

EXHIBIT K

LEGAL DEPARTMENT
IMMIGRANTS'
RIGHTS PROJECT



August 22, 2016

FREEDOM OF INFORMATION ACT APPEAL

VIA HAND-DELIVERY

U.S. Immigration and Customs Enforcement
Office of Principal Legal Advisor
U.S. Department of Homeland Security
Freedom of Information Act Office
500 12th Street, S.W., Stop 5900
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IMMIGRANTS'
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**RE: FOIA Appeal re Parole Decisions for Arriving Aliens Found to
Have a Credible Fear of Persecution or Torture**

**FOIA Reference Numbers: 2016-ICFO-01568 and
2016-ICFO-01574
FOIA Appeal Number: 2016-ICAP-00405**

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Dear Sir or Madam:

OFFICERS AND DIRECTORS
SUSAN N HERMAN
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ROBERT REMAR
TREASURER

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (a)(6)(A)(ii) and 6 C.F.R. § 5.9. This appeal is on behalf of the Immigrants' Rights Project of the American Civil Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law (together referred to as "Requesters"). This appeal is timely filed.

Specifically, the Requesters file their *second* appeal of the adequacy of U.S. Immigration and Customs Enforcement's ("ICE") searches for and responses to the above-referenced requests, and the agency's assertion of Exemptions 2, 6, 7(C) and 7(E).¹ ICE's second production of records in June

¹ Although Requesters made two separate requests – 2016-ICFO-01568 and 2016-ICFO-01574, ICE responded with reference to only one request number, 2016-ICFO-01574. Then, in March 2016 when Requesters first appeal was granted, ICE assigned a separate appeal number to the request – 2016-ICAP-00405. For purposes of this second appeal, we have

2016 entirely fails to address the concerns raised in Requesters' original appeal, which ICE granted to conduct a new search for responsive records. Instead, the spreadsheets and PDF that ICE produced largely *duplicates* information in the spreadsheets ICE previously released, and contain both the *same* fields of information, as well as the *same* total number of entries. Moreover, as with the original spreadsheets, ICE withheld portions of the new spreadsheets pursuant to the FOIA exemptions without any explanation.

ICE's response is plainly inadequate and has only further delayed the processing of the FOIA Requests, which were filed more than ten months ago. The second response fails to address the substance of *any* of the issues raised by Requesters' appeal. Therefore, the Requesters once again ask that the agency conduct new searches for records responsive to both requests, provide information concerning data disclosed, and disclose the portions of the records withheld under each exemption.

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BACKGROUND

On October 5, 2015, the Requesters submitted two requests to ICE for records pertaining to parole decisions for arriving aliens found to have a credible fear of persecution or torture. The first request, **2016-ICFO-1574**, sought the following reports and analyses created pursuant to the ICE Directive 11002.1, Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009), from January 2010 to the present:

1. Monthly reports by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶ 8.11.
2. All analyses of these monthly reports and of random samplings of individual case information by the Assistant Director for Operations or his or her designee. *See id.*
3. All quality assurance reports by the Assistant Director for Operations or his or her designee. *See id.* at ¶ 8.12.

The second request, **2016-ICFO-1568**, sought internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications (hereinafter, "policy documents") on:

1. How the U.S. Department of Homeland Security's ("DHS") civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear of persecution or torture.

referenced all three request numbers.

2. How the following directive is applied in such parole decisions:
“absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens . . . whose detention is . . . not in the public interest.”
Memorandum from Jeh Johnson, Sec’y of Homeland Security re: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at 3-4 (Nov. 20, 2014) (hereinafter, “Priorities Memo”).
3. The effect of the Priorities Memo on parole decisions made pursuant to ICE Directive 11002.1.

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Copies of the FOIA Requests are attached as Exhibits A and B.

The requests reasonably and specifically described the records sought, which are not otherwise publicly available. The first request, after defining the terms used, sought three subcategories of information which were delineated by bullet points: “monthly reports,” “all analyses,” and “all quality assurance reports.” *See* Exh. B at 3-4. All these records are specifically identified in ICE Directive 11002.1 ¶¶ 8.11-8.12. Moreover, the request specifically requested records created from January 2010 to the present.

Similarly, after defining the terms used, the second request sought three enumerated subcategories of information and a broad range of types of records: any “internal memoranda, guidelines, worksheets, training materials, reports or other agency communications.” *See* Exh. A at 3-4.

On October 13, 2015, ICE acknowledged receipt of the FOIA requests and denied the requests for a fee waiver and expedited processing. On October 15 and 16, 2015, the Requesters filed timely appeals of these decisions. On November 3, 2015, the FOIA office reversed and granted the fee waivers but upheld the denials of expedited processing.

On December 17, 2015, ICE provided a final response to the FOIA requests (hereinafter, “December 2015 response”). *See* Exh. C (Cover Letter). The response consisted of nine Excel workbooks and a 60-page PDF, much of which included documents already publicly available on ICE’s website. ICE also withheld portions of the records pursuant to FOIA exemptions (b)(2), (b)(6), and (b)(7).

On February 4, 2016, Eunice Lee, counsel for the Requesters, called the ICE FOIA office and spoke to a FOIA office associate, Rebecca Seele, to clarify the contents of the Excel workbooks.² Ms. Seele was unable to provide

² Specifically, Requesters asked: (1) that unique identifiers be assigned to each individual case

substantive answers to any of the Requesters' questions, and suggested raising these issues in an appeal.³

On February 11, 2016, the Requesters filed a timely appeal. *See* Exh. J. The Requesters appealed ICE's response and search for records as insufficient, as well as ICE's assertion of several FOIA Exemptions and the denial of expedited processing insofar as it affects the timing of any additional search and production of documents. On March 31, 2016, ICE granted the Requesters' appeal, stating "ICE has determined that information previously withheld may be releasable to you under FOIA" and "remanding . . . for re-processing of the responsive records for release directly to you of any non-exempt information." *See* Exhibit K. Additionally, ICE granted the Requesters' appeal with respect to the adequacy of the search stating "ICE has determined that a new search or modifications to the existing search for both requests could be made" and "remanding . . . for processing and re-tasking to the appropriate agency/office(s) to obtain responsive documents, if any." *Id.*

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On June 23, 2016 ICE sent its second "final response" (hereinafter, "June 2016 response") (cover attached as Exh. L.) This response consisted of nine Excel workbooks and a nine-page PDF. This second "final" response fails to address the issues raised by Requesters' appeal. Instead, the new spreadsheets largely *duplicate* the information in the original spreadsheets and contain the *same* fields of information, as well as the *same* total number of entries.⁴ The June 2016 spreadsheets appear to differ only by differently

reflected in the reports; (2) whether the spreadsheets reflect multiple parole determinations for a unique individual or the most recent parole determination for that individual; (3) what the field office codes and DCO codes mean, and for ICE to provide an index or look-up table for all the codes in the reports; (4) why there are discrepancies in the number of entries in the "Summary" versus "Cumulative" tabs in the spreadsheets; (5) why the credible fear finding column sometimes says "N/A"; (5) why certain categories of information requested were not provided; and (6) how spreadsheets were generated and who generated them.

³ Ms. Seele additionally suggested emailing the FOIA email address for clarification of some of the Requesters' questions. The Requesters sent an email to ICE-FOIA@dhs.gov on Tuesday, February 9, 2016. *See* Exh. D. That same day, the Requesters received an automated response from ICE, which did not provide clarification on our questions. *See* Exh. E. On February 17, 2016, ICE replied with a two-sentence response stating, "Thank you for your follow-up. As the case is closed, anything you might take issue with in our response can be addressed with an administrative appeal or by filing a new request for the information you are seeking." *See* Exh. I.

⁴ Both the June 2016 production and the December 2015 production reflect 3517 cumulative entries for the latest-in-time spreadsheet (titled "2016-ICFO-01574 – SEPT 2015 Final Copy.xls" and "2016-ICFO-01568, Responsive 10.xls" respectively); and both contain the same fields, or columns, of information. *See* Exhs. H and M.

disaggregating certain information, without containing any new information.⁵ Compare Exhibits H and M. Moreover, as with the original spreadsheets, ICE withheld some portions of the June 2016 spreadsheets pursuant to FOIA exemptions (b)(6) and (b)(7) without any explanation. The PDF produced in June 2016 also contains no new information, but instead merely repeats information contained in the December 2015 spreadsheets.⁶

Once again, the Requesters appeal ICE's second final response and search for records as insufficient and ICE's assertion of several FOIA Exemptions. The Requesters also challenge ICE's failure to address and provide information as requested in the Requesters' February 4, 2016 call with the FOIA office. Finally, the Requesters again appeal the denial of expedited processing insofar as it affects the timing of any additional search and any future production of documents.⁷

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I. THE AGENCY'S SEARCH AND RESPONSE WERE INADEQUATE

An agency must "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a [FOIA] request." 5 U.S.C. § 552(a)(3)(D). A record includes:

- (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including electronic format; and
- (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.

5 U.S.C. § 552(f)(2).

⁵ Specifically, the June 2016 spreadsheets contain additional spreadsheet "tabs" that disaggregate information by field office. However, this does not constitute new information as the December 2015 spreadsheets already contained entries for "field office" in Column B of its "Cumulative" tab. See Exh. H.

⁶ Specifically, the PDF document reflects information on credible fear parole determinations that is contained in the "Percentage Totals" tab of the December 2015 spreadsheets.

⁷ The Requesters herein incorporate by reference our arguments on Expedited Processing in our appeal letters dated October 15, 2015 and October 16, 2015. See Exh. F (explaining that expedited processing is warranted because there is an "urgency to inform the public about an actual or alleged government activity," and the request is made by organizations "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II)).

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The agency must conduct a search reasonably calculated to uncover all relevant documents. *Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 770-71 (9th Cir. 2015). The adequacy of an agency's search is measured by a "standard of reasonableness," and is "depends, not surprisingly, upon the facts of each case." *Zemansky v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (citations omitted). In particular, courts have found that searches may be inadequate where "a review of the record raises substantial doubt, particularly in view of well-defined requests and positive indications of overlooked materials." *Hamdan*, 797 F.3d at 771. Agency searches have been deemed inadequate based on evidence that responsive documents exist but were not produced. *See, e.g., Tarullo v. U.S. Dep't of Def.*, 170 F. Supp. 2d 271, 275 (D. Conn. 2001); *Kronberg v. U.S. Dep't of Justice*, 875 F. Supp. 861, 869-71 (D.D.C. 1995). Moreover, although "[a]n agency has discretion to conduct a standard search in response to a general request," it "must revise its assessment of what is 'reasonable' in a particular case to account for leads that emerge during its inquiry." *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998), *as amended* (Mar. 3, 1999); *see also Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 109-11 (D.D.C. 2002), *aff'd in part, rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003).

The agency's search was inadequate in both request 2016-ICFO-01568 and request 2016-ICFO-01574. Review of the record raises substantial doubt about ICE's search and reveals the existence or likely existence of responsive documents that were not produced.

A. First Request (2016-ICFO-1574): ICE Did Not Release Records Created Pursuant to Its Own Directive

The first request (2016-ICFO-1574) sought records and information that ICE is required to create under its own parole directive, but that were not released in either Response. Such information should have been released. *Kronberg*, 875 F. Supp. at 869-71.

As set forth above, ICE Directive 11002.1 specifically requires the creation of three categories of documents (1) monthly reports by the ICE Field Office Directors on parole decisions; (2) related analyses by the Assistant Director for Operations, and (3) quality assurance reports by the Assistant Director for Operations. *See* ICE Directive 11002.1 ¶¶ 8.11, 8.12.

The Requesters sought all three categories of documents created from January 2010 to the present. Although ICE has produced monthly field office reports created between January and September 2015, it has yet to produce any reports created prior to January 2015. Nor has it produced any analyses or quality assurance reports. Although the Requesters' first appeal specifically

challenged these failures, ICE's June 2016 production did not address them. Thus, the Requesters again ask that ICE respond to its *entire* request and produce all relevant records created from January 2010 to the present.

B. First Request (2016-ICFO-1574): The Monthly Reports Produced are Insufficient

Furthermore, the monthly reports that ICE released in both productions are inadequate for several reasons. First, ICE included no index, lookup table, key, or glossary of terms. Therefore, the Requesters have no way to read numerous entries on the reports.⁸ Second, the monthly reports do not provide any other unique identifier to each individual case. As a result, it is impossible to analyze the data provided. Third, there are numerous discrepancies and ambiguities in the data that prevents even the simplest data analysis. *See supra* n.2 & 3; Exhs. H and M. Each of these issues was raised in the Requesters' original appeal, but ICE failed to address any of these deficiencies in its second production. This supplemental information is well within the scope of the original request as it is necessary to interpret the monthly reports.⁹

C. Second Request (2016-ICFO-1568): ICE Did Not Produce Responsive Documents Evidenced or Referenced in its Response.

ICE's search for policy documents was inadequate. In its first response, ICE disclosed a 60-page PDF that included (1) a copy of ICE Directive 11002.1 (which is already publicly available online); (2) a lesson plan on noncitizens in the custody of state and local law enforcement; and (3) a lesson plan on prosecutorial discretion. *See* Exh. G. In ICE's second response, ICE produced *no* additional information relating to the request for policy documents.

Clearly there is "substantial"—if not more serious—doubt that ICE conducted a reasonably adequate search. *Hamdan*, 797 F.3d at 771. First, ICE's own monthly reports list "enforcement priority" or "recent entrant/enforcement priority" or "enforcement priority 1" as a reason for hundreds denials of parole. *See* Exh. H. This strongly suggests that there are at

⁸ For example, without a lookup table, Requesters cannot reliably identify the code for each ICE field office; the reports also do not explain what "DCO" refers to, or why certain entries are listed as "N/A."

⁹ For example, Requesters have received unique identifiers and look-up tables in order to facilitate statistical analysis in other FOIA requests without compromising the responsive agency's concerns regarding privacy and other issues.

least some “internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications” on how the enforcement priorities are applied in parole decisions. Yet no such documents were produced.

Moreover, it is highly unlikely that ICE does not have any other responsive records, given the breadth of the ICE Directive 11002.1—which governs all ICE enforcement personnel—the fact that the Directive was issued more than six years ago, the scope of the Priorities Memo—which applies to all DHS personnel—and the scope of the FOIA Request. In *Ctr. for Nat. Sec. Studies*, the plaintiffs challenged the adequacy of the Department of Justice’s search for documents responsive to their request for “all policy directives and guidance issued to officials about making public statements or disclosures” about persons detained after Sept. 11, 2001 or about “sealing judicial or immigration proceedings.” In response to that request, the DOJ had released only two documents: a two-page document from DOJ entitled “draft talking points” for the Attorney General; and (2) a memorandum via electronic mail from the Chief Immigration Judge. The district court found that this response was inadequate on several grounds. As the court reasoned:

it is simply not credible that no other documents are responsive to Plaintiffs’ request. Somehow all United States Attorneys Offices, all FBI offices, all INS offices, and all DOJ offices throughout the United States were told that matters related to those apprehended in connection with September 11, were to remain secret. How was this directive communicated? The Government never explains how widespread notification was accomplished without the use of a single document produced under FOIA.

For the foregoing reasons, the Court concludes that the Government’s search of “all policy directives and guidance issued to officials about making public statements or disclosures” with respect to the detainees or about “sealing judicial or immigration proceedings” was inadequate. The Government must conduct another search.

Ctr. for Nat. Sec. Studies, 215 F. Supp. 2d at 110-11.

Similarly in this case, it is highly likely there are additional “internal memoranda, guidelines, worksheets, training materials, reports, or other agency communications” on how the civil enforcement priorities are applied in parole decisions for noncitizens found to have a credible fear. Nonetheless, ICE disclosed only 60 pages of information, much of which is publicly available on ICE’s website.

We therefore ask that ICE conduct another search for additional documentation in response to the request.

II. ICE IMPROPERLY WITHHELD INFORMATION PURSUANT TO EXEMPTIONS 2, 6, 7(C) AND 7(E)

Finally, ICE withheld portions of the records produced in response to both requests pursuant to 5 U.S.C. §§ 552(b)(2), (6), (7)(C) and (7)(E). The spreadsheets produced in ICE's first and second responses are marked with Exemptions (6) and (7)(C), and the December 2015 PDF document is marked with Exemptions (2), (6), (7)(C) and (7)(E). *See* Exhs. G and H. As noted in the Requesters' original appeal, this is improper because ICE merely asserts, without explanation, that certain information and/or records meet the standards outlined in 5 U.S.C. §552(b). It is well-settled that FOIA's "exemptions 'must be narrowly construed.'" *ACLU of N. Cal. v. FBI*, No. C 12-03728 SI, 2014 WL 4629110 (N.D. Cal. Sept. 16, 2014), at *2 (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 154 (1989)). "The government agency bears the ultimate burden of proving that a particular document or redaction falls within one of the nine statutory exemptions to the disclosure requirement." *Id.* at *3. Furthermore, in claiming a law enforcement exemption, the government must "establish a 'rational nexus' between enforcement of a federal law and the document for which an exemption is claimed." *Church of Scientology v. U.S. Dep't of Army*, 611 F.2d 738, 748 (9th Cir. 1980).

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For these reasons, Requesters once again ask that ICE disclose the portions of the records withheld pursuant to the FOIA Exemptions or, at a minimum, explain why its assertion of the Exemptions is proper.

Thank you for your consideration and prompt attention to this request.

Sincerely,



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