



IMMIGRANT
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Honoring our immigrant past, shaping our immigrant future

September 18, 2021

U.S. Department of Justice
Executive Office for Immigration Review (EOIR)
Office of the General Counsel – FOIA Service Center
FOIA/Privacy Act Requests
5107 Leesburg Pike, Suite 1903
Falls Church, VA 22041

Via email: EOIR.FOIARequests@usdoj.gov

Re: Freedom of Information Act Request

Dear FOIA Officer:

Immigrant Legal Defense (ILD) and the American Immigration Council (Council) submit the following request for information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, et. seq. In accordance with 5 U.S.C. § 552(a)(6)(A)(i), we expect that you will respond to this request within twenty working days, unless otherwise permitted by statute.

1. REQUEST FOR INFORMATION

The present request is for the following records from the Executive Office for Immigration Review (EOIR):

- A.** For FY 2011 through the present, the total number of motions to reconsider that have been filed with the Board of Immigration Appeals (Board).
- B.** For each motion to reconsider in Section A, please provide the following data:
 - i.** Date that the motion was filed;
 - ii.** Which party in the removal proceeding filed the motion, i.e., Respondent or counsel for the U.S. Immigration and Customs Enforcement)
 - iii.** Date that the Board decided the motion;
 - iv.** Disposition of the decided motion, i.e., whether the Board denied or granted the motion.



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2. FEE WAIVER REQUEST

ILD and the Council request a fee waiver because the information they seek 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 [requesters]. . . .” 5 U.S.C. § 552(a)(4)(A)(iii).

A. Disclosure Will Contribute to Public Understanding of EOIR Operations

Through this FOIA request, ILD and the Council seek information regarding a key governmental operation, that is, the Board’s adjudication of motions to reconsider. These motions constitute an important procedural mechanism for purposes of judicial review under 8 U.S.C. § 1252(a)(1), as outlined below. Given the consequential nature of these motions, ILD, the Council and the public should have access to the information requested, which will improve understanding of the frequency, timing and disposition of these motions as adjudicated by the Board.

i. Requesters Seek Information Regarding the Board of Immigration Appeals’ Adjudication of Motions to Reconsider

The immigration courts and the Board are tasked with administering the immigration laws of the United States. 8 C.F.R. § 1003.1; 1003.9; 1003.10. These courts collectively preside over removal proceedings to determine whether noncitizens subject to these proceedings will be ordered removed from the United States. *Id.* In many circumstances, a noncitizen may challenge a removal order by filing a petition for review with a federal court of appeals with jurisdiction over the petition. 8 U.S.C. § 1252(a)(1). In order to seek review before a court of appeals, a noncitizen must exhaust remedies “as of right.” 8 U.S.C. § 1252(d)(1). The noncitizen ordinarily must first appeal the immigration judge’s removal order to the Board of Immigration Appeals. *See e.g.*, 8 C.F.R. 1003.38. If the Board upholds the removal order, the noncitizen may then file a petition for review before the federal court of appeals.

Several courts of appeals have held or otherwise suggested that in order to fully exhaust administrative remedies and legal issues prior to seeking review in federal court, a noncitizen must first have filed a motion to reconsider before the Board of Immigration Appeals. *See e.g.*, *Mencia Medina*; 6 F.4th 846, 849 (8th Cir. 2021) (and cases cited therein) same.

Because many courts of appeals have held that the failure to pursue a motion to reconsider before the Board will result in the denial of a petition for review for failure to exhaust, motions to reconsider can play an important role in the judicial review of removal orders in the courts of



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appeals., Information regarding the Board's treatment of motions to reconsider will shed light on access to due process in immigration proceedings.

ii. Requesters Seek to Share This Information for the Benefit of the Public

As outlined further below, ILD and the Council intend to make the information received in response to this request available to the public at no charge. Both requesters have significant audience reach, which includes varied segments of the U.S. public.

ILD is a legal services organization that regularly provides legal consultations, information and representation to hundreds of noncitizens each year. ILD also provides training and mentoring to attorneys in their representation of low-income non-citizens. ILD must routinely assess and advise on the propriety of a motion to reconsider as part of its mission to defend noncitizens who seek to challenge a removal order. ILD attorneys regularly file petitions for review where the question of exhaustion, and by extension, the need to file a motion to reconsider, arises.

The Council regularly provides information to the public based on its FOIA requests.¹ It synthesizes and publishes information about governmental operations obtained from FOIA requests on its publicly accessible website. In calendar year 2020, the Council's website received more than 2.4 million pageviews from more than 1.4 million visitors. The Council also has regular contact with national print and news media and plans to share information obtained from FOIA disclosures with interested media.

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



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B. Disclosure of the Information Is Not in the Commercial Interest of ILD and the Council

ILD is a non-profit legal services organization that provides consultation and representation to noncitizens at no cost. ILD will, in coordination with the Council, publicize the information it obtains via this request.

The Council is a not-for-profit organization and has no commercial interest in the present request. *See e.g.* 6 C.F.R. § 5.11(k)(3)(i)-(ii). This request furthers the Council's work to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of immigrants in the United States. As with all other reports and information available on the Council's website, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge.

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 v. Rossotti*, 326 F.3d 1309, 1312 (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).

3. EXEMPTIONS

The information that ILD and the Council seek is not subject to exemptions. However, if EOIR concludes that statutory exemptions apply to any of the information requested, 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.

4. FORMAT OF PRODUCTION

ILD and the Council seek the data in a workable format, such as Microsoft Excel. Please also provide a glossary or other descriptive records containing definitions of acronyms, numerical codes or terms contained in data responsive to this request, if those terms are not in the form template and/or publicly defined.



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If you have any questions or concerns, please contact me by phone at (872) 256-1979, or by email at claudia@ild.org.

Sincerely,

Claudia Valenzuela
Managing Attorney