

a. The Six Factors the Freedom of Information Act Makes Relevant to Fee Waivers Are Factors to Be Weighed, Not Requirements.

The Agency's regulations identify two requirements: "Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and Disclosure of the information is not primarily in the commercial interest of the requester." 6 C.F.R. § 5.11(k)(1). The Agency's regulations then list six factors relevant to determining whether these two requirements have been met. 6 C.F.R. § 5.11(k)(2) ("To determine whether the first fee waiver requirement is met, components *will consider the following factors*") (emphasis added); § 5.11(k)(3) ("To determine whether the second fee waiver requirement is met, components *will consider the following factors*") (emphasis added). A Requester satisfying one or more of the enumerated factors weighed to evaluate whether each requirement is met may be found to have met the requirements. Here, Requesters satisfy all of the factors and meets both requirements for a fee waiver.

b. Requesters Meet Both Requirements Because All Six Factors Weigh in Favor of Granting a Fee Waiver for This Request and Because of the Strong Public Interest in Disclosure and the Absence of any Commercial Interest by Requesters.

The first requirement, that disclosure is in the public interest, is to be evaluated by considering four factors: (1) "[t]he subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government;" (2) "[t]he informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;" (3) "[t]he contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding;" and (4) "[t]he significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities." 6 C.F.R. § 5.11(k)(2)(i-iv).

The requested records concern the operations and activities of DHS and its related offices, all of which are government agencies, thus fulfilling the first factor. The disclosure of these records will also fulfill factor two, for it will undoubtedly contribute to the enhanced understanding of government operations and activities well beyond the mere three-page memorandum that is currently available to the public. While there has been widespread relief over the termination of the federal government's contentious Secure Communities program, its replacement, Priority Enforcement Program, has been met with equal skepticism and debate.²¹ Such concern is not unwarranted, given that on its face, PEP presents a striking resemblance to its predecessor, S-Comm.²²

²¹ See Editorial Board, L.A. Times, *supra* note 13.

²² Exhibit B, Aura Bogado, *Goodbye, Secure Communities. Hello, Priority Enforcement Program*, ColorLines.com (Nov. 21, 2014, 8:57 PM), http://colorlines.com/archives/2014/11/goodbye_secure_communities_hello_priority_enforcement_program.html.

The third factor, which measures the breadth of the audience of persons who will gain understanding through the disclosure, and the ability of the requester to effectively convey this information to the audience, favors a fee waiver here. Requesters will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost. Requesters have effectively shared other information obtained through FOIA requests in the past with a substantial audience.²³ The information requested here is part of Requesters' continuous efforts to inform and engage the public around immigration enforcement and deportation policies.²⁴ Members of the public as well as of the news media look to Requesters as a valued source of information on such issues.²⁵ Requesters remain committed to serving the public at large as well as communities most affected by immigration enforcement activities by providing them with broad, free public dissemination of information pertinent to these issues, including through public reports as well as community education events and workshops, free web access to information, and open public debate.

The fourth factor, which considers whether the disclosure is likely to contribute "significantly" to public understanding of government activities, also weighs in favor of a fee waiver. The public was presented with nothing beyond the three-page PEP Memo, and over three months later, still has received no further information even as to the basic question of when S-Comm was, or will be, terminated and when PEP is going into effect. Immigrant communities and the public at large continue to be skeptical as to how PEP differs from the controversial S-Comm and how exactly the federal government will be conducting deportation and other immigration enforcement activities. Because the public has not been provided with the details of guidelines, standards, and enforcement mechanisms of PEP, the public is severely limited in its ability to effectively evaluate the government's practices and policies, engage in reasoned debate over the government's activities, or petition the government for changes in deportation activities.²⁶ The information that Requesters have requested will, when made public through Requesters' websites, through Requesters' direct communication with community members affected by deportation activities, through Requesters' sharing with news media, and through

²³ See, e.g., Uncover the Truth: About, <http://uncoverthetruth.org/campaign/> (website by National Day Laborer Organizing Network and partners disseminating documents obtained through Freedom of Information Act request about the Secure Communities program); NDLO, *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities" Program*, available at <http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf>; Josh Gerstein, *Administration Folds in Immigration FOIA Fight, Admits Error*, Politico, Jan. 9, 2012, at <http://www.politico.com/blogs/under-the-radar/2012/01/administration-folds-in-immigration-foia-fight-admits-110124.html>; Asian Americans Advancing Justice, *National Security and Civil Rights, FOIA Documents*, <http://www.asianlawcaucus.org/crop-foia-documents> (disseminating and analyzing FOIA documents); Kohli et. al., *supra* note 17.

²⁴ See, e.g., Asian Americans Advancing Justice. Publications, <http://www.asianlawcaucus.org/news-media/publications> (listing numerous publications on immigration enforcement and deportation policies).

²⁵ See, e.g., Michael D. Shear, *Obama Weighing Delay in Action on Immigration*, N.Y. Times, Aug. 29, 2014, at A1 (quoting NDLO Legal Director Chris Newman regarding federal deportation policies); Kirk Semple, *Cuomo Ends State's Role in U.S. Immigrant Checks*, N.Y. Times, June 2, 2011, at A21, available at <http://www.nytimes.com/2011/06/02/nyregion/cuomo-pulls-new-york-from-us-fingerprint-checks.html> (quoting NDLO Director Pablo Alvarado); Aura Bogado, *supra* note 21, (quoting AAAJ-ALC policy director regarding Secure Communities and PEP).

²⁶ See, e.g., Cantu, *supra* note 17.

incorporation into public reports and analysis, contribute significantly to public understanding of the federal government's deportation activities.

The second requirement, that the information sought not be primarily for the requester's commercial benefit, is to be evaluated using two factors. The Agency's FOIA regulations define a "commercial use request" as "a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests." 6 C.F.R. § 5.11(b)(1). The two factors are "the existence and magnitude of a commercial interest" and "the primary interest in disclosure." *Id.* at § 5.11(k)(3). Here, there is no commercial interest of any magnitude at stake, which means that the public interest in the information clearly outweighs any commercial interest. Requesters are non-profit organizations whose missions are to advance civil and immigrants' rights.²⁷ Additionally, the Clinic is part of an educational institution. They have no commercial, trade, or profit interests in the information sought here and will in no way profit commercially from its disclosure.²⁸

In the alternative, if a full fee waiver is not granted, Requesters seek all applicable reductions in fees pursuant to 6 C.F.R. § 5.11(d). Further, fees are limited to only reasonable duplication costs when the request is not for commercial purposes and "the request is made by an educational or noncommercial scientific institution." 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Clinic, as an educational institution, requests that if the fee waiver is not granted, fees be limited to duplication costs only. Requesters further ask that, if no fee waiver is granted and the fees exceed \$200.00, the Agency please contact Requesters, through the undersigned counsel, to obtain consent to incur additional fees. Requesters have undertaken this work solely in the public interest and not for any private commercial interest. This request's sole purpose is to obtain information to further the public's understanding of federal immigration enforcement actions and the legal reasoning and policy justifications behind them, which the government has never disclosed. The current administration has a track record of deporting an unprecedented number of individuals and subjecting the public to the contentious S-Comm program. Access to the requested information is an essential prerequisite for immigrants, their families, and their communities, including community organizations engaged in immigrant rights advocacy, to meaningfully evaluate immigration enforcement actions and their potential detrimental effects. The guidelines and standards that govern PEP, as well as the legal and policy reasoning behind them, are subject to intense public scrutiny and debate and are crucial in furthering public interest.²⁹

G. CERTIFICATION

The Requesters certify that the above information is true and correct to the best of their knowledge. *See* 6 C.F.R. § 5.5(d)(3).

²⁷ *See* www.ndlon.org/en/about-us.

²⁸ *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requesters.'").

²⁹ "[T]he public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975).


If this request is denied in whole or in part, we ask that you justify all redactions by reference to specific FOIA exemptions and notify us of appeal procedures available to us under the law. Please specify the searches that were undertaken to locate records responsive to this request. We expect you to release all segregable portions of otherwise exempt material. 5 U.S.C. § 552(b). We reserve the right to appeal a decision to withhold any information or to deny expedited processing or a waiver of fees. 5 U.S.C. § 552(a)(6)(A)(i).

We look forward to your response to our request for expedited processing within ten (10) business days, as required under 5 U.S.C. § 552(a)(6)(E)(ii)(I). Should our request for expedited processing be denied, we expect to receive your response to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

If any records are available in electronic form, please furnish them in electronic form. Please furnish all responsive Records to:

Esmeralda Daci
Aya Tasaki
Tom Fritzsche
Cardozo School of Law, Immigration Justice Clinic
55 Fifth Ave., 11th Floor
New York, NY 10003

Respectfully submitted,



Esmeralda Daci
Aya Tasaki
Tom Fritzsche
Counsel for Requesters

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Immigrants on ICE: Obama Plan Still Leaves Many Worried



New York City immigrants gather at SEIU Local 32BJ's headquarters on November 20 to listen to President Obama announce his immigration plan on national television. Photo: Gwynne Hogan



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BY **ALINA MOGILYANSKAYA**
DECEMBER 16, 2014
ISSUE #202

On the evening of November 20, some 200 immigrants and advocates gathered in SEIU Local 32BJ's Chelsea headquarters to watch President Obama announce his much-anticipated executive action on immigration in prime time. The media had been called in, pizza and beverages had been bought and American flags and art supplies had been set out. As Obama spoke, some of the children in the room made signs with messages about immigration. A pair hanging on the wall read, "*Gracias, Señor Presidente.*"

After Obama finished describing his offer to provide temporary relief from deportation for some 4 million of the nation's estimated 11 million undocumented immigrants — so long as they "get right with the law" — he proclaimed, "We were strangers once too." The line prompted scattered applause from the crowd, but the mood was uncertain.

It reflected the ambiguous nature of Obama's reforms. He is extending temporary relief from deportation to undocumented immigrants with U.S. citizen or legal permanent resident children that have been in the United States for at least five years, as well as to an expanded set of childhood arrivals not covered under the Deferred Action for Childhood Arrivals program of 2012. But the gesture excludes more than 6 million undocumented people, and leaves them — along with more than 13 million green card holders and countless future immigrants — even more vulnerable to the vagaries of U.S. Immigration and Customs Enforcement (ICE).

"Those who aren't eligible for deferred action will face a harsher enforcement regime," said Alisa Wellek, co-director of the Immigrant Defense Project. "That's what we've seen every time there's been some kind of reform at the national level: the people who are left out of it are then left with a system that's really lacking in due process and human rights."



The need to stand in solidarity with Palestinians has never been greater. Ilan Pappé and Noam Chomsky discuss the road ahead in the struggle to liberate Palestine.

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President Obama embraces Astrid Silve, a 26-year-old undocumented college student, at a rally in Las Vegas one day after he announced his plan to provide temporary relief from deportation for 4 million immigrants. Photo: usnews.com

In New York City, about half of the city's estimated 500,000 undocumented immigrants stand to benefit from deferred action. Obama's move also comes on the heels of multiple immigrant-friendly policy changes in the city: the municipal ID program, funding for legal representation for low-income immigrants in deportation proceedings, and, effective mid-December, a pair of laws that will further limit cooperation with ICE "detainers," or requests for local law enforcement to hold suspected immigration violators.

"New York City has put into place as much as I can think of, in terms of things the city can proactively do, to limit deportations happening," said Daniel Coates, an organizer with Make the Road New York. "I hope those safeguards hold up. But it remains to be seen."

'It's a Band-Aid'

"We're going to keep focusing enforcement resources on actual threats to our security. Felons, not families," Obama declared in his November 20 speech. "Are we a nation that accepts the cruelty of ripping children from their parents' arms?"

That night, Khalil A. Cumberbatch watched the speech from his living room in Springfield Gardens, Queens, with his 7-year-old daughter. He had been reunited with his wife and two young children in October after being arrested by ICE and spending five months in immigration detention.

"The Obama action is a band-aid. It doesn't get at the heart of the problem, which is the need for these policies to constantly criminalize and punish a group of people," said Cumberbatch.

Obama's offer of deportation deferral comes with a revised set of guidelines for federal immigration agencies, including ICE. Directives issued by the Department of Homeland Security instruct ICE officials to use discretion and prioritize resources for the removal of immigrants with a previously established range of criminal convictions, newly arrived immigrants and those with prior deportation orders. The contentious Secure Communities program is to be replaced with what is being called the Priority Enforcement Program (PEP), and more resources will be funneled toward enforcement at the U.S.-Mexico border.

"These new enforcement priorities are really not very different from the old enforcement priorities," said Wellek. "For the most part, PEP is probably just a rebranding of the Secure Communities program."

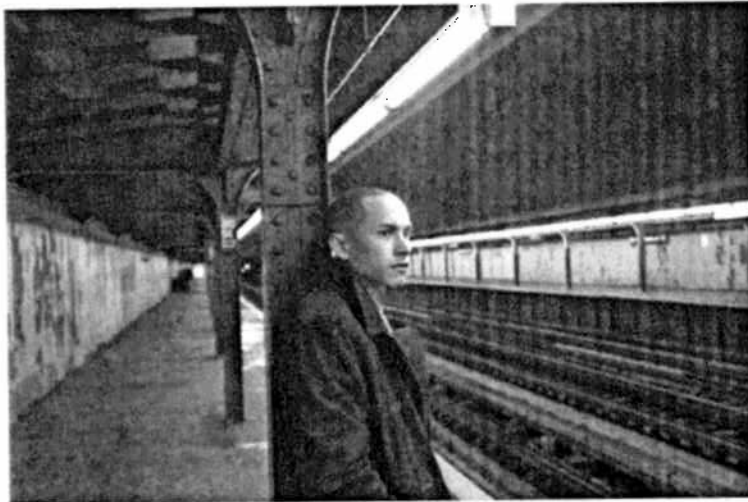
Cumberbatch recalls that in the early morning of May 8, his wife, Chamika, saw what looked like police officers outside the couple's apartment window. The agents, sporting vests marked "police," came to the Cumberbatchs' door, said they were conducting an investigation and asked to be let inside. Once in the apartment, they arrested Cumberbatch, took him away in an unmarked car

and, after processing, transferred him to immigration detention at the Hudson County Correctional Facility in New Jersey.

"I was totally sideswiped by the fact that they had total disregard for how long I had been here, everything positive that I had done, the fact that I had a family, I had two young children. They didn't care about any of that," Cumberbatch said.

Cumberbatch has been a legal permanent resident since he immigrated to the United States from Guyana at the age of 4. ICE targeted him because of a felony conviction on his record from an armed robbery he committed when he was 20 years old.

Since coming out of prison, Cumberbatch, now 33, has completed two degrees, started his own company and worked on a range of prisoner reentry and criminal justice projects. He was able to win his release from immigration detention with help from his family, advocates and community organizers, and based on what he calls "a moral, not legal argument" that he is a positive force in the community and not a threat. But Cumberbatch falls into the category of first priority for deportation under PEP, which means mandatory detention and placement into deportation proceedings. Apart from the legal precedent of his previous release, there is little to protect him from another visit by ICE agents.



Khalil Cumberbatch. Photo: Ivy Meisner

"I feel anxious, because they granted what is called prosecutorial discretion," said Cumberbatch. "Basically it means that they can come back at any time to do the same process all over again."

Raids on the Rise

Cumberbatch's experience being picked up at home isn't unique. New York City passed detainer laws in 2011 and 2013 limiting law enforcement's cooperation with ICE. The agency saw its access to potential deportees in city jails restricted, and adapted.

"Over the past year we've seen a real uptick in home raids and probation arrests," said Wellek. She and other advocates also describe anecdotal evidence of immigrants being arrested in public spaces such as city courthouses and homeless shelters, and of ICE going after people with years- or decades-old criminal convictions who have not had subsequent contact with the criminal justice system.

As outlined in the recent National Day Laborer Organizing Network report, "Destructive Delay," similar ICE tactics — including agents coming to people's homes in vests marked "police," as they did in Cumberbatch's case — have been observed around the country in the run-up to Obama's immigration enforcement reforms.

That has been particularly noticeable in the more than 250 locales that have passed detainer bills. Now that a new round of such laws was passed in New

York City, ICE is being forced to shutter its office at Rikers Island and the New York Police Department and Department of Corrections are prohibited from detaining most people at ICE's request or notifying the agency about someone's release. The city's Department of Probation, notably, has also agreed to amend its policy in accordance with the laws.

Immigrant rights advocates widely expect that ICE will continue to evolve its tactics. "[The detainer legislation] puts a further barrier to ICE's easy access to people who they want to remove," said Donald Anthonyson, an organizer with Families for Freedom, a Manhattan-based organization that fights deportations. But he was less than optimistic about what will come next. "They're going to use a lot of dirty tricks," he predicted.

"They could be making regular visits to the jail [Rikers], and trying to get more access to people as they might be coming out," said Alina Das, co-director of New York University's Immigrant Rights Clinic. "They might be trying to figure out other ways to increase their presence in courts and other offices, even without city agencies notifying them that they have someone who is potentially deportable."

Neither the city's detainer laws nor the Obama administration's revised enforcement guidelines disrupt the data-sharing mechanisms that allow ICE to identify potential targets for deportation. The agency will still have access to fingerprint data that is collected as soon as any arrest happens and to other information sources.

More than that, ICE's budget and the "bed mandate" quota, which compels the agency to have more than 30,000 people in detention on any given night, remain unchanged.

"It's the same detention and deportation machine," said Wellek. "This is just going to be changing the mechanism by which people are going into it."

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NOW IN RACIAL JUSTICE



Goodbye, Secure Communities. Hello, Priority Enforcement Program

People gather to rally in support of President Obama's executive action on immigration policy in Lafayette Square across from the White House November 21, 2014. Photo: Chip Somodevilla/Getty

by [Aura Bogado](#), Friday, November 21 2014, 8:57 PM EST

The controversial Secure Communities (S-Comm) program is coming to an end under Obama's executive action on immigration. A new program called the Priority Enforcement Program, or PEP-Comm for short, will take its place. But will it be much better?

In his announcement Thursday, and then nearly verbatim in Las Vegas Friday, Obama stressed new targets for the Department of Homeland Security (DHS): "Felons, not families. Criminals, not children. Gang members, not a mom who's working hard to provide for her kids," the president said. "We'll prioritize, just like law enforcement does every day."

Those dichotomies raise concerns for some. "I was thinking about how certain communities are over-policed à la Ferguson," says Angela Chan, policy director and senior staff attorney at the Asian Law Caucus. "This juxtaposition forgets the reality that some communities are over-policed and over-criminalized."

Like PEP-Com, its predecessor created a path to deportation. The program—which began in 2008 under George W. Bush and escalated under by Obama—required local jails and prisons to hand over the fingerprints of anyone being processed to Immigration and Customs Enforcement (ICE), including people who hadn't yet had their day in court. If ICE deemed the person a threat it would issue them a so-called detainer, a 48-hour hold in a local jail or prison. Although detainees were supposed to last up to two days, many were extended by weeks or months at a time. And although S-Comm was created to catch undocumented immigrants, it often swept up U.S. citizens [<http://www.thenation.com/blog/174921/why-us-born-citizen-being-detained-ice>], even those who hadn't been convicted of a crime. Some [local agencies and entire states refused](#) [http://colorlines.com/archives/2013/06/connecticut_limits_cooperation_with_secure_communities.html] to cooperate with S-Comm because the detainees weren't warrants issued by a judge. Rather, they were the result of decisions made by a federal agency plagued [http://colorlines.com/archives/2013/01/ice_raids_wrong_home_video.html] with problems.

The National Day Laborer Organizing Network (NDLON) [led the charge to end S-Comm](#) [<http://www.ndlon.org/en/program-areas/migrant-rights/s-comm>] and explicitly demanded its end in the days leading up to the president's announcement. In some ways, it seems like NDLON has won.

In a November 14 [memo \[PDF\]](#), [Homeland Security Secretary Jeh Johnson](#) [http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf] conceded that the program essentially failed:

The Secure Communities program, as we know it, will be discontinued.

3/5/2015

The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation; its very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation. A number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program.

Under the president's new program, most people who haven't been convicted of crimes won't be issued a detainer—although undocumented immigrants who are suspected of terrorism may be targeted. In addition, PEP-Comm will ensnare people found crossing the border, gang members, those convicted of felonies, people who've been convicted of three misdemeanors, and those who have one "significant misdemeanor" on their record. Significant misdemeanors include domestic violence, burglary and drug-selling. Instead of issuing a detainer, Johnson's memo instructs local and state agencies to notify ICE that the person in question will soon be released.

But the Asian Law Caucus' Chan finds what she calls alarming similarities between S-Comm and PEP-Comm—particularly when it comes to local and state agencies doing the work of what should be federal enforcement. "The bones of the program are the same. Under S-Comm, fingerprints are transmitted to Immigration and Customs Enforcement by local police. Under PEP-Comm, the same thing will happen."

Chan adds that any entanglement with local law enforcement is a threat to public safety because it invites police to select people for deportation instead of protecting their welfare.

Time will also tell whether agents honor the directives of Johnson's PEP-Comm memo.

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