

EXHIBIT D

U.S. Department of Homeland Security
500 12th St. SW; STOP 5009
Washington, DC 20536-5009



U.S. Immigration
and Customs
Enforcement

November 5, 2015

Michael Tan
ACLU Immigrant's Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

RE: 2016-ICAP-00031, 2015-ICFO-99765

Dear Mr. Tan:

This is in response to your letter dated October 1, 2015, received on October 8, 2015, requesting reconsideration of the denial of the Freedom of Information Act (FOIA) fee waiver request you filed with the U.S. Immigration and Customs Enforcement's (ICE) FOIA Office.

Your original September 10, 2015 FOIA request sought data related to ICE's mandatory and non-mandatory detention population for September 2014-September 2015, for each ICE Area of Responsibility (AOR). You requested the number of individuals subject to certain mandatory detention categories and sub-categories. In your September 10th correspondence, you also requested a full fee waiver, or, in the alternative, that the ACLU be labeled a news media requestor for fee assessment purposes.

In correspondence dated September 21, 2015, the ICE FOIA Office denied your request for a full fee waiver, citing failure of factors 4, 5, and 6 of the DHS FOIA Regulations located at 6 CFR § 5.11(k)(2). The ICE FOIA Office labeled the ACLU a non-commercial requestor for fee assessment purposes.

In your letter appealing the fee waiver determination, received on October 8, 2015, you state disclosure of the records in question is in the public interest because it is likely to significantly contribute to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester, and state ACLU satisfies the factors set forth at 6 C.F.R. § 5.11(k) for receiving a fee waiver.

As stated in ICE FOIA's correspondence dated September 21, 2015, the DHS FOIA Regulations at 6 C.F.R. § 5.11(k) set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. These factors are:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government";
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow

Michael Tan
2016-ICAP-00031, 2015-ICFO-99765
Page 2 of 3

- segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant";
 - (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
 - (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

On appeal, ICE completes a *de novo* review of the fee assessment and fee waiver request. As a requester, you bear the burden under FOIA of showing that the fee waiver requirements have been met.

As to the first requirement, the requested information likely concerns the operations or activities of the government related to mandatory detention and non-mandatory detention under the Immigration and Nationality Act (INA).

The second requirement requires that the disclosure "likely contribute" to the understanding of the public at large regarding specific government operations or activities. With respect to your request, the requested information will likely contribute to an understanding of government operations or activities related to mandatory detention and non-mandatory detention.

The third requirement mandates the disclosure of the requested information contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons. Moreover, a requestor must establish an ability to disseminate the information to the public at large. See *Cause of Action v. Fed. Trade Comm'n*, 961 F. Supp. 2d 142, 158 (D.D.C. 2013) (requester must specifically demonstrate its intent and ability to disseminate the requested information to the public); *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (requester bears burden to demonstrate intent and ability to disseminate the information to the public). In your appeal, you argue there is no publically available data that provides a detailed description of ICE's mandatory and non-mandatory detention population for the past year (September 2014-September 2015). With respect to your request, the requested information will likely contribute to the understanding of the public at large. Moreover, the ACLU has established the ability and intent to disseminate the requested information to the public, through publications such as news briefings and newsletters, as well as on blogs and web pages.

The fourth requirement mandates the disclosure and subsequent contribution to public understanding of government operations or activities be "significant." To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question must be likely to be enhanced by the disclosure to a significant extent. With respect to your request, the information would likely contribute a significant public understanding of ICE' mandatory and non-mandatory detention population, and the specific classifications of those subject to mandatory detention.

The fifth and sixth requirements consider whether the requester has a commercial interest that would be furthered by the requested disclosure; and whether the magnitude of any identified commercial

Michael Tan
2016-ICAP-00031, 2015-ICFO-99765
Page 3 of 3

interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. In your appeal, you state that the ACLU is a nationwide, non-profit, non-partisan organization dedicated to protecting the civil liberties of individuals residing within the United States and the ACLU intends to disseminate work product and information gleaned from this FOIA request to the public at no cost. With respect to your request, you have established that any potential commercial interest is outweighed by the public interest and that the primary interest in disclosure is the public interest.

Upon a complete review of the administrative record, your request for a fee waiver in case 2015-ICFO-99765 is granted. As ICE is granting ACLU's request for a full fee waiver, addressing ACLU's classification as a representative of the news media is not necessary.

Should you have any questions regarding this appeal adjudication, please contact ICE at ice-foia@dhs.gov. In the subject line of the email please include the word "appeal," your appeal numbers, which are 2016-ICAP-00031, and the FOIA case number, which is 2015-ICFO-99765.

Sincerely,



Debbie Seguin
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
U.S. Department of Homeland Security

cc: The ICE FOIA Office