Exhibit D

June 21, 2023

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, Case Number 2022-ICFO-17726

Dear FOIA Appeals Officer:

Capital Area Immigrants' Rights Coalition ("CAIR Coalition") writes to appeal the U.S. Immigration and Customs Enforcement's ("ICE") response to their Freedom of Information Act ("FOIA") request no. 2022-ICFO-17726 (the "Request"). The Request, dated May 4, 2022, seeks records regarding the policies and practices of ICE pertaining to the custody of noncitizens granted withholding of removal ("withholding") and protection under the Convention Against Torture ("CAT") by an Immigration Judge ("IJ"). Ex. A.

ICE responded to the Request in a letter dated May 10, 2023 ("Response Letter"). Ex. B. The Response Letter states that as a "final response," ICE identified "242 pages that are responsive…46 pages will be released in their entirety, 159 pages will be withheld in full, and portions of 37 pages will be withheld pursuant to Exceptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E) of the FOIA." *Id.* at 1. CAIR Coalition also received a PDF file containing 242 pages of documents with redactions consistent with the Response Letter ("Responsive Documents"). Ex. C.

ICE's response to the Request violates the requirements of FOIA. *See* 5 U.S.C. §552 (a)(3). CAIR Coalition appeals (1) ICE's lack of "reasonable efforts" to search for records responsive to this request, *id*. §552(a)(3)(C); (2) to provide "any reasonably segregable portion" of records of otherwise exempt, *id*. §552(b); and (3) the withholding records contained on pages 2-160, 180-188 of the Responsive Documents pursuant to Exemptions 5, 6, and 7(C), *id*. §552 (b)(5), (b)(6), (7)(C). This appeal is timely submitted within 90 days of the response. 28 C.F.R. §16.8(a).

I. ICE's Search for Responsive Records was Inadequate.

ICE failed to demonstrate that it has conducted a thorough and reasonable search for the requested records. "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (citation and internal quotation marks omitted). "The question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Steinberg v. U.S. Dept. of J.*, 23 F.3d 548 (D.C. Cir. 1994) (quoting *Weisberg v. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). An "agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, ICE searched only within the "ICE Office of Regulatory Affairs and Policy (ORAP), ICE Director Records and Enforcement and Removal Operations (ERO)," Ex. B at 1, despite the fact that items 3 and 4 of the Request specify "[a]ny memorandum, directive, email, or other communication issued between January 1, 2004, and the date of this FOIA request by an ICE official working within ICE's Virginia or Maryland Areas of Responsibility…." Ex. A at 1-2. Notably, ICE did not search for responsive records within the ICE Washington Field Office ("ICE WAS").

ICE's own documents reveal the existence of responsive documents that have not been provided. For example, an email from Acting ICE Director Tae Johnson, which reiterates long-standing ICE policy on the detention of non-citizens granted relief by an IJ, states that "Office Director approval is required to continue detention for those affected noncitizens, and such decisions must be made in consultation with the local OPLA Field Location and appropriately documented." Ex. C at 178. CAIR Coalition has represented approximately 15 non-citizens in the last two years who have been detained following a grant of withholding or CAT relief by an IJ. Per Acting Director Johnson's directive, the continued detention of these 15 (at the very least) non-citizens would have and should have been communicated to the ICE Field Office Director and the OPLA Field location and "properly documented." *Id*. That no records pertaining to these 15 cases were contained in the 242 responsive documents strongly suggests that ICE has not discharged its obligation to "demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Valencia-Lucena*, 180 F.3d at 325.

Furthermore, the inclusion of entirely unrelated documents in the response indicates that ICE conducted a haphazard search and may not have understood what CAIR Coalition was seeking. For example, ICE included an "Order Granting Motion to Restore Nationwide Scope of Injunction" issued in September 2019 by the U.S. District Court for the Northern District of California in *East Bay Sanctuary Convenant v. Barr*, a case that dealt with DHS-DOJ joint interim final rule banning non-citizens from applying for asylum if they passed through a third county in route to the United States. Ex. C at 189-202. This court document, which is already publicly available and has been rendered moot by the subsequent rescission of the enjoined rule, has nothing to do with the detention of non-citizens granted withholding of removal and CAT relief. Indeed, it appears to have been included to justify the improper use of deliberative process and attorney-client privilege exemptions (see below).

ICE must reevaluate what offices, databases, and files it chooses to search, conduct a thorough search within each office, and disclose responsive records it identifies.

I. ICE has Improperly Withheld the Entirety of Records on Pages 2-160

ICE did not provide any explanation for withholding pages 2-160 of the Response Documents, except for labeling the blank pages "[w]ithheld pursuant to exemption (b)(5) of the Freedom of Information and Privacy Act." The Response Letter merely generalizes that Exemption 5 may include information exempt from disclosure under the deliberative process privilege, the attorney-client privilege, and/or the attorney work product privilege. *See* Ex. B. ICE did not explain which of the three specific privileges in Exemption 5 applied to each page, nor did it even specify which of the three applied to *most* of the withheld documents. *Id*. These failures have made it extremely

difficult for CAIR Coalition to formulate this appeal and constitute independent grounds for overturning it. *See Shermico Indus., Inc. v. Sec. of the Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980) ("A person cannot effectively appeal a decision about the releasability of documents... if he is not informed of why those decisions were made."); *see also Friends of the Coast Fork v. U.S. Dep't of Interior*, 110 F.3d 53, 5 (9th Cir. 1997) ("[T]he government's denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester's case.").

Moreover, ICE did not explain why these 158 pages of records must be withheld in their entirety nor why there was no segregable information in the documents that could be released. *See* 5 U.S.C.§ 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). Even assuming that pages 2-160 include some properly exempt portions of the "Briefing Materials" outlined on page one of the Responsive Documents, they also likely contain purely factual material, adopted agency decisions, and other information not properly withheld under any exemption. *Mead Data Central, Inc. v. U.S. Dept. of Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977) ("The focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material."). Even if some of this information was properly withheld, there is no basis for withholding all of it. We request that you reconsider the withholding of pages 2-160 of the Responsive Documents in their entirety or, at a minimum, release some segregable portions of the documents.

II. ICE has Improperly Withheld Records Pursuant to Exemption (b)(5)

As discussed above, ICE has failed to differentiate which privilege applied to which record or portions of the records. *See Mead Data C., Inc. v. U.S. Dept. of A.F.*, 566 F.2d 242, 251 (D.C. Cir. 1977) ("the burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material"). Given ICE's failures, we will limit discussion to the improper withholding of specific records under the "deliberative process privilege." *See Rein v. U.S. Pat. & Trademark Off.*, 553 F.3d 353, 371 (4th Cir. 2009) ("Exemption 5 encompasses the attorney-client privilege, the attorney work product privilege, and the deliberative process privilege."). If ICE is invoking the attorney-work product privilege or attorney-client privilege, we reserve the right to appeal any records withheld pursuant to those privileges. *See Mead Data C., Inc.*, 566 F.2d at 251.

To the extent that ICE is withholding the entirety of pages 2-160 and portions of emails on pages 180-188 of the Responsive Documents pursuant to the deliberative process privilege, that withholding is improper. Exemption 5 permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5). "To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it." *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001). For a document to be properly withheld under the deliberative process exemption, the government must show it is both "predecisional" and "deliberative." *Solers, Inc. v. Internal Revenue Serv.*, 827 F.3d

323, 329 (4th Cir. 2016); *Petroleum Info. Corp. v. U.S. Dept. of Int.*, 976 F.2d 1429 (D.C. Cir. 1992).

A document is predecisional if it was '"prepared in order to assist an agency decisionmaker in arriving at his decision,' rather than to support a decision already made." *Id.* (quoting *Renegotiation Bd. v. Grumman Aircraft*, 421 U.S. 168, 184 (1975)); *see also Coastal States*, 617 F.2d at 862 (explaining that a document is "predecisional" if it is "generated before the adoption of an agency policy"). A document is "deliberative" if it "reflects the give-and-take of the consultative process by revealing the manner in which the agency evaluates possible alternative policies or outcomes." *Id.* Deliberative material reveals "the manner in which the agency evaluates possible alternative policies or outcomes." *City of Virginia Beach, Va. v. U.S. Dep't of Com.*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Solers, Inc. v. Internal Revenue Serv.*, 827 F.3d 323, 329 (4th Cir. 2016).

The privilege does not protect purely factual material nor formally or informally adopted agency decisions. *See City of Virginia Beach*, 995 F.2d at 1253; *Cath. Legal Immigr. Network, Inc. v. USCIS*, No. TJS-19-1511, 2020 WL 5747183, at *8 (D. Md. Sept. 25, 2020) (if it is 'used by the agency in its dealings with the public,' the document may lose its privileged status."). The courts have long held that "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context, would be discoverable in civil litigation with Government," and thus not exempt from disclosure under FOIA. *Envtl. Protec. Agency v. Mink*, 410 U.S. 73, 87–88 (1973).

The body of emails withheld on pages 179-188 of the Responsive Documents clearly contains information not protected by the deliberative process privilege as they are neither pre-decisional nor deliberative. These emails, labeled "Broadcast Message: UPDATED GUIDANCE- Asylum Eligibility and Procedure Modification IFR," were sent by Ken Padilla, the Deputy Principle Legal Advisor for Field Operation for the Office of the Principle Legal Advisor (OPLA), and Michael P. Davis, the Executive Deputy Principle Legal Advisor, to all OPLA personnel. Due to the sender's position and rank, the number of recipients, and the email's title, the emails clearly contain information conveying guidance regarding an agency decision already made. *Schwartz v. IRS*, 511 F.2d 1303, 1305 (D.C.Cir.1975) ("final opinions . . . and . . . orders,' 'statements of policy' and 'instructions to staff' are not exempt under Exemption 5) *see also*, *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (noting that "a document from a subordinate to a superior official is more likely to be predecisional, while a document moving in the opposite direction is more likely to contain instructions to staff explaining the reasons for a decision already made"). The fact that these emails contain information on adopted agency decisions is made abundantly clear from page 184 of the Responsive Documents, which states, "[t]he message includes internal guidance provided for internal OPLA use…."

Similarly, pages 2 through 160, which are withheld in their entirety, appear to contain "briefing materials" as described on page 1. Ex. C at 1. It can be reasonably inferred that "briefing materials" would include briefing on adopted agency policy, rather than a mere discussion of policy options. To the extent that these materials articulated a policy that was "in development" at the time as of June 2022, some version of that policy was likely finalized and articulated in subsequent materials, yet those materials have not been provided.

Even if the deliberative process privilege applies to these records, it be overcome by showing a compelling need. *Hugler v. Bat Masonry Co., Inc.*, No. 6:15-cv-28, 2017 WL 722069, at *2 (W.D. Va. Feb. 22, 2017). Factors considered in determining a compelling need include the relevance of the evidence, availability of other evidence, the role of the government, and the possibility of future timidity by government employees. *Murray Energy Corp. v. McCarthy*, No. 5:14-CV-39, 2016 WL 6902359, at *4 (N.D.W. Va. July 20, 2016) (finding that possible government misconduct or deficiencies in the deliberative process are factored into any analysis and, where present, weigh in favor of denying the privilege).

The general public, including legal advocates and non-citizens who are or will be impacted by ICE's detention practices, have a compelling need to understand how and why the ICE Washington Field Office is continuing to detain noncitizens for months after an immigration judge has granted them relief from removal. ICE has exclusive custody and control over the detention and records of non-citizens subject to practices outlined in the Request. If any of these records demonstrate the ICE Washington Field Office's noncompliance with ICE Headquarters' stated policy, such information would favor the records' release. *Id*.

III. ICE Improperly Withheld Records Pursuant to Exemptions 6 and 7(C)

ICE's withholding of the contents of the emails on pages 180-184 of the Responsive Documents under Exemptions 6 and 7(C) is also improper. Exemption 6 exempts from compelled disclosure of "personnel and medical files [or] similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, 5 U.S.C. §552(b)(6) and Exemption 7(C) exempts from disclosure records "compiled for law enforcement purposes" that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Under these standards, to determine if a privacy exemption properly applies, a court must balance the privacy interest against the public interest in citizens being "informed about "what their government is up to." *U.S. Dep't of Justices v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 762, 772-73 (1989) (internal citation omitted). Information that "sheds light on an agency's performance of its statutory duties falls squarely within the public interest." *Id.* at 773. Moreover, personal information may be withheld only when it "reveals little to nothing" about the government's conduct. *Id*.

The contents of these emails were widely disseminated nationwide to all OPLA personnel and are unlikely to contain any private information protected under Exemptions 6 and 7(C). See *Dept. of A.F. v. Rose*, 425 U.S. 352, 377 (1976) (finding that where agency widely disseminated case summaries "for their value as an educational and instructional tool to better train officers for discharge of their important and exacting functions," agency cannot claim Exemption 6). Meanwhile, the contents of the emails would unquestionably inform the public about what ICE is up to, especially concerning whether the ICE Washington Field Office is adhering to or departing from ICE Headquarters' policies when it fails to release individuals granted withholding or CAT relief.

Even if the requested records contain some information for which some privacy interest outweighs the public interest in disclosure, ICE did not comply with its duty under FOIA to disclose all non-exempt, segregable portions of the records. 5 U.S.C. §552(b). "[T]he focus of FOIA is information,

not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, Inc.*, 566 F.2d at 260.

IV. Conclusion

For the above-stated reasons, CAIR Coalition respectfully requests that ICE re-open its search for responsive records described in the Request and make those records promptly available. Additionally, we request a review of the withheld records on pages 2-160 and 179-188 of the Responsive Documents. As to the specified records, we expect the release of all segregable portions of otherwise-exempt material and sufficiently detailed justification under specific FOIA exemptions for any records withheld.

Thank you for your attention to this matter. We look forward to receiving a determination within twenty business days of your receipt of this Appeal. 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,

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