

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 29, 2011

Via Certified Mail, Fax, and Email
U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009
Fax: (202) 732-0660
ICE-FOIA@dhs.gov

RE: Freedom of Information Act Request

To Whom It May Concern:

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), on behalf of the American Immigration Council (“AIC”) and the Connecticut chapter of the American Immigration Lawyers Association (“Connecticut AILA”) (collectively, “Requestors”).

The following requests are for records of U.S. Immigration and Customs Enforcement (“ICE”) and its predecessor agency, the Immigration and Naturalization Service (“INS”), as well as any other related records which may be held elsewhere in the Department of Homeland Security (“DHS”). The Requestors seek to understand the development, operation, and implementation of the ICE Criminal Alien Program (“CAP”). We request all records¹ related to CAP, as well as to the series of INS and ICE programs out of which CAP developed, including the INS Alien Criminal Apprehension Program, INS Institutional Hearing Program, INS/ICE Institutional Removal Program, and ICE National Criminal Alien Removal Plan. We subsequently refer to these programs collectively as “CAP and its predecessors.” These records include, but are not limited to:

I. Policies and Procedures

1. All records related to the development, implementation, and operation of CAP and its predecessors, including but not limited to:
 - a. Reports;
 - b. Memoranda;
 - c. Legal opinions;
 - d. Correspondence, including but not limited to intra-governmental correspondence;
 - e. Audits;
 - f. Policies, rules, orders, and any other sub-regulatory guidance.
2. In particular, but not limited to, all records described in request number 1 related to the following specific topics:

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, audio tapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

- a. The creation, implementation, monitoring, or auditing of the incidence of racial profiling or policies to prevent it instituted by ICE, INS, or local law enforcement agencies in the course of the implementation and operation of CAP and its predecessors;
- b. Policies and procedures related to interviewing by ICE or INS agents under CAP and its predecessors, including but not limited to policies and procedures regarding advising interviewees of their rights, translation for non-native English speakers, wearing of official uniforms, provision of identification;
- c. Records, policies and procedures related to the issuance of civil immigration detainers (Form I-247) by CAP agents, including, but not limited to policies and procedures regarding CAP agent/team response protocols once the detainer is triggered and the individual is transferred to ICE custody.

II. **Communication**

1. All records of communication, whether electronic or conventional, to or from ICE or INS related to CAP and its predecessors, including but not limited to communications with:
 - a. Federal agencies or officials, including but not limited to personnel within ICE, DHS, or INS; other federal agencies or personnel within those agencies; Congress, members of Congress, or staff; and the White House;
 - b. State and local authorities, including but not limited to any state, city, county, or local police agency, department of corrections, sheriff's office, jail, or other holding facility;
 - c. Members of the press, non-governmental organizations, and members of the public.

III. **Program Organization**

1. All records regarding the internal structure of CAP and its predecessors, including but not limited to:
 - a. Organizational charts and other such diagrams or schematics;
 - b. Number, location, membership, and history of teams of ICE or INS enforcement agents constituted under CAP and its predecessors ("CAP Teams"), as well as the nature of officers' assignment to CAP Teams and supervision of CAP Teams;
 - c. Organizational and operational records regarding establishment, implementation and maintenance of telephonic call-in centers operated by CAP teams or agents to facilitate communication with state and local law enforcement agencies.
2. All records regarding the relationship of CAP and its predecessors to other government agencies or programs, including but not limited to all organizational charts and other such diagrams or schematics as well as any associated explanatory materials.
3. All records indicating the relationship between CAP and its predecessors and other ICE programs and activities, including but not limited to Enforcement and Removal Operations, Secure Communities, 287(g) arrangements, immigration detainers, and ICE Agreements of Cooperation in Communities to Enhance Safety and Security ("ICE ACCESS").

4. All memoranda, policies, procedures, guidance, or other materials related to the connection between CAP and its predecessors and DHS administered databases, including but not limited to ENFORCE and IDENT.
5. All agreements, training materials, briefing, guidance, rules, and other records related to negotiation or cooperation with state and local law enforcement officials under CAP and its predecessors, including but not limited to
 - a. Records regarding the presence of ICE agents within state and local jails, prisons, or other sites of incarceration;
 - b. Records regarding the establishment or use of telephone or video conferencing capabilities between ICE and state and local jails, prisons, or other sites of incarceration;
 - c. All analyses and other records regarding changes or potential changes to state and local law enforcement agencies' policies, priorities, or actions related to CAP and its predecessors.
6. All records regarding contracts with private for-profit or not-for-profit organizations to implement part or all of CAP and its predecessors, including but not limited to Requests for Proposals, collected bids, contracts, criteria for choosing contractors, communication with contractors, and audits of contractors.

IV. Statistical Data and Resource Allocation

1. All statistical data and analysis regarding the identification, detention, arrest, and transfer to federal custody pursuant to or in connection with CAP and its predecessors, including, but not limited to, analysis of individuals' race, national origin, gender, age, criminal history, status of criminal cases, and immigration and removal history.
2. All statistical data regarding the volume, distribution, type, and result of contact between local law enforcement officials and ICE, including but not limited to communications directed to the Law Enforcement Support Center.
3. All statistical and other records detailing total ICE or INS expenditures, in both personnel time and financial resources, involved in developing and implementing CAP and its predecessors, including but not limited to all records of Congressional and/or DHS appropriations, budget requests, and analyses related to CAP and its predecessors.
4. All records detailing or referencing the relationship between CAP and its predecessors and the State Criminal Alien Assistance Program ("SCAAP").

V. Individual Records

1. All records regarding any individual identified by, detained by, arrested by, and/or transferred to the custody of ICE, INS, or any other federal agency pursuant to or in connection with CAP and its predecessors, including but not limited to Forms I-247 (Immigration Detainers), I-213 (Records of Deportable/Inadmissible Alien), I-286 (Notices of Custody Determination) and I-862 (Notices to Appear).²

² Requestors are prepared to negotiate the appropriate scope of these records, and are open to discussion of sampling as an appropriate means of producing individual records.

2. All judicial and administrative complaints alleging unlawful or otherwise actionable conduct related to CAP and its predecessors, as well as the dispositions of any and all such complaints.

Requestors seek disclosure of all such records created from January 1, 1986 to the present. Requestors request that any records that exist in electronic form be provided in their native electronic format on a compact disc, digital video disk, or equivalent electronic medium. Requestors request that any documents stored in Portable Document Format (“PDFs”) be provided as individual files in a searchable PDF format. Finally, Requestors request that reasonable metadata be transmitted along with files, including but not limited to maintaining parent-child relationships between emails and their attachments, author information, date and time stamp information. If any of the requested records or information are not kept in a succinct format, we request the opportunity to view the documents in your offices.

Requestors agree to pay search duplication and review fees of up to \$100.00. If the fees will amount to more than \$100.00, we request a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records 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 requestor. 5 U.S.C. §552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k)(1).

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 disclosure is likely to contribute ‘significantly’ to public understanding of government operations or activities.”

This request satisfies all four factors. Indeed, U.S. Customs and Border Patrol (“CBP”), another component of DHS, recently granted a fee waiver for a similar request made by AIC for immigration-related records. *See* Exhibit A, September 29, 2011 Letter from Customs and Border Control. After a review of the above-listed factors, CBP concluded that “the public interested standard [was] satisfied and that the disclosure [was] not in the commercial interest of the requester, AIC.” *Id.* at 8.

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

The requested records straightforwardly concern the operations or activities of the government. ICE is a component of DHS, a cabinet level department of the federal government. ICE is responsible, in part, for enforcement of the immigration law through identification, detention, and removal of non-citizens. The records Requestors seek relate to ICE’s investigation and enforcement programs. Such

programs are "operations and activities" of ICE.

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

The disclosure of the records requested is in the public interest because it will inform Requestors and the public at large about the organization and operations of CAP and its predecessors. CAP is currently one of the largest areas of cooperation between the federal government and state and local authorities in the area of immigration law and leads to a large proportion of annual immigration detentions and removals. The government's policies towards and the treatment of immigrants and suspected other non-citizens are of immense public concern at present and the disclosure of the requested records will help inform public debate about these issues.

Requestors are well situated to widely disburse information regarding CAP and its predecessors. 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.³ The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws.⁴ Connecticut AILA is a nonprofit organization comprised of immigration attorneys who are members of the national organization American Immigration Lawyers Association.⁵ Connecticut AILA works at the state level to advocate for immigrants rights and educate the public regarding the administration of the immigration system in Connecticut.

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 and Connecticut AILA will significantly advance the general public's understanding of CAP and ICE's enforcement practices more generally. 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 Altnet, 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.

³ See <http://www.immigrationpolicy.org/>.

⁴ See <http://www.legalactioncenter.org/>.

⁵ See <http://www.ctaila.org/>.

4. *Disclosure of the requested information will contribute significantly to public understanding of CAP and its predecessors.*

CAP and its predecessors are extremely important ICE enforcement programs. In Fiscal Year 2009, 48 percent of all deportable aliens that were identified by ICE were identified through CAP, leading the agency to request a record \$200 million for the program in FY 2010. Despite the size and importance of these programs, they are not well understood by advocates or the general public. *See, e.g., American Immigration Council, Special Report: The Criminal Alien Program – Immigration Enforcement in Travis County, Texas, 2010* at p. 6 (“Despite its long history and widespread reach, CAP is not a well known program and confusion exists—even among [local governments] themselves—as to what participation in CAP entails”). The requested records will shed light on CAP’s organization and functioning, and will significantly contribute to the public’s understanding of the program.

Additionally, disclosure of the information requested is not in Requestors’ commercial interest. Any information disclosed by the Requestors as a result of this FOIA request will be available to the public at no cost and will be used to develop publicly available materials. Thus, a fee waiver would fulfill Congress’s legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters’”); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2523, § 2 (Dec. 31, 2007) (finding that “disclosure, not secrecy is the dominant objective of the Act,” but that “in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . .”).

Requestors also request a waiver of search fees on the grounds that each Requestor qualifies as a “representative of the news media.” 6 C.F.R. §§ 5.11(b)(6). Accordingly, fees associated with the processing of the Request should be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also* 6 C.F.R. §§ 5.11(d)(1) (search fees shall not be charged to “representatives of the news media”).

AIC and Connecticut AILA meet the statutory and regulatory definitions of a representative of the news media because each is an “entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *ACLU v. Dep’t of Justice*, 321 F.Supp. 2d 24, 30 n. 5 (finding non-profit public interest group to be “primarily engaged in disseminating information”); *Elec. Privacy Info Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a “representative of the media” for the purposes of FOIA).

The American Immigration Council’s mission is to “strengthen America by . . . shaping how Americans think about and act towards immigration now and in the future.”⁶ In furtherance of this mission, the Council publishes an array of fact sheets, newsletters, and other documents for public consumption. In 2010, AIC issued 74 such publications and over 270 blog posts regarding immigration

⁶ *American Immigration Council: Mission*, available at <http://www.americanimmigrationcouncil.org/mission>.

issues.⁷ Among those reports were *Giving Facts a Fighting Chance – Answers to the Toughest Immigration Questions*,⁸ *Raising the Floor for American Workers – The Economic Benefits of Comprehensive Immigration Reform*,⁹ *ICE's Enforcement Priorities and the Factors that Undermine Them*,¹⁰ and *The Secure Communities Program – Unanswered Questions and Continuing Concern*.¹¹ As the local chapter of the American Immigration Lawyers Association, Connecticut AILA provides a forum for discussion of important issues related to the immigration system, and acts as a platform to distribute that information to a wider audience. See, e.g., Rebecca Kidder, *Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees*, 106 Yale L.J. 389, 394 n. 34 (1996) (Citing comments of an INS district director delivered at a Connecticut AILA forum).

Finally, pursuant to the applicable regulations and statute, Requestors expect the determination of this request for documents within 20 days. See 5 U.S.C. 552(a)(6)(A)(i). If this request is denied in whole or in part, we ask that you justify all deletions by reference to specific exemptions to FOIA. Requestors expect the release of all segregable portions of otherwise exempt material. Requestors reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
P.O. Box 209090
New Haven, CT 06520-9090

Thank you for your assistance and prompt attention to this matter.

Sincerely,



Michael Wishnie
Supervising Attorney



Cody Wofsy
Josh Rosenthal
Law Student Interns

⁷ See AIC 2010 Annual Report, available at <http://www.americanimmigrationcouncil.org/sites/default/files/docs/council/AnnualReport2010.pdf>.

⁸ Available at http://www.immigrationpolicy.org/sites/default/files/docs/Giving_Facts_a_Fighting_Chance_100710.pdf.

⁹ Available at <http://www.immigrationpolicy.org/sites/default/files/docs/Hinojosa%20-%20Raising%20the%20Floor%20for%20American%20Workers%2010710.pdf>.

¹⁰ Available at http://www.immigrationpolicy.org/sites/default/files/docs/ICE_Enforcement_Priorities_110910.pdf.

¹¹ Available at http://www.immigrationpolicy.org/sites/default/files/docs/Secure_Communities_updated_110410.pdf.

Exhibit A



**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;

- 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 “[l]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,

A handwritten signature in cursive script, appearing to read "Shari Suzuki".

Shari Suzuki, Chief
FOIA Appeals, Policy & Litigation Branch

Attachments