

Exhibit D



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

VIA EMAIL TO: gildfoiaappeals@ice.dhs.gov

RE: FOIA Appeal – Case Number 2023-ICFO-41827 – Inadequate Search

Dear FOIA Officer,

This letter constitutes an administrative appeal pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a) and 6 C.F.R. § 5.1 et seq. Access Now, through its counsel, appeals the sufficiency of Immigration and Customs Enforcement’s (“ICE”) search for responsive records pursuant to FOIA request 2023-ICFO-41827 (“the Request”).¹

Background

The Request sought all records from January 1, 2008 to December 9, 2022 concerning biometric data sharing agreements between the United States and any foreign government. Specifically, it requested:

1. The full text of any data sharing agreements between the United States and any foreign government, including but not limited to:
 - a. The full text of the U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities; and
 - b. The full text of any Memoranda of Cooperation regarding biometric data sharing with Guatemala, Honduras, or El Salvador.

¹ See Attachment A.

2. Records describing any biometric database used in conjunction with any data sharing agreements and any other government, including but not limited to:
 - a. The schema or textual description of the structure of such databases;
 - b. The capabilities of such databases to determine the location of people on the move before, during, or after their visit to the United States; and
 - c. The interoperability of such biometric databases for the purposes of data sharing.
3. Records describing the intended, permitted, limited, or prohibited uses of biometric data of people on the move, including but not limited to use of biometric data in conjunction with other aggregated data of migrant populations.

Access Now filed the request with the Department of Homeland Security (“DHS”) through the Secure Release portal on December 9, 2022. On August 1, 2023, DHS informed counsel for Access Now that it was forwarding the Request to ICE for additional processing.²

On September 6, 2023, counsel for Access Now received an email from ICE acknowledging the request and assigning it case number 2023-ICFO-41827.³ In this communication, ICE stated that it had “determined that [the Request] is too broad in scope and did not specifically identify the records” Access Now is seeking.⁴ ICE directed Access Now to “resubmit your request containing a reasonable description of the records you are seeking” within 30 days.⁵

On September 20, 2023, counsel for Access Now provided, by email, the following updated request language (changes in bold):⁶

1. The full text of any data sharing agreements between the United States and any foreign government, including but not limited to:
 - a. The full text of the U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities; and
 - b. The full text of any Memoranda of Cooperation regarding biometric data sharing with Guatemala, Honduras, or El Salvador.

² See Attachment B

³ See Attachment C.

⁴ *Id.*

⁵ *Id.*

⁶ See Attachment D.

2. Records describing any biometric database used in conjunction with any data sharing agreements and any other government, including but not limited to:
 - a. The schema or textual description of the structure of such databases;
 - b. The capabilities of such databases to determine the location of people on the move before, during, or after their visit to the United States; and
 - c. **Steps taken to export data from such biometric databases, or otherwise make such biometric databases interoperable, for the purposes of sharing personal data of people on the move.**
3. **Records describing DHS policies permitting, limiting, or prohibiting specific uses of biometric data of people on the move, including but not limited to DHS policies governing the use of biometric data in conjunction with other aggregated data of migrant populations.**

Items (2) and (3) in this request may be limited to coming biometric data of people on the move from Mexico, Guatemala, Honduras, and El Salvador, or databases that contain such data.

On September 29, 2023, counsel for Access Now received an email from ICE acknowledging the narrowed request.⁷

On November 15, 2023, ICE sent a final response to the Request (“the Response”).⁸ The Response stated that “ICE has conducted a search of the ICE Office of Regulatory Affairs and Policy (ORAP) and ICE Homeland Security Investigations (HSI) for records responsive to your request and no records responsive to your request were found.”⁹ The Response asserted that “an adequate search was conducted” but offered no specific information about the efforts made to find the records requested.¹⁰

Basis for Appeal

An agency receiving a FOIA request is under a duty to conduct an adequate search for responsive documents.¹¹ A reasonable search, in turn, is one that is “reasonably calculated

⁷ See Attachment E.

⁸ See Attachment F.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Int’l Refugee Assistance Project, Inc. v. United States Citizenship & Immigr. Servs.*, 551 F. Supp. 3d 136, 151 (S.D.N.Y. 2021).

to uncover all relevant documents.”¹² An agency must construe requests liberally in order to ensure responsive documents are found.¹³ An agency can only refuse to conduct a search if “if it demonstrates that a search would be futile.”¹⁴ Where an agency reports that it has found no records, it must explain the process used, including its rationale for limiting the search to specific offices.¹⁵

In the present case, the Response itself contains very little information about the search conducted to respond to the Request. It simply asserts states that “an adequate search was conducted,” leading to “no records responsive” to the Request.¹⁶ This is far from sufficient for ICE to establish that an adequate search was conducted. At the very least, ICE must issue a more detailed response explaining how it concluded that it was not in possession or control of any responsive records.

Although ICE’s perfunctory response makes it impossible for Access Now to determine whether an adequate search was conducted, evidence suggests that it was not. As an initial matter, the Request was forwarded to ICE by DHS. It seems unlikely that DHS would impose this request on ICE unless the Department had good reason to believe ICE possessed responsive records.

Moreover, there are specific facts that suggest responsive records exist, despite ICE’s conclusion to the contrary. Subpart 1 of the Request seeks the text of data sharing agreements with foreign governments. ICE states, on its official website, that it engages in data sharing with international partners.¹⁷ It would be strange to find that none of ICE’s data sharing was conducted pursuant to written agreements, or that ICE had not bothered to keep copies of such agreements.

Records responsive to subparts 2 and 3 of the Request are also likely in ICE’s control. Subpart 2 of the Request seeks descriptions of biometric databases used in conjunction with data sharing, and subpart 3 seeks the policies governing their use. DHS operates

¹² *Weisberg v. U.S. Dep’t of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

¹³ *Nation Magazine v. United States Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995) (citing *Truitt v. United States Dep’t of State*, 897 F.2d 540, 544-45 (D.C. Cir. 1990)) (“Although a requester must reasonably describe the records sought, an agency also has a duty to construe a FOIA request liberally.”).

¹⁴ *Jenkins v. U.S. Dep’t of Just.*, 263 F. Supp. 3d 231, 234 (D.D.C. 2017), *aff’d in part sub nom. Jenkins v. United States Dep’t of Just.*, No. 17-5184, 2018 WL 4151275 (D.C. Cir. Aug. 14, 2018).

¹⁵ See *Steinberg v. U.S. Dep’t of Just.*, 23 F.3d 548, 552 (D.C. Cir. 1994) (failure to describe “in any detail what records were searched, by whom, and through what process” precluded summary judgment on adequacy of search); see also *Whitaker v. DOC*, 970 F.3d 200 (2d. Cir. 2020) (where the Court ruled in favor of the agency taking a presumption of “good faith” and noted specific explanations about not maintaining records requested in the FOIA request).

¹⁶ Attachment F.

¹⁷ See *Law Enforcement Information Sharing Initiative*, ICE.gov, <https://www.ice.gov/le-information-sharing>.

programs for the express purpose of sharing biometric information with foreign partners.¹⁸ ICE is an active participant in these programs, contributing data and, in some cases, deciding what information to share with foreign governments.¹⁹ ICE also receives regular reports on data sharing with foreign governments.²⁰ ICE's claim that it has no records related to the databases used to store such data, or the policies governing its use, is hard to square with DHS's description of ICE's role in international biometric data sharing.

ICE's Response raises two possible reasons for excluding responsive records: the Privacy Act and subpart (c) of the FOIA. As for the former, Access Now does not seek records on individuals to which the Privacy Act would apply.²¹ As for the latter, Access Now does not seek records related to a pending investigation or an informant, such that ICE would be entitled to treat responsive records as if they did not exist.²² Rather, the Request seeks records describing the storage, maintenance, and sharing of biometric information generally—information that fits comfortably within the scope of the FOIA.

Conclusion

For the foregoing reasons, ICE should conduct a new search for responsive records and, upon completion, issue a new response with sufficient detail for Access Now to determine whether the search is adequate. Access Now is not asking for “meticulous documentation” of an “epic search”²³; it is simply asking that ICE be held to the same standard that every federal agency must meet in response to a FOIA request.

Thank you for your consideration of this appeal. Should you have any questions please do not hesitate to contact me at mkortz@law.harvard.edu.

Sincerely,



Mason Kortz
Counsel for Access Now

¹⁸ See *Privacy Impact Assessment for the DHS International Biometric Information Sharing Program (IBIS) - Biometric Data Sharing Partnerships (BDSP)*, DHS Reference No. DHS/ALL/PIA-095(a) (Nov. 18, 2022), available at <https://www.dhs.gov/sites/default/files/2022-11/privacy-pia-dhs095a-ibis-november2022.pdf>.

¹⁹ See *id.* at 7-8.

²⁰ See *id.* at 17.

²¹ 5 U.S.C §552a(a)(5) (limiting covered systems of records to those identifying individuals).

²² 5 U.S.C §552(c)(1-2) (allowing agencies to treat records as non-FOIA material in limited circumstances).

²³ *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982) (“Neither *Weisberg* nor *Founding Church of Scientology* demands in every FOIA case that the affidavits of the responding agency set forth with meticulous documentation the details of an epic search for the requested records.”).