

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IMMIGRANT DEFENSE PROJECT,

Plaintiff

v.

UNITED STATES
IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendant.

Case No. 22-cv-1153

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

Freedom of Information Act,
5 U.S.C. § 552

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552 *et seq.*, seeking declaratory, injunctive, and other appropriate relief to compel Defendant, United States Immigration and Customs Enforcement (“ICE”), to produce agency records that have been improperly withheld from Plaintiff, Immigrant Defense Project (“IDP”).

2. Plaintiff brings this action to compel production of documents sought in a FOIA request, dated September 2, 2021, to obtain records from the last two years regarding ICE’s ever expanding, punitive supervision programs. Ex. 1, Plaintiff’s 2021 FOIA Request. These programs use carceral monitoring technology that monitors, tracks and constrains individuals’ movements, as well as punitive conditions of release, in order to reproduce conditions of incarceration by depriving individuals of their liberty and privacy.¹ ICE uses these programs to

¹ For purposes of this complaint, the term “supervision program” refers to Orders of Supervision (“OSUPs”) and Alternative to Detention (“ATD”) programs – including but not limited to the Intensive Supervision Appearance

cast a wide net of surveillance over immigrant communities, subjecting over 160,000 immigrants and their families to invasive data collection.

3. This FOIA request seeks to obtain up to date records to supplement recently obtained records on ICE supervision. Plaintiff submitted a set of FOIA requests in December 2019, for which Defendant ICE is currently producing records created or maintained between January 2017 and December 2019. *See Immigrant Defense Project et al. v. U.S. Immigration and Customs Enforcement*, No. 20-cv-10660 (SDA). The instant FOIA request seeks records from December 2019 to the present, which will shed light on ICE's current policies and practices, including any changes that have resulted from the COVID-19 pandemic or the Biden administration's emphasis on carceral monitoring.

4. The Biden administration has overseen a dramatic expansion of ICE's ATD programs in the last year,² while also increasing the number of detained immigrants, which had fallen during the first year of the COVID-19 pandemic.³ This expansion, carried out with little transparency, has raised concerns from immigrants, advocates, and elected officials. Of concern is the growing capacity to collect massive amounts of data on persons within, and outside ATD programs, casting a shadow of fear over entire immigrant communities.

5. The records requested by Plaintiff are urgently required to ensure that the public is fully informed about current ICE supervision practices and is able to effectively engage law and policy makers, who are actively debating the future expansion of ICE's surveillance and

Program ("ISAP"), technology-only monitoring programs, Population Management programs – and other forms of supervision for noncitizens which are administered by DHS and third-party contractors, including non-government actors.

² *Alternatives to Detention (ATD)*, SYRACUSE UNIVERSITY TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html (last visited Feb. 3, 2022).

³ Philip Marcela & Gerald Herbert, *Immigrant detentions soar despite Biden's campaign promises*, AP NEWS (Aug. 5, 2021), <https://apnews.com/article/joe-biden-health-immigration-coronavirus-pandemic-4d7427ff67d586a77487b7efec58e74d>.

carceral monitoring apparatus. ICE's failure to respond to Plaintiff's FOIA request, which was submitted over five months ago, prevents the public from having a meaningful voice in addressing the issues pertaining to the ICE supervision regime at a critical time in which it is experiencing unparalleled growth.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 28 U.S.C. 1331 (federal question jurisdiction), 5 U.S.C. 552(a)(4)(B), and 5 U.S.C. 1346 (United States as defendant).

7. Plaintiff has its principal places of business within this District and Defendant ICE maintains a field office in this District and operates in all 50 states. Jurisdiction and venue are therefore proper under 5 U.S.C. 552(a)(4)(B).

8. Venue is also proper under 28 U.S.C. 1391(e) and 1402(a) as a civil action against an agency of the United States.

PARTIES

9. Plaintiff Immigrant Defense Project ("IDP") is an expert resource and advocacy organization that monitors the intersection of the criminal legal and immigration systems.⁴ IDP disseminates information about these issues and provides training, advice, and support to policy makers, attorneys, the general public, and affected communities, and these materials routinely include information obtained through FOIA requests.⁵ IDP is a nonprofit

⁴ *Mission*, IMMIGRANT DEFENSE PROJECT, <https://www.immigrantdefenseproject.org/about/> (last visited Feb. 7, 2022).

⁵ *IDP Resources*, IMMIGRANT DEFENSE PROJECT, <https://www.immigrantdefenseproject.org/resources2/> (last visited Feb. 7, 2022); *Denied, Disappeared, and Deported: The Toll of ICE Operations at New York's Courts in 2019*, IMMIGRANT DEFENSE PROJECT (Jan. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/Denied-Disappeared-Deported-FINAL.pdf> (last visited Feb. 7, 2022) (data in part provided by information obtained in *Immigrant Defense Project v. U.S. Immigration and*

organization fiscally sponsored by the Fund for the City of New York, a 501(c)(3) headquartered in New York. IDP's principal place of business is located in New York, N.Y.

10. Defendant Immigration and Customs Enforcement ("ICE") is a component agency of the Department of Homeland Security ("DHS"). It is an "agency" within the meaning of 5 U.S.C. 552(f)(1). ICE has field offices in New York, N.Y. and operates in all 50 states. Upon information and belief, ICE has possession, custody, and control over the records Plaintiff seeks.

STATEMENT OF FACTS

All statements herein are made upon information and belief except where the basis of knowledge is specified.

I. Records Produced in Response to 2019 FOIA Requests Confirmed That ICE's Supervision Programs Were Used as an Alternative *Form of Detention*, Resulting in Harassment and Mass Surveillance of Immigrants and their Communities.

11. In December 2019, Plaintiff submitted two FOIA Requests seeking records related to ICE supervision programs and practices between January 2017 and December 2019. *See Ex. 5, Plaintiff's 2019 FOIA Requests.* Plaintiff subsequently filed suit in December 2020 to compel production. *See Immigrant Defense Project et al. v. U.S. Immigration and Customs*

Customs Enforcement); *Defend Against ICE Raids and Community Arrests*, IMMIGRANT DEFENSE PROJECT (2017), <https://www.immdefense.org/raids-toolkit/> (last visited Feb. 7, 2022) (including documents obtained in the *Immigrant Defense Project et al. v. ICE, et al.* FOIA litigation); *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City*, IMMIGRANT DEFENSE PROJECT (July 23, 2012), <https://www.immigrantdefenseproject.org/wp-content/uploads/2012/08/NYC-FOIA-Report-2012-FINAL-Aug.pdf> (data in part provided through FOIA with ICE); *ICE Raids FOIA*, IMMIGRANT DEFENSE PROJECT, <https://www.immigrantdefenseproject.org/raids-foia/> (last visited Feb. 7, 2022) (information on ICE trainings and practices around home raids, obtained through ongoing FOIA litigation, available online).

Enforcement, No. 1:20-cv-10660 (S.D.N.Y. 2020). ICE began producing documents in April 2021, 14 months after Plaintiff's initial request.⁶

12. Plaintiff's 2019 FOIA Requests sought to understand the policies and practices that led ICE to subject over 83,000 individuals to supervision under ICE's so called "Alternatives to Detention" (ATD) programs by August 2019,⁷ even while continuing to hold at times more than 55,000 people in detention per day that same year.⁸ Ex. 6, Plaintiff's 2020 FOIA Complaint. In particular, Plaintiff's FOIA sought records concerning ATD programs—namely the Intensive Supervision Appearance Program (ISAP), which is managed by Behavioral Interventions (BI) Inc.

13. As alleged in Plaintiff's 2020 FOIA complaint, ISAP uses carceral monitoring technology—including GPS-enabled ankle shackles—and punitive conditions of release, such as curfews and home inspections, to restrict the freedoms of immigrants and surveil whole communities.⁹ *Id.* Much like physical detention, ISAP grew exponentially between

⁶ Despite a lengthy delay in processing the 2019 Requests, ICE declined to produce records dated after December 2019. As a result, Plaintiff submitted the instant September 2021 request for up-to-date information, so that the organization can educate the public about the current state of ICE supervision programs.

⁷ See *Alternatives to Detention (ATD)*, SYRACUSE UNIVERSITY TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html (last visited Feb. 8, 2022).

⁸ Gabe Ortiz, *Immigrants required to check in regularly with ICE fear not being able to walk back out*, DAILY KOS (May 7, 2019), <https://www.dailykos.com/stories/2019/5/7/1855799/-Immigrants-required-to-check-in-regularly-with-ICE-fear-not-being-able-to-walk-back-out>; *ICE Detainees*, SYRACUSE UNIVERSITY TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html, (last visited Feb. 7, 2022).

⁹ The ankle shackles limit mobility and people's ability to work or care for their children. They have to be charged about every six hours and can take hours to fully charge. *Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention*, NATIONAL IMMIGRATION FORUM (Feb. 22, 2019), <https://immigrationforum.org/article/fact-sheet-electronic-monitoring-devices-as-alternatives-to-detention/>. People have been detained simply because their shackles ran out of battery. If the battery dies, or if it bangs against something, an alarm is triggered. One asylum seeker lost his job after his ankle shackle's alarm went off because his boss "worried it could put other undocumented employees at risk of deportation." Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 606. (2020). See also Joanna Bernstein, *Caseworkers Say ICE Accused Women of Tampering With Ankle Monitors, Leading To Their Deportations*, LATINO USA (Feb. 3 2020), <https://www.latinousa.org/2020/02/13/anklemonitorsice/>; David Yaffe-Bellany, "It's humiliating": Released immigrants describe life with ankle monitors, THE TEXAS TRIBUNE (Aug. 10, 2018), <https://www.texastribune.org/2018/08/10/humiliating-released-immigrants-describe-life-ankle-monitors/>; Ruthie Epstein, *ICE is using an alternative to immigrant detention. But it's inhumane*, Opinion Section, THE WASHINGTON POST (Sept. 5, 2018), <https://www.washingtonpost.com/news/worldpost/wp/2018/09/05/trump-immigrants-2/>.

2015 and 2019; the program was originally limited to “high-priority cases” of immigrants but evolved to include immigrants who in the past, would have been paroled or released on bond rather than detained.¹⁰

14. Records produced through Plaintiff’s 2019 FOIA and a related FOIA Request made in California, confirmed concerns about ICE’s vast, unchecked authority over immigrants under ICE supervision.¹¹ ICE deportation officers enjoy extraordinary discretion to impose onerous conditions on immigrants, for example by requiring weekly office visits or home inspections every two weeks. *See* Ex. 7, ATD Participant Enrollment Form. The ISAP Program Rules Agreement also requires immigrants to allow the search of their car when they report to the ISAP office for a mandated visit. Ex. 8, ISAP Program Rules Agreement. Further, ICE explicitly prohibits attorneys from accompanying clients during ISAP check-ins. Ex. 9, Select Pages from ISAP IV Contract at A114, 2021 ICLI-00015 at 736.¹² Records also show that immigrants can be penalized for failing to return an ISAP call within five minutes. *Id* at A117, 2021-ICLI-00015 at 682-683. The records further reveal obscure procedures for de-escalating conditions of release and filing grievances. Ex. 10, Select Pages from ICE ATD Handbook (2017) at A128-130, 2021-ICLI-00015 059-061. Informed by these records, attorneys are now better able to counsel their clients.

15. Produced documents show that ISAP collects immigrant’s private information, including data on friends and family members outside of the program. When a woman reports a

¹⁰ Pittman, *supra* note 9, at 593; *see also* Bernstein, *supra* note 9; *Ramirez v. United States Immigration & Customs Enft.*, No. 18-508 (RC), 2020 U.S. Dist. LEXIS 115875, at *5 (D.D.C. July 2, 2020).

¹¹ Plaintiff’s Exhibit 11 is the only exhibit of documents not produced in response to Plaintiff’s 2019 FOIA. Plaintiff did obtain the same document in response to their 2019 FOIA requests, but it was much more substantially redacted. *See* Ex. 11, Select Pages from BI Technical Proposal.

¹² Where Plaintiff cites to specific pages of exhibits, Plaintiff has provided a Bates number for purposes of the exhibits to this complaint (located in the upper right-hand corner of the page) and provided the FOIA case number and Bates number assigned by Defendant ICE (located in the bottom center of the page).

pregnancy, BI Inc. employees are directed to obtain information regarding the biological father, including his citizenship and address. Ex. 9, Select Pages from ISAP IV Contract at A115-116, 2021-ICLI-00015 at 681-682. Records also confirmed what had previously been reported by the press¹²—ICE used GPS data obtained from ankle shackles to identify travel patterns, plan detention operations, and collaborate with local law enforcement. *See* Ex. 11, Select Pages from BI Inc. Technical Proposal (July, 2019) at A153-154, 2020-ICLI-00054 004237-004238; Ex. 12, Select Pages from ISAP Connections Report (April, 2017).

16. Although production of responsive records commenced in April 2021, ICE did not agree to search for documents created after the December 2019 date of submission. To understand any changes or developments since December 2019, Plaintiff submitted a new FOIA request in September 2021 seeking records and data on the implementation of supervision programs and any policy changes up to the present date.

17. Given that the 2019 and the 2021 FOIA requests seek substantially similar records and share parties, and in the interest of conserving judicial resources, Plaintiffs request that this Complaint for Declaratory and Injunctive Release be processed as a related case to the ongoing FOIA litigation around Plaintiff's 2019 FOIA.

II. Under the Biden Administration, ICE's Supervision Programs Have Significantly Expanded, Raising New Questions and Concerns.

18. Biden has ushered in a new emphasis on ICE supervision programs. During his campaign, President Biden advocated for ending “prolonged detention” and community-based, non-profit “alternatives to detention,” indicating a commitment to transitioning away from

¹² Unsealed search warrants from a raid in Mississippi showed that ICE used data from an ankle shackle worn by a Guatemalan woman to identify the site of the raid. In fact, immigrants on electronic monitoring were present at all five worksites that were raided in Mississippi in 2019. Daniella Silva, *GPS tracking of immigrants in ICE raids troubles advocates*, NBC NEWS (Aug. 15, 2019), <https://www.nbcnews.com/news/us-news/gps-tracking-immigrants-ice-raids-troubles-advocates-n1042846>.

carceral monitoring.¹³ Yet, in the first six months of the new administration, the number of people in immigrant detention nearly doubled,¹⁴ and the number of people in ISAP also nearly doubled by January 2022, reaching an all-time high of 164,391 people.¹⁵

19. To accommodate this expansion, ICE's budget has ballooned.¹⁶ In its FY2022 proposed budget, ICE requested a budget of \$52.2 billion, including an increased request of \$440 million for its ATD programs¹⁷ – a 25% surge from ICE's proposed FY2021 ATD budget.¹⁸ In July 2021, the House Appropriations Committee exceeded ICE's ATD budget proposal by passing a budget of \$475 million.¹⁹ This figure stands in sharp contrast to ICE's FY2015 budget of approximately \$109 million.²⁰ In addition, the public is paying for a \$2.2 billion five-year contract with BI, which was recently renewed for the fourth time in April 2020.²¹

20. President Biden and some Democratic leaders have signaled a desire to further expand ATD programs. In February 2021, the Administration announced an immigration reform

¹³ In calling for “proven” alternatives to detention, the President’s campaign cites to Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 *Cardozo L. Rev.* 2141 (2017), which specifically calls for community-based alternatives provided by traditional service providers, as opposed to reliance on electronic monitoring which serves as another form of custody. *The Biden Plan for Securing Our Values As a Nation Of Immigrants*, JOEBIDEN.COM, <https://joebiden.com/immigration/#> (last visited Feb. 7, 2022).

¹⁴ *ICE Detainees*, SYRACUSE UNIVERSITY TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html, (last visited Feb. 7, 2022).

¹⁵ See *Alternatives to Detention (ATD)*, SYRACUSE UNIVERSITY TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html (last visited Feb. 7, 2022).

¹⁶ See *The President’s FY2016 Budget*, NATIONAL IMMIGRATION FORUM (Feb. 7, 2015), <https://immigrationforum.org/article/presidents-fy-2016-budget-2/> (last visited Feb. 7, 2022); see also Heidi Altman, *Principles for a Just Immigration Budget for 2022*, NATIONAL IMMIGRANT JUSTICE CENTER, <https://immigrantjustice.org/staff/blog/budgeting-better-way> (last visited Feb. 7, 2022).

¹⁷ *FY 2022 Budget in Brief*, U.S. DEPT. OF HOMELAND SEC. at 3, https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf (last visited Feb. 7, 2022).

¹⁸ *FY 2021 Budget in Brief*, U.S. DEPT. OF HOMELAND SEC. at 3, https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_web_version.pdf (last visited Feb. 7, 2022).

¹⁹ Chris Mills Rodrigo, *Homeland Security funding package pours millions into migrant surveillance*, *The Hill* (Jul. 13, 2021), <https://thehill.com/policy/technology/562811-homeland-security-funding-package-pours-millions-into-surveillance>.

²⁰ *The President’s FY2016 Budget*, NATIONAL IMMIGRATION FORUM (Feb. 6, 2015), <https://immigrationforum.org/article/presidents-fy-2016-budget-2/> (last visited Feb. 7, 2022).

²¹ Altman, *supra* note 16.

bill which, among other things, calls for DHS to expand alternatives to detention.²² More recently, Democratic Representative Lofgren, chair of the House Subcommittee on Immigration and Citizenship, advocated for increasing ICE’s reliance on ankle monitors to track immigrants.²³ Indeed, GEO Group, Inc., the second largest private prison corporation²⁴ and BI, Inc.’s parent company has signaled that it expects immigrant detention and ATD programs to continue growing. The company reassured investors that any losses from the Biden administration’s executive order barring contracts with private criminal detention facilities²⁵ would be offset by increased profits from “diversified business interests,” including immigrant supervision and detention.²⁶

21. The Biden administration has also announced a new supervision program called the ATD Case-Management Pilot Program (“ATD CMPP”).²⁷ Very little is known about this proposed new program, but it raises questions about how immigrants will be selected and to what extent it will rely on carceral monitoring technologies and onerous reporting requirements.

²² Camilo Montoya-Galvez, *Democratic lawmakers unveil Biden-backed immigration overhaul bill*, CBS NEWS (Feb. 18, 2021) <https://www.cbsnews.com/news/immigration-bill-democrats-biden-unveil/>.

²³ Meena Venkataramanan, *ICE poised for changes as Biden nominee heads to Senate for confirmation vote*, LOS ANGELES TIMES (Aug. 25, 2021), <https://www.latimes.com/politics/story/2021-08-25/ice-poised-for-reform-as-biden-nominee-heads-to-senate-for-confirmation-vote>.

²⁴ *The GEO Group Inc*, INVESTIGATE <https://investigate.afsc.org/company/geo-group> (last visited Feb. 7, 2022).

²⁵ *Executive Order on Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities*, White House (Jan. 26, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities/>.

²⁶ *The GEO Group Reports First Quarter 2021 Results and Updates Full Year 2021 Guidance*, THE GEO GROUP, Inc. (May 10, 2021), <https://investors.geogroup.com/news-events-and-reports/investor-news/news-details/2021/The-GEO-Group-Reports-First-Quarter-2021-Results-and-Updates-Full-Year-2021-Guidance/default.aspx> (last visited Feb. 7, 2022).

²⁷ Press Release, *DHS Announces Alternatives to Detention Case Management Pilot Program*, U.S. DEP’T OF HOMELAND SEC., (Aug. 17, 2021) <https://www.dhs.gov/news/2021/08/17/dhs-announces-alternatives-detention-case-management-pilot-program> (last visited Feb. 7, 2022).

22. Responding to these developments, immigrant rights groups, including Plaintiff, have condemned the Biden Administration’s reliance on carceral surveillance methods.²⁸ Advocates have criticized ICE for increasing “the number of people overall who are caught in this sort of enforcement and surveillance system,” under the false pretense of reducing the number of immigrants in physical detention.²⁹ Advocacy organizations are calling on the administration to make “greater investments in community-based, community-supported resources that exist outside of ICE and CBP and are matched by bold reductions in funding for detention and enforcement,”³⁰ including by phasing out ISAP entirely.³¹ Lawmakers have introduced legislation to further those objectives by proposing legislation which would “shrink the population of detention centers and promote more humane and less costly community-based alternatives.”³²

23. Lawmakers and the public urgently need information about ICE’s supervision programs to participate in an informed debate about the ICE’s expansion of carceral monitoring. Yet, ICE continues to shroud their supervision programs in secrecy. Indeed, “opacity is a

²⁸ Sarah Betancourt, *‘Traumatizing and abusive’: Immigrants reveal personal toll of ankle monitors*, THE GUARDIAN (Jul. 12, 2021), <https://www.theguardian.com/us-news/2021/jul/12/immigrants-report-physical-emotional-harms-electronic-ankle-monitors>.

²⁹ Giulia McDonnell Nieto del Rio, *Ankle Monitors and GPS Apps: ICE’s Alternatives to Detention, Explained*, DOCUMENTED (Sep. 20, 2021), <https://documentedny.com/2021/09/20/ankle-monitors-and-gps-apps-ices-alternatives-to-detention-explained/>.

³⁰ *Defund Hate: Humane Immigration Starts With Dramatically Defunding ICE and CBP. President Biden’s Proposed Budget Fails to Do That*, DEFUND HATE COALITION (Apr. 12, 2021), <https://defundhate.org/2021/04/12/defund-hate-humane-immigration-starts-with-dramatically-defunding-ice-and-cbp-president-bidens-proposed-budget-fails-to-do-that/>; see also *245 Human and Civil Rights Organizations call on Congress to Cut Funding for ICE and CBP by at least 50% in FY2022 DHS Appropriations Bill*, DEFUND HATE COALITION, <https://defundhate.org/2021/03/17/245-human-and-civil-rights-organizations-call-on-congress-to-cut-funding-for-ice-and-cbp-by-at-least-50-in-fy2022-dhs-appropriations-bill/> (last visited Feb. 7, 2022).

³¹ Altman, *supra* note 16.

³² Pramila Jayapal, *Jayapal, Booker, and Smith Reintroduce Dignity for Detained Immigrants Act*, <https://jayapal.house.gov/2021/03/25/dignity-for-detained-immigrants/> (last visited Feb. 7, 2022).

hallmark of ICE’s ATD program,” leaving immigrants, and their advocates, with no understanding of why they are placed in ATD.³³

III. Plaintiff’s 2021 FOIA Request Seeks Records Which are Urgently Needed

24. Plaintiff’s instant FOIA Request supplements its 2019 FOIA requests by seeking ICE supervision records created after December 2019, including updated versions of reports, data, and policy documents produced in response to the 2019 FOIA. Ex 1, 2021 FOIA Requests.

25. For example, Plaintiff’s 2021 FOIA seeks to obtain updated documents regarding custody decisions and determinations as to conditions of release. In 2017, ICE changed its automated Risk Classification Assessment (“RCA”) tool, used to make initial custody determinations, such that it no longer recommended release under any circumstance. Ex. 13, RCA Update Memo and Analysis (June 2017). Plaintiff’s 2021 FOIA Request seeks to uncover whether the Biden administration has changed the custody determination process.

26. Moreover, evolving technology raises questions about new encroachment on privacy rights. Produced documents revealed an increasing reliance on SmartLINK, a smartphone application that uses location tracking and facial recognition technology to monitor immigrants. *See* Ex. 11, Select Pages of BI Inc. Technical Proposal (July, 2019) at A150, 2020-ICLI-00054 at 004234. Plaintiff’s request aims to unveil critical information about the capabilities of what has become ICE’s “go-to” technology.³⁴ Records also suggested that BI Inc. may be developing new surveillance technologies, including “[s]maller, wrist-worn GPS solution” to track immigrants. *Id* at A147, 155.

³³ McDonnell Nieto del Rio, *supra* note 29.

³⁴ James Kilgore, *Big Tech is Using the Pandemic to Push Dangerous New Forms of Surveillance*, TRUTHOUT (June 22, 2020), <https://truthout.org/articles/big-tech-is-using-the-pandemic-to-push-dangerous-new-forms-of-surveillance/>.

27. Additionally, Plaintiff's 2021 Request seeks to obtain any policy documents regarding policy changes, including changes produced by the COVID-19 pandemic. Use of ankle monitors has become more prevalent as more people were released from immigration jails during the pandemic,³⁵ however, some immigrants have been re-detained without any explanation.³⁶ The instant FOIA seeks to understand what policies were put in place to determine when someone, who was released due to the pandemic, should be re-detained. Plaintiff also seeks records on ICE's policies for supervising qualified individuals with disabilities given the disproportionate risk that COVID-19 creates for persons with disabilities.³⁷

28. ICE's failure to publicly disclose the current policies and practices of their supervision programs makes this FOIA necessary, since FOIA exists "to ensure that the Government's activities be opened to the sharp eye of public scrutiny."³⁸ Currently, Plaintiff only has a snapshot of what these policies and practices were in the period between 2017 and 2019. Ex. 5, Plaintiff's 2019 FOIA Requests. Plaintiff's request seeks to ensure that the public is able to meaningfully engage in important conversations about immigration enforcement and immigrant rights that are currently unfolding.

IV. ICE Failed to Timely Comply with Plaintiff's 2021 FOIA Requests

29. On September 2, 2021, Plaintiff filed a FOIA Request pursuant to 5 U.S.C. §§ 552 et seq. to Defendant. Ex. 1, Plaintiff's 2021 FOIA Request.

³⁵ Matt Katz, *ICE Releases Hundreds of Immigrants As Coronavirus Spreads in Detention Centers*, NPR.ORG (Apr. 16, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/16/835886346/ice-releases-hundreds-as-coronavirus-spreads-in-detention-centers>.

³⁶ Matt Katz, *Released From ICE Detention Due to COVID, NJ Green Card Holder Is Detained Again*, GOTHAMIST (Oct. 19, 2020), <https://gothamist.com/news/released-ice-detention-due-covid-nj-green-card-holder-detained-again>.

³⁷ *People with Disabilities*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/ncbddd/humandevlopment/covid-19/people-with-disabilities.html> (last visited Feb. 7, 2022).

³⁸ *U.S. Dep't of Just. v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 774 (1989) (emphasis omitted).

30. Plaintiff's 2021 Request sought expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II), citing the "urgency to inform the public about an actual or alleged federal government activity," noting that requesters are "primarily engaged in disseminating information" and thus warrant expedited processing. 5 U.S.C. § 552(a)(6)(E)(v)(II). By publishing reports, Know Your Rights materials, community legal resources, as well as resources for attorneys, prosecutors and judges, to name a few, Plaintiff disseminates information that is both free and widely accessible to the public.³⁹ The Plaintiff thus meets the standard for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II). *See also* 6 C.F.R. § 5.5(e)(3).

31. Plaintiff sought a fee waiver on the basis that "disclosure of the requested materials is in the public interest because it is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest" of the Plaintiff. 5 U.S.C. 552(a)(4)(A)(iii). Plaintiff is a nonprofit organization with no private commercial interest in the records requested and will make non-confidential information available to the public, including the media, at no charge.

32. Plaintiff requested a response within twenty business days pursuant to 5 U.S.C. § 552(a)(6)(A)(i). Plaintiff received no letter of acknowledgement.

33. On September 22, 2021, October 7, 2021, and November 3, 2021, Plaintiff's undersigned counsel inquired electronically about ICE's failure to acknowledge receipt of the FOIA request. Ex. 2, Plaintiff's Administrative Appeal. Neither Plaintiff nor undersigned counsel received a response to their inquiries. On November 2, 2021, undersigned counsel also

³⁹ IDP Resources, IMMIGRANT DEFENSE PROJECT, <https://www.immigrantdefenseproject.org/resources2/>, (last visited Feb 7, 2022).

sent the ICE FOIA office a letter outlining attempts to confirm receipt of the Request and inquiring again about its status but did not receive a response. *Id.*

34. By failing to respond to Plaintiff's request for expedited proceeding within the 10 days mandated by statute, ICE constructively denied Plaintiff's expedited processing request.

35. Plaintiff filed an administrative appeal of the FOIA Request with the Government Information Law Division at the Office of the Principal Legal Advisor ("OPLA") on December 9, 2021, appealing the constructive denial of Plaintiff's FOIA Request by the ICE FOIA Office. *See Ex. 2, Plaintiff's Administrative Appeal.*

36. ICE sent Plaintiff an acknowledgement letter on December 20, 2021 acknowledging the receipt of Plaintiff's administrative appeal. *See Ex. 3, Defendant ICE Acknowledgement of Receipt of Appeal.*

37. On January 19, 2022, the ICE Government Information Law Division sent Plaintiff another letter stating that ICE was remanding the administrative appeal back to the ICE FOIA Office "for the completion of processing." Defendant ICE assigned case number 2022-ICAP-00268. *Ex. 4, Defendant ICE Response to Administrative Appeal.* To date, Plaintiff has received no further response from ICE or from the Government Information Law Division at OPLA regarding the FOIA Request.

38. ICE has failed to make a determination on Plaintiff's request, failing FOIA's requirement that the agency provide one within 20 business days (or 30 days under "unusual circumstances"). *See 5 U.S.C. § 552(a)(6)(A)(i); 5 U.S.C. § 552(a)(6)(B).* Because ICE has failed to comply with the time limits imposed by FOIA, Plaintiff exhausted their administrative remedies. *5 U.S.C. § 552(a)(6)(C)(i).* Plaintiff is therefore entitled to appeal directly to this Court for relief. *5 U.S.C. § 552(a)(4)(B).*

CAUSES OF ACTION

COUNT I

FOIA Violation: Failure to Comply with Time Limit Provisions

39. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if repeated and incorporated herein.

40. Defendant failed to respond to Plaintiff's request within the 20 days afforded under the FOIA statute, 5 U.S.C. § 552(a)(6)(A)(i), or the additional 10 days provided for "unusual circumstances," 5 U.S.C. § 552(a)(6)(B), 6 C.F.R § 5.5(c)

41. Plaintiff has exhausted administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

42. Defendant's response to Plaintiff's administrative appeal failed to make the requisite determination as to Plaintiff's Request and thus did not remedy the violation of the statute. *See* Ex. 3, Defendant ICE Acknowledgement of Receipt of Appeal; Ex. 4, Defendant ICE Response to Administrative Appeal. A determination "must at least indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." *Citizens for Responsibility and Ethics in Washington v. Federal Election Com'n*, ("CREW"), 711 F.3d 180,182–183 (D.C. Cir. 2013).

43. Plaintiff has a legal right under FOIA 5 U.S.C. § 552(a)(6)(A)(i), 5 U.S.C. § 552(a)(6)(B), and 6 C.F.R § 5.5(c) to timely notification from Defendant of its determination of whether to comply with Plaintiff's request and the reasons therefor, or to a written notice to Plaintiff requesting the 10 day extension of the statutory 20-day period as a result of 'unusual circumstances' set forth in the notice. There exists no basis for Defendant's denial of this right.

COUNT II

FOIA Violation: Failure To Disclose and Release Responsive Records

44. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if repeated and incorporated herein.

45. Plaintiffs have exhausted all administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

46. Plaintiffs have a statutory right under FOIA, 5 U.S.C. § 552(a)(3)(A), to the records they requested, and there is no legal basis for ICE's failure to disclose them.

47. Upon receiving Plaintiffs' Request, Defendants were obligated under 5 U.S.C. § 552(a) to promptly conduct a reasonable search for responsive records and to produce any responsive records.

48. As of the date of this Complaint and in violation of the deadlines set forth in 5 U.S.C. § 552(a)(6), Defendants have failed to disclose and release records in violation of 5 U.S.C. § 552(a).

49. Defendants have not identified any legal basis for their failure to timely conduct a reasonable search for, and to produce, responsive records.

50. By failing to disclose and release the requested records, and by failing to conduct timely and adequate searches reasonably calculated to uncover responsive records, Defendant has violated the public's right, advanced by the Plaintiff, to agency records under 5 U.S.C. § 552(a)(6)(A), 5 U.S.C. § 552(a)(3), and Defendant's corresponding regulations.

COUNT III

Defendant Improperly Denied Plaintiff's Request for Expedited Processing

51. Plaintiff repeat and reallege each and every allegation contained in the foregoing paragraphs as if repeated and incorporated herein.

52. Defendant constructively denied Plaintiff's request for expedited processing by failing to make a determination of whether to provide expedited processing within 10 days as required by 5 U.S.C. § 552 (a)(6)(E)(ii).

53. Defendant failed to address the constructive denial for expedited processing in its response to Plaintiff's administrative appeal, violating Plaintiff's right to "expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing." 5 U.S.C. § 552 (a)(6)(E)(ii)(II).

54. Defendant has violated Plaintiff's right to expedited processing under 5 U.S.C. § 552(a)(6)(E) and Defendant's own regulations. 6 C.F.R. § 5.5(e).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare that Defendant's withholding of the requested records is unlawful;
- (2) Order Defendant to immediately conduct a full, adequate, and expedited search and make available all records responsive to the Requests immediately after the Court's order;
- (3) Order Defendant to engage in expedited processing in this action;
- (4) Enjoin the Defendant from withholding all records responsive to the Requests;
- (5) Enjoin the Defendant from assessing fees or costs for the processing of the FOIA Requests;
- (6) Order Defendant to prepare an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *cert denied*, 415 U.S. 977 (1974), for any documents they seek to withhold under a FOIA exemption;
- (7) Award Plaintiff their costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

(8) Grant such other and further relief as this Court may deem just and proper.

Dated: New York, New York
February 10, 2021

Respectfully Submitted,

/s/ Nancy Morawetz

Nancy Morawetz – NM 1193

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