



September 23, 2021

Submitted via Electronic Mail to ice-foia@dhs.gov

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

RE: FREEDOM OF INFORMATION ACT REQUEST TO U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Dear FOIA Officer:

This is a Freedom of Information Act (FOIA) request by the Immigrant Legal Resource Center (“ILRC”), the American Immigration Council (“Council”) and Mijente Support Committee (together with the ILRC and Council, “Requesters”) under 5 U.S.C. § 552.

The ILRC works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC’s mission is to protect and defend the rights of immigrant families and the communities in which they live. The ILRC also provides technical assistance to immigration practitioners on many aspects of immigration law, with a focus on the intersection between the immigration and criminal justice systems. The ILRC works towards the elimination of unjust penalties for immigrants entangled in the criminal justice system and to end the criminalization of immigrant communities. The ILRC is a non-profit public interest organization under Internal Revenue Code Section 501(c)(3).

The Council was established to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens and citizens, and educate the public about the enduring contributions of immigrants. Through research and analysis, the Council informs policymakers at the national, state, and local levels who seek to understand the power and potential of immigration and to develop policies that are based on facts rather than myths. The Council also seeks to hold the government accountable for unlawful conduct and restrictive interpretations of the law and for failing to ensure that the immigration laws are implemented and executed in a manner that

comports with due process through the pursuit of transparency and impact litigation. The Council is a non-profit public interest organization under Internal Revenue Code Section 501(c)(3).

Mijente Support Committee is a national organization that coordinates and organizes with its members in several states to address issues relating to immigration enforcement and Latinx political participation.

I. Request for Records

We request the following records and information:

- Records created by the U.S. Department of Homeland Security (“DHS”) providing operational guidance regarding the process for ICE Field Office Directors or Special Agents in Charge to review and approve civil immigration enforcement actions against individuals outside of the interim enforcement and removal priorities (“Interim Enforcement Priorities”) provided in the Jan. 20, 2021 memorandum from Acting Secretary David Pekoske entitled “*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*” (“Pekoske memorandum”) ¹ and the directive from Acting ICE Director Tae Johnson on February 18, 2021 entitled “*Interim Guidance: Civil Immigration Enforcement and Removal Priorities.*” (“Johnson memorandum”).²
- All ICE agents’ (including 287(g) designated officers and contractors) requests for approval of enforcement actions outside of the Interim Enforcement Priorities, including written justifications for the requests, as well as the approvals, denials or other responses to those requests, pursuant to the process created by the Pekoske memo and the Johnson memo.
- Data regarding each request for approval of enforcement actions outside of the Interim Enforcement Priorities. For each request, please provide:
 - The date of each request
 - The field office to which the request was directed
 - The date of the response to the request

¹ Memorandum from David Pekoske, Acting Secretary, to Troy Miller, Tae Johnson, and Tracey Renaud on *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf. On September 15, 2021, the Fifth Circuit Court of Appeals partly stayed the preliminary injunction issued by the Southern District of Texas blocking the enforcement of this policy. *State of Texas et al v. United States et al.*, No. 21-40618 (5th Cir. Sept. 15, 2021). The Fifth Circuit’s decision allows for ICE to continue to apply the enforcement and removal priorities.

² Memorandum from Tae Johnson, Acting Director, to ICE Employees on *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

- The decision to approve or deny the request or any other decision related to the request.
- Records providing the total number of pre-approval requests for enforcement actions, including how many were made from each field office and how many were approved or denied by each field office per month, since January 20, 2021.
- Forms or templates created or used by ICE officers to request approval of enforcement actions.

Requesters do not seek the names or contact information of individuals or other exempt personal identifiable information of people referenced in the records requested herein. If any of the requested records contain exempt personal identifiable information, Requesters ask that said personal identifiable information be redacted in a manner as to ensure that the maximum relational information contained within the records is provided. Nothing in this request should be construed as a waiver of Requesters' right to challenge any redactions made on the basis of personal identifiable information, including in the event of litigation regarding this FOIA request.

Unless otherwise stated, all requests for "records" refer to all physical or electronic records that were prepared, received, transmitted, collected, or maintained by ICE, including documents, meeting notes and minutes, lists of meeting participants, electronic (emails) and paper correspondence, legal research, legal opinions, letters, drafts, internal agency guides, regulations, memoranda, and spreadsheets. Furthermore, the scope of the search should not be limited to ICE-originated records and should be construed to include records that are currently in the possession of any U.S. government contractors for purposes of records management. Records should be provided in electronic format wherever possible.

II. Request for Fee Waiver

Under the FOIA, we request a waiver of fees.³ A fee waiver requires that: (1) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government;" and (2) the request "is not primarily in the commercial interest of the requestor."⁴

The public interest criteria is satisfied when (1) the request concerns operations or activities of the government; (2) disclosure is likely to contribute to an understanding of government operations or activities; (3) disclosure contributes to an understanding of the subject by the

³ 5 U.S.C. § 552 (West 2017).

⁴ *See id.*; *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (holding a public interest must be identified with "reasonable specificity"); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (holding that requestors must explain with reasonable specificity how disclosure will contribute to public understanding); 6 C.F.R. § 5.11(k)(1).

public at large; and (4) disclosure is likely to contribute significantly to such understanding.⁵ This request meets all four of these criteria.

A. Disclosure Will Contribute to Understanding ICE Operations

Requesters seek to use the requested information to: (a) inform advocates about immigrant enforcement patterns for the purpose of upholding immigrant rights; (b) enable oversight of agency actions and monitor compliance with federal policies across various field offices to ensure consistency and adherence to the protocols announced by the agency; and (c) collaborate with media organizations to disseminate information about immigration enforcement to the public.

This request clearly concerns the operations and activities of the government, in this case, ICE, a federal agency subcomponent of the DHS. Disclosure of these records will contribute to the understanding of government operations in several ways. The records will enable advocates and the public to discern the type of cases the agency prioritizes for enforcement action; to ascertain whether the agency abides by its own policy directives; and the extent of actual supervision and accountability within the agency. The records requested will expand and improve public understanding of immigration enforcement and allow the public to have clearer expectations regarding ICE policies and operations in light of policy changes from one administration to another.

Disclosure of these records will contribute to the understanding of immigration enforcement by the public at large because the records will explain the agency's implementation of its own new enforcement guidance. Policymakers and community members impacted by immigration enforcement are acutely interested in changes to civil enforcement and removal policies.

The Requesters employ multiple channels of communication and platforms to disseminate information obtained in response to the public.

The ILRC has demonstrated the expertise and technical ability to understand, digest, summarize, and disseminate responsive information obtained from ICE as a result of FOIA requests. The ILRC has been particularly involved in informing and educating the public about the DHS Enforcement Priorities and their implications and interpretation, as well as monitoring the agency's compliance with those priorities. The ILRC has produced explanatory materials, practice advisories, and trainings meant to inform advocates and attorneys about what to expect and how to advise their clients with regards to enforcement policy, as well as educating the public about the DHS Enforcement Priorities and their implications and interpretation.⁶

⁵ 6 C.F.R. § 5.11(k)(2) (2017) (DHS regulations outlining criteria for responses to requests for fee waivers under FOIA); *See also Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing 28 C.F.R. § 16.11(k)(2)).

⁶ Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Advocating for Clients under the Biden Administration's Interim Enforcement Priorities*, (March

Through mailing lists, social media,⁷ and the organization's webpage at www.ilrc.org, the ILRC shares reports, graphics, advisories, and other documents explaining various aspects of the immigration system. The ILRC has used previous FOIA records to produce a national map of local policies on immigration enforcement, as well as several explanatory reports.⁸

Similarly, the Council regularly synthesizes and publishes information about governmental operations obtained from FOIA requests on its publicly accessible website. This information is shared with the public in the form of summaries with links to government documents, reports, fact sheets and practice materials.⁹ In calendar year 2020, the Council's website received more than 2.4 million pageviews from more than 1.4 million visitors. The Council also regularly shares information with national print and news media and plans to distribute information obtained from these FOIA disclosures to interested media.

Mijente Support Committee has demonstrated its capacity to use FOIA information to inform the public about immigration enforcement. For example, Mijente Support Committee and the Detention Watch Network filed FOIA litigation over ICE's Operation Mega, and published the resulting documents in context on a webpage dedicated to this topic.¹⁰ In partnership with other organizations, Mijente Support Committee has also published several reports seeking to advance the public's knowledge on the surveillance technology used by ICE and the companies profiting from that relationship.¹¹ These reports are readily available through Mijente Support Committee's website to members of the public. Mijente Support Committee also utilizes its

2021) <https://www.ilrc.org/advocating-clients-under-biden-administration%E2%80%99s-interim-enforcement-priorities>; Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Practice Advisory for Criminal Defense Attorneys: The Biden Administration's Interim Enforcement Priorities*, (March 2021) <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-biden-administration%E2%80%99s-interim-enforcement-priorities>; Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Advocating for Clients in Removal Proceedings Using the OPLA Prosecutorial Discretion Memo*, (March 2021) <https://www.ilrc.org/advocating-clients-removal-proceedings-using-opla-prosecutorial-discretion-memo>.

⁷ Twitter.com, @the_ILRC, https://twitter.com/the_ILRC; Facebook.com, Immigrant Legal Resource Center (ILRC), <https://www.facebook.com/immigrantlegalresourcecenter/>; Instagram.com, https://www.instagram.com/the_ilrc.

⁸ See www.ilrc.org/local-enforcement-map; Lena Graber and Nikki Marquez, Searching for Sanctuary, *ILRC* (2016), available at <https://www.ilrc.org/searching-sanctuary>; Lena Graber, Kemi Bello, Nikki Marquez, and Krsna Avila, The Rise of Sanctuary, *ILRC* (2018), available at <https://www.ilrc.org/rise-sanctuary>.

⁹ See, e.g., American Immigration Council, *The Electronic Nationality Verification Program: An Overview* (Jan. 26, 2021), <https://www.americanimmigrationcouncil.org/research/electronic-nationality-verification-program-overview>; Guillermo Cantor et al., *Changing Patterns of Interior Immigration Enforcement in the United States, 2016-2018*, American Immigration Council (July 1, 2019), <https://americanimmigrationcouncil.org/research/interior-immigration-enforcement-united-states-2016-2018>; American Immigration Council, *Stays of Removal Responses from EOIR* (May 2019), https://americanimmigrationcouncil.org/sites/default/files/foia_documents/board_of_immigration_appeals_interpretation_of_stay_of_removal_foia_production.pdf; Guillermo Cantor & Walter Ewing, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, American Immigration Council (Aug. 2017) (examining records of alleged misconduct by Border Patrol employees), http://bit.ly/Council_StillNoActionTaken.

¹⁰ Blueprint for Terror: How ICE Planned its Largest Immigration Raid in History, available at <https://mijente.net/icepapers/>.

¹¹ See <https://notechforice.com/>.

website and social media to disseminate information that furthers its mission. Mijente Support Committee has over 9,000 followers on Facebook, and close to 1,000 Twitter followers.¹² These platforms are used to share the work of Mijente Support Committee with followers and others.

Requesters have a demonstrated ability to disseminate exactly the types of information requested herein. Further, requesters plan to employ all of the above methods when sharing and disseminating the information received by ICE pursuant to this petition. Accordingly, this satisfies the test for a fee waiver that the request and disclosure would “contribute significantly to public understanding of the operations or activities of the government.”¹³

B. Disclosure of the Information is not in the Commercial Interest of Requesters

Finally, the disclosure of records would not primarily be in the commercial interest of the Requesters. The ILRC is a non-profit 501(c)(3) organization that does not primarily partake in commercial, economic, or profit-producing activity.¹⁴ The information obtained through the above request would not be sold, commercialized, or used in any way to derive profit. In fact, the interactive map composed of the information obtained through the previous FOIA request is easily searchable and available at the ILRC website (<http://www.ilrc.org>) free of charge to all members of the public,¹⁵ and the ILRC will publish the updated information received from ICE to the public in the same way.

The Council is also a not-for-profit organization that has no commercial interest in the request. The request furthers the Council’s work to increase public understanding of immigration law and policy and to advocate for the fair and just administration of U.S. immigration laws as well as to protect the legal rights of noncitizens. As with all other reports and information available on the Council’s website, the information that the Council receives in response to the Request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge.

Mijente Support Committee is a not-for-profit organization that plans to analyze and disseminate to the public the information gathered through this Request at no cost, and the records are not sought for any commercial purpose.

Please contact me if this fee waiver is not granted. The maximum dollar amount the ILRC is willing to pay for this request is \$100. If the amount for this request is greater than \$100, please contact me to discuss this request and associated pricing. You may deliver the requested

¹² Twitter.com, @mijentecomite, <https://twitter.com/mijentecomite>; Facebook.com, Mijente Support Committee, <https://www.facebook.com/mijentecomite>.

¹³ 5 U.S.C. § 552 (West 2017).

¹⁴ See *Consumers’ Checkbook, Center for Study of Services v. U.S. Dep’t of Health and Human Services*, 502 F. Supp. 2d 79 (D.D.C. 2007) (holding that a FOIA requestor who charges fees to produce and disseminate its work does not render its interest “primarily commercial” when it charges fees only to support its operation).

¹⁵ Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE*, (last accessed June 1, 2017), <https://www.ilrc.org/local-enforcement-map>.

records electronically to lgraber@ilrc.org. Alternatively, you may physically mail the responsive records to the ILRC at:

ATTN: Lena Graber
Immigrant Legal Resource Center
1663 Mission St., Suite 602
San Francisco, CA 94103

If you have any questions, please do not hesitate to contact me at 415-321-8545 or lgraber@ilrc.org or you may contact our outside counsel on this matter, W. Hardy Callcott at Sidley Austin LLP, at 415-772-7402 or hcallcott@sidley.com.

Thank you for timely responding to this request.

Sincerely,
/s/
Lena Graber
Senior Staff Attorney
Immigrant Legal Resource Center

/s/
Raul Pinto
Senior Attorney
American Immigration Council

/s/
Jacinta Gonzalez
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Cc:
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