

EXHIBIT 13

December 7, 2020

U.S. Customs and Border Protection
FOIA Appeals, Policy and Litigation Branch
90 K Street
NE, Washington, D.C. 20229

Re: Freedom of Information Act Appeal, CBP-2021-005336

Dear FOIA Officer:

This is an appeal under the federal Freedom of Information Act, 5 U.S.C. § 552.

On October 21, 2020, the Harvard Immigration and Refugee Clinical Program (“HIRC”) submitted a FOIA request to U.S. Customs and Border Protection (“CBP”) for certain records pertaining to the implementation of the Nationwide Policy and National Qualified Representative Program (“NQRP”). *See* Attachment 1.

On November 4, 2020, HIRC received an acknowledgement receipt of our FOIA request, which extended CBP’s time period to respond by additional 10 working days. On November 4, 2020, CBP also denied our request for the expedited treatment of our FOIA request and our request for a fee waiver. On December 3, 2020, CBP responded to the request by stating that “[w]e conducted a comprehensive search of files within the CBP databases for records that would be responsive to your request. Unfortunately, we were unable to locate or identify any responsive records, based upon the information you provided in your request.” Attachment 2 at 1.

CBP’s response was insufficient to demonstrate that it had conducted an adequate search in response to HIRC’s FOIA request. For example, CBP failed to explain what components of CBP were searched or what CBP databases were searched. *See, e.g., Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (“[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested.”); *id.* (holding that agency “was required to explain ... that no other record system was likely to produce responsive documents”). For these reasons, CBP failed to conduct an adequate search, 5 U.S.C. § 552(a)(3)(A), and its response was insufficient to meet the “reasonable effort” requirement in 5 U.S.C. § 552(a)(3)(B)–(C).

In addition, HIRC appeals CBP’s denial of our request for expedited treatment. Where, as here, a requestor can show “exceptional need or urgency,” that request should be processed on an expedited basis.¹ As this request is being processed, many unrepresented ICE detainees with serious mental disorders have not been afforded the procedural protections that should be provided to them by the Nationwide Policy and NQRP. As a result, these vulnerable unrepresented detainees

¹ *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

have been and will continue to be detained without due process and be placed into unfair immigration proceedings without necessary legal representation. *See* Attachment 1 at 10.

Further, because the primary purpose of this FOIA request is to obtain information to further the public's understanding of federal immigration policies and practices, and is not for any private commercial interest, HIRC also appeals CBP's denial of our fee waiver request. 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution); 6 C.F.R. § 5.11(d). *See* Attachment 1 at 10-11.

For the reasons set forth above, CBP's response to HIRC's FOIA request was improper. We respectfully request that CBP conduct an adequate search for responsive records and produce all non-exempt portions of those records as soon as possible. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), HIRC expects a response within the twenty (20) day statutory time limit. If you have any questions in processing this appeal, I can be contacted by e-mail at sahmed@law.harvard.edu, telephone at (617) 384-0088, or by mail at: Sameer Ahmed, Harvard Immigration and Refugee Clinical Program, 6 Everett St., Cambridge, MA 02138.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Ahmed'.

Sameer Ahmed, Esq.

Harvard Immigration and Refugee Clinical Program

ATTACHMENT 1

**HARVARD LAW SCHOOL
CAMBRIDGE · MASSACHUSETTS · 02138**

HARVARD IMMIGRATION AND REFUGEE CLINIC
Harvard Law School

Location: 6 Everett St.
E-mail Address: hirc@law.harvard.edu
Phone: 617-384-0088

October 21, 2020

SENT VIA EMAIL

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12 Street, S.W., Stop 5009
Washington, DC 20536-5009
ICE-FOIA@dhs.gov

FOIA Officer
U.S. Customs and Border Protection
90 K Street, NE
FOIA Division
Washington, DC 20229
Phone: 202-325-0150

Chief Privacy Officer/Chief FOIA Officer
The Privacy Office
U.S. Department of Homeland Security
245 Murray Lane SW STOP-0655
Washington, D.C. 20528-0655
foia@hq.dhs.gov

To Whom It May Concern:

This is a request for records made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., and the relevant implementing agency regulations. The Request is submitted by the Harvard Immigration and Refugee Clinical Program (“HIRC”), Clinical Professor of Law Sabi Ardalan, and Clinical Instructor Sameer Ahmed (“Requestors”). Requestors seek the disclosure of records related to the implementation of the Nationwide Policy and National Qualified Representative Program (“NQRP”) by the U.S. Department of Homeland Security (“DHS”), the U.S. Immigration and Customs Enforcement (“ICE”), and the U.S. Customs and Border Protection (“CBP”) to provide enhanced procedural protections to certain unrepresented and detained individuals in removal proceedings with serious mental disorders or

conditions that may render them incompetent to represent themselves in immigration proceedings.¹

Background

In April 2013, DHS and ICE collaborated with the U.S. Department of Justice (“DOJ”) and the Executive Office for Immigration Review (“EOIR”) to create the Nationwide Policy, which provides “enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”² At the same time, and as part of the Nationwide Policy’s enhanced procedural protections, EOIR also implemented the NQRP, “a nationwide program to provide Qualified Representatives (“QRs”) to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA [(Board of Immigration Appeals)] to be mentally incompetent to represent themselves in immigration proceedings.”³

According to a joint press release issued by the DOJ and DHS in April 2013, the Nationwide Policy and NQRP require Immigration Judges to “convene a competency hearing to determine whether the detainee is competent to represent himself or herself in immigration proceedings. When an Immigration Judge is unable to make a determination of mental competency based upon evidence already presented, the Immigration Judge will be authorized to order an independent examination and psychiatric or psychological report. The competency examinations will be administered through a program run by the DOJ Executive Office for Immigration Review (EOIR) and performed by an independent medical professional.”⁴ For unrepresented detainees who are deemed mentally incompetent, “EOIR will make available a qualified representative.”⁵ Furthermore, “detainees who were identified as having a serious mental disorder or condition that may render them mentally incompetent to represent themselves and who have been held in immigration detention for at least six months will also be afforded a bond hearing.”⁶ DOJ and DHS “expect[ed] these new procedures to be fully operational on a national basis by the end of 2013.”⁷

¹ U.S. DEP’T JUST., *National Qualified Representative Program* (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

² *Id.*

³ *Id.* According to ICE, the Nationwide Policy “supplements all previous guidance distributed by ICE pursuant to the Board of Immigration Appeals’ decision in *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).” Ex. A at 1 n.1 (JOHN MORTON, CIVIL IMMIGRATION DETENTION: GUIDANCE FOR NEW IDENTIFICATION AND INFORMATION-SHARING PROCEDURES RELATED TO UNREPRESENTED DETAINEES WITH SERIOUS MENTAL DISORDERS OR CONDITIONS (Apr. 22, 2013), available at https://www.ice.gov/doclib/detention-reform/pdf/11063.1_current_id_and_infosharing_detainees_mental_disorders.pdf).

⁴ U.S. DEP’T JUST., *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions 1* (Apr. 22, 2013), <https://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

On April 22, 2013, in order to implement the Nationwide Policy, then-ICE Director John Morton issued a memorandum directing “that procedures be in place to ensure that [ICE] detainees who may be mentally incompetent to represent themselves in removal proceedings before [EOIR] are identified, that relevant information about them is provided to the immigration court so that an immigration judge (IJ) can rule on their competency and, where appropriate, that such aliens are provided with access to new procedures for unrepresented mentally incompetent detainees being implemented by EOIR.”⁸

On May 7, 2014, then-ICE Executive Associate Director Thomas Homan issued another memorandum that sets forth procedures that ICE must use pursuant to the Nationwide Policy.⁹ In a subsequent court order, ICE was required to “utilize a toll-free telephone hotline ... for detainees, family members, and others to report and provide relevant information regarding detainees who have serious mental disorders or conditions that may impact their ability to represent themselves in immigration proceedings.”¹⁰ Additionally, ICE was ordered to “accept relevant information and documents from family members, social workers, or treatment providers regarding detainees’ mental disorders or conditions.”¹¹ (hereinafter “Third Party Notifications”). ICE was required to provide these Third Party Notifications to the mental health provider performing the mental health screenings at the detention facility.¹²

The Nationwide Policy and NQRP provide important legal services to a specific vulnerable population facing deportation: detained, unrepresented individuals with serious mental disorders.¹³ Without the Nationwide Policy and NQRP, these individuals typically remain unrepresented by counsel and impaired by serious mental health conditions. This results in unfair immigration proceedings in which they are much more likely to be deported without due process or the capacity to represent themselves.¹⁴ These detained individuals are also at a higher risk for prolonged immigration proceedings and some have been detained for years without process.¹⁵ Additionally, these individuals are generally involved in high-stakes immigration proceedings, often facing persecution and torture in their home countries as a result of their mental illnesses.¹⁶

⁸ Ex. A at 1.

⁹ Ex. B at 1 (THOMAS HOMAN, IDENTIFICATION OF DETAINEES WITH SERIOUS MENTAL DISORDERS OR CONDITIONS (May 7, 2014)).

¹⁰ *Franco-Gonzalez v. Holder*, No. CV-10-02211 DMG DTBX, 2014 WL 5475097, at *4 (C.D. Cal. Oct. 29, 2014)

¹¹ *Id.*

¹² *Id.*

¹³ VERA INST. JUST., *National Qualified Representative Program Overview* (2020), <https://www.vera.org/projects/national-qualified-representative-program/overview>.

¹⁴ See Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 9 (2015) (“Detained immigrants with counsel obtained a successful outcome (i.e., case termination or relief) in 21% of cases, ten-and-a-half times greater than the 2% rate for their pro se counterparts.”). See also VERA INST. JUST., *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court* (2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/why-does-representation-matter/legacy_downloads/why-does-representation-matter.pdf (“95 percent of successful [deportation] cases were represented”).

¹⁵ Eagly & Shafer, *supra* note 14.

¹⁶ *Id.*

The Nationwide Policy and NQRP are carried out through federal staff and contracts. However, little is publicly known about the procedures and guidance that DHS, ICE, CBP, DOJ, and EOIR provide to detention facility personnel and Immigration Judges to implement the programs and ensure their essential procedural protections are being applied consistently and uniformly across the United States.

Definitions

As used herein, the term “records” includes all records or communications preserved in electronic or written form, including but not limited to: correspondence; documents; data; videotapes; audio tapes; emails (and their attachments); faxes; files; guidance; guidelines; evaluations; instructions; analysis; memoranda; agreements; notes; orders; policies; procedures; protocols; reports; rules; manuals; specifications; and studies.

As used herein, the term “Nationwide Policy” refers to DHS’s, ICE’s, CBP’s, DOJ’s, and EOIR’s Nationwide Policy to provide “enhanced procedural protections, including competency inquiries, mental health examinations, and bond hearings to certain unrepresented and detained respondents with serious mental disorders or conditions that may render them incompetent to represent themselves in immigration proceedings.”¹⁷

As used herein, the terms “National Qualified Representative Program” or “NQRP” refer to DOJ’s and EOIR’s “nationwide program to provide Qualified Representatives (QRs) to certain unrepresented and detained respondents who are found by an Immigration Judge or the BIA to be mentally incompetent to represent themselves in immigration proceedings.”¹⁸

As used herein, the terms “detainee” or “ICE detainee” refer to any individual detained for the purposes of immigration proceedings, whether in a facility operated by ICE, CBP, or a facility that ICE or CBP has a contract or agreement with to detain individuals for the purposes of immigration proceedings, and regardless of whether the facility is staffed by the ICE Health Service Corps or not.

As used herein, the term “Third Party Notification” refers to the “relevant information and documents from family members, social workers, or treatment providers regarding detainees’ mental disorders or conditions” that DHS was ordered to accept and provide to the mental health provider performing the mental health screenings at the detention facility.¹⁹

As used herein, the term “Mental Health Information” refers to “any information expressly contained in or directly obtained from an Immigration Court’s administrative inquiry into mental competence, a portion of a hearing in which mental competence is addressed, a mental health examination of a detainee (including a request for such examination), and a report of such examination.”²⁰

¹⁷ U.S. DEP’T JUST., *National Qualified Representative Program* (Feb. 18, 2020), <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

¹⁸ *Id.*

¹⁹ *Franco-Gonzalez*, 2014 WL 5475097, at *4.

²⁰ *Id.* at *9.

Records Requested

For the period **beginning April 1, 2013 to the present**, Requestors seek disclosure of the following records in the custody or control of DHS, ICE, and CBP regarding the implementation of the Nationwide Policy and the NQRP:

- I. All directives, orders, training materials, memoranda, guidance, briefings, instructions, policies, procedures, rules, regulations, e-mail, other electronic communications and/or any other communications, whether issued verbally or in writing, regarding DHS's, ICE's, and CBP's implementation of the Nationwide Policy and the National Qualified Representative Program, including the following:
 - a. Implementation of procedures put into place in accordance with the April 22, 2013 memorandum from ICE Director John Morton.²¹
 - b. Implementation of procedures put into place in accordance with the May 7, 2014 memorandum from ICE Executive Associate Director Thomas Homan.²²
 - c. Implementation of identification and assessment procedures at facilities that are staffed by the ICE Health Service Corps ("IHSC") to ensure that "all immigration detainees will be initially screened when they enter the facility and will receive a more thorough medical and mental health assessment within 14 days of their admission."²³
 - d. Implementation of identification and assessment procedures at facilities that are not staffed by IHSC personnel to "identify detainees with serious mental disorders or conditions that may impact their ability to participate in their removal proceedings, including through use of a national telephone hotline for detainees and family members to report and provide information regarding detainees."²⁴
 - e. Implementation of procedures that "provide that if a detainee is identified as having serious mental disorders or conditions, ICE will request that either a qualified mental health provider complete a mental health review report or the facility provide the detainee's medical records within the facility's possession to ICE for further review."²⁵
 - f. Implementation of information-sharing procedures to "ensure that documents related to an unrepresented detainee's mental competency, including a mental health review report and mental health records in ICE's possession, are provided to the applicable Office of Chief Counsel (OCC)."²⁶

²¹ Ex. A.

²² Ex. B.

²³ Ex. A at 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

- g. Implementation of the ICE Office of Chief Counsel’s procedures “to ensure that relevant information in its possession that would inform the immigration court about the detainee’s mental competency is made available to the IJ.”²⁷
 - h. Implementation of procedures that “[w]hen an IJ orders a competency exam for a detained alien, ICE will ensure that the independent examiner has the necessary access to the detained alien to conduct the competency exam.”²⁸
 - i. Implementation of procedures for “ICE trial counsel [to] participate in custody hearings to unrepresented detained aliens who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer.”²⁹
 - j. Implementation of procedures for “ICE trial counsel [to] work with ... qualified representatives to detainees who are found to be mentally incompetent to represent themselves” “consistent with treatment afforded any respondent’s representative-of-record, in removal proceedings before EOIR.”³⁰
 - k. Implementation of procedures to ensure that ICE trial counsel only use Mental Health Information “to determine a detainee’s mental competency to participate or represent oneself in an immigration proceeding,” and not to “establish the truth of allegations or charges against the detainee, or to establish ineligibility for relief.”³¹
- II. Records responsive to Section I that indicate whether they have been provided to personnel at each ICE Enforcement and Removal Operations Field Office, including the Boston Field Office, at each ICE Office of Chief Counsel, including the Boston ICE Office of Chief Counsel, and at each CBP Field Office.
- III. Records responsive to Section I that indicate whether they have been provided to personnel at each detention facility holding ICE detainees, including all facilities in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court.
- IV. Records responsive to Section I that indicate whether they have been provided to IHSC personnel, including the IHSC Field Medical Coordinator and any IHSC personnel serving all detention facilities holding ICE detainees in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court. For facilities staffed by non-IHSC medical personnel, please provide records responsive to Section I that indicate whether they have been provided to non-IHSC medical personnel, including such personnel serving all detention facilities holding ICE detainees in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court.

²⁷ *Id.*

²⁸ *Id.* at 1 n.1.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Franco-Gonzalez*, 2014 WL 5475097, at *9.

- V. Records disclosing the number of ICE detainees who may be mentally incompetent to represent themselves in immigration proceedings, including records disclosing the requested information in the following enumerated categories. For each category, please provide records disclosing the requested information at each detention facility holding ICE detainees, including all facilities in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court. Please provide these records broken down by how many detainees have been in each category each year from 2013 to the present.
- a. The total number of ICE detainees who have been identified with serious mental disorders or conditions that may impact their ability to participate in their immigration proceedings.
 - b. The total number of ICE detainees who have been identified with serious mental disorders or conditions through Third Party Notifications.
 - c. The total number of ICE detainees who have been identified with serious mental disorders or conditions via the ICE's toll-free telephone hotline "for detainees, family members, and others to report and provide relevant information regarding detainees who have serious mental disorders or conditions that may impact their ability to represent themselves in immigration proceedings."³²
 - d. The total number of ICE detainees identified as having serious mental disorders or conditions where ICE has requested that a qualified mental health provider complete a mental health review report.
 - e. The total number of ICE detainees identified as having serious mental disorders or conditions where ICE has requested that the facility provide the detainee's medical records within the facility's possession to ICE for further review.
 - f. The total number of ICE detainees where documents related to a detainee's mental competency, including a mental health review report and mental health records in ICE's possession, have been provided to the applicable Office of Chief Counsel (OCC).
 - g. The total number of ICE detainees where the ICE Office of Chief Counsel provided relevant information in its possession to inform the Board of Immigration Appeals or the Immigration Court about the detainee's mental competency.
 - h. The total number of ICE detainees where the Immigration Judge found indicia resulting in a "bona fide doubt" that the detainee has a mental disorder impairing his or her ability to represent him- or herself in an immigration proceeding and the date of such finding.
 - i. The total number of ICE detainees where an Immigration Judge held a competency inquiry to determine whether the detainee has a serious mental disorder or condition that may render them incompetent to represent themselves in immigration proceedings, including the date the judicial inquiry was conducted and whether the Immigration Judge found "reasonable cause"

³² *Id.* at *4.

to believe the detainee has a mental disorder impairing his or her ability to perform the functions listed in the definition of competence to represent him- or herself.

- j. The total number of ICE detainees where the Immigration Judge held a competency inquiry and determined that the detainee (1) was competent, (2) was not competent, or (3) there was insufficient evidence to decide if the detainee was competent, and the date of the competence determination.
- k. The total number of ICE detainees where an Immigration Judge referred the detainee for a mental health or competency examination to be conducted by an independent examiner, and the date of the referral.
- l. The total number of ICE detainees where the Language Services Unit of the Office of the Chief Immigration Judge was notified so that arrangements were made to secure the services of a qualified interpreter for a mental health or competency examination for the detainee.
- m. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided a custody hearing because the detainee was identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and had been detained in ICE custody for six months or longer.
- n. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided bond after receiving a custody hearing because the detainee was identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and had been detained in ICE custody for six months or longer, as well as the amount of the bond provided.
- o. The total number of ICE detainees where an Immigration Judge ordered that the detainee be provided a Qualified Representative because they were found incompetent to represent themselves.
- p. The total number of ICE detainees where the detainee received a Qualified Representative after the Immigration Judge ordered it, and the date when the Qualified Representative was assigned to the detainee.
- q. The total number of ICE detainees where the Immigration Judge ordered the detainee's case to be administratively closed or terminated because the detainee had a serious mental disorder or condition.
- r. The total number of ICE detainees where the detainee was transferred to a mental health unit or facility because the detainee had a serious mental disorder or condition. This includes detainees that were transferred to local hospitals and private mental health facilities contractually used by ICE to provide short-term mental health care, such as the Alvarado Parkway Institute in La Mesa, CA, and the Columbia Regional Care Center in Columbia, SC.
- s. The total number of ICE detainees where the detainee was transferred to another immigration detention facility after receiving a Qualified Representative.
- t. The total number of ICE detainees with serious mental disorders or conditions where the detainee was placed in any form of segregation for any reason, the

reason for that placement, when it occurred, and the length of time each detainee was placed in segregation.

- VI. All records disclosing whether each detention facility holding ICE detainees is staffed by IHSC personnel, including all facilities in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court.
- VII. All screening forms and materials used by ICE, CBP, and detention facility personnel to screen and evaluate ICE detainees for serious mental disorders or conditions at each detention facility holding ICE detainees, including all facilities in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court.
- VIII. All records indicating what training has been provided regarding the implementation of the Nationwide Policy and the NQRP and when such training has occurred, including training provided to:
 - a. Personnel at all facilities holding ICE detainees, including medical staff that are privately contracted by facilities
 - b. ICE personnel, including at all Enforcement and Removal Operations Field Offices, all IHSC personnel, and all Office of the Principal Legal Advisor Field Locations
 - c. CBP personnel, including at all CBP Field Offices
 - d. EOIR personnel, including Immigration Judges, Appellate Immigration Judges of the Board of Immigration Appeals, and Immigration Court clerks and administrators, as well as the names of each Immigration Judge, Appellate Immigration Judge, clerk, and administrator that has received such training
 - e. Mental health professionals required to be qualified to conduct mental health examinations in immigration proceedings.
- IX. All records disclosing any information received through ICE's toll-free telephone hotline created for "detainees, family members, and others to report and provide relevant information regarding detainees who have serious mental disorders or conditions that may impact their ability to represent themselves in immigration proceedings."³³ Any responsive records should include the dates and times at which any of the information was received by ICE.
- X. All records disclosing whether ICE or DHS has identified any detention facilities holding ICE detainees as "mental health hub" facilities or any facilities that focus on individuals with mental health concerns.
- XI. All Mental Health Examination Referral forms completed by Immigration Judges to refer an ICE detainee for a mental health examination.

³³ *Franco-Gonzalez*, 2014 WL 5475097, at *4.

- XII. All Third Party Notifications received by ICE, CBP, or detention facility personnel at each detention facility holding ICE detainees, including all facilities in Massachusetts and/or facilities where detainees have immigration proceedings before the Boston Immigration Court.

Expedited Processing Request

The D.C. Circuit in *Open America v. Watergate Special Prosecution Force* recognized that some FOIA requests involve a greater degree of urgency than others.³⁴ Accordingly, where, as here, a requestor can show “exceptional need or urgency,” that request should be processed on an expedited basis.³⁵

The above request should be expedited because, as this request is being processed, many unrepresented ICE detainees have serious mental disorders or conditions that impact their ability to participate in their removal proceedings. Many of these unrepresented ICE detainees have not been afforded the procedural protections that should be provided to them by the Nationwide Policy and NQRP. As a result, these vulnerable unrepresented detainees have been and will continue to be detained without due process and be placed into unfair immigration proceedings without necessary legal representation.³⁶ These vulnerable unrepresented ICE detainees are seriously harmed because they have been and will continue to be deported without receiving crucial procedural protections that should be provided to them by DHS, ICE, CBP, DOJ, and EOIR. This request will shed light on DOJ’s, EOIR’s, DHS’s, CBP’s, and ICE’s implementation of the Nationwide Policy and NQRP in the hopes that these detainees may soon receive the protections afforded to them by the Nationwide Policy and NQRP to ensure their immigration proceedings are fair. Therefore, this request requires immediate attention. Furthermore, the information requested in this FOIA request cannot be obtained elsewhere, as it is only in the custody and control of DOJ, EOIR, DHS, CBP, and ICE.

Fee Waiver Request

Requestors are entitled to a waiver or reduction of all fees and costs because the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requestors’] commercial interest.” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k) (records must be furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution); 6 C.F.R. § 5.11(d).

Requestors are members of the Harvard Immigration and Refugee Clinical Program (“HIRC”), an academic program focused on direct representation of individuals applying for U.S. asylum and related protections, as well as representation of individuals who have survived domestic violence and other crimes and/or who seek avoidance of forced removal in immigration proceedings pursuant to various forms of relief (i.e., VAWA, U-visas, Cancellation of Removal,

³⁴ *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605, 616 (D.C. Cir. 1976).

³⁵ *Id.*

³⁶ VERA INST. JUST., *National Qualified Representative Program: Learn More* (2020), <https://www.vera.org/projects/national-qualified-representative-program/learn-more>.

Temporary Protected Status, etc.). HIRC is also involved in appellate and policy advocacy at the local, national, and international levels on a broad range of immigrants' rights issues. One primary goal of HIRC is to disseminate information about and make the public aware of procedural protections guaranteed to vulnerable individuals in immigration proceedings, including unrepresented ICE detainees with serious mental disorders and conditions, and to ensure the protections guaranteed to them by the Nationwide Policy and NQRP are being properly implemented. For these reasons, Requestors will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost.

The issues of the treatment of vulnerable ICE detainees, including those without attorneys and with serious mental disorders and conditions, are of significant public interest. Requestors have undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of federal immigration policies and practices. Access to this information is necessary for the public to meaningfully evaluate the consequences of federal immigration policies, including policies with regard to the treatment of unrepresented ICE detainees with serious mental disorders and conditions.

Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent. *See, e.g., Judicial Wrath, 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 of noncommercial requestors.'"). Furthermore, because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged at least for the first two hours of search time and for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II).

Certification


Requestors certify that the above information is true and correct to the best of their knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Please reply to this request within twenty working days as required by statute. *See* 5 U.S.C. §552(a)(6)(A)(i). Please furnish records as soon as they are identified to the following individual and address:

Sameer Ahmed
Harvard Immigration and Refugee Clinical Program
Harvard Law School
6 Everett Street
Cambridge, MA 02138
sahmed@law.harvard.edu

If you have any questions regarding this request, please contact me at sahmed@law.harvard.edu or via phone at (617) 384-0088.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sameer Ahmed', with a stylized flourish at the end.

Sameer Ahmed
Harvard Immigration and
Refugee Clinical Program
(617) 384-0088

EXHIBIT A

Policy Number: 11063.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536




U.S. Immigration
and Customs
Enforcement

April 22, 2013

MEMORANDUM FOR: Thomas D. Homan
Acting Executive Associate Director
Enforcement & Removal Operations

Peter S. Vincent
Principal Legal Advisor

Kevin Landy
Assistant Director
Office of Detention Policy and Planning

FROM: John Morton
Director 

SUBJECT: Civil Immigration Detention: Guidance for New
Identification and Information-Sharing Procedures Related
to Unrepresented Detainees With Serious Mental Disorders
or Conditions

Purpose

This memorandum directs that procedures be in place to ensure that U.S. Immigration and Customs Enforcement (ICE) detainees who may be mentally incompetent to represent themselves in removal proceedings before the Department of Justice's Executive Office for Immigration Review (EOIR) are identified, that relevant information about them is provided to the immigration court so that an immigration judge (IJ) can rule on their competency and, where appropriate, that such aliens are provided with access to new procedures for unrepresented mentally incompetent detainees being implemented by EOIR.¹ In order to assist EOIR in identifying unrepresented individuals detained in ICE custody for removal proceedings who have serious mental disorders or conditions that may render them mentally incompetent to represent themselves in those proceedings, ICE personnel should immediately begin taking the following steps.²

¹ This policy directive supplements all previous guidance distributed by ICE pursuant to the Board of Immigration Appeals' decision in *Matter of M-A-M-*, 25 I. & N. Dec. 474 (BIA 2011).

² On this same date, EOIR issued a nationwide policy authorizing IJs to order competency exams for detained aliens where there are indicia of mental incompetency and the immigration judge believes that he or she cannot render a competency determination in the absence of an exam. When an IJ orders a

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Identification and Assessment Procedures

For facilities that are staffed by the ICE Health Service Corps (IHSC) where screening procedures have not yet begun being implemented, Enforcement and Removal Operations (ERO) and IHSC personnel should immediately begin developing procedures to ensure that, absent emergency circumstances related to facility security or the health and safety of staff or detainees, all immigration detainees will be initially screened when they enter the facility and will receive a more thorough medical and mental health assessment within 14 days of their admission. For all other facilities, ERO and IHSC personnel should immediately begin working with the detention facilities' medical staff to develop procedures to identify detainees with serious mental disorders or conditions that may impact their ability to participate in their removal proceedings, including through use of a national telephone hotline for detainees and family members to report and provide information regarding detainees.

These procedures should provide that if a detainee is identified as having serious mental disorders or conditions, ICE will request that either a qualified mental health provider complete a mental health review report or the facility provide the detainee's medical records within the facility's possession to ICE for further review.

Information-Sharing Procedures

ERO and IHSC personnel should also immediately begin developing procedures to ensure that documents related to an unrepresented detainee's mental competency, including a mental health review report and mental health records in ICE's possession, are provided to the applicable Office of Chief Counsel (OCC). OCCs should begin developing procedures to ensure that relevant information in its possession that would inform the immigration court about the detainee's mental competency is made available to the IJ.

Timeline

Where these procedures have not yet begun being implemented, ICE personnel are directed to begin developing these procedures immediately and have the relevant procedures in place at all immigration detention facilities by December 31, 2013.

competency exam for a detained alien, ICE will ensure that the independent examiner has the necessary access to the detained alien to conduct the competency exam. EOIR's new policy also provides custody hearings to unrepresented detained aliens who were identified as having a serious mental disorder or condition that may render them incompetent to represent themselves and have been detained in ICE custody for six months or longer. ICE trial counsel shall participate in these custody hearings. EOIR's new nationwide policy also provides qualified representatives to detainees who are found to be mentally incompetent to represent themselves. ICE trial counsel will work with such qualified representatives, consistent with treatment afforded any respondent's representative-of-record, in removal proceedings before EOIR.

EXHIBIT B

MAY 7 2014



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

MEMORANDUM FOR: Field Office Directors
Deputy Field Office Directors
Assistant Field Office Directors
ICE Health Service Corps

FROM: Thomas Homan
Executive Associate Director

SUBJECT: Identification of Detainees with Serious Mental Disorders or
Conditions

Purpose

This memorandum sets forth procedures to ensure that U.S. Immigration and Customs Enforcement (ICE) detainees who may be mentally incompetent to represent themselves in removal proceedings before the Department of Justice's Executive Office for Immigration Review (EOIR) are identified, that relevant information about them is provided to the immigration court so that an immigration judge (IJ) can rule on their competency and, where appropriate, that such aliens are provided with access to new procedures for unrepresented mentally incompetent detainees being implemented by EOIR. In concert with other actions already taken by the agency, this memorandum implements ICE Policy No. 11063.1: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013). This memorandum will also assist ICE and detention facility personnel in identifying detainees with serious mental disorders or conditions in order to assess appropriate facility placement and treatment.

Background

ICE Enforcement and Removal Operations (ERO) is committed to identifying and, during the course of their detention in ICE custody, treating detainees who have mental disorders or conditions. The identification, diagnosis and treatment of ICE detainees who have mental disorders or conditions serves to protect both the detainees and facility and agency staff. ICE's national detention standards¹ require facilities housing immigration detainees to provide the

¹ Several versions of these standards are currently in use. Although the procedures identified in this memorandum are intended to complement procedures contained in the national detention standards, any reference to "ICE's national detention standards" within this policy refers to the 2000 National Detention Standards, the 2008 Performance Based National Detention Standards, or the 2011 Performance Based National Detention Standards.

Identification of Detainees with Serious Mental Disorders or Conditions

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following to all newly admitted detainees: (1) an initial medical screening, including a documented mental health screening; (2) a 14-day full medical assessment, with mental health components; and (3) timely referral for follow-up mental evaluations, diagnosis, treatment, or stabilization. Consistent with ICE Policy No. 11063.1: *Civil Immigration Detention: Guidance for New Identification and Information-Sharing Procedures Related to Unrepresented Detainees With Serious Mental Disorders or Conditions* (Apr. 22, 2013), ICE is implementing procedures to enhance the agency's assistance to EOIR in identifying detainees with serious mental disorders or conditions that may render them mentally incompetent to represent themselves in their immigration proceedings before EOIR.

For purposes of the procedures identified below only, a detainee has a "serious mental disorder or condition" if either:

- A qualified medical provider² determines the detainee:
 - has a mental disorder that is causing serious limitations in communication, memory or general mental and/or intellectual functioning (e.g., communicating, conducting activities of daily living, social skills); or a severe medical condition(s) (e.g., traumatic brain injury or dementia) that is significantly impairing mental function; or
 - is exhibiting one or more of the following active psychiatric symptoms and/or behavior: severe disorganization, active hallucinations or delusions, mania, catatonia, severe depressive symptoms, suicidal ideation and/or behavior, marked anxiety or impulsivity;

or:

- A qualified medical provider otherwise diagnoses the detainee as demonstrating significant symptoms of one of the following:
 - Psychosis or Psychotic Disorder;
 - Bipolar Disorder;
 - Schizophrenia or Schizoaffective Disorder;
 - Major Depressive Disorder with Psychotic Features;
 - Dementia and/or a Neurocognitive Disorder; or
 - Intellectual Development Disorder (moderate, severe or profound).

1. Identification Procedures

- a. In facilities staffed by the ICE Health Service Corps (IHSC), the Health Services Administrator (HSA) shall take steps to ensure the Field Office Director (FOD) is notified as soon as practicable of all detainees housed at the facilities identified as having a "serious mental disorder or condition," but no later than 72 hours after their

² For purposes of the procedures set forth in this memorandum, qualified medical providers include appropriately licensed psychiatrists, physicians, physician assistants, psychologists, clinical social workers, licensed nurse practitioners, and registered nurses.

Identification of Detainees with Serious Mental Disorders or Conditions

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identification. The HSA shall also identify any detainee housed in administrative segregation on the basis of a mental illness, housed in segregation for any reason and has a mental illness, or who has been hospitalized due to a mental illness while detained in ICE custody, and notify the FOD accordingly.

- b. In facilities not staffed by IHSC, ERO field office supervisory personnel, in consultation with the IHSC Field Medical Coordinator (FMC) or an appropriately designated IHSC medical provider, shall take steps to ensure that the FOD is notified as soon as practicable by facility custody personnel and medical staff of all detainees housed at the facilities identified as having a “serious mental disorder or condition,” but no later than 72 hours after their identification. Any detainee housed in administrative segregation on the basis of a mental illness, housed in segregation for any reason and has a mental illness, or who has been hospitalized due to a mental illness while detained in ICE custody shall also be identified, and the FOD must be notified.
- c. FODs must coordinate with their local Chief Counsel to ensure that appropriate ERO field office, IHSC, and Office of the Chief Counsel (OCC) supervisory personnel meet regularly, but not less than monthly, to discuss any cases within their area of responsibility involving detainees with serious mental disorders or conditions and detainees otherwise reported pursuant to subparagraphs (a) or (b) irrespective of whether immigration proceedings are pending before EOIR.

2. Information-Sharing Procedures

- a. Once a detainee has been identified as having a serious mental disorder or condition, or otherwise identified pursuant to subparagraphs (a) or (b) of Section 1, the FMC or HSA shall request documentation of the detainee’s referral for follow-up mental evaluations, diagnosis, treatment, or stabilization pursuant to the requirements of ICE’s national detention standards. If the detainee has not been referred, ICE will request that a qualified mental health provider complete a mental health review (IHSC Form 883) or that the facility provide the detainee’s medical records within the facility’s possession as soon as practicable.
- b. All such documented mental evaluations, mental health reviews, or medical records involving detainees identified as having a serious mental disorder or condition must be provided to the local OCC mental health point(s)-of-contact.

3. Monitoring and Assessment Procedures

- a. Upon receipt of information that a particular immigration detainee has a serious mental disorder or condition, IHSC shall review facility capabilities to determine if another detention or off-site treatment facility would provide an environment better suited to the needs of the detainee. IHSC shall immediately report its conclusion to the FOD and, where appropriate, suggest the detention or off-site treatment facility

Identification of Detainees with Serious Mental Disorders or Conditions

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for transfer and treatment.³ Where it is determined that the detainee is not appropriately housed, and in accordance with ICE Policy No. 11022.1: *Detainee Transfers* (Jan. 4, 2012), the FOD shall take measures to transfer the detainee as soon as practicable.

- b. If transfer is contemplated, the FOD must consult the local Chief Counsel, as appropriate, regarding coordination of the detainee's immigration proceedings and coordinate with ERO Headquarters to facilitate transfer. The FMC shall monitor the detainee's condition and report progress to the IHSC Behavioral Health Branch.
- c. Once a detainee has been identified as having a serious mental disorder or condition, IHSC and ERO field office supervisory personnel, in coordination with OCC supervisory personnel, must continue to monitor the case until removal or release.
- d. IHSC and ERO field office supervisory personnel, in coordination with OCC supervisory personnel, must report any major changes in stability to the responsible FOD and Chief Counsel as soon as practicable.

Use of Detention Services Managers (DSM)

For all facilities with DSM oversight, the DSM shall contact the FOD and the FMC if any serious mental health concerns are identified through the course of their interactions with detainees.

Access for Mental Health Examinations

When an immigration judge orders a mental health examination to assess a detainee's competency, the FOD shall ensure that the EOIR-retained mental health professional has the necessary access to the detainee to conduct the examination.

No Private Right of Action

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

³In facilities not staffed by IHSC, IHSC and the FMC will work with facility medical staff, but will not control or provide direct medical care.

ATTACHMENT 2

Sameer Ahmed
Harvard Immigration and Refugee Clinical Program
6 Everett St.
Cambridge, MA, 02138

12/03/2020

CBP-2021-005336

Dear Sameer Ahmed,

This is a final response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP).

We conducted a comprehensive search of files within the CBP databases for records that would be responsive to your request. Unfortunately, we were unable to locate or identify any responsive records, based upon the information you provided in your request.

Note: You may wish to file a FOIA with U.S. Immigration and Customs Enforcement (ICE). Their information can be found at <https://www.ice.gov/foia/request>.

This completes the CBP response to your request. You may contact CBP's FOIA Public Liaison, Charlyse Hoskins, by sending an email via your FOIAonline account, mailing a letter to 90 K St, NE MS 1181, Washington DC, 20229 or by calling 202-325-0150. The FOIA Public Liaison is able to assist in advising on the requirements for submitting a request, assist with narrowing the scope of a request, assist in reducing delays by advising the requester on the type of records to request, suggesting agency offices that may have responsive records and receive questions or concerns about the agency's FOIA process. Please notate file number CBP-2021-005336 on any future correspondence to CBP related to this request.

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

If you are not satisfied with the response to this request, you have a right to appeal the final disposition. Should you wish to do so, you must file your appeal within 90 days of the date of this letter following the procedures outlined in the DHS regulations at Title 6 C.F.R. §5.8. Please include as much information as possible to help us understand the grounds for your appeal. You should submit your appeal via FOIAonline by clicking on the "Create Appeal" button that appears when you view your initial request. If you do not have computer access, you may send your appeal and a copy of this letter to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia. Additional information can be found at the following link https://www.cbp.gov/sites/default/files/assets/documents/2019-Dec/definitions-exemptions-foia_0.pdf.

Additionally, you have a right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. Please note that contacting the CBP FOIA Public Liaison or OGIS **does not** stop the 90-day appeal clock and **is not** a substitute for filing an administrative appeal.

Sincerely,

U.S. Customs and Border Protection