

UNITED STATES DISTRICT COURT

for the

DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff

v.

U.S. DEPARTMENT OF HOMELAND SECURITY, et al.

Defendant

Case: 1:11-cv-01972
Assigned To : Boasberg, James E.
Assign. Date : 11/8/2011
Description: FOIA/Privacy Act

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Ronald C. Machen Jr., Esquire
U.S. Attorney for the District of Columbia
555 Fourth Street, N.W.
Washington, D.C. 20530

A lawsuit has been filed against you.

Within ~~21~~ days after service of this summons on you (not counting the day you received it) ³⁰ or ~~14~~ days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Creighton R. Magid, DC Bar No. 476961
DORSEY & WHITNEY LLP
1801 K Street NW, Suite 750
Washington, DC 20006
Telephone: 202-442-3555

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date:

11/8/2011

Deborah Scott

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
for the
DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL

Plaintiff

v.

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SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) The Hon. Eric Holder, Jr.
Attorney General
U.S. Department of Justice
Robert F. Kennedy Building
950 Pennsylvania Avenue, N.W. Room 5111
Washington, D.C. 20530

A lawsuit has been filed against you.

Within 1 days after service of this summons on you (not counting the day you received it) 30 or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Creighton R. Magid, DC Bar No. 476961
DORSEY & WHITNEY LLP
1801 K Street NW, Suite 750
Washington, DC 20006
Telephone: 202-442-3555

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

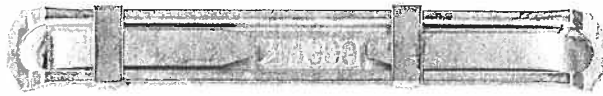
CLERK OF COURT

Date:

11/8/2011

Handwritten signature of Jonathan Scott

Signature of Clerk or Deputy Clerk



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL)
1331 G Street, NW, Suite 200)
Washington, DC 20005-3141)

Plaintiff,

v.

UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY)
Office of the General Counsel)
20 Massachusetts Avenue, NW)
Washington, DC 20528)

and)

U.S. CUSTOMS AND BORDER)
PROTECTION)
1300 Pennsylvania Avenue, NW)
Washington, DC 20229,)

Defendants.)

Case: 1:11-cv-01972
Assigned To : Boasberg, James E.
Assign. Date : 11/8/2011
Description: FOIA/Privacy Act

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking disclosure of records concerning individuals’ access to counsel during their interactions with U.S. Customs and Border Protection (“CBP”). The American Immigration Council (“AIC”) seeks declaratory, injunctive, and other appropriate relief with respect to CBP’s unlawful withholding of these records.

2. Access to counsel is at the very core of our legal system and is integral to ensuring that all noncitizens seeking admission, asylum, or lawful permanent residence, or facing removal are afforded a fair process and a meaningful opportunity to be heard. Without lawyers, noncitizens confront the daunting and often insurmountable task of navigating a complicated set of immigration statutes, regulations, and court decisions.

3. Under the U.S immigration system, the majority of decisions about the legal status of noncitizens are made not by immigration judges in courtrooms, but by various Department of Homeland Security (“DHS”) officials, including CBP officers, in airports, interview rooms, and offices. These interactions can have dramatic consequences that may include denial of entry into the United States, arrest, detention, and removal.

4. Reports from immigration lawyers across the country indicate that CBP imposes far-reaching limitations on access to counsel. CBP officers have prevented attorneys from accompanying their clients during inspection, limited the scope of representation, refused to accept supporting documentation proffered by attorneys, and actively dissuaded noncitizens from hiring attorneys. These limitations, which are not mandated by existing regulations, are fundamentally unfair. They also undermine the quality and efficiency of immigration decision making. The reported problems are geographically varied and widespread.

5. CBP’s policies on access to counsel are difficult to ascertain and are arbitrarily applied. As a result, they are a source of great confusion for immigration lawyers, their clients, and the general public. To clarify these policies, AIC submitted a Freedom of Information Act (“FOIA”) request to CBP in March 2011. CBP’s failure to turn over requested records violates the FOIA, and is impeding AIC’s efforts to educate the immigration bar regarding the right to counsel and to effectively advocate for justice and fairness for noncitizens in their interactions with CBP.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. This Court has jurisdiction to grant declaratory and further necessary or proper relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal Rules of Civil Procedure 57 and 65.

7. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

The Parties

8. Plaintiff AIC is a tax-exempt, not-for-profit educational and charitable organization under section 501(c)(3) of the Internal Revenue Code, with its principal place of business at 1331 G Street, Suite 200, in Washington, D.C. Founded in 1987, AIC's mission is to educate the American public about immigrants' contributions to American society, to promote sensible and humane immigration policy, and to advocate for the just and equitable enforcement of immigration laws. AIC's Immigration Policy Center ("IPC") and Legal Action Center ("LAC") help carry out this mission by reaching out to the public and to attorneys practicing in the immigration arena to promote a better understanding of immigration law, policy and practice. The IPC targets policymakers, the media, and advocates using a range of publications, new media, and presentations to inform the public debate on immigration. The LAC undertakes administrative advocacy, impact litigation, and education to advance the fair administration of immigration laws. The LAC has historically focused on access to counsel issues by educating the immigration bar about the relevant laws, advocating for fair standards and procedures to remedy ineffective assistance of counsel, and encouraging better access to counsel in proceedings before DHS and its agencies, including CBP.

9. Defendant DHS is a Department of the Executive Branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws. DHS has possession and control over the records sought by AIC.

10. Defendant CBP is a component of DHS and is an agency within the meaning of 5 U.S.C. § 552(f). Among other duties, CBP is responsible for enforcing immigration laws at the borders and other ports of entry to the United States. CBP inspects individuals seeking entry to the United States, including U.S. citizens, lawful permanent residents, nonimmigrants, and asylum seekers. CBP has authority to admit or exclude individuals, issue “expedited removal” orders, make arrests, and detain noncitizens. CBP also facilitates “voluntary returns” whereby noncitizens in the United States give up their right to contest removal and are immediately returned to their home countries. CBP has possession and control over the records sought by AIC.

AIC’s FOIA Request

11. On March 14, 2011 AIC submitted a FOIA request to CBP seeking:

[A]ny and all records which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:

- Attorneys’ ability to be present during their clients’ interactions with CBP;
- What role attorneys may play during their clients’ interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

A copy of the March 14 letter is attached hereto as Exhibit A.

12. On March 29, 2011, CBP acknowledged receipt of AIC's FOIA request, but did not respond to the substance of the request. A copy of CBP's March 29 letter is attached hereto as Exhibit B.

13. On May 12, 2011, CBP issued its "final response" to AIC's FOIA request. CBP acknowledged the request for "all records" in the four categories set forth in paragraph 11 above. However, CBP indicated that "much of the information ... [sought] is already publicly available," and referred AIC to three sources of information: (1) 8 C.F.R. § 292.5(b); (2) CBP's Personal Search Handbook, available on the agency's website; and (3) CBP's Inspector's Field Manual, which "is currently under review for determination and release." A copy of CBP's May 12 letter is attached hereto as Exhibit C.

14. CBP's final response to AIC's FOIA request did not indicate that the agency had conducted a reasonable search for responsive records beyond the three items described in paragraph 13 above. CBP also did not assert that any responsive records were subject to exemptions under FOIA. *See* Exhibit C.

15. On May 26, 2011, AIC timely filed an administrative appeal of the decision on the FOIA request. In the appeal letter, AIC asserted that CBP did not conduct an adequate search for responsive records as required by 5 U.S.C. § 552(a)(3) and did not produce responsive, non-exempt portions of the Inspector's Field Manual, which CBP stated was "under review for determination and release." A copy of AIC's May 26 appeal letter is attached hereto as Exhibit D.

16. On June 10, 2011, CBP acknowledged receipt of AIC's appeal, indicating that it had been assigned to the FOIA Appeals, Policy and Litigation Branch. CBP's letter did not

address the substance of AIC's appeal. A copy of CBP's June 10 letter is attached hereto as Exhibit E.

17. On September 29, 2011, CBP responded to AIC's appeal, acknowledging AIC's assertions that CBP's search had been incomplete and that its reference to "public information" was not an adequate disclosure. In responding to AIC's contentions, CBP first noted that access to counsel is governed by statute and regulation, and went on to state:

Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary.

A copy of CBP's letter is attached hereto as Exhibit E.

18. CBP further stated that it had contacted "several offices within CBP in which responsive records could likely be found: The Office of the Border Patrol ("OBP"), the Office of Field Operations ("OFO"), and the Office of Chief Counsel ("OCC")." CBP indicated that the OBP and OFO had provided certain responsive records, which CBP enclosed with its response. The records CBP produced comprise two pages of excerpts from (1) the Inspector's Field Manual Chapters 2.9, 17.1.g, and 17.9.11.2; (2) OBP's Officer's Handbook, M68; and (3) OBP's "The Law of Arrest: Search and Seizure Manual, M69." CBP stated that "OCC reviewed [these] documents, conducted a separate search, and confirmed that no other responsive records exist." *See* Ex. E at 10. A copy of the excerpts produced by CBP is attached as Exhibit F.

19. CBP's response to AIC's appeal indicates that CBP and DHS did not conduct a search reasonably calculated to uncover all responsive documents and records. AIC's request specifically sought documents and records from CBP offices at ports of entry, as well as any

other CBP field offices or subdivisions. *See* Ex. A at 1. Yet CBP's response to AIC's appeal clearly states that CBP only searched three central offices.

20. In addition, numerous facts strongly support the inference that CBP and DHS failed to produce all available nonexempt documents and records responsive to AIC's request. First, publicly available documents and information show that CBP and DHS are in possession of responsive documents and records beyond those produced in response to AIC's appeal. For example, AIC is in possession of a 2002 Immigration and Naturalization Service memorandum that discusses, among other subjects, "Attorney representation at deferred inspection" (a function now carried out by CBP). A copy of this memorandum is attached as Exhibit G. Given CBP's size and mandate, the practical need for such an agency to periodically review, update, and/or modify its policies, and the imperative to communicate policies to its many agents and subdivisions, it is highly likely that CBP and DHS are in possession of similar memoranda, directives, emails, and other documents that discuss, explain, update, or communicate the policies set forth in the manuals described in paragraph 18. Such documents would be responsive to AIC's request, but CBP and DHS have not disclosed them.

21. Furthermore, information provided to AIC by practicing immigration attorneys strongly supports the inference that CBP and DHS are in possession of responsive records that they have not produced. Attorneys have communicated to AIC, for example, that access-to-counsel policies at various CBP offices have changed over time. It is highly likely that such changes would be communicated or otherwise discussed in writing. Any such documents would be responsive to AIC's request, but CBP and DHS have not disclosed them.

22. Finally, the limited documents CBP and DHS have disclosed strongly support the inference that further responsive documents exist. For example, Chapter 17.1.g of the

Inspector's Field Manual provides that "an attorney may be allowed to be present [at deferred inspection] upon request if the supervisory CBPO on duty deems it appropriate. . . . Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel." *See* Ex. F. CBP policy thus contemplates that CBP officers may make particularized decisions on requests for access to counsel in certain proceedings, and that they may consult with CBP counsel in reaching such decisions. It is highly likely that DHS and/or CBP are in possession of records containing guidance on how to make such decisions and/or memorializing discussion of particular decisions. Any such documents would be responsive to AIC's request, but CBP and DHS have not disclosed them.

23. The foregoing facts show that CBP and DHS have wrongfully failed to make reasonable efforts to search for responsive records and have wrongfully failed to release responsive records to Plaintiff.

CAUSE OF ACTION

Violation of Freedom of Information Act for Failure to Disclose Responsive Records

24. AIC repeats, alleges and incorporates the allegations in paragraphs 1-23 as if fully set forth herein.

25. CBP is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for and to produce records responsive to AIC's FOIA request. AIC has a legal right to obtain such records, and no legal basis exists for CBP's failure to search for and disclose them.

26. CBP's failure to conduct a reasonable search for records responsive to AIC's request and its failure to disclose responsive records violate 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

WHEREFORE, AIC requests that judgment be entered in its favor against defendants CBP and DHS, and that the Court:

(a) Declare that Defendants' refusal to conduct a reasonable search for records responsive to AIC's FOIA request and refusal to disclose such records violated FOIA;

(b) Order Defendants and any of Defendants' departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a reasonable search for records responsive to AIC's FOIA request;


(c) Enjoin Defendants and any of Defendants' departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from withholding records responsive to AIC's FOIA request and order them to promptly produce the same;

(d) Award AIC its reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and

(e) Grant all other such relief to AIC as the Court deems just and equitable.

Respectfully submitted,

Dated: November 8, 2011



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mcrow@immcouncil.org

Attorneys for Plaintiff American Immigration Council

EXHIBIT A



COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

March 14, 2011

**U.S. Customs and Border Protection
FOIA Division
799 9th Street NW, Mint Annex
Washington, DC 20229-1181**

Re: Freedom of Information Act Request

Dear Sir or Madam:

The American Immigration Council (AIC) submits this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. §552, *et. seq.*

1. RECORDS SOUGHT

AIC requests any and all records¹ which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

The above records may include, but are not limited to:

- 1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;
- 2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies.

www.americanimmigrationcouncil.org

- 3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;
- 4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;
- 5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;
- 6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;
- 7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;
- 8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP's intention to question their clients;
- 9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP's decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;
- 10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

AIC requests that records existing in electronic form be provided in electronic format or on a compact disc. If any of the requested records or information is not in a succinct format, we request the opportunity to view the documents in your offices.

If under applicable law any of the information requested is considered exempt, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the information is withheld, and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

2. REQUEST FOR WAIVER OF ALL COSTS

AIC requests that all fees associated with this FOIA request be waived. AIC is 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 also* 6 C.F.R. § 5.11 (k) (Records furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in commercial interest of institution). In addition, AIC has the ability to widely disseminate the requested information. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

i. Disclosure of the Information Is in the Public Interest

AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media. The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. Relevant to this FOIA request, the LAC has historically focused on access to counsel issues. Specifically, the LAC educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its sub-agencies.

Disclosure of the requested information will contribute significantly to public understanding of non-citizens' access to counsel in interactions with ICE. The disclosed records will inform attorneys who represent non-citizens at risk of removal from the United States, the noncitizens themselves, and other members of the public who are concerned with immigration agency proceedings and policies. Because there is no available comprehensive guidance governing attorney representation and conduct in interactions with CBP, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP. AIC has the capacity and intent to disseminate widely the requested information to the public. To this end, the LAC and the IPC will post the information on the AIC website, a website that is accessible by any member of the public. In addition, the LAC and IPC will publish this information in an LAC report, an LAC newsletter and an IPC blog. The LAC newsletter is directly distributed to 12,000 recipients and the IPC blog is distributed to 25,000 recipients. These publications also are available on the AIC website.

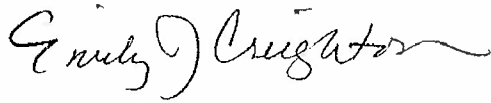
ii. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requester

AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization. Immigration attorneys, noncitizens and any other interested member of the public may obtain information about counsel-related issues on AIC's frequently updated website. AIC seeks the requested information for the purpose of disseminating it to members of the public who access AIC's website and other AIC publications, and not for the purpose of commercial gain.

Please inform us if the charges for this FOIA production will exceed \$25.00.

Thank you in advance for your response to this request within twenty working days, as FOIA requires. *See* 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, please feel free to contact me at (202) 507-7505.

Sincerely,

A handwritten signature in cursive script that reads "Emily Creighton". The signature is written in black ink and is positioned above the typed name and contact information.

Emily Creighton
Staff Attorney
American Immigration Council
Suite 200
1331 G Street, NW
Washington, DC 20005-3141
Telephone: (202) 507-7505
Fax: (202) 742-5619
E-mail: ecreighton@immcouncil.org

EXHIBIT B



**U.S. Customs and
Border Protection**

DIS 2:OT:CTE:FD PH
2011F08147

March 29, 2011

Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005

Dear Ms. Creighton:

This is an acknowledgement of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested the all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities;

As it relates to your fee waiver request, we have reviewed your letter and have determined that you have not presented a convincing argument you are entitled to a blanket waiver of fees.

The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

- (1) Whether the subject of the requested records concerns "the operations or activities of the government;"
- (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
- (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;
- (4) Whether the contribution to public understanding of government operations or activities will be "significant;"
- (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and
- (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

EXHIBIT B

As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met. Based on our review of your request and for the reasons stated herein, we have determined that your fee waiver request is deficient because disclosure of this information will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s), and it will not contribute significantly to the public understanding of government operations or activities. Since your request for a fee waiver has failed to satisfy each of the required factors, we are denying the request.

Your request has been categorized as commercial. In accordance with 6 C.F.R. § 5.11, U.S., commercial requestors are responsible to pay 10-cents per page for duplication of records. Further, you will be required to pay for search and review time at the per quarter-hour rate of the searcher and reviewer. You state you are willing to pay fees up to \$25. Please be advised that if costs exceed this amount, you will be contacted in writing.

You have a right to appeal determination of your fee category. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to:

FOIA Appeals, Policy and Litigation Branch
U.S. Customs and Border Protection
799 Ninth Street, NW, 5th Floor
Washington, DC 20229-1179

Please follow the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Your request has been assigned reference number 2011F08147. Please refer to this identifier in any future correspondence. If you have any questions, you may contact this office at 202-325-0150.

Sincerely,



Dorothy Pullo
Director, FOIA Division
Office of International Trade

EXHIBIT B

EXHIBIT C



**U.S. Customs and
Border Protection**

DIS-2:OT:CTE:FD PH
2011F08147

May 12, 2011

Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005

Dear Ms. Creighton:

This is a final response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

Upon consultation with several component offices within CBP, much of the information you are seeking is already publicly available. Responsive information may be found in the Code of Federal Regulations, specifically 8 CFR 292.5(b), which may be found at the following website:

<http://law.justia.com/cfr/title08/8-1.0.1.2.59.0.1.5.html>

Further responsive information may be found within the Personal Search Handbook, which you may view at the following website:

<http://foia.cbp.gov/index.asp?category=Manuals and Instructions&ps=1&search=>

Further information may be found in the Inspector's Field Manual (IFM) which is currently under review for determination and release. Once approved for release, you will be able to view this document on the CBP Reading Library.

You have a right to appeal our determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 799 Ninth Street, NW, 5th Floor, Washington, DC 20229-1179, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call (877) 684-6448.

EXHIBIT C

This office may be reached at (202) 325-0150. Please notate file number 2011F08147 on any future correspondence to CBP related to this request.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dorothy Pullo", with a long horizontal flourish extending to the right.

Dorothy Pullo
Director, FOIA Division
Office of International Trade

Enclosure(s)

EXHIBIT C

EXHIBIT D



COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

May 26, 2011

FOIA Appeals, Policy and Litigation Branch
U.S. Customs and Border Protection
799 Ninth Street, NW, 5th Floor
Washington, DC 20229-1179

Re: Freedom of Information Act Request Reference Number 2011F08147

Dear Sir or Madam:

We are in receipt of your letter dated May 12, 2011, acknowledging our March 14, 2011, FOIA request for all records from CBP including but not limited to records prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP) which relate or refer in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

Your letter states that "much of the information [we] are seeking is already publicly available." It refers us to three "records": 1) Section 292.5(b) of Title 8 of the Code of Federal Regulations; 2) a document titled the Personal Search Handbook (July 2004), available on CBP's website and 3) the Inspector's Field Manual, which the letter indicates is "currently under review for determination and release" and will be available for review at some point in the future on the "CBP Reading Library."

We also are in receipt of your letter dated March 29, 2011, denying the American Immigration Council's (AIC) fee waiver included in AIC's March 14, 2011, FOIA request.

Please consider this letter an appeal of both determinations: the final response to our FOIA request and the denial of our fee waiver request. This appeal is filed within 60 days of both the March 29, 2011, and May 12, 2011, letters pursuant to 6 C.F.R. § 5.25.

www.americanimmigrationcouncil.org

Suite 200, 1331 G Street, NW, Washington, DC 20005-3141 • Telephone: 202.507.7500 • Fax: 202.742.5619

EXHIBIT D

1. APPEAL OF THE MAY 12, 2011 RESPONSE LETTER

a. CBP Did Not Conduct an Adequate Search.

CBP did not conduct an adequate search for records responsive to our comprehensive request for guidance related to noncitizens' access to counsel before CBP pursuant to 5 U.S.C. § 552(a)(3).

An agency must carry out a reasonable search for records responsive to the FOIA request. *See Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). It must show that its search was reasonably calculated to uncover relevant documents. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (quotations omitted). An agency's search need not be exhaustive, merely reasonable. *See W. Ctr. for Journalism v. Internal Revenue Serv.*, 116 F. Supp. 2d 1, 8 (D.D.C. 2000).

We are aware of 8 C.F.R. § 292.5(b) and the language referencing counsel in that provision. We also have reviewed the Inspector's Field Manual and the provisions relating to counsel in a version of the manual updated through January 2007. In addition, we have reviewed the Personal Search Handbook (July 2004) available on your website. We do not think these documents reflect a search reasonably calculated to uncover relevant documents.

Our request for "records" related to the role of counsel in CBP settings encompasses all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies. Given the varied circumstances in which noncitizens and their attorneys interact with CBP, it is very unlikely that the three documents referenced in your May 12, 2011, letter reflect a search reasonably calculated to uncover documents relevant to the role of counsel in CBP settings. We indicated in our FOIA request that the interactions among CBP officers, attorneys and their noncitizen clients take place in different settings such as secondary and deferred inspection. In addition, the reasons for the interview or interaction may vary significantly. As stated in the request, among other reasons, the interaction may stem from a CBP officer's inquiry related to a person's alleged abandonment of U.S. residence or it may relate to CBP's decision to return an unaccompanied alien child to Mexico. The May 12, 2011, response merely includes general documents that are publicly available and does not reflect a search reasonably calculated to uncover documents relevant to the guidance outlined in the request.

b. CBP Must Produce All Responsive, Non-Exempt Information in its Possession That Is Not Already in the Public Domain.

You indicate that "responsive" information is contained in the Inspector's Field Manual which is currently under review for determination and release. Assuming that this manual is not in draft form or subject to exemptions under 5 U.S.C. §§ 552(b)(1)-(9), CBP has an obligation to produce relevant portions with appropriate redactions in response to this FOIA request. 5 U.S.C. § 552(a)(3).

2. APPEAL OF THE MARCH 29, 2011 RESPONSE LETTER

*a. AIC Meets the Requirements for a Public Interest Fee Waiver and Is not a Commercial Requester.*¹

We also appeal the denial of the fee waiver request and the commercial requester designation. Your March 29, 2011, letter states that AIC's fee waiver request was "deficient" because disclosure of the information requested 1) "will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s)," and 2) will not "contribute significantly to the public understanding of government operations or activities." Thus, the letter determined that AIC "failed to satisfy each of the required factors" set forth at 6 C.F.R. § 5.11(k)(2) and denied the request. The letter does not explain why AIC failed to meet these two factors. In addition, the letter categorizes the request as "commercial" and states that AIC would be charged for duplication of records in accordance with 6 C.F.R § 5.11. The letter does not explain or provide support for its determination that AIC is a commercial requester.

i. Disclosure of the Information Is in the Public Interest.

In the event that responsive records are located, AIC is entitled to a public interest fee waiver. The FOIA Office wrongly determined that AIC's request for a fee waiver was deficient. Under 6 C.F.R. §5.11(k)(1), fees may be waived where the requester has demonstrated that (i) disclosure of the information is in the public interest in that it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.

DHS considers four factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

- (1) "Whether the subject of the request concerns the 'operations or activities of the government,'"
- (2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"
- (3) "Whether disclosure of the requested information will contribute to 'public understanding'" as opposed to the individual understanding of the requestor or a narrow segment of interested persons; and
- (4) "Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities."

¹ Significantly, USCIS recently granted AIC's public interest fee waiver request after AIC sent a similar FOIA request to USCIS requesting records relating to attorneys' role before USCIS. USCIS responded on May 2, 2011, that AIC qualified for a fee waiver request.

For a request to be considered in the public interest, all four criteria must be satisfied. The March 29, 2011, letter appears to deny our request only on the basis of the third and fourth factors. For the sake of clarity and completeness, we address each factor in turn.

1. The subject of the requested records concerns the operations and activities of the government.

The March 29, 2011, letter does not dispute that the subject of the requested records concerns the operations and activities of the government. The requested records clearly concern the operations or activities of the government. U.S. Customs and Border Protection is a component of the U.S. Department of Homeland Security, a cabinet level department of the federal government. CBP is responsible, in part, for protecting our nation's borders and inspecting individuals seeking admission to the United States. The records we seek relate to CBP's policies regarding a noncitizen's access to counsel in interactions with the agency. Such interactions are very clearly "operations and activities" of CBP.

2. Disclosure is likely to contribute to an understanding of government operations or activities.

The March 29, 2011, letter does not dispute that the subject of the requested records will contribute to an understanding of government operations or activities. However, a further understanding of this second factor informs the third and fourth factors. In short, disclosure of the requested documents will contribute to a deeper understanding of the role of counsel before CBP.

The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) reach out to lawyers and the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media. *See* <http://www.immigrationpolicy.org/>. The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. *See* <http://www.legalactioncenter.org/>. Relevant to this FOIA request, the LAC has historically focused on access to counsel issues. Specifically, the LAC educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its components.

As discussed above, disclosure of the requested records is likely to contribute to a better understanding of government operations or activities related to the role of counsel in interactions with CBP. Beyond the three documents mentioned in the May 12, 2011, letter, AIC is not aware of any publicly available documents explaining how and why CBP limits access to counsel in various settings. Because this information is not already in the public domain, its release will significantly increase understanding of CBP's policies involving counsel.

3. *Disclosure will contribute to public understanding of government operations or activities.*

Disclosure of the requested information also will contribute to “public understanding,” as opposed to understanding of a narrow segment of interested persons. Release of this information to AIC will significantly advance the general public’s understanding of CBP’s policies toward counsel. AIC has the capacity, legal expertise, and intention to review, analyze and synthesize this information and make it accessible to a broader public audience. In addition to providing all released information on its website, AIC plans to draft one or more summary reports of the records received in response to the FOIA request. AIC has the intent and capacity to disseminate the reports by posting them on the AIC website which contains immigration-related information and news and is accessible by any member of the public. AIC’s website receives more than 58,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will distribute the summary reports to our mailing list of over 33,000 supporters and will publish them in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC has regular contact with national print and news media and plans to continue to share information about this process with interested media.

4. *Disclosure of the requested information will contribute significantly to public understanding of non-citizens’ access to counsel in interactions with CBP.*

The disclosure of the requested information will contribute significantly to public understanding about CBP practices related to counsel. This issue is of sufficient importance that a regulation, 8 C.F.R. § 292.5(b), has been adopted to address the role of counsel before CBP, and counsel is mentioned several times throughout the Inspector’s Field Manual.

Interviews and interactions with CBP officers often can be intimidating and confusing, and noncitizens seek assistance from attorneys to help navigate these encounters. It is critical that noncitizens understand when and for what reasons access to counsel is limited before CBP. In addition, U.S. citizens may be subject to the same treatment as noncitizens if their citizenship is questioned by a CBP officer. Thus, U.S. citizens have an equally important stake in understanding CBP policies related to counsel.

The disclosed records will inform attorneys who represent noncitizens at risk of removal from the United States, the noncitizens themselves, and other members of the public who are concerned with the fairness of immigration agency proceedings and policies. Because there is no publicly available comprehensive CBP guidance governing attorney representation and conduct, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP. The disclosure and dissemination of the requested documents also will help explain disparate treatment by CBP of attorneys and their noncitizen clients throughout the country. Finally, this information will inform non-profit and international organizations interested in the treatment of noncitizens at the border and in other settings before CBP.

b. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requestor.

DHS considers two factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is primarily in the commercial interest of the requester:

- (1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure," and
- (2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the general public and not for the purpose of commercial gain. The LAC has a long track record of administrative advocacy on issues related to counsel in immigration proceedings. Like all other reports and information available on the AIC website, information about counsel received in response to this FOIA request will be widely distributed to immigration attorneys, noncitizens and other interested members of the public free of charge. Given that FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

Sincerely,



Emily Creighton
Staff Attorney
American Immigration Council
Suite 200
1331 G Street, NW
Washington, DC 20005-3141
Telephone: (202) 507-7505
Fax: (202) 742-5619
E-mail: ecreighton@immcouncil.org

EXHIBIT E



**U.S. Customs and
Border Protection**

OT:RR:FAPL
H170224

June 10, 2011

Emily Creighton
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005-3141

Dear Ms. Creighton:

This acknowledges receipt of your correspondence dated May 26, 2011, concerning the FOIA appeal.

The matter has been assigned to the FOIA Appeals, Policy and Litigation Branch for review and preparation of a response. Although we make every effort to promptly complete our review and prepare a response, multiple issue inquiries, or those requiring other agency input, may delay our response.

Your inquiry has been assigned to Andrew Langreich. If it becomes necessary to contact us regarding this matter, you may call him on 202-325-0089, or write to us at U.S. Customs and Border Protection, FOIA Appeals, Policy and Litigation Branch, Regulations and Rulings, 799 9th Street, NW, Washington, DC 20229-1179. In any future correspondence, please refer to the file number in the upper right corner of this letter.

Any questions regarding substantive legal issues involved in your inquiry may be raised with the person to whom it is assigned. All questions regarding the priority or status of the processing should be raised with undersigned.

Sincerely,

A handwritten signature in cursive script that reads "Shari Suzuki".

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch

EXHIBIT E

EXHIBIT F



**U.S. Customs and
Border Protection**

SEP 29 2011

DIS-3 OT:RR:RDL:FAPL
H170224 AML

Ms. Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, N.W., Suite 200
Washington, D.C. 20005-3141

RE: Freedom of Information Act Appeal; Request for information concerning the availability and role(s) of attorneys during noncitizen clients' interactions with CBP; Denial of Fee Waiver Request; CBP FOIA Division File No. 2011F08147

Dear Ms. Creighton:

This is in reply to your letter of May 26, 2011, with which you appeal, on behalf of your organization, the American Immigration Council (hereinafter "AIC"), the response you received from the Director, Freedom of Information Act (FOIA) Division, U.S. Customs and Border Protection (CBP) dated May 12, 2011 (FOIA Division File No. 2011F08147) to your FOIA request. Within the May 26, 2011 letter, you also note the appeal of the March 29, 2011 decision of the FOIA Division to deny your request for a fee waiver. You appeal the decision of the FOIA Division which directed you to what it determined to be "public information" in response to your original FOIA request and question the adequacy of the FOIA Division's search for responsive records.

On June 23, 2011, you confirmed in a telephone call with an attorney on my staff that your request for information regarding CBP policies, directives and guidance relating to the accessibility of counsel is limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry, rather than the policies, directives and guidance concerning the permissible roles of attorneys in CBP's myriad trade matters.

In the initial FOIA request to CBP dated March 14, 2011, you requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;

EXHIBIT F

- Attorney appearances at CBP offices or other facilities.¹²

In response to your request, the FOIA Division collected and reviewed responsive records and concluded that “much of the information you are seeking is already publicly available.” The FOIA Division stated that responsive information could be found in the Code of Federal Regulations (CFR), the Personal Search Handbook, and the Inspector’s Field Manual (IFM) (which, “once the IFM is approved for release,” will be available via the internet on the CBP Reading Library).

On appeal, you contend that “CBP did not conduct an adequate search for records responsive to our comprehensive request for guidance related to noncitizens’ access to counsel before CBP pursuant to 5 U.S.C. § 552(a)(3).” You elaborate that:

[Y]our request for “records” related to the role of counsel in CBP settings encompasses all records or communications preserved in electronic or written form, including but not limited to correspondence, documents,

¹ You explained via an itemized list in the initial request that the above records may include, but are not limited to:

- 1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;
- 2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;
- 3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;
- 4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;
- 5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;
- 6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;
- 7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;
- 8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP’s intention to question their clients;
- 9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP’s decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;
- 10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP’s decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

² With regard to your request for NSEERS information (see item # 6 in footnote 1 immediately above), we note that effective April 28, 2011, DHS will no longer register aliens under NSEERS. See Federal Register Volume 76, Number 82 (Thursday, April 28, 2011) at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm>.

data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies. Given the varied circumstances in which noncitizens and their attorneys interact with CBP, it is very unlikely that the three documents referenced in your May 12, 2011, letter reflect a search reasonably calculated to uncover documents relevant to the role of counsel in CBP settings. We indicated in our FOIA request that the interactions among CBP officers, attorneys and their noncitizen clients take place in different settings such as secondary and deferred inspection. In addition, the reasons for the interview or interaction may vary significantly.

You conclude your contentions regarding this issue by stating that “the May 12, 2011, response merely includes general documents that are publicly available and does not reflect a search reasonably calculated to uncover documents relevant to the guidance outlined in the request.”

You “also appeal the denial of the fee waiver request and the commercial requester designation.” The March 29, 2011, FOIA Division letter denying the fee waiver request concludes that the request was “deficient” because disclosure of the information requested 1) “will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s),” and 2) will not “contribute significantly to the public understanding of government operations or activities.” Thus, the letter determined that AIC “failed to satisfy each of the required factors” set forth at 6 C.F.R. § 5.11(k)(2) and denied the request for fee waiver.

Initially, we reconsider your request for fee waiver. You indicate that “AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization . . . [that] seeks the requested information for the purpose of disseminating it to members of the public who access AIC’s website and other AIC publications, and not for the purpose of commercial gain.” You state that:

AIC is 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 also 6 C.F.R. § 5.1(k).

You explain that:

Because there is no available comprehensive guidance governing attorney representation and conduct in interactions with CBP, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP.

The Department of Homeland Security (DHS) FOIA regulation which governs fee waivers, 6 CFR § 5.11(k), provides in relevant part that:

(k) Requirements for waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested 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

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

The regulation then provides guidance about the factors to be considered in making a fee waiver determination.

(2) To determine whether the first fee waiver requirement is met, components will consider the following factors:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as

opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, components will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. Components shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

In compliance with the regulation set forth above, we apply the factors set forth in 6 CFR § 5.11(k) to the contentions you make in support of your fee waiver request.

In support of the contention that disclosure of the information requested would be in the public interest, you state that:

AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice.

Therefore, we consider whether "disclosure of the requested 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 whether "disclosure of the information is not primarily in the commercial interest of the requester."

In order to make the "public interest" determination, the regulation requires consideration of (i) whether the subject of the requested records concerns "the operations or activities of the government"; (ii) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to "public understanding"; and (iv) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

In consideration of the first public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry "concerns the operations or activities of the government." CBP is the federal agency charged with protecting the borders and enforcing the immigration and customs laws. Your request for certain information related to the agency's enforcement of the immigration laws, *i.e.*, whether travelers or immigrants will be permitted access to attorneys in their interactions with border enforcement personnel, is an inquiry regarding an operation and activity of the government.

In consideration of the second public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry is "likely to contribute" to an understanding of government operations or activities. Immigration has been and continues to be a significant issue in the United States. The disclosure of non-exempt portions of the CBP policies, directives and guidance regarding immigrant access to attorneys during interactions at ports of entry is "likely to contribute" to an increased public understanding of those CBP operations or activities.

In consideration of the third public interest factor, we conclude that the disclosure of information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry will contribute to "public understanding." Given your

representations that your organization has expertise in the subject area and the ability and intention to effectively disseminate the information to the public, we are persuaded that disclosure will contribute to the understanding of a reasonably broad audience of persons interested in immigration issues.

In consideration of the fourth public interest factor, we conclude that the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

In *Manley v. Dep’t of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008), the United States District Court for the Southern District of Ohio, in reversing the denial of a fee waiver request, held that:

The Navy’s argument is premised on the assumption that the information must be disseminated to the public-at-large before a waiver is appropriate. However, “[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large.” *Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir.), cert. denied, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994). See also *Judicial Watch, Inc. v. General Services Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, *7 (D.D.C. 2000). Courts have rejected the narrow interpretation urged by the Navy in light of the legislative history of the FOIA which suggests a more focused group: “A request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.” 32 Cong. Rec. S14,270-01 (daily ed. Sept. 30, 1986) (comments of Senator Leahy). For example, in *Carney v. Department of Justice*, 19 F.3d 807 (2d Cir.), cert. denied, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994), the Second Circuit rejected as “not realistic” the position that a requester was required to disseminate the information to “a large cross-section of the public.” *Id.* at 814. “The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.” *Carney*, 19 F.3d at 815 (finding sufficiently “public” that a doctoral student in political science planned to publish a dissertation and write scholarly articles; while usually not reaching a general audience, the dissertation would enlighten interested scholars and be of great benefit to the public at large). Likewise, the court in *Community Legal Services, Inc. v. U.S. Dept. of Housing and Urban Development*, 405 F. Supp.2d 553 (E.D. Pa. 2005), determined that while the Legal Services work was unlikely to reach a very general audience, there was nevertheless a segment of the public interested in its work, to wit, a reasonably large segment of Philadelphia’s low- and moderate-income families. *Id.* at 556 -557. In other words, the relevant

issue is whether “the requester will disseminate the disclosed records to a reasonably broad *audience of persons interested in the subject.*” *Carney*, 19 F.3d at 815 (emphasis added [in original]). *Manley v. Dep’t of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008).

We conclude based on the rationale set forth in *Manley* that there is sufficient public interest among the segment of the public with interest in immigration issues (“a reasonably broad audience of persons interested in the subject”) to satisfy the “public interest” factors set forth in the relevant DHS regulation.

With regard to whether AIC has a commercial interest in the disclosure of the information, we consider whether AIC has any commercial interest that would be furthered by the requested disclosure. Given that your organization is a non-profit organization and the stated purpose for requesting the information is to distribute and disseminate it via the internet and mailing lists without charge (for example, you state unequivocally in the appeal letter that “[I]ike all other reports and information available on the AIC website, information about counsel received in response to this FOIA request will be widely distributed to immigration attorneys, noncitizens and other interested members of the public free of charge.”), we are persuaded that AIC does not have a commercial interest that would be furthered by release of the information requested.

In light of the foregoing, we conclude that the public interest standard is satisfied and that the disclosure is not in the commercial interest of the requester, AIC. Therefore, the fee waiver pursuant to 6 CFR § 5.11(k) is justified and we reverse the decision of the FOIA Division to deny the request for fee waiver.

In consideration of your appeal, we note that the subject matter of the FOIA request – the availability and role(s) of attorneys during noncitizen clients’ interactions with government personnel at U.S. borders – is governed by statute and regulation.

8 U.S.C. § 1357 provides that:

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained

for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

8 U.S.C. § 287.3(c) provides:

(c) Notifications and information. Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under §292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I-862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

8 CFR § 292.5, captioned "Service upon and action by attorney or representative of record" provides:

(b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. **Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.** (Bold emphasis added.)

Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance

governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject – it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.

In response to your appeal and contention that the search conducted in response to the initial request was inadequate, we contacted several offices within CBP in which responsive records could likely be found: the Office of the Border Patrol (OBP), the Office of Field Operations (OFO), and the Office of Chief Counsel (OCC). OBP is the organization within CBP responsible for preventing the entry of terrorists and terrorist weapons from entering the United States between official U.S. Customs and Border Protection ports of entry. OBP's traditional mission is to enforce immigration laws and to detect, interdict and apprehend those who attempt to illegally enter or smuggle people or contraband across U.S. borders between official ports of entry. OFO manages core CBP programs and operations at 20 Field Operations offices; 327 ports of entry; 15 preclearance stations in Canada, Ireland and the Caribbean; Immigration policy and programs; and Agricultural Quarantine Inspection (AQI) at all ports of entry in order to protect the health of U.S. plant and animal resources. OFO has primary operational responsibility for trade and passenger facilitation, interdiction and enforcement programs. OCC provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. OCC is also responsible for reviewing proposed actions to ensure compliance with legal requirements, preparing formal legal opinions, preparing or reviewing responses in all court actions, civil or criminal, involving CBP, and developing, implementing, and evaluating nationwide programs, policies, and procedures within its functional areas. Accordingly, these offices were determined to be the offices in which responsive records were likely to have been created and be maintained.

OFO provided information, some of which had been previously provided to you in response to the initial request by the FOIA Division, taken from the Inspector's Field Manual. OBP provided information from two of its manuals, the "Officers' Handbook" and "The Law of Arrest, Search and Seizure Manual". OCC reviewed the aforementioned documents, conducted a separate search, and confirmed that no other responsive records exist. We have appended copies of the responsive records to this letter and provided electronic copies on a disc as you requested.

Despite the searches and requests to components and offices within CBP, we have been unable to find responsive records beyond those identified above. We are unable to provide you with any further information because no such information exists.

If you have questions or concerns regarding this matter, please contact Andrew Langreich of my staff at (202) 325-0089.

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §

552(a)(4)(B) in the United States District Court in the district in which you reside, in the district where the agency records are situated, or in the United States District Court for the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,



Shari Suzuki, Chief
FOIA Appeals, Policy & Litigation Branch

Attachments

EXHIBIT G

RESPONSIVE RECORDS

Inspector's Field Manual (IFM) Chapter 2.9 Dealing with Attorneys and Other Representatives.

No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney - unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action.

IFM Chapter 17.1.g Attorney Representation at Deferred Inspection.

(g) Attorney Representation at Deferred Inspection. At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory CBPO on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant. Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel. In general, applicants for admission in primary and secondary processing are not entitled to representation. See 8 CFR 292.5(b).

IFM Chapter 17.9.11.2 Notification for Detainees in Baggage Control Secondary.

9.11.2.1 Any person detained for more than two hours after a personal search is conducted will be given the opportunity to have OFO personnel notify someone, including an attorney, of his or her delay unless probable cause has been established. The two hour notification process is only used during a continuation of the personal search process. Officers will utilize Attachment 2 of the Personal Search Handbook to complete the notification.

9.11.2.2 When the two hour notification period has elapsed, the supervisor will notify the ICE duty agent and/or a CBP enforcement officer prior to the notification. The detainee will not be given the opportunity to consult with an attorney at any time before *Miranda* warnings are required and such right is invoked by the detainee.

From The Officers' Handbook, M68**SOLICITATION OF SERVICES**

An alien who is detained or an alien or other person who has official business with the Service may ask you whether it is necessary or desirable to seek the services of an attorney or other representative. In no case should he be informed that he should not obtain an attorney. The person making such inquiry should be informed that he has the right to be represented at his own expense by an attorney in proceedings before the Service. However, he should also be informed that the determination whether he should obtain an attorney is one that he must make himself and that Service employees may not make such determination for him. If such a person states he would like to be represented by an attorney but that he cannot afford the expense involved, he may be referred to a voluntary social agency or a legal aid organization or a Bar Association. Also you may be requested to suggest the name of an attorney or bonding company. A person requesting the name of an attorney should be referred to a Bar Association or to a telephone directory which lists the names and addresses of attorneys. A person requesting the name of a bonding company should be referred to a telephone directory which lists the names of bonding companies. In no instance should a person be referred to a specific attorney or firm.

From The Law of Arrest; Search and Seizure Manual, M69**b. Warnings Required Following Administrative Arrest.**

Once the examining officer determines that formal exclusion or deportation proceedings will be instituted, certain advisals must be given to the alien. The alien must be informed of the reason for the arrest, of the right to be represented by counsel of his or her choice at no expense to the government, and of the availability of free legal services programs and of organizations recognized pursuant to 8 C.F.R. 292.210 located in the district where the proceedings are to be held. The alien must be given a list of such programs and organizations. The alien also must be advised that any statement made may be used against him or her in a subsequent proceeding 28. If arrested without a warrant, the alien must be advised that a decision will be made within 24 hours whether custody will be continued or whether release on bond or on personal recognizance will be available 29. The 1-221 (Order to Show Cause) provides the required warnings to aliens placed in deportation proceedings or granted administrative voluntary departure. Miranda warnings need not be given where the only contemplated legal action against the alien is exclusion, deportation, or voluntary departure.

EXHIBIT H



U.S. Department of Justice
Immigration and Naturalization Service

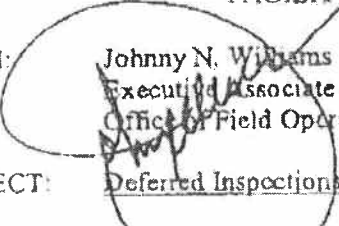
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Office of the Executive Associate Commissioner

425 I Street NW
Washington, DC 20536

MAY 18 2002

MEMORANDUM FOR REGIONAL DIRECTORS
DIRECTOR OF INTERNATIONAL AFFAIRS
OFFICER DEVELOPMENT AND TRAINING
FACILITY, GLYNCO
OFFICER DEVELOPMENT AND TRAINING
FACILITY, ARTESIA

FROM:  Johnny N. Williams
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Deferred Inspections Policy - IFM Update IN02-03

Effective immediately, the policies and procedures outlined in this document shall be followed when processing deferred inspections at ports-of-entry. To reflect these requirements and reiterate the proper procedures, the Inspectors Field Manual (IFM) will be updated in a future release of INSERTS. Please direct any questions relating to this policy to Floyd Sam Farmer, Assistant Chief Inspector at (202) 305-8153.

Chapter 17.1 of the IFM is revised to read as follows:

17.1 Deferred Inspection.

(a) General. A deferred inspection may be used when an immediate decision concerning admissibility cannot be made at a port-of-entry and the officer has reason to believe that the alien can overcome a finding of inadmissibility by presenting additional evidence or by further review of the case. In such cases the inspecting officer shall defer inspection to the office having jurisdiction over the area where the alien will be staying. Deferred inspections may be necessary in order to review an existing Service file or some other documentary evidence essential to clarifying admissibility. Deferral shall be for a specific purpose, not used as a way to transfer a difficult case to another office, and should normally only be used when it appears the case would probably be resolved in the alien's favor. Any alien who is not expected to establish his or her admissibility shall not be deferred. Before an alien is deferred, the inspecting officer shall consider the likelihood that the alien will abscond or pose a security risk. All persons being

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deferred shall be queried in the appropriate databases including, but not limited to, the Interagency Border Inspection System (IBIS), the National Crime Information Center (NCIC) and the National Automated Immigration Lookout System (NAIS).

These database queries shall be completed in order to determine if any adverse information exists that would preclude the alien from being paroled into the United States for deferred inspection and to provide additional information regarding the case. The results shall be noted on Form I-546, Order to Appear for Deferred Inspection.

Factors that may be considered when making a decision on whether to defer the inspection may include the following:

1. The likelihood that the alien will be able to establish admissibility;
2. The types of documents lacking, and the ability to obtain necessary documentation;
3. The good faith efforts on the part of the alien to obtain necessary documents prior to arrival at the port-of-entry;
4. The verification or establishment of the alien's identity and nationality;
5. Age, health, and family ties;
6. Other humanitarian considerations;
7. The likelihood that the alien would appear;
8. The nature of possible inadmissibility (i.e. criminal history, previous violations, etc.); and
9. The potential danger posed to society if the alien were to be paroled.

If the alien is clearly inadmissible or may pose a security risk or danger to society, the inspection shall not be deferred. The alien shall be placed in removal proceedings or allowed to withdraw his or her application for admission.

(b) Deferral procedures. Express approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations is required before any inspection can be deferred. Current field guidance on approval authority can be found in Headquarters memorandum "Deferred Inspection, Parole and Waivers of Documentary Requirements" dated November 14, 2001. Current guidance states, in part, that aliens shall not be paroled for deferred inspection without the express approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations (copy attached).

If an "A" file does not exist, one shall be opened. To determine if an "A" file exists, a query of the Central Index System (CIS) should be made. If there is an existing "A" file, the file number and files control office should be identified based on the CIS query so that the onward office can locate or request the file before the alien appears. In the event of an existing "A" file, all documentation shall be placed in a temporary "A" file. The "A" file or temporary "A" file shall be forwarded to the onward office along with the Form I-546.

An inspection shall be deferred using the new version of Form I-546 (Order to Appear for Deferred Inspection) revised date 12/12/01; Form I-259 (Notice to Detain, Remove or Present Alien), if appropriate; Form FD-249 (Fingerprint Card - Red); and Form I-94 (Arrival/Departure Record). The I-94 shall be stamped with a parole stamp and endorsed to show "DE, Deferred Inspection," the onward office code and date to which deferred, as well as the officer's admission stamp number, port, and action date. Parole the applicant for a brief period (not to exceed 30 days), sufficient for the paperwork to arrive at the onward office and for the applicant to obtain any necessary evidence to establish admissibility (additional guidelines related to parole can be found in Chapter 16.1 of the IFM). Inspectors shall complete the Interagency Border Information System (IBIS) secondary screen indicating a deferral. In the remarks section, enter the office deferred to, date of inspection, and reason for deferral. Each applicant whose inspection is deferred shall be photographed. Each alien whose inspection is deferred shall be fingerprinted on Form FD-249. Only one set needs be completed. The set of fingerprints shall be maintained with the other information related to the alien and forwarded to the onward office in the "A" file. This set of fingerprints is kept in the "A" file or temporary "A" file and used if the alien fails to appear for his or her scheduled deferred inspection. A copy of Form I-546 shall be maintained at the deferring office for a period of one year. For deferral procedures related to the Visa Waiver Program (VWP) see the Inspector's Field Manual chapter 15.7(g)(5).

The applicant shall be given the departure section of the Form I-94 and the appointment copy of the Form I-546 with a specific reporting date and a time block, rather than a specific time. Also provide the applicant with the telephone number of the onward office's deferred inspection unit. A complete list of deferred office addresses, phone numbers, and hours of operation are located in Appendix 17-1 of the Inspectors Field Manual.

Some local offices conduct deferred inspections only on certain days of the week, or during certain hours, and may have specific room numbers for deferred applicants. Secondary stations at ports-of-entry should have current information on office hours, addresses and room numbers, telephone numbers and jurisdictions of various sub-offices and satellite offices which handle deferrals. (See Appendix 17-1 for a list of deferred inspection locations.) A deferred inspection places additional unscheduled work on the onward office. Appearance for deferred inspection may place additional burdens on the applicant who may, in many cases, be required to spend considerable time and money to comply with the required deferral procedures. Ensure that the

information provided to the onward office is sufficient to allow the onward office to complete the deferred inspection in a single appearance.

The remarks block on the Form I-546 should contain complete, accurate information for the inspector at the onward office. The deferring officer (recommending officer) should state specifically the purpose of the deferral and identify any documentation that the applicant is expected to produce. All relevant information, such as local address (a P.O. Box number is not an acceptable address) and phone numbers shall be included on Form I-546. The supervisory officer will verify that the details on the form are correct, annotate the name of the appropriate district official approving the deferred inspection and sign the Form I-546. Include all forms in the "A" file along with any other documents relevant to the inspection, and forward to the onward office. Follow local procedures for deferrals within the same district.

in all air and sea cases, Form I-259 shall be served on the affected carrier or on the captain of a private aircraft or vessel. The officer should check the fourth block (Notice of potential liability under section 241(c), (d), or (e) of the Act). In the event the alien is formally ordered removed, an amended Form I-259 should be created by checking the second box (Notice to Remove the Alien from The United States on ___ at ___). The amended Form I-259 should be issued to the carrier responsible for removing the alien to the last port of embarkation to the United States. Aliens granted voluntary departure are responsible for costs associated with travel to the port of their arrival to the United States. However, if placed under INS control the Service will not hold the carrier responsible for the alien's detention and related expenses prior to the alien being delivered to the responsible carrier for removal from the United States. Once custody is transferred, any cost associated with detention or removal of the alien shall be borne by the carrier. Follow local guidelines and procedures for authorization to detain an alien for removal. Attach copies of the amended Form I-259 to the Form I-546 in the "A" file and forward a copy to the deferring POE.

The Form G-22.1 should be completed to indicate the category and reason for the deferred inspection. Instructions for completion of Form G-22.1 can be found in INSERTS.

(Go to INSERTS, click on Statistics handbook, next click on Operational statistics, then click on G-23 Procedures. After you click on G-23 Procedures, you will be at the table of contents, then select number 3. INSPECTIONS ACTIVITY WORKLOAD RECORDS (G-22.1F) PROCEDURES.)

(c) Processing a deferred inspection. The inspecting officer at the onward office should have received the deferral paperwork in advance of the applicant's appearance. An already existing Service file should be located and reviewed prior to the applicant's appearance. If the applicant is found admissible, a new Form I-94 shall be executed using the office symbol of the onward

office and the current date as the date of admission. The officer should ensure that the name, date of birth and country of citizenship written on the new Form I-94 is exactly the same as the information recorded on the Form I-94 issued at the time of the deferred inspection. If the inspecting officer concludes that the alien is inadmissible, the officer shall complete processing according to appropriate guidelines, which can be found in Chapters 17.2 through 17.17 of the IFM. Upon completion of the deferred inspection, use IO-95 to create a new record within IBIS to show the deferred inspection results. Indicate the disposition on the Form I-546 included in the "A" file and send one copy to the deferring office. Forward the original deferred Form I-94 departure section and the new arrival section to the recipient indicated in Appendix 15-8 for data entry.

The Form G-22.1 should be completed to indicate the disposition of the deferred inspection. The disposition shall be noted on the Form G-22.1 under other (PORT = Other) secondary inspections operation report, columns A-L, any applicable lines 46-126, and hour's lines 142-205. Instructions for completion of Form G-22.1 can be found in INSERTS as noted above.

(d) No shows. If an alien fails to appear for his or her deferred inspection, a Form I-862, Notice to Appear shall be executed using the information listed on the Form I-546 and mailed to the address provided. All information related to the case shall be added to the "A" file. A lookout must be posted in NAILS. All aliens who have lookouts posted shall be reported on line 65 of the G-22.1. Criminal penalties and the possible pursuit of a criminal warrant under 8 U.S.C. 1325 shall be pursued on a case-by-case basis. All related information shall be forwarded to the Senior Inspector Unit and/or the Criminal Investigations Unit to allow further follow-up of the case. All aliens who fail to appear and for whom prosecution is pursued shall be reported on line 69 (Prosecutable cases referred to DNV) of the Form G-22.1.

(e) Attorney representation at deferred inspection. At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory inspector on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant.

(f) Medical deferrals. When deferring inspection for ground of inadmissibility under INA Section 212(a)(1) (medical), consult with the Public Health Service (PHS) before permitting the alien to proceed. If the alien is required to submit to further medical examination prior to reporting to the onward office, return all medical documents including local PHS certification and x-rays to the applicant in a sealed envelope for presentation to the doctor, medical clinic, or PHS facility as instructed. If the alien is to report first to the onward INS office, forward the medical documents with the deferral papers directly to the onward office.

Attachments (2)



U.S. Department of Justice
Immigration and Naturalization Service

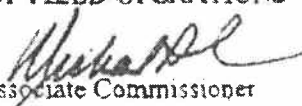
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Office of the Executive Associate Commissioner

425 J Street NW
Washington, DC 20536

NOV 14 2001

MEMORANDUM FOR MICHAEL A. PEARSON
EXECUTIVE ASSOCIATE COMMISSIONER
OFFICE OF FIELD OPERATIONS

FROM: Michael D. Cronin 
Acting Executive Associate Commissioner
Office of Programs

SUBJECT: Deferred Inspection, Parole and Waivers of Documentary Requirements

During the Nation's heightened security alert and until further notice, aliens shall not be paroled for deferred inspection, otherwise paroled into the United States, or be granted a waiver of any documentary requirement without the express approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations.

District Directors, Deputy District Directors, Assistant District Directors for Inspections, and Assistant District Directors for Examinations shall only parole for deferred inspections, otherwise parole into the United States, or grant a waiver of any documentary requirement on a case-by-case basis after all appropriate database checks have been completed. Such discretion should be applied only in cases where inadmissibility is technical in nature (i.e., documentary or paperwork deficiencies), or where the national interest, law enforcement interests, or compelling humanitarian circumstances require the subject's entry into the United States, and where the alien is likely to comply with the terms of the exercise of discretion.

This authority shall not be delegated. This guidance does not change the existing statutory and regulatory standards for paroles and documentary waivers.

Further, all Authorizations for Parole of an Alien into the United States (Form I-512) issued by overseas Immigration and Naturalization Service (INS) offices must be approved by the District Director or Deputy District Director. Authorizations for Parole of an Alien into the United States (Forms I-512 and I-512L) issued at stateside INS district offices or service centers

Subject: Deferred Inspection, Parole and Waivers of Documentary Requirements

need not have the express approval of the District Director, Deputy District Director, or Service Center Director.

Officers at ports-of-entry (POEs) must obtain the approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations when granting waivers of documentary requirements for nonimmigrants under section 212(d)(4) of the Immigration and Nationality Act (INA) and for returning residents not in possession of proper documents pursuant to section 211(b) of the INA. Pursuant to the attached October 3, 2001, memorandum, "Interim Guidance: Status of FY 2002 Refugee Admissions," refugee applicants who arrive at a port-of-entry may be granted a 30-day deferred inspection. Officers must obtain the approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations prior to deferring the inspection of refugee applicants.

While Officers need not obtain the approval of the District Director, Deputy District Director, Assistant District Director for Inspections, or Assistant District Director for Examinations to parole aliens in possession of a valid Form I-512 or I-512L, such as adjustment of status applicants or certain alien applicants under the Legal Immigration Family Equity (LIFE) Act, such aliens are still subject to the INS inspection process. Attached is a copy of the October 26, 2001, memorandum addressing the issue of aliens presenting Form I-512L at the POE.

This memo does not change the procedures for Border Crossing Card holders contained in the September 28, 2001 Memorandum entitled "Expiration of Non-Biometric Border Crossing Cards (BCCs) and Implementation of the Machine-Readable Biometric BCC on October 1, 2001." A copy of this memorandum is also attached.

The point of contact in the Office of Inspections is Assistant Chief Inspector Cheryl Becker (202) 305-4764.

Attachments (3)



RECEIVED
 MAY 14 2002
 DISTRICT DIRECTOR
 Portland, OR District

U.S. Department of Justice
 Immigration and Naturalization Service
 Western Regional Office
 Office of the Regional Director

WROINS 00/10.10

P.O. Box 30080
 Laguna Niguel, CA 92607-0080

MAY 14 2002

MEMORANDUM FOR DISTRICT DIRECTORS
 WESTERN

FROM: Carolyn L. Muzyka *Carolyn Muzyka*
 Acting Regional Director

SUBJECT: Deferred Inspections Policy - IFM Update IN02-03

The attached memorandum contains the latest updates to Chapter 17 of the Inspectors Field Manual. Effective immediately, the policies and procedures outlined in this document shall be followed when processing deferred inspections at ports-of-entry.

Please ensure that officers within your jurisdiction receive this information. Questions relating to this policy should be directed to the Regional Office of Inspections at (949) 360-3045.

Attachment

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GDD	
LTD	
AO	
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OLD	
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