected in the reports; (2) whether the spreadsheets reflect multiple parole determinations for a unique individual or the most recent parole determination for that individual; (3) what the field office codes and DCO codes mean, and for ICE to provide an index or look-up table for all the codes in the reports; (4) why there are discrepancies in the number of entries in the "Summary" versus "Cumulative" tabs in the spreadsheets; (5) why the credible fear finding column sometimes says "N/A"; (5) why certain categories of information requested were not provided; and (6) how spreadsheets were generated and who generated them.

³ Ms. Seele additionally suggested emailing the FOIA email address for clarification of some of the Requesters' questions. The Requesters sent an email to ICE-FOIA@dhs.gov on Tuesday, February 9, 2016. *See* Exh. D. That same day, the Requesters received an automated response from ICE, which did not provide clarification on our questions. *See* Exh. E. On February 17, 2016, ICE replied with a two-sentence response stating, "Thank you for your follow-up. As the case is closed, anything you might take issue with in our response can be addressed with an administrative appeal or by filing a new request for the information you are seeking." *See* Exh. I.

⁴ Both the June 2016 production and the December 2015 production reflect 3517 cumulative entries for the latest-in-time spreadsheet (titled "2016-ICFO-01574 – SEPT 2015 Final Copy.xls" and "2016-ICFO-01568, Responsive 10.xls" respectively); and both contain the same fields, or columns, of information. *See* Exhs. H and M.

disaggregating certain information, without containing any new information.⁵ Compare Exhibits H and M. Moreover, as with the original spreadsheets, ICE withheld some portions of the June 2016 spreadsheets pursuant to FOIA exemptions (b)(6) and (b)(7) without any explanation. The PDF produced in June 2016 also contains no new information, but instead merely repeats information contained in the December 2015 spreadsheets.⁶

Once again, the Requesters appeal ICE's second final response and search for records as insufficient and ICE's assertion of several FOIA Exemptions. The Requesters also challenge ICE's failure to address and provide information as requested in the Requesters' February 4, 2016 call with the FOIA office. Finally, the Requesters again appeal the denial of expedited processing insofar as it affects the timing of any additional search and any future production of documents.⁷

I. THE AGENCY'S SEARCH AND RESPONSE WERE INADEQUATE

An agency must "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a [FOIA] request." 5 U.S.C. § 552(a)(3)(D). A record includes:

- (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including electronic format; and
- (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 552(f)(2).

⁵ Specifically, the June 2016 spreadsheets contain additional spreadsheet "tabs" that disaggregate information by field office. However, this does not constitute new information as the December 2015 spreadsheets already contained entries for "field office" in Column B of its "Cumulative" tab. See Exh. H.

⁶ Specifically, the PDF document reflects information on credible fear parole determinations that is contained in the "Percentage Totals" tab of the December 2015 spreadsheets.

⁷ The Requesters herein incorporate by reference our arguments on Expedited Processing in our appeal letters dated October 15, 2015 and October 16, 2015. See Exh. F (explaining that expedited processing is warranted because there is an "urgency to inform the public about an actual or alleged government activity," and the request is made by organizations "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II)).

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The agency must conduct a search reasonably calculated to uncover all relevant documents. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770-71 (9th Cir. 2015). The adequacy of an agency's search is measured by a "standard of reasonableness," and is "depends, not surprisingly, upon the facts of each case." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (citations omitted). In particular, courts have found that searches may be inadequate where "a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials." *Hamdan*, 797 F.3d at 771. Agency searches have been deemed inadequate based on evidence that responsive documents exist but were not produced. *See, e.g., Tarullo v. U.S. Dep't of Def.*, 170 F. Supp. 2d 271, 275 (D. Conn. 2001); *Kronberg v. U.S. Dep't of Justice*, 875 F. Supp. 861, 869-71 (D.D.C. 1995). Moreover, although "[a]n agency has discretion to conduct a standard search in response to a general request," it "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999); *see also Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 109-11 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

The agency's search was inadequate in both request 2016-ICFO-01568 and request 2016-ICFO-01574. Review of the record raises substantial doubt about ICE's search and reveals the existence or likely existence of responsive documents that were not produced.

A. First Request (2016-ICFO-1574): ICE Did Not Release Records Created Pursuant to Its Own Directive

The first request (2016-ICFO-1574) sought records and information that ICE is required to create under its own parole directive, but that were not released in either Response. Such information should have been released. *Kronberg*, 875 F. Supp. at 869-71.

As set forth above, ICE Directive 11002.1 specifically requires the creation of three categories of documents (1) monthly reports by the ICE Field Office Directors on parole decisions; (2) related analyses by the Assistant Director for Operations, and (3) quality assurance reports by the Assistant Director for Operations. *See* ICE Directive 11002.1 ¶¶ 8.11, 8.12.

The Requesters sought all three categories of documents created from January 2010 to the present. Although ICE has produced monthly field office reports created between January and September 2015, it has yet to produce any reports created prior to January 2015. Nor has it produced any analyses or quality assurance reports. Although the Requesters' first appeal specifically

challenged these failures, ICE's June 2016 production did not address them. Thus, the Requesters again ask that ICE respond to its *entire* request and produce all relevant records created from January 2010 to the present.

B. First Request (2016-ICFO-1574): The Monthly Reports Produced are Insufficient

Furthermore, the monthly reports that ICE released in both productions are inadequate for several reasons. First, ICE included no index, lookup table, key, or glossary of terms. Therefore, the Requesters have no way to read numerous entries on the reports.⁸ Second, the monthly reports do not provide any other unique identifier to each individual case. As a result, it is impossible to analyze the data provided. Third, there are numerous discrepancies and ambiguities in the data that prevents even the simplest data analysis. *See supra* n.2 & 3; Exhs. H and M. Each of these issues was raised in the Requesters' original appeal, but ICE failed to address any of these deficiencies in its second production. This supplemental information is well within the scope of the original request as it is necessary to interpret the monthly reports.⁹

C. Second Request (2016-ICFO-1568): ICE Did Not Produce Responsive Documents Evidenced or Referenced in its Response.

ICE's search for policy documents was inadequate. In its first response, ICE disclosed a 60-page PDF that included (1) a copy of ICE Directive 11002.1 (which is already publicly available online); (2) a lesson plan on noncitizens in the custody of state and local law enforcement; and (3) a lesson plan on prosecutorial discretion. *See* Exh. G. In ICE's second response, ICE produced *no* additional information relating to the request for policy documents.

Clearly there is "substantial"—if not more serious—doubt that ICE conducted a reasonably adequate search. *Hamdan*, 797 F.3d at 771. First, ICE's own monthly reports list "enforcement priority" or "recent entrant/enforcement priority" or "enforcement priority 1" as a reason for hundreds denials of parole. *See* Exh. H. This strongly suggests that there are at

⁸ For example, without a lookup table, Requesters cannot reliably identify the code for each ICE field office; the reports also do not explain what "DCO" refers to, or why certain entries are listed as "N/A."

⁹ For example, Requesters have received unique identifiers and look-up tables in order to facilitate statistical analysis in other FOIA requests without compromising the responsive agency's concerns regarding privacy and other issues.

least some “internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications” on how the enforcement priorities are applied in parole decisions. Yet no such documents were produced.

Moreover, it is highly unlikely that ICE does not have any other responsive records, given the breadth of the ICE Directive 11002.1—which governs all ICE enforcement personnel—the fact that the Directive was issued more than six years ago, the scope of the Priorities Memo—which applies to all DHS personnel—and the scope of the FOIA Request. In *Ctr. for Nat. Sec. Studies*, the plaintiffs challenged the adequacy of the Department of Justice’s search for documents responsive to their request for “all policy directives and guidance issued to officials about making public statements or disclosures” about persons detained after Sept. 11, 2001 or about “sealing judicial or immigration proceedings.” In response to that request, the DOJ had released only two documents: a two-page document from DOJ entitled “draft talking points” for the Attorney General; and (2) a memorandum via electronic mail from the Chief Immigration Judge. The district court found that this response was inadequate on several grounds. As the court reasoned:

it is simply not credible that no other documents are responsive to Plaintiffs’ request. Somehow all United States Attorneys Offices, all FBI offices, all INS offices, and all DOJ offices throughout the United States were told that matters related to those apprehended in connection with September 11, were to remain secret. How was this directive communicated? The Government never explains how widespread notification was accomplished without the use of a single document produced under FOIA.

For the foregoing reasons, the Court concludes that the Government’s search of “all policy directives and guidance issued to officials about making public statements or disclosures” with respect to the detainees or about “sealing judicial or immigration proceedings” was inadequate. The Government must conduct another search.

Ctr. for Nat. Sec. Studies, 215 F. Supp. 2d at 110-11.

Similarly in this case, it is highly likely there are additional “internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications” on how the civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear. Nonetheless, ICE disclosed only 60 pages of information, much of which is publicly available on ICE’s website.

We therefore ask that ICE conduct another search for additional documentation in response to the request.

II. ICE IMPROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTIONS 2, 6, 7(C) AND 7(E)

Finally, ICE withheld portions of the records produced in response to both requests pursuant to 5 U.S.C. §§ 552(b)(2), (6), (7)(C) and (7)(E). The spreadsheets produced in ICE's first and second responses are marked with Exemptions (6) and (7)(C), and the December 2015 PDF document is marked with Exemptions (2), (6), (7)(C) and (7)(E). *See* Exhs. G and H. As noted in the Requesters' original appeal, this is improper because ICE merely asserts, without explanation, that certain information and/or records meet the standards outlined in 5 U.S.C. §552(b). It is well-settled that FOIA's "exemptions 'must be narrowly construed.'" *ACLU of N. Cal. v. FBI*, No. C 12-03728 SI, 2014 WL 4629110 (N.D. Cal. Sept. 16, 2014), at *2 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989)). "The government agency bears the ultimate burden of proving that a particular document or redaction falls within one of the nine statutory exemptions to the disclosure requirement." *Id.* at *3. Furthermore, in claiming a law enforcement exemption, the government must "establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed." *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1980).

For these reasons, Requesters once again ask that ICE disclose the portions of the records withheld pursuant to the FOIA Exemptions or, at a minimum, explain why its assertion of the Exemptions is proper.

Thank you for your consideration and prompt attention to this request.

Sincerely,



Michael K.T. Tan
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CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

American Civil Liberties Union Immigrants' Rights Project & Center for Gender & Refugee Studies at the University of California Hastings College of the Law

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Riley Safer Holmes & Cancila, 111 New Montgomery Street, Suite 600 San Francisco, CA 94105, (415) 275-8550; American Civil Liberties Union Foundation of Northern California, 39 Drumm Street, San Francisco, CA 94111, (415) 621-2493; American Civil Liberties Union Immigrants' Rights Project, 125 Broad Street, 18th Floor, New York, NY 10004, (347) 714-0740; Center for Gender & Refugee Studies at the University of California Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102, (415) 581-4877

DEFENDANTS

U.S. Immigration and Customs Enforcement, an agency of the Department of Homeland Security

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question (U.S. Government Not a Party)
☒ 2 U.S. Government Defendant
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF |
|---|----------------------------|--|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 Incorporated or Principal Place of Business In This State |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 Incorporated and Principal Place of Business In Another State |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 Foreign Nation |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment Of Veteran's Benefits <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC § 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC § 158 <input type="checkbox"/> 423 Withdrawal 28 USC § 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC § 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC § 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input checked="" type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities-Employment <input type="checkbox"/> 446 Amer. w/Disabilities-Other <input type="checkbox"/> 448 Education PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee-Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation-Transfer ☐ 8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
5 U.S.C. section 552

Brief description of cause:

Plaintiffs seek to enforce the public's right to information regarding the federal government's detention of thousands of asylum seekers who recently arrived in the United States, despite an existing agency directive providing for their release in most cases.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA-MCKINLEYVILLE

DATE: 09/22/2016

SIGNATURE OF ATTORNEY OF RECORD: /s/ Mishan R. Wroe

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
 - b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
 - c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket.
- Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23.
- Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
- Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”

Date and Attorney Signature. Date and sign the civil cover sheet.