UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IMMIGRANT DEFENSE PROJECT, Plaintiff, -against- UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendant.	No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, *et seq*., to compel U.S. Immigration and Customs Enforcement ("ICE") to conduct a reasonable search for and produce records improperly withheld in response to a FOIA request from Plaintiff Immigrant Defense Project ("IDP"). Plaintiff seeks records related to civil immigration arrests by ICE agents that occur inside, on the property of, or within two city blocks of New York State courthouses (hereinafter "courthouse arrests").

2. ICE has provided almost no information about courthouse arrests in New York. ICE published a January 2018 internal policy memorandum on courthouse arrests but it does little more than reveal that ICE has adopted a practice of arresting immigrants attending court. Similarly, public statements from federal officials merely inform the public that ICE will continue to arrest immigrants attending court, including victims and witnesses. ICE has not explained, clarified, or released data pertaining to its current guidelines and practices for conducting courthouse arrests, the frequency of such arrests, or ICE's relationships and arrangements with New York State's Office of Court Administration ("OCA") relating to such

arrests.

3. Plaintiff submitted its request to Defendant on March 5, 2018 (attached hereto as Exhibit A), seeking information on courthouse arrests. More than three months later, on June 11, 2018, Plaintiff received Defendant's formal response (attached hereto as Exhibit B), consisting of two pages: an e-mail blast from ICE's Deputy Director to ICE employees about a policy directive and a Buffalo, New York field office e-mail stating that courthouse arrests must be approved at the Deputy Field Office Director level or higher.

4. In response to Defendant's clearly deficient two-page disclosure, Plaintiff submitted an administrative appeal challenging the adequacy of Defendant's search on August 17, 2018 (attached hereto as Exhibit C). Defendant responded to Plaintiff on September 19, 2018, (attached hereto as Exhibit D), agreeing to conduct additional searches. Plaintiff sent two follow-up letters to Defendant on October 3, 2018, and November 16, 2018 (attached hereto as Exhibits E and F); Defendant replied by e-mail on November 20, 2018 (attached hereto as Exhibit G), assuring Plaintiff its request would be processed as expeditiously as possible. Plaintiff sent a third follow-up letter on February 8, 2019 (attached hereto as Exhibit H). Defendant replied by e-mail on February 14, 2019 (attached hereto as Exhibit I), stating that Plaintiff's request is currently tasked to the appropriate program offices for responsive records to be returned.

5. 381 days have passed since Plaintiff submitted its request, and 183 since Defendant agreed to conduct additional searches. Plaintiff has received no additional records or communications from Defendant. Left with no alternative, Plaintiff now seeks to compel Defendant to fulfill immediately its obligation to perform an adequate search and promptly disclose responsive records.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

7. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) because the principal place of business for IDP is in New York City. ICE operates in all 50 states.

PARTIES

8. Plaintiff IDP is a non-profit organization whose mission is to promote fundamental fairness for immigrants accused or convicted of crimes. IDP seeks to minimize the harsh and disproportionate immigration consequences of contact with the criminal justice system by working to transform unjust deportation laws and policies and educating and advising immigrants, their criminal defenders, and other advocates. IDP disseminates information about the immigration system to the public in accessible ways and is a leader in providing training and support for legal practitioners and community members.

9. Defendant ICE is a component of the Department of Homeland Security, which is a department of the executive branch of the United States. ICE enforces immigration and customs laws and is responsible for the detention and removal of immigrants from the United States. It has offices in all 50 states, including New York. ICE is an "agency" with the meaning of 5 U.S.C. § 552(f)(1).

STATEMENT OF FACTS

A. ICE Conducts Courthouse Arrests But Has Provided Minimal Public Information on the Practice.

10. Increasingly, ICE conducts civil immigration arrests at or near courthouses (referred to colloquially as "courthouse arrests").

11. ICE has asserted that its agents "generally" seek to avoid enforcement actions in

areas dedicated to non-criminal proceedings, and that officers will not arrest family members of arrest targets "absent special circumstances." But, according to statistics compiled by IDP from attorneys and advocates who work with immigrants and their family members, courthouse arrests in New York increased 1,700% from 2016 to 2018, and DHS and ICE's inconsistent and vague statements about that practice provide little clarity as to when, where, and why ICE will make a courthouse arrest.

12. Such arrests have had a chilling effect on access to justice for non-citizens in New York State. ICE's ambiguous courthouse-arrest policy and the sharp spike in courthouse-arrest volumes have inspired fear in immigrant communities about the risks of appearing in court, and whether doing so will lead to arrest, detention, or deportation. As a result, court participation by immigrant victims of domestic violence, sexual assault, and rape has declined markedly, posing a significant threat to public health and safety. In December 2018, 75 former state and federal judges expressed their concerns in a letter to ICE, asserting that "the public must be able to access courthouses safely and without fear of retribution. For many, however, ICE's courthouse arrests have made courts places to avoid."

13. It is critical to obtain information on the frequency of courthouse arrests, related policies, and ICE's working relationship with the OCA in order to provide the public—including crucial stakeholders such as legal services lawyers, anti-violence advocates, and other participants in the court system—much needed clarity on the risks that individuals attending court proceedings face in New York State.

14. The information Plaintiff seeks is not publicly available. Absent the public release of the requested records, the only available statistics on the frequency and type of courthouse arrests come from self-reported data collected by IDP from advocates and attorneys

practicing in counties across New York State. These data are incomplete and provide no information about ICE's policies or procedures or the manner in which it works with OCA.

15. Without the requested records, mass confusion and misunderstanding over courthouse arrests will persist, litigants and witnesses will refrain from accessing the courts to protect their rights, and attorneys will be unable to advise their clients about the consequences of participation. As the letter from 75 former state and federal judges stated: "Following nearly two years of high profile ICE courthouse activity, only unequivocal guarantees and protections will restore the public's confidence that it can safely pursue justice in our nation's courts."

B. ICE Responded to Plaintiff's FOIA Request Regarding Courthouse Arrests With a Clearly Inadequate Disclosure.

16. On March 5, 2018, Plaintiff submitted to ICE a FOIA request (attached hereto as Exhibit A) seeking any and all records prepared, received, transmitted, collected, and/or maintained by ICE's New York and Buffalo field offices that reflect:

- internal protocols regarding communication between the DHS and OCA staff, policies, protocols, or trainings about courthouse arrests;
- information about enforcement incidents related to courthouse arrests;
- meetings between DHS staff and OCA staff;
- information regarding production of individuals held in ICE custody to any New York State law enforcement or correctional agency; and
- copies of certain DHS reporting requirements.

17. On June 11, 2018, nearly three months after Plaintiff submitted its request, ICE told Plaintiff that, after searching its Enforcement and Removal Operations ("ERO") division, it had identified only two pages responsive to the request. The first page contained an e-mail blast from ICE's Deputy Director to ICE employees about a policy directive; the second page contained a Buffalo, New York field office e-mail stating that courthouse arrests must be

approved at the Deputy Field Office Director level or higher.

18. ICE's initial search—which was, to Plaintiff's knowledge, ICE's ***only*** search—was inadequate for failure to encompass clearly responsive records. Although public documents leave no doubt that ICE has responded to inquiries and criticism, addressed concerns raised by state courts, and created a new internal policy on courthouse arrests, ICE disclosed no records whatsoever relating to these activities.

19. ICE also omitted numerous responsive documents of which Plaintiff is aware. For example, the New York Chief Administrative Judge has stated publicly that ICE officials have "agreed, unofficially on a regional level" not to enter non-criminal courtrooms, yet ICE's two-page disclosure contains no evidence of this agreement. Nor has ICE disclosed responsive materials described by its own internal courthouse-arrest directives.

20. Deficiencies in ICE's response are particularly clear when compared to recent ICE responses to other courthouse-arrest-records requests. For example, when asked for recent Colorado field office courthouse-arrest records, ICE produced a far more extensive response (attached hereto as Exhibit J) than the mere two pages it disclosed here.

21. Furthermore, ICE's search was inadequate because it did not search all divisions likely to have responsive records. Plaintiff sought records prepared, received, transmitted, collected, or maintained by ICE's New York and Buffalo field offices. But ICE's response stated that ICE searched only its ERO division. There was no indication that ICE conducted a meaningful search of any field office, much less the specific offices Plaintiff identified.

22. On August 17, 2018, Plaintiff formally appealed the adequacy of ICE's search.

C. In Response to Plaintiff's Administrative Appeal, ICE Admitted It Had Not Conducted a Thorough Search and Committed to Perform Additional Searches.

23. On September 19, 2018, ICE advised it had "determined that new search(s) or,

modifications to the existing search(s), could be made" and was "remanding [Plaintiff's] appeal to the ICE FOIA Office for processing and re-tasking to the appropriate agency/office(s) to obtain any responsive documents."

24. In letters dated October 3, 2018 and November 16, 2018, Plaintiff asked for a swift response to the appeal. On November 20, 2018—three months after remanding the request—ICE notified Plaintiff that it had "queried the appropriate component of DHS for responsive records" and would "process [the] request as expeditiously as possible." In a letter dated February 8, 2019, Plaintiff again requested a response. On February 14, 2019—six months after remanding the Request—ICE notified Plaintiff that the "request is currently tasked to the appropriate program offices for responsive records to be returned." Plaintiff has received no further communication from ICE.

25. 381 days have passed since the request was made, and 216 days have passed since Plaintiff appealed the adequacy of ICE's search. ICE's continued delay and resulting withholding of the requested records are unwarranted.

CLAIM FOR RELIEF

Violation of the Freedom of Information Act

26. Paragraphs 1-25 above are hereby incorporated by reference as if set forth fully herein.

27. ICE has violated 5 U.S.C. § 552(a)(3)(A) by failing to promptly release agency records in response to Plaintiff's request.

28. ICE has violated 5 U.S.C. § 552(a)(3)(C)-(D) by failing to make reasonable efforts to perform an adequate search for records responsive to Plaintiff's request.

29. Plaintiff has exhausted the applicable administrative remedies with respect to its request.

30. Injunctive relief is authorized under 5 U.S.C. § 552(a)(4)(B) because ICE continues to improperly withhold agency records in violation of FOIA. Plaintiff will suffer irreparable injury from, and have no adequate remedy for, ICE's unlawful withholding of government documents subject to their request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1) Order Defendant to conduct, immediately and expeditiously, an adequate search for agency records responsive to Plaintiff's request;

2) Order Defendant to disclose all responsive agency records to Plaintiff;

3) Award Plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

4) Grant such other relief as the Court may deem just and proper.

Dated: New York, New York
March 21, 2019

O'MELVENY & MYERS LLP

By: */s/ Daniel L. Cantor*

Daniel L. Cantor
Jennifer B. Sokoler
Matt Schock
dcantor@omm.com
jsokoler@omm.com
mschock@omm.com
Times Square Tower
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061

Andrew Wachtenheim
andrew@immdefense.org
Immigrant Defense Project
40 W. 39th Street, Fifth Floor
New York, NY 10018
Telephone: (212) 725-6422

Attorneys for Plaintiff Immigrant Defense Project