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13 IMMIGRANT LEGAL RESOURCE CENTER,
14 AMERICAN IMMIGRATION COUNCIL, and
15 MIJENTE SUPPORT COMMITTEE

16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 IMMIGRANT LEGAL RESOURCE CENTER,
19 AMERICAN IMMIGRATION COUNCIL, and
20 MIJENTE SUPPORT COMMITTEE

21 Plaintiffs,

22 v.

23 UNITED STATES DEPARTMENT OF
24 HOMELAND SECURITY; UNITED STATES
25 IMMIGRATION AND CUSTOMS
26 ENFORCEMENT,

27 Defendants.

Case No.: 22-cv-00183

**COMPLAINT UNDER THE
FREEDOM OF INFORMATION ACT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1
2 1. U.S. Immigration and Customs Enforcement (“ICE”), the agency within the U.S.
3 Department of Homeland Security (“DHS”) (together collectively with ICE, “Defendants”) that
4 oversees the detention and deportation of immigrants, is improperly withholding operational
5 guidance, records, and data relating to the review and approval of civil enforcement actions against
6 individuals outside of the interim enforcement and removal priorities in effect at ICE from February
7 1, 2021 to November 29, 2021. These records were required to be generated pursuant to a January 20,
8 2021 memorandum from Acting Secretary David Pekoske titled “*Review of and Interim Revision to*
9 *Civil Immigration Enforcement and Removal Policies and Priorities*”¹ (“Pekoske memorandum”) and
10 a February 18, 2021 memorandum from Acting ICE Director Tae D. Johnson titled “*Interim*
11 *Guidance: Civil Immigration Enforcement and Removal Priorities*”² (“Johnson memorandum”).
12 Plaintiffs Immigrant Legal Resource Center (“ILRC”), American Immigration Council (“AIC”) and
13 Mijente Support Committee (“Mijente,” collectively with ILRC and AIC, “Plaintiffs”) requested
14 these records pursuant to the Freedom of Information Act (“FOIA” or the “Act”), 5 U.S.C. § 552, on
15 September 23, 2021, but Defendants failed to respond within the statutory time period. Plaintiffs
16 accordingly seek the immediate release of these records and other appropriate relief.

17 2. The Pekoske memorandum identified three priority categories for civil immigration
18 enforcement. Pekoske memorandum at 2. The Johnson memorandum instructed that any enforcement
19 or removal actions inconsistent with those priorities would require preapproval from an ICE Field
20 Office Director (“FOD”) or Special Agent in Charge (“SAC”) and must be supported by written
21 justification. Johnson memorandum at 6. The Johnson memorandum also required ICE field offices to
22 collect data on the nature and type of enforcement and removal actions they perform. *Id.* at 5.

24 ¹ *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and*
25 *Priorities*, Memorandum from David Pekoske, Acting Secretary, to Troy Miller, Tae Johnson, and
26 Tracey Renaud (Jan. 20, 2021),
https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf (last
accessed January 10, 2022).

27 ² *Interim Guidance: Civil Immigration Enforcement and Removal Priorities*, Memorandum from Tae
28 Johnson, Acting Director, to ICE Employees (Feb. 18, 2021),
[https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf)
[guidance.pdf](https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf) (last accessed January 10, 2022).

1 3. Plaintiffs seek records created in response to these memoranda related to
2 immigration officials' requests to deviate from interim enforcement and removal priorities. The
3 records include operational guidance created by DHS or ICE regarding the process for FODs or SACs
4 to review and approve such actions; all requests for approval of enforcement actions outside of the
5 interim enforcement and removal priorities, including the approvals, denials, or other responses to
6 those requests; data regarding each request, such as the dates of requests and responses, the number
7 of such requests by field office, and how many were approved or denied since January 20, 2021; and
8 any forms or templates created or used by ICE officers to request approval of enforcement actions.

9 4. Policy makers and community members impacted by immigration enforcement are
10 acutely interested in changes to civil enforcement and removal policies, especially from one
11 administration to another. The requested data is needed to ensure ICE's compliance with guidance set
12 forth in the Johnson memorandum, consistency across geographic areas of responsibility, and to
13 evaluate the effectiveness of interim priorities. *Id.* Disclosure of all of the requested records will
14 contribute to the public's understanding of government operations and enable oversight of agency
15 actions and compliance with federal policies across various field offices.

16 5. FOIA sets a 20-day statutory deadline for agencies to respond to FOIA requests. ICE
17 received Plaintiffs' request on September 23, 2021. On October 7, ICE invoked a 10-day extension,
18 as permitted by law, but then failed to respond.

19 6. The immediate disclosure of the requested records is needed to remedy the lack of
20 current information available to the public and to ascertain whether the agency adhered to the
21 Pecoske and Johnson memorandum's requirements on the review and approval of enforcement
22 actions against individuals outside of the interim enforcement priorities. Plaintiffs accordingly bring
23 this suit under the FOIA for declaratory, injunctive, and other appropriate relief.

24 **JURISDICTION & VENUE**

25 7. This Court has subject matter jurisdiction over this action and personal jurisdiction
26 over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), (6)(C)(i), and (6)(E)(iii). This Court also has
27 subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331.
28

1 8. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B), because ILRC has its
2 principal place of business in this district.

3 9. Assignment to the San Francisco Division is proper pursuant to Civil Local Rule 3-
4 2(c) and (d) because a substantial portion of the events giving rise to this action occurred in San
5 Francisco County, where Plaintiff ILRC maintains its principal place of business.

6 **PARTIES**

7 10. Plaintiff Immigrant Legal Resource Center is a nonprofit organization that works with
8 immigrants, community organizations, legal professionals, law enforcement, and policy makers to
9 build a democratic society that values diversity and the rights of all people. ILRC maintains its
10 principal place of business in San Francisco, California.

11 11. Plaintiff American Immigration Council is a nonprofit organization that works to
12 increase public understanding of immigration law and policy, and to advocate for the fair and just
13 administration of U.S. immigration laws as well as to protect the legal rights of noncitizens. AIC
14 maintains a principal place of business in Washington, D.C.

15 12. Plaintiff Mijente Support Committee is a national nonprofit organization that
16 coordinates and organizes with its members in several states to address issues relating to immigration
17 enforcement and Latinx political participation. Mijente maintains a principal place of business in
18 Phoenix, Arizona.

19 13. Defendant U.S. Department of Homeland Security is a department of the executive
20 branch of the United States government that is tasked with, among other things, administering and
21 enforcing the federal immigration laws.

22 14. Defendant U.S. Immigration and Customs Enforcement is the agency within DHS
23 that is specifically responsible for immigration enforcement.

24 **FACTS**

25 **I. *Background – ICE Changes to Enforcement and Removal Policies and Priorities***

26 15. On January 20, 2021, Acting Secretary of DHS David Pekoske issued a memorandum
27 titled “*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and*
28 *Priorities.*” The Pekoske memorandum directed DHS to conduct a review of policies and practices

1 concerning immigration enforcement, including an identification of interim priorities for civil
2 immigration enforcement. The memorandum identified three categories of enforcement priorities for
3 DHS (including ICE): 1. National security; 2. Border security; and 3. Public safety. These priorities
4 applied “not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad
5 range of other discretionary enforcement decisions, including deciding: whom to stop, question, and
6 arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and
7 whether to grant deferred action or parole.” Pekoske memorandum at 2. Acting Secretary Pekoske
8 directed the Acting Director of ICE to promulgate operational guidance on the implementation of
9 these priorities, including a protocol for the Acting Secretary to conduct a periodic review of
10 enforcement actions to ensure consistency with the priorities set forth in the memorandum. *Id.*

11 16. On February 18, 2021, ICE Acting Director Tae D. Johnson issued a memorandum
12 titled “*Interim Guidance: Civil Immigration Enforcement and Removal Priorities.*” This
13 memorandum provided operational guidance on the civil enforcement priorities identified in the
14 Pekoske memorandum and laid out the review and approval process and data collection requirements
15 that form the basis of Plaintiffs’ FOIA request.

16 17. Pursuant to the Pekoske memorandum, the Acting Director of ICE must issue
17 operational guidance on ICE’s implementation of its civil enforcement priorities. *Id.* at 3. The
18 Johnson memorandum delineates the process for the review and approval of civil immigration
19 enforcement actions against individuals outside of the interim enforcement priorities:

20 Any civil immigration enforcement or removal actions that do not meet
21 the above criteria for presumed priority cases will require preapproval
22 from the FOD or SAC. In deciding to undertake an enforcement action
23 or removal, the agent or officer must consider, in consultation with his
24 or her leadership, the nature and recency of the noncitizen’s convictions,
25 the type and length of sentences imposed, whether the enforcement
26 action is otherwise an appropriate use of ICE’s limited resources, and
27 other relevant factors. In requesting this preapproval, the officer or agent
28 must raise a written justification through the chain of command,
explaining why the action otherwise constitutes a justified allocation of
limited resources, and identify the date, time and location the
enforcement action or removal is expected to take place.

27 Johnson memorandum at 6. The guidance set forth in the Johnson memorandum was “effective
28 immediately.” *Id.* at 1.

1 18. Also pursuant to the Johnson memorandum, ICE field offices must collect data on
2 enforcement and removal actions, including those that depart from the interim enforcement priorities

3 To ensure compliance with this guidance and consistency across
4 geographic areas of responsibility, and to facilitate a dialogue between
5 headquarters and field leadership about the effectiveness of the interim
6 guidance, ICE will require that field offices collect data on the nature
7 and type of enforcement and removal actions they perform. [...] The
8 data and coordination will inform the development of the Secretary's
9 new enforcement guidance.

10 *Id.* at 5.

11 19. On August 19, 2021, a federal judge in the Southern District of Texas issued a
12 preliminary injunction against the enforcement of these two memoranda, and litigation is pending.
13 *State of Texas et al v. United States et al*, No. 6:21-cv-00016, Dkt. 79 (S.D. Tex. Aug. 19, 2021). The
14 preliminary injunction, which had a delayed effective date of August 30, 2021, was temporarily
15 administratively stayed by the Fifth Circuit in *State of Texas et al v. United States et al*, No. 21-40618
16 (5th Cir. Aug. 25, 2021). On September 15, 2021, the Fifth Circuit granted-in-part and denied-in-part
17 the government's motion to stay the district court's injunction pending appeal. On November 30,
18 2021, the Fifth Circuit, on rehearing *en banc*, vacated the September stay. However, on information
19 and belief, none of these rulings disrupted the requirements for the generation and consideration of
20 preapproval requests in order to deviate from interim enforcement priorities or the data collection at
21 issue in this FOIA request.

22 20. On September 30, 2021, DHS Secretary Alejandro N. Mayorkas issued a
23 memorandum titled "*Guidelines for the Enforcement of Civil Immigration Law*."³ Although this
24 memorandum set forth revised guidelines on enforcement priorities and reporting as compared to the
25 Pekoske memorandum, it did not become effective until November 29, 2021.

26 21. Because the salient portions of the Pekoske memorandum and the Johnson
27 memorandum remained in effect between February 18, 2021 and November 29, 2021, Defendants
28

³ *Guidelines for the Enforcement of Civil Immigration Law*, Memorandum from Alejandro N. Mayorkas, Secretary, to Tae D. Johnson, Troy Miller, Ur Jaddou, Robert Silvers, Katherine Culliton-González, Lynn Parker Dupree (Sept. 30, 2021), <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> (last accessed January 10, 2022).

1 should, on information and belief, have been continuously generating the requested records in that
2 timeframe.

3 **II. *Plaintiffs' Request for Crucial Records Under the Freedom of Information Act and***
4 ***Defendants' Failure to Timely Respond***

5 22. On September 23, 2021, Plaintiffs requested that ICE produce operational guidance,
6 preapproval requests and responses, and data pertaining to the review and approval of civil
7 immigration enforcement actions against individuals outside the interim enforcement and removal
8 priorities. These records would have been produced pursuant to the Pecoske and Johnson
9 memoranda. *See* FOIA Request, attached hereto as Exhibit A.

10 23. ICE responded by e-mail on October 7, 2021, acknowledging receipt of the request
11 and invoking the ten-day extension period for response provided in 5 U.S.C. § 552(a)(6)(B), giving
12 the agency a total of thirty working days to respond to the request with a determination of whether it
13 would comply. *See* Acknowledgment Letter, attached hereto as Exhibit B.

14 24. Defendants have failed to comply with their fundamental obligations under the Act.
15 Defendants failed to issue a determination within thirty days of the initial September 23, 2021
16 request, nor did they produce any responsive records. *See* 5 U.S.C. § 552(a)(6)(B).

17 **III. *Ongoing Harm and Need for the Unlawfully Withheld Records***

18 25. Plaintiffs' request remains pending and ICE has failed to issue the legally required
19 determination or produce responsive records, depriving the public of vital information concerning the
20 agency's compliance with its own priorities and guidance while the Pecoske and Johnson memoranda
21 were operative.

22 26. Defendants' continued failure to produce records responsive to Plaintiffs' request
23 violates the FOIA and deprives Plaintiffs of the ability to inform the public of a matter of exceptional
24 public importance. Plaintiffs accordingly seek relief from this Court.

1 **CLAIMS FOR RELIEF**

2 **First Claim**

3 **Failure to Determine Whether to Comply with the Request in Violation of FOIA**

4 27. Plaintiffs repeat and incorporate all facts in paragraphs 1 through 26 as though set
5 forth fully herein.

6 28. Defendants have a statutory obligation to respond to Plaintiffs' FOIA request and to
7 communicate that determination to Plaintiffs within thirty days of receiving the request. 5 U.S.C.
8 § 552(a)(6)(A).

9 29. Defendants' failure to make such a determination and to communicate it to Plaintiffs
10 violates the FOIA. 5 U.S.C. § 552 (a)(6)(E)(iii).

11 **Second Claim**

12 **Improper Withholding of Agency Records in Violation of FOIA**

13 30. Plaintiffs repeat and incorporate all facts in paragraphs 1 through 26 as though set
14 forth fully herein.

15 31. Defendants have failed to produce any records in response to Plaintiffs' FOIA
16 request.

17 32. Defendants' failure to produce these records violates their statutory obligation to
18 make requested records "promptly" available to the public. 5 U.S.C. § 552(a).

19 **Third Claim**

20 **Failure to Conduct a Reasonable Search**

21 33. Plaintiffs repeat and incorporate all facts in paragraphs 1 through 26 as though set
22 forth fully herein.

23 34. Defendants have failed to make a reasonable effort to search for records sought by
24 Plaintiffs' request, and that failure violates the FOIA, 5 U.S.C. § 552(a)(6)(A), and corresponding
25 regulations.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs pray that this Court:

28 A. Order Defendants to issue a determination within seven days;

1 B. Order Defendants to process the requested records in their entirety, to disclose the
2 requested records in their entirety, and to make copies available to Plaintiffs in their entirety within
3 thirty days;

4 C. Order Defendants to prepare a *Vaughn* index for any documents they seek to continue
5 to withhold under a FOIA exemption;

6 D. Award Plaintiffs their costs and reasonable attorney's fees incurred in this action
7 pursuant to 5 U.S.C. § 552(a)(4)(E); and

8 E. Order such other relief that the Court deems just and appropriate.
9

10 Dated: January 11, 2022

Respectfully Submitted,

11 By: */s/ W. Hardy Callcott*

12

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24 IMMIGRANT LEGAL RESOURCE CENTER,
AMERICAN IMMIGRATION COUNCIL, and
25 MIJENTE SUPPORT COMMITTEE
26
27
28

AO 440 (Rev. 06/12) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Northern District of California

IMMIGRANT LEGAL RESOURCE CENTER,
AMERICAN IMMIGRATION COUNCIL, and
MIJENTE SUPPORT COMMITTEE

Plaintiff(s)

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY; UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT

Defendant(s)

Civil Action No. 22-cv-00183

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) UNITED STATES DEPARTMENT OF HOMELAND SECURITY;
UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT c/o
Office of the General Counsel
U.S. Department of Homeland Security
245 Murray Lane, SW
Mail Stop 0485
Washington, DC 20528-0485

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — 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: W. Hardy Callcott, Sue Wang, Wesley Chao, SIDLEY AUSTIN LLP, 555 California
Street, Suite 2000, San Francisco, California 94104

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:

Signature of Clerk or Deputy Clerk

Civil Action No. 22-cv-00183

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*:

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 _____.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Exhibit A



September 23, 2021

Submitted via Electronic Mail to ice-foia@dhs.gov

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

RE: FREEDOM OF INFORMATION ACT REQUEST TO U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Dear FOIA Officer:

This is a Freedom of Information Act (FOIA) request by the Immigrant Legal Resource Center ("ILRC"), the American Immigration Council ("Council") and Mijente Support Committee (together with the ILRC and Council, "Requesters") under 5 U.S.C. § 552.

The ILRC works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the rights of immigrant families and the communities in which they live. The ILRC also provides technical assistance to immigration practitioners on many aspects of immigration law, with a focus on the intersection between the immigration and criminal justice systems. The ILRC works towards the elimination of unjust penalties for immigrants entangled in the criminal justice system and to end the criminalization of immigrant communities. The ILRC is a non-profit public interest organization under Internal Revenue Code Section 501(c)(3).

The Council was established to increase public understanding of immigration law and policy, advocate for the fair and just administration of U.S. immigration laws, protect the legal rights of noncitizens and citizens, and educate the public about the enduring contributions of immigrants. Through research and analysis, the Council informs policymakers at the national, state, and local levels who seek to understand the power and potential of immigration and to develop policies that are based on facts rather than myths. The Council also seeks to hold the government accountable for unlawful conduct and restrictive interpretations of the law and for failing to ensure that the immigration laws are implemented and executed in a manner that

comports with due process through the pursuit of transparency and impact litigation. The Council is a non-profit public interest organization under Internal Revenue Code Section 501(c)(3).

Mijente Support Committee is a national organization that coordinates and organizes with its members in several states to address issues relating to immigration enforcement and Latinx political participation.

I. Request for Records

We request the following records and information:

- Records created by the U.S. Department of Homeland Security (“DHS”) providing operational guidance regarding the process for ICE Field Office Directors or Special Agents in Charge to review and approve civil immigration enforcement actions against individuals outside of the interim enforcement and removal priorities (“Interim Enforcement Priorities”) provided in the Jan. 20, 2021 memorandum from Acting Secretary David Pekoske entitled “*Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*” (“Pekoske memorandum”) ¹ and the directive from Acting ICE Director Tae Johnson on February 18, 2021 entitled “*Interim Guidance: Civil Immigration Enforcement and Removal Priorities.*” (“Johnson memorandum”).²
- All ICE agents’ (including 287(g) designated officers and contractors) requests for approval of enforcement actions outside of the Interim Enforcement Priorities, including written justifications for the requests, as well as the approvals, denials or other responses to those requests, pursuant to the process created by the Pekoske memo and the Johnson memo.
- Data regarding each request for approval of enforcement actions outside of the Interim Enforcement Priorities. For each request, please provide:
 - The date of each request
 - The field office to which the request was directed
 - The date of the response to the request

¹ Memorandum from David Pekoske, Acting Secretary, to Troy Miller, Tae Johnson, and Tracey Renaud on *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities* (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf. On September 15, 2021, the Fifth Circuit Court of Appeals partly stayed the preliminary injunction issued by the Southern District of Texas blocking the enforcement of this policy. *State of Texas et al v. United States et al.*, No. 21-40618 (5th Cir. Sept. 15, 2021). The Fifth Circuit’s decision allows for ICE to continue to apply the enforcement and removal priorities.

² Memorandum from Tae Johnson, Acting Director, to ICE Employees on *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021), https://www.ice.gov/doclib/news/releases/2021/021821_civil-immigration-enforcement_interim-guidance.pdf.

- The decision to approve or deny the request or any other decision related to the request.
- Records providing the total number of pre-approval requests for enforcement actions, including how many were made from each field office and how many were approved or denied by each field office per month, since January 20, 2021.
- Forms or templates created or used by ICE officers to request approval of enforcement actions.

Requesters do not seek the names or contact information of individuals or other exempt personal identifiable information of people referenced in the records requested herein. If any of the requested records contain exempt personal identifiable information, Requesters ask that said personal identifiable information be redacted in a manner as to ensure that the maximum relational information contained within the records is provided. Nothing in this request should be construed as a waiver of Requesters' right to challenge any redactions made on the basis of personal identifiable information, including in the event of litigation regarding this FOIA request.

Unless otherwise stated, all requests for "records" refer to all physical or electronic records that were prepared, received, transmitted, collected, or maintained by ICE, including documents, meeting notes and minutes, lists of meeting participants, electronic (emails) and paper correspondence, legal research, legal opinions, letters, drafts, internal agency guides, regulations, memoranda, and spreadsheets. Furthermore, the scope of the search should not be limited to ICE-originated records and should be construed to include records that are currently in the possession of any U.S. government contractors for purposes of records management. Records should be provided in electronic format wherever possible.

II. Request for Fee Waiver

Under the FOIA, we request a waiver of fees.³ A fee waiver requires that: (1) "disclosure of the 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 (2) the request "is not primarily in the commercial interest of the requestor."⁴

The public interest criteria is satisfied when (1) the request concerns operations or activities of the government; (2) disclosure is likely to contribute to an understanding of government operations or activities; (3) disclosure contributes to an understanding of the subject by the

³ 5 U.S.C. § 552 (West 2017).

⁴ *See id.*; *Larson v. C.I.A.*, 843 F.2d 1481, 1483 (D.C. Cir. 1988) (holding a public interest must be identified with "reasonable specificity"); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987) (holding that requestors must explain with reasonable specificity how disclosure will contribute to public understanding); 6 C.F.R. § 5.11(k)(1).

public at large; and (4) disclosure is likely to contribute significantly to such understanding.⁵ This request meets all four of these criteria.

A. Disclosure Will Contribute to Understanding ICE Operations

Requesters seek to use the requested information to: (a) inform advocates about immigrant enforcement patterns for the purpose of upholding immigrant rights; (b) enable oversight of agency actions and monitor compliance with federal policies across various field offices to ensure consistency and adherence to the protocols announced by the agency; and (c) collaborate with media organizations to disseminate information about immigration enforcement to the public.

This request clearly concerns the operations and activities of the government, in this case, ICE, a federal agency subcomponent of the DHS. Disclosure of these records will contribute to the understanding of government operations in several ways. The records will enable advocates and the public to discern the type of cases the agency prioritizes for enforcement action; to ascertain whether the agency abides by its own policy directives; and the extent of actual supervision and accountability within the agency. The records requested will expand and improve public understanding of immigration enforcement and allow the public to have clearer expectations regarding ICE policies and operations in light of policy changes from one administration to another.

Disclosure of these records will contribute to the understanding of immigration enforcement by the public at large because the records will explain the agency's implementation of its own new enforcement guidance. Policymakers and community members impacted by immigration enforcement are acutely interested in changes to civil enforcement and removal policies.

The Requesters employ multiple channels of communication and platforms to disseminate information obtained in response to the public.

The ILRC has demonstrated the expertise and technical ability to understand, digest, summarize, and disseminate responsive information obtained from ICE as a result of FOIA requests. The ILRC has been particularly involved in informing and educating the public about the DHS Enforcement Priorities and their implications and interpretation, as well as monitoring the agency's compliance with those priorities. The ILRC has produced explanatory materials, practice advisories, and trainings meant to inform advocates and attorneys about what to expect and how to advise their clients with regards to enforcement policy, as well as educating the public about the DHS Enforcement Priorities and their implications and interpretation.⁶

⁵ 6 C.F.R. § 5.11(k)(2) (2017) (DHS regulations outlining criteria for responses to requests for fee waivers under FOIA); *See also Judicial Watch, Inc. v. U.S. Dep't of Justice*, 365 F.3d 1108, 1126 (D.C. Cir. 2004) (citing 28 C.F.R. § 16.11(k)(2)).

⁶ Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Advocating for Clients under the Biden Administration's Interim Enforcement Priorities*, (March

Through mailing lists, social media,⁷ and the organization's webpage at www.ilrc.org, the ILRC shares reports, graphics, advisories, and other documents explaining various aspects of the immigration system. The ILRC has used previous FOIA records to produce a national map of local policies on immigration enforcement, as well as several explanatory reports.⁸

Similarly, the Council regularly synthesizes and publishes information about governmental operations obtained from FOIA requests on its publicly accessible website. This information is shared with the public in the form of summaries with links to government documents, reports, fact sheets and practice materials.⁹ 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 regularly shares information with national print and news media and plans to distribute information obtained from these FOIA disclosures to interested media.

Mijente Support Committee has demonstrated its capacity to use FOIA information to inform the public about immigration enforcement. For example, Mijente Support Committee and the Detention Watch Network filed FOIA litigation over ICE's Operation Mega, and published the resulting documents in context on a webpage dedicated to this topic.¹⁰ In partnership with other organizations, Mijente Support Committee has also published several reports seeking to advance the public's knowledge on the surveillance technology used by ICE and the companies profiting from that relationship.¹¹ These reports are readily available through Mijente Support Committee's website to members of the public. Mijente Support Committee also utilizes its

2021) <https://www.ilrc.org/advocating-clients-under-biden-administration%E2%80%99s-interim-enforcement-priorities>; Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Practice Advisory for Criminal Defense Attorneys: The Biden Administration's Interim Enforcement Priorities*, (March 2021) <https://www.ilrc.org/practice-advisory-criminal-defense-attorneys-biden-administration%E2%80%99s-interim-enforcement-priorities>; Immigrant Legal Resource Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild, *Advocating for Clients in Removal Proceedings Using the OPLA Prosecutorial Discretion Memo*, (March 2021) <https://www.ilrc.org/advocating-clients-removal-proceedings-using-opla-prosecutorial-discretion-memo>.

⁷ Twitter.com, @the_ILRC, https://twitter.com/the_ILRC; Facebook.com, Immigrant Legal Resource Center (ILRC), <https://www.facebook.com/immigrantlegalresourcecenter/>; Instagram.com, https://www.instagram.com/the_ilrc.

⁸ See www.ilrc.org/local-enforcement-map; Lena Graber and Nikki Marquez, Searching for Sanctuary, *ILRC* (2016), available at <https://www.ilrc.org/searching-sanctuary>; Lena Graber, Kemi Bello, Nikki Marquez, and Krsna Avila, The Rise of Sanctuary, *ILRC* (2018), available at <https://www.ilrc.org/rise-sanctuary>.

⁹ See, e.g., American Immigration Council, *The Electronic Nationality Verification Program: An Overview* (Jan. 26, 2021), <https://www.americanimmigrationcouncil.org/research/electronic-nationality-verification-program-overview>; 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/interior-immigration-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.

¹⁰ Blueprint for Terror: How ICE Planned its Largest Immigration Raid in History, available at <https://mijente.net/icepapers/>.

¹¹ See <https://notechforice.com/>.

website and social media to disseminate information that furthers its mission. Mijente Support Committee has over 9,000 followers on Facebook, and close to 1,000 Twitter followers.¹² These platforms are used to share the work of Mijente Support Committee with followers and others.

Requesters have a demonstrated ability to disseminate exactly the types of information requested herein. Further, requesters plan to employ all of the above methods when sharing and disseminating the information received by ICE pursuant to this petition. Accordingly, this satisfies the test for a fee waiver that the request and disclosure would “contribute significantly to public understanding of the operations or activities of the government.”¹³

B. Disclosure of the Information is not in the Commercial Interest of Requesters

Finally, the disclosure of records would not primarily be in the commercial interest of the Requesters. The ILRC is a non-profit 501(c)(3) organization that does not primarily partake in commercial, economic, or profit-producing activity.¹⁴ The information obtained through the above request would not be sold, commercialized, or used in any way to derive profit. In fact, the interactive map composed of the information obtained through the previous FOIA request is easily searchable and available at the ILRC website (<http://www.ilrc.org>) free of charge to all members of the public,¹⁵ and the ILRC will publish the updated information received from ICE to the public in the same way.

The Council is also a not-for-profit organization that has no commercial interest in the request. The request furthers the Council’s work to increase public understanding of immigration law and policy and to advocate for the fair and just administration of U.S. immigration laws as well as to protect the legal rights of noncitizens. As with all other reports and information available on the Council’s website, the information that the Council receives in response to the Request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge.

Mijente Support Committee is a not-for-profit organization that plans to analyze and disseminate to the public the information gathered through this Request at no cost, and the records are not sought for any commercial purpose.

Please contact me if this fee waiver is not granted. The maximum dollar amount the ILRC is willing to pay for this request is \$100. If the amount for this request is greater than \$100, please contact me to discuss this request and associated pricing. You may deliver the requested

¹² Twitter.com, @mijentecomite, <https://twitter.com/mijentecomite>; Facebook.com, Mijente Support Committee, <https://www.facebook.com/mijentecomite>.

¹³ 5 U.S.C. § 552 (West 2017).

¹⁴ See *Consumers’ Checkbook, Center for Study of Services v. U.S. Dep’t of Health and Human Services*, 502 F. Supp. 2d 79 (D.D.C. 2007) (holding that a FOIA requestor who charges fees to produce and disseminate its work does not render its interest “primarily commercial” when it charges fees only to support its operation).

¹⁵ Immigrant Legal Resource Center, *National Map of Local Entanglement with ICE*, (last accessed June 1, 2017), <https://www.ilrc.org/local-enforcement-map>.

records electronically to lgraber@ilrc.org. Alternatively, you may physically mail the responsive records to the ILRC at:

ATTN: Lena Graber
Immigrant Legal Resource Center
1663 Mission St., Suite 602
San Francisco, CA 94103

If you have any questions, please do not hesitate to contact me at 415-321-8545 or lgraber@ilrc.org or you may contact our outside counsel on this matter, W. Hardy Callcott at Sidley Austin LLP, at 415-772-7402 or hcallcott@sidley.com.

Thank you for timely responding to this request.

Sincerely,
/s/
Lena Graber
Senior Staff Attorney
Immigrant Legal Resource Center

/s/
Raul Pinto
Senior Attorney
American Immigration Council

/s/
Jacinta Gonzalez
Field Director
Mijente Support Committee

Cc:
W. Hardy Callcott
Sidley Austin LLP
555 California Street, Suite 2000
San Francisco, CA 94104

Exhibit B

Sent: Thursday, October 7, 2021 10:54 AM
To: Lena Graber
Subject: ICE FOIA Request 2022-ICFO-00153

October 07, 2021

LENA GRABER
IMMIGRANT LEGAL RESOURCE CENTER
1663 MISSION STREET
STE 602
SAN FRANCISCO, CA 94103

RE: ICE FOIA Case Number 2022-ICFO-00153

Dear Ms. Graber:

This acknowledges receipt of your September 23, 2021, Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), for records created by the U.S. Department of Homeland Security ("DHS") providing operational guidance regarding the process for ICE Field Office Directors or Special Agents in Charge to review and approve civil immigration enforcement actions against individuals outside of the interim enforcement and removal priorities ("Interim Enforcement Priorities") provided in the Jan. 20, 2021 memorandum from Acting Secretary David Pekoske entitled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" ("Pekoske memorandum") 1 and the directive from Acting ICE Director Tae Johnson on February 18, 2021 entitled "Interim Guidance: Civil Immigration Enforcement and Removal Priorities." ("Johnson memorandum"), all ICE agents' (including 287(g) designated officers and contractors) requests for approval of enforcement actions outside of the Interim Enforcement Priorities, including written justifications for the requests, as well as the approvals, denials or other responses to those requests, pursuant to the process created by the Pekoske memo and the Johnson memo, data regarding each request for approval of enforcement actions outside of the Interim Enforcement Priorities, Records providing the total number of pre-approval requests for enforcement actions, including how many were made from each field office and how many were approved or denied by each field office per month, since January 20, 2021, forms or templates created or used by ICE officers to request approval of enforcement actions. Your request was received in this office on September 23, 2021.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Per Section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, ICE processes FOIA requests according to their order of receipt. Although ICE's goal is to respond within 20 business days of receipt of your request, the FOIA does permit a 10- day extension of this time period. As your request seeks numerous documents that will necessitate a thorough and wide-ranging search, ICE will invoke a 10-day extension for your request, as allowed by Title 5 U.S.C. § 552(a)(6)(B). If you care to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requesters. As a non-commercial requester, you will be charged 10 cents per page for duplication; the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-hour rate (\$4.00 for clerical personnel, \$7.00 for professional personnel, \$10.25 for managerial personnel) of the searcher. We will construe the submission of your request as an agreement to pay up to \$25.00. You will be contacted before any further fees are accrued.

We have queried the appropriate program offices within ICE for responsive records. If any responsive records are located, they will be reviewed for determination of releasability. Please be assured that one of the processors in our office will respond to your request as expeditiously as possible. We appreciate your patience as we proceed with your request.

Your request has been assigned reference number **2022-ICFO-00153**. Please refer to this identifier in any future correspondence. To check the status of an ICE FOIA/PA request, please visit <http://www.dhs.gov/foia-status>. Please note that to check the status of a request, you must enter the 2022-ICFO-00153 tracking number. If you need any further assistance or would like to discuss any aspect of your request, please contact the FOIA office. You may send

an e-mail to ice-foia@ice.dhs.gov, call toll free (866) 633-1182, or you may contact our FOIA Public Liaison, Marcus Francis, in the same manner. Additionally, you have a right to right to seek dispute resolution services from the Office of Government Information Services (OGIS) which 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. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Regards,

ICE FOIA Office
Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street, S.W., Stop 5009
Washington, D.C. 20536-5009
Telephone: 1-866-633-1182
Visit our FOIA website at www.ice.gov/foia