

EXHIBIT C

Krista Oehlke

From: Katherine Anthony <katherine.anthony@americanoversight.org> on behalf of FOIA <foia@americanoversight.org>
Sent: Monday, November 25, 2019 9:45 AM
To: ice-foia@dhs.gov
Subject: Re: ICE FOIA Request 2020-ICFO-08860

Hello,

Thank you for your message. We disagree that our FOIA request (which seeks general communications concerning a specified incident involving specified individuals) falls within the provisions of the Privacy Act such that a third party authorization is necessary.

As you know, the Privacy Act governs records within a “system of records,” 5 U.S.C. § 552a(b)—i.e., a system or database “from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying number, symbol, or other identifying particular assigned to the individual.” 5 U.S.C. § 552a(a)(5). For instance, with respect to your agency, disclosure of information from a database wherein information could be queried by an individual immigrant’s “A” number, may be subject to the provisions of the Privacy Act. See OMB Guidelines, 40 Fed. Reg. 28,948, 28,952 (July 9, 1975) (explaining that a “system of records” exists where (1) there is an “indexing or retrieval capability using identifying particulars [that is] built into the system,” and (2) the agency “does, in fact, retrieve records about individuals by reference to some personal identifier”).

On the other hand, emails, text messages, and other communications from an agency’s general archives are ordinarily not understood to constitute “records” in a “system of records” subject to the Privacy Act. See OMB Guidelines at 28,952 (explaining that the “retrieved by” criterion referenced above “implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; *not merely that a capability or potential for retrieval exists*”) (emphasis added); see also *Krieger v. U.S. Dep’t of Justice*, 592 F. Supp. 2d 29, 42 (D.D.C. 2008) (email archives not system of records where plaintiff “offer[ed] no facts suggesting that [they] would have been indexed by name, or that an electronic folder existed that grouped emails related to [plaintiff] by name or other identifier”); *Minshew v. Donley*, 911 F. Supp. 2d 1043, 1071 (D. Nev. 2012) (finding emails about individual as the method of disclosure and not the source or record of the disclosure); *Counce v. Nicholson*, No. 3:06cv00171, 2007 WL 1191013, at *15 (M.D. Tenn. Apr. 18, 2007) (concluding that “email contain[ing] information regarding a potential presentation on bullying that [plaintiff’s] supervisors directed her to submit for their review” was not a “record” for Privacy Act purposes).

Here, as opposed to the example above of a request for records identified by an individual’s “A” number, our request is properly treated as a FOIA request for agency records—namely, for communications of ICE personnel in their official capacities, concerning a subject of considerable media attention about the official activities of state and federal government officials. See, e.g., Ellen Barry, *When the Judge Became the Defendant*, N.Y. Times, Nov. 16, 2019, <https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html?smid=nytcore-ios-share>. As such, any concerns regarding the treatment of information in which the individuals involved may have a privacy interest is properly treated by analysis and (as appropriate) redaction pursuant to the privacy-related FOIA Exemptions. See 5 U.S.C. §552(b)(6), (b)(7)(C). Withholding of records or portions of records under those provisions requires balancing the privacy interest (if any) against the public interest in disclosure. See, e.g., *NARA v. Favish*, 541 U.S. 157, 172 (2004). Where, as here, the subject matter of the request is particularly well known and widely available in the public domain, individuals generally do not have a substantial privacy interest. See, e.g., *Gawker Media LLC v. FBI*, 145 F. Supp. 3d 1100, 1108–11 (M.D. Fla. 2015) (ordering disclosure of information related to highly-publicized investigation where it had been disclosed in open court and was the subject of widespread media attention). Accordingly, we would anticipate the

balancing test largely favoring disclosure in this case, given the public interest in the subject matter, as described in our FOIA Request.

We therefore ask that you confirm that you will proceed with processing our request pursuant to FOIA. Please feel free to contact us with any questions or concerns.

Best,

Katherine M. Anthony
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From: "ice-foia@dhs.gov" <ice-foia@dhs.gov>
Date: Tuesday, November 19, 2019 at 11:28 AM
To: FOIA <foia@americanoversight.org>
Subject: ICE FOIA Request 2020-ICFO-08860

November 19, 2019

Austin Evers
American Oversight
1030 15th Street, NW
Suite B255
Washington, DC 20005

RE: ICE FOIA Case Number 2020-ICFO-08860

Dear Mr. Evers:

This acknowledges receipt of your November 18, 2019, Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), for 1. All communications (including emails, email attachments, calendar invitations, text messages, memoranda, or other communication) of the following ICE Officials concerning Judge Joseph, Officer MacGregor, and/or the events alleged in the Indictment (please see request for list of individuals) 2. All records concerning any investigations by ICE of Judge Joseph, Officer MacGregor and/or the events alleged in the Indictment, including but not limited to any notes, reports, and memoranda. 3. All records of final guidance, directives, or instructions provided by ICE to Mr. Lelling or his staff concerning Judge Joseph, Officer MacGregor and/or the events alleged in the Indictment. Your request was received in this office on November 18, 2019.

We determined that third party authorization will be needed from both Wesley MacGregor and Shelley M. Richmond Joseph in order to process the request since the search would require us to search by their personally identifiable information. Please be advised that DHS regulations require, in the case of third party information requests, a statement from the individual verifying his or her identity and certifying that individual's agreement that records concerning him or her may be accessed, analyzed and released to a third party. See 6 C.F.R. § 5.21(f). Because you have not provided this documentation with your request, we are unable to initiate a search for responsive records.

Please provide the requested documentation within 30 days from the date of this letter, or we will assume you are no longer interested in this FOIA/PA request, and the case will be administratively closed.

This is not a denial of your request. Upon receipt of a perfected request, you will be advised as to the status of your request.

Your request has been assigned reference number **2020-ICFO-08860**. 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 2020-ICFO-08860 tracking number. If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office. You may send an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Fernando Pineiro, in the same manner. 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.

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