

# CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

## KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC

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July 17, 2018

Freedom of Information Act Request  
Executive Office for Immigration Review  
Office of General Counsel  
5107 Leesberg Pike, Suite 1903  
Falls Church, VA 20503  
Email: [EOIR.FOIARequests@usdoj.gov](mailto:EOIR.FOIARequests@usdoj.gov)  
VIA EMAIL

RE: Freedom of Information Act (“FOIA”) Request

Dear Executive Office for Immigration Review FOIA Unit,

The Kathryn O. Greenberg Immigration Justice Clinic (“Clinic”) and the American Immigration Council (“AIC”) (collectively “Requesters”) submit this letter as a request for records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* We ask that this request be expedited pursuant to 5 U.S.C. § 552(a)(6)(E), and that we be granted a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

### **Records Requested**

We request disclosure of any and all records in the possession of the Executive Office for Immigration Review, or sub-offices thereof, that reflect the following information regarding the adjudication of motions for a stay of removal filed with the Board of Immigration Appeals (“BIA”) which were filed in connection with a motion to reopen with the BIA or a motion for reconsideration with the BIA. To be clear, we do not seek data on all motions for a stay of removal filed in the periods described below. Rather, we seek only data regarding motions for a stay of removal filed in cases where the respondent either (1) already has a pending motion to reopen or motion for reconsideration or (2) filed a motion for a stay of removal concurrently with the filing of the motion to reopen or motion for reconsideration.

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1. For each motion for a stay of removal described above that was filed in (a) fiscal year (“FY”) 2015; FY 2016, FY 2017; and FY 2018 (to date), please provide:
  - a. Whether the motion was treated as an “emergency” or “non-emergency” motion for a stay of removal (as those terms are defined in BIA Practice Manual 6.4(d));
  - b. The date that the motion for a stay of removal was decided;
  - c. The number of days that elapsed between the date that the motion for a stay of removal was filed and the date of decision on the motion for a stay of removal;
  - d. Whether the motion for a stay of removal was granted or denied;
  - e. Whether the motion to reopen associated with the motion for a stay of removal was based on changed circumstances, as described in INA § 240(c)(7)(C)(ii), 8 C.F.R. § 1003.2(c)(3)(ii);
  - f. Whether the motion to reopen or motion for reconsideration was granted or denied; and
  - g. The date that the motion to reopen or motion for reconsideration was decided.
2. Please provide the aggregate raw numbers and percentage of emergency motions for a stay of removal (filed in connection with a motion to open or motion for reconsideration) that were granted and denied in FY 2015, FY 2016, FY 2017, and FY 2018 (to date), broken down by the year and month of the decision.
3. Please provide the aggregate raw numbers and percentages of non-emergency motions for a stay of removal (filed in connection with a motion to open or motion for reconsideration) that were granted and denied in FY 2015, FY 2016, FY 2017, and FY 2018 (to date), broken down by the year and month of the decision.
4. Please provide the mean and average processing times (from date of filing to date of decision) for non-emergency motions for a stay of removal (filed in connection with a motion to reopen or motion for reconsideration) that were decided in FY 2015, FY 2016, FY 2017, and FY 2018 (to date), broken down by year.
5. Please provide aggregate number of non-emergency motions for a stay of removal (filed in connection with a motion to open or motion for reconsideration) filed in FY 2015; FY 2016, FY 2017; and FY 2018 (to date) that remain pending, broken down by the year in which the motion for a non-emergency stay of removal was filed.

### **Request for Expedited Processing**

This request meets two independent criteria for expedited processing under the Department of Justice’s (“DOJ”) regulations.

First, expedited processing is warranted because there is “an urgency to inform the public about an actual or alleged federal government activity” and the request is made by entities “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II). Given current circumstances, there is an urgent need to inform the public about the adjudication and disposition of motions for a stay of removal that are filed in connection with motions to reopen and motions for reconsideration. Beginning in early 2017, federal immigration enforcement practices

underwent dramatic changes. Of particular relevance for this request, Immigration and Customs Enforcement (“ICE”) suddenly began detaining and attempting to remove large numbers of people who had been ordered removed, but resided in the United States for years, often with the federal government’s permission. Given the time that elapsed between these sometimes decades-old removal orders and the changes that have occurred in immigration law and in respondents’ countries of origin, many now have bases for reopening their removal proceedings. However, because ICE generally abruptly moves to execute these old removal orders with no notice or screening for changes in the law or conditions in their countries of origin, these noncitizens must quickly file a motion to reopen or a motion for reconsideration and simultaneously seek a stay of removal so that the BIA has an opportunity to decide the motion to reopen or motion for reconsideration before they are removed to their countries of origin, where all too many face persecution. Informing the public about the BIA’s practices in this respect is critical because understanding the way that this process functions would (1) allow the public, including courts, to realistically assess the degree to which the filing of a stay motion protects respondents’ constitutional, statutory, and regulatory rights, and (2) allow noncitizens and their attorneys to make informed decisions about how to proceed in cases with extremely fast timelines and where the consequence of failing to prevent a deportation may be death.

The Requesters—both entities with the capacity, intent and demonstrated ability to disseminate the requested information to a broad cross-section of the public—are “primarily engaged in disseminating information.” 5 U.S.C. § 552(a)(6)(E)(v)(II); *see also* 28 C.F.R. § 16.5(d)(1)(ii). The Clinic has a long track record of obtaining and analyzing data from government agencies and publishing studies and evaluations to educate the public about the way that the U.S. immigration enforcement and adjudication systems function.<sup>1</sup> It disseminates these materials by publishing them on websites, circulating them on listservs, and sharing them with media.

AIC is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America’s immigrants. AIC researches issues related to immigration, and regularly provides information to leaders on Capitol Hill, the media, and the general public. AIC works with other immigrants’ rights organizations and immigration attorneys across the United States to advance the fair administration of our immigration laws. Furthermore, AIC has synthesized and disseminated information from prior FOIA requests to facilitate the sharing of this information with a broad public audience.<sup>2</sup> Finally, AIC has regular contact with national

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<sup>1</sup> *See, e.g.*, New York Immigrant Representation Study Steering Committee (including Lindsay Nash), *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings – New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 358 (2011) (analyzing and reporting on ICE and EOIR data regarding the rates of representation and success in various EOIR proceedings for noncitizens facing removal in the New York area); PETER L. MARKOWITZ, *ET AL.*, CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE (2009), available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC\\_ICEHome-Raid-Report%20Updated.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICEHome-Raid-Report%20Updated.pdf) (reporting on documents released by the Department of Homeland Security (DHS) in response to FOIA request regarding home raids).

<sup>2</sup> *See, e.g.*, AMERICAN IMMIGRATION COUNCIL, *ET AL.*, BEHIND CLOSED DOORS: AN OVERVIEW OF DHS RESTRICTIONS ON ACCESS TO COUNSEL, available at <https://www.americanimmigrationcouncil.org/research/behind->

print and news media and plans to share information gleaned from FOIA disclosures with interested media. Upon receipt of the records requested, the Requesters will review them carefully and disseminate educational or newsworthy information through these channels.

Second, expedited processing is required when a request involves “a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 28 C.F.R. § 16.5(d)(1)(iv). In the past year, there has been significant media coverage of cases involving individuals who face dire consequences in their countries of origin and seek a stay of deportation until their motions to reopen are adjudicated.<sup>3</sup> The ongoing news coverage of these types of cases and the mechanisms—or lack thereof—to stay deportations pending adjudication of motions to reopen or motions for reconsideration demonstrates that the data requested here involves “a matter of widespread and exceptional media interest” as well as “questions about the government’s integrity [regarding the process for seeking a stay of removal] which affect public confidence,” *id.*

### **Request of Waiver of Fees**

The Requesters ask that all fees associated with this FOIA request be waived. We are entitled to a waiver of all costs because disclosure of the information is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). *See* 28 C.F.R. §§ 16.10(k)(1), 701.18(d)(1)–(2) (providing that records should be furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in the commercial interest of the institution); *see also* *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003).

Requesters have undertaken this work in the public interest and not for any private commercial interest. Requesters will make this information publicly available, and it will be critical to inform the public, including immigration attorneys, about the process, processing time, and success rate for motions for a stay of removal filed in connection with motions to reopen. Accordingly, disclosure in this case meets the statutory criteria, and a fee waiver would fulfill

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[closed-doors-overview-dhs-restrictions-access-counsel](#) (summarizing certain key documents released by DHS agencies in response to FOIA requests regarding noncitizens’ access to counsel).

<sup>3</sup> *See, e.g.*, Chris Fuchs, Judge grants Christian Indonesians in New Jersey time to fight deportation, NBC News, Feb. 5, 2018, <https://www.nbcnews.com/news/asian-america/judge-grants-christian-indonesians-new-jersey-time-fight-deportation-n844841> (last visited July 14, 2018); Nate Raymond, U.S. judge gives Indonesian illegal immigrants deportation reprieve, Reuters, Feb. 2, 2018, <https://www.reuters.com/article/us-usa-immigration-indonesia-new-hampshi/u-s-judge-gives-indonesian-illegal-immigrants-deportation-reprieve-idUSKBN1FL6KF> (last visited July 14, 2018); Kelly Knaub, Removal Of 50 Indonesian Christian Immigrants Put On Hold, Feb 2, 2018, <https://www.law360.com/articles/1008383/removal-of-50-indonesian-christian-immigrants-put-on-hold> (last visited July 14, 2018); Carlos Ballasteros, *Trump Wants to Deport Iraqi Christians—Even if it’s a Death Sentence*, NEWSWEEK (Dec. 6, 2017), available at <http://www.newsweek.com/trump-ice-deportations-christian-refugees-iraq-726624>; Chris Gelardi, When ICE Came for the Chaldeans, Slate, (Sept. 4, 2017), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/09/michigan\\_s\\_iraqi\\_chaldean\\_community\\_is\\_fighting\\_to\\_protect\\_dozens\\_of\\_people.html](http://www.slate.com/articles/news_and_politics/politics/2017/09/michigan_s_iraqi_chaldean_community_is_fighting_to_protect_dozens_of_people.html) (last visited July 14, 2018); Amanda Holpunch, *Judge halts deportation of more than 1,000 Iraqi nationals from US*, THE GUARDIAN (June 27, 2017), available at <https://www.theguardian.com/us-news/2017/jun/27/us-iraqi-deportations-halted-judge-immigration-ruling>.

Congress' legislative intent in amending FOIA. *See Judicial Watch, Inc.*, 326 F.3d at 1312 (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers of noncommercial requesters’”) (internal citation omitted).

In the alternative, if a full fee waiver is not granted, Requesters seek all applicable reductions in fees pursuant to 28 C.F.R. §§ 16.10(k)(2), 701.18(d)(1). 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, which is part of an educational institution and engages in analysis and public education work, 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.

### **Format**

Please provide all data in a searchable, unrestricted Microsoft Excel format. Aggregate figures and keys or tools to interpret the data may be provided in a searchable Microsoft Word document.

### **Certification**

We certify that the foregoing is true and correct to the best of our knowledge. *See* 28 C.F.R. § 16.5(e)(3).

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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). Notwithstanding our request for expedited processing, we alternatively look forward to your reply to this request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(I).

If you have any questions regarding this request, please contact Lindsay Nash at [lindsay.nash@yu.edu](mailto:lindsay.nash@yu.edu) or (212) 790-0433. Please furnish copies of all applicable information to:

Lindsay Nash  
Assistant Clinical Professor of Law  
Benjamin N. Cardozo School of Law  
55 Fifth Avenue, 11th Floor  
New York, New York 10003

Thank you for your timely cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Lindsay Nash", enclosed in a light gray rectangular box.

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