

EXHIBIT C

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FREEDOM OF INFORMATION ACT APPEAL

March 5, 2019

VIA FEDERAL EXPRESS OVERNIGHT

Kevin Tyrrell
Director, FOIA Appeals and Litigation
Privacy Office
Attn: FOIA Appeals
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0655
Washington, D.C. 20528-0655

Re: Appeal of DHS's Final Response on Freedom of Information Act Request No. 2019-HQFO-00332

Dear Mr. Tyrrell,

I am *pro bono* counsel for Asian Americans Advancing Justice – Los Angeles (“AAAJ-LA”) in connection with its above-referenced Freedom of Information Act (“FOIA”) request (the “Request”) for records regarding the implementation of the United States Citizenship & Immigration Services (“USCIS”) Policy Memorandum 602-0050.1, which purports to implement a new policy regarding the issuance of Notices to Appear (“NTAs”). The Request was submitted to USCIS, the Department of Homeland Security (“DHS”), the Department of Justice (“DOJ”), and Immigration and Customs Enforcement (“ICE”). I am in receipt of the final response of DHS dated January 31, 2019, which determined that “due to the

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subject matter of the request,” the Request would be transferred to the USCIS FOIA office. *See Exhibit A*. I am writing to appeal DHS’s final response to AAAJ-LA’s Request.¹

I. The Request

On December 21, 2018, AAAJ-LA submitted the Request by Federal Express to USCIS, DHS, DOJ, and ICE seeking 18 specific categories of records from each entity. Generally, these categories covered (i) documents related to the implementation of PM-602-0050.1, and (ii) agency statistics related to the issuance of NTAs from 2012 to the present (or the most current Quarter for which such statistics are available).

Included among the 18 specific categories of records was specific request (a)17, made on DHS, DOJ, and ICE, for “all Records and communications between and among USCIS, the DOJ, ICE, the Office of the Attorney General, DHS, and any other government agency regarding the implementation of the New NTA Policy.” *See Exhibit B* at ¶ IV(a)(17). The Request further noted that responsive Records, at a minimum, should be retrieved from, among other places, the “Office of the Secretary of the Department of Homeland Security and all subordinate offices.” *See Exhibit B* at ¶ V(9).

On January 31, 2019, DHS acknowledged receipt of the Request and recapped specific categories 1 through 15. DHS’s final response, however, **omitted and ignored** AAAJ-LA’s final three specific requests, including specific request (a)17 which asks for “all Records and communications between and among USCIS, the DOJ, ICE, the Office of the Attorney General, DHS, and any other government agency regarding the implementation of the New NTA Policy.” *See Exhibit A* at 1-2; *Exhibit B* at ¶ IV(a)(17). After quoting categories 1 through 15 and omitting the remaining three, DHS noted that the Request would be transferred to the USCIS FOIA Office “[d]ue to the subject matter.” DHS did not produce any records or communications responsive to any of the specific categories of requests.

II. Argument

DHS Has Failed to Meet its Duty to Search for Responsive Records

By transferring the case to USCIS without responding to nor recognizing AAAJ-LA’s specific request (a)17, DHS has failed to meet its duty to search for responsive records. Under FOIA, an agency has “a duty to construe a FOIA request liberally.” *Nation Magazine, Washington Bureau v. U.S. Customs Serv.*, 71 F. 3d 885, 890 (D.C. Cir. 1995). Importantly, an agency “cannot limit its search to only one or more places if there are additional sources that are likely to turn up the information requested,” *Valencia-Lucena v. U.S. Coast Guard*, 180 F. 3d 321, 326 (D.C. Cir. 1999) (internal quotations and citations omitted). Additionally, an agency is obligated to search for documents in locations specified within the four corners of the request, *Kowalczyk v. Department of Justice*, 73 F. 3d 386, 389 (D.C. Cir. 1996).

¹ Under DHS regulations, a requester “may appeal adverse determinations denying his or her request or any part of the request to the appropriate Appeals Officer. A requester may also appeal if he or she questions the adequacy of the component’s search for responsive records, or believes the component either misinterpreted the request or did not address all aspects of the request (*i.e.*, it is sued an incomplete response),” 6 C.F.R. § 5.8(a)(1).

DHS's final response does not meet these legal standards. First, DHS has failed properly to construe the Request. Instead of the liberal interpretation required under *Nation Magazine*, DHS construed the Request narrowly by omitting from its final response specific request (a)17, which calls on DHS specifically to produce documents exchanged between and among DHS, DOJ, ICE, and USCIS regarding the New NTA policy. Second, the Request notes that the records requested should be located, among other places, in "[t]he Office of the Secretary of the Department of Homeland Security and all subordinate offices." See *Exhibit B* at ¶ V(9). Given that the Request specifies DHS and all subordinate offices as a probable location of requested records, DHS is bound under *Kowalczyk*, at a minimum, to conduct a search for any and all responsive records at the location specified within the four corners of the request. Finally, DHS's referral of the entire Request to USCIS violates *Valencia-Lucena's* mandate that an agency not limit a request to one or more places when there exist additional sources that are likely to turn up the information requested.

DHS Should Approve AAAJ-LA's Request for Expedited Processing

AAAJ-LA's Request additionally asked that DHS grant expedited processing because "of the severity of the issue of deportation or removal and because of the size of the impacted populations, which likely exceeds tens of thousands of legal permanent residents, temporary non-immigrants, and unauthorized persons." DHS did not respond to the expedited processing request. Since AAAJ-LA's Request was improperly transferred by DHS to USCIS, AAAJ-LA reemphasizes in this appeal that expedited processing should be granted.

Under FOIA, a Request should be granted expedited processing if it is urgently needed by an organization primarily engaged in disseminating information to inform the public about actual or alleged Federal Government activity. See 5 U.S.C. § 552(a)(6)(E)(v)(II). See also 6 C.F.R. § 5.5 (e)(1)(ii). The U.S. Court of Appeals for the District of Columbia Circuit looks to three factors for determining whether a FOIA request qualifies for expedited processing based on an urgency to inform the public. See *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). Namely, the court will examine, "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Id.* Additionally, DHS regulations note that "[t]he existence of numerous articles published on a given subject can be helpful to establishing the requirement that there be an 'urgency to inform' the public on the topic." 6 C.F.R. § 5.5 (e)(1)(ii). See also *Amer. Civil Liberties Union v. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004) (noting that numerous newspaper articles on the topic requested justify expedited processing of the request).

In this case, there is no doubt that the New NTA policy concerns a matter of current exigency to the American public. The purported implementation of the New NTA policy has received extensive media coverage, including, but not limited to, the following news articles:

- "New USCIS Policy Will Carry Harsh Consequences For Applicants" published July 11, 2018 in Forbes Magazine. See Exhibit C.
- "The Trump Administration Is Working to Deport More Legal Immigrants" published July 17, 2018 by Mother Jones. See Exhibit D.

- "The Trump Administration Just Made It Easier to Deport Survivors of Human Trafficking and Domestic Abuse" published November 19, 2018 by Mother Jones. *See* Exhibit E.
- "The U.S. now has even more leeway to start deportation proceedings for immigrants" published November 15, 2018 by The Miami Herald. *See* Exhibit F.
- "Big blow for H1-B holders! New rule makes it easy for US to deport foreign nationals if visa extension gets rejected" published July 14, 2018 by Business Today. *See* Exhibit G.
- "New Processing Hardships To Be Faced By U.S. Immigrants" published July 26, 2018 in Forbes Magazine. *See* Exhibit H.
- "Even with a green card, an immigrant can be deported under new guidelines" published July 13, 2018 in The Miami Herald. *See* Exhibit I.
- "Legal immigration becomes harder under Trump-era changes to visa rules" published July 18, 2018 by Michigan NPR Radio. *See* Exhibit J.
- "New rules: Even with green cards, immigrants can be deported" published July 15, 2018 by Tribune News Service. *See* Exhibit K.

Additionally, PM-602-0050.1 has received widespread coverage in the legal community, including publication of the following non-exhaustive list of legal news articles and legal advisories:

- "New USCIS Deportation Policy Has Far-Reaching Implications for Employers" published by the Law Offices of Ford & Harrison LLP. *See* Exhibit L.
- "United States: New USCIS 'Deportation' Policy May Impact Legal Foreign Artists And Entertainers" published by Dickinson and Wright on Mondaq. *See* Exhibit M.
- "10 Key Points From New USCIS 'Notice To Appear' Policy" published by Lisa Pino on Law360.com. *See* Exhibit N.
- "USCIS issues a new NTA policy guidance" published by Catholic Immigration Network. *See* Exhibit O.
- "Employment-Based Petitions Exempt (at Least for Now) Under New NTA Policy" published by The National Law Review. *See* Exhibit P.
- "AILA Policy Brief: New USCIS Notice to Appear Guidance" published by American Immigration Lawyers Association. *See* Exhibit Q.

These articles and policy briefings, which represent only a small subset of the numerous articles published on the New NTA Policy, demonstrate that the requested information concerns a matter of current urgency, thus satisfying the first prong of the *Al-Fayed* factors.

Additionally, delaying a response to this FOIA request would compromise a significant interest. As noted in the original request, the New NTA policy is significant because "of the severity of the issue of deportation or removal and because of the size of the impacted populations, which likely exceeds tens of thousands of legal permanent residents, temporary nonimmigrants, and unauthorized persons." The New NTA policy has created much uncertainty for immigrants, their family members, and members of the legal community. Making available the requested records will provide greater clarity to the American public, particularly those who may be deportable, those who may have a family member who is deportable, and the legal service providers who work with the immigrant community. Thus, the second *Al-Fayed* factor is clearly met by this Request. Finally, it is unquestionable that the Request meets the third *Al-Fayed* factor because the New NTA Policy involves federal government activity. The New NTA Policy was issued by USCIS in conjunction with DHS, ICE, the DOJ, and other agencies. Consequently, AAAJ-LA's Request meets all of the relevant factors under *Al-Fayed* warranting expedited processing. Additionally, one of the recipients of the Request, the DOJ, has already granted expedited processing for the same Request that was submitted to DHS. *See* Exhibit R. As a result, the grant of expedited processing by DHS would be consistent with the DOJ's decision to grant expedited processing.

III. Conclusion

For the reasons set forth above, AAAJ-LA respectfully requests that DHS reconsider its final action on this Request, produce all documents responsive to the Request, grant expedited processing, and respond to this appeal within 20 days. *See* 5 U.S.C. § 552(a)(6)(A)(ii); 6 C.F.R. § 5.8(d).

We appreciate your assistance in this request. If you have any questions or concerns regarding this appeal, please feel free to call me.

Very truly yours,

Stephen Benz

cc: AAAJ-LA