



October 28, 2022

Via Public Access Link

Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 1903
Falls Church, VA 22041

Re: Freedom of Information Act Request

Dear FOIA Officer:

The American Immigration Council (the "Council") and the Capital Area Immigrants' Rights Coalition ("CAIR") (hereinafter referred to as "Requesters") submit the following Freedom of Information Act (FOIA) request for records regarding immigration courts, including immigration adjudication centers. In accordance with 5 U.S.C. § 552(a)(6)(A)(i), we expect a response to this request within 20 working days, unless otherwise permitted by statute.

I. REQUEST FOR INFORMATION

1. For the period between January 1, 2017, to the present, we request EOIR records¹ of guidelines, procedures, protocols, or policies relating to the following:
 - a. Immigration courts' process and criteria used to advance the date of individual merit hearings. This includes, but is not limited to, immigration court clerks' advancement of individual merit hearing dates.
 - b. Immigration judges' adjudication of motions to continue individual merit hearings when the basis for continuances relate to the following:
 - i. Attorney has a case-related scheduling conflict; or

¹ The term "records" in this request includes, but is not limited to: communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

- ii. Attorneys' workload or case-related conflicts that may prevent case preparation, such as having multiple hearings scheduled with EOIR within a short period of time or case appointments with other agencies, e.g. client interviews with U.S. Citizenship and Immigration Services (USCIS).
 - c. Immigration courts' process for notifying respondents, respondents' representatives, or both, that individual merit hearings have been advanced.
 - d. Court personnel's process for selecting a new hearing date when an individual merit hearing is advanced, including materials that describe how to input rescheduling information in attorneys' EOIR ECAS calendar.
 - e. The agency's implementation of the November 27, 2020, Notice of Proposed Rulemaking titled "Good Cause for a Continuance in Immigration Proceedings."
2. Aggregate data since January 1, 2020, that includes the following:
- a. The number of cases in the EOIR system that have been marked with idnAdjCode 87, strCode 55, strDescription "HEARING DELIBERATELY ADVANCED BY COURT."
 - b. The number of cases in the EOIR system that have been marked with idnAdjCode 107, strCode 9B, strDescription "DOCKET MANAGEMENT (ADVANCE HEARING)."

II. FORMAT OF PRODUCTION

Requesters seek responsive electronic records in a machine-readable, native file format, with all metadata and load files. We request that any data be provided in a workable format, such as Microsoft Excel or comma-separated values (CSV) files. If terms or codes are not in the form template and/or publicly defined, please provide a glossary or other descriptive records containing definitions of acronyms, numerical codes, or terms contained in data responsive to this request. We request that you produce responsive materials in their entirety, including all attachments, appendices, enclosures, and/or exhibits.

Requesters also ask that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency's possession, and that the records be provided in separate, Bates-stamped files.

III. FEE WAIVER REQUEST

Requesters seek a fee waiver because the information sought 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).

The public interest criteria are 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 public at large; and (4) disclosure is likely to contribute significantly to such understanding.²

1) *Disclosure Will Contribute to Public Understanding of EOIR Operations*

a) *The request concerns the operations of the government, i.e. EOIR.*

EOIR administers the nation's immigration courts and its immigration judges are tasked with decision-making in individual removal proceedings.³ Under federal regulations, "the Immigration Court shall be responsible for scheduling cases and providing notice to the government and the alien of the time, place, and date of hearings." 8 C.F.R. § 1003.18.

Over the past two years, attorneys have reported that immigration courts have advanced hearing dates in potentially thousands of cases without consideration of respondents' representatives' schedules or workload and provided short notice – or in some cases no notice – of the changes in schedule. In some cases, the court moved hearings to days when attorneys had two hearings scheduled at the same time and sometimes even in different states.⁴ Immigration attorneys report that courts have scheduled multiple individual hearings for an attorney in one week, including scheduling up to twenty individual merit hearings in one month.

Given the amount of time it takes immigration attorneys to prepare with their clients for individual merit hearings, scheduling multiple hearings in one week may prejudice respondents by limiting the time attorneys have to properly prepare for hearings. Because respondents' testimony is critical to the outcome of their cases, practitioners are generally advised to have at least two preparation sessions prior to their individual hearings to go over expected direct and cross examinations.⁵ It is recommended that the first preparation session occur four days prior to the hearing and the second session occur two days before the hearing.⁶ Stacking multiple hearings in one week can severely curtail the time available for these sessions, which often can take hours depending on the type of relief for which the respondent applied.

² 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)).

³ See Department of Justice, Executive Office for Immigration Review (EOIR), "Fact Sheet: Executive Office for Immigration Review: An Agency Guide," December 2017, https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

⁴ Posting of Jason Dzubow to The Asylumist, <https://www.asylumist.com/2022/09/21/ue-process-disaster-in-immigration-court/> (Sept. 21, 2022).

⁵ Etnyre, Jr., "Preparing and Presenting an Asylum Case in Immigration Court," 12-08 *Immigration Briefings* (Aug. 2012).

⁶ Etnyre at 20.

A crowded hearing schedule also is prejudicial to respondents because EOIR guidance suggests that motions to continue based on representatives' workload or scheduling conflicts fail to meet the regulatory standard. To alleviate a heavy workload in a given day or week, attorneys could file motions to continue one or more of the merit hearings. However, immigration courts retain discretion to grant such motions⁷ for good cause shown. 8 C.F.R. § 1003.29. And a 2020 proposed rule sought to clarify that "good cause" may not be found on the basis of a representative's assertion that his or her workload or obligations in other cases prevent preparation.⁸ While this proposed rule did not go into effect, it is unclear as to what extent this position with respect to "good cause" influences immigration judges' decisions regarding motions to continue.

Further, filing motions for continuances as a purported solution to the overload of cases is meaningless if attorneys of record are not provided with sufficient notice that EOIR has advanced a hearing. The lack of notice about advanced hearing dates often does not allow an attorney to follow EOIR's practice manual, which requires a motion for a continuance to be filed 15 days in advance of an individual hearing.

Thus, this FOIA request seeks specific information about EOIR's operations relating to how the agency decides to advance the date of certain individual merits hearings.

b) *Disclosure will contribute to the public's understanding of EOIR policies on advancing hearings.*

Because EOIR has not provided the public with information regarding the agency's procedures for advancing individual merit hearings, this request seeks information about this practice. This information is critical to the public's understanding of immigration courts, particularly to individuals in removal proceedings and their representatives.

As previously mentioned, the courts have rescheduled individual merit hearings originally set for months, and sometimes years, in the future to impending dates often within mere weeks of such rescheduling appearing on attorneys' EOIR calendars. Attorneys assert that the EOIR calendar is the only way EOIR notifies respondents of this rescheduling. In order to adequately prepare for their individual merit hearings, individuals need information relating to this practice and whether or not the immigration courts consider attorneys' workloads in making these determinations. While the EOIR Practice Manual addresses how attorneys can request to advance a hearing date,⁹ it fails to describe procedures to be applied when the courts move hearings to earlier dates.

As stated above, EOIR's practice of advancing hearings with short or no notice to immigrants and their lawyers can have deleterious effects to respondents' due process, as it can severely curtail attorneys' ability to prepare for hearings. Further, the stress of juggling multiple individual hearings

⁷ EOIR, Immigration Court Practice Manual, at 101.

⁸ 85 Fed. Reg. 75925, 36.

⁹ EOIR, Immigration Court Practice Manual, at 102.

over a short period of time, sometimes in one day, and resolving the ensuing scheduling conflicts, can have a detrimental impact on practitioners' work performance. The 2019 AILA Market Place Study reports that 69% of immigration attorneys surveyed strongly or somewhat agree that job stress affects their performance and ranked dealing with difficult government agencies and time and effort managing workload as the two leading factors that affect job stress.¹⁰

Accordingly, guidance, policies, and other EOIR records will further the public's understanding about EOIR's practices on advancement of hearings and assist the immigration defense bar adopt best practices for handling the large volume of individual hearings that have been moved to new, and sometimes conflicting, times on their calendars. Disclosure of information requested will help attorneys and respondents understand why certain cases have been advanced so that respondents will quickly cooperate with the preparation of their cases. Information about notification practices will help attorneys and respondents to know the best practices on how to receive prompt notification that a case has been advanced.

c) *Disclosure contributes to an understanding of the subject by the public at large.*

While some information on EOIR procedures is publicly available through its website, practice manual, and policies and procedures memoranda, clear explanations about how immigration courts advance certain cases is not provided. For example, a 2017 memorandum from then Chief Immigration Judge MaryBeth Keller suggested that continuances of individual merit hearings based on scheduling conflicts should generally not be granted because the hearings generally only are scheduled after considering the availability of respondents' representatives.¹¹ As previously noted, however, EOIR has advanced individual hearings without consideration of respondents' representatives' schedule. Further, a January 8, 2021, memorandum from EOIR Director James R. McHenry III calls for the careful review of requests to continue individual merit hearings and states that the proposed regulation – which disfavors motions to continue because of attorneys' workload – can provide helpful information regarding requests for continuances.¹²

The Council's track record on disseminating information to a wide audience can help the public understand EOIR's scheduling practices and how they impact people in removal proceedings and their attorneys. The Council plans to provide the information obtained to the public. In calendar

¹⁰ American Immigration Lawyers Association, THE 2019 AILA MARKET PLACE STUDY 45 – 46 (Nov. 2019), <https://www.aila.org/File/Related/19110890.pdf>.

¹¹ Memorandum from MaryBeth Keller, Chief Immigration Judge, EOIR to All Immigration Judges, Court Administrators, Attorney Advisors and Judicial Law Clerks, and Immigration Court Staff on Operating Policies and Procedures Memorandum 17-01: *Continuances* 4 – 5 (July 31, 2017), <https://www.justice.gov/eoir/file/oppm17-01/download>.

¹² Memorandum from James R. McHenry III, Director, EOIR to All of EOIR on *Continuances* 5 – 6 (Jan. 8, 2021), <https://www.justice.gov/eoir/page/file/1351816/download>.

year 2021, the Council's website received more than 2.6 million page views from about 1.5 million visitors. The Council also regularly shares information with national print and news media.

Further, the Council regularly provides information to the public based on its FOIA requests.¹³ In keeping with its track record of synthesizing or otherwise publishing information on governmental operations shared in responses to FOIA requests, the Council intends to post documents received in response to this FOIA request on its publicly accessible website. It also plans to share documents and other information with other interested stakeholders, including through networks with the immigration defense bar.

Similarly, CAIR Coalition also has the capacity to effectively convey the information to a broad audience as CAIR Coalition's website, which is available to the public, receives more than 3,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences. CAIR Coalition will circulate a summary of information disclosed through this request in its listserv, in which approximately 2,500 attorneys participate, as well as other listservs for immigration practitioners. Further information on CAIR Coalition's organization and the services CAIR Coalition provides is available on our website at www.caircoalition.org. CAIR Coalition has no commercial interest in the information to be obtained under this FOIA request and may make the information publicly available at no cost through our website.

Requesters' demonstrated commitment to disseminate this type of information through publicly accessible means and free of charge will contribute to the public's understanding of EOIR's practices.

d) Disclosure will significantly contribute to the public's understanding of EOIR's practices.

As previously noted, EOIR has thus far failed to explain the procedures and protocols used by immigration courts to advance hearings and provide clear guidance to attorneys about the availability to reschedule hearings when attorneys are overloaded with hearings during a particular week.

Thus, the request for information will contribute to the public's understanding of EOIR's practices.

2) Disclosure of the information is not in the commercial interest of the Requesters.

The Council is a not-for-profit organization and has no commercial interest in the present request. See *e.g.* 6 C.F.R. § 5.11(k)(3)(i)-(ii). This request furthers the Council's work to increase public

¹³ See, *e.g.*, Guillermo Cantor and Walter Ewing, American Immigration Council, Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered (August 2017) (examining records of alleged misconduct by Border Patrol employees), http://bit.ly/Council_StillNoActionTaken; American Immigration Council, Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program (November 2015) (analyzing data obtained from ICE on the CAP program), http://bit.ly/Council_ICE_CAP.

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. As with all other reports and information available on the Council's website, the information the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge. Accordingly, the request is not primarily in the commercial interest of the Council.

CAIR Coalition is a 501(c)(3) nonprofit organization that provides legal services to detained noncitizens, including services administered through EOIR's Office of Legal Access Programs. Originally started as a project of the Washington Lawyer's Committee for Civil Rights and Urban Affairs, CAIR Coalition became an independent non-profit organization in 1999. CAIR Coalition consists of the Detained Adults Program, the Detained Children's Program, and the Immigration Impact Lab. CAIR Coalition's mission is to ensure equal justice for all immigrant adults and children at risk of detention and deportation in the Capital region and beyond through direct legal representation, know-your-rights presentations, impact litigation, advocacy, and the enlistment and training of attorneys to defend immigrants. We are driven in our pursuit of a vision for equal justice for all immigrants at risk of detention and deportation by our understanding of the grave human costs of the American detention and deportation system. We provide information for free, including the Virginia Immigration Consequences of Criminal Convictions Chart and free webinars and trainings. Due to the CAIR Coalition's mission, and because the information received as a result of this request will be publicly disseminated, the request is also not primarily in the commercial interest of the CAIR Coalition.

Thank you for your attention to this request. If you have any questions regarding this request, please do not hesitate to contact me.

Very truly yours,

/s/ Raul A. Pinto

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on behalf of Requesters