



**U.S. Immigration
and Customs
Enforcement**

April 11, 2017

Susan Long
Transactional Records Access Clearinghouse (TRAC)
360 Newhouse II
Syracuse, NY 13244

RE: 2017-ICFO-08062, 2017-ICAP-00302

Dear Dr. Long:

This is in response to your e-mail dated March 14, 2017, appealing the adverse determination by the U.S. Immigration and Customs Enforcement (ICE), Freedom of Information Act (FOIA) Office in response to your FOIA request, seeking for the latest anonymous data concerning Form I-247N requests issued for November 2016.

By letter dated February 2, 2017, the ICE FOIA Office advised you that “A search of the ICE Office of Enforcement and Removal Operations (ERO) for records responsive to your request produced 1 Excel spreadsheet that is responsive to your request. After review of those documents, ICE has determined that portions of the 1 Excel spreadsheet will be withheld pursuant to Exemptions (b)(6) and (b)(7)(C) of the Privacy Act and FOIA.”

By e-mail dated March 14, 2017, you appealed the withholdings and the adequacy of the search. Specifically, you stated:

“[A] We do not believe that an adequate search was conducted for the records. Many requested records were not contained in the data we received. Some of the omitted records we have reason to believe are actually contained in the agency’s databases since we have been provided with this same type of information on many previous occasions. We therefore ask that a more thorough search be conducted. [B] In addition, we also were not provided with an adequate description of the search that was conducted, and ask that your response provide us with complete details of all search(es) that have been conducted, the locations and databases searched, why the search was limited to these particular locations/databases, and what was particularly searched for at each location/database. If a specific computer query was used, or particular search terms applied, we ask that we be provided with these express details.

[C] We note that existing records, even where the information isn’t complete or “systematic,” must be provided. If the agency believes that the information requested requires that a “calculation or analysis” not required by FOIA be performed on other relevant information that is recorded, then this is actually an admission that additional responsive records exist and the agency’s response must identify these additional

responsive records and then either provide this additional information, or explicitly provide a legal basis for withholding it. Our request clearly extends to this additional information, and as you may be aware, as scholars we prefer to carry out any required analyses ourselves from the original information that is recorded in the agency's files.

[D] The response also failed to abide by FOIA's "reasonably segregable" obligations. FOIA does not permit withholding of information that is not in itself exempt simply because it is found within other information that may be exempt from disclosure.

[E] The agency's response also claimed that release of some information was exempt from disclosure. However, the claimed exemptions do not apply to the specific information items that were withheld. In addition, the response failed to comply with new requirements contained in the FOIA Improvement Act of 2016. No exemption can be claimed unless "the agency reasonably foresees that disclosure would harm an interest protected by [such] an exemption." The response did not point to any harm that could be reasonably foreseen that would justify such withholding. We are also concerned that the redaction method used did not fully comply with legal requirements."

Analysis

"[A] We do not believe that an adequate search was conducted for the records. Many requested records were not contained in the data we received. Some of the omitted records we have reason to believe are actually contained in the agency's databases since we have been provided with this same type of information on many previous occasions. We therefore ask that a more thorough search be conducted."

With respect to [A] above, you stated that "[w]e do not believe that an adequate search was conducted for the records."

In response to your FOIA request, ICE provided the data fields from the Enforcement Integrated Database (EID) that are responsive to your request. To the extent your request seeks ICE to provide additional data sets, those data fields do not exist in EID.

It is well settled that "the FOIA imposes no duty on the agency to create records,"¹ and "an agency is not required by FOIA to create a document that does not exist in order to satisfy a request."² The FOIA also does not require agencies to conduct research by "answer[ing] questions disguised as a FOIA request"³ and that agencies are "not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to *create* a document that answers plaintiff's question."⁴

¹ *Forsham v. Harris*, 445 U.S. 169, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 4212 U.S. 132, 161-62, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)).

² *Yeager v. DEA*, 678 F.3d 315, 321 (D.C.Cir.1982).

³ *Hudgins v. IRS*, 620 F.Supp. 19, 21 (D.D.C.1985, *aff'd mem.*, 808 F.2d 137 (D.C.Cir.1987)).

⁴ *Frank v. U.S. Dep't of Justice*, 941 F.Supp. 4, 5 (1996) (emphasis added).

To the extent that a data field that you have requested exists in the EID, ICE conducted a search of the database to retrieve that data field and provided that information. To the extent that your FOIA request has asked questions, ICE has not answered those questions. If the information requested does not exist in a searchable form and would require ICE to create new records via calculations or conducting data analysis, ICE did not provide that information because the agency is not obligated to create new records in response to a FOIA request.

Lastly, with respect to [A] above, you stated that “[s]ome of the omitted records we have reason to believe are actually contained in the agency’s databases since we have been provided with this same type of information on many previous occasions.” ICE reviews each FOIA request independently. The FOIA does not create an obligation to answer questions, conduct data analyses, and/or create records for the purpose of responding to subsequent FOIA requests, even if ICE previously performed such analysis and/or created records in response to previous requests.

“[B] In addition, we also were not provided with an adequate description of the search that was conducted, and ask that your response provide us with complete details of all search(es) that have been conducted, the locations and databases searched, why the search was limited to these particular locations/databases, and what was particularly searched for at each location/database. If a specific computer query was used, or particular search terms applied, we ask that we be provided with these express details.”

With respect to [B] above, you stated that “we also were not provided with an adequate description of the search that was conducted, and ask that your response provide us with complete details of all search(es) that have been conducted, the locations and databases searched, why the search was limited to these particular locations/databases, and what was particularly searched for at each location/database.”

To the extent you are requesting ICE to create records describing searches including details of the locations and databases searched, “the FOIA imposes no duty on the agency to create records,”⁵ and “an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”⁶ Creating documents with the information you request would require creation of documents that do not exist in order to satisfy your FOIA request.

“[C] We note that existing records, even where the information isn’t complete or “systematic,” must be provided. If the agency believes that the information requested requires that a “calculation or analysis” not required by FOIA be performed on other relevant information that is recorded, then this is actually an admission that additional responsive records exist and the agency’s response must identify these additional responsive records and then either provide this additional information, or explicitly provide a legal basis for withholding it. Our request clearly extends to this additional information, and as you may be aware, as scholars we prefer to carry out any required analyses ourselves from the original information that is recorded in the agency’s files.”

⁵ *Forsham v. Harris*, 445 U.S. 169, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 4212 U.S. 132, 161-62, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)).

⁶ *Yeager v. DEA*, 678 F.3d 315, 321 (D.C.Cir.1982).

With respect to [C] above, you stated that “[w]e note that existing records, even where the information isn’t complete or “systematic,” must be provided. If the agency believes that the information requested requires that a “calculation or analysis” not required by FOIA be performed on other relevant information that is recorded...the agency’s response must identify these additional responsive records and then either provide this additional information, or explicitly provide a legal basis for withholding it.”

The fields of information that were not provided are data fields that do not exist in the Enforcement Integrated Database (EID).

It is well settled that “the FOIA imposes no duty on the agency to create records,”⁷ and “an agency is not required by FOIA to create a document that does not exist in order to satisfy a request.”⁸ The FOIA also does not require agencies to conduct research by “answer[ing] questions disguised as a FOIA request”⁹ and that agencies are “not required, by FOIA or by any other statute, to dig out all the information that might exist, in whatever form or place it might be found, and to *create* a document that answers plaintiff’s question.”¹⁰

To the extent that a data field that you have requested exists in the EID, ICE conducted a search of the database to retrieve that data field and provided that information to you. To the extent that your FOIA request asked questions, ICE has not answered those questions. If the information requested does not exist in a searchable form and would require ICE to create new records via calculations or conducting data analysis, ICE did not conduct those calculations or analysis and did not provide that information because the agency is not obligated to create new records in response to a FOIA request.

“[D] The response also failed to abide by FOIA’s “reasonably segregable” obligations. FOIA does not permit withholding of information that is not in itself exempt simply because it is found within other information that may be exempt from disclosure.”

With respect to [D] above, you stated that “FOIA does not permit withholding of information that is not in itself exempt simply because it is found within other information that may be exempt from disclosure.”

As explained in the ICE FOIA Office's letter, dated February 2, 2017, ICE has applied FOIA Exemptions (b)(6) and (b)(7)(C) to protect from public disclosure personally identifiable information pertaining to third party individuals. The *harm* to the personal privacy of the individuals in the records you have requested outweighs any minimal public interest in the disclosure of the information. Please understand that any litigation interest you may have in that information cannot factor into this determination. In addition, the Enforcement Integrated Database (EID) does not contain a data field “year of birth,” which you requested in your FOIA request. ICE provided the “Birth Date” data field instead. ICE is unable to release the birth date, birth year, Subject Id, Eid Civ Pers Id, Eid Civ Id, Government Employee Id, and Detainer Id2, because, in conjunction with

⁷ *Forsham v. Harris*, 445 U.S. 169, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 4212 U.S. 132, 161-62, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)).

⁸ *Yeager v. DEA*, 678 F.3d 315, 321 (D.C.Cir.1982).

⁹ *Hudgins v. IRS*, 620 F.Supp. 19, 21 (D.D.C.1985, *aff’d mem.*, 808 F.2d 137 (D.C.Cir.1987)).

¹⁰ *Frank v. U.S. Dep’t of Justice*, 941 F.Supp. 4, 5 (1996) (emphasis added).

the other information released on the spreadsheet, including, but not limited to, Aor, Gender, Birth Country, Citizenship Country, Birth Date, Entry Date, Entry Status, Detainer Detention Facility, City, State, Projected Release Day, Projected Release Date, Projected Release Month, and Projected Release Year, because the release of that information could potentially allow the individuals to be identified.

In addition, upon a complete review of the information withheld by ICE in the initial determination on your FOIA request, as well as the entire administrative record, ICE has determined that the columns "Subject Id", "Eid Civ Pers Id," "Eid Civ Id," "Government Employee Id," and "Detainer Id2," should also be withheld under FOIA Exemption (b)(7)(E). Therefore, ICE is also asserting Exemption (b)(7)(E) to this information, at this time. FOIA Exemption (b)(7)(E) is applied to protect from disclosure investigative techniques and procedures, such as internal agency subject and database codes and numbers, which are not well known to the public.

Upon a review of the information withheld by ICE in the initial determination on your FOIA request, specifically within the "Eid Civ Pers Id" column, ICE has determined that some of the information contained in this column, which was previously withheld, is releasable to you under the FOIA. Therefore, ICE is remanding your request to the ICE FOIA Office for reprocessing and direct response to you.

"[E] The agency's response also claimed that release of some information was exempt from disclosure. However, the claimed exemptions do not apply to the specific information items that were withheld. In addition, the response failed to comply with new requirements contained in the FOIA Improvement Act of 2016. No exemption can be claimed unless 'the agency reasonably foresees that disclosure would harm an interest protected by [such] an exemption.' The response did not point to any harm that could be reasonably foreseen that would justify such withholding. We are also concerned that the redaction method used did not fully comply with legal requirements."

With respect to [E] above, you stated that "[n]o exemption can be claimed unless 'the agency reasonably foresees that disclosure would harm an interest protected by [such] an exemption.' The response did not point to any harm that could be reasonably foreseen that would justify such withholding."

As explained in the ICE FOIA Office's letter, dated February 2, 2017, ICE has applied FOIA Exemptions (b)(6) and (b)(7)(C) to protect from public disclosure personally identifiable information pertaining to third party individuals. The *harm* to personal privacy of the individuals in the records you have requested outweigh any minimal public interest in the disclosure of the information. Please understand that any litigation interest you may have in that information cannot factor into this determination. With respect to the "Birth Date," "Subject Id", "Eid Civ Pers Id," "Eid Civ Id," "Government Employee Id," and "Detainer Id2," columns, ICE has determined that these fields are related to an individual subject to a detainer, or government employees, and are therefore properly withheld under FOIA Exemptions (b)(6) and (b)(7)(C).

The columns "Subject Id", "Eid Civ Pers Id," "Eid Civ Id," "Government Employee Id," and "Detainer Id," are also being withheld under FOIA Exemption (b)(7)(E). FOIA Exemption (b)(7)(E)

is applied to protect from disclosure investigative techniques and procedures, such as internal agency subject and database codes and numbers, which are not well known to the public, and the disclosure of which could reasonably be expected to cause *harm* to the agency and risk circumvention of the law.

Conclusion

Upon a complete review of the information withheld by ICE in the initial determination on your FOIA request, ICE has determined that some of the information contained in the “Eid Civ Pers Id” column, which was previously withheld, is releasable to you under the FOIA. Therefore, ICE is remanding your request to the ICE FOIA Office for reprocessing and direct response to you.

Upon a complete review of the administrative record, ICE affirms the adequacy of the search conducted on your FOIA request.

Should you have any questions regarding this appeal remand, please contact Ryan Stubbs, Associate Legal Advisor with the ICE Office of the Principal Legal Advisor, at Ryan.Stubbs@ice.dhs.gov. In the subject line of the email please include the word “appeal,” your appeal number, which is **2017-ICAP-00302**, and the FOIA case number, which is **2017-ICFO-08062**.

Sincerely,

Ryan Stubbs

for Erin J. Clifford
Chief
Government Information Law Division
ICE Office of the Principal Legal Advisor
U.S Department of Homeland Security