



GUARDIAN
THE SAN FRANCISCO BAY GUARDIAN

September 8, 2011

Via Certified Mail, Return Receipt Requested

U.S. Immigration and Customs Enforcement

Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

Nikki Gramian, OIG Office of Counsel

U.S. Dept of Homeland Security, Office of the Inspector General, FOIA Public Liaison
Murray Drive, Bldg. 410
Mail Stop - 2600
Washington, D.C. 20528-0001

FOIA/PA

The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive SW
STOP-0655
Washington, D.C. 20528-0655

RE: Freedom of Information Act Request Regarding Workplace Immigration
Enforcement Audits in the State of California
Expedited Processing Requested

Dear FOIA Officer:

The American Civil Liberties Union of California ("ACLU"), the Glass, Molders,
Pottery, Plastics & Allied Workers International Union, The Glass, Molders, Pottery, Plastics &

Allied Workers International Union Local 164B, the Service Employees International Union United Service Workers West ("USWW"), (hereinafter collectively "Unions"), and the San Francisco Bay Guardian submit this request for information under the Freedom of Information Act ("FOIA") pursuant to 5 U.S.C. § 552 et seq.

In this request we seek records pertaining to workplace immigration enforcement operations, including workplace audits of employer I-9 records and employment practices conducted by the Department of Homeland Security. We are requesting this information from the Department of Homeland Security ("DHS"), the Office of Inspector General ("OIG"), the U.S. Immigration and Customs Enforcement ("ICE") and Homeland Security Investigations ("HSI").

Factual Background and Media Attention

Earlier this year, ICE announced that it would audit a record number of employers. *See e.g.,* Miriam Jordan, *Crackdown on Illegal Workers*, Washington Post, (Jan. 20, 2011) (Appendix A, Tab 1.); Miriam Jordan, *Feds Target Illegal Hires, Expanded Government Audits Force About 1,000 Firms to Verify Workers' Status*, Washington Post (Feb. 17, 2011) (Appendix A, Tab 2.) In June ICE announced another round of audits to be conducted of another 1,000 employers. *See e.g.,* Jennifer, Epstein, *New ICE Audit Target 1,000 Firms*, (June 16, 2011) (Appendix A, Tab 5.) While DHS policy on worksite enforcement is to target those employers who violate labor and employment laws and thus exploit a vulnerable unauthorized workforce, it appears that many of the targets of these workplace enforcement actions by DHS are not the unscrupulous or bad apple employers. To the contrary, worksites that have been targeted include employers that are trying to do the right thing such as abiding by industry standards and complying with state and federal employment laws. In many cases, targeted employers have been parties to existing collective bargaining agreements with labor unions where workers are paid a living wage and have further protected workplace rights. These audits have a detrimental impact on local businesses, the economy, and workers in the U.S.

Immigration enforcement audits have attracted significant public interest. Several media outlets have documented the record number of audits conducted by DHS and the detrimental impact that the audits have on the community, business, the economy, workers and workers' families. *See e.g.,* Miriam Jordan, *Immigration Audit Takes Toll, Janitorial Firm Harvard Maintenance to Lose Over Half of Minnesota Work Force*, The Wall Street Journal (Mar. 15, 2011) (Appendix A, Tab 4.); Steve Alexander, *Chipotle Fires Hundreds, Draws Protests*, Star Tribune, (Jan. 20, 2011), (Appendix A, Tab 6.); Philip Caulfield, *Chipotle under fire for hiring illegal immigrants; chain fires hundreds after customs crackdown*, NY Daily News (Feb. 8, 2011) (Appendix A, Tab 3.); Miriam Jordan, *'Silent Raids' Squeeze Illegal Workers*, The Wall Street Journal, (Mar. 29, 2011) (Appendix A, Tab 8.); Lisa Baertlein, *Chipotle Workers Quit Ahead of Immigration Audits*, Reuters, (Mar. 8, 2011) (Appendix A, Tab 9.); Ayesha Khan, *Pacific Steel to undergo employment eligibility audits*, The Daily Californian, (June 17, 2011) (Appendix A, Tab 11.); R. M. Arrieta, *'Silent Raids': ICE's New Tactic Quietly Wreaks Havoc on Immigrant Workers*, (Jan. 27, 2011) (Appendix A, Tab 13.), Lornet Turnbull, *Illegal workers quietly let go*, The Seattle Times, (Nov. 23, 2009) (Appendix A, Tab 14.)

Community members, local government officials, civil rights organizations, non-governmental organizations, and labor unions have reported the detrimental impact that immigration enforcement audits of employers are having on workers and communities.¹ Indeed, the audit of a national steel foundry in Berkeley, California resulted in the Berkeley City County passing a resolution in opposition to these government sponsored audits.² See e.g., Tiffany Chiao, *Berkeley City Council Opposes Federal Audit of Pacific Steel*, The Daily Californian, (July 5, 2011, updated July 6, 2011) (Appendix A, Tab 10.) Local communities have participated in protests and demonstrations in opposition of these government audits. Steve Alexander, *Chipotle Fires Hundreds, Draws Protests*, Star Tribune, (Jan. 20, 2011) (Appendix A, Tab 6.) The Oakland City Council passed a similar ordinance. See e.g., *Five to Watch at Oakland Council Meeting – Tonight July 5*, Oakland Local, (July 5, 2011) (Appendix A, Tab 12.)

Further, the manner and scope in which DHS conducts employer audits are not transparent. Often, workers and labor unions are unable to obtain the necessary information from the employer targets of the audits, notwithstanding the employer's obligations under federal labor law to bargain with the union over immigration issues and over the timing, impact and process of I-9 audits and reverification of union members' employment authorization. *Washington Beef, Inc.*, 328 NLRB 612 (1999) (employer violated Section 8(a)(5) by refusing to bargain over time period for workers to provide new documents); *Nortech Waste and Operating Engineers Local Union No 3*, 336 NLRB 554, 569-570 (2001) (an employer must bargain with the union regarding treatment of employees with alleged immigration issues). Due to employer fear of sanctions resulting from these audits, many employers fail to abide by their bargaining and contractual obligations under the National Labor Relations Act, leaving labor unions no choice but to file unfair labor practice charges with the National Labor Relations Board. Media reports include the suggestion that worksite enforcement efforts are targeted at unionized workplaces. David Bacon, *Fighting the Firings*, In These Times (August 23, 2011) (Appendix A, Tab 15) ("In reality, the DHS workplace enforcement wave is focusing not on low-wage employers, but on high-wage, and often unionized ones").

We also know that unscrupulous employers may find ways to use the issue of workers' immigration status to chill workers' efforts to organize, protest sub-standard working conditions, enforce violations of wage, safety and discrimination laws, and exercise collective bargaining rights. Add to this the threat of, or actual, workplace enforcement actions by the federal immigration authorities, and we have a recipe for disaster with respect to protecting the rights of workers in the United States.³

¹ See *Deeper Into the Shadows, The Unintended Consequences of Immigration Worksite Enforcement*, American Immigration Council, (Feb. 9, 2011) available at <http://immigrationpolicy.org/special-reports/deeper-shadows>.

² Berkeley City Council Resolution, on file with requestors and available at http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_-_City_Council/2011/06Jun/2011-06-28_Item_41_Urging_the_U.S._Department_of_Homeland_Security.pdf.

³ See Rebecca Smith, Ana Avendaño, et al., *ICED OUT: How Immigration Enforcement Has Interfered With Workers' Rights* (2009).

Given this background, it is imperative that the public gain a better understanding of the method and scope of the DHS audits that are being conducted, including obtaining information as to how certain employers are targeted and what criteria is considered by DHS when it decides to commence an immigration workplace enforcement action on a particular employer.

FOIA Request

Requestors seek disclosure of records concerning immigration enforcement audits of I-9 records conducted beginning January 1, 2009 through the present for worksites in the State of California. Please provide all records⁴ in your⁵ possession that fall within the following categories:

- 1) Notices of Inspection issued to employers.
- 2) Any and all other documents or notices issued to employers announcing an audit of I-9 records or other worksite enforcement action.
- 3) Any and all correspondence, memoranda, policies, procedures, directives, guidance, protocols, legal analysis, communications, training materials, notes, and other documents pertaining to:
 - a. Pre-investigation, pre-operation, worksite enforcement operation plans, and pre-operation briefings pertaining to Notices of Inspection.
 - b. Written materials setting forth reasoning or authority or evidence relied upon to initiate and conduct I-9 audits or worksite enforcement action.
 - c. Criteria, factors, facts, circumstances, triggers, or other things or events that influence agency decisions to consider or implement I-9 audits or other worksite enforcement action.
 - d. Results of the I-9 audits or worksite enforcement actions, including but not limited to Notices of Suspect Documents, Notices of Unauthorized Aliens, Notices of Intent to Fine.
 - e. Subpoenas issued against employers for I-9 or other work authorization records.
 - f. Criminal Warrants issued against employers.
 - g. Administrative Compliance Agreements entered into with employers.
 - h. Employer requests for extensions of time during an I-9 audit or worksite enforcement action.

⁴ The term "records" as used herein includes but is not limited to all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, faxes, files, e-mails, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

⁵ Requestors seek records in the possession or control of DHS, ICE, OIG, and HSI including any field offices of those agencies with jurisdiction over worksite immigration enforcement actions in California.

- i. Employer requests for extensions of time during an I-9 audit or worksite enforcement action in order to satisfy bargaining obligations under federal labor law.
- 4) Aggregate data regarding employees impacted by I-9 audits and other worksite enforcement actions by worksite and in total, as follows:
- a. Number of employees identified as lacking employment authorization through I-9 audits and other worksite enforcement actions;
 - b. Number of employees identified as lacking employment authorization through I-9 audits and other worksite enforcement actions disaggregated by individual worksite;
 - c. Number of employees identified through I-9 audits and other worksite enforcement actions for whom warrants were issued;
 - d. Number of employees identified through I-9 audits and other worksite enforcement actions for whom warrants were issued disaggregated by individual worksite;
 - e. Number of employees arrested during worksite enforcement actions;
 - f. Number of employees arrested during worksite enforcement actions, disaggregated by individual worksite;
 - g. Number of employees identified through I-9 audits and other worksite enforcement actions who were arrested by ICE away from work;
 - h. Number of employees identified through I-9 audits and other worksite enforcement actions who were arrested by ICE away from work disaggregated by individual worksite;
 - i. Number of employees identified through I-9 audits and other worksite enforcement actions to whom ICE issued Notices to Appear;
 - j. Number of employees identified through I-9 audits and other worksite enforcement actions to whom ICE issued Notices to Appear disaggregated by worksite;
 - k. Number of employees identified through I-9 audits and other worksite enforcement actions who took voluntary departure prior to issuance of an NTA; and
 - l. Number of employees identified through I-9 audits and other worksite enforcement actions who took voluntary departure prior to issuance of an NTA disaggregated by worksite.

Request for Expedited Processing, Waiver of Processing Fees and Duplication Costs

We request a waiver of document search, review, and duplication fees on the grounds that disclosure of the requested records is in the public interest because disclosure 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 requester." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k).

The records sought here will significantly contribute to public understanding of the federal government's policies and practices in conducting I-9 audits as well as how employers are selected and targeted for such audits. Release of the records requested will shed much-needed light on these practices.

The Requestors plan to disseminate widely to the public records disclosed as a result of this FOIA request. The ACLU of Northern California ("ACLU-NC") is one of the ACLU of California offices participating in this request. The ACLU-NC's communications department is a division of a nonprofit 501(c)(3) organization, and both the ACLU-NC's communications department and the Guardian are "representative[s] of the news media." They are well situated to disseminate information gained through this request to the public, to affected communities, to organizations that protect immigrants' rights, and to political and labor organizations. Requestor ACLU-NC routinely obtains information about government activity (including through FOIA), analyzes that information, and widely publishes and disseminates that information to the press and to the public in a variety of ways including the following:

The ACLU-NC's communications department publishes newsletters, news briefings, right-to-know documents, and other materials that are disseminated to the public. Its material is widely available to everyone, including tax-exempt organizations, not-for-profit groups, law students and faculty, for no cost or for a nominal fee. The ACLU-NC's communications department also disseminates information through the website, <http://www.aclunc.org>, which had 142,000 visitors who viewed 472,000 pages in 2009. This website addresses civil liberties issues in depth and provides features on civil liberties issues on which the ACLU-NC is focused. ACLU-NC staff persons are frequent spokespersons in television and print media and make frequent public presentations at meetings and events. Finally, the ACLU-NC's communications department disseminates information through a newsletter, which is distributed to subscribers by mail. Due to these extensive publication activities, the ACLU-NC is a "representative of the news media" under the FOIA and agency regulations.

The Guardian is the largest circulation newsweekly in northern California, with audited weekly distribution of 95,000 copies. The paper is locally owned, independent, and has been continuously published since 1966. The paper covers breaking news, does detailed investigative reporting, publishes editorials and covers arts, entertainment, and lifestyle issues. The Guardian has received more than 100 state, local and national awards for journalistic excellence. The Guardian is a member of the California Newspaper Publishers Association and the Association of Alternative Newsweeklies.

Disclosure of the requested records is not in the Requestors' commercial interest. The records requested are not sought for commercial use and the ACLU, the Unions, and the Guardian plan to disseminate the information disclosed as a result of this FOIA request to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters'") (citation omitted).

News Media Status Fee Limitation Request

We also request a waiver of document reproduction fees on the grounds that the Requestors qualify as “representatives of the news media” and the records are not sought for commercial use. 6 C.F.R. § 5.11(d). The Guardian is a newsweekly. The ACLU-NC also meets the statutory and regulatory definitions of a “representative of the news media” because it is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); see also *Nat’l Sec. Archive v. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989) (finding that an organization that “gathers information from a variety of sources,” exercises editorial discretion in selecting and organizing documents, “devises indices and finding aids,” and “distributes the resulting work to the public” is a “representative of the news media” for purposes of the FOIA); cf. *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be “primarily engaged in disseminating information”).

Notably, courts have found other organizations whose missions, functions, publishing, and public education activities are similar in kind to the ACLU’s to be “representatives of the news media.” See, e.g., *Elec. Privacy Info. Ctr. v. Dep’t of Defense*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for purposes of FOIA); *Nat’l Security Archive*, 880 F.2d at 1387; *Judicial Watch, Inc. v. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester).

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If this request is denied in whole or in part, we ask that you justify all withholdings by reference to specific exemptions to the FOIA. We expect the release of all segregable portions of otherwise exempt material. If the fee waivers are denied, the requesters are prepared to pay fees up to \$25, and request to be informed of further fees that may be charged, but reserve the right to appeal a denial of fee waivers.

Thank you in advance for your timely consideration of this request. Please furnish all applicable records to Julia Harumi Mass, American Civil Liberties Union of Northern California, 39 Drumm Street, San Francisco, California 94111, telephone (415) 621-2493, and Monica Guizar, Weinberg, Roger & Rosenfeld, 3435 Wilshire Blvd. Ste. 620, Los Angeles, CA 90010, (213) 380-2344. By their signatures below, the undersigned requestors certify that the above statement is true and correct to the best of their knowledge and belief.

Sincerely,



Julia Harumi Mass, Esq.
American Civil Liberties Union
of California



Monica Guizar, Esq.
Conchita Lozano-Batista, Esq.
Weinberg, Roger & Rosenfeld



Tim Redmond
Executive Editor, *San Francisco Bay Guardian*

APPENDIX A

TAB	CITATION
1.	Miriam Jordan, <i>Crackdown on Illegal Workers</i> , Washington Post, (Jan. 20, 2011), available at http://online.wsj.com/article_email/SB10001424052748703951704576092381196958362-1MyQjAxMTAxMDIwMDEyNDAYWj.html
2.	Miriam Jordan, <i>Feds Target Illegal Hires, Expanded Government Audits Force About 1,000 Firms to Verify Workers' Status</i> , Washington Post (Feb. 17, 2011) available at http://online.wsj.com/article/SB10001424052748703961104576148590023309196.html .
3.	Philip Caulfield, <i>Chipotle under fire for hiring illegal immigrants; chain fires hundreds after customs crackdown</i> , NY Daily News (Feb. 8, 2011), available at http://www.nydailynews.com/news/national/2011/02/08/2011-02-08_chipotle_under_fire_for_hiring_illegal_immigrants_chain_fires_hundreds_after_cus.html
4.	Miriam Jordan, <i>Immigration Audit Takes Toll, Janitorial Firm Harvard Maintenance to Lose Over Half of Minnesota Work Force</i> , The Wall Street Journal (March 15, 2011) available at http://online.wsj.com/article/SB10001424052748703363904576201192988972556.html?mod=WSJ_WSJ_US_News_5 .
5.	Jennifer, Epstein, <i>New ICE Audit Target 1,000 Firms</i> , Politico (June 16, 2011), available at http://www.politico.com/news/stories/0611/57108.html
6.	Steve Alexander, <i>Chipotle Fires Hundreds, Draws Protests</i> , Star Tribune, (Jan. 20, 2011) available at http://www.startribune.com/business/114310024.html
7.	Miriam Jordan, <i>More 'Silent Raids' Over Immigration</i> , The Wall Street Journal (June 16, 2011) available at http://online.wsj.com/article/SB10001424052702304186404576387843087137216.html?KEYWORDS=Silent+Raids+Squeeze
8.	Miriam Jordan, <i>'Silent Raids' Squeeze Illegal Workers</i> , The Wall Street Journal (Mar. 29, 2011) available at http://online.wsj.com/article/SB10001424052748704355304576214443126694256.html
9.	Lisa Baertlein, <i>Chipotle Workers Quit Ahead of Immigration Audits</i> , Reuters (Mar. 8, 2011) available at http://www.reuters.com/article/2011/03/08/us-chipotle-idUSTRE72752P20110308
10.	Tiffany Chiao, <i>Berkeley City Council Opposes Federal Audit of Pacific Steel</i> , The Daily Californian, (July 5, 2011, updated July 6, 2011) available at http://www.dailycal.org/2011/07/05/berkeley-city-council-opposes-pacific-steel-audits/

TAB	CITATION
11.	Ayesha Khan, <i>Pacific Steel to undergo employment eligibility audits</i> , The Daily Californian (June 17, 2011) available at http://www.dailycal.org/2011/06/17/pacific-steel-to-undergo-employment-eligibility-audits/
12.	<i>Five to Watch at Oakland Council Meeting – Tonight July 5</i> , Oakland Local (July 5, 2011), available at http://oaklandlocal.com/article/five-watch-oakland-council-meeting-tonight-july-5
13.	R. M. Arrieta, <i>'Silent Raids': ICE's New Tactic Quietly Wreaks Havoc on Immigrant Workers</i> , In These Times (Jan. 27, 2011), available at http://www.inthesetimes.com/working/entry/6895/silent_raids/
14.	Lornet Turnbull, <i>Illegal workers quietly let go</i> , The Seattle Times (Nov. 23, 2009) available at http://seattletimes.nwsourc.com/html/localnews/2010333876_firedjanitors23m.html
15.	David Bacon, <i>Fighting the Firings</i> , In These Times (Aug. 23, 2011) available at http://inthesetimes.com/article/11857/fighting_the_firings

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