

Exhibit D

**NATIONAL
IMMIGRANT
JUSTICE CENTER**
A HEARTLAND ALLIANCE PROGRAM

August 11, 2020

FOIA Appeals, Policy and Litigation Branch,
U.S. Customs and Border Protection
90 K Street, NE, 10th Floor
Washington, DC 20229-1177

Sent electronically via FOIAonline

RE: FOIA Appeal #CBP-2019-077960

Dear Sir or Madam:

This is an administrative appeal pursuant to 5 U.S.C. § 552(a)(6) in light of the determination of the U.S. Customs and Border Protection (“CBP”) in response to the Freedom of Information Act (“FOIA”) request filed by the National Immigrant Justice Center (“NIJC”) on August 20, 2019, seeking access to, and copies of: “1. all Legal guidance for referrals, plea agreements, and sentencing guidelines used by CBP Prosecutions Units or Enforcement Officers as part of Operation Streamline; 2. Communications relating to the decision to restart Operation Streamline prosecutions in San Diego in July 2018, for the first time since 2005; 3. Policy guidance used by CBP Prosecutions Units or Enforcement Officers when making referrals for 8 U.S.C. 1325 prosecutions for individuals who expresses fear of persecution or return to their home country; and 4. Guidance used to determine when U.S. attorneys from CBP Prosecutions Units or Enforcement officers are assigned to prosecute Operation Streamline or 8 U.S.C. § 1325 or 8 U.S.C. § 1326 cases.” *See* Attachment A.

In response to the FOIA, CBP sent a letter on May 13, 2020, indicating that they “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 (keywords, locations, and/or dates).” *See* Attachment B.

NIJC respectfully submits that CBP has not conducted a reasonable search for records and requests that CBP conduct a search reasonably designed to uncover all responsive records.

Appeal

NIJC sent CBP the FOIA request on August 20, 2019. On May 13, 2020, CBP sent a final disposition letter, claiming that agency was unable to locate any records in response to NIJC’s request. CBP, however, did not conduct an adequate search for records responsive to NIJC’s very specific request for access to, and copies of, all records relating to for guidance and communications relating to Operation Streamline, and referrals for 8 U.S.C. §§ 1325 and 1326 cases. *See* 5 U.S.C. § 552(a)(3).



An agency must carry out a reasonable search for records responsive to a FOIA request. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). In responding to a FOIA request, an agency “must demonstrate that it has conducted a search reasonably calculated to uncover all relevant documents.” *Rojas v. Fed. Aviation Admin.*, 927 F.3d 1046, 1052 (9th Cir. 2019) (quoting another source); *see also Reporters Comm. for Freedom of Press v. Fed. Bureau of Investigation*, 877 F.3d 399, 402 (D.C. Cir. 2017). It is clear CBP has not met its legal obligations to conduct a reasonable and adequate search.

CBP has failed to produce any of the Operation Streamline related guidance which NIJC expects has been issued by the Chief of Border Patrol. There are many government documents that refer to CBP guidance relating to Operation Streamline and referrals for 8 U.S.C. §§ 1326 prosecutions. For example, the Department of Homeland Security’s Office of the Inspector General reported in 2015 that CBP told the DHS OIG that the Chief of the U.S. Border Patrol would develop guidance for all Border Sectors that use Operation Streamline. According to the OIG report:

“CBP responded that the Chief of the U.S. Border Patrol will develop and implement guidance in all Border Patrol sectors that use Streamline to ensure consistency in all aspects of administrative and criminal processing, particularly with regard to claims of fear of persecution or return. In developing this guidance, Border Patrol headquarters will work with the sectors to explore the possibility of establishing a working group comprised of processing subject matter experts, including ICE ERO. The working group will review Streamline processing operations and establish internal controls that will provide reasonable assurance of the consistency, integrity, and accuracy of Border Patrol’s processing for Streamline. CBP officials estimate it will develop the guidance by September 30, 2015.”¹

Based on this information, NIJC reasonably expected that CBP guidance has been issued by the Chief of the U.S. Border Patrol, as was indicated in the response to the DHS OIG in 2015.

The response from CBP to the DHS IG report in 2015 clearly indicated that the agency was developing guidance for all Border Patrol sectors that use Streamline. Under FOIA, CBP is required to conduct a search reasonably designed to uncover *all* responsive records. CBP’s failure to locate *any* local guidance records or other responsive records demonstrates that CBP has failed to fulfill its obligations under FOIA. CBP’s response to this FOIA request would have one believe that the Chief of the U.S. Border Patrol failed to issue guidance that was expected to be issued nearly five years ago. Thus, CBP bears the burden of justifying its search and must confirm that it searched all physical and electronic locations within its possession, custody or

¹ U.S. Department of Homeland Security, Office of the Inspector General, “Streamline: Measuring Its Effect on Illegal Border Crossing” OIG-15-95, May 15, 2020, https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf.



control where responsive records might reasonably be located, and that, notwithstanding the CBP response to the DHS IG report, no records were found.

NIJC re-affirms in all aspects the August 20, 2019 FOIA request. Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to CBP's response to this FOIA request should also be considered within the scope of the request. Please provide records that are most current as of the day of production of the data.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data, as well as a *Vaughn* index describing the responsive records. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. 5 U.S.C. § 552(b). To the extent that materials are excised, please "black out" these materials, rather than "whiting out" or "cutting out" these materials. NIJC reserves the right to appeal any decision(s) to withhold information and expects that ICE will list the address and office to which such an appeal may be directed. 5 U.S.C. § 552(a)(6)(A)(i). Please reply to this request within twenty working days, or as required by statute. *Id.*

Fee Waiver

NIJC reiterates its request that the fees for this FOIA request be waived because disclosure of the requested information is (1) likely to contribute significantly to public understanding of the operations or activities of the government and (2) not primarily in the commercial interest of the requester. *See* Attachment A; 5 U.S.C. § 552(a)(4)(A)(iii).

Conclusion

Please note that, pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we expect you will make a determination on our appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of our appeal.

NIJC reserves all rights. If you have any questions regarding this appeal or the FOIA request, please feel free to call me at my direct line, 202-276-2569.

Sincerely,

/s/ Jesse Franzblau

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Enclosures:

- Attachment A: NIJC FOIA Request, August 20, 2019, FOIA #CBP-2019-077960
- Attachment B: CBP Response to FOIA Request, May 13, 2020, FOIA #CBP-2019-077960