

# **Exhibit C**

# The Intercept

March 23, 2020

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

Re: Freedom of Information Act Appeal, ICE FOIA Case Number 2020-ICFO-21851

Dear FOIA Appeals Officer,

This letter constitutes an administrative appeal under Freedom of Information Act (“FOIA” or the “Act”), 5 U.S.C § 552, and is submitted on behalf of First Look Media Works, Inc., publisher of *The Intercept* (“FLMW”). In particular, FLMW’s request was denied because “no records responsive to your request were found.” For the reasons fully stated below, the request was sufficiently specific to identify records and the assertion that there are no responsive records is so implausible as to suggest an insufficient search. This is a denial.

## I. Factual and Procedural History

On January 14, 2020, FLMW submitted a FOIA request (“Request”) to U.S. Immigration & Customs Enforcement (“ICE”) seeking “all video and audio recordings in connection with the force-feeding of former detainee Ajay Kumar at the El Paso Service Processing Center ... from August 14, 2019 through September 5, 2019.” FOIA Request attached hereto as Exhibit 1. After a few weeks, ICE responded that it could not find responsive records. ICE response is attached hereto as Exhibit 2.

In addition to official ICE medical use of force assessment documents and court records confirming that Mr. Kumar was force-fed during the time period mentioned at the El Paso Service Processing Center, we have a first-hand account from Mr. Kumar who confirmed that all force-feeding incidents were recorded by video.

The response from ICE further stated, “ICE has conducted a search of the ICE Office of Enforcement and Removal Operations (ERO). ... If any records responsive to your request exist, they would be under the purview of the detention facility.” However, the El Paso Service Processing Center is owned and operated by DHS, so it appears that you’re referring us back to the detention facility that is run by ICE itself.

Furthermore, the FOIA Request included a DHS privacy waiver authorizing disclosure to a third party signed by Kumar for all information and records requested by FLMW. The privacy waiver is attached hereto as Exhibit 3.

# The Intercept

Given the official ICE documents confirming Mr. Kumar was force-fed during those dates, and Mr. Kumar's first-hand account of video recordings, it strains credulity to believe that the ICE can find no video or audio recordings documenting these incidents. The failure calls into question the reasonableness of the search.

## II. Duty to Fulfill Search Obligations

An agency must "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt.*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citations omitted). *See also Ancient Coin Collectors Guild v. United States Dep't of State*, 641 F.3d 504, 514 (D.C. Cir. 2011) ("An agency is required to perform more than a perfunctory search in response to a FOIA request."). The duty imposed on the agency is to conduct an adequate search, evaluated under a standard of reasonableness. *Id.*


It is patently unreasonable for the agency to summarily opine that there are no responsive records. What ICE offices beyond ERO were searched? Why was the El Paso detention facility which is operated by ICE not searched?

## III. Conclusion

By failing to make a reasonable search for requested records, ICE has constructively denied FLMW's Request. FLMW respectfully requests that the agency make a reasonable search for responsive records and produce the requested records as soon as possible.

If you have any questions, please feel free to call me at [REDACTED] or email me at [david.bralow@theintercept.com](mailto:david.bralow@theintercept.com). I look forward to a determination in twenty business days pursuant to 5 U.S.C. § 552(a)(6)(A)(ii).

Warm regards,

DocuSigned by:  
  
C011B4BDA9B34CD...

David Bralow  
Senior Vice President, Law  
First Look Media Works, Inc.  
[david.bralow@firstlook.org](mailto:david.bralow@firstlook.org)  
[REDACTED]

**The  
Intercept\_**

**Exhibit 1**

Travis Mannon  
The Intercept  
114 Fifth Avenue  
First Look Media 18th Floor  
New York, NY 10011

FOIA Officer  
Department of Homeland Security  
U.S. Immigration & Customs Enforcement  
500 12th Street, SW  
Stop 5009  
Washington, DC 20536-5009  
(866) 633-1182  
ice-foia@dhs.gov

January 14, 2020

**FOIA REQUEST**

**Fee waiver requested**

Dear FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I request access to and seek all video and audio recordings in connection with the force-feeding of former detainee Ajay Kumar at the El Paso Service Processing Center. According to official ICE medical use of force assessment documents and court records, Kumar was force-fed from August 14, 2019 through September 5, 2019, but we also request any and all footage related to Kumar's force-feeding that falls outside of this date range. We have a privacy waiver authorizing disclosure to a third party signed by Kumar for all information and records requested by us. Please find that document signed and attached to this request.

## **Exhibit 1**

I would like to receive the information electronically, but we will accept on CD, thumb drive, or whatever you have available.

I agree to pay reasonable fees for the processing of this request up to \$300. Please notify me before incurring any expenses in excess of that amount.

### Fee Categorization

For fee categorization purposes, I am a representative of the news media. Through this request, I am gathering information for my journalistic work with The Intercept, a nonprofit news organization. Accordingly, I am only required to pay for the direct cost of duplication after the first 100 pages. 5 U.S.C. § 552(a)(4)(A)(ii)(II); id. § 552(a)(4)(A)(iv)(II).

### Request for Fee Waiver

Please waive any applicable fees. Release of the information is not in The Intercept's commercial interest and will contribute significantly to public understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii). Release of this information is in the public interest because it will significantly contribute to the public understanding of government operations and activities.

### Request for Expedited Processing

Please provide expedited processing of this request which concerns a matter of urgency. As a reporter, I am primarily engaged in disseminating information. The public has an urgent need for information about the activities of ICE as they relate to the records requested in this FOIA. The records requested will shed light on federal government activities that raised significant civil liberties concerns. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

### Conclusion

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**Exhibit 1**

If my request is denied in whole or part, please justify all withholdings by reference to specific exemptions and statutes, as applicable. For each withholding please also explain why your agency “reasonably foresees that disclosure would harm an interest protected by an exemption” or why “disclosure is prohibited by law[.]” 5 U.S.C. § 552(a)(8)(A)(i).

I would appreciate your communicating with me by email or telephone, rather than by mail.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires.

Thank you in advance for your assistance.

Sincerely,

Travis Mannon

## Exhibit 2

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



U.S. Immigration  
and Customs  
Enforcement

February 24, 2020

Travis Mannon  
The Intercept  
114 Fifth Avenue  
First Look Media 18th Floor  
New York, NY 10011

**RE: ICE FOIA Case Number 2020-ICFO-21851**

Dear Mr. Mannon:

This letter is the final response to your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated January 14, 2020. You have requested all video and audio recordings in connection with the force-feeding of former detainee Ajay Kumar at the El Paso Service Processing Center.

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 individual<sup>1</sup> unless the agency has exempted the system of records from the access provisions of the Privacy Act.<sup>2</sup>

ICE has conducted a search of the ICE Office of Enforcement and Removal Operations (ERO) for records responsive to your request and no records responsive to your request were found. If any records responsive to your request exist, they would be under the purview of the detention facility.

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

While an adequate search was conducted, you have the right to appeal this determination that no records exist within ERO that would be responsive to your request. Should you wish to do so, you must send your appeal and a copy of the original response letter, within 90 days of the date

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<sup>1</sup> 5 U.S.C. § 552a(d)(1).

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

## Exhibit 2

of the letter following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. You may submit your appeal electronically at [GILDFOIAAppeals@ice.dhs.gov](mailto:GILDFOIAAppeals@ice.dhs.gov) or via regular mail to:

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

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

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

If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office and refer to FOIA case number **2020-ICFO-21851**. You may send an e-mail to [ice-foia@ice.dhs.gov](mailto: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 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](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Sincerely,



Catrina M. Pavlik-Keenan  
FOIA Officer



**Exhibit 3**

DEPARTMENT OF HOMELAND SECURITY  
U.S. Immigration and Customs Enforcement

**PRIVACY WAIVER AUTHORIZING DISCLOSURE TO A THIRD PARTY**

Use this form to authorize the U.S. Department of Homeland Security ("DHS") to disclose information and/or records about you to a third party. Taking this action is entirely voluntary; you are under no obligation to consent to the release of your information to any third party. **Authority:** Privacy Act of 1974 (5 U.S.C. § 552a); DHS Privacy Act Regulations (6 C.F.R. § 5.21(d)).

**STEP 1 Provide information about yourself and identify the third party that you intend to receive your information and/or records (the "Recipient").**

Your Full Name: Ajay Kumar	Your Alien Registration Number (if applicable): [REDACTED]
Your Current Address: [REDACTED], [REDACTED], [REDACTED]	Date of Birth: [REDACTED] Country of Birth: India
Recipient's Name: Travis Mannon	Recipient's Phone Number: [REDACTED]
Recipient's Mailing Address (required if requesting disclosure by mail): 114 Fifth Avenue, First Look Media 18th Floor, New York, NY 10011	
Recipient's Organization, if the waiver will apply to it (e.g. news media, congressional office, law firm): The Intercept (News Media)	

**STEP 2 Specify what information and/or records DHS is authorized to share with the Recipient.**

Identifying Data (Date of Birth, etc.)     
  Family Data     
  Travel/Border Crossing  
 Immigration Case     
  Detention Information     
  Medical Information  
 Alien File (A-File)     
  Criminal History     
  Criminal Case

**AND/OR**

The following information/records (describe): \_\_\_\_\_

**OR**

ALL information and/or Records Requested by the Recipient

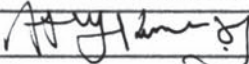
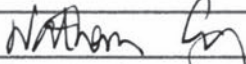
**For Aliens Only:** If you have applied for or received any of the immigration benefits below, you are legally entitled to confidentiality. (See reverse for more information.) If you want DHS to share information about these benefits with the Recipient, you must waive your confidentiality rights by checking the appropriate boxes below. Waiver of these rights is not required; however, if you do not waive these rights DHS may be unable to disclose to the Recipient some or all of the information you identified above.

**I waive my right to confidentiality and authorize disclosure to the Recipient regarding these immigration benefits:**

Temporary Protected Status (TPS)     
  T Visa (for trafficking victims)     
  U Visa (for victims of certain crimes)  
 Seasonal Agricultural Worker     
  Battered Spouse/Child Seeking Hardship Waiver     
  Violence Against Women Act (VAWA)  
 Asylum  
(confidentially applies even if petition is denied)

**STEP 3 Sign the statement below authorizing DHS to disclose your information and/or records to the Recipient.**

I certify under penalty of perjury that the information above is accurate. I authorize DHS, its components, offices, employees, contractors, agents, and assignees, to disclose the information or records specified above to the Recipient. I understand this may include and is not limited to reports, evaluations, and notes of any kind, contained in any record keeping system maintained by or on behalf of DHS; that DHS retains the discretion to decide if particular records or information are within the scope of this Waiver; and that DHS has no control over how the Recipient will use or disseminate my information. I agree to release and hold harmless DHS, its components, offices, employees, contractors, agents, and assignees, from any and all claims of action or damages of any kind arising from, or in any way connected to, the release or use of any information or records pursuant to this Waiver.

Your Signature: 	Witness Signature: 
Date: 12/20/2019	Witness Name: Nathan Craig

\*Privacy Waiver is valid for 90 days from date of signature

\*Witness may not be the Recipient or employed by Recipient's employer

### Exhibit 3

#### Explanation of Immigrant Benefits

If you have applied for or received any of the immigration benefits below, you may be legally entitled to confidentiality regarding these benefits. An explanation of these benefits is provided below to help you identify whether you have applied for such benefits. If you have applied for or received these benefits and you want DHS to share information about these benefits with the Recipient, you must waive your confidentiality rights by checking the appropriate boxes in Step 2 of this form (reverse). You are not required to waive confidentiality regarding these benefits; however, if you do not waive these rights DHS may be unable to disclose to the Recipient some or all of the information you identified above.

Temporary Protected Status (TPS) - 8 U.S.C. § 1254a(c)(6). TPS is for foreign nationals currently residing in the U.S. whose homeland conditions are recognized by the U.S. government as being temporarily unsafe or overly dangerous to return to (e.g., war, earthquake, flood, drought, or other extraordinary and temporary conditions). ICE may disclose information related to TPS to a third party with the consent of the alien.

T Visas and U Visas - Public Law 106-386, Section 701(c)(1)(C). A T visa allows certain victims of human trafficking to remain in the United States for a period of time. A U visa allows certain victims of crimes to remain in the United States for a period of time. ICE may disclose information related to T and U visas to third parties with the consent of the alien.

Legalization Claims, including Seasonal Agricultural Worker (SAW) Claims - 8 U.S.C. § 1255a(c)(4) and (5) and 8 U.S.C. § 1160(b)(5) and (6). Individuals who have applied for legalization, including those individuals employed in agricultural work of a seasonal or temporary nature who have made SAW Claims, may permit ICE to disclose information related to their claim to a third party with the individual's consent.

Battered Spouse or Child Information - 8 U.S.C. § 1186a(c)(4)(C). This provision applies to a battered alien or child who has applied for a hardship waiver from removal under the INA. ICE may disclose information the alien provided to ICE in support his or her request for waiver to a third party with consent of the alien.

Information Relating to Violence Against Women Act (VAWA) Claimants - 8 U.S.C. § 1367(a)(2). This provision applies to a person who has filed a claim under the VAWA. ICE may disclose information related to a person's claim to a third party with the consent of the person.

Asylum Information - 8 C.F.R. § 208.6. This provision applies to individuals who have applied for asylum, and confidentiality regarding the asylum claim applies even if the claim is ultimately denied. ICE may disclose information related to an individual's asylum claim to a third party with the consent of the person.

#### Revocation of Privacy Waiver

This Privacy Waiver is valid for 90 days from the date of signature unless you have otherwise specified on this form. You may revoke this Privacy Waiver at any time by contacting the ICE Privacy Office (202-732-3300 or [ICEPrivacy@dhs.gov](mailto:ICEPrivacy@dhs.gov)) or the relevant ICE office handling this matter or case. Certain information about you may be requested to confirm your identity and you may be asked to revoke the waiver in writing.