

Exhibit J



Privacy Office
Attn: FOIA Appeals
U.S. Department of Homeland Security
245 Murray Lane, SW, Mail Stop 0655
Washington, D.C. 20528-0655

April 12, 2021

RE: FOIA Appeal, Request 2021-IAFO-00006; 2021-HQFO-00013; CBP-2021-000784; 2021-ICFO-04458

To Whom It May Concern:

Pursuant to 5 U.S.C. § 552(a)(6) and 6 C.F.R. § 5.8(a)(1), the New York Legal Assistance Group (“NYLAG”) appeals (1) the December 16, 2020 response of the Office of Intelligence and Analysis (“I&A”) of the U.S. Department of Homeland Security (“DHS”) to FOIA Request No. 2021-IAFO-00006 (the “Request”), and (2) the failure of other DHS agencies to timely respond and/or produce records responsive to the same Request. Copies of the Request and subsequent correspondence with DHS FOIA officers are attached to this letter. As required by 6 C.F.R. § 5.8(a)(1), this appeal is postmarked within 90 working days of I&A’s response and is therefore timely.

I. Background

On September 29, 2020, NYLAG submitted the Request via email to the FOIA officers at DHS and U.S. Immigration & Customs Enforcement (“ICE”). *See* Ex. A. Broadly speaking, the Request sought records relating to the involvement of ICE, Homeland Security Investigations (“HSI”), or any other DHS personnel in protests that occurred in New York City between May 25, 2020 and the date of the Request. *See* Ex. A. The Request set forth nine specific categories of document requests. *See* Ex. A. The Request also sought expedited treatment and a fee waiver. *See* Ex. A.

On October 5, 2020, NYLAG received by email a letter from DHS, which acknowledged receipt of the Request, assigned tracking number 2021-HQFO-00013, conditionally granted the Request for a fee waiver, and invoked the statutory ten-day extension for unusual circumstances in 6 C.F.R. § 5.5(c). *See* Ex. B. In addition, the letter stated that DHS had referred the Request to the FOIA officers for U.S. Customs and Border Protection (CBP), U.S. Secret Service (USSS), and the Federal Protective Services (FPS). *See* Ex. B. As of the date of this appeal, NYLAG has not received any correspondence from FPS.

Also on October 5, 2020, NYLAG received by email a letter from CBP, which acknowledged receipt of the Request, assigned tracking number CBP-2021-000784, and invoked the statutory ten-day extension. *See* Ex. C. NYLAG has not received any further correspondence from CBP.

On October 7, 2020, NYLAG received by email a letter from USSS, which acknowledged receipt of the Request, assigned tracking number 20210010, granted the Request for expedited treatment, and held the Request for fee waiver in abeyance pending the quantification of responsive records. *See* Ex. D.

On October 15, 2020, NYLAG received by email another letter from USSS, which stated that USSS has “conducted a reasonable search for all potentially responsive documents” and that “records were located.” *See* Ex. E. The letter further stated that USSS would process the records and mail them to NYLAG upon completion. *See* Ex. E. As of the date of this appeal, NYLAG has not received any records from USSS, nor has NYLAG received any further correspondence from USSS.

On October 20, 2020, NYLAG received an email from ICE, which acknowledged receipt of the Request and invoked the statutory ten-day extension for unusual circumstances in 6 C.F.R. § 5.5(c). *See* Ex. F. NYLAG has not received any further correspondence from ICE.

On December 16, 2020, NYLAG received by email a letter from I&A that purported to be a “final response” to the Request. *See* Ex. G. The letter stated that I&A has made an “adequate search” in response to the Request, and that “no records responsive to [the Request] were found.” *See* Ex. G. The I&A letter also stated that it was the “final response” to the Request and that NYLAG may appeal I&A’s determination. *See* Ex. G.

On February 2, 2021, NYLAG sent a response via email to I&A’s final response of December 16, 2020. *See* Ex. H. In its letter, NYLAG asked I&A to clarify whether its December 16, 2020 “final response” was sent on behalf of all DHS agencies, including ICE, CBP, USSS, and FPS. *See* Ex. H. NYLAG also objected to I&A’s oversimplified summary of the Request and sought clarification regarding the scope and methods of I&A’s search. *See* Ex. H. Finally, the response stated that if I&A did not respond within 15 days, NYLAG would begin the appellate procedure outlined in 6 C.F.R. § 5.8. As of the date of this appeal, I&A has not responded to NYLAG’s request for clarification.

On February 11, 2021, NYLAG received by email another letter from the DHS Privacy Office, which stated that NYLAG should expect to receive a “final response” directly from I&A and the Privacy Office. *See* Ex. I. It was unclear whether the “final response” refers to the December 16, 2020 letter from I&A. The February 11 letter further stated that I&A was in the process of searching for potentially responsive records (despite the fact that two months prior, I&A had sent NYLAG a “final response” stating that no responsive records were found). *See* Ex. I. In addition, the

February 11 letter stated that the Privacy Office had “located some potentially responsive records.” *See* Ex. I. As of the date of this appeal, NYLAG has not received any documents from the Privacy Office.

II. Reasons for Appeal

“It is elementary that an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents, and, if challenged, must demonstrate beyond material doubt that the search was reasonable.” *Truitt v. U.S. Dep’t of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal quotation marks omitted). “The agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). “An inadequate search for records constitutes an improper withholding under the FOIA.” *Dean v. U.S. Dep’t of Justice*, 141 F. Supp. 3d 46, 48 (D.D.C. 2015). The agency bears the burden of proving that a search was adequate. *See Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 813 (2d Cir. 1994).

As the only agency to respond to the Request, I&A has failed to demonstrate that it conducted an adequate search in response to the Request. The December 16, 2020 final response letter from I&A does not describe how I&A searched for responsive records, what search methods were used, or what locations were searched, thus providing no information for NYLAG to assess whether I&A’s search was adequate. *See, e.g., Albaladejo v. Immigration & Customs Enft*, 2021 WL 354173, at *5 (D.D.C. Feb. 2, 2021) (holding that agency’s search is inadequate when agency’s declaration regarding search efforts is “sparse on details”). Moreover, I&A never responded to NYLAG’s February 2, 2021 request for clarification.

To the extent I&A has in fact located responsive records which it has failed to produce, NYLAG likewise appeals I&A’s failure to “promptly” produce responsive records pursuant to 5 U.S.C. § 552(a)(3)(A). Depending on the search criteria that I&A used to identify those records, NYLAG reserves the right to challenge the adequacy of such criteria.

NYLAG also appeals the failures of ICE, USSS, CBP, and FPS to timely respond and/or produce records responsive to the Request. It has now been six months since ICE, USSS, and CBP acknowledged the Request. In this time, none of these agencies provided a meaningful response nor produced any records. Moreover, FPS failed to even acknowledge the Request, even though DHS had transferred it to FPS. While some of the agencies invoked “unusual circumstances” to justify a delay in responding to the Request, such a justification would have earned them only an additional ten business days. *See id.* at § 552(a)(6)(B)(i). Accordingly, these agencies’ responses to the Request are woefully overdue and NYLAG is “deemed to have exhausted [its] administrative remedies.” *See id.* at § 552(a)(6)(C)(i).

Accordingly, NYLAG respectfully requests that I&A immediately: (1) conduct an adequate search and disclose all records responsive to the Request in an expeditious manner, and (2) provide a response to NYLAG's February 2, 2021 clarification letter. In addition, NYLAG respectfully requests that all other DHS agencies that are responding to the Request, including ICE, CBP, USSS, and FPS, promptly produce records responsive to the Request following an adequate search process. In the event that the FOIA Appeals Officer reaches an adverse determination regarding this appeal, NYLAG requests a comprehensive description of all searches conducted, a complete list of documents that have been identified as being covered by the Request, and specific justifications for any such records that have been withheld.

Thank you for your attention to this matter.

Sincerely,

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

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