

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

NATIONAL IMMIGRANT JUSTICE	)	
CENTER,	)	
	)	
Plaintiff,	)	Case No.
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
HOMELAND SECURITY, UNITED	)	
STATES CITIZENSHIP AND	)	
IMMIGRATION SERVICES, UNITED	)	
STATES IMMIGRATION AND CUSTOMS	)	
ENFORCEMENT, UNITED STATES	)	
DEPARTMENT OF JUSTICE, the	)	
EXECUTIVE OFFICE FOR	)	
IMMIGRATION REVIEW, and	)	
DEPARTMENT OF THE ARMY	)	
	)	
Defendants.	)	

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended, to order defendants United States Department of Homeland Security (“DHS”), United States Citizenship and Immigration Services (“USCIS”), United States Immigration and Customs Enforcement (“ICE”), United States Department of Justice (“DOJ”), the Executive Office for Immigration Review (“EOIR”), and Department of the Army (“Army”) to produce information related to defendants’ implementation of prosecutorial discretion policies in removal proceedings. To date, plaintiff National Immigrant Justice Center (“NIJC”) has not received any substantive response to its October 20, 2011 and October 27, 2011 FOIA requests seeking this information. This action is being filed in order to vindicate the public’s fundamental right to understand how the government is employing its prosecutorial discretion in removal proceedings and whether it is fulfilling its stated goals.

## **JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*

3. Venue lies in the Northern District of Illinois pursuant to 5 U.S.C. § 552(a)(4)(B) because NIJC's principal place of business is within this district.

## **PARTIES**

4. Plaintiff NIJC is an Illinois non-profit entity dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC provides direct legal services to more than 10,000 individuals each year and advocates for these populations through direct representation, policy reform, impact litigation, and public education. It is crucial to NIJC's mandate to obtain information regarding the government's detention of non-citizens and use of prosecutorial discretion in immigration cases to ensure the protection of civil rights and liberties of detained individuals where there are no formal mechanisms to ensure such oversight. NIJC's principal place of business is Chicago, Illinois. NIJC submitted the FOIA requests that are the subject of this action.

5. Defendant DHS is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). DHS has possession of, and control over, the information sought by NIJC under FOIA.

6. Defendant USCIS is a component agency of DHS and is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). USCIS has possession of, and control over, the information sought by NIJC under FOIA.

7. Defendant ICE is a component agency of DHS and is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). ICE has possession of, and control over, the information sought by NIJC under FOIA.

8. Defendant DOJ is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). DOJ has possession of, and control over, the information sought by NIJC under FOIA.

9. Defendant EOIR is a component agency of DOJ and is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). EOIR has possession of, and control over, the information sought by NIJC under FOIA.

10. Defendant Army is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). Army has possession of, and control over, the information sought by NIJC under FOIA.

### **FACTUAL ALLEGATIONS**

11. In August 2011, the White House announced that a working group of DOJ and DHS officials would review the current deportation caseload on a case-by-case basis to determine whether to pursue removal in those cases. Exhibit A.

12. The working group was to identify high- and low-priority cases for removal, focusing on the removal of individuals identified as high-priority cases while administratively closing low-priority cases. *Id.*

13. Criteria for identifying low-priority cases are allegedly based on a memorandum released by ICE Director John Morton on June 17, 2011. Exhibit B. But the determination of whether to pursue removal is left to the government's discretion.

### **NIJC's October 20, 2011 FOIA Request to DHS, USCIS, and ICE**

14. On October 20, 2011, NIJC submitted a request pursuant to FOIA to defendants DHS, USCIS, and ICE requesting “information regarding the U.S. Department of Homeland Security’s implementation of its prosecutorial discretion guidelines and directives.” Exhibit C.

15. The letter specifically requested 26 pieces of information pertaining to “all cases **where prosecutorial discretion has been considered, exercised, and/or requested**, from January 1, 2010 to the present.” *Id.*

16. The letter also requested “any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines.” *Id.*

17. The information was requested to better understand the implementation of prosecutorial discretion in removal proceedings and to inform NIJC staff, legal advocates, clients, and the general public about the government’s exercise of prosecutorial discretion in immigration cases.

### **DHS/ICE's Response**

18. DHS/ICE received and responded to NIJC’s October 20, 2011 FOIA request on November 8, 2011. Exhibit D.

19. DHS/ICE assigned NIJC’s FOIA request the reference number 2012FOIA1406. *Id.*

20. In its November 8, 2011 response, DHS/ICE invoked a ten-day extension to respond as permitted by 5 U.S.C. § 552(a)(6)(B). *Id.*

21. To date, DHS/ICE have not sought any additional extensions of time within which to respond to NIJC’s October 20, 2011 request nor have DHS/ICE provided any of the documents requested by NIJC in its October 20, 2011 request.

22. Having received no substantive response from DHS/ICE, NIJC filed a timely appeal on April 9, 2012. Exhibit E.

23. DHS/ICE received NIJC's appeal on April 11, 2012 and responded on April 18, 2012. Exhibit F.

24. DHS/ICE assigned NIJC's appeal of its FOIA request the reference number OPLA12-471. *Id.*

25. More than twenty working days have now elapsed since NIJC's appeal was received by DHS/ICE, without any substantive response.

26. No exceptional circumstances prevent DHS/ICE from responding to NIJC's FOIA request.

#### **DHS/USCIS's Response**

27. DHS/USCIS received NIJC's October 20, 2011 FOIA request on October 24, 2011. Exhibit G.

28. DHS/USCIS responded to NIJC's October 20, 2011 FOIA request on November 7, 2011. *Id.*

29. DHS/USCIS assigned NIJC's FOIA request the reference number COW2011000997. *Id.*

30. To date, DHS/USCIS has not sought any extensions of time within which to respond to NIJC's October 20, 2011 request nor have DHS/USCIS provided any of the documents requested by NIJC in its October 20, 2011 request.

31. Having received no substantive response from DHS/USCIS, NIJC filed a timely appeal on April 9, 2012. Exhibit H.

32. DHS/USCIS received NIJC's appeal on April 11, 2012 and responded on April 18, 2012, assigning it the reference number APP2012000377. Exhibit I.

33. DHS/USCIS denied NIJC's appeal, determining that NIJC's request did not warrant expedited treatment but indicated that judicial review was available if NIJC was dissatisfied with DHS/USCIS's decision. *Id.*

34. No exceptional circumstances prevent DHS/ICE from responding to NIJC's FOIA request.

#### **Army Response**

35. On May 16, 2012, NIJC received a letter from Army responding to NIJC's October 20, 2011 FOIA request. Exhibit J.

36. Army indicated that USCIS forwarded NIJC's October 20, 2011 FOIA request to it along with 27 pages containing Army information, all of which was received by Army on May 10, 2012. *Id.*

37. Since its receipt of NIJC's October 20, 2011 FOIA request on May 10, 2012, Army has not sought any extensions of time within which to respond to that request nor has Army provided any of the documents requested by NIJC in that request.

38. No exceptional circumstances prevent Army from responding to NIJC's FOIA request.

#### **NIJC's October 27, 2011 FOIA Request to DOJ and EOIR**

39. On October 27, 2011, NIJC submitted a request pursuant to FOIA to the DOJ's Office of Information Policy seeking information from the Office of the Attorney General, EOIR, and any other subcomponents of DOJ, requesting "information regarding communications between the Department of Justice ('DOJ') and the U.S. Department of Homeland Security ('DHS') regarding implementation of prosecutorial discretion guidelines and directives." Exhibit K.

40. Specifically, NIJC requested the following that “relate to the implementation of prosecutorial discretion or immigration enforcement priorities policies and guideline[s] from January 1, 2010 to the present”:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security (“DHS”) and the DOJ which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
- b) Additionally any reports, memoranda, analysis, emails or communication by DOJ regarding implementation and use of DHS’s prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

*Id.*

41. The information was requested to better understand the implementation of prosecutorial discretion in removal proceedings and to inform NIJC staff, legal advocates, clients, and the general public about the government’s exercise of prosecutorial discretion in immigration cases.

#### **DOJ’s Response on Behalf of the Office of the Attorney General**

42. DOJ’s Office of Information Policy received NIJC’s October 27, 2011 FOIA request on October 28, 2011. Exhibit L.

43. DOJ’s Office of Information Policy responded on behalf of the Offices of the Attorney General and Deputy Attorney General on November 7, 2011. *Id.*

44. In its November 7, 2011 response, DOJ indicated that a search had been performed and that no records were found that were responsive to NIJC’s request. *Id.*

45. DOJ also stated that a copy of NIJC's request was being routed to EOIR and DOJ's Civil Division, the "Department components responsible for the adjudication of removal cases and thus . . . more likely to maintain records responsive to [NIJC's] request." *Id.*

#### **DOJ - Civil Division's Lack of Response**

46. Despite the fact that the November 7, 2011 response indicates that NIJC's request was routed to the DOJ's Civil Division, NIJC has not received a substantive response from the Civil Division.

47. Having received no substantive response from the Civil Division, NIJC filed a timely appeal on April 9, 2012. Exhibit M.

48. More than twenty working days have now elapsed since NIJC's appeal was received by DOJ's Civil Division, without any substantive response.

49. No exceptional circumstances prevent the DOJ's Civil Division from responding to NIJC's FOIA request.

#### **EOIR's Response**

50. EOIR acknowledged receipt of and responded to NIJC's October 27, 2011 FOIA request on November 2, 2011. Exhibit N.

51. EOIR assigned NIJC's FOIA request the reference number 2012-1855. *Id.*

52. In its November 2, 2011 response, EOIR invoked a ten-day extension to respond as permitted by 5 U.S.C. § 552(a)(6)(B). *Id.*

53. To date, EOIR has not sought any additional extensions of time within which to respond to NIJC's October 27, 2011 request nor has EOIR provided any of the documents requested by NIJC in its October 27, 2011 request.

54. Having received no substantive response from EOIR, NIJC filed a timely appeal on April 9, 2012. Exhibit O.

55. DOJ received NIJC's appeal on April 10, 2012 and assigned it reference number AP-2012-01970. Exhibit P.

56. On April 30, 2012, DOJ responded to NIJC's appeal, indicating that, as no adverse determination had yet been made by EOIR, there was no action for DOJ's Office of Information Policy to consider on appeal. Exhibit Q.

57. DOJ's April 30, 2012 letter further reiterated that FOIA "authorizes requesters to file a lawsuit when an agency takes longer than the statutory time period to respond. See 5 U.S.C. § 552(a)(6)(C)(i)." *Id.*

58. While DOJ's April 30, 2012 letter stated that EOIR advised the Office of Information Policy that NIJC's request is being processed, *id.*, no substantive response has yet been received to NIJC's request.

59. No exceptional circumstances prevent EOIR from responding to NIJC's FOIA request.

## **COUNT I**

### **(against DHS/ICE)**

60. NIJC incorporates and realleges paragraphs 1-59 above.

61. By statute, DHS/ICE had twenty working days from date of receipt to respond to NIJC's October 20, 2011 FOIA request.

62. Because DHS/ICE invoked the provisions of 5 U.S.C. § 552(a)(2)(C), they had another ten working days to respond to the request.

63. The requested records in NIJC's FOIA request are agency records subject to FOIA.

64. Upon information and belief, DHS/ICE have records responsive to NIJC's FOIA request in their possession.

65. NIJC has a statutory right to the records it seeks, and there is no legal basis for DHS/ICE's refusal to produce them.

66. DHS/ICE's failure to execute a sufficient search and to produce responsive records violates FOIA, 5 U.S.C. § 552(a).

67. Alternatively, DHS/ICE's failure to produce the requested documents is arbitrary and capricious.

68. DHS/ICE failed to respond to NIJC's request and to its appeal within the statutory time period. Thus, NIJC is deemed to have exhausted its administrative remedies.

## **COUNT II**

### **(against DHS/USCIS)**

69. NIJC incorporates and realleges paragraphs 1-68 above.

70. By statute, DHS/USCIS had twenty working days from date of receipt to respond to NIJC's October 20, 2011 FOIA request.

71. The requested records in NIJC's FOIA request are agency records subject to FOIA.

72. Upon information and belief, DHS/USCIS have records responsive to NIJC's FOIA request in their possession.

73. NIJC has a statutory right to the records it seeks, and there is no legal basis for DHS/USCIS's refusal to produce them.

74. DHS/USCIS's failure to execute a sufficient search and to produce responsive records violates FOIA, 5 U.S.C. § 552(a).

75. Alternatively, DHS/USCIS's failure to produce the requested documents is arbitrary and capricious.

76. DHS/USCIS failed to respond to NIJC's request within the statutory time period and denied NIJC's appeal. Thus, NIJC has exhausted its administrative remedies.

### **COUNT III**

#### **(against Army)**

77. NIJC incorporates and realleges paragraphs 1-76 above.

78. By statute, Army had twenty working days from date of receipt to respond to NIJC's October 20, 2011 FOIA request.

79. The requested records in NIJC's FOIA request are agency records subject to FOIA.

80. Upon information and belief, Army has records responsive to NIJC's FOIA request in its possession.

81. NIJC has a statutory right to the records it seeks, and there is no legal basis for Army's refusal to produce them.

82. Army's failure to execute a sufficient search and to produce responsive records violates FOIA, 5 U.S.C. § 552(a).

83. Alternatively, Army's failure to produce the requested documents is arbitrary and capricious.

84. Army failed to respond to NIJC's request within the statutory time period. Thus, NIJC is deemed to have exhausted its administrative remedies.

### **COUNT IV**

#### **(against DOJ)**

85. NIJC incorporates and realleges paragraphs 1-84 above.

86. By statute, DOJ had twenty working days from the date of receipt to respond to NIJC's October 27, 2011 FOIA request.

87. The requested records in NIJC's FOIA request are agency records subject to FOIA.

88. Upon information and belief, DOJ's Civil Division has records responsive to NIJC's FOIA request in its possession.

89. NIJC has a statutory right to the records it seeks, and there is no legal basis for DOJ's refusal to produce them.

90. DOJ's failure to execute a sufficient search and to produce responsive records violates FOIA, 5 U.S.C. § 552(a).

91. Alternatively, DOJ's failure to produce the requested documents is arbitrary and capricious.

92. DOJ failed to respond to NIJC's request and to its appeal within the statutory time period. Thus, NIJC is deemed to have exhausted its administrative remedies.

## **COUNT V**

### **(against EOIR)**

93. NIJC incorporates and realleges paragraphs 1-92 above.

94. By statute, EOIR had twenty working days from the date of receipt to respond to NIJC's October 27, 2011 FOIA request.

95. Because EOIR invoked the provisions of 5 U.S.C. § 552(a)(2)(C), it had another ten working days to respond to NIJC's FOIA request.

96. The requested records in NIJC's FOIA request are agency records subject to FOIA.

97. Upon information and belief, EOIR has records responsive to NIJC's FOIA request in its possession.

98. NIJC has a statutory right to the records it seeks, and there is no legal basis for EOIR's refusal to produce them.

99. EOIR's failure to execute a sufficient search and to produce responsive records violates FOIA, 5 U.S.C. § 552(a).

100. Alternatively, EOIR's failure to produce the requested documents is arbitrary and capricious.

101. EOIR failed to respond to NIJC's request within the statutory time period and declined to address NIJC's appeal, indicating instead that NIJC may file a lawsuit. Thus, NIJC is deemed to have exhausted its administrative remedies.

### **RELIEF REQUESTED**

WHEREFORE, NIJC prays that this Court:

- a) Enter judgment in favor of NIJC and against defendants DHS, USCIS, ICE, Army, DOJ, and EOIR;
- b) Declare that defendants DHS, USCIS, ICE, Army, DOJ, and EOIR unlawfully failed to respond to NIJC's October 20, 2011 and October 27, 2011 FOIA requests;
- c) Enjoin the withholding of responsive records to NIJC's October 20, 2011 and October 27, 2011 FOIA requests and order the production of responsive documents and information by defendants DHS, USCIS, Army, DOJ, and EOIR;
- d) Find that defendants' failure to respond to NIJC's October 20, 2011 and October 27, 2011 FOIA requests is arbitrary and capricious;
- e) Award NIJC its costs and reasonable attorneys' fees in this action; and
- f) Grant such other and further relief as the Court may deem just and proper.

Dated: June 18, 2012

Respectfully submitted,

By: /s/ Samuel Fifer

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# **EXHIBIT A**

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### Immigration Update: Maximizing Public Safety and Better Focusing Resources

Posted by [Cecilia Muñoz](#) on August 18, 2011 at 02:00 PM EDT

*Ed. Note: Cecilia Muñoz will be answering your questions on today's announcement during Office Hours on Twitter. Use the hashtag [#whchat](#) to ask questions, then join us [@whitehouse](#) at 4:15 pm EDT to follow the question and answer session.*

President Obama is deeply committed to fixing our immigration laws and has been aggressively searching for partners in Congress who are willing to work with him to pass a new law. As he focuses on building a new 21st century immigration system that meets our nation's economic and security needs, the President has a responsibility to enforce the existing laws in a smart and effective manner. This means making decisions that best focus the resources that Congress gives the Executive Branch to do this work. There are more than 10 million people who are in the U.S. illegally; it's clear that we can't deport such a large number. So the Administration has developed a strategy to make sure we use those resources in a way that puts public safety and national security first. If you were running a law enforcement agency anywhere in the world, you would target those who pose the greatest harm before those who do not. Our immigration enforcement work is focused the same way.

Under the President's direction, for the first time ever the Department of Homeland Security has prioritized the removal of people who have been convicted of crimes in the United States. And they have succeeded; in 2010 DHS removed 79,000 more people who had been convicted of a crime compared to 2008. Today, they announced that they are strengthening their ability to target criminals even further by making sure they are not focusing our resources on deporting people who are low priorities for deportation. This includes individuals such as young people who were brought to this country as small children, and who know no other home. It also includes individuals such as military veterans and the spouses of active-duty military personnel. It makes no sense to spend our enforcement resources on these low-priority cases when they could be used with more impact on others, including individuals who have been convicted of serious crimes.

So DHS, along with the Department of Justice, will be reviewing the current deportation caseload to clear out low-priority cases on a case-by-case basis and make more room to deport people who have been convicted of crimes or pose a security risk. And they will take steps to keep low-priority cases out of the deportation pipeline in the first place. They will be applying [common sense guidelines](#) to make these decisions, like a person's ties and contributions to the community, their family relationships and military service record. In the end, this means more immigration enforcement pressure where it counts the most, and less where it doesn't – that's the smartest way to follow the law while we stay focused on working with the Congress to fix it.

*Cecilia Muñoz is White House Director of Intergovernmental Affairs*

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## **EXHIBIT B**

Policy Number: 10075.1  
FEA Number: 306-112-0026

Office of the Director


U.S. Department of Homeland Security  
500 12th Street, SW  
Washington, D.C. 20536



## U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors  
All Special Agents in Charge  
All Chief Counsel

FROM: John Morton  
Director 

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil  
Immigration Enforcement Priorities of the Agency for the  
Apprehension, Detention, and Removal of Aliens

### Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement<sup>1</sup>. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

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<sup>1</sup> The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director<sup>2</sup> and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

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<sup>2</sup> Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

*Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*

communication with represented individuals<sup>3</sup> and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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<sup>3</sup> For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

## **EXHIBIT C**

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National Immigrant Justice Center

*Sent Via U.S. 2 Day Fed-Ex and Electronic Mail*

October 20, 2011

Department of Homeland Security  
Headquarters & Privacy Office  
U.S. Department of Homeland Security  
Privacy Office  
Director, Disclosure & FOIA  
245 Murray Drive SW, Building 410  
STOP-655  
Washington, D.C. 20528-0655  
E-mail: [foia@dhs.gov](mailto:foia@dhs.gov) and [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)

Re: Freedom of Information Act Request

Dear Ms. Pavlik-Keenan:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding the U.S Department of Homeland Security's implementation of its prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the of the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), Immigrations and Customs Enforcement ("ICE"), and any other subcomponents (collectively the "DHS"), as described in the specific requests listed below.

Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(II)-(III). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. § 552 (a)(6)(E).

### **Specific Requests and Instructions**

1. Please provide the following electronic records from the DHS's databases for all cases **where prosecutorial discretion has been considered, exercised, and/or requested**, from January 1, 2010 to the present. Please provide the following data:
  - a) The Immigration Court which handled the individuals' case;
  - b) The Immigration Judge(s) assigned to individuals' case;
  - c) The time period case was assigned to each individual court listed;

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## National Immigrant Justice Center

- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- f) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G-28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual/respondent;
- w) Nationality of each individual/ respondent;
- x) Month and year of birth of each individual/ respondent;
- y) Gender of each individual/ respondent;
- z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i) Whether the person has an outstanding deportation or removal order;
  - ii) Whether the person has a record of illegal re-entry into the U.S.;
  - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v) Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

**Please provide a report** generated from DHS's computer database with all of the fields requested above and in which each individual/respondent is identified by his or her A number. Please prepare the report in such a way that it will be accessible using a standard database program (such as Excel). Data in a delimited field database is also acceptable. If a delimited field database is used, please indicate the delimiter (tab, comma, etc.). Compact discs are the preferred media. Please provide data that is current as of the day of production of the data.

- 2. Please provide records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
- 3. Please provide any and all reports, memoranda, analysis, communications, or other documents,

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which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
- b) Additionally any reports, memoranda, analysis, emails or communication by DHS to the US Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

### **Request for Fee Waiver**

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which “is in the public interest because it 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.” *Id.*

From the outset, it is important to note that Congress intended to encourage “open and accountable government” under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should “apply the public-interest waiver liberally.” *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DHS regulations clarify that fee waivers are appropriate if disclosure of the requested information satisfies two requirements: that it is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and that it is “not primarily in the commercial interest of the requester.” 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, DHS has identified four relevant factors: (i) whether the subject of the request concerns “the operations or activities of the [federal] government;” (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is “likely to contribute” to an understanding of such government functions; (iii) whether disclosure of the information will contribute to “public understanding,” meaning a reasonably broad audience of interested persons



## National Immigrant Justice Center

beyond just the requester; and (iv) whether the disclosure will “significantly” increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, DHS has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC’s request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC’s request seeks information relating to the interpretation and implementation DHS’s policies regarding prosecutorial discretion. As this request concerns the application of DHS’s policies concerning implementation of immigration law and policy, including removal of non-citizens from the United States, it pertains directly to the primary mission of DHS and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate DHS’s performance and investigate whether DHS is fulfilling its stated goals. DHS has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency’s respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether “dissemination of the requested information is likely to contribute significantly to citizens’ understanding of the workings of their government.” *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined “in light of the identity and objectives of the requester, the scope of the requester’s proposed dissemination, and the requester’s capacity to disseminate the requested information.” *D.C. Technical Assistance Org., Inc. v. U.S. Dep’t. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. NIJC’s request seeks information necessary to clarify the process by which DHS applies its authority under INA § 212(a)(3)(B)(vi)(III). The identifications of organizations as Tier III terrorist organizations are government activities affecting thousands of individuals. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the provision’s effect on immigration, a subject which is of interest to the public at large and

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency’s initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.

particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, “[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement.” *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) (“Liberalizing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE’s website, newsletter and chat room are an adequate means of disseminating information. . . .”). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency’s own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency’s governmental activities.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are “hopelessly intertwined.” *Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. DHS standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS’s policies regarding prosecutorial discretion. Additionally, NIJC’s expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC’s *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization’s work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the “public at large” for this purpose. *See, e.g., Carney v. U.S. Dep’t. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov’t Ass’n v. Dep’t of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) (“public to be benefited” is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Serrv. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information through additional reports or articles that will likely be published nationwide and internationally. NIJC’s website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS

should consider NIJC's track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 ("The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE's dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons."); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, "a nonprofit, public interest organization" that "has a national reputation for researching and publishing concerns held by government whistleblowers"). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 ("A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff's can serve as an electronic clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .").

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding DHS's implementation of its prosecutorial guidelines. To date, DHS has made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public's understanding regarding the government's use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no "existing 'threshold level of public dissemination'" publicly available) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. § 5.11(k)(3)(i). The term "commercial" is used in its ordinary meaning; "[i]nformation is commercial if it relates to commerce, trade, or profit." *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(c)(3) organization. Therefore, it has no "commercial, trade, or profit interests" that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by

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NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. § 5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC's request for fee waivers thus satisfies the criteria set out in 6 C.F.R. § 5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. See 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge "reasonable standard charges for document duplication," and not search-related costs, to "a representative of the news media." Under the 2007 amendments to FOIA, "a representative of the news media" means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience." See 5 U.S.C. §552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public," (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

#### **Request for Expedited Processing Pursuant to 6 C.F.R. § 5.5(d)(ii)**

##### **There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the DHS's policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DHS itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases



## National Immigrant Justice Center

currently pending before the immigration courts in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients who's cases could be impacted by the government's exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS's implementation of its prosecutorial guidelines. Ensuring an individual's right to fair and adequate consideration of DHS's policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester's "main professional activity or occupation" but "need not be his or her sole occupation." 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC's "main professional activity."

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides on-going training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

### Conclusion

For all the foregoing reasons, NIJC requests that DHS reconsider the request for expedited processing under either 6 C.F.R. § 5.5(d)(1)(i) or 6 C.F.R. § 5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. §

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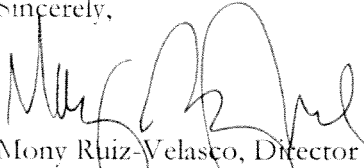
National Immigrant Justice Center

5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. 522(a)(6)(E)(vi) and C.F.R. 5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. *See* 5 U.S.C. §552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

## **EXHIBIT D**

U.S. Department of Homeland Security  
Washington, DC 20536-5009



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

November 8, 2011

MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco:

This acknowledges receipt of your October 26, 2011, Freedom of Information Act (FOIA) request to the Immigration and Customs Enforcement (ICE), for Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- t) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual! respondent; t

- w) Nationality of each individual/ respondent;
- x) Month and year of birth of each individual/ respondent;
- y) Gender of each individual/ respondent;
- z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i) Whether the person has an outstanding deportation or removal order;
  - ii) Whether the person has a record of illegal re-entry into the U.S.;
  - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v) Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

Your request was received in this office on November 8, 2011.

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, the Department processes FOIA requests according to their order of receipt. Although DHS' 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, DHS 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; however, there are currently 601 open requests ahead of yours.

Provisions of the Act 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 a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the quarter-hour rate (\$4.00, \$7.00, \$10.25) 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 **2012FOIA1406**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in black ink, appearing to read "Catrina M. Pavlik-Keenan". The signature is fluid and cursive, with the first name "Catrina" being the most prominent part.

Catrina M. Pavlik-Keenan  
FOIA Officer



## U.S. Immigration and Customs Enforcement

November 8, 2011

MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco :

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated October 26, 2011, and to your request for a waiver of all assessable FOIA fees. Your request was received in this office on November 8, 2011. Specifically, you requested Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- t) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
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- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
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- v) A Number for each individual! respondent; t
- w) Nationality of each individual/ respondent;

x) Month and year of birth of each individual/ respondent;  
 y) Gender of each individual/ respondent;  
 z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:

- i) Whether the person has an outstanding deportation or removal order;
- 0) Whether the person has a record of illegal re-entry into the U.S.;
- iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
- iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- v) Whether the person has a U.S. citizen same-sex partner or spouse;
- vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
- vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

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, the Department processes FOIA requests according to their order of receipt. Although DHS' 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, DHS 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; however, there are currently 601 open requests ahead of yours.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

In the event that your fee waiver is denied, we shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requestors. As a non-commercial requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-

Case: 1:12-cv-04825 Document #: 1-4 Filed: 06/18/12 Page 7 of 10 PageID #:41  
hour rate of the searcher. You will be promptly notified once a determination is made regarding your fee waiver request. Per section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, the Department processes FOIA requests according to their order of receipt. We will make every effort to comply with your request in a timely manner; however, there are currently 601 open requests ahead of yours. Nevertheless, please be assured that one of the processors in our office will respond to your request as expeditiously as possible.

Your request has been assigned reference number **2012FOIA1406**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in black ink, appearing to read "Catrina M. Pavlik-Keenan".

Catrina M. Pavlik-Keenan  
FOIA Officer

U.S. Department of Homeland Security  
Washington, DC 20536-5009



U.S. Immigration  
and Customs  
Enforcement

November 8, 2011

MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco:

This acknowledges receipt of your October 26, 2011 Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement(ICE), seeking Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
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- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual! respondent; t
- w) Nationality of each individual/ respondent;

- x) Month and year of birth of each individual/ respondent;
  - y) Gender of each individual/ respondent;
  - z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
    - i) Whether the person has an outstanding deportation or removal order;
    - 0) Whether the person has a record of illegal re-entry into the U.S.;
    - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
    - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
    - v) Whether the person has a U.S. citizen same-sex partner or spouse;
    - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
    - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces..
- Your request was received in this office on November 8, 2011.

As it relates to your request for expedited treatment, your request is denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(d)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(d)(1)(ii). Requesters that seek expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(d)(3).

Your request for expedited processing is denied because you do not qualify for either category. You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

If you deem the decision to deny expedited treatment of your request an adverse determination, you may exercise your appeal rights. Should you wish to do so, you must send your appeal and a copy of this letter within 60 days of receipt of this letter to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in Subpart A, Section 5.9, of the DHS Regulations. Your envelope and letter should be marked "Freedom of Information Act Appeal." Copies of the DHS regulations are available at: [www.dhs.gov/foia](http://www.dhs.gov/foia).

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 component of 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 **2012FOIA1406**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in dark ink, appearing to read "Catrina M. Pavlik-Keenan". The signature is fluid and cursive, with the first name "Catrina" being the most prominent part.

Catrina M. Pavlik-Keenan  
FOIA Officer

## **EXHIBIT E**



## National Immigrant Justice Center

*Sent Via U.S. 2 Day FedEx*

April 9, 2012

Ms. Catrina M. Pavlik-Keenan  
FOIA Officer  
U.S. Department of Homeland Security  
U.S. Immigrations and Customs Enforcement  
500 12th Street, S.W. Stop 5009  
Washington, D.C. 20536-5009

Re: Freedom of Information Act Appeal of Request for Prosecutorial Discretion and  
Immigration Enforcement Priorities Information, January 1, 2010 to the present.  
**Reference Number: 2012FOIA1406**

Dear Ms. Pavlik-Keenan:

This is a timely appeal pursuant to 5 U.S.C. §552(a)(6)(A)(ii) of the Freedom of Information Act (FOIA) for the denial of our FOIA request. On November 8, 2011, the office of U.S. Immigration and Customs Enforcement (ICE) acknowledged receipt of the National Immigrant Justice Center's (NIJC) FOIA on information about the implementation of prosecutorial discretion policies. *See Attachment A.* More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of ICE to respond as a denial. *See* 5 U.S.C. §552(a)(6)(A)(i).

Through this appeal, NIJC reaffirms all aspects of its FOIA dated October 20, 2011, in which NIJC requested the following:

1. Please provide a report generated from DHS's computer database for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present, with all of the fields requested below, and in which each individual/respondent is identified by his or her A number.:
  - a) The Immigration Court which handled the individuals' case;
  - b) The Immigration Judge(s) assigned to individuals' case;
  - c) The time period case was assigned to each individual court listed;
  - d) The time period case was assigned to individual Judge listed;
  - e) Date case was transferred to non-detained docket;
  - f) Custody history for each individual, including date detained and date released;
  - g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
  - h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
  - i) An electronic record of whether or not any G-28 forms were filed in the case;
  - j) Date of filing of G-28(s) by attorney(s) or representative(s), if any;
  - k) End date of representation for each attorney;
  - l) Date of initiation of removal proceedings;
  - m) Date of first master calendar hearing, if any;



## National Immigrant Justice Center

- n) Date of conclusion of removal proceedings;
  - o) Forms of relief (if any) which were sought in the case;
  - p) Whether those relief applications were granted or denied;
  - q) Date prosecutorial discretion was requested for each case;
  - r) A record indicating which party made the request for prosecutorial discretion;
  - s) Date of decision regarding request for prosecutorial discretion;
  - t) As to each case, final outcome in removal case;
  - u) Date of final outcome in removal case;
  - v) A Number for each individual/respondent;
  - w) Nationality of each individual/ respondent;
  - x) Month and year of birth of each individual/ respondent;
  - y) Gender of each individual/ respondent;
  - z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
    - i) Whether the person has an outstanding deportation or removal order;
    - ii) Whether the person has a record of illegal re-entry into the U.S.;
    - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
    - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
    - v) Whether the person has a U.S. citizen same-sex partner or spouse;
    - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
    - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.
2. Records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
3. All reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:
- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
  - b) Additionally any reports, memoranda, analysis, emails or communication by DHS to the US Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
  - c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

NIJC requested copies of the above listed documents and manuals to better understand the implementation of prosecutorial discretion, and better inform NIJC staff, legal advocates, clients, and the general public. A copy of NIJC's FOIA request is enclosed. *See Attachment B.*



## National Immigrant Justice Center

### **Expedited Processing**

Furthermore, USCIS erred in finding that expedited processing was not warranted. *See Attachment A* page 2. There is urgency in reporting to the public the information about the government activity requested through the instant FOIA request. *See* 6 C.F.R. §5.5(d).

### **Fee Waiver**

The Requester is entitled to a waiver of all costs because the information sought “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requester’s] commercial interest.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution). The Requester has a proven track-record of compiling and disseminating information to the public about government functions and activities. We intend to make your response – and an analysis thereof – publicly available on our website, [www.immigrantjustice.org](http://www.immigrantjustice.org). The issue of implementation of the government’s prosecutorial discretion principles is one of significant public interest. The Requester has undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public’s understanding of federal government’s policies and practices regarding the exercise of prosecutorial discretion. The records sought in this request will inform the public of the scope and effect of the government’s implementation of its prosecutorial discretion guidelines.

As stated above, the Requester has no commercial interest in this matter. The Requester will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress’ 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 of noncommercial requesters.’”).

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before fulfilling this request. We note that under FOIA, an agency may only charge “reasonable standard charges for document duplication,” and not search-related costs, to “a representative of the news media.” Under the 2007 amendments to FOIA, “a representative of the news media,” means “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(6)(A)(ii). “News” means “information that is about current events or that would be of current interest to the public.” Examples of news media entities includes “alternative media” that disseminate their publications for free “through telecommunications services,” i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge. Because NIJC qualifies as “a representative of the news media” under the revised statutory definition, you should not charge NIJC any search-related costs for this FOIA request. Should you have any questions regarding NIJC’s work in gathering information and using editorial skills to digest or distribute that



## National Immigrant Justice Center

information to the general public, please advise me, and I will be happy to provide examples and explanation.

In the alternative, the Requester seeks all applicable reductions in fees pursuant to 6 C.F.R. §5.11(d). The Requester agrees to pay for the first 100 pages of duplication. See 6 C.F.R. §5.11(d). The Requester agrees to pay search, duplication, and review fees up to \$200.00. If the fees will amount to more than \$200.00, the Requester requests a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). If no fee waiver is granted and the fees exceed \$200.00, please contact the Requester at the telephone number below to obtain consent to incur additional fees.

ICE did not indicate whether our request for a fee waiver has been granted and has only indicated that our request will be held in abeyance pending the quantification of responsive records. It should be noted that in response to the same FOIA request, U.S. Citizenship and Immigration Services (USCIS) indicated on November 07, 2011 that NIJC's fee waiver request had been granted. NIJC is entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which "is in the public interest because it 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." *Id.* As indicated in further detail in the original FOIA request, NIJC satisfies all of these requirements.

### Conclusion

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your response to this FOIA request should also be considered within the scope of the request. Please provide data that is current as of the day of production of the data.

More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of ICE to respond as a denial.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. See 5 U.S.C. §552(b). To the extent that materials are excised, please "black out" these materials, rather than "whiting out" or "cutting out" these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. See 5 U.S.C. §552(a)(6)(A)(i).

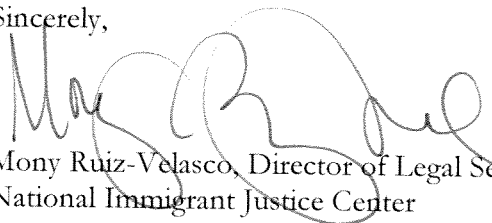
The Requester certifies that the above information is true and correct to the best of the Requester's knowledge. See 6 C.F.R. §5.5(d)(3).



## National Immigrant Justice Center

We anticipate a response to this appeal from your office within 20 business days, as stipulated by 5 U.S.C. § 552(a)(6)(A)(ii). Please do not hesitate to contact me at 312/660-1360 or via email at [mruizvelasco@heartlandalliance.org](mailto:mruizvelasco@heartlandalliance.org) should you have any questions.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

Enclosures

cc: James A. Klenk, Esq. SNR Denton US LLP  
Samuel Fifer, Esq. SNR Denton UL LLP

13030802\V-1

U.S. Department of Homeland Security  
Washington, DC 20536-5009



U.S. Immigration  
and Customs  
Enforcement

November 8, 2011

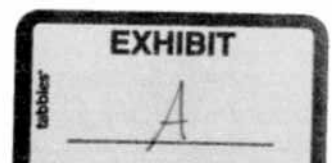
MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco:

This acknowledges receipt of your October 26, 2011, Freedom of Information Act (FOIA) request to the Immigration and Customs Enforcement (ICE), for Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
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- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual! respondent; t



- w) Nationality of each individual/ respondent;
- x) Month and year of birth of each individual/ respondent;
- y) Gender of each individual/ respondent;
- z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i) Whether the person has an outstanding deportation or removal order;
  - ii) Whether the person has a record of illegal re-entry into the U.S.;
  - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v) Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

Your request was received in this office on November 8, 2011.

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, the Department processes FOIA requests according to their order of receipt. Although DHS' 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, DHS 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; however, there are currently 601 open requests ahead of yours.

Provisions of the Act 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 a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the quarter-hour rate (\$4.00, \$7.00, \$10.25) 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 **2012FOIA1406**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Catrina M. Pavlik-Keenan', written in a cursive style.

Catrina M. Pavlik-Keenan  
FOIA Officer



U.S. Immigration  
and Customs  
Enforcement

November 8, 2011

MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated October 26, 2011, and to your request for a waiver of all assessable FOIA fees. Your request was received in this office on November 8, 2011. Specifically, you requested Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- t) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
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- u) Date of final outcome in removal case;
- v) A Number for each individual! respondent; t
- w) Nationality of each individual/ respondent;

x) Month and year of birth of each individual/ respondent;  
 y) Gender of each individual/ respondent;  
 z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:

- i) Whether the person has an outstanding deportation or removal order;
- ii) Whether the person has a record of illegal re-entry into the U.S.;
- iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
- iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- v) Whether the person has a U.S. citizen same-sex partner or spouse;
- vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
- vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

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, the Department processes FOIA requests according to their order of receipt. Although DHS' 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, DHS 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; however, there are currently 601 open requests ahead of yours.

As it relates to your fee waiver request, your request will be held in abeyance pending the quantification of responsive records. The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government;" (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) Whether the contribution to public understanding of government operations or activities will be "significant;" (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and (6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. If any responsive records are located, we will consider these factors in our evaluation of your request for a fee waiver.

In the event that your fee waiver is denied, we shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to non-commercial requestors. As a non-commercial requestor you will be charged 10-cents a page for duplication, although the first 100 pages are free, as are the first two hours of search time, after which you will pay the per quarter-

Case: 1:12-cv-04825 Document #: 1-5 Filed: 06/18/12 Page 12 of 24 PageID #:56  
hour rate of the searcher. For all be promptly notified once a determination is made regarding  
your fee waiver request. Per section 5.5(a) of the DHS FOIA regulations, 6 C.F.R. Part 5, the Department  
processes FOIA requests according to their order of receipt. We will make every effort to comply with  
your request in a timely manner; however, there are currently 601 open requests ahead of yours.  
Nevertheless, please be assured that one of the processors in our office will respond to your request as  
expeditiously as possible.

Your request has been assigned reference number **2012FOIA1406**. Please refer to this identifier in any  
future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing  
address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,



Catrina M. Pavlik-Keenan  
FOIA Officer

U.S. Department of Homeland Security  
Washington, DC 20536-5009



U.S. Immigration  
and Customs  
Enforcement

November 8, 2011

MONY RUIZ-VELASCO  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 LS SALLE STREET, SUITE 1818  
CHICAGO, IL 60604

**Re: 2012FOIA1406**

Dear Mr. Ruiz-Velasco:

This acknowledges receipt of your October 26, 2011 Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement(ICE), seeking Please provide the following electronic records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a) The Immigration Court which handled the individuals' case; b) The Immigration Judge(s) assigned to individuals' case;
- c) The time period case was assigned to each individual court listed;
- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- t) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
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- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual/ respondent; t
- w) Nationality of each individual/ respondent;

- x) Month and year of birth of each individual/ respondent;
  - y) Gender of each individual/ respondent;
  - z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
    - i) Whether the person has an outstanding deportation or removal order;
    - ii) Whether the person has a record of illegal re-entry into the U.S.;
    - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
    - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
    - v) Whether the person has a U.S. citizen same-sex partner or spouse;
    - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
    - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces..
- Your request was received in this office on November 8, 2011.

As it relates to your request for expedited treatment, your request is denied.

Under the DHS FOIA regulations, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 6 C.F.R. § 5.5(d)(1)(i), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information," 6 C.F.R. § 5.5(d)(1)(ii). Requesters that seek expedited processing must submit a statement explaining in detail the basis for the request, and that statement must be certified by the requester to be true and correct. 6 C.F.R. § 5.5(d)(3).

Your request for expedited processing is denied because you do not qualify for either category. You failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

If you deem the decision to deny expedited treatment of your request an adverse determination, you may exercise your appeal rights. Should you wish to do so, you must send your appeal and a copy of this letter within 60 days of receipt of this letter to: Associate General Counsel (General Law), U.S. Department of Homeland Security, Washington, D.C. 20528, following the procedures outlined in Subpart A, Section 5.9, of the DHS Regulations. Your envelope and letter should be marked "Freedom of Information Act Appeal." Copies of the DHS regulations are available at: [www.dhs.gov/foia](http://www.dhs.gov/foia).

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 component of 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 **2012FOIA1406**. Please refer to this identifier in any future correspondence. You may contact this office at (202) 732-0600 or (866) 633-1182. Our mailing address is 500 12th Street, S.W., Stop 5009, Washington, D.C. 20536-5009.

Sincerely,

A handwritten signature in dark ink, appearing to read "Catrina M. Pavlik-Keenan", written over a faint, circular official stamp.

Catrina M. Pavlik-Keenan  
FOIA Officer

HEARTLAND  
ALLIANCE

## National Immigrant Justice Center

*Not Valid U.S. 2 Day FedEx and Electronic Mail*

October 20, 2011

Department of Homeland Security  
Headquarters & Privacy Office  
U.S. Department of Homeland Security  
Privacy Office  
Director, Disclosure & FOIA  
245 Murray Drive SW, Building 410  
STOP-655  
Washington, D.C. 20528-0655  
E-mail: [foia@dhs.gov](mailto:foia@dhs.gov) and [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)

### Re: Freedom of Information Act Request

Dear Ms. Pavlik-Keenan:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding the U.S. Department of Homeland Security's implementation of its prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the of the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), Immigrations and Customs Enforcement ("ICE"), and any other subcomponents (collectively the "DHS"), as described in the specific requests listed below.

Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(III). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. § 552 (a)(6)(I).

### Specific Requests and Instructions

1. Please provide the following electronic records from the DHS's databases for all cases where **prosecutorial discretion has been considered, exercised, and/or requested**, from January 1, 2010 to the present. Please provide the following data:
  - a) The Immigration Court which handled the individuals' case;
  - b) The Immigration Judge(s) assigned to individuals' case;
  - c) The time period case was assigned to each individual court listed;





## National Immigrant Justice Center

- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- f) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G-28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual/respondent;
- w) Nationality of each individual/ respondent;
- x) Month and year of birth of each individual/ respondent;
- y) Gender of each individual/ respondent;
- z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i) Whether the person has an outstanding deportation or removal order;
  - ii) Whether the person has a record of illegal re-entry into the U.S.;
  - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v) Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

**Please provide a report** generated from DHS's computer database with all of the fields requested above and in which each individual/respondent is identified by his or her A number. Please prepare the report in such a way that it will be accessible using a standard database program (such as Excel). Data in a delimited field database is also acceptable. If a delimited field database is used, please indicate the delimiter (tab, comma, etc.). Compact discs are the preferred media. Please provide data that is current as of the day of production of the data.

2. Please provide records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
3. Please provide any and all reports, memoranda, analysis, communications, or other documents,



## National Immigrant Justice Center

which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
- b) Additionally any reports, memoranda, analysis, emails or communication by DHS to the US Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

### **Request for Fee Waiver**

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which "is in the public interest because it 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." *Id.*

From the outset, it is important to note that Congress intended to encourage "open and accountable government" under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should "apply the public-interest waiver liberally." *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DHS regulations clarify that fee waivers are appropriate if disclosure of the requested information satisfies two requirements: that it is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and that it is "not primarily in the commercial interest of the requester." 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, DHS has identified four relevant factors: (i) whether the subject of the request concerns "the operations or activities of the [federal] government;" (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is "likely to contribute" to an understanding of such government functions; (iii) whether disclosure of the information will contribute to "public understanding," meaning a reasonably broad audience of interested persons



## National Immigrant Justice Center

beyond just the requester; and (iv) whether the disclosure will “significantly” increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, DHS has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC’s request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC’s request seeks information relating to the interpretation and implementation DHS’s policies regarding prosecutorial discretion. As this request concerns the application of DHS’s policies concerning implementation of immigration law and policy, including removal of non-citizens from the United States, it pertains directly to the primary mission of DHS and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate DHS’s performance and investigate whether DHS is fulfilling its stated goals. DHS has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency’s respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether “dissemination of the requested information is likely to contribute significantly to citizens’ understanding of the workings of their government.” *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined “in light of the identity and objectives of the requester, the scope of the requester’s proposed dissemination, and the requester’s capacity to disseminate the requested information.” *D.C. Technical Assistance Org., Inc. v. U.S. Dep’t. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. NIJC’s request seeks information necessary to clarify the process by which DHS applies its authority under INA § 212(a)(3)(B)(vi)(III). The identifications of organizations as Tier III terrorist organizations are government activities affecting thousands of individuals. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the provision’s effect on immigration, a subject which is of interest to the public at large and

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Serv. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency’s initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.



## National Immigrant Justice Center

particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) ("Liberalizing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE's website, newsletter and chat room are an adequate means of disseminating information. . . ."). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency's own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency's governmental activities.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are "hopelessly intertwined." *Project on Military Procurement v. Dep't of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. DHS standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS's policies regarding prosecutorial discretion. Additionally, NIJC's expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC's *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization's work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the "public at large" for this purpose. *See, e.g., Carney v. U.S. Dep't. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov't Ass'n v. Dep't of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) ("public to be benefited" is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information through additional reports or articles that will likely be published nationwide and internationally. NIJC's website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS



## National Immigrant Justice Center

should consider NIJC's track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 ("The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE's dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons."); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, "a nonprofit, public interest organization" that "has a national reputation for researching and publishing concerns held by government whistleblowers"). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 ("A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff's can serve as an electronic clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .").

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding DHS's implementation of its prosecutorial guidelines. To date, DHS has made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public's understanding regarding the government's use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no "existing threshold level of public dissemination" publicly available) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. § 5.11(k)(3)(i). The term "commercial" is used in its ordinary meaning; "[i]nformation is commercial if it relates to commerce, trade, or profit." *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(c)(3) organization. Therefore, it has no "commercial, trade, or profit interests" that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by

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National Immigrant Justice Center

NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. § 5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC's request for fee waivers thus satisfies the criteria set out in 6 C.F.R. § 5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. *See* 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge "reasonable standard charges for document duplication," and not search-related costs, to "a representative of the news media." Under the 2007 amendments to FOIA, "a representative of the news media" means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience." *See* 5 U.S.C. §552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public," (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

#### **Request for Expedited Processing Pursuant to 6 C.F.R. § 5.5(d)(ii)**

**There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the DHS's policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DHS itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases



## National Immigrant Justice Center

currently pending before the immigration courts in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients who's cases could be impacted by the government's exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS's implementation of its prosecutorial guidelines. Ensuring an individual's right to fair and adequate consideration of DHS's policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester's "main professional activity or occupation" but "need not be his or her sole occupation." 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC's "main professional activity."

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides ongoing training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

### Conclusion

For all the foregoing reasons, NIJC requests that DHS reconsider the request for expedited processing under either 6 C.F.R. § 5.5(d)(1)(i) or 6 C.F.R. § 5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. §

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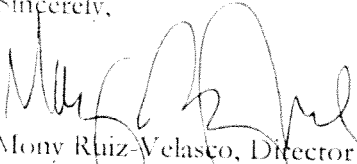
## National Immigrant Justice Center

5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. 552(a)(6)(E)(vi) and C.F.R. 5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. See 5 U.S.C. 552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

## **EXHIBIT F**

U.S. Department of Homeland Security  
500 12<sup>th</sup> ST. SW; STOP 5009  
Washington, DC 20536-5009



U.S. Immigration  
and Customs  
Enforcement

April 18, 2012

MONY RUIZ-VELASCO  
HEARTLAND ALLIANCE  
NATIONAL IMMIGRANT JUSTICE CENTER  
208 S. LASALLE SUITE 1818  
CHICAGO, IL 60604

Dear Sir or Madam:

The Department of Homeland Security has received your letter appealing the adverse determination of your Freedom of Information Act/Privacy Act (FOIA/PA) request by U.S. Immigration and Customs Enforcement seeking records from the DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested from January 1, 2010 to the present. Your appeal, dated April 9, 2012, was received on April 11, 2012.

On behalf of the Chief for the Government Information Law Division, we acknowledge your appeal request of **2012FOIA1406** and are assigning it number **OPLA12-471** for tracking purposes. Please reference this number in any future communications about your appeal.

A high number of FOIA/PA requests have been received by the Department. Accordingly, we have adopted the court-sanctioned practice of generally handling backlogged appeals on a first-in, first-out basis.<sup>1</sup> While we will make every effort to process your appeal on a timely basis, there may be some delay in resolving this matter. Should you have any questions concerning the processing of your appeal, please contact ICE FOIA at 1-202-732-0600, or by email at [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Mathias".

Susan Mathias  
Chief

Government Information Law Division  
ICE Office of the Principal Legal Advisor  
Department of Homeland Security

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<sup>1</sup> Appeals of expedited treatment denials will be handled on an expedited basis.

## **EXHIBIT G**

U.S. Citizenship  
and Immigration  
Services

November 7, 2011

COW2011000997

Monty Ruiz Velasco  
National Immigration Justice Center  
208 A. LaSalle St., Ste. 1818  
Chicago, IL 60604

Dear Monty Ruiz Velasco:

We received your request for information relating to the following on October 24, 2011.

... records from DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a. The Immigration Court which handled the individuals' case;
- b. The Immigration Judge(s) assigned to individuals' case;
- c. The time period case was assigned to each individual court listed;
- d. The time period case was assigned to individual Judge listed;
- e. Date case was transferred to non-detained docket;
- f. Custody history for each individual, including date detained and date released;
- g. An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h. Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i. An electronic record of whether or not any G-28 forms were filed in the case;
- j. Date of filing of G-28(s) by attorney(s) or representative(s), if any;
- k. End date of representation for each attorney;
- l. Date of initiation of removal proceedings;
- m. Date of first mater calendar hearing, if any;
- n. Date of conclusion of removal proceedings;
- o. Forms of relief (if any) which were sought in the case;
- p. Whether those relief applications were granted or denied;
- q. Date prosecutorial discretion was requested for each case;
- r. A record indicating which party made the request for prosecutorial discretion;
- s. Date of decision regarding request for prosecutorial discretion;
- t. As to each case, final outcome in removal case;
- u. Date of final outcome in removal case;
- v. A Number of each individual/respondent;
- w. Nationality of each individual/respondent;
- x. Month and year of birth of each individual/ respondent;
- y. Gender of each individual/ respondent;
- z. For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i. Whether the person has an outstanding deportation or removal order;
  - ii. Whether the person has a record of illegal re-entry into the U.S.;

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- iii. Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv. Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v. Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi. Whether the person is likely to be granted temporary or permanent status of other relief from removal including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii. Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.
- 2. Please provide records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
  - 3. Please provide any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:
    - a. Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
    - b. Additionally any reports, memoranda, analysis, emails or communications by DHS to the U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
    - c. Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

Your request is being handled under the provisions of the Freedom of Information Act (5 U.S.C. § 552). It has been assigned the following control number: COW2011000997. Please cite this number in all future correspondence about your request.

In accordance with Department of Homeland Security Regulations (6 C.F.R. § 5.4(a)), USCIS uses a "cut-off" date to delineate the scope of a FOIA request by treating records created after that date as not responsive to that request. Therefore, in determining which records are responsive to your request, we will include only records in our possession as of the date we begin the search for records.

We respond to requests on a first-in, first-out basis and on a multi-track system. Your request has been placed in the complex track (Track 2). You may wish to narrow your request to a specific document in order to be eligible for the faster track. To do so, please send a written request, identifying the specific document sought, to the address above. We will notify you if your request is placed in the simple track.

Your fee waiver request has been granted.

On the basis of information you provided, we have determined that expedited processing of your request is not warranted. Standards established by the Department of Homeland Security regarding expedited processing are very strict (6 C.F.R. § 5.5(d)) and permit expedited treatment only when the requester demonstrates that:

- a. circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

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Page 3

- b. an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

In the event you can demonstrate any further showing as to the nature and degree of any of the above categories, submit this additional information to this office for reconsideration.

This office will be providing your records on a Compact Disc (CD) for use on your personal computer. The CD is readable on all computers through the use of Adobe Acrobat software. A version of Adobe Acrobat will be included on the CD. Your records can be viewed on your computer screen and can be printed onto paper. Only records 15 pages or more are eligible for CD printing. To request your responsive records on paper, please include your control number and write to the above address Attention: FOIA/PA Officer, or fax them to (816) 350-5785.


USCIS no longer collects Social Security Numbers in connection with FOIA or PA requests. When forwarding to us any documents related to your request, please ensure any Social Security Numbers on the documents are blanked out or removed.

The National Records Center (NRC) has the responsibility to ensure that personally identifiable information (PII) pertaining to U.S. Citizenship and Immigration Services (USCIS) clients is protected. In our efforts to safeguard this information, we may request that additional information be provided to facilitate and correctly identify records responsive to your request. Though submission of this information is voluntary, without this information, your request may be delayed while additional steps are taken to ensure the correct responsive records are located and processed. Further, if we are unable to positively identify the subject of the record we may be unable to provide records responsive to your FOIA request.

You may check the status of your FOIA request online, at [www.uscis.gov](http://www.uscis.gov). Click on "FOIA Request Status Check" located on the left side of the web page under "Other Services", and follow the instructions. If you have any questions concerning your pending FOIA/PA request, or to check the status of a pending application or petition, please call The National Customer Service Center at 1-800-375-5283. Please be aware that the National Records Center no longer accepts FOIA/PA related questions directly by phone.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Jill A. Eggleston", written over a horizontal line.

Jill A. Eggleston  
Director, FOIA Operations

## **EXHIBIT H**



## National Immigrant Justice Center

*Sent Via Email at* [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov)

April 9, 2012

Ms. Jill Eggleston  
Director, FOIA Operations  
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
National Records Center  
P.O. Box 648010  
Lee's Summit, MO 64064-8010  
E-mail: [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov)

Re: Freedom of Information Act Appeal of Request for Prosecutorial Discretion and  
Immigration Enforcement Priorities Information, January 1, 2010 to the present.  
**Reference Number: COW2011000997**

Dear Ms. Eggleston:

This is a timely appeal pursuant to 5 U.S.C. §552(a)(6)(A)(ii) of the Freedom of Information Act (FOIA) for the denial of our FOIA request pursuant to. On November 7, 2011, the office of United States Citizenship and Immigration Services (USCIS) acknowledged receipt of the National immigrant Justice Center's (NIJC) FOIA on information about the implementation of prosecutorial discretion policies. *See Attachment A.* More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of USCIS to respond as a denial. *See* 5 U.S.C. §552(a)(6)(A)(i).

Through this appeal, NIJC reaffirms all aspects of its FOIA dated October 20, 2011, in which NIJC requested the following:

1. A report generated from DHS's computer database for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present, with all of the fields requested below, and in which each individual/respondent is identified by his or her A number.:
  - a) The Immigration Court which handled the individuals' case;
  - b) The Immigration Judge(s) assigned to individuals' case;
  - c) The time period case was assigned to each individual court listed;
  - d) The time period case was assigned to individual Judge listed;
  - e) Date case was transferred to non-detained docket;
  - f) Custody history for each individual, including date detained and date released;
  - g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
  - h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
  - i) An electronic record of whether or not any G-28 forms were filed in the case;
  - j) Date of filing of G-28(s) by attorney(s) or representative(s), if any;

- k) End date of representation for each attorney;
  - l) Date of initiation of removal proceedings;
  - m) Date of first master calendar hearing, if any;
  - n) Date of conclusion of removal proceedings;
  - o) Forms of relief (if any) which were sought in the case;
  - p) Whether those relief applications were granted or denied;
  - q) Date prosecutorial discretion was requested for each case;
  - r) A record indicating which party made the request for prosecutorial discretion;
  - s) Date of decision regarding request for prosecutorial discretion;
  - t) As to each case, final outcome in removal case;
  - u) Date of final outcome in removal case;
  - v) A Number for each individual/respondent;
  - w) Nationality of each individual/ respondent;
  - x) Month and year of birth of each individual/ respondent;
  - y) Gender of each individual/ respondent;
  - z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
    - i) Whether the person has an outstanding deportation or removal order;
    - ii) Whether the person has a record of illegal re-entry into the U.S.;
    - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
    - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
    - v) Whether the person has a U.S. citizen same-sex partner or spouse;
    - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
    - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.
2. Records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
  3. All reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:
    - a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
    - b) Additionally any reports, memoranda, analysis, emails or communication by DHS to the USCIS and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
    - c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

NIJC requested copies of the above listed documents and manuals to better understand the implementation of prosecutorial discretion, and better inform NIJC staff, legal advocates, clients, and the general public. A copy of NIJC's FOIA request is enclosed. *See Attachment B.*

Furthermore, USCIS erred in finding that expedited processing was not warranted. *See Attachment A* page 2. There is urgency in reporting to the public the information about the government activity requested through the instant FOIA request. *See* 6 C.F.R. §5.5(d).

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your response to this FOIA request should also be considered within the scope of the request. Please provide data that is current as of the day of production of the data.

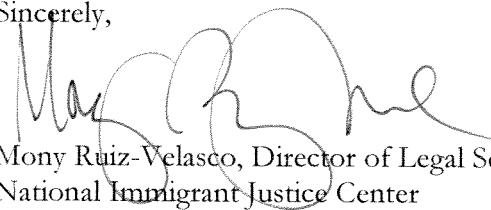
More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of USCIS to respond as a denial.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). To the extent that materials are excised, please "black out" these materials, rather than "whiting out" or "cutting out" these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

The Requester certifies that the above information is true and correct to the best of the Requester's knowledge. *See* 6 C.F.R. §5.5(d)(3).

We anticipate a response to this appeal from your office within 20 business days, as stipulated by 5 U.S.C. § 552(a)(6)(A)(ii). Please do not hesitate to contact me at 312/660-1360 or via email at [mruizvelasco@heartlandalliance.org](mailto:mruizvelasco@heartlandalliance.org) should you have any questions.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

Enclosures

cc: James A. Klenk, Esq. SNR Denton US LLP  
Samuel Fifer, Esq. SNR Denton US LLP

U.S. Citizenship  
and Immigration  
Services

November 7, 2011

COW2011000997

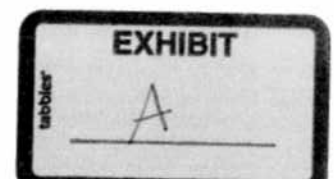
Monty Ruiz Velasco  
National Immigration Justice Center  
208 A. LaSalle St., Ste. 1818  
Chicago, IL 60604

Dear Monty Ruiz Velasco:

We received your request for information relating to the following on October 24, 2011.

... records from DHS's databases for all cases where prosecutorial discretion has been considered, exercised, and/or requested, from January 1, 2010 to the present. Please provide the following data:

- a. The Immigration Court which handled the individuals' case;
- b. The Immigration Judge(s) assigned to individuals' case;
- c. The time period case was assigned to each individual court listed;
- d. The time period case was assigned to individual Judge listed;
- e. Date case was transferred to non-detained docket;
- f. Custody history for each individual, including date detained and date released;
- g. An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h. Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i. An electronic record of whether or not any G-28 forms were filed in the case;
- j. Date of filing of G-28(s) by attorney(s) or representative(s), if any;
- k. End date of representation for each attorney;
- l. Date of initiation of removal proceedings;
- m. Date of first mater calendar hearing, if any;
- n. Date of conclusion of removal proceedings;
- o. Forms of relief (if any) which were sought in the case;
- p. Whether those relief applications were granted or denied;
- q. Date prosecutorial discretion was requested for each case;
- r. A record indicating which party made the request for prosecutorial discretion;
- s. Date of decision regarding request for prosecutorial discretion;
- t. As to each case, final outcome in removal case;
- u. Date of final outcome in removal case;
- v. A Number of each individual/respondent;
- w. Nationality of each individual/respondent;
- x. Month and year of birth of each individual/ respondent;
- y. Gender of each individual/ respondent;
- z. For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i. Whether the person has an outstanding deportation or removal order;
  - ii. Whether the person has a record of illegal re-entry into the U.S.;



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Page 2

- iii. Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv. Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v. Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi. Whether the person is likely to be granted temporary or permanent status of other relief from removal including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii. Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.
2. Please provide records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
3. Please provide any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:
- a. Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
  - b. Additionally any reports, memoranda, analysis, emails or communications by DHS to the U.S. Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
  - c. Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

Your request is being handled under the provisions of the Freedom of Information Act (5 U.S.C. § 552). It has been assigned the following control number: COW2011000997. Please cite this number in all future correspondence about your request.

In accordance with Department of Homeland Security Regulations (6 C.F.R. § 5.4(a)), USCIS uses a "cut-off" date to delineate the scope of a FOIA request by treating records created after that date as not responsive to that request. Therefore, in determining which records are responsive to your request, we will include only records in our possession as of the date we begin the search for records.

We respond to requests on a first-in, first-out basis and on a multi-track system. Your request has been placed in the complex track (Track 2). You may wish to narrow your request to a specific document in order to be eligible for the faster track. To do so, please send a written request, identifying the specific document sought, to the address above. We will notify you if your request is placed in the simple track.

Your fee waiver request has been granted.

On the basis of information you provided, we have determined that expedited processing of your request is not warranted. Standards established by the Department of Homeland Security regarding expedited processing are very strict (6 C.F.R. § 5.5(d)) and permit expedited treatment only when the requester demonstrates that:

- a. circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

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- b. an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information.

In the event you can demonstrate any further showing as to the nature and degree of any of the above categories, submit this additional information to this office for reconsideration.

This office will be providing your records on a Compact Disc (CD) for use on your personal computer. The CD is readable on all computers through the use of Adobe Acrobat software. A version of Adobe Acrobat will be included on the CD. Your records can be viewed on your computer screen and can be printed onto paper. Only records 15 pages or more are eligible for CD printing. To request your responsive records on paper, please include your control number and write to the above address Attention: FOIA/PA Officer, or fax them to (816) 350-5785.

USCIS no longer collects Social Security Numbers in connection with FOIA or PA requests. When forwarding to us any documents related to your request, please ensure any Social Security Numbers on the documents are blanked out or removed.

The National Records Center (NRC) has the responsibility to ensure that personally identifiable information (PII) pertaining to U.S. Citizenship and Immigration Services (USCIS) clients is protected. In our efforts to safeguard this information, we may request that additional information be provided to facilitate and correctly identify records responsive to your request. Though submission of this information is voluntary, without this information, your request may be delayed while additional steps are taken to ensure the correct responsive records are located and processed. Further, if we are unable to positively identify the subject of the record we may be unable to provide records responsive to your FOIA request.

You may check the status of your FOIA request online, at [www.uscis.gov](http://www.uscis.gov). Click on "FOIA Request Status Check" located on the left side of the web page under "Other Services", and follow the instructions. If you have any questions concerning your pending FOIA/PA request, or to check the status of a pending application or petition, please call The National Customer Service Center at 1-800-375-5283. Please be aware that the National Records Center no longer accepts FOIA/PA related questions directly by phone.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at [uscis.foia@uscis.dhs.gov](mailto:uscis.foia@uscis.dhs.gov).

Sincerely,



Jill A. Eggleston  
Director, FOIA Operations

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## National Immigrant Justice Center

*Send in U.S. 2 Day Fed-Ex and Electronic Mail*

October 20, 2011

Department of Homeland Security  
Headquarters & Privacy Office  
U.S. Department of Homeland Security  
Privacy Office  
Director, Disclosure & FOIA  
245 Murray Drive SW, Building 410  
STOP-655  
Washington, D.C. 20528-0655  
E-mail: [foia@dhs.gov](mailto:foia@dhs.gov) and [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)

Re: Freedom of Information Act Request

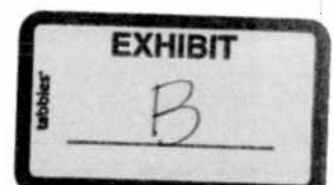
Dear Ms. Pavlik-Keenan:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding the U.S. Department of Homeland Security's implementation of its prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the of the Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"), Immigrations and Customs Enforcement ("ICE"), and any other subcomponents (collectively the "DHS"), as described in the specific requests listed below.

Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. § 552(a)(4)(A)(ii)(I)-(II). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. § 552(a)(6)(E).

### Specific Requests and Instructions

1. Please provide the following electronic records from the DHS's databases for all cases where **prosecutorial discretion has been considered, exercised, and/or requested**, from January 1, 2010 to the present. Please provide the following data:
  - a) The Immigration Court which handled the individuals' case;
  - b) The Immigration Judge(s) assigned to individuals' case;
  - c) The time period case was assigned to each individual court listed;



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## National Immigrant Justice Center

- d) The time period case was assigned to individual Judge listed;
- e) Date case was transferred to non-detained docket;
- f) Custody history for each individual, including date detained and date released;
- g) An electronic record of whether or not any EOIR-28 forms were filed in the case;
- h) Date of filing of E-28(s) by attorney(s) or representative(s), if any;
- i) An electronic record of whether or not any G-28 forms were filed in the case;
- j) Date of filing of G-28(s) by attorney(s) or representative(s), if any;
- k) End date of representation for each attorney;
- l) Date of initiation of removal proceedings;
- m) Date of first master calendar hearing, if any;
- n) Date of conclusion of removal proceedings;
- o) Forms of relief (if any) which were sought in the case;
- p) Whether those relief applications were granted or denied;
- q) Date prosecutorial discretion was requested for each case;
- r) A record indicating which party made the request for prosecutorial discretion;
- s) Date of decision regarding request for prosecutorial discretion;
- t) As to each case, final outcome in removal case;
- u) Date of final outcome in removal case;
- v) A Number for each individual/respondent;
- w) Nationality of each individual/ respondent;
- x) Month and year of birth of each individual/ respondent;
- y) Gender of each individual/ respondent;
- z) For each individual case, please indicate whether any of the following factors were taken into consideration in the exercise of prosecutorial discretion:
  - i) Whether the person has an outstanding deportation or removal order;
  - ii) Whether the person has a record of illegal re-entry into the U.S.;
  - iii) Whether the person graduated from a U.S. high school or has successfully pursued or is pursuing a college degree at a legitimate institution of higher education in the U.S.;
  - iv) Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
  - v) Whether the person has a U.S. citizen same-sex partner or spouse;
  - vi) Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, a victim of domestic violence, human trafficking, or other crime; and
  - vii) Whether the person has immediate relatives who are veterans or members of the U.S. armed forces.

**Please provide a report** generated from DHS's computer database with all of the fields requested above and in which each individual/respondent is identified by his or her A number. Please prepare the report in such a way that it will be accessible using a standard database program (such as Excel). Data in a delimited field database is also acceptable. If a delimited field database is used, please indicate the delimiter (tab, comma, etc.). Compact discs are the preferred media. Please provide data that is current as of the day of production of the data.

2. Please provide records which explain any coding included in the response to request #1, so as to enable us to understand your response to the FOIA request.
3. Please provide any and all reports, memoranda, analysis, communications, or other documents,



## National Immigrant Justice Center

which include, summarize, or relate to the implementation of prosecutorial discretion policies and guidelines. We would specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of DHS and the Department of Justice which was mentioned in the August 18, 2011 letter from Secretary Janet Napolitano to Senate Majority Leader Harry Reid;
- b) Additionally any reports, memoranda, analysis, emails or communication by DHS to the US Citizenship and Immigration Services (USCIS) and Customs and Border Patrol officers relating to prosecutorial discretion, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

### Request for Fee Waiver

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which "is in the public interest because it 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." *Id.*

From the outset, it is important to note that Congress intended to encourage "open and accountable government" under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should "apply the public-interest waiver liberally." *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DHS regulations clarify that fee waivers are appropriate if disclosure of the requested information satisfies two requirements: that it is "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and that it is "not primarily in the commercial interest of the requester." 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, DHS has identified four relevant factors: (i) whether the subject of the request concerns "the operations or activities of the [federal] government;" (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is "likely to contribute" to an understanding of such government functions; (iii) whether disclosure of the information will contribute to "public understanding," meaning a reasonably broad audience of interested persons



## National Immigrant Justice Center

beyond just the requester; and (iv) whether the disclosure will “significantly” increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, DHS has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC’s request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC’s request seeks information relating to the interpretation and implementation DHS’s policies regarding prosecutorial discretion. As this request concerns the application of DHS’s policies concerning implementation of immigration law and policy, including removal of non-citizens from the United States, it pertains directly to the primary mission of DHS and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate DHS’s performance and investigate whether DHS is fulfilling its stated goals. DHS has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency’s respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether “dissemination of the requested information is likely to contribute significantly to citizens’ understanding of the workings of their government.” *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined “in light of the identity and objectives of the requester, the scope of the requester’s proposed dissemination, and the requester’s capacity to disseminate the requested information.” *D.C. Technical Assistance Org., Inc. v. U.S. Dep’t. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. NIJC’s request seeks information necessary to clarify the process by which DHS applies its authority under INA § 212(a)(3)(B)(vi)(III). The identifications of organizations as Tier III terrorist organizations are government activities affecting thousands of individuals. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the provision’s effect on immigration, a subject which is of interest to the public at large and

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency’s initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.



## National Immigrant Justice Center

particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) ("Liberalizing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE's website, newsletter and chat room are an adequate means of disseminating information. . . ."). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency's own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency's governmental activities.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are "hopelessly intertwined." *Project on Military Procurement v. Dep't of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. DHS standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS's policies regarding prosecutorial discretion. Additionally, NIJC's expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC's *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization's work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the "public at large" for this purpose. *See, e.g., Carney v. U.S. Dep't. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov't Ass'n v. Dep't of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) ("public to be benefited" is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information through additional reports or articles that will likely be published nationwide and internationally. NIJC's website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS



## National Immigrant Justice Center

should consider NIJC's track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 ("The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE's dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons."); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, "a nonprofit, public interest organization" that "has a national reputation for researching and publishing concerns held by government whistleblowers"). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 ("A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff's can serve as an electronic clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .").

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding DHS's implementation of its prosecutorial guidelines. To date, DHS has made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public's understanding regarding the government's use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no "existing threshold level of public dissemination" publicly available) (quoting *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. § 5.11(k)(3)(i). The term "commercial" is used in its ordinary meaning; "[i]nformation is commercial if it relates to commerce, trade, or profit." *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(c)(3) organization. Therefore, it has no "commercial, trade, or profit interests" that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by



## National Immigrant Justice Center

NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. § 5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC's request for fee waivers thus satisfies the criteria set out in 6 C.F.R. § 5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. *See* 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge "reasonable standard charges for document duplication," and not search-related costs, to "a representative of the news media." Under the 2007 amendments to FOIA, "a representative of the news media" means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience." *See* 5 U.S.C. §552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public," (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

### Request for Expedited Processing Pursuant to 6 C.F.R. § 5.5(d)(ii)

#### **There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the DHS's policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DHS itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases



## National Immigrant Justice Center

currently pending before the immigration courts in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients who's cases could be impacted by the government's exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS's implementation of its prosecutorial guidelines. Ensuring an individual's right to fair and adequate consideration of DHS's policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester's "main professional activity or occupation" but "need not be his or her sole occupation." 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC's "main professional activity."

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides on-going training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

### Conclusion

For all the foregoing reasons, NIJC requests that DHS reconsider the request for expedited processing under either 6 C.F.R. § 5.5(d)(1)(i) or 6 C.F.R. § 5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. §

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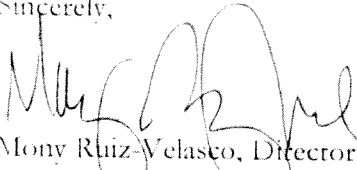
## National Immigrant Justice Center

5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. 552(a)(6)(E)(vi) and C.F.R. 5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. *See* 5 U.S.C. 552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

# **EXHIBIT I**



**U.S. Citizenship  
and Immigration  
Services**

April 20, 2012

**APP2012000377**

Monty Ruiz Velasco  
National Immigration Justice Center  
208 A. LaSalle Street, Suite 1818  
Chicago, IL 60604

Dear Mr. Velasco:

Re: COW2011000997

You appealed the action of the National Records Center regarding your request for access to records pertaining to Implementation of prosecutorial discretion guidelines and directives for D.H.S., dated November 04, 2011.

Based on the information you provided, we are denying your appeal. Departmental regulations require that you demonstrate that your request warrants expedited treatment because it involves:

- (1) circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or
- (2) an urgency to inform the public about an actual or alleged federal government activity (if you are a person primarily engaged in disseminating information).

Because you have not sufficiently demonstrated that your request involves either of these factors, your request does not warrant expedited treatment. Please be advised that information provided in my judgment is not sufficient reason to process your request out of turn.

If you are dissatisfied with our action on your appeal, you may seek judicial review in accordance with 5 U.S.C. § 552(a)(4)(B). The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. The 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](mailto:ogis@nara.gov) or call 1-877-684-6448.

Sincerely,

Alan D. Hughes, Associate Counsel  
Commercial & Administrative Law Division  
Department of Homeland Security  
Citizenship and Immigration Services

## **EXHIBIT J**



DEPARTMENT OF THE ARMY  
FREEDOM OF INFORMATION AND PRIVACY DIVISION  
7701 TELEGRAPH ROAD, SUITE 144  
ALEXANDRIA, VA 22315-3905  
May 16, 2012

U.S. Army Freedom of Information  
and Privacy Act Office (FOI/PA 12-0542)

Mony Ruiz-Velasco  
Director of Legal Services  
National Immigrant Justice Center  
208 S. LaSalle St., Suite 1818  
Chicago, IL 60604  
Email: [mruizelvasco@heartlandalliance.org](mailto:mruizelvasco@heartlandalliance.org)

Dear Mr. Ruiz-Valasco:

This responds to your Freedom of Information Act request dated October 20, 2011 which was forwarded from U.S. Citizenship and Immigration Services (USCIS) along with 27 pages containing Army information and received on May 10, 2012. Your request is being processed in accordance with Title 5, United States Codes 552, The Freedom of Information Act.

Please be advised that this office serves as the referral point and oversight office for the Department of the Army Freedom of Information entity and is not a repository for documents maintained by the Department of the Army. Requests for information and documents under the purview of the Army are referred to the activity most likely to have records for processing, and that activity has the responsibility for the review and release of the records in accordance with Army Regulation (AR) 25-55, The Army Freedom of Information Act Program.

We have referred your request and the 27 pages containing Army information to the following activity for action and direct response to you.

U.S. Army Human Resources Command  
ATTN: AHRC-FOI  
1600 Spearhead Division Ave., Suite 1-3-17  
Ft. Knox, KY 40121  
Email: [hrc.foia@conus.army.mil](mailto:hrc.foia@conus.army.mil)

If you have any questions regarding the status of your request, you should contact the activity at the address/email above. If this office can be of further assistance, please contact us at the address on the letterhead.

Sincerely,

A handwritten signature in black ink, reading "Norma Ferguson", is written over a horizontal line.

Norma Ferguson  
Program Analyst  
U.S. Army Freedom of Information Office

## **EXHIBIT K**



## National Immigrant Justice Center

*Sent Via U.S. 2 Day Fed-Ex and Electronic Mail*

October 27, 2011

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-FOIA  
Fax: (202) 514-1009  
E-mail: [DOJ.OIP.Initial.Requests@usdoj.gov](mailto:DOJ.OIP.Initial.Requests@usdoj.gov)

Re: Freedom of Information Act Request

Dear Ms. Mallon:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding communications between the Department of Justice ("DOJ") and the U.S. Department of Homeland Security ("DHS") regarding implementation of prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the of the Office of the Attorney General or any of his designees (collectively known as the "AG"), Executive Office for Immigration Review ("EOIR"), and any other subcomponents (collectively the "DOJ"), as described in the specific requests listed below.

Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. §552(a)(4)(A)(ii)(II)-(III). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. §552 (a)(6)(E).

### **Specific Requests and Instructions**

Please provide any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion or immigration enforcement priorities policies and guideline from January 1, 2010 to the present. We specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security ("DHS") and the DOJ which was mentioned in the August 18, 2011 letter from

Secretary Janet Napolitano to Senate Majority Leader Harry Reid;

- b) Additionally any reports, memoranda, analysis, emails or communication by DOJ regarding implementation and use of DHS's prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

### **Request for Fee Waiver**

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which “is in the public interest because it 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.” *Id.*

From the outset, it is important to note that Congress intended to encourage “open and accountable government” under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should “apply the public-interest waiver liberally.” *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DOJ regulations clarify that the fee waivers are appropriate if disclosure of the requested information is “in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government.” 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, the federal policy has identified four relevant factors: (i) whether the subject of the request concerns “the operations or activities of the [federal] government;” (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is “likely to contribute” to an understanding of such government functions; (iii) whether disclosure of the information will contribute to “public understanding,” meaning a reasonably broad audience of interested persons beyond just the requester; and (iv) whether the disclosure will “significantly” increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, federal policy has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC's request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC's request seeks information relating to the interpretation and implementation of policies regarding prosecutorial discretion at the DOJ and DHS. As this request concerns the application of federal policies concerning implementation of immigration law and policy, including the prosecution and detention of non-citizens in the United States, it pertains directly to the primary mission of the DOJ and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate implementation strategies of federal policy by the DOJ and investigate whether the DOJ is fulfilling its stated goals. The DOJ has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency's respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether "dissemination of the requested information is likely to contribute significantly to citizens' understanding of the workings of their government." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined "in light of the identity and objectives of the requester, the scope of the requester's proposed dissemination, and the requester's capacity to disseminate the requested information." *D.C. Technical Assistance Org., Inc. v. U.S. Dep't. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the implementation of prosecutorial discretion, and inter-agency collaboration on policy implementation, a subject which is of interest to the public at large and particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) ("Liberally construing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE's website, newsletter and chat room are an adequate means of disseminating information. . . ."). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency's own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency's governmental activities.

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency's initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are “hopelessly intertwined.” *Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. Federal standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS’s policies regarding prosecutorial discretion. Additionally, NIJC’s expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC’s *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization’s work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the “public at large” for this purpose. *See, e.g., Carney v. U.S. Dep’t. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov’t Ass’n v. Dep’t of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) (“public to be benefited” is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information though additional reports are articles that will likely be published nationwide and internationally. NIJC’s website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS should consider NIJC’s track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 (“The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE’s dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons.”); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, “a nonprofit, public interest organization” that “has a national reputation for researching and publishing concerns held by government whistleblowers”). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 (“A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff’s can serve as an electronic

clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .”).

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding the role of the DOJ in the implementation of federal prosecutorial guidelines. To date, federal agencies, including the DHS and the DOJ, have made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public’s understanding regarding the government’s use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no “existing ‘threshold level of public dissemination’” publicly available) (quoting *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. §5.11(k)(3)(i). The term “commercial” is used in its ordinary meaning; “[i]nformation is commercial if it relates to commerce, trade, or profit.” *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(3)(c) organization. Therefore, it has no “commercial, trade, or profit interests” that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. §5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC’s request for fee waivers thus satisfies the criteria set out in 6 C.F.R. §5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. *See* 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge “reasonable standard charges for

document duplication,” and not search-related costs, to “a representative of the news media.” Under the 2007 amendments to FOIA, “a representative of the news media” means “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience.” *See* 5 U.S.C. §552(a)(6)(A)(ii). “News” means “information that is about current events or that would be of current interest to the public,” (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes “alternative media” that disseminate their publications for free “through telecommunications services,” i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

### **Request for Expedited Processing Pursuant to 6 C.F.R. §5.5(d)(ii)**

#### **There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the federal policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DOJ itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases currently pending before the immigration courts in a joint committee with the DOJ in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients whose cases could be impacted by the government’s exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS’s implementation of its prosecutorial guidelines and the collaboration to implement these guidelines with the DOJ. Ensuring an individual’s right to fair and adequate consideration of DHS’s policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester’s “main professional activity or occupation” but “need not be his or her sole occupation.” 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC’s “main professional activity.”

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides on-going training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

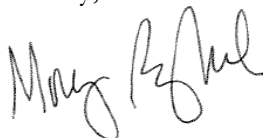
### **Conclusion**

For all the foregoing reasons, NIJC requests that the DOJ consider the request for expedited processing under either 6 C.F.R. §5.5(d)(1)(i) or 6 C.F.R. §5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. §5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. §522(a)(6)(E)(vi) and C.F.R. §5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. *See* 5 U.S.C. §552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

## **EXHIBIT L**



**U.S. Department of Justice**

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

NOV 07 2011

Ms. Mony Ruiz-Velasco  
National Immigrant Justice Center  
208 S. LaSalle Street  
Suite 1818  
Chicago, IL 60604

Re: AG/12-00135 (F)  
DAG/12-00136 (F)  
CLM:LAD:CMW

Dear Ms. Ruiz-Velasco:

This responds to your Freedom of Information Act request dated October 27, 2011, and received in this Office on October 28, 2011, for specific information identified in your request, including reports, memoranda, analysis, communications, or other documents pertaining to prosecutorial discretion or immigration enforcement priority policies and guidelines from January 1, 2010 to the present. This response is made on behalf of the Offices of the Attorney General and Deputy Attorney General.

Please be advised that a search has been conducted of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General and Deputy Attorney General, and no records responsive to your request have been located.

Furthermore, please be advised that a copy of your request has been routed to the Executive Office for Immigration Review and the Civil Division, which are the Department components responsible for the adjudication of removal cases and thus are more likely to maintain records responsive to your request. Those components will respond to you directly. However, should you wish to contact those components, you may do so at the following addresses:

Cecilia Espenosa  
Senior Associate General Counsel  
Executive Office for Immigration Review  
United States Department of Justice  
5107 Leesburg Pike  
Suite 2600  
Falls Church, VA 22041

James M. Kovakas  
Freedom of Information Office  
Civil Division  
United States Department of Justice  
20 Massachusetts Avenue, NW  
Room 7304  
Washington, DC 20035

Finally, if you have any questions or otherwise wish to discuss this Office's handling of your request, please contact Christine Wallace, the FOIA Specialist assigned to your request, at the telephone number listed above.

-2-

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Mallon', with a long horizontal flourish extending to the right.

Carmen L. Mallon  
Chief of Staff

## **EXHIBIT M**



## National Immigrant Justice Center

*Sent Via U.S. 2 Day FedEx*

April 9, 2012

Ms. Cecilia Espenoza  
Senior Associate General Counsel  
U.S. Department of Justice  
Executive Office for Immigration Review  
5107 Leesburg Pike  
Suite 2600  
Falls Church, Virginia 22041

Mr. James M. Kovakas  
Freedom of Information Office  
Civil Division  
United States Department of Justice  
20 Massachusetts Avenue, NW  
Room 7304  
Washington, D.C., 20035

Re: Freedom of Information Act Appeal of Request for Prosecutorial Discretion and  
Immigration Enforcement Priorities Information, January 1, 2010 to the present.

Dear Ms. Espenoza and Mr. Kovakas:

This is a timely appeal pursuant to 5 U.S.C. §552(a)(6)(A)(ii) of the Freedom of Information Act (FOIA) for the denial of our FOIA request. On November 7, 2011, the office of the U.S. Department of Justice, Office of Information Policy acknowledged receipt of the National Immigrant Justice Center's (NIJC) FOIA on information about the implementation of prosecutorial discretion policies. On the same day, the Office of Information Policy re-routed the instant FOIA request to your office at the Executive Office for Immigration Review (EOIR) and the Freedom of Information Office, Civil Division (FOIA – Civil Division Office). *See Attachment A.* More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of EOIR and FOIA – Civil Division Office to respond as a denial. *See* 5 U.S.C. §552(a)(6)(A)(i).

Through this appeal, NIJC reaffirms all aspects of its FOIA dated October 27, 2011, in which NIJC requested the following:

1. Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security (DHS) and the Department of Justice (DOJ);
2. Any reports, memoranda, analysis, emails or communication by DOJ regarding

implementation and use of DHS's prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and

3. Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

NIJC requested copies of the above listed documents and manuals to better understand the implementation of prosecutorial discretion, and better inform NIJC staff, legal advocates, clients, and the general public. A copy of NIJC's FOIA request is enclosed. *See Attachment B.*

### **Fee Waiver**

The Requester is entitled to a waiver of all costs because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requester's] commercial interest." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution). The Requester has a proven track-record of compiling and disseminating information to the public about government functions and activities. We intend to make your response – and an analysis thereof – publicly available on our website, [www.immigrantjustice.org](http://www.immigrantjustice.org). The issue of implementation of the government's prosecutorial discretion principles is one of significant public interest. The Requester has undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of federal government's policies and practices regarding the exercise of prosecutorial discretion. The records sought in this request will inform the public of the scope and effect of the government's implementation of its prosecutorial discretion guidelines.

As stated above, the Requester has no commercial interest in this matter. The Requester will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress' 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 of noncommercial requesters.'").

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. § 552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before fulfilling this request. We note that under FOIA, an agency may only charge "reasonable standard charges for document duplication," and not search-related costs, to "a representative of the news media." Under the 2007 amendments to FOIA, "a representative of the news media," means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public." Examples of news media entities includes "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As

noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge. Because NIJC qualifies as “a representative of the news media” under the revised statutory definition, you should not charge NIJC any search-related costs for this FOIA request. Should you have any questions regarding NIJC’s work in gathering information and using editorial skills to digest or distribute that information to the general public, please advise me, and I will be happy to provide examples and explanation.

In the alternative, the Requester seeks all applicable reductions in fees pursuant to 6 C.F.R. §5.11(d). The Requester agrees to pay for the first 100 pages of duplication. See 6 C.F.R. §5.11(d). The Requester agrees to pay search, duplication, and review fees up to \$200.00. If the fees will amount to more than \$200.00, the Requester requests a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). If no fee waiver is granted and the fees exceed \$200.00, please contact the Requester at the telephone number below to obtain consent to incur additional fees.

EOIR did not indicate whether our request for a fee waiver has been granted. It should be noted that in response to the same FOIA request, U.S. Citizenship and Immigration Services (USCIS) indicated on November 7, 2011 that NIJC’s fee waiver request had been granted. NIJC is entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which “is in the public interest because it 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.” *Id.* As indicated in further detail in the original FOIA request, NIJC satisfies all of these requirements.

### **Conclusion**

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your response to this FOIA request should also be considered within the scope of the request. Please provide data that is current as of the day of production of the data.

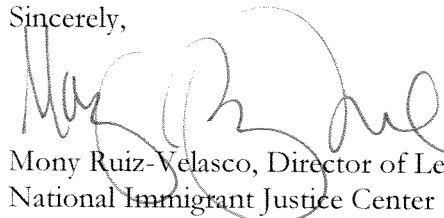
More than 30 business days have now elapsed since the filing of NIJC’s original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of EOIR and FOIA – Civil Division Office to respond as a denial.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. See 5 U.S.C. §552(b). To the extent that materials are excised, please “black out” these materials, rather than “whiting out” or “cutting out” these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. See 5 U.S.C. §552(a)(6)(A)(i).

The Requester certifies that the above information is true and correct to the best of the Requester’s knowledge. See 6 C.F.R. §5.5(d)(3).

We anticipate a response to this appeal from your office within 20 business days, as stipulated by 5 U.S.C. § 552(a)(6)(A)(ii). Please do not hesitate to contact me at 312/660-1360 or via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) should you have any questions.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

Enclosures

cc: James A. Klenk, Esq. SNR Denton US LLP  
Samuel Fifer, Esq. SNR Denton US LLP

13030806\V-1



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Mony Ruiz-Velasco  
National Immigrant Justice Center  
208 S. LaSalle Street  
Suite 1818  
Chicago, IL 60604

Re: AG/12-00135 (F)  
DAG/12-00136 (F)  
CLM:LAD:CMW

Dear Ms. Ruiz-Velasco:

This responds to your Freedom of Information Act request dated October 27, 2011, and received in this Office on October 28, 2011, for specific information identified in your request, including reports, memoranda, analysis, communications, or other documents pertaining to prosecutorial discretion or immigration enforcement priority policies and guidelines from January 1, 2010 to the present. This response is made on behalf of the Offices of the Attorney General and Deputy Attorney General.

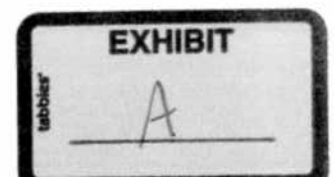
Please be advised that a search has been conducted of the electronic database of the Departmental Executive Secretariat, which is the official records repository for the Offices of the Attorney General and Deputy Attorney General, and no records responsive to your request have been located.

Furthermore, please be advised that a copy of your request has been routed to the Executive Office for Immigration Review and the Civil Division, which are the Department components responsible for the adjudication of removal cases and thus are more likely to maintain records responsive to your request. Those components will respond to you directly. However, should you wish to contact those components, you may do so at the following addresses:

Cecilia Espenosa  
Senior Associate General Counsel  
Executive Office for Immigration Review  
United States Department of Justice  
5107 Leesburg Pike  
Suite 2600  
Falls Church, VA 22041

James M. Kovakas  
Freedom of Information Office  
Civil Division  
United States Department of Justice  
20 Massachusetts Avenue, NW  
Room 7304  
Washington, DC 20035

Finally, if you have any questions or otherwise wish to discuss this Office's handling of your request, please contact Christine Wallace, the FOIA Specialist assigned to your request, at the telephone number listed above.



-2-

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001. Your appeal must be received within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "C. Mallon", with a long horizontal flourish extending to the right.

Carmen L. Mallon  
Chief of Staff

HEARTLAND  
ALLIANCE

## National Immigrant Justice Center

*Sent Via U.S. 2 Day Fed-Ex and Electronic Mail*

October 27, 2011

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-FOIA  
Fax: (202) 514-1009  
E-mail: [DOJ.OIP.Initial.Requests@usdoj.gov](mailto:DOJ.OIP.Initial.Requests@usdoj.gov)

Re: Freedom of Information Act Request

Dear Ms. Mallon:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding communications between the Department of Justice ("DOJ") and the U.S. Department of Homeland Security ("DHS") regarding implementation of prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the Office of the Attorney General or any of his designees (collectively known as the "AG"), Executive Office for Immigration Review ("EOIR"), and any other subcomponents (collectively the "DOJ"), as described in the specific requests listed below.

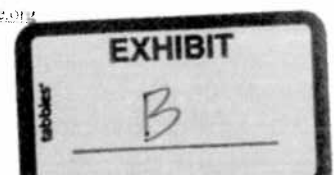
Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. §552(a)(4)(A)(ii)(II)-(III). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. §552 (a)(6)(E).

### **Specific Requests and Instructions**

Please provide any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion or immigration enforcement priorities policies and guideline from January 1, 2010 to the present. We specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security ("DHS") and the DOJ which was mentioned in the August 18, 2011 letter from

Heartland Alliance for Human Needs & Human Rights | National Immigrant Justice Center  
208 S. LaSalle Street, Suite 1818, Chicago, Illinois 60604 | ph: 312-660-1370 | fax: 312-660-1505 | [www.nimmigrantjustice.org](http://www.nimmigrantjustice.org)



Secretary Janet Napolitano to Senate Majority Leader Harry Reid;

- b) Additionally any reports, memoranda, analysis, emails or communication by DOJ regarding implementation and use of DHS's prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

#### **Request for Fee Waiver**

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which "is in the public interest because it 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." *Id.*

From the outset, it is important to note that Congress intended to encourage "open and accountable government" under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should "apply the public-interest waiver liberally." *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DOJ regulations clarify that the fee waivers are appropriate if disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government." 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, the federal policy has identified four relevant factors: (i) whether the subject of the request concerns "the operations or activities of the [federal] government;" (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is "likely to contribute" to an understanding of such government functions; (iii) whether disclosure of the information will contribute to "public understanding," meaning a reasonably broad audience of interested persons beyond just the requester; and (iv) whether the disclosure will "significantly" increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, federal policy has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC's request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC's request seeks information relating to the interpretation and implementation of policies regarding prosecutorial discretion at the DOJ and DHS. As this request concerns the application of federal policies concerning implementation of immigration law and policy, including the prosecution and detention of non-citizens in the United States, it pertains directly to the primary mission of the DOJ and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate implementation strategies of federal policy by the DOJ and investigate whether the DOJ is fulfilling its stated goals. The DOJ has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency's respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether "dissemination of the requested information is likely to contribute significantly to citizens' understanding of the workings of their government." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined "in light of the identity and objectives of the requester, the scope of the requester's proposed dissemination, and the requester's capacity to disseminate the requested information." *D.C. Technical Assistance Org., Inc. v. U.S. Dep't. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the implementation of prosecutorial discretion, and inter-agency collaboration on policy implementation, a subject which is of interest to the public at large and particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) ("Liberally construing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE's website, newsletter and chat room are an adequate means of disseminating information. . . ."). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency's own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency's governmental activities.

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency's initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are “hopelessly intertwined.” *Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. Federal standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS’s policies regarding prosecutorial discretion. Additionally, NIJC’s expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC’s *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization’s work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the “public at large” for this purpose. *See, e.g., Carney v. U.S. Dep’t. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov’t Ass’n v. Dep’t of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) (“public to be benefited” is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information through additional reports or articles that will likely be published nationwide and internationally. NIJC’s website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS should consider NIJC’s track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 (“The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE’s dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons.”); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, “a nonprofit, public interest organization” that “has a national reputation for researching and publishing concerns held by government whistleblowers”). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 (“A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff’s can serve as an electronic

clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .”).

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding the role of the DOJ in the implementation of federal prosecutorial guidelines. To date, federal agencies, including the DHS and the DOJ, have made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public’s understanding regarding the government’s use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no “existing ‘threshold level of public dissemination’” publicly available) (quoting *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. §5.11(k)(3)(i). The term “commercial” is used in its ordinary meaning; “[i]nformation is commercial if it relates to commerce, trade, or profit.” *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(3)(c) organization. Therefore, it has no “commercial, trade, or profit interests” that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. §5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC’s request for fee waivers thus satisfies the criteria set out in 6 C.F.R. §5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. *See* 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge “reasonable standard charges for

document duplication,” and not search-related costs, to “a representative of the news media.” Under the 2007 amendments to FOIA, “a representative of the news media” means “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience.” *See* 5 U.S.C. §552(a)(6)(A)(ii). “News” means “information that is about current events or that would be of current interest to the public,” (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes “alternative media” that disseminate their publications for free “through telecommunications services,” i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

**Request for Expedited Processing Pursuant to 6 C.F.R. §5.5(d)(ii)**

**There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the federal policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DOJ itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases currently pending before the immigration courts in a joint committee with the DOJ in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients whose cases could be impacted by the government’s exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS’s implementation of its prosecutorial guidelines and the collaboration to implement these guidelines with the DOJ. Ensuring an individual’s right to fair and adequate consideration of DHS’s policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester’s “main professional activity or occupation” but “need not be his or her sole occupation.” 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC’s “main professional activity.”

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides on-going training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

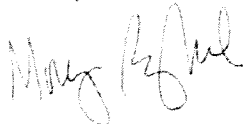
### **Conclusion**

For all the foregoing reasons, NIJC requests that the DOJ consider the request for expedited processing under either 6 C.F.R. § 5.5(d)(1)(i) or 6 C.F.R. § 5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. § 5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. § 522(a)(6)(E)(vi) and C.F.R. § 5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. *See* 5 U.S.C. § 552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruiizvelasco@heartlandalliance.org](mailto:mruiizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

## **EXHIBIT N**



**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the General Counsel*

5107 Leesburg Pike, Suite 2600  
Falls Church, Virginia 22041

November 2, 2011

Mony Ruiz-Velasco  
208 S. LaSalle St., Suite 1818  
Chicago, IL 60604

RE: Freedom of Information Act Request  
Prosecutorial Discretion

Dear Mony Ruiz-Velasco:

This response acknowledges receipt of your Freedom of Information Act (FOIA) request. Your request has been assigned control number: 2012-1855.

If you have filed a fee waiver request, the fee waiver will be addressed in a separate letter. Otherwise, your request constitutes an agreement to pay fees that may be chargeable up to \$25 without notice. Most requests do not require any fees; however, if fees in excess of \$25.00 are required, we will notify you beforehand. Fees may be charged for searching records at the rate of \$4.00/\$7.00/\$10.25 per quarter hour, and for duplication of copies at the rate of \$.10 per copy. The first 100 copies and two hours of research time are not charged, and charges must exceed \$14.00 before we will charge a fee.

Ordinarily, FOIA requires an agency to respond within 20 working days after receipt of the request. EOIR endeavors to meet this standard, however the FOIA does permit a ten day extension of this time period. Pursuant to 5 U.S.C. § 552(a)(6)(B), we are notifying you that due to 'unusual circumstances' an additional 10 day extension will be added to the standard processing time since your request either requires the collection of records from field offices, or involves a search for numerous documents that will necessitate a thorough and wide-range search of records at headquarters. If you care to narrow the scope of your request, please contact our office.

We will give your request every consideration consistent with applicable law. If you have any further questions, please contact the FOIA Service Center at 703-605-1297.

Sincerely,

*Felecia Springs-Freston*

Felecia Springs-Freston

EOIR# 2012-1855



**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the General Counsel*

5107 Leesburg Pike, Suite 2600  
Falls Church, Virginia 22041

November 2, 2011

Mony Ruiz-Velasco  
208 S. LaSalle St., Suite 1818  
Chicago, IL 60604

RE: Freedom of Information Act Request  
Prosecutorial Discretion

Dear Mony Ruiz-Velasco:

The Executive Office for Immigration Review has received your request for expedited treatment of your Freedom of Information Act (FOIA) request. The FOIA regulations states that expedited treatment is granted if there is an exceptional need such as jeopardy to life or personal safety, a threatened loss of substantial due process rights, or an urgency to inform the public concerning actual or alleged Federal Government activities.

Upon review of your FOIA request, it has been determined that you did not meet the threshold. Therefore, your request for expedited treatment has been denied.

If you are not satisfied with this decision, you may file an appeal with the Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., N.W., Suite 11050, Washington, D.C. 20530. OIP must receive your appeal within 60 days of the date of this letter. The procedures for appeal are stated at 28 C.F.R. Section 16.9.

Sincerely,

*Felecia Springs-Freston*

Felecia Springs-Freston

EOIR# 2012-1855

## **EXHIBIT O**



## National Immigrant Justice Center

*Sent Via U.S. 2 Day FedEx*

April 9, 2012

Ms. Felicia Springs-Freston  
U.S. Department of Justice  
Executive Office for Immigration Review  
Office of General Counsel  
5107 Leesburg Pike  
Suite 2600  
Falls Church, Virginia 22041

Office of Information Policy  
U.S. Department of Justice  
1425 New York Ave., NW, Suite 11050  
Washington, DC 20530

Re: Freedom of Information Act Appeal of Request for Prosecutorial Discretion and  
Immigration Enforcement Priorities Information, January 1, 2010 to the present.  
**Control Number: 2012-1855**

Dear Ms. Springs-Freston:

This is a timely appeal pursuant to 5 U.S.C. §552(a)(6)(A)(ii) of the Freedom of Information Act (FOIA) for the denial of our FOIA request. On November 2, 2011, the office of U.S. Department of Justice, Executive Office for Immigration Review Office of General Counsel (EOIR- General Counsel) acknowledged receipt of the National Immigrant Justice Center's (NIJC) FOIA on information about the implementation of prosecutorial discretion policies. *See Attachment A.* More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of EOIR- General Counsel to respond as a denial. *See* 5 U.S.C. §552(a)(6)(A)(i).

Through this appeal, NIJC reaffirms all aspects of its FOIA dated October 27, 2011, in which NIJC requested the following:

1. Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security (DHS) and the Department of Justice (DOJ);
2. Any reports, memoranda, analysis, emails or communication by DOJ regarding implementation and use of DHS's prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
3. Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

NIJC requested copies of the above listed documents and manuals to better understand the role of the Department of Justice in the implementation of the prosecutorial discretion guidelines. A copy of NIJC's FOIA request is enclosed. *See Attachment B.*

More than 30 business days have now elapsed since the filing of NIJC's original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating EOIR's failure to respond as a denial.

### **Fee Waiver**

The Requester is entitled to a waiver of all costs because the information sought "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the [Requester's] commercial interest." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of the institution). The Requester has a proven track-record of compiling and disseminating information to the public about government functions and activities. We intend to make your response – and an analysis thereof – publicly available on our website, [www.immigrantjustice.org](http://www.immigrantjustice.org). The issue of implementation of the government's prosecutorial discretion principles is one of significant public interest. The Requester has undertaken this work in the public interest and not for any private commercial interest. The primary purpose of this FOIA request is to obtain information to further the public's understanding of federal government's policies and practices regarding the exercise of prosecutorial discretion. The records sought in this request will inform the public of the scope and effect of the government's implementation of its prosecutorial discretion guidelines.

As stated above, the Requester has no commercial interest in this matter. The Requester will make any information that it receives as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress' 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 of noncommercial requesters.'").

Because the documents subject to this request are not sought for any commercial use, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. 5 U.S.C. § 552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before fulfilling this request. We note that under FOIA, an agency may only charge "reasonable standard charges for document duplication," and not search-related costs, to "a representative of the news media." Under the 2007 amendments to FOIA, "a representative of the news media," means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(6)(A)(ii). "News" means "information that is about current events or that would be of current interest to the public." Examples of news media entities includes "alternative media" that disseminate their publications for free "through telecommunications services," i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge. Because NIJC qualifies as "a

representative of the news media” under the revised statutory definition, you should not charge NIJC any search-related costs for this FOIA request. Should you have any questions regarding NIJC’s work in gathering information and using editorial skills to digest or distribute that information to the general public, please advise me, and I will be happy to provide examples and explanation.

In the alternative, the Requester seeks all applicable reductions in fees pursuant to 6 C.F.R. §5.11(d). The Requester agrees to pay for the first 100 pages of duplication. See 6 C.F.R. §5.11(d). The Requester agrees to pay search, duplication, and review fees up to \$200.00. If the fees will amount to more than \$200.00, the Requester requests a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). If no fee waiver is granted and the fees exceed \$200.00, please contact the Requester at the telephone number below to obtain consent to incur additional fees.

EOIR-General Counsel’s office did not indicate whether our request for a fee waiver has been granted and has only indicated that our request will be held in abeyance pending the quantification of responsive records. It should be noted that in response to the same FOIA request, U.S. Citizenship and Immigration Services (USCIS) indicated on November 7, 2011 that NIJC’s fee waiver request had been granted. NIJC is entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which “is in the public interest because it 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.” *Id.* As indicated in further detail in the original FOIA request, NIJC satisfies all of these requirements.

### **Conclusion**

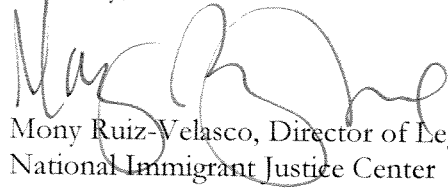
Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your response to this FOIA request should also be considered within the scope of the request. Please provide data that is current as of the day of production of the data.

More than 30 business days have now elapsed since the filing of NIJC’s original FOIA request, and NIJC has yet to receive any substantive response. We are therefore treating the failure of EOIR-General Counsel’s office to respond as a denial.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each item of data. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. See 5 U.S.C. §552(b). To the extent that materials are excised, please “black out” these materials, rather than “whiting out” or “cutting out” these materials. We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. See 5 U.S.C. §552(a)(6)(A)(i).

The Requester certifies that the above information is true and correct to the best of the Requester's knowledge. *See* 6 C.F.R. §5.5(d)(3).

Sincerely,

A handwritten signature in dark ink, appearing to read 'Mony Ruiz-Velasco', is written over the typed name and title.

Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

Enclosure

cc: James A. Klenk, Esq. SNR Denton US LLP  
Samuel Fifer, Esq. SNR Denton US LLP

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**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the General Counsel*

5107 Leesburg Pike, Suite 2600  
Falls Church, Virginia 22041

November 2, 2011

Mony Ruiz-Velasco  
208 S. LaSalle St., Suite 1818  
Chicago, IL 60604

RE: Freedom of Information Act Request  
Prosecutorial Discretion

Dear Mony Ruiz-Velasco:

This response acknowledges receipt of your Freedom of Information Act (FOIA) request. Your request has been assigned control number: 2012-1855.

If you have filed a fee waiver request, the fee waiver will be addressed in a separate letter. Otherwise, your request constitutes an agreement to pay fees that may be chargeable up to \$25 without notice. Most requests do not require any fees; however, if fees in excess of \$25.00 are required, we will notify you beforehand. Fees may be charged for searching records at the rate of \$4.00/\$7.00/\$10.25 per quarter hour, and for duplication of copies at the rate of \$.10 per copy. The first 100 copies and two hours of research time are not charged, and charges must exceed \$14.00 before we will charge a fee.

Ordinarily, FOIA requires an agency to respond within 20 working days after receipt of the request. EOIR endeavors to meet this standard, however the FOIA does permit a ten day extension of this time period. Pursuant to 5 U.S.C. § 552(a)(6)(B), we are notifying you that due to 'unusual circumstances' an additional 10 day extension will be added to the standard processing time since your request either requires the collection of records from field offices, or involves a search for numerous documents that will necessitate a thorough and wide-range search of records at headquarters. If you care to narrow the scope of your request, please contact our office.

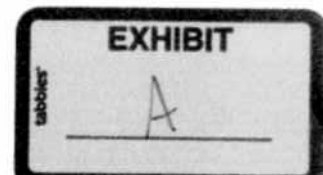
We will give your request every consideration consistent with applicable law. If you have any further questions, please contact the FOIA Service Center at 703-605-1297.

Sincerely,

*Felecia Springs-Freston*

Felecia Springs-Freston

EOIR# 2012-1855





**U.S. Department of Justice**

Executive Office for Immigration Review

*Office of the General Counsel*

5107 Leesburg Pike, Suite 2600  
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November 2, 2011

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208 S. LaSalle St., Suite 1818  
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Prosecutorial Discretion

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Upon review of your FOIA request, it has been determined that you did not meet the threshold. Therefore, your request for expedited treatment has been denied.

If you are not satisfied with this decision, you may file an appeal with the Office of Information Policy (OIP), U.S. Department of Justice, 1425 New York Ave., N.W., Suite 11050, Washington, D.C. 20530. OIP must receive your appeal within 60 days of the date of this letter. The procedures for appeal are stated at 28 C.F.R. Section 16.9.

Sincerely,

*Felecia Springs-Freston*

Felecia Springs-Freston

EOIR# 2012-1855



## National Immigrant Justice Center

*Sent Via U.S. 2 Day Fed-Ex and Electronic Mail*

October 27, 2011

Carmen L. Mallon  
Chief of Staff  
Office of Information Policy  
Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, D.C. 20530-0001  
(202) 514-FOIA  
Fax: (202) 514-1009  
E-mail: [DOJ.OIP.Initial.Requests@usdoj.gov](mailto:DOJ.OIP.Initial.Requests@usdoj.gov)

Re: Freedom of Information Act Request

Dear Ms. Mallon:

This letter constitutes a request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 on behalf of Heartland Alliance's National Immigrant Justice Center ("NIJC"). NIJC is a not-for-profit agency that provides immigration legal services to low-income immigrants, refugees and asylum seekers. NIJC seeks information regarding communications between the Department of Justice ("DOJ") and the U.S. Department of Homeland Security ("DHS") regarding implementation of prosecutorial discretion guidelines and directives. To this end, NIJC seeks disclosure of any and all records, including all electronic documents and communications in the custody of the of the Office of the Attorney General or any of his designees (collectively known as the "AG"), Executive Office for Immigration Review ("EOIR"), and any other subcomponents (collectively the "DOJ"), as described in the specific requests listed below.

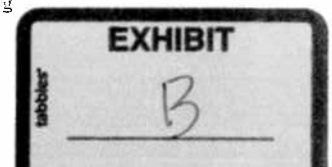
Against this backdrop, and as further discussed below, NIJC is entitled to a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii) and even absent the grant of such a fee waiver, "fees shall be limited to reasonable standard charges for document duplication," and *no search charges may be assessed* for these requests, because NIJC qualifies as a "representative of the news media" under 5 U.S.C. §552(a)(4)(A)(ii)(II)-(III). NIJC is also entitled to expedited processing of these requests under 5 U.S.C. §552 (a)(6)(E).

### **Specific Requests and Instructions**

Please provide any and all reports, memoranda, analysis, communications, or other documents, which include, summarize, or relate to the implementation of prosecutorial discretion or immigration enforcement priorities policies and guideline from January 1, 2010 to the present. We specifically request:

- a) Any analyses, reports, communications, emails, memoranda, or other documents pertaining to the joint commission comprised of the Department of Homeland Security ("DHS") and the DOJ which was mentioned in the August 18, 2011 letter from

Heartland Alliance for Human Needs & Human Rights | National Immigrant Justice Center  
208 S. LaSalle Street, Suite 1818, Chicago, Illinois 60604 | ph: 312-660-1370 | fax: 312-660-1505 | [www.nimmigrantjustice.org](http://www.nimmigrantjustice.org)



Secretary Janet Napolitano to Senate Majority Leader Harry Reid;

- b) Additionally any reports, memoranda, analysis, emails or communication by DOJ regarding implementation and use of DHS's prosecutorial discretion policies and guidelines, administrative closure of cases of individuals in removal proceedings, or efforts to prioritize immigration enforcement; and
- c) Any form, worksheet, or document used to analyze, determine, consider, or review determinations regarding prosecutorial discretion.

If all or part of any of this request is denied, please specify the exemption(s) claimed for withholding each record. Please also state the number of documents or portions thereof being withheld, the number of pages of each document being withheld, and the dates of the documents withheld. If some portion(s) of the requested materials are determined to be exempt, please provide the remaining non-exempt portions. *See* 5 U.S.C. §552(b). We reserve the right to appeal any decision(s) to withhold information and expect that you will list the address and office to which such an appeal may be directed. *See* 5 U.S.C. §552(a)(6)(A)(i).

#### **Request for Fee Waiver**

NIJC is also entitled to a fee waiver pursuant to 5 U.S.C. 552(a)(4)(A)(iii) and 6 CFR § 5.11(k) because these requests seek documents, the disclosure of which "is in the public interest because it 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." *Id.*

From the outset, it is important to note that Congress intended to encourage "open and accountable government" under the FOIA fee waiver provision. *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 271 (D.D.C. 2009). Agencies should "apply the public-interest waiver liberally." *Conklin v. United States*, 654 F. Supp. 1104, 1005 (D.Colo. 1987). DOJ regulations clarify that the fee waivers are appropriate if disclosure of the requested information is "in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government." 6 CFR 5.11 § (k)(i) and 6 CFR § 5.11(k)(ii).

To determine whether the requested information satisfies the first requirement, the federal policy has identified four relevant factors: (i) whether the subject of the request concerns "the operations or activities of the [federal] government;" (ii) whether the information is meaningfully informative about the operations or activities of the government such that its disclosure is "likely to contribute" to an understanding of such government functions; (iii) whether disclosure of the information will contribute to "public understanding," meaning a reasonably broad audience of interested persons beyond just the requester; and (iv) whether the disclosure will "significantly" increase public understanding of government operations or activities. 6 CFR § 5.11(k)(2)(i)-(iv).

To determine whether the request satisfies the second requirement, federal policy has identified two concerns: (i) whether the requester has a commercial interest that would be furthered by the requested disclosure and (ii) whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requester. 6 CFR § 5.11(k)(3)(i)-(ii).

NIJC's request satisfies all of these requirements, as discussed in further detail below.<sup>1</sup>

- **The Subject Directly Concerns the Operations of the Federal Government**

NIJC's request seeks information relating to the interpretation and implementation of policies regarding prosecutorial discretion at the DOJ and DHS. As this request concerns the application of federal policies concerning implementation of immigration law and policy, including the prosecution and detention of non-citizens in the United States, it pertains directly to the primary mission of the DOJ and clearly deals with the operations and activities of the government. The public has an interest in obtaining information that may help them evaluate implementation strategies of federal policy by the DOJ and investigate whether the DOJ is fulfilling its stated goals. The DOJ has issued numerous press releases, publications, and newsletters that they routinely disseminate to the public regarding their operations, and which are available on the Agency's respective websites, which further demonstrate this factor is met.

- **The Informative Value Will Contribute to an Understanding of Government Activities**

The key inquiry with respect to a FOIA fee waiver request is whether "dissemination of the requested information is likely to contribute significantly to citizens' understanding of the workings of their government." *Citizens for Responsibility and Ethics in Washington v. U.S. Dep't. of Educ.*, 593 F. Supp. 2d 261, 270 (D.D.C. 2009). When evaluating this factor, fee waiver requests should be examined "in light of the identity and objectives of the requester, the scope of the requester's proposed dissemination, and the requester's capacity to disseminate the requested information." *D.C. Technical Assistance Org., Inc. v. U.S. Dep't. of Housing and Urban Dev.*, 85 F. Supp. 2d 46, 48-49 (D.D.C. 2000).

This element is also met for many of the same reasons as the first factor. This request will meaningfully contribute to an understanding of this process as it will reveal substantive and procedural information relevant to the implementation of prosecutorial discretion, and inter-agency collaboration on policy implementation, a subject which is of interest to the public at large and particularly to individuals who face removal proceedings. NIJC intends to analyze any information responsive to its requests, share this analysis with the public through memoranda, reports, or press releases, and disseminate any documents it acquires from this request to the public via the news media or directly to its members. NIJC clearly has the ability to disseminate the information; as one court noted, "[i]n this Information Age, technology has made it possible for almost anyone to fulfill this requirement." *D.C. Technical Assistance*, 85 F. Supp. 2d at 49. *See also Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203 (D.D.C. 2009) ("Liberally construing the fee waiver requirements in the favor of the requester as it must, the Court finds that FedCURE's website, newsletter and chat room are an adequate means of disseminating information. . . ."). As noted above, NIJC intends to host the responsive documents on its website, which will provide a useful tool to the public. Furthermore, as discussed above, the Agency's own publications demonstrate that a release of this information will significantly contribute to an understanding of the Agency's governmental activities.

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<sup>1</sup> NIJC notes that before making an adverse determination regarding fee waiver, the Agency should seek additional information from the applicant. *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*4 (D.D.C. Sept. 25, 2000). Thus, to the extent the Agency's initial assessment is to deny this fee waiver, which NIJC strongly asserts would be improper and in error, the Agency should first seek additional information from NIJC before reaching such an adverse determination.

- **This Information Will Contribute to the Understanding of a Broad Audience**

The criteria of whether disclosure will benefit the public at large and contribute to public understanding are “hopelessly intertwined.” *Project on Military Procurement v. Dep’t of Navy*, 710 F. Supp. 362, 364 n. 8 (D.D.C. 1989). These requirements seek to ensure that a fee waiver results in the dissemination of information to an audience greater than the requester alone. Federal standards specifically note that expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. 6 CFR § 5.11(k)(2)(iii). NIJC is a non-profit organization which advocates for immigrants through direct legal services, advocacy campaigns aimed at policy reform, and public education. NIJC facilitates legal services for more than 10,000 non-citizens each year. Many of these non-citizens are directly affected by DHS’s policies regarding prosecutorial discretion. Additionally, NIJC’s expertise is reflected in the training and guidance it provides for approximately 1,000 pro bono attorneys representing non-citizens through NIJC’s *pro bono* projects. Consequently, any information received by NIJC would be incorporated into the organization’s work and disseminated to a large audience.

Moreover, courts have repeatedly held that the requested information need not reach literally reach broad cross-section of the public to benefit the “public at large” for this purpose. *See, e.g., Carney v. U.S. Dep’t. of Justice*, 19 F.3d 807, 814-15 (2d Cir. 1994) (doctoral student seeking records from the Department of Justice to use in his dissertation, scholarly articles, college classes, panels and conventions and in a tentative book benefits the public at large even though aimed at a narrow audience of interested scholars); *Better Gov’t Ass’n v. Dep’t of State*, 780 F. 2d 86, 89 (D.C. Cir. 1986) (“public to be benefited” is larger than the requestor but not so broad as to encompass all citizens); *Judicial Watch, Inc. v. Gen. Serrv. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*7 (D.D.C. Sept. 25, 2000).

Specifically, NIJC will disseminate the records by hosting them on its website, thereby disseminating this information to the public at large, other members of the media who can then further disseminate the information though additional reports are articles that will likely be published nationwide and internationally. NIJC’s website is frequented by the public at large, as well as attorneys, news reporters, members of major universities and institutes of learning, as well as government officials and employees. NIJC will also issue several press releases and post documents on its website, and ask employees to appear on radio and television to discuss these matters. DHS should consider NIJC’s track record and reputation for disseminating information to the public. *See Federal Cure*, 602 F. Supp. 2d at 204-05 (“The information provided regarding the activity on its chat site and website, coupled with the estimated subscriber base who receive its newsletter . . . presents a strong case for treating FedCURE’s dissemination efforts as an effective means of distributing the requested information to a broad group of interested persons.”); *Judicial Watch*, 2000 WL 35538030, at \*8 (holding that disclosure would benefit the public at large as Judicial Watch, an organization whose stated business was publicizing potential governmental impropriety, also set forth a list of methods it customarily uses to disseminate information; *Pederson v. RTC*, 847 F. Supp. 851, 855 (D. Colo. 1994) (finding that plaintiffs had ability to disseminate information adequately based on their association with the Government Accountability Project, “a nonprofit, public interest organization” that “has a national reputation for researching and publishing concerns held by government whistleblowers”). Moreover, NIJC will post all disclosed information for public review on its website. *See Judicial Watch*, 2000 WL 35538030, at \*9 (“A website, after all, is readily accessible from anywhere in the country and can be designed to allow easy navigation through voluminous quantities of information. Indeed, a website such as the plaintiff’s can serve as an electronic

clearinghouse of information which citizens would otherwise have to cull from a variety of disparate sources. . . .”).

- **This Information Will Significantly Increase Public Understanding**

There is significant public confusion surrounding the role of the DOJ in the implementation of federal prosecutorial guidelines. To date, federal agencies, including the DHS and the DOJ, have made public very little information regarding the substantive criteria or procedural means used to determine when it will exercise prosecutorial discretion. The disclosure of this information will be used to educate NIJC, members of the legal profession, members of academia, the news media, potential immigrants to the United States, and the general public, as to the criteria that is applied under the prosecutorial discretion guidelines. Moreover, the availability of the requested information must also be considered. *Federal Cure*, 602 F. Supp. 2d at 206. The information requested is not available publicly in any form, and the public has no access to it. By compiling this information, placing the data on its website, in its newsletter, and making it generally available to the public, the media, and attorneys, NIJC will substantially impact the public's understanding regarding the government's use of prosecutorial discretion in immigration cases. *Id.* at 206-07 (non-profit satisfies this prong when it desires to make information with no “existing ‘threshold level of public dissemination’” publicly available) (quoting *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 36 (D.C. Cir. 1999)).

- **NIJC is a Non-Profit Interest Group Dedicated to Immigrant Rights and is Not Seeking These Documents for Commercial Use**

NIJC does not have a commercial interest in the disclosure of the requested information. 6 C.F.R. §5.11(k)(3)(i). The term “commercial” is used in its ordinary meaning; “[i]nformation is commercial if it relates to commerce, trade, or profit.” *Judicial Watch, Inc. v. Gen. Servs. Admin.*, No. Civ.A 98-2223(RMU), 2000 WL 35538030, at \*5 (D.D.C. Sept. 25, 2000). NIJC is a not-for-profit organization that is part of Heartland Alliance for Human Needs and Human Rights, a publicly supported, 501(3)(c) organization. Therefore, it has no “commercial, trade, or profit interests” that could be furthered by any request. Further, all outside attorneys recruited, trained, and supported by NIJC only represent NIJC clients on a *pro bono* basis and their work does not result in any commercial gain.

Moreover, because NIJC does not have a commercial interest in the disclosure of the requested information, there is no need to consider whether the public interest in disclosure is greater in magnitude than any identified commercial interest of the requestor. 6 C.F.R. §5.11(k)(3)(ii). Even if NIJC is found to have some kind of commercial interest in the advancement of immigration litigation, the public benefit that will result from the disclosure of the requested information is significantly greater, for the reasons previously set forth. NIJC's request for fee waivers thus satisfies the criteria set out in 6 C.F.R. §5.11(k).

The documents subject to this request are not sought for any commercial use. Thus, we understand that no fee may be charged for the first two hours of search time or for the first 100 pages of duplication. *See* 5 U.S.C. §552(a)(4)(A)(iv)(II). If you decline to waive these fees, and if these fees will exceed \$100.00, please notify us of the amount of these fees before filing this request.

Finally, we would note under FOIA, an agency may only charge “reasonable standard charges for

document duplication,” and not search-related costs, to “a representative of the news media.” Under the 2007 amendments to FOIA, “a representative of the news media” means “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into distinct work, and distributes that work to an audience.” *See* 5 U.S.C. §552(a)(6)(A)(ii). “News” means “information that is about current events or that would be of current interest to the public,” (e.g. the implementation of prosecutorial discretion by DHS). Examples of news media entities includes “alternative media” that disseminate their publications for free “through telecommunications services,” i.e., the internet. As noted above, NIJC has a track record of turning raw material into reports and other publications for distribution to the general public, which it does at no charge.

**Request for Expedited Processing Pursuant to 6 C.F.R. §5.5(d)(ii)**

**There is an urgency and hence compelling need to inform the public about this issue.**

This determination hinges on three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, 321 F. Supp. 2d 24, 29 (D.D.C. 2004). As discussed *supra* pages 12-13, the request concerns federal government activity.

This request involves a matter of current exigency. There is significant concern and debate regarding the implementation of the federal policies regarding prosecutorial discretion. There have been numerous articles and publications written on this topic; a relevant factor that courts have previously considered when analyzing a request for expedited processing. *Am. Civil Liberties Union*, 321 F. Supp. at 29-30. DOJ itself recognizes that these requests seek information regarding topics that satisfy these criteria and has published numerous materials regarding these topics on its website. These publications demonstrate the Agency recognizes that these issues are important matters of public concern. In addition, a failure to grant expedited processing will compromise the interests of thousands of people. DHS stated that it would review 300,000 cases currently pending before the immigration courts in a joint committee with the DOJ in light of its policies regarding prosecutorial discretion. NIJC alone has over 100 clients whose cases could be impacted by the government’s exercise of prosecutorial discretion.

The information requested through this FOIA request all relates to DHS’s implementation of its prosecutorial guidelines and the collaboration to implement these guidelines with the DOJ. Ensuring an individual’s right to fair and adequate consideration of DHS’s policies, where the denial of relief could lead to serious harm, death or permanent exile from the United States, is an urgent concern.

- **The requester is a person primarily engaged in disseminating information**

In order to qualify for expedited processing under 6 C.F.R. § 5.5(d)(1)(ii), information dissemination must be the requester’s “main professional activity or occupation” but “need not be his or her sole occupation.” 6 C.F.R. § 5.5(d)(3). As discussed at length above in the representative of the news media section and elsewhere, it is apparent that NIJC meets this element. One of the core missions of the NIJC is public education, which is largely achieved by disseminating information regarding immigration issues to the public, policy makers, attorneys, and immigrants. As such, information dissemination is NIJC’s “main professional activity.”

NIJC currently works with an active roster of over 1,000 *pro bono* attorneys to whom it provides on-going training, technical support, and advice regarding immigration law and policy. NIJC also conducts approximately 30 "Know Your Rights" presentations to immigrants in detention facilities throughout the Midwest each year. Lastly, NIJC publishes newsletters, policy briefs, and other informational materials for members of the legal profession, immigrants, and the public providing information about the immigration system and recent developments in law and policy. Consequently, this FOIA request satisfies the last requirement for expedited processing as NIJC is an organization primarily engaged in disseminating information.

- **The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual**

NIJC further requests expedited processing under 6 C.F.R. § 5.5(d)(1)(i) as the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. As previously noted, very little information exists regarding the application of DHS's prosecutorial discretion guidelines. The confusion caused by this lack of information is often exacerbated when an individual is facing removal proceedings and faces imminent removal and family separation. Without more information regarding the interpretation and implementation of the DHS's prosecutorial discretion guidelines, attorneys are unable to provide competent and effective counsel to clients, and pro se applicants are unable to avail themselves of protections that may be available to them.

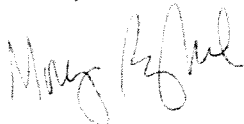
### **Conclusion**

For all the foregoing reasons, NIJC requests that the DOJ consider the request for expedited processing under either 6 C.F.R. § 5.5(d)(1)(i) or 6 C.F.R. § 5.5(d)(1)(ii). Finally, if this request is denied in whole or in part, please provide the reason(s) for the denial(s), pursuant to 6 C.F.R. § 5.6(c), so that any appeal can be focused on the alleged deficiency. In accordance with 5 U.S.C. § 522(a)(6)(E)(vi) and C.F.R. § 5.5(d)(3), I certify that the above information pertaining to a request for expedited processing is true and correct to the best of my knowledge and belief.

Please reply to this request within twenty working days, or as required by statute. *See* 5 U.S.C. § 552(a)(6)(A)(i).

If you have any questions regarding this request, please feel free to contact me via email at [mruizvelasco@heartlandalliance.org](mailto:mruizvelasco@heartlandalliance.org) or call me at my direct line, 312-660-1360. Thank you in advance for your kind attention to this matter.

Sincerely,



Mony Ruiz-Velasco, Director of Legal Services  
National Immigrant Justice Center

## **EXHIBIT P**



**U.S. Department of Justice**

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

APR 25 2012

Mony Ruiz-Velasco, Esq.  
National Immigrant Justice Center  
Suite 1818  
208 S. LaSalle Street  
Chicago, IL 60604

Re: Request No. 2012-1855

Dear Ms. Ruiz-Velasco:

This is to advise you that your administrative appeal from the action of the Executive Office for Immigration Review was received by this Office on April 10, 2012.

The Office of Information Policy has the responsibility of adjudicating such appeals. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number **AP-2012-01970**. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. If you have any questions about the status of your appeal you may contact me at the number above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Priscilla Jones".

Priscilla Jones  
Supervisory Administrative Specialist

## **EXHIBIT Q**



**U.S. Department of Justice**  
Office of Information Policy  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Telephone: (202) 514-3642

**APR 30 2012**

Mr. Mony Ruiz-Velasco  
National Immigration Justice Center  
Suite 1818  
208 S. LaSalle Street  
Chicago, IL 60604

Re: Appeal No. AP-2012-01970  
Request No. 2012-1855  
ADW:CAS

Dear Mr. Ruiz-Velasco:

You attempted to appeal from the failure of the Executive Office for Immigration Review (EOIR) to respond to your request for access to records concerning the Department of Homeland Security's prosecutorial discretion in immigration proceedings.

Department of Justice regulations provide for an administrative appeal to the Office of Information Policy only after there has been an adverse determination by a component. See 28 C.F.R. § 16.9(a) (2011). As no adverse determination has yet been made by EOIR there is no action for this Office to consider on appeal.

As you may know, the Freedom of Information Act authorizes requesters to file a lawsuit when an agency takes longer than the statutory time period to respond. See 5 U.S.C. § 552(a)(6)(C)(i). However, I can assure you that this Office has contacted EOIR and has been advised that your request is being processed. If you are dissatisfied with EOIR's final response you may appeal again to this Office.

This Office has forwarded a copy of your letter to EOIR. I suggest that you contact EOIR's Requester Service Center at 703-605-1297 for further updates regarding the status of your request.

Sincerely,

Janice Galli McLeod  
Associate Director

By: 

Anne D. Work  
Senior Counsel  
Administrative Appeals Staff