

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION,  
OF MASSACHUSETTS; and  
AMERICAN OVERSIGHT,

Plaintiffs,

v.

U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT,

Defendant.

Civil Action No. 1:21-cv-10761-AK

**MOTION FOR (LIMITED) RECONSIDERATION OF PRESERVATION ORDER**

Defendant hereby seeks partial reconsideration of the Court's September 1, 2022 order requiring preservation of certain evidence and a search of one particular cellular telephone that ICE had already undertaken. The motion for reconsideration is very narrow, as is explained below.<sup>1</sup> The government recognizes that the Court is unlikely to vacate its order given the missed deadline and the fact that the order merely formalizes what Defendant was already doing. Thus, while it is Defendant's position that the order was unnecessary, it cannot also argue that the order

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<sup>1</sup> The Court allowed Plaintiffs' motion for preservation of evidence on the ground that it was unopposed. This is undersigned counsel's error; he thought he had obtained a one week extension, making Defendant's opposition due today, September 1, 2022. In fact, counsel prepared an opposition to the TRO motion, discussed it with ICE counsel and could easily have filed it on August 25, 2022. But, on that date, undersigned counsel emailed ICE counsel and told her that the brief was not due until September 1, 2022 because he had obtained a one week extension. It is clear that this was mistaken, and the only explanation that makes sense is that counsel for the government was before this Court on August 24, 2022 in a different case (*Singh v. Riordan*, 21-cv-11304 AK), and in that case the Court granted government counsel an extension. Confusing the two cases, if that is what occurred, is unacceptable, but perhaps understandable given that counsel has had approximately 10 briefing deadlines in the second half of August.

is a significant burden.

However, the content of the TRO motion requires a response on the record as it makes incorrect statements and implications that are simply unsupported.<sup>2</sup>

**A. The Order Is Overbroad**

The principal ground upon which Defendant seeks reconsideration of the Court's order is that it is overbroad in two significant ways.<sup>3</sup> First, the order requires Defendant, ICE, to "preserve in their present condition all mobile devices, including cellular telephones, within its possession, custody, or control, that were issued at any time by any government agency to [the seven named ICE officials]." By its terms, this requires ICE to reach out to *all* governmental agencies to determine if they issued a mobile device to any of the named individuals *at any time*. But this is a FOIA case brought to enforce a request for information made to ICE and ICE alone. Neither Plaintiffs, nor the Court, have the right or the power to require government-wide action in a FOIA case filed against a particular agency. In other words, because Plaintiffs chose to make a FOIA request to ICE, they cannot now seek the equivalent of broad civil discovery and evidence preservation from other agencies.

Therefore, Defendant requests that the Court's order be modified to require preservation of only those devices that were issued by ICE to the named individuals and in their possession as of the underlying incident involving state court Judge Shelley Joseph and Officer MacGregor from

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<sup>2</sup> Plaintiffs have made statements to the media attempting to link this case to other situations in which issues of text message preservation have arisen. This is sensationalistic and illogical, as the cited situations involve different agencies and likely different situations (former versus current employees' phones, for example).

<sup>3</sup> Clearly, if Defendant had not been mistaken about the deadline for opposing the TRO, the Court would have been given the opportunity to consider Defendant's arguments regarding both the lack of necessity for any order as well as the overbreadth of Plaintiffs' requests. It is Defendant's fault that the Court did not have its response.

March 15, 2018, through April 25, 2019.<sup>4</sup>

**B. Plaintiffs Did Not Show a Need for the Order**

While Defendant is not asking the Court to vacate its order, but instead to modify it in one narrow regard only, the hyperbole and misinterpretation of the facts by Plaintiffs requires correction. First, there is nothing in Plaintiffs' motion that suggests any possibility that Defendant intended to alter or erase any content on the phones. The affidavits filed by Defendant do not remotely support such an interpretation. ICE has no intention of destroying responsive documents that may exist on the phones.<sup>5</sup>

As regards the search of the phone that was assigned to Jon Feere, Plaintiffs themselves stated in their TRO motion that ICE was already committed to attempting to unlock and search that phone. The Court's order accepts that this is already happening. There was no need for an order regarding the Feere phone. However, since the Court's order merely requires ICE to do what

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<sup>4</sup> Defendant has no information that any other agency issued an electronic device to any of the seven named individuals. But it should not be required to conduct a government-wide inquiry given that this litigation is about a FOIA request to ICE only.

<sup>5</sup> Plaintiffs refer to a policy whereby departing employees' phones are deactivated, which means text messages are lost, but none of the seven individuals is in possession of their cell phones from the relevant period. Five of the seven mobile devices were confirmed deactivated per the Court's June 3, 2022 order, which means there were no data or text messages on the mobile devices when the mobile devices were returned to the property custodians. Plaintiffs claim that five phones were not actually checked to see if the text messages were, in fact, gone. This is incorrect and reflects a fundamental misunderstanding of how cell phones work. Once a phone is deactivated, there is no data from the carrier preserved. Text messages no longer exist on the phone. And, as described in the Clark declaration, when ICE deactivates a cell phone, all data, including anything stored in memory, is wiped clean. Thus, as Plaintiffs know, there is no data on the phones to preserve. The two remaining mobile devices belonged to Nathalie Asher and Jon Feere. Nathalie Asher retired in December of 2021. The Office of Professional Responsibility (OPR) conducted a search of the phone and determined there were no responsive text messages or emails on it. The Feere phone is in ICE's possession, and Plaintiffs' own motion acknowledges that ICE is attempting to unlock the phone so it can search it. How Plaintiffs derive an emergency requiring judicial intervention from these facts is, frankly, unfathomable.

it was already doing, Defendant is not seeking to modify or vacate that portion of the order.

**C. FOIA Requires Only That an Agency Make a Reasonable Search**

Plaintiffs have insinuated that ICE has somehow acted in bad faith in response to their request despite Defendant's multiple and extensive searches. First, as the declarations filed previously with the Court establish, ICE has made multiple diligent searches in a rigorous and good-faith effort to locate responsive documents. Second, it is also important to note that the FOIA request was received approximately three months before the COVID pandemic began. As the Court is well aware, the pandemic reduced the available workforce everywhere<sup>6</sup> Moreover, DHS, including ICE, receives an enormous volume of FOIA requests, with the total increasing every year. Beginning in fiscal year ("FY") 2018, the ICE FOIA Office experienced a substantial and dramatic increase in the number of FOIA requests received by ICE compared to previous years. In FY 2015, the ICE FOIA Office received 44,748 FOIA requests; 63,385 FOIA requests were received in FY 2016. The number of requests received briefly decreased in FY 2017 to 47,893 but was then followed by a spike of 70,267 FOIA requests in FY 2018. In FY 2019, that number climbed to a total of 123,370 requests received and in FY 2020 the ICE FOIA Office received 114,475 FOIA requests. Between FY 2017 and FY 2020, the ICE FOIA Office experienced approximately a 240% increase in FOIA requests.<sup>7</sup>

Absent a court order or some compelling circumstance, FOIA requests are generally handled on a first in, first out priority.<sup>8</sup> The claimed delay in responding to the FOIA request in

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<sup>6</sup> See Dep't of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2022* at 2, located at [FY 21 DHS Annual FOIA Report.pdf](#).

<sup>7</sup> See Exhibit 1, Declaration of Fernando Pineiro, filed herewith, at ¶ 5-6.

<sup>8</sup> See, e.g., *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)(FOIA "due diligence" requirement may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed

this case is, in fact, the unfortunate reality of DHS and ICE’s FOIA work load. Similar to the backlog in processing visa applications on behalf of U.S. Citizenship and Immigration Services or the State Department, what appears to be unreasonable in a specific case must be considered as part of a virtual tsunami of other FOIA requests.<sup>9</sup>

FOIA does not require that the receiving agency drop all other FOIA requests, much less all non-FOIA activity, and instantly process a new FOIA request. Nor does the statute require a federal agency to issue a “litigation hold” immediately upon receiving a request. *Houser v. U.S. Dep’t of Health & Hum. Servs.*, 486 F. Supp. 3d 104, 114 (D.D.C. 2020)(absent a showing that the government has improperly destroyed agency records, not important that a litigation hold was not issued). Therefore, as between ICE’s overall FOIA work load and the outbreak of COVID-19, as well as the “first in, first processed” approach to requests, the delay between when the FOIA request was made and when ICE took steps to find responsive documents was entirely reasonable.

The touchstone for evaluating an agency’s response to a FOIA request is whether it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.<sup>10</sup> It does not have to show that it made

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out of turn requires a particularized showing of exceptional need or urgency).

<sup>9</sup> Indeed, the ACLU is responsible for a significant portion of the increase in FOIA litigation in this district, as a search of PACER for “ACLU” or its full name indicates over 25 cases in which it is a plaintiff, amicus or interested party. And that is just the District of Massachusetts.

<sup>10</sup> *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995); *Oglesby v. U.S. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)); *Stalcup v. CIA*, 768 F.3d 65, 74 (1st Cir. 2014) (noting that resolution of search claim ‘turns on whether the agency made a good faith, reasonable effort using methods which can be reasonably expected to produce the information requested’; *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007); *Maynard v. CIA*, 986 F.2d 547, 559 (1st Cir. 1993) (noting that crucial search issue is whether agency's search was reasonably calculated to discover the requested documents).

a perfect search or that it ensured that every last document was preserved.<sup>11</sup>

Moreover, as regards the reasonableness of a search, agency declarations are entitled to a presumption of good faith.<sup>12</sup> Consequently, the failure of a search to produce particular documents, or mere speculation that as yet uncovered documents might exist, does not undermine the adequacy of a search.<sup>13</sup>

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<sup>11</sup> *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Veterans Affs.*, 828 F. Supp. 2d 325, 335 (D.D.C. 2011) (noting defendant's position that no case holds that agencies must preserve, restore, and search evidence whenever a pending FOIA request seeks electronic records); *Hornbostel v. U.S. Dep't of the Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2003), *aff'd*, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004); *Mobley v. CIA*, 806 F.3d 568, 581 (D.C. Cir. 2015) (finding agency search is "not unreasonable simply because it fails to produce all relevant material"); *Grand Cent. P'ship v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999) ("the factual question . . . is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant"); *In re Wade*, 969 F.2d at 249 n.11 (same); *Amnesty Int'l USA v. CIA*, 728 F. Supp. 2d 479, 498 (S.D.N.Y. 2010) (noting that discovery of two additional responsive documents in an area that the CIA determined would probably not lead to uncovering responsive documents does not render the CIA's search inadequate); *Blanck v. FBI*, No. 07-0276, 2009 WL 728456, at \*7 (E.D. Wis. Mar. 17, 2009); *Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) ("perfection is not the standard by which the reasonableness of a FOIA search is measured"); *Garcia v. DOJ*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002) ("[t]he agency is not expected to take extraordinary measures to find the requested records").

<sup>12</sup> *Chilingirian v. EOUSA*, 71 F. App'x 571, 572 (6th Cir. 2003) (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164, 179 (1991)); *Carney*, 19 F.3d at 812 (holding that "affidavits submitted by an agency are accorded a presumption of good faith"; *Havemann*, 629 F. App'x at 539; *Coyne v. United States*, 164 F. App'x 141, 142 (2d Cir. 2006); *Peltier v. FBI*, No. 03-905, 2005 WL 735964, at \*4 (W.D.N.Y. Mar. 31, 2005) (same); *Butler v. SSA*, No. 03-0810, slip op. at 5 (W.D. La. June 25, 2004), (same), *aff'd on other grounds*, 146 F. App'x 752, 753 (5th Cir. 2005).

<sup>13</sup> *Kucernak v. FBI*, 129 F.3d 126, 126 (9th Cir. 1997) ("[m]ere allegations that the government is shielding or destroying documents does [sic] not undermine the adequacy . . . of the search") (unpublished table decision); *Lasko v. DOJ*, No. 10-5068, 2010 WL 3521595, at \*1 (D.C. Cir. Sept. 3, 2010); *Assassination Archives Research Ctr. v. CIA*, No. 18-5280, 2019 WL 691517, at \*1 (D.C. Cir. Feb. 15, 2019) (finding search adequate notwithstanding search did not locate several records requester speculated existed); *Clemente v. FBI*, 867 F.3d 111, 118 (D.C. Cir. 2017) (same); *Pub. Emp. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 200 (D.C. Cir. 2014) (noting that "an agency's failure to turn up every responsive document in an initial search is not necessarily evidence of bad faith"); *Steinberg*, 23 F.3d at 552; *Attkisson v. DOJ*, 205 F. Supp. 3d 92, 95 (D.D.C. 2016) (same); *Pinson v. DOJ*, 61 F. Supp. 3d 164, 179 (D.D.C. 2015) (finding that "the fact that additional documents responsive to [the]

#### **D. There Is No Evidence of Bad Faith Here**

The target cell phones were not deactivated in response to the FOIA litigation. Plaintiffs have not, and cannot, suggest otherwise. In fact, the picture Plaintiffs present is that the phones were deactivated in the normal course of ICE business as regards to employees leaving.<sup>14</sup> Plaintiffs are trying to retroactively narrow the very broad scope of their FOIA requests to bolster the argument that ICE knew Plaintiffs were interested in text messages on the cellular telephones of the named individuals and that the alleged failure to preserve the contents of the phones is bad faith. This ignores the reality that (a) ICE cannot respond to every new FOIA request immediately; and (b) ICE in this case made a reasonable and good faith search- actually, multiple searches.

As was demonstrated in the declarations filed with the Court, ICE does not have a central, overarching infrastructure capable of preserving text messages. ICE does not have the technical

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requests may exist, or that the agency's searches have been imperfect, does not mean that the searches were inadequate"); *Kintzi v. Office of the Att'y Gen.*, No. 08-5830, 2010 WL 2025515, at \*6 (D. Minn. May 20, 2010) ("No evidence before the court indicates that the document [plaintiff] seeks exists. Therefore, the court determines that the [agency] conducted a reasonable search and properly denied [the] request."); *Kromrey v. DOJ*, No. 09-376, 2010 WL 2633495, at \*1 (W.D. Wis. June 25, 2010) ("While plaintiff alleges that there must be more records, he has produced no evidence that there are any additional records, nor does he dispute the fact that the FBI conducted a search reasonably designed to yield documents responsive to his request"), *aff'd*, 423 F. App'x 624 (7th Cir. 2011); *Clemente v. FBI*, 741 F. Supp. 2d 64, 79 (D.D.C. 2010) (same); *Citizens for Responsibility & Ethics in Wash. v. DOJ*, 405 F. Supp. 2d 3, 5 (D.D.C. 2005) (rejecting plaintiff's assertion that additional documents must exist "given the magnitude of the [alleged] scandal" that was subject of its request); *Flowers v. IRS*, 307 F. Supp. 2d 60, 67 (D.D.C. 2004).

<sup>14</sup> Plaintiffs seem to be making some kind of claim that the deactivation was a consequence of an executive order by (then) President Trump. But federal agencies do not keep government-issued cell phones preserved upon an employees' termination. Typically, the phone is deactivated and restored to its original condition – i.e., without any data – and reassigned to another employee. Thus, with or without an executive order, the target phones would not have been preserved unless it was known to the persons handling the phone at the time of the employees' departure that there was a pending FOIA request or litigation that might implicate the phones. And this gets back to the misguided notion that an agency has an immediate duty to issue some type of litigation hold upon receipt of a FOIA request.



ability to search its employees' text messages. The only way is by a manual review of the actual cellular telephone *if* the messages still exist on the phone. In this case, there is no evidence that any responsive messages *ever* existed on the targeted telephones, and certainly no evidence that such messages exist now. FOIA does not require an agency to search records that it cannot search. *Wilson v. DOJ*, 270 F.Supp.3d 248, 255 (D.D.C. 2017) (rejecting argument that agency violates FOIA when, because of technical inability, it does not search a particular file); *Lockett v. Wray*, 271 F.Supp.3d 205, 210 (D.D.C. 2017) (summary judgment for agency where agency had "inability" to conduct requested search); *Moore v. Nat'l DNA Index. Sys.*, 662 F.Supp.2d 136, 139 (D.D.C. 2009) (where the requested search is "literally impossible for the defendants to conduct," not searching satisfies FOIA's requirement to conduct a search reasonably calculated to uncover responsive documents).

Plaintiffs' focus on the purported failure of ICE to preserve the phones in light of the FOIA request is misplaced. As stated, the FOIA request could not be addressed immediately given the backlog of older requests and the pandemic. Plaintiffs' argument that ICE had an obligation to preserve the phones simply because it received a FOIA request is, at base, an argument about ICE's document retention policies. It is not cognizable in a FOIA action.. But this is a FOIA action. *See* Dkt. 1; *see also, e.g., Kissinger v. Reporters Comm. for Freedom of Press*, 445 U.S. 136, 154 (1980) ("Congress never intended, when it enacted the FOIA, to displace the statutory scheme embodied in the Federal Records Act and the Federal Records Disposal Act providing for administrative remedies to safeguard against wrongful removal of agency records").<sup>15</sup>

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<sup>15</sup> As stated in *Forsham v. Harris*, 445 U.S. 169, 186 (1980), "FOIA imposes no duty on the agency to create records." There is no duty on an agency to copy the contents of a cellular telephone of a departing employee based upon the chance that the contents might be responsive to a FOIA request. Critical here is that at the time the target telephones were taken out of service, the FOIA tracker/inquiry had not been disseminated due to the FOIA backlog. Therefore, there



### **CONCLUSION**

There was simply no need for a Court order as there was no evidence that the phones were in any danger of destruction or that data will be removed from any that still have data. The evidence before the Court and Plaintiffs actually established the opposite. Plaintiffs misinterpreted the supplemental declarations to create a controversy that is nonexistent.

However, Defendant requests only that the Court modify subparagraph (a) of its order to require preservation of devices issued to the named employees by ICE, rather than by any governmental agency, and for the time period relevant to the original FOIA request.

Respectfully submitted,

MARY M. MURRANE  
Chief, Civil Division

Dated: September 3, 2022

By: /s/ Thomas E. Kanwit  
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### **CERTIFICATE OF SERVICE**

I, Thomas E. Kanwit, Assistant United States Attorney, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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was no reason to suspect that the phone contents required preservation, particularly since the agency's policy is that text messages should not be used to conduct official agency business and, if they are, those messages should be separately preserved. This is a general responsibility of the individual employee, however, and it goes to ICE's record preservation practices and not to the adequacy of its FOIA search.

Dated: September 3, 2022

By: /s/ Thomas E. Kanwit  
Thomas E. Kanwit  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

AMERICAN CIVIL LIBERTIES UNION	)	
FOUNDATION; AMERICAN CIVIL	)	
LIBERTIES UNION FOUNDATION	)	
	)	D. Mass No. 21-10761-NMG
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
U.S. IMMIGRATION AND CUSTOMS	)	
ENFORCEMENT	)	
	)	
Defendants.	)	

**DECLARATION OF FERNANDO PINEIRO**

I, Fernando Pineiro, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am the FOIA Director of the U.S. Immigration and Customs Enforcement (“ICE”) Freedom of Information Act Office (the “ICE FOIA Office”). I have held this position since August 14, 2022, and I am the ICE official immediately responsible for supervising ICE responses to requests for records under the Freedom of Information Act, 5 U.S.C § 552 (the FOIA), the Privacy Act, 5 U.S.C. § 552a (the Privacy Act), and other applicable records access statutes and regulations. Prior to this position, I was the Deputy FOIA Officer of the ICE FOIA Office from December 29, 2013, to August 13, 2022, and prior to that I was the FOIA Officer for three years at the Office for Civil Rights and Civil Liberties (“CRCL”) at the U.S. Department of Homeland Security (“DHS”). The ICE FOIA office mailing address is 500 12th Street, S.W., STOP 5009, Washington, D.C. 20536-5009.

2. As the FOIA Director my official duties and responsibilities include the general management, oversight, and supervision of the ICE FOIA Office regarding the processing of FOIA, 5 U.S.C. § 552, and Privacy Act, 5 U.S.C. § 552a, requests received at ICE. In connection with my official duties and responsibilities, I am familiar with ICE's procedures for responding to requests for information pursuant to the FOIA and the PA.

3. I make this declaration in support of ICE's Opposition to Plaintiff's Motion for Temporary Restraining Order. The statements contained in this declaration are based upon my personal knowledge, my review of documents kept by ICE in the ordinary course of business, and information provided to me by other ICE employees in the course of my official duties.

## **II. RECENT STATISTICS REGARDING FOIA REQUESTS SUBMITTED TO ICE**

4. As of June 23, 2022, the ICE FOIA Office is processing approximately 15,820 open FOIA requests addressing a backlog of 13,284 requests.<sup>1</sup> There are approximately 160 open federal district court cases, and 75 cases in active record production.

5. Beginning in fiscal year ("FY") 2018, the ICE FOIA Office experienced a substantial and dramatic increase in the number of FOIA requests received by ICE compared to previous years. In FY 2015, the ICE FOIA Office received 44,748 FOIA requests; 63,385 FOIA requests were received in FY 2016. The number of requests received briefly decreased in FY 2017 to 47,893 but was then followed by a spike of 70,267 FOIA requests in FY 2018. In FY 2019, that number climbed to a total of 123,370 requests received and in FY 2020 the ICE FOIA Office received 114,475 FOIA requests.

6. Between FY 2017 and FY 2020, the ICE FOIA Office experienced approximately a 240% increase in FOIA requests. This dramatic increase in ICE FOIA's workload is attributed to an increase in the number of referrals ICE received from USCIS and the increased public

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<sup>1</sup> Backlog case are those that have been pending for over 20 days.

interest in the Department's operations as they pertain to recent Presidential and/or Executive Orders and subsequent guidance from the Secretary of Homeland Security. According to Syracuse University's FOIA Project, during the month of November 2021, federal district courts saw a total of 56 new FOIA lawsuits filed under 5 U.S.C. 552. As of December 14, 2021, the total overall reported FOIA filings for the last 12 months were 652.<sup>2</sup>

### **III. ICE FOIA OFFICE'S STAFF LEVELS AND WORKLOAD**

7. In addition to the increasing volume of FOIA requests, ICE has also experienced an increase in the complexity of FOIA requests, both in terms of volume and substance. For example, it is now not uncommon to see FOIA requests with 50 to 60 sub-parts comprising several pages, searches of numerous program offices, and a universe of records that has thousands of pages to review and process. These FOIA requests take considerably longer to process due to extensive searches and the intricacy of the documents and/or data produced. In FY 2019, one FOIA requester alone – a data clearing house – filed more than 370 FOIA requests seeking extensive data extracts. In FY 2020, the same requester filed more than 480 similar FOIA requests.

8. All these factors have nearly doubled the ICE FOIA Office's overall workload since FY 2017. In response to the increasingly heavy workload, the ICE FOIA Office has adopted the court-sanctioned practice of generally handling backlogged requests on a "first-in, first-out basis," which ensures fairness to all FOIA requestors by not prioritizing one request over another. This practice applies to requests that are in litigation. The reason for this is that the principle of fairness to all requestors would be jeopardized were a requestor permitted to "jump the line" simply by virtue of filing a case in U.S. District Court. Generally, the only exception to this is where a court order processing at rates above the ICE FOIA Office's current processing rate for all cases. In FY 2020, the ICE FOIA Office closed 79,081 cases and 17,060 referrals from USCIS.

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<sup>2</sup> The FOIA Project Freeing Information through Public Accountability (December 14, 2021) <http://foiaproject.org/2021/12/14/november-2021-foia-litigation-with-five-year-monthly-trends/>.

#### **IV. CURRENT WORKLOAD OF THE ICE FOIA LITIGATION PROCESSING UNIT**

9. Additionally, the ICE FOIA Office has the Litigation Processing Unit comprised of experienced paralegal specialists who process records in litigation under the FOIA and the Privacy Act.

10. The increasing complexity and volume of ICE FOIA's workload and backlog (*see* paragraphs 4-9) creates the potential that some FOIA requests could become subject to litigation in the U.S. District Court.

11. The ICE FOIA Litigation Processing Unit's workload has increased such that it is currently processing approximately 160 active FOIA litigations as of the date of this declaration and of which approximately 75 have rolling productions. ICE's normal processing rate for cases in litigation is 500 pages per month. This yields a monthly litigation review of approximately 32,500 pages and an average of 13,500 pages released every month. Based on this workload, each paralegal reviews approximately 10,800 pages per month.

12. The ICE FOIA Litigation Processing Unit also drafts, assigns, and tracks all searches for responsive documents concerning FOIA litigations. The FOIA litigation search taskings frequently span dozens of ICE program and field offices and require the Unit to keep track of hundreds of thousands of responsive records, as well as the documentation from searches of the program offices and field offices.

13. The ICE FOIA Litigation Processing Unit has collateral duties, in addition to processing documents pursuant to litigation. For example, the processing unit prepares various reports for statistical tracking, responds to Congressional inquiries and requests for records, redacts Prison Rape Elimination Act reports, sends out FOIA Exemption (b)(4) submitter notices, and manages litigation consults and referrals from other agencies. Additionally, the processing unit supports attorneys in the ICE Office of the Principal Legal Advisor with federal FOIA litigation, by assisting in first level review of records which include reviewing incoming

consults and referrals from other agencies in concurrent FOIA litigations. These collateral duties are within the scope of the FOIA and are required.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 25, 2022, at Washington, D.C.

**FERNANDO**  
**PINEIRO JR**

Digitally signed by  
FERNANDO PINEIRO JR  
Date: 2022.08.25  
11:05:59 -04'00'

Fernando Pineiro

FOIA Director

Freedom of Information Act Office

U.S. Department of Homeland Security

U.S. Immigration and Customs Enforcement

500 12th Street, S.W., Stop 5009





# Department of Homeland Security

Fiscal Year 2022 Freedom of Information Act Report  
to the Attorney General of the United States and the  
Director of the Office of Government Information Services  
*February 2022*



Homeland  
Security

## Executive Summary

In Fiscal Year 2021, the Department of Homeland Security (DHS) set new records for the number of Freedom of Information Act (FOIA) requests received and processed, while achieving its lowest backlog in almost a decade. Overall, DHS received 442,650 FOIA requests and responded to 467,347 requests. DHS ended FY 2021 with a backlog of 25,102 requests – a reduction of more than 30 percent compared to the end of FY 2020, and only 6 percent of the total number of requests received.

The Privacy Office published the [2020 – 2023 DHS Departmental FOIA Backlog Reduction Plan](#) in March 2019, resulting in substantial progress in modernizing DHS FOIA business operations. In addition to reducing the DHS Privacy Office backlog by 92 percent, the DHS Privacy Office closed approximately 25,000 requests received by mail in FY 2019 that could not be logged previously due to necessary COVID-19 safety protocols. The DHS Privacy Office also assisted U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) with closing requests in their backlogs. Eight Components reduced their backlogs in FY 2021.

DHS FOIA operations also made notable progress on long-term efforts to strengthen FOIA operations. Key among these advancements is maintenance of an agreement between USCIS and ICE that reduces the administrative burden of processing A-File records. This agreement enables the Department to respond to requests more efficiently. Additionally, the Privacy Office undertook several actions to substantially upgrade the FOIA information technology infrastructure used by most components.<sup>1</sup> Modernized FOIA processing solutions will improve efficiency and assist with the identification of potentially sensitive information that should be withheld. The Privacy Office is working with Components to customize the technology and expects to deploy the tool in Spring 2022.

The DHS Privacy Office, led by the Chief Privacy and Chief FOIA Officer, has distinct responsibilities for oversight of DHS FOIA programs and improvements to enhance compliance with the law. The Privacy Office is committed to creating a mature and sustainable FOIA program that better serves the public and the Department, and to working with Components to implement the backlog reduction strategy to improve operations.

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<sup>1</sup> The Privacy Office maintains the FOIA processing solution used by all components except CBP, USSS, and USCIS.

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## **I. Basic Information Regarding Report**

1. Questions regarding this report may be directed to:

Lynn Parker Dupree  
Chief Privacy Officer and Chief FOIA Officer  
Privacy Office  
U.S. Department of Homeland Security  
245 Murray Lane SW, Mail Stop 0655  
Washington, DC 20528-0655  
Phone: 202-343-1743; Fax: 202-343-4011

2. This report can be downloaded from the DHS FOIA website at  
<http://www.dhs.gov/foia-annual-reports>.

3. Requests for this report in paper form may also be directed to the Privacy Office, as listed above.

## **II. Making a FOIA Request<sup>2</sup>**

1. Names, addresses, and contact numbers for DHS FOIA Officers can be found on our website at <http://www.dhs.gov/foia-contact-information>.

2. Brief description of why requests may not be granted:

In response to a FOIA request, DHS may respond that that the requested records are exempt, in whole or in part, as well as that the requested record does not exist or cannot be located. For example, the Department frequently receives requests for law enforcement records, which are of specific interest to subjects of investigation, victims of crime, and the public at large. Depending on who is requesting the information (i.e., a first or third-party requester) the Department may invoke exemptions 6 and 7(C) (to prevent an unwarranted invasion of personal privacy) and/or exemption 7(E) (to protect against the disclosure of law enforcement techniques, procedures, and guidelines).

## **III. Acronyms, Definitions, and Exemptions**

1. Agency-specific acronyms or other terms.

- a. CBP U.S. Customs and Border Protection
- b. CISA<sup>3</sup> Cybersecurity and Infrastructure Security Agency
- c. CISOMB Office of the Citizenship and Immigration Services Ombudsman
- d. CRCL Office for Civil Rights and Civil Liberties
- e. CWMD Countering Weapons of Mass Destruction Office<sup>4</sup>

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<sup>2</sup> The Privacy Office (PRIV) processes and reports on FOIA requests for PRIV, the Office of the Secretary (including the Military Advisor's Office), and the following components: CISOMB, CISA, CRCL, CWMD, ESEC, FPS, MGMT, OBIM, OGC, OLA, OPA, OPE, OPS, PLCY, and S&T.

<sup>3</sup> On November 16, 2018, President Trump signed into law the Cybersecurity and Infrastructure Security Agency Act of 2018. This legislation elevated the mission of the former National Protection and Programs Directorate (NPPD) within DHS and established the Cybersecurity and Infrastructure Security Agency (CISA).

<sup>4</sup> In December 2018, President Trump signed the Countering Weapons of Mass Destruction Act of 2018, authorizing



f. DHS	Department of Homeland Security
g. ESEC	Office of the Executive Secretary
h. FEMA	Federal Emergency Management Agency
i. FLETC	Federal Law Enforcement Training Centers
j. FPS	Federal Protective Service <sup>5</sup>
k. I&A	Office of Intelligence and Analysis
l. ICE	U.S. Immigration and Customs Enforcement
m. MGMT	Management Directorate
n. MIL	Military Advisors Office
o. NCSC	National Cyber Security Center
p. OBIM	Office of Biometric Identity Management
q. OCP	Office of Community Partnerships
r. OGC	Office of the General Counsel
s. OIG	Office of Inspector General
t. OLA	Office of Legislative Affairs
u. OPA	Office of Public Affairs
v. OPE	Office of Partnership and Engagement
w. OPS	Office of Operations Coordination
x. PLCY	Office of Strategy, Policy, and Plans
y. PRIV	Privacy Office
z. S&T	Science and Technology Directorate
aa. TSA	Transportation Security Administration
bb. USCG	United States Coast Guard
cc. USCIS	U.S. Citizenship and Immigration Services
dd. USSS	United States Secret Service

## 2. Definition of terms, as used in this report.

- a. **Administrative Appeal** – A request to a federal agency asking that it review at a higher administrative level a FOIA determination made by the agency at the initial request level. Under section 704 of the Administrative Procedures Act, the Department’s response to an administrative appeal is considered final agency action that is then appealable to a federal district court.
- b. **Backlog** – The number of requests or administrative appeals that are pending at an agency at the end of the fiscal year that are beyond the statutory time period for a response.

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the CWMD Office. The Act transferred the functions, personnel, budget authority, and assets of the Domestic Nuclear Detection Office (DNDO) and the Office of Health Affairs (OHA), with the exception of workforce health and medical support functions that were transferred from OHA to the DHS Management Directorate, to the CWMD Office, and abolished DNDO and OHA.

<sup>5</sup> FPS is an operational component within the DHS Management Directorate that provides law enforcement and security services to approximately 9,000 federal facilities nationwide.

- c. **Component** – For agencies that process requests on a decentralized basis, a “component” is an entity, also sometimes referred to as an Office, Division, Bureau, Center, or Directorate, within the agency that processes FOIA requests. The FOIA now requires that agencies include in the Annual FOIA Report data for both the agency overall and for each principal component of the agency.
- d. **Consultation** – The procedure whereby the agency responding to a FOIA request first forwards a record to another agency for its review because that other agency has an interest in the document. Once the agency in receipt of the consultation finishes its review of the record, it provides its views on the record to the agency that forwarded it. That agency, in turn, will then respond to the FOIA requester.
- e. **Exemption 3 Statute** – A federal statute other than FOIA that exempts information from disclosure and which the agency relies on to withhold information under subsection (b)(3) of the FOIA.<sup>6</sup>
- f. **FOIA Request** – A FOIA request is generally a request to a federal agency for access to records concerning another person (in other words, a “third-party” request), an organization, or a particular topic of interest. Moreover, because requesters covered by the Privacy Act who seek records concerning themselves (in other words, “first-party” requesters) are afforded the benefit of the access provisions of both FOIA and the Privacy Act, the term “FOIA request” also includes any such “first-party” requests when an agency determines that it must search beyond its Privacy Act “systems of records” or when the agency applies a Privacy Act exemption and therefore looks to FOIA to afford the greatest possible access. DHS applies this same interpretation of the term “FOIA request” even to “first-party” requests from persons not covered by the Privacy Act, e.g., non-U.S. citizens. Because DHS policy provides non-U.S. citizens the ability to access their own records as if they are subject to the Privacy Act’s access provisions, DHS processes the requests under FOIA as well. Thus, all requests that require DHS to utilize FOIA in responding to the requester are included in this Report.

Additionally, a FOIA request includes records referred to DHS for processing and direct response to the requester. It does not, however, include records for which the agency has received a consultation from another agency. (Consultations are reported separately in Section XII of this Report.)

- g. **Full Grant** – An agency decision to disclose all records in full in response to a FOIA request.
- h. **Full Denial** – An agency decision not to release any records in response to a FOIA request because the records are exempt in their entirety under one or more of the FOIA exemptions, or because of a procedural reason, such as when no records could be located.

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<sup>6</sup> Pursuant to 5 U.S.C. § 552(b)(3) as amended by sec. 564 of Public Law 111-83, a statute enacted after October 28, 2009 can qualify as an Exemption 3 law only if it cites specifically to 5 U.S.C. § 552(b)(3).



- i. **Multi-Track Processing** – A system in which simple requests requiring relatively minimal review are placed in one processing track and more voluminous and complex requests are placed in one or more other tracks. Requests granted expedited processing are placed in yet another track. Requests in each track are processed on a first in/first out basis.
  - i. **Expedited Processing** – An agency will process a FOIA request on an expedited basis when a requester satisfies the requirements for expedited processing as set forth in the statute and in agency regulations.
  - ii. **Simple Request** – A FOIA request that an agency using multi-track processing places in its fastest (non-expedited) track based on the volume and/or simplicity of records requested.
  - iii. **Complex Request** – A FOIA request that an agency using multi-track processing places in a slower track based on the high volume and/or complexity of the records requested.
- j. **Partial Grant/Partial Denial** – An agency decision to disclose portions of the records and to withhold other portions that are exempt under the FOIA, or to otherwise deny a portion of the request for a procedural reason.
- k. **Pending Request or Pending Administrative Appeal** – A pending request is one where the agency has not yet provided a response to the requester. A pending administrative appeal is where one where the agency has not taken final action in all respects.
- l. **Perfected Request** – A request for records that reasonably describes such records and is made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed.
- m. **Processed Request or Processed Administrative Appeal** – A processed request is one where the agency has provided a complete response to the requester’s initial request. A processed administrative appeal is one where the agency has advised the requester of its final decision on the requester’s appeal as to the handling of the initial request.
- n. **Range in Number of Days** – The lowest and highest number of days required to process requests or administrative appeals.
- o. **Time Limits** – The time period in the statute for an agency to respond to a FOIA request (ordinarily 20 working days from receipt of a perfected FOIA request).<sup>7</sup>

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<sup>7</sup> Absent “unusual circumstances,” the FOIA provides that agencies should make a determination with respect to an appeal within twenty working-days of its receipt by the agency. 5 U.S.C. § 552(a)(6)(A)(ii).

3. Concise descriptions of FOIA exemptions:

- a. **Exemption 1:** classified national defense and foreign relations information.
- b. **Exemption 2:** internal agency rules and practices (personnel).
- c. **Exemption 3:** information that is prohibited from disclosure by another federal law.
- d. **Exemption 4:** trade secrets and other confidential or financial information obtained from a person.
- e. **Exemption 5:** inter-agency or intra-agency communications that are protected by legal privileges, such as the deliberative process privilege, attorney work product privilege, and attorney client privilege.
- f. **Exemption 6:** information that, if released, would be a clearly unwarranted invasion of personal privacy.
- g. **Exemption 7:** law enforcement records where the disclosure would (A) interfere with enforcement proceedings, B) deprive a person of a fair trial or impartial adjudication, C) constitute an unwarranted invasion of personal privacy, D) identify a confidential source, E) disclose law enforcement techniques and procedures or guidelines for law enforcement investigations or prosecutions, or F) endanger the life or physical safety of any individual.
- h. **Exemption 8:** information relating to the supervision of financial institutions.
- i. **Exemption 9:** geological/geophysical information concerning wells

**IV. Exemption 3 Statutes**

Statute	Type of Information Withheld	Case Citation	Number of Times Relied upon per Component <sup>8</sup>		Total Number of Times Relied upon by DHS
2 U.S.C. 437g(a)(12)(A)* (Federal Election Campaign Act)		N/A	USCG	1	1
5 U.S.C. a §7 (Inspector General Act)	Identity of employee who submits a complaint	N/A	OIG	1	1
6 U.S.C. § 121 (d)	Intelligence sources and methods	N/A	I&A OIG PRIV	85 1 6	92
6 U.S.C. § 133(a)(1)	Protection of voluntarily shared critical infrastructure information	N/A	CISA FEMA PRIV	4 4 2	10
6 USC § 1504(d)(3)(B)	A cyber threat indicator or defensive measure shared with the federal government under the Cybersecurity Information Sharing Act of 2015.	N/A	CISA	1	1
6 U.S.C 623(e) Protecting and Securing Chemical Facilities from Terrorist Attacks Act of 2014	Information submitted regarding chemical facilities	N/A	I&A	7	7
7 U.S.C. § 12(a)(1)	[D]ata and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers, as well as certain other information concerning, or obtained in, the course of the Commission's investigation under the Commodity Exchange Act	<u>Hunt v. Commodity Futures Trading Comm'n</u> , 484 F. Supp. 47, 49 (D.D.C. 1979).	CISA	1	1

<sup>8</sup> DHS Component(s) are referred to as "Component" for the remainder of this report.

Statute	Type of Information Withheld	Case Citation	Number of Times Relied upon per Component <sup>8</sup>		Total Number of Times Relied upon by DHS
8 U.S.C. § 1202(f) (Immigration and Nationality Act)	Certain records pertaining to the issuance or refusal of visas to enter the United States	<u>Medina-Hincapie v. Dep't of State</u> , 700 F.2d 737, 741-42 (D.C. Cir. 1983); <u>DeLaurentiis v. Haig</u> , 686 F.2d 192, 194 (3d Cir. 1982); <u>Assadi v. Dep't of State</u> , No. 12-1111, 2014 WL 4704840, at *6 (S.D.N.Y. Sept. 19, 2014); <u>Beltranena v. U.S. Dep't of State</u> , 821 F. Supp. 2d 167, 177-78 (D.D.C. 2011); <u>Badalamenti v. U.S. Dep't of State</u> , 899 F. Supp. 542, 547 (D. Kan. 1995); <u>Jan-Xin Zang v. FBI</u> , 756 F. Supp. 705, 711-12 (W.D.N.Y. 1991); <u>Smith v. DOJ</u> , No. 81-CV-813, 1983 U.S. Dist. LEXIS 10878, at *13-14 (N.D.N.Y. Dec. 13, 1983).	PRIV USCIS	5,033 32,523	37,556
10 U.S.C. § 130b	Personally identifiable information pertaining to “any member of the armed forces assigned to an overseas unit, a sensitive unit, or a routinely deployable unit” and “any employee of the Department of Defense or of the Coast Guard whose duty station is with any such unit”	<u>Freedom Watch, Inc. v. NSA</u> , 197 F. Supp. 3d 165, 174 (D.D.C. 2016); <u>Hiken v. DOD</u> , 521 F. Supp. 2d 1047, 1062 (N.D. Cal. 2007); <u>O'Keefe v. DOD</u> , 463 F. Supp. 2d 317, 325 (E.D.N.Y. 2006); <u>Windel v. United States</u> , No. A02-306, 2005 WL 846206, at *2 (D. Alaska Apr. 11, 2005).	USCG	1	1
10 U.S.C. § 2305(g)	Certain contractor proposals	<u>Roman v. NSA</u> , Nos. 09-2947, 09-4281, 09-3344, 09-2504, 09-5633, 2012 WL 569747, at *7 (E.D.N.Y. Feb. 22, 2012); <u>Margolin v. NASA</u> , No. 09-CV-00421-LRH-VPC, 2011 WL 1303221, at *6 (D. Nev. Mar. 31, 2011).	FEMA	2	2
16 U.S.C. § 470hh	Information pertaining to the nature and location of certain archaeological resources	<u>Hornbostel v. U.S. Dep't of the Interior</u> , 305 F. Supp. 2d 21, 30 (D.D.C. 2003), summary affirmance granted, No.03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).	CBP	7	7

Statute	Type of Information Withheld	Case Citation	Number of Times Relied upon per Component <sup>8</sup>		Total Number of Times Relied upon by DHS
18 U.S.C. §§ 2510, et seq. (Title III of the Omnibus Crime Control and Safe Streets Act)	Wiretap requests and the contents of any wire, oral, or electronic communication obtained through wiretaps	<u>Payne v. DOJ</u> , No. 96-30840, slip op. at 5-6 (5th Cir. July 11, 1997); <u>Lam Lek Chong v. DEA</u> , 929 F.2d 729, 733 (D.C. Cir. 1991).	USSS	5	5
18 U.S.C. § 3123 (d)	Certain court "order[s] authorizing or approving the installation and use of a pen register or a trap and trace device"; information pertaining to "the existence of the pen register or trap and trace device or the existence of the investigation"	<u>Labow v. DOJ</u> , 831 F.3d 523, 527-28 (D.C. Cir. 2016); <u>ACLU v. DOJ</u> , 2014 WL 4954121, at *11 (N.D. Cal. Sept. 30, 2014); <u>Manna v. DOJ</u> , 815 F. Supp. 798, 812 (D.N.J. 1993), aff'd on other grounds, 51 F.3d 1158 (3d Cir. 1995).	ICE	1	1
18 U.S.C. § 3509(d) (Federal Victims' Protection and Rights Act)	Certain records containing identifying information pertaining to children involved in criminal proceedings	<u>Davis v. U.S. Postal Inspection Serv.</u> , 75 F. Supp. 3d 425, 430-31 (D.D.C. 2014).	ICE	2	2
26 U.S.C. §§ 6103, 6105 (Internal Revenue Code)	Certain tax return information, to include Taxpayer Identification Numbers of third parties, and certain tax convention information	<u>Church of Scientology v. IRS</u> , 484 U.S. 9, 15 (1987) (26 U.S.C. § 6103); <u>Elec. Priv. Info. Ctr. v. IRS</u> , 910 F.3d 1232 (D.C. Cir. 2018); <u>Leonard v. U.S. Dep't of Treasury</u> , 590 F. App'x. 141, 143-44 (3d Cir. 2014) (per curiam); <u>Pac. Fisheries, Inc. v. IRS</u> , 395 F. App'x. 438, 440 (9th Cir. 2010) (unpublished disposition) (26 U.S.C. §§ 6103, 6105); <u>Tax Analysts v. IRS</u> , 217 F. Supp. 2d 23, 27-29 (D.D.C. 2002) (26 U.S.C. § 6105).	CBP USCIS	4 189	193

Statute	Type of Information Withheld	Case Citation	Number of Times Relied upon per Component <sup>8</sup>		Total Number of Times Relied upon by DHS
31 U.S.C. § 5319 (Bank Secrecy Act)	Reports pertaining to monetary instruments transactions filed under subchapter II of chapter 53 of title 31 and records of those reports	<u>Turner v. Dep't of Treasury</u> , No. 15-00007, 2017 WL 1106030 at *7 (E.D. Cal. Mar. 23, 2017); <u>Yunes v. DOJ</u> , 263 F. Supp. 3d 82, 87 (D.D.C. 2017); <u>Council on Am.-Islamic Rels., Cal. v. FBI</u> , 749 F. Supp. 2d 1104, 1117 (S.D. Cal. 2010); <u>Berger v. IRS</u> , 487 F. Supp. 2d 482, 496-97 (D.N.J. 2007), aff'd on other grounds, 288 F. App'x 829 (3d Cir. 2008).	ICE USCIS	1 64	65
41 U.S.C. § 4702 (formerly at 41 U.S.C. § 253b(m)(1))	Contractor proposals that are in the possession or control of an executive agency and that have not been set forth or incorporated by reference into contracts	<u>Sinkfield v. HUD</u> , No. 10-885, 2012 U.S. Dist. LEXIS 35233, at *13-15 (S.D. Ohio Mar. 15, 2012); <u>Margolin v. NASA</u> , No. 09-CV-00421, 2011 WL 1303221, at *6 (D. Nev. Mar. 31, 2011); <u>Hornbostel v. U.S. Dep't of the Interior</u> , 305 F. Supp. 2d 21, 30 (D.D.C. 2003), summary affirmance granted, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).	CBP FEMA ICE PRIV USCIS	1 13 2 2 13	31
41 U.S.C. § 2102 (amending 41 U.S.C. § 423(a)(1))* (Procurement Integrity Act)	Contractor bid or proposal information; source selection information	<u>Legal &amp; Safety Employer Research, Inc. v. U.S. Dep't of the Army</u> , No. Civ. S001748, 2001 WL 34098652, at *3-4 (E.D. Cal. May 4, 2001) (dictum).	CBP FEMA ICE PRIV	1 3 1 4	9
49 U.S.C. § 114 (r) (formerly at 49 U.S.C. § 114 (s))	Information obtained or developed in carrying out security under the authority of the Aviation and Transportation Security Act or under chapter 449 of this title	<u>Skurrow v. DHS</u> , No. 11-1296, 2012 WL 4380895, at *9-10 (D.D.C. Sept. 26, 2012); <u>Gordon v. FBI</u> , 390 F. Supp. 2d 897, 900 (N.D. Cal. 2004).	CBP CISA FEMA I&A ICE TSA USCG USCIS USSS	2 1 1 1 3,389 113 5 18,057 121	21,690
49 U.S.C. 1114(c) (Transportation Safety Act of 1974)	Certain "cockpit voice or video recorder recording[s] or transcript[s] of communications by and between flight crew members and ground stations pertaining to [] incident[s] investigated by the [National Transportation Safety] Board"	<u>McGilvra v. NTSB</u> , 840 F. Supp. 100, 102 (D. Colo. 1993).	ICE	2	2

Statute	Type of Information Withheld	Case Citation	Number of Times Relied upon per Component <sup>8</sup>		Total Number of Times Relied upon by DHS
50 U.S.C. § 4565(c) (formerly at 50 U.S.C. app. 2170(c))	Information or documentary material filed with the Committee on Foreign Investment in the United States	N/A	I&A	8	8
50 U.S.C. § 3024(i)(1) (formerly at 50 U.S.C. § 403-1(i)(1)) (National Security Act of 1947)	Intelligence sources and methods	<u>CIA v. Sims</u> , 471 U.S. 159, 167 (1985).	FEMA I&A OIG PRIV USCG USCIS	1 83 1 6 1 1	93
50 U.S.C. § 3507 (formerly at 50 U.S.C. § 403g)	Intelligence sources and methods; certain information pertaining to Agency employees, specifically: “the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency”	<u>Assassination Archives &amp; Rsch. Ctr. v. CIA</u> , No. 18-5280, 2019 WL 691517 (D.C. Cir. Feb. 15, 2019) (per curiam); <u>Berman v. CIA</u> , 501 F.3d 1136, 1137-38, 1140 (9th Cir. 2007); <u>Makky v. Chertoff</u> , 489 F. Supp. 2d 421, 442 (D.N.J. 2007), aff’d on other grounds, 541 F. 3d 205 (3d Cir. 2008).	USSS	1	1
50 U.S.C. 403-1(i)(1)(National Security Act of 1947)	Intelligence sources and methods	<u>CIA v. Sims</u> , 471 U.S. 159, 167 (1985); <u>ACLU v. DOJ</u> , 681 F.3d 61, 72-75 (2d Cir. May 21, 2012); <u>ACLU v. DOD</u> , 628 F.3d 612, 619, 626 (D.C. Cir. 2011); <u>Berman v. CIA</u> , 501 F.3d 1136, 1137-38, 1140 (9th Cir. 2007).	ICE	2	2
Fed. R. Crim. P. 6(e), enacted by Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319	Certain records that would reveal some secret aspect pertaining to grand jury proceedings	<u>Sussman v. USMS</u> , 494 F.3d 1106, 1113 (D.C. Cir. 2007); <u>Sorin v. DOJ</u> , No. 18-99, 2018 WL 6431027 (2d Cir. Dec. 6, 2018) (per curiam); <u>Widi v. McNeil</u> , No. 12-CV-00188, 2016 WL 4394724, at *23 (D. Me. Aug 16, 2016); <u>Durham v. U.S. Atty. Gen.</u> , No. 06-843, 2008 WL 620744, at *2 (E.D. Tex. Mar. 3, 2008); <u>Cozen O’Connor v. U.S. Dep’t of Treasury</u> , 570 F. Supp. 2d 749, 776 (E.D. Pa. 2008).	USCIS	41	41



## V. FOIA Requests

### A. Received, Processed, and Pending FOIA Requests<sup>9</sup>

Processing Center	Number of Requests Pending as of Start of Fiscal Year	Number of Requests Received in Fiscal Year	Number of Requests Processed in Fiscal Year	Number of Requests Pending as of End of Fiscal Year
CBP	8,085	108,177	90,576	25,686
CISA	131	153	177	107
CRCL <sup>10</sup>	17	80	76	21
FEMA	547	975	916	606
FLETC	2	162	155	9
FPS	22	210	211	21
I&A	33	257	226	64
ICE	12,361	39,716	47,865	4,212
OIG	211	253	142	322
PRIV <sup>11</sup>	22,186	53,432	71,586	4,032
TSA	741	794	1,008	527
USCG	1,833	2,341	2,012	2,162
USCIS	37,025	235,210	251,289	20,946
USSS	400	890	1,108	182
<b>AGENCY OVERALL</b>	<b>83,594</b>	<b>442,650</b>	<b>467,347</b>	<b>58,897</b>

### B. (1) Disposition of FOIA Requests – All Processed Requests

Processing Center	No. of Full Grants	No. of Partial Grants/Partial Denials	No. of Full Denials Based on Exemptions	Number of Full Denials Based on Reasons Other than Exemptions									Total
				No Records	All Records Referred	Request Withdrawn	Fee-Related Reason	Not Reasonably Described	Improper FOIA Request	Not Agency Record	Duplicate Request	Other	
CBP	14,535	21,358	1,962	36,647	1,721	531	38	639	11,357	857	931	0	<b>90,576</b>
CISA	3	50	11	57	2	11	1	23	3	1	7	8	<b>177</b>
CRCL	0	18	2	22	0	0	0	4	10	12	5	3	<b>76</b>
FEMA	155	260	38	93	82	179	5	39	14	18	32	1	<b>916</b>
FLETC	5	23	1	12	22	5	0	63	20	0	4	0	<b>155</b>
FPS	9	109	3	31	8	2	0	14	22	0	5	8	<b>211</b>
I&A	4	38	84	22	17	6	0	13	0	19	20	3	<b>226</b>
ICE	1,432	39,722	941	3,757	328	54	0	42	246	201	352	790	<b>47,865</b>
OIG	4	60	9	19	16	9	0	5	4	7	5	4	<b>142</b>
PRIV	681	35,652	28	33,485	518	38	0	139	488	29	452	76	<b>71,586</b>
TSA	113	269	63	141	46	131	0	61	70	25	28	61	<b>1,008</b>
USCG	956	232	34	295	22	311	2	2	3	10	63	82	<b>2,012</b>
USCIS	22,559	151,163	9351	47,647	961	320	0	0	7,403	927	10,958	0	<b>251,289</b>
USSS	35	561	26	162	2	7	0	17	199	18	8	73	<b>1,108</b>

<sup>9</sup> After reviewing their databases, the following components adjusted the number of requests pending as of the start of the Fiscal Year: CBP, CISA, FEMA, FLETC, FPS I&A, ICE, OIG, PRIV, TSA, USCG, USCIS, and USSS.

<sup>10</sup> CRCL requests were previously included in PRIV.

<sup>11</sup> PRIV includes requests sent through the physical mail that were not logged in during the previous year due to safety restrictions.

Processing Center	No. of Full Grants	No. of Partial Grants/ Partial Denials	No. of Full Denials Based on Exemptions	Number of Full Denials Based on Reasons Other than Exemptions									
				No Records	All Records Referred	Request Withdrawn	Fee-Related Reason	Not Reasonably Described	Improper FOIA Request	Not Agency Record	Duplicate Request	Other	Total
AGENCY OVERALL	4,0491	249,515	12,553	122,390	3,745	1,604	46	1,061	19,839	2,124	12,870	1,109	467,347

**B. (2) Disposition of FOIA Requests – “Other” Reasons for “Full Denials Based on Reasons Other than Exemptions” from Section V, B (1) Chart**

Processing Center	Description	No. of Times Used	Total
CBP	N/A	0	0
CISA	Unable to locate requester Aggregated	1 7	8
CRCL	Request in Litigation	3	3
FEMA	Unable to locate requester Aggregated Request in Litigation	4 2 1	7
FLETC	N/A	0	0
FPS	Aggregated	8	8
I&A	Request in Litigation	3	3

Processing Center	Description	No. of Times Used	Total
ICE	Request in Litigation Unable to Locate Requester Aggregated	62 28 700	790
OIG	Records Referred Non-Responsive Unable to Locate Requester	1 3	4
PRIV	Request in Litigation Aggregated Unable to Locate Requester	9 65 2	76
TSA	Unable to Locate Requester Records Referred Non-Responsive	58 3	61
USCG	Aggregated Unable to Locate Requester	2 80	82
USCIS	N/A	0	0
USSS	Request in Litigation Records Referred Non-responsive Unable to Locate Requester	36 36 1	73
<b>AGENCY OVERALL</b>			<b>1,115</b>

**B. (3) Disposition of FOIA Requests – Number of Times Exemptions Applied**

Processing Center	Ex. 1	Ex. 2	Ex. 3	Ex. 4	Ex. 5	Ex. 6	Ex. 7(A)	Ex. 7(B)	Ex. 7(C)	Ex. 7(D)	Ex. 7(E)	Ex. 7(F)	Ex. 8	Ex. 9
CBP	2	269	15	186	196	21,141	45	23	21,011	13	21,609	9	0	0
CISA	1	0	7	5	27	48	4	0	6	0	28	7	0	0
CRCL	0	0	0	0	12	20	0	0	11	0	10	0	0	0
FEMA	1	17	24	96	63	251	4	0	35	0	25	1	0	0
FLETC	0	0	0	2	2	23	0	0	3	0	1	0	0	0
FPS	0	0	0	5	43	110	20	0	108	2	101	37	0	0
I&A	1	0	184	0	2	54	0	0	0	0	87	0	0	0
ICE	1	66	3,400	140	3,259	39,658	95	77	39,652	120	37,000	86	8	3
OIG	1	4	3	82	17	61	6	0	56	1	6	0	0	0
PRIV	0	1	5,053	24	118	32,184	3	3	29,654	1	34,755	4	0	0
TSA	2	2	113	28	62	277	12	1	52	0	2	0	0	0
USCG	1	3	8	21	42	235	22	0	143	8	12	1	0	0
USCIS	0	46	50,888	312	43,924	117,624	36	0	130,531	22	139,942	92	0	0
USSS	2	0	127	42	87	538	22	6	538	40	494	6	0	0
<b>AGENCY OVERALL</b>	<b>12</b>	<b>408</b>	<b>59,822</b>	<b>863</b>	<b>47,854</b>	<b>212,224</b>	<b>269</b>	<b>110</b>	<b>221,800</b>	<b>207</b>	<b>234,072</b>	<b>243</b>	<b>8</b>	<b>3</b>

**VI. Administrative Appeals of Initial Determinations of FOIA Requests****A. Received, Processed, and Pending Administrative Appeals<sup>12</sup>**

Processing Center	No. of Appeals Pending as of Start of Fiscal Year	No. of Appeals Received in Fiscal Year	No. of Appeals Processed in Fiscal Year	No. of Appeals Pending as of End of Fiscal Year
CBP	65	3194	3181	78
FEMA	14	37	22	29
FLETC	0	3	0	3
ICE	225	667	690	202
OIG	9	27	21	15
PRIV	61	360	198	223
TSA	8	36	41	3
USCG	40	33	46	27
USCIS	70	2,511	2,331	250
USSS	28	40	49	19
<b>AGENCY OVERALL</b>	<b>520</b>	<b>6,908</b>	<b>6,579</b>	<b>849</b>

<sup>12</sup> After reviewing its database, CBP, FEMA, FLETC, OIG, TSA, USCG, and USSS adjusted the number of appeals pending as of the start of the Fiscal Year.

**B. Disposition of Administrative Appeals – All Processed Appeals**

Processing Center	Number Affirmed on Appeal	Number Partially Affirmed & Partially Reversed/Remanded on Appeal	Number Completely Reversed/Remanded on Appeal	Number of Appeals Closed for Other Reasons	Total
CBP	703	361	1,597	520	3,181
FEMA	1	3	1	17	22
FLETC	0	0	0	0	0
ICE	553	50	35	52	690
OIG	4	0	0	17	21
PRIV	122	2	26	48	198
TSA	18	4	0	19	41
USCG	10	10	9	17	46
USCIS	586	1,392	53	300	2,331
USSS	18	11	12	8	49
<b>AGENCY OVERALL</b>	<b>2,015</b>	<b>1,833</b>	<b>1,733</b>	<b>998</b>	<b>6,579</b>

**C. (1) Reasons for Denial on Appeal – Number of Times Exemptions Applied**

Processing Center	Ex. 1	Ex. 2	Ex. 3	Ex. 4	Ex. 5	Ex. 6	Ex. 7(A)	Ex. 7(B)	Ex. 7(C)	Ex. 7(D)	Ex. 7(E)	Ex. 7(F)	Ex. 8	Ex. 9
CBP	0	17	150	3	27	1,508	4	94	1,503	0	1,166	7	0	0
FEMA	0	0	0	0	3	2	0	0	2	0	0	0	0	0
FLETC	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ICE	0	2	43	4	75	527	0	0	494	0	450	1	0	0
OIG	0	0	0	0	0	4	0	0	4	0	0	0	0	0
PRIV	0	0	4	1	4	11	1	0	7	0	9	1	0	0
TSA	0	1	2	2	3	12	2	0	1	0	0	0	0	0
USCG	0	0	0	2	8	14	3	0	9	0	3	0	0	0
USCIS	0	0	511	3	324	678	1	0	998	0	1,048	0	0	0
USSS	0	0	0	4	0	14	3	0	14	0	10	1	0	0
<b>AGENCY OVERALL</b>	<b>0</b>	<b>20</b>	<b>710</b>	<b>19</b>	<b>444</b>	<b>2,770</b>	<b>14</b>	<b>94</b>	<b>3,032</b>	<b>0</b>	<b>2,686</b>	<b>10</b>	<b>0</b>	<b>0</b>

**C. (2) Reasons for Denial on Appeal – Reasons Other than Exemptions**

Processing Center	No Records	Records Referred at Initial Request Level	Request Withdrawn	Fee-Related Reason	Records not Reasonably Described	Improper Request for Other Reasons	Not Agency Record	Duplicate Request or Appeal	Request in Litigation	Appeal Based Solely on Denial for Expedited Processing	Other *Explained in chart C. (3), below
CBP	15	7	15	2	3	402	2	73	1	0	0
FEMA	2	0	3	0	0	0	0	1	0	1	10

Processing Center	No Records	Records Referred at Initial Request Level	Request Withdrawn	Fee-Related Reason	Records not Reasonably Described	Improper Request for Other Reasons	Not Agency Record	Duplicate Request or Appeal	Request in Litigation	Appeal Based Solely on Denial for Expedited Processing	Other *Explained in chart C. (3), below
FLETC	0	0	0	0	0	0	0	0	0	0	0
ICE	5	1	2	1	19	2	3	3	6	1	9
OIG	1	0	2	0	0	2	10	0	2	0	0
PRIV	0	3	18	0	0	2	0	4	4	0	17
TSA	3	0	7	0	0	0	0	1	0	0	8
USCG	1	3	8	0	0	2	0	0	3	0	0
USCIS	0	0	2	0	0	57	117	124	0	0	0
USSS	0	4	0	0	0	1	0	0	3	0	0
<b>AGENCY OVERALL</b>	<b>27</b>	<b>18</b>	<b>57</b>	<b>3</b>	<b>22</b>	<b>468</b>	<b>132</b>	<b>206</b>	<b>19</b>	<b>2</b>	<b>44</b>

**C. (3) Reasons for Denial on Appeal – “Other” Reasons from Section VI, C (2)  
Chart**

Processing Center	Description	No. of Times Used	Total
CBP	N/A	0	0
FEMA	Improper Appeal Adequacy of Search	9 1	10
FLETC	N/A	0	0
ICE	Improper Appeal	9	9
OIG	N/A	0	0
PRIV	Constructive Denial	17	17
TSA	No Component Response to Adjudicate Improper Appeal	4 4	8
USCG	N/A	0	0
USCIS	N/A	0	0
USSS	N/A	0	0
<b>AGENCY OVERALL</b>			<b>44</b>

**C. (4) Response Times for Administrative Appeals**

Processing Center	Median Number of Days	Average Number of Days	Lowest Number of Days	Highest Number of Days
CBP	5	11	1	1,032
FEMA	56	108	<1	330
FLETC	N/A	N/A	N/A	N/A
ICE	17	66	<1	256
OIG	18	96	2	348
PRIV	80	87	<1	313
TSA	19	49	<1	353
USCG	333	340	3	850
USCIS	8	10	1	79
USSS	100	116	12	332
<b>AGENCY OVERALL</b>	<b>7</b>	<b>24</b>	<b>&lt;1</b>	<b>1,032</b>

**C. (5) Ten Oldest Pending Administrative Appeals**

Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Appeal
CBP	Date of Receipt	4/13/2021	4/7/2021	3/22/2021	9/1/2020	7/28/2020	7/20/2020	10/4/2019	5/21/2019	12/7/2018	9/15/2017
	Number of Days Pending	118	122	134	268	293	299	495	590	702	1,008
FEMA	Date of Receipt	6/22/2020	6/29/2020	7/15/2020	8/18/2020	8/28/2020	10/6/2020	10/6/2020	11/25/2020	8/11/2020	7/15/2020
	Number of Days Pending	246	246	272	280	285	304	304	315	320	381
FLETC	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	6/10/2021	3/31/2021	1/13/2021
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	95	146	201
ICE	Date of Receipt	3/19/2021	3/19/2021	3/19/2021	3/19/2021	3/19/2021	3/19/2021	3/19/2021	3/19/2021	3/19/2021	2/18/2021
	Number of Days Pending	186	186	186	186	186	186	186	186	186	287
OIG	Date of Receipt	3/5/2021	11/30/2020	11/30/2020	11/30/2020	7/29/2020	7/7/2020	12/16/2019	9/25/2019	9/25/2019	5/6/2019
	Number of Days Pending	140	210	210	210	294	310	450	505	511	604
PRIV	Date of Receipt	1/15/2021	12/19/2020	12/16/2020	12/10/2020	12/10/2020	12/10/2020	11/12/2020	11/12/2020	10/29/2020	7/7/2020
	Number of Days Pending	179	195	198	202	202	202	215	215	230	310
TSA	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	9/9/2021	8/19/2021	8/16/2021
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	15	29	35
USCG	Date of Receipt	1/27/2021	12/14/2020	12/9/2020	9/22/2020	9/11/2020	7/17/2020	5/26/2020	4/21/2020	11/19/2019	1/4/2017
	Number of Days Pending	172	200	203	256	263	302	339	365	468	1,188



Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Appeal
USCIS	Date of Receipt	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/8/2021	9/3/2021
	Number of Days Pending	19	19	19	19	19	19	19	19	19	17
USSS	Date of Receipt	7/22/2021	7/15/2021	6/30/2021	6/30/2021	6/14/2021	5/14/2021	5/13/2021	3/30/2021	3/30/2021	6/30/2020
	Number of Days Pending	49	54	64	64	76	96	97	129	129	315
AGENCY OVERALL	Date of Receipt	4/21/2020	11/19/2019	10/4/2019	9/25/2019	9/25/2019	5/21/2019	5/6/2019	12/7/2018	9/15/2017	1/4/2017
	Number of Days Pending	365	468	495	505	511	590	604	702	1,008	1,188

## VII. FOIA Requests: Response Time for Processed and Pending Requests

### A. Processed Requests – Response Time for All Processed Perfected Requests

Processing Center	Simple				Complex				Expedited			
	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days
CBP	30	40	1	1,164	45	106	1	1,449	112	299	4	1,083
CISA	6	7	<1	20	299	367	23	1,182	126	145	4	323
CRCL	3	4	<1	20	209	214	24	607	N/A	N/A	N/A	N/A
FEMA	3	4	<1	20	125	90	23	910	56	91	5	327
FLETC	11	21	1	38	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FPS	4	6	<1	20	26	30	21	57	35	39	6	65
I&A	6	7	<1	19	47	72	21	223	15	37	0	194
ICE	8	9	<1	20	42	71	<1	1,487	84	99	<1	598
OIG	9	9	2	19	141	256	21	1,081	97	97	97	97
PRIV	7	27	<1	413	105	130	<1	1,006	169	173	<1	960
TSA	3	5	<1	20	326	432	21	1,416	164	164	59	269
USCG	8	9	<1	20	73	209	21	1,905	63	568	12	1,628
USCIS	17	22	1	783	25	34	1	1,083	18	51	1	237
USSS	3	7	1	20	148	229	21	1,060	47	83	5	825
AGENCY OVERALL	18	29	<1	1,164	30	63	1	1,905	87	132	<1	1,628

### B. Processed Requests – Response Time for Perfected Requests in Which Information Was Granted

Processing Center	Simple				Complex				Expedited			
	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days
CBP	49	58	<1	1,164	48	107	1	1,449	96	277	6	1,069
CISA	7	7	7	7	122	347	23	1,182	N/A	N/A	N/A	N/A

Processing Center	Simple				Complex				Expedited			
	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days	Median No. of Days	Average No. of Days	Lowest No. of Days	Highest No. of Days
CRCL	15	14	6	20	203	237	29	607	N/A	N/A	N/A	N/A
FEMA	9	9	<1	20	126	193	23	910	52	75	7	255
FLETC	22	33	1	102	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FPS	5	7	<1	20	27	32	21	57	36	42	28	65
I&A	3	5	1	18	69	88	21	223	73	81	41	194
ICE	8	9	<1	20	40	66	5	1,487	86	104	19	598
OIG	12	11	4	19	175	242	26	923	N/A	N/A	N/A	N/A
PRIV	N/A	N/A	N/A	N/A	125	148	<1	1,006	157	241	57	887
TSA	8	10	<1	20	268	415	21	1,416	164	164	59	269
USCG	10	10	0	20	62	99	21	1,857	63	568	12	1,628
USCIS	19	29	1	783	29	43	1	1,083	41	63	11	237
USSS	4	6	1	20	160	240	21	1,060	50	99	5	825
<b>AGENCY OVERALL</b>	<b>19</b>	<b>35</b>	<b>&lt;1</b>	<b>1,164</b>	<b>28</b>	<b>55</b>	<b>&lt;1</b>	<b>1,857</b>	<b>81</b>	<b>142</b>	<b>5</b>	<b>1,628</b>

### C. Processed Requests – Response Time in Day Increments

#### (1) Simple Requests

Processing Center	1-20 Days	21-40 Days	41-60 Days	61-80 Days	81-100 Days	101-120 Days	121-140 Days	141-160 Days	161-180 Days	181-200 Days	201-300 Days	301-400 Days	401+ Days	Total
CBP	26,400	22,143	10,900	7,658	3,475	3,388	1,934	307	90	45	77	35	40	<b>76,492</b>
CISA	29	0	0	0	0	0	0	0	0	0	0	0	0	<b>29</b>
CRCL	41	0	0	0	0	0	0	0	0	0	0	0	0	<b>41</b>
FEMA	311	0	0	0	0	0	0	0	0	0	0	0	0	<b>311</b>
FLETC	48	11	5	5	1	1	1	0	0	0	0	0	0	<b>72</b>
FPS	125	0	0	0	0	0	0	0	0	0	0	0	0	<b>125</b>
I&A	97	0	0	0	0	0	0	0	0	0	0	0	0	<b>97</b>
ICE	24,489	0	0	0	0	0	0	0	0	0	0	0	0	<b>24,489</b>
OIG	36	0	0	0	0	0	0	0	0	0	0	0	0	<b>36</b>
PRIV	447	147	91	51	24	22	7	6	2	3	21	2	1	<b>824</b>
TSA	338	0	0	0	0	0	0	0	0	0	0	0	0	<b>338</b>
USCG	667	0	0	0	0	0	0	0	0	0	0	0	0	<b>667</b>
USCIS	40,668	6,395	1,425	2,136	1,401	387	55	86	31	16	155	44	46	52,845
USSS	351	0	0	0	0	0	0	0	0	0	0	0	0	<b>351</b>
<b>AGENCY OVERALL</b>	<b>109,570</b>	<b>106,710</b>	<b>26,134</b>	<b>31,030</b>	<b>11,802</b>	<b>4,594</b>	<b>2,312</b>	<b>827</b>	<b>370</b>	<b>195</b>	<b>648</b>	<b>299</b>	<b>412</b>	<b>294,903</b>

**(2) Complex Requests**

<b>Processing Center</b>	<b>1-20 Days</b>	<b>21-40 Days</b>	<b>41-60 Days</b>	<b>61-80 Days</b>	<b>81-100 Days</b>	<b>101-120 Days</b>	<b>121-140 Days</b>	<b>141-160 Days</b>	<b>161-180 Days</b>	<b>181-200 Days</b>	<b>201-300 Days</b>	<b>301-400 Days</b>	<b>401+ Days</b>	<b>Total</b>
CBP	644	295	319	146	82	55	51	46	36	43	140	46	120	<b>2,023</b>
CISA	0	16	11	7	4	5	6	1	1	1	7	10	48	<b>117</b>
CRCL	0	4	0	2	0	1	1	1	0	1	6	3	2	<b>21</b>
FEMA	0	85	54	51	34	34	23	23	13	20	76	46	62	<b>521</b>
FLETC	0	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
FPS	0	26	7	0	0	0	0	0	0	0	0	0	0	<b>33</b>
I&A	0	29	17	9	3	3	4	4	1	5	2	0	0	<b>77</b>
ICE	126	10,978	4,859	2,090	1,346	1,185	550	289	122	157	520	280	495	<b>22,997</b>
OIG	0	12	12	5	6	3	10	4	4	4	14	3	19	<b>96</b>
PRIV	2,338	8,445	8,471	7,088	7,364	6,079	5,083	3,448	2,664	3,323	11,249	4,229	210	<b>69,991</b>
TSA	0	78	38	24	25	14	17	11	9	12	30	37	242	<b>537</b>
USCG	0	355	220	184	145	65	33	17	16	18	49	30	203	<b>1335</b>
USCIS	56,191	84,409	15,138	23,316	8,302	1,183	370	514	278	147	550	262	371	<b>191,031</b>
USSS	1	101	41	30	24	19	20	31	19	22	50	32	105	<b>495</b>
<b>AGENCY OVERALL</b>	<b>59,300</b>	<b>104,833</b>	<b>29,187</b>	<b>32,952</b>	<b>17,335</b>	<b>8,646</b>	<b>6,168</b>	<b>4,389</b>	<b>3,163</b>	<b>3,753</b>	<b>12,693</b>	<b>4,978</b>	<b>1,877</b>	<b>289,274</b>

**(3) Requests Granted Expedited Processing**

<b>Processing Center</b>	<b>1-20 Days</b>	<b>21-40 Days</b>	<b>41-60 Days</b>	<b>61-80 Days</b>	<b>81-100 Days</b>	<b>101-120 Days</b>	<b>121-140 Days</b>	<b>141-160 Days</b>	<b>161-180 Days</b>	<b>181-200 Days</b>	<b>201-300 Days</b>	<b>301-400 Days</b>	<b>401+ Days</b>	<b>Total</b>
CBP	6	3	0	4	0	1	0	0	1	0	0	4	8	<b>27</b>
CISA	2	0	0	0	0	0	0	0	0	0	1	1	0	<b>4</b>
CRCL	0	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
FEMA	6	3	5	3	2	1	0	2	0	0	2	2	0	<b>26</b>
FLETC	0	0	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
FPS	1	9	4	3	0	0	0	0	0	0	0	0	0	<b>17</b>
I&A	21	2	8	4	2	0	0	0	2	0	0	0	0	<b>39</b>
ICE	6	12	16	10	13	13	4	5	0	2	8	0	2	<b>91</b>
OIG	0	0	0	0	1	0	0	0	0	0	0	0	0	<b>1</b>
PRIV	10	5	6	3	0	15	11	15	19	33	20	1	6	<b>144</b>
TSA	0	0	1	0	0	0	0	0	0	0	1	0	0	<b>2</b>
USCG	1	0	0	1	0	0	0	0	0	0	0	0	1	<b>3</b>
USCIS	6	0	0	3	0	0	0	0	0	0	1	0	0	<b>10</b>
USSS	12	7	7	4	6	1	1	2	2	2	1	0	1	<b>46</b>
<b>AGENCY OVERALL</b>	<b>71</b>	<b>41</b>	<b>47</b>	<b>35</b>	<b>24</b>	<b>31</b>	<b>16</b>	<b>24</b>	<b>24</b>	<b>37</b>	<b>34</b>	<b>8</b>	<b>18</b>	<b>410</b>

**D. Pending Requests – All Pending Perfected Requests**

Processing Center	Simple			Complex			Expedited		
	Number Pending	Median No. of Days	Average No. of Days	Number Pending	Median No. of Days	Average No. of Days	Number Pending	Median No. of Days	Average No. of Days
CBP	19,508	44	51	1,861	283	353	69	568	532
CISA	14	11	10	83	504	499	4	561	554
CRCL	5	7	7	15	94	289	0	N/A	N/A
FEMA	55	7	7	464	177	253	21	154	209
FLETC	9	112	118	0	N/A	N/A	0	N/A	N/A
FPS	10	11	11	1	61	61	0	N/A	N/A
I&A	8	15	13	45	119	142	11	134	123
ICE	2,186	129	214	1,737	111	204	35	178	226
OIG	14	6	8	298	245	294	0	N/A	N/A
PRIV	52	13	11	2,454	10	49	37	252	234
TSA	40	7	8	467	445	465	0	N/A	N/A
USCG	191	9	10	1,961	312	467	0	N/A	N/A
USCIS	4,033	22	47	16,908	30	50	5	357	454
USSS	27	4	5	140	270	382	15	183	196
<b>AGENCY OVERALL</b>	<b>26,152</b>	<b>38</b>	<b>64</b>	<b>26,434</b>	<b>31</b>	<b>130</b>	<b>197</b>	<b>297</b>	<b>341</b>

**E. Pending Requests – Ten Oldest Pending Perfected Requests**

Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Request
CBP	Date of Receipt	5/4/2016	4/18/2016	3/2/2016	2/22/2016	2/19/2016	1/8/2016	4/13/2015	1/20/2015	4/1/2014	1/30/2014
	Number of Days Pending	1,352	1,342	1,397	1,404	1,403	1,126	1,313	1,677	1,876	1,768
CISA	Date of Receipt	8/24/2017	8/24/2017	7/25/2017	7/11/2017	7/11/2017	7/10/2017	7/10/2017	5/10/2017	2/10/2017	1/18/2017
	Number of Days Pending	1,026	1,031	1,048	1,058	1,058	1,059	1,059	1,100	1,162	1,179
CRCL	Date of Receipt	6/28/2021	5/21/2021	5/18/2021	1/31/2021	1/30/2021	7/5/2019	5/20/2019	4/23/2019	4/23/2019	3/28/2019
	Number of Days Pending	66	87	94	419	420	562	594	613	613	631
FEMA	Date of Receipt	5/11/2018	5/2/2018	3/20/2018	1/9/2018	11/6/2017	11/6/2017	11/2/2017	10/19/2017	9/29/2017	9/14/2017
	Number of Days Pending	847	855	857	934	976	976	976	988	1,001	1,012
FLETC	Date of Receipt	9/30/2021	9/27/2021	9/15/2021	6/4/2021	4/22/2021	3/24/2021	3/10/2021	8/28/2020	6/25/2020	N/A
	Number of Days Pending	1	4	12	69	112	133	143	273	318	N/A
FPS	Date of Receipt	9/24/2021	9/23/2021	9/17/2021	9/23/2021	8/31/2021	9/10/2021	/8/2021	9/7/2021	9/7/2021	7/6/2021
	Number of Days Pending	4	8	10	10	11	14	16	17	17	61
I&A	Date of Receipt	9/9/2020	9/8/2020	9/2/2020	8/26/2020	7/31/2020	7/31/2020	7/31/2020	7/30/2020	7/24/2020	7/24/2020
	Number of Days Pending	265	266	269	274	292	292	292	293	297	297
ICE	Date of Receipt	1/6/2018	1/25/2018	1/17/2018	1/11/2018	12/27/2017	11/9/2017	10/16/2017	10/5/2017	10/3/2017	4/27/2017
	Number of Days Pending	918	923	929	932	942	975	991	997	999	1,109
OIG	Date of Receipt	6/20/2018	6/19/2018	6/18/2018	6/14/2018	6/8/2018	5/2/2018	3/29/2018	4/3/2018	3/8/2018	1/24/2018

Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Request
	Number of Days Pending	821	822	823	825	829	855	868	876	894	924
PRIV	Date of Receipt	10/26/2018	10/25/2018	10/25/2018	9/25/2018	7/19/2018	6/18/2018	6/18/2018	6/12/2018	12/20/2017	10/9/2017
	Number of Days Pending	732	733	733	754	801	823	823	827	919	995
TSA	Date of Receipt	11/8/2016	1/24/2017	2/17/2017	3/7/2017	3/17/2017	4/4/2017	3/17/2017	3/14/2017	1/19/2017	11/4/2016
	Number of Days Pending	1,138	1,138	1,141	1,146	1,157	1,175	1,178	1,191	1,225	1,227
USCG	Date of Receipt	10/20/2014	10/20/2014	10/2/2014	10/1/2014	10/31/2014	8/25/2014	8/14/2014	5/29/2014	4/16/2014	5/12/2014
	Number of Days Pending	1,741	1,741	1,752	1,753	1,756	1,773	1,786	1,827	1,870	1,878
USCIS	Date of Receipt	11/12/2017	11/12/2017	11/8/2017	10/31/2017	10/31/2017	10/27/2017	10/12/2017	10/10/2017	9/25/2017	9/18/2017
	Number of Days Pending	991	991	993	999	999	1,001	1,012	1,014	1,024	1,029
USSS	Date of Receipt	10/19/2019	10/9/2019	6/3/2019	6/3/2019	5/30/2019	5/22/2019	4/9/2019	3/26/2019	1/18/2019	12/13/2018
	Number of Days Pending	490	496	586	586	590	593	622	634	679	703
AGENCY OVERALL	Date of Receipt	10/20/2014	10/20/2014	10/2/2014	10/1/2014	10/31/2014	8/25/2014	8/14/2014	5/29/2014	4/16/2014	5/12/2014
	Number of Days Pending	1,741	1,741	1,752	1,753	1,756	1,773	1,786	1,827	1,870	1,878

## VIII. Requests for Expedited Processing and Requests for Fee Waivers

### A. Requests for Expedited Processing

Processing Center	Number Granted	Number Denied	Median Number of Days to Adjudicate	Average Number of Days to Adjudicate	Number Adjudicated within 10 Calendar Days
CBP	14	4,632	11	25	2,315
CISA	4	16	9	10	13
CRCL	0	7	1	1	7
FEMA	62	37	4	13	41
FLETC	0	0	N/A	N/A	0
FPS	13	10	1	5	21
I&A	53	1	1	2	53
ICE	90	171	28	31	109
OIG	1	12	22	52	1
PRIV	46	62	3	6	89
TSA	2	92	1	64	76
USCG	3	0	3	11	2
USCIS	5	11,707	1	2	11,533
USSS	48	8	1	3	54
AGENCY OVERALL	341	16,755	1	9	14,314

**B. Requests for Fee Waiver**

Processing Center	Number Granted	Number Denied	Median Number of Days to Adjudicate	Average Number of Days to Adjudicate
CBP	26	605	<1	<1
CISA	42	0	5	5
CRCL	6	0	4	105
FEMA	132	0	2	22
FLETC	0	0	N/A	N/A
FPS	32	0	1	4
I&A	67	0	1	4
ICE	55	0	2	12
OIG	5	0	223	301
PRIV	263	0	1	3
TSA	37	0	1	77
USCG	5	0	60	67
USCIS	24	139	63	91
USSS	0	0	0	0
<b>AGENCY OVERALL</b>	<b>694</b>	<b>744</b>	<b>1</b>	<b>27</b>

**IX. FOIA Personnel and Costs**

Processing Center	Personnel			Costs		
	Number of "Full Time FOIA Employees"	Number of "Equivalent Full-Time FOIA Employees"	Total Number of "Full-Time FOIA Staff" (Col. 1 + Col. 2)	Processing Costs	Litigation - Related Costs	Total Costs
CBP	71	1.34	72.34	\$5,163,998.10	\$0.00	\$5,163,998.10
CISA	1	0	1	\$1,065,260.00	\$0.00	\$1,065,260.00
CRCL	2	0	1.52	\$113,401.00	\$111,940.00	\$225,341.00
FEMA	16	12.23	28.23	\$1,144,382.00	\$3,300.00	\$1,147,682.00
FLETC	2	2.3	4.3	\$400,250.25	\$0.00	\$400,250.25
FPS	1	1	2	\$31,417.00	\$0.00	\$31,417.00
I&A	2	0	2	\$370,655.50	\$27,000.00	\$397,655.50
ICE	48	9.7	57.7	\$9,598,191.18	\$217,460.60	\$9,815,651.78
OIG	5	1	5.4	\$777,736.98	\$7,500	\$785,236.98
PRIV	27	12.5	39.45	\$7,993,757.41	\$5,000.00	\$7,998,757.41
TSA	10	2	12	\$1,852,525.00	\$135,286.00	\$1,987,811.00
USCG	9	14.064	23.064	\$304,775.00	\$3,000.00	\$307,775.00
USCIS	253	103	356	\$39,929,161.96	\$1,493,489.00	\$41,422,650.96
USSS	15	2.1	17.1	\$2,150,578.40	\$1,500.00	\$2,152,078.40
<b>AGENCY OVERALL</b>	<b>462</b>	<b>161.234</b>	<b>623.234</b>	<b>\$70,896,089.78</b>	<b>\$2,005,475.60</b>	<b>\$72,901,565.38</b>

**X. Fees Collected for Processing Requests**

Processing Center	Total Amount of Fees Collected	Percentage of Total Costs
CBP	\$14,971.00	0.29%
CISA	0	0
CRCL	0	0
FEMA	0	0
FLETC	0	0
FPS	0	0
I&A	0	0
ICE	0	0
OIG	0	0
PRIV	0	0
TSA	0	0
USCG	\$4,184.46	1.37%
USCIS	0	0
USSS	0	0
<b>AGENCY OVERALL</b>	<b>\$19,155.46</b>	<b>0.00%</b>

**XI. FOIA Regulations** – The Department of Homeland Security FOIA Implementing Regulations are codified at 6 C.F.R. Part 5, dated December 22, 2016, available at [http://www.dhs.gov/xlibrary/assets/FOIA\\_FedReg\\_Notice.pdf](http://www.dhs.gov/xlibrary/assets/FOIA_FedReg_Notice.pdf). This final rule established procedures for the public to obtain information from DHS under the Freedom of Information Act and the Privacy Act.

**A. Number of Times Subsection (c) Used<sup>13</sup>**

Processing Center	Number of Times Subsection (c) Used
CBP	0
CISA	0
CRCL	0
FEMA	0
FLETC	0
FPS	0
I&A	0
ICE	0
OIG	0
PRIV	0
TSA	0
USCG	0

<sup>13</sup> 5 U.S.C. § 552(c) provides special protection for three categories of particularly sensitive law enforcement records. For these three specifically defined categories of records, federal law enforcement agencies “may treat the records as not subject to the requirements of [the FOIA].”

Processing Center	Number of Times Subsection (c) Used
USCIS	0
USSS	0
<b>AGENCY OVERALL</b>	<b>0</b>

**B. Number of Subsection (a)(2) Postings<sup>14</sup>**

Processing Center	Number of (a)(2) Records Posted by the FOIA Office	Number of (a)(2) Records Posted by Program Offices
CBP	87,693	N/A
CISA	0	N/A
CRCL	0	N/A
FEMA	0	N/A
FLETC	28	N/A
FPS	3,336	N/A
I&A	0	N/A
ICE	108	N/A
OIG	3,336	N/A
PRIV	0	N/A
TSA	43,345	N/A
USCG	0	N/A
USCIS	1,637	N/A
USSS	0	N/A
<b>AGENCY OVERALL</b>	<b>139,483</b>	<b>N/A</b>

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<sup>14</sup> 5 U.S.C. § 552(a)(2) requires agencies to post specific categories of records, including released records that have been requested three times.



**XII. Backlogs, Consultations, and Comparisons****A. Backlogs of FOIA Requests and Administrative Appeals**

Processing Center	Number of Backlogged Requests as of the End of Fiscal Year	Number of Backlogged Appeals as of End of Fiscal Year
CBP	15,696	14
CISA	84	N/A
CRCL	14	N/A
FEMA	472	25
FLETC	6	3
FPS	1	N/A
I&A	53	N/A
ICE	3,958	169
OIG	282	12
PRIV	450	171
TSA	459	1
USCG	1,882	25
USCIS	1,599	0
USSS	146	16
<b>AGENCY OVERALL</b>	<b>25,102</b>	<b>436</b>

**B. Consultations on FOIA Requests – Received, Processed, and Pending Consultations<sup>15</sup>**

Processing Center	Number of Consultations Received from Other Agencies that Were Pending at Your Agency as of Start of the Fiscal Year	Number of Consultations Received from Other Agencies During the Fiscal Year	Number of Consultations Received from Other Agencies that Were Processed by Your Agency During the Fiscal Year	Number of Consultations Received from Other Agencies that were Pending at Your Agency as of the End of the Fiscal Year
CBP	40	119	97	62
CISA	0	3	2	1
CRCL	0	7	7	0
FEMA	26	58	61	23
FLETC	0	0	0	0
FPS	0	23	23	0
I&A	13	22	8	27
ICE	162	188	141	209
OIG	2	23	10	15
PRIV	40	62	57	45
TSA	9	31	31	9
USCG	54	37	25	66
USCIS	12	88	93	7
USSS	36	71	87	20

<sup>15</sup> After reviewing their databases, the following components adjusted the number of consultations pending as of the start of the Fiscal Year: CBP, CISA, FEMA, I&A, ICE, PRIV, TSA, USCIS, and USSS.

Processing Center	Number of Consultations Received from Other Agencies that Were Pending at Your Agency as of Start of the Fiscal Year	Number of Consultations Received from Other Agencies During the Fiscal Year	Number of Consultations Received from Other Agencies that Were Processed by Your Agency During the Fiscal Year	Number of Consultations Received from Other Agencies that were Pending at Your Agency as of the End of the Fiscal Year
AGENCY OVERALL	394	732	642	484

**C. Consultations on FOIA Requests – Ten Oldest Consultations Received from Other Agencies and Pending**

Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4th	3rd	2nd	Oldest Request
CBP	Date of Receipt	3/14/2019	3/7/2019	9/18/2018	6/16/2018	4/16/2018	4/16/2018	3/16/2018	2/13/2018	1/8/2018	10/11/2017
	Number of Days Pending	638	643	756	842	864	864	885	907	932	991
CISA	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1/4/2021
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	188
CRCL	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FEMA	Date of Receipt	7/27/2020	6/26/2020	5/14/2020	8/22/2019	11/28/2019	11/28/2019	11/28/2019	11/28/2019	3/3/2018	4/10/2017
	Number of Days Pending	296	316	346	528	711	711	711	711	897	1,122
FLETC	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
FPS	Date of Receipt	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	Number of Days Pending	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
I&A	Date of Receipt	2/4/2020	10/22/2019	8/30/2019	7/19/2019	7/15/2019	7/12/2019	7/10/2019	4/17/2019	11/20/2018	5/15/2018
	Number of Days Pending	417	487	522	552	556	557	559	617	716	846
ICE	Date of Receipt	5/15/2017	5/15/2017	5/15/2017	5/15/2017	5/15/2017	5/15/2017	5/15/2017	5/15/2017	5/15/2017	4/16/2017
	Number of Days Pending	1,017	1,017	1,017	1,017	1,017	1,017	1,017	1,017	1,017	1,117
OIG	Date of Receipt	9/3/2021	9/3/2021	9/3/2021	9/3/2021	6/22/2021	4/16/2021	4/6/2021	1/25/2021	11/16/2021	5/22/2020
	Number of Days Pending	18	18	18	18	70	116	124	174	219	340
PRIV	Date of Receipt	2/14/2017	2/1/2017	1/6/2017	1/5/2017	1/5/2017	11/22/2016	11/3/2016	10/26/2016	10/11/2016	9/12/2016
	Number of Days Pending	1,160	1,169	1,186	1,187	1,187	1,216	1,228	1,234	1,245	1,265
TSA	Date of Receipt	N/A	9/29/2021	9/28/2020	9/28/2021	9/21/2021	6/30/2021	6/29/2021	7/17/2020	7/16/2020	5/18/2020
	Number of Days Pending	N/A	1	2	2	7	64	65	302	303	344
USCG	Date of Receipt	6/23/2016	6/7/2016	5/5/2016	5/3/2016	9/17/2015	8/20/2015	4/3/2015	1/13/2015	1/13/2015	6/3/2013
	Number of Days Pending	1,320	1,332	1,354	1,356	1,512	1,531	1,628	1,684	1,684	2,063
USCIS	Date of Receipt	N/A	N/A	N/A	8/10/2021	8/5/2021	7/28/2021	7/19/2021	2/18/2021	2/4/2021	11/17/2020
	Number of Days Pending	N/A	N/A	N/A	45	50	54	61	157	166	218
USSS	Date of Receipt	10/18/2018	10/18/2018	9/13/2018	9/13/2018	9/13/2018	9/13/2018	9/13/2018	9/13/2018	4/27/2017	4/27/2017
	Number of Days Pending	741	741	765	765	765	765	765	765	1,112	1,112

Processing Center	Sub-Row Heading	10th	9th	8th	7th	6th	5th	4 <sup>th</sup>	3 <sup>rd</sup>	2nd	Oldest Request
AGENCY OVERALL	Date of Receipt	6/23/2016	6/7/2016	5/5/2016	5/3/2016	9/17/2015	8/20/2015	4/3/2015	1/13/2015	1/13/2015	6/3/2013
	Number of Days Pending	1,320	1,332	1,354	1,356	1,512	1,531	1,628	1,684	1,684	2,063

**(D). (1) Comparison of Numbers of Requests from Previous and Current Annual Report – Requests Received, Processed, and Backlogged<sup>16</sup>**

Processing Center	Number of Requests Received		Number of Requests Processed	
	Received During Fiscal Year from Last Year's Annual Report	Received During Fiscal Year from Current Annual Report	Processed During Fiscal Year from Last Year's Annual Report	Processed During Fiscal Year from Current Annual Report
CBP	80,366	108,177	90,543	90,576
CISA	177	153	221	177
CRCL	N/A	80	N/A	76
FEMA	1,110	975	1,031	916
FLETC	335	162	338	155
FPS	238	210	221	211
I&A	346	257	337	226
ICE	90,304	39,716	80,275	47,865
OIG	306	253	241	142
PRIV	24,121	53,432	23,904	71,586
TSA	695	794	918	1,008
USCG	2,705	2,341	2,248	2,012
USCIS	195,930	235,210	191,114	251,289
USSS	1,038	890	1,232	1,108
<b>AGENCY OVERALL</b>	<b>397,671</b>	<b>442,650</b>	<b>39,2623</b>	<b>46,7347</b>

**D. (2) Comparison of Backlogged Requests from Previous and Current Annual Report**

Processing Center	Number of Backlogged Requests as of End of the Fiscal Year from Previous Annual Report	Number of Backlogged Requests as of End of the Fiscal Year from Current Annual Report
CBP	1,729	15,696
CISA	123	84
CRCL	N/A	14
FEMA	340	472
FLETC	12	6
FPS	9	1
I&A	25	53
ICE	5,308	3,958
OIG	187	282
PRIV	5,752	450
TSA	558	459

<sup>16</sup> CRCL previously included in PRIV.

Processing Center	Number of Backlogged Requests as of End of the Fiscal Year from Previous Annual Report	Number of Backlogged Requests as of End of the Fiscal Year from Current Annual Report
USCG	1,671	1,882
USCIS	20,344	1,599
USSS	292	146
<b>AGENCY OVERALL</b>	<b>36,350</b>	<b>25,102</b>

**D. (3) Comparison of Numbers of Administrative Appeals from Previous and Current Annual Report – Appeals Received, Processed, and Backlogged**

Processing Center	Number of Appeals Received		Number of Appeals Processed	
	Received During Fiscal Year from Last Year's Annual Report	Received During Fiscal Year from Current Annual Report	Processed During Fiscal Year from Last Year's Annual Report	Processed During Fiscal Year from Current Annual Report
CBP	3,601	3,194	3,666	3,181
FEMA	24	37	17	22
FLETC	1	3	1	0
ICE	517	667	498	690
OIG	12	27	9	21
PRIV	183	360	205	198
TSA	25	36	20	41
USCG	29	33	7	46
USCIS	2,156	2,511	2,393	2,331
USSS	57	40	35	49
<b>AGENCY OVERALL</b>	<b>6,605</b>	<b>6,908</b>	<b>6,851</b>	<b>6,579</b>

**(4) Comparison of Backlogged Administrative Appeals from Previous and Current Annual Report**

Processing Center	Number of Backlogged Appeals as of End of the Fiscal Year from Previous Annual Report	Number of Backlogged Appeals as of End of the Fiscal Year from Current Annual Report
CBP	10	14
FEMA	13	25
FLETC	2	3
ICE	206	169
OIG	9	12
PRIV	42	171
TSA	4	1
USCG	38	25
USCIS	1	0
USSS	29	16
<b>AGENCY OVERALL</b>	<b>354</b>	<b>436</b>

## APPENDIX A: Composition of the Department of Homeland Security

The U.S. Department of Homeland Security (DHS) has six overarching homeland security missions: to counter terrorism and enhance security, secure and manage our borders while facilitating trade and travel, enforce and administer our immigration laws, safeguard and secure cyberspace, build resilience to disasters, and provide essential support for national and economic security. DHS carries out these missions in coordination with federal, state, local, international, tribal, and private sector partners.

### Offices:

**The Office for Civil Rights and Civil Liberties (CRCL)** provides policy advice to Department leadership on civil rights and civil liberties issues, investigates and resolves complaints, and provides leadership to Equal Employment Opportunity Programs.

**The Office of the Citizenship and Immigration Services Ombudsman (Ombudsman)** is dedicated to improving the quality of citizenship and immigration services delivered to the public by providing individual case assistance, as well as making recommendations to improve the administration of immigration benefits by U.S. Citizenship and Immigration Services (USCIS).

**The Office of the Executive Secretary (ESEC)** provides all manner of direct support to the Secretary and Deputy Secretary, as well as related support to leadership and management across the Department.

**The Office of the General Counsel (OGC)** integrates over 2,500 attorneys from throughout the Department into an effective, client-oriented, full-service legal team. The Office of the General Counsel comprises a headquarters office with subsidiary divisions and the legal offices for nine Department components.

**The Joint Requirements Council (JRC)** validates capability gaps, associated with operational requirements and proposed solution approaches to mitigate those gaps through the Joint Requirements Integration and Management System (JRIMS), leveraging opportunities for commonality to enhance operational effectiveness directly and better inform the DHS's main investment pillars.

**The Office of Legislative Affairs (OLA)** serves as primary liaison to members of Congress and their staffs, the White House and Executive Branch, and to other federal agencies and governmental entities that have roles in assuring national security.

**The Military Advisor** provides counsel and support to the Secretary and Deputy Secretary in affairs relating to policy, procedures, preparedness activities, and operations between DHS and the Department of Defense (DoD).

**The Office of Partnership and Engagement (OPE)** is the headquarters-level organization that through a unified approach to external engagement provides the Secretary with current unfettered information on the impact of the Department's policies, regulations, processes, and actions on state, local, tribal, territorial (SLTT) governments, elected officials, law enforcement, the private sector, and faith-based and non-governmental organizations across the United States and globally.

**The Privacy Office (PRIV)** sets privacy and FOIA policy and for the Department. It also works to preserve and enhance privacy protections for all individuals and to promote transparency in the Department's operations.

**The Office of Public Affairs (OPA)** coordinates the public affairs activities of all of the Department's components and offices and serves as the federal government's lead public information office during a national emergency or disaster.

**The Office of Strategy, Policy, and Plans (PLCY)** serves as a central resource to the Secretary and other Department leaders for strategic planning and analysis, and facilitation of decision-making on the full breadth of issues that may arise across the dynamic homeland security enterprise.

Operational and Support Components:

**U. S. Customs and Border Protection (CBP)** is one of the Department of Homeland Security's largest and most complex components. It has responsibility for securing and facilitating trade and travel while enforcing hundreds of U.S. laws and regulations, including those encompassing customs, immigration, border security, and agricultural protection.

**The Cybersecurity and Infrastructure Security Agency (CISA)** leads the national effort to defend critical infrastructure against the threats of today, while working with partners across all levels of government and in the private sector to secure against the evolving risks of tomorrow.

**The DHS Countering Weapons of Mass Destruction Office (CWMD)** enables operational partners to prevent WMD attacks against the United States and promotes readiness for chemical, biological, radiological, and health security threats.

**The Federal Emergency Management Agency (FEMA)** supports state, local, tribal, and territorial partners to ensure we work together to help people before, during, and after disasters.

**The Federal Law Enforcement Training Centers (FLETC)** provides career-long training to law enforcement professionals to help them fulfill their responsibilities safely and proficiently.

**The Office of Intelligence and Analysis (I&A)** equips the Homeland Security Enterprise with the timely intelligence and information it needs to keep the homeland safe, secure, and resilient.

**U. S. Immigration and Customs Enforcement (ICE)** promotes homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration.

**The Management Directorate (MGMT)** is responsible for budget, appropriations, expenditure of funds, accounting and finance; procurement; human resources and personnel; information technology systems; facilities, property, equipment, and other material resources; providing biometric identification services; and identification and tracking of performance measurements relating to the responsibilities of the Department.

- **Federal Protective Service (FPS)** is an operational component within the DHS Management Directorate that provides law enforcement and security services to approximately 9,000 federal facilities nationwide.

**The Office of Operations Coordination (OPS)** provides daily information to the Secretary of Homeland Security, senior leaders, and the homeland security enterprise to enable decision-making; oversees the National Operations Center; and leads the Department's Continuity of Operations and Government Programs to enable continuation of primary mission essential functions in the event of a degraded or crisis operating environment.

**The Transportation Security Administration (TSA)** protects the nation's transportation systems to ensure freedom of movement for people and commerce.

**The United States Coast Guard (USCG)** is one of the six armed forces of the United States and the only military organization within the Department of Homeland Security. The Coast Guard protects the maritime economy and the environment, defends our maritime borders, and saves those in peril.

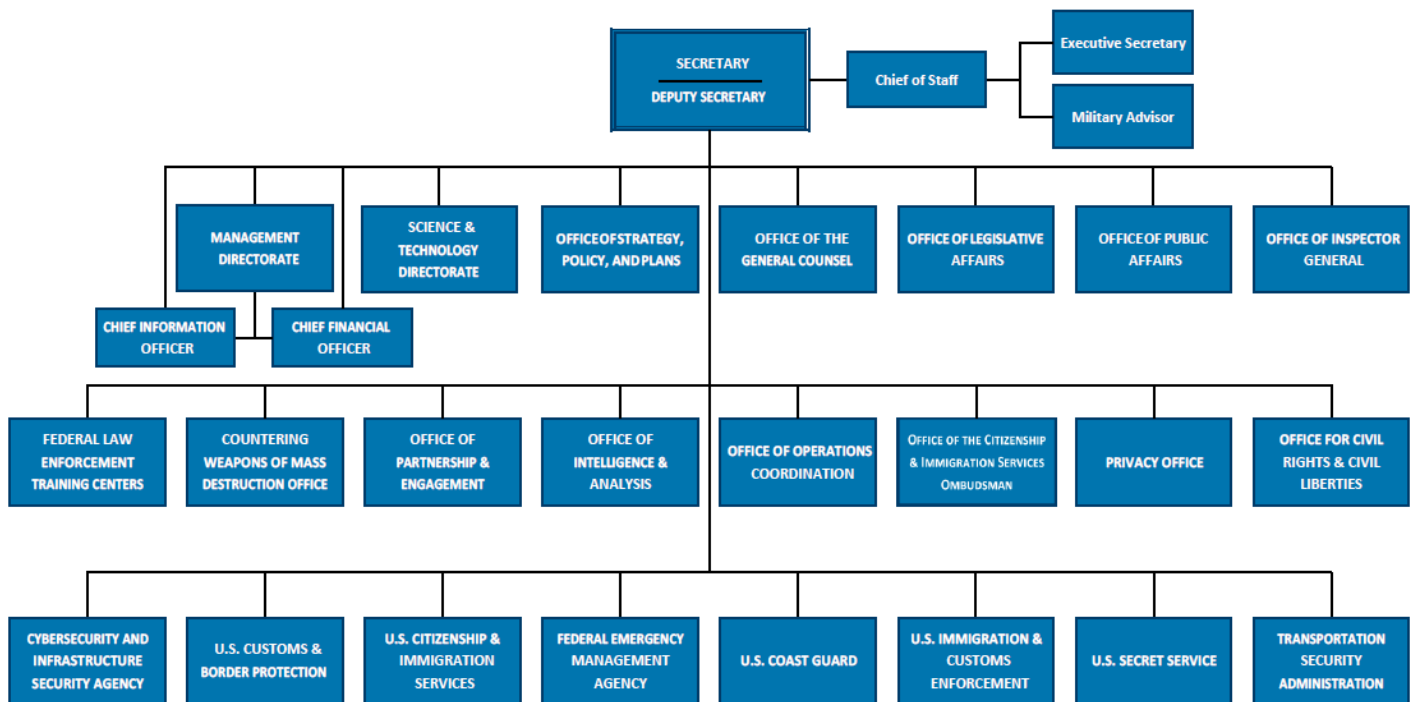
**U.S. Citizenship and Immigration Services (USCIS)** administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values.

**The Science and Technology Directorate (S&T)** is the primary research and development arm of the Department. It provides federal, state, and local officials with the technology and capabilities to protect the homeland.

**The United States Secret Service (USSS)** safeguards the nation's financial infrastructure and payment systems to preserve the integrity of the economy, and protects national leaders, visiting heads of state and government, designated sites, and National Special Security Events.

## APPENDIX B: Organization of the Department of Homeland Security Chart

### U.S. Department of Homeland Security





## **APPENDIX C: Names, Addresses, and Contact Information for DHS FOIA Officers**

### **Department of Homeland Security Chief FOIA Officer**

Lynn Parker Dupree  
Chief FOIA Officer  
Privacy Office, Mail Stop 0655  
U.S. Department of Homeland Security  
2707 Martin Luther King Jr. AVE SE  
Washington, DC 20528-0655

### **Department of Homeland Security Component FOIA Officers**

The Privacy Office  
Catrina Pavlik-Keenan  
Deputy Chief FOIA Officer  
Ph: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)  
Privacy Office, Mail Stop 0655  
Department of Homeland Security  
2707 Martin Luther King Jr. AVE SE  
Washington, DC 20528-0655

U.S. Citizenship and Immigration Services  
Cynthia Munita  
Ph: 816-350-5521; Fax: 816-350-1793  
National Records Center, FOIA/PA Office  
P. O. Box 648010  
Lee's Summit, MO 64064-8010

Office for Civil Rights and Civil Liberties  
Rosemary Law  
Ph: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: [crclfoia@hq.dhs.gov](mailto:crclfoia@hq.dhs.gov)  
Privacy Office, Mail Stop 0190  
Department of Homeland Security  
2707 Martin Luther King Jr. AVE SE  
Washington, DC 20528-0655

U.S. Coast Guard  
Kathleen Claffie  
Ph: 202-475-3525 Fax: 202-475-3927  
Commandant (CG-6P)  
2703 Martin Luther King Jr Ave, SE  
Stop 7710  
Washington, DC 20593-7710

U.S. Customs and Border Protection  
Sabrina Burroughs  
Ph: 202-325-0150; Fax: 202-325-1476  
FOIA Division  
90 K Street, NE  
Washington, DC 20229-1181

Cybersecurity and Infrastructure Security  
Agency  
Charles Schnepfe  
Ph: 202-343-1743 or 866-431-0486  
Fax: 202-343-4011  
E-mail: [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)  
Privacy Office, Mail Stop 0655  
Department of Homeland Security  
2707 Martin Luther King Jr. AVE SE  
Washington, DC 20528-0655

Federal Emergency Management Agency  
Gregory Bridges  
Ph: 202-646-3323  
Information Management Division  
500 C Street, SW  
Mail Stop 3172  
Washington, DC 20472-3172

Federal Law Enforcement Training Centers  
Alicia Mikuta  
Ph: 912-261-4512; Fax: 912-267-3113  
Building No.681, Suite 187B  
1131 Chapel Crossing Road  
Glynco, GA 31524

U.S. Immigration and Customs Enforcement  
Fernando Pinero  
Ph: 866-633-1182; Fax: 202-732-4265  
500 12<sup>th</sup> Street, SW, Mail Stop 5009  
Washington, DC 20536-5009

Office of Inspector General  
Roy Jones  
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U.S. Department of Homeland Security  
245 Murray Lane, SW, Mail Stop 0305  
Washington, DC 20528-2600

Office of Intelligence and Analysis  
Teresa Taylor  
Ph: 202-447-3783; Fax: 202-612-1936  
U.S. Department of Homeland Security  
Washington, DC 20528-0001

Science & Technology Directorate  
Erica Talley  
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Fax: 202-343-4011  
E-mail: [foia@hq.dhs.gov](mailto:foia@hq.dhs.gov)  
Privacy Office, Mail Stop 0655  
Department of Homeland Security  
2707 Martin Luther King Jr. AVE SE  
Washington, DC 20528-0655

United States Secret Service  
Kevin Tyrrell  
Ph: 202-406-6370; Fax: 202-406-5586  
245 Murray Lane, SW, Building T-5  
Washington, DC 20223

Transportation Security Administration  
Kerry Callahan (Acting)  
Ph: 1-866-FOIA-TSA; Fax: 571-227-1406  
6595 Springfield Center Drive  
Springfield, VA 20598-6020

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CENTER FOR LAW AND  
JUSTICE,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY, *et al.*,

Defendants.

Case No. 1:21-cv-01364 (TNM)

**MEMORANDUM OPINION**

Court dockets in this district overflow with Freedom of Information Act (FOIA) matters. Many of those cases seek reams of records, requiring massive efforts from defendant agencies. Despite the at times Sisyphean effort to respond, agencies rarely object to the breadth of a request. But sometimes they do.

This is one of those cases. The American Center for Law and Justice (ACLJ) submitted a FOIA request to four agencies for responsive records about eight broadly defined immigration-related subject areas. When the agencies failed to timely respond, ACLJ sued. The agencies move to dismiss, arguing that ACLJ's underlying FOIA request was overbroad. The Court agrees and will dismiss the case.

**I.**

The southern border occupies a prominent spot in our nation's public discourse. Border policies tend to fluctuate with each incoming administration. The Biden Administration is no different. After President Biden took office, he changed (sometimes wholesale) his predecessor's immigration policies. For example, the new administration stopped Operation

Talon, a program “aimed at removing convicted sex offenders” living illegally in the United States. Compl. Ex. 1 at 6, ECF No. 1-1.<sup>1</sup>

In early 2021, media outlets reported a surge of illegal migrants at the southern border. *See generally id.* at 2–9. This surge threatened to overload the country’s immigration agencies. Some policymakers worried that terrorists might slip through in the mass migration. *See* Compl. Ex. 1 at 6 (statement of Rep. Katko). Indeed, media outlets reported that Customs and Border Protection (CBP) had caught two men listed on the FBI’s Terrorist Watchlist. *See id.* at 8–9. Other policymakers worried that some migrants might contract COVID-19 in the overcrowded detention facilities and would carry the virus into the United States. *See id.* at 8. The media also reported that the Biden Administration refused to call the situation a “crisis,” instead directing officials to use the word “challenge” when discussing the chaos. *See id.* at 2–3.

Enter ACLJ, which submitted a FOIA request to the Department of Homeland Security (DHS) and several of its daughter agencies: CBP, Immigration and Customs Enforcement (ICE), and U.S. Citizenship & Immigration Services (USCIS). The request sought “any and all records” about eight subjects:<sup>2</sup>

- Instructions from the Biden Administration to refer publicly to the migrant surge as a “challenge,” not a crisis, *see* Compl. Ex. 1 at 10;
- Records of how many migrants remain in custody, how many of those have been released without a court date, and how many are convicted criminals. *See id.* at 11. More, any actions taken (1) to prevent trafficking of unaccompanied minors

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<sup>1</sup> All page citations refer to the page numbers that the CM/ECF system generates, and all exhibit numbers refer to the numbered attachments to the CM/ECF filings.

<sup>2</sup> ACLJ’s request technically includes nine categories of information. But the seventh and eighth categories both discuss a CBP press release, with the former focused on Secretary Mayorkas and the latter focused on any other CBP, ICE, or USCIS official. *See* Compl. Ex. 1 at 12. In all other categories, ACLJ mentioned together Secretary Mayorkas and any other CBP, ICE, or USCIS official. So the request as a whole deals with eight subjects, not nine.

and women; (2) to stem the tide of migrants across the border; and (3) to protect Americans from migrants on various terror watch lists, *see id.* at 10–11;

- Instructions that DHS employees should not discuss the surge with the press, *see id.* at 11;
- Records of how many migrants have COVID-19, how many of those have been released into the nation, how the government is tracking those migrants, and how the government is lessening the rate of infection at migrant detention centers, *see id.*;
- Warnings from DHS staff that a quick repeal of the Trump Administration’s border policies could lead to a surge at the southern border, *see id.* at 12;
- Cancellation of Operation Talon, *see id.*;
- An April 2021 CBP press release about the arrest of two migrants on the FBI’s Terror Watch List and the removal of that press release from CBP’s website, *see id.*; and
- Arrest or detention of any person at the border who is on the government’s terrorism watch lists, *see id.* at 13.

ACLJ’s request also specified that it sought records “sent from, prepared by, sent to, received by, reviewed by, or in any way communicated to or by, [DHS] Secretary Alejandro Mayorkas, his aides, staff, representative or agents, or acting predecessor, or any CBP, ICE, or USCIS official.” *Id.* at 10–14. ACLJ limited the request to any records from November 4, 2020 “to the date this Request is processed.” *Id.* at 10.

Both USCIS and CBP acknowledged ACLJ’s request and invoked FOIA’s provision allowing 30 days for the agency to respond. *See* 5 U.S.C. § 552(a)(6); Compl. Exs. C and D, ECF Nos. 1-3 and 1-4. But 30 days later, DHS and its daughter agencies still had not responded. So ACLJ sued, arguing that the agencies had violated FOIA.<sup>3</sup> *See* Compl. ¶¶ 25–41. The

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<sup>3</sup> On the same day that ACLJ filed its Complaint, DHS acknowledged receipt of the request. *See* Defendants’ Reply (“Defs.’ Reply”) Ex. 1, ECF No. 17-1.

agencies moved to dismiss that complaint. *See* Defs.’ Motion to Dismiss (“Defs.’ MTD”), ECF No. 15. That motion is now ripe.<sup>4</sup>

## II.

To survive a motion to dismiss, a complaint must “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In considering a motion to dismiss, the Court “treat[s] the complaint’s factual allegations as true and must grant the plaintiff the benefit of all inferences that can be derived from the facts alleged.” *L. Xia v. Tillerson*, 865 F.3d 643, 649 (D.C. Cir. 2017) (cleaned up). The Court, however, need not credit legal conclusions couched as factual allegations. *See Iqbal*, 556 U.S. at 678.

FOIA exposes “agency action to the light of public scrutiny.” *DOJ v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989). The Act requires an agency to release records not otherwise exempt from disclosure when the agency receives a request that “reasonably describes such records.” 5 U.S.C. § 552(a)(3)(A). And a request “reasonably describes” agency records when it “would be sufficient [to enable] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.” *Truitt v. Dep’t of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990).<sup>5</sup> “Agencies must read

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<sup>4</sup> The Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

<sup>5</sup> FOIA also requires a request to be “in accordance with” an agency’s FOIA regulations. 5 U.S.C. § 552(a)(3)(A). DHS rules incorporate the Act’s “reasonably describes” requirement. *See* 6 C.F.R. § 5.3(b) (“Requesters must describe the records sought in sufficient detail to enable DHS personnel to locate them with a reasonable amount of effort.”). The Court thus need not analyze whether ACLJ’s request violates DHS regulations. If the request violates FOIA’s “reasonably describes” requirement, it also violates those regulations. *See Freedom Watch, Inc. v. Dep’t of State*, 925 F. Supp. 2d 55, 60 n.1 (D.D.C. 2013).

FOIA requests as drafted,” *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984), and “[b]road, sweeping requests lacking specificity are not sufficient.” *Dale v. IRS*, 238 F. Supp. 2d 99, 104 (D.D.C. 2002).

### III.

#### A.

Congress enacted FOIA in 1966 to “assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.” *Dep’t of Air Force v. Rose*, 425 U.S. 352, 362–65 (1976). FOIA has ably served the public interest, checking government corruption and “hold[ing] the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). But those benefits are not costless, especially as agency records have multiplied in recent decades with the ubiquity of computers.

To see why, some background is necessary. FOIA allows members of the public to request “agency records” and to go to court for responsive records if the agency withholds them. 5 U.S.C. § 552(a)(4)(B); see *Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980). As one might guess, requestable agency communications for much of FOIA’s fifty years were in paper form. See, e.g., *Kissinger*, 445 U.S. at 140 (analyzing whether paper transcripts qualified as “agency records”).

That began to change in the mid-1980s when some agencies started using email. See, e.g., *Armstrong v. Exec. Off. of the President*, 1 F.3d 1274, 1279 (D.C. Cir. 1993). With email came an explosion of agency records. Discussions among agency employees now occurred in a medium that generated records which could be located and searched, rather than during phone calls or unrecorded meetings. Since then, email has only expanded in use, dramatically boosting the amount of potential records to which a FOIA requester might be entitled and, by extension,

the amount of agency time needed to find all responsive records. *See* Melanie Ann Pustay, *Memorandums to Messages: The Evolution of FOIA in the Age of the Internet*, 126 Yale L.J. F. 252 (2016) (“The proliferation of records can make locating and processing responsive material incredibly time-consuming.”). To make matters tougher for agencies, they must respond to any request within at most 30 days. 5 U.S.C. § 552(a)(6)(A)(i), (a)(6)(B)(iii). Surprising no one, agencies often miss that deadline. According to the Justice Department, agencies in Fiscal Year 2020 spent on average 30.23 days to respond to “simple” requests.<sup>6</sup> And over half of “complex” requests—which are requests that seek records from multiple locations—required more than 40 days for the agency to process.<sup>7</sup>

In that sense, FOIA has not evolved with the realities and technologies of government operations. Thanks to email, today’s agencies must search through more records than ever to find responsive ones. And they must respond to a deadline enacted 25 years ago, well before email’s proliferation in the American workplace. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 8(b), 110 Stat. 3048, 3052 (1996).<sup>8</sup> Failure to meet that deadline brings courts into the fray. *See Citizens for Resp. and Ethics in Wash. v. FEC*, 711 F.3d 180, 185 (D.C. Cir. 2013) (“If the agency does not make a determination within the relevant statutory time period, the requester may file suit without exhausting administrative appeal remedies.”).

As outstanding requests pile up at agencies, so do FOIA cases on court dockets. Judges in this district currently have 991 active FOIA cases, which represent almost a quarter of the

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<sup>6</sup> *See* Dep’t of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2020* at 12, located at <https://www.justice.gov/oip/page/file/1393381/download>.

<sup>7</sup> *See id.* at 13.

<sup>8</sup> Admittedly, most agencies probably used email in 1996, but not to the same extent as today.



district's entire civil docket.<sup>9</sup> And many of those take years to resolve. *See, e.g., Reps. Comm. for Freedom of the Press v. FBI*, 3 F.4th 350, 359 (D.C. Cir. 2021) (resolving a FOIA dispute seven years after the plaintiff had originally filed its FOIA request); *McGehee v. U.S. Dep't of Just.*, 362 F. Supp. 3d 14, 16 (D.D.C. 2019) ("In 1998, the Indianapolis Colts drafted Peyton Manning, Britney Spears released her hit single "Baby One More Time," and Fielding McGehee submitted a [FOIA] request to the FBI. While the heydays of Mr. Manning and Ms. Spears have come and gone, Mr. McGehee's FOIA request lingers.").

Nonprofit FOIA plaintiffs create much of that backlog. FOIA generously allows requests and suits by "any person," meaning anyone opposed to an agency's mission or policies can use FOIA requests to "dig up dirt on the policy and the people behind it." David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1127 (2017). Nonprofit organizations dedicated to certain causes or policies often march in the vanguard of such objectors and thus "employ similar tactics, backed up by a continuous succession of FOIA lawsuits." *Id.*

And nonprofits are doing so at an increasing rate. According to Syracuse University's FOIA Project, nonprofits accounted for 56% of all FOIA lawsuits filed nationwide in 2018, compared to just 14.2% in 2001.<sup>10</sup> And of those nonprofit plaintiffs, many are repeat litigants. From 2001–2018, plaintiffs with one FOIA lawsuit accounted for only 15% of all FOIA suits by nonprofits. The other 85% can be explained by nonprofit requesters who bring more than one

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<sup>9</sup> Statistics based on district-wide case filing system as of November 9, 2021.

<sup>10</sup> For the statistics that appear in this paragraph, see *FOIA Suits Filed by Nonprofit/Advocacy Groups Have Doubled Under Trump*, The FOIA Project (Oct. 18, 2018), <http://foiaproject.org/2018/10/18/nonprofit-advocacy-groups-foia-suits-double-under-trump/>.

FOIA lawsuit. The implication is clear: as more nonprofits file FOIA suits, some nonprofits file a disproportionate number of them.

The civil docket in this district features some of these frequent flyers. For example, ACLJ has 12 pending FOIA cases before judges here. As of this writing, American Oversight has 74 active FOIA cases, Judicial Watch has 63, Citizens for Responsibility and Ethics in Washington has 27, the Center for Biological Diversity has 15, and the Democracy Forward Foundation has 14.<sup>11</sup>

To be sure, nonprofits have plenty of reason to file FOIA requests and to pursue those requests through litigation. Some might oppose the political party in charge of government and thus use FOIA requests to focus on policies that receive comparatively little attention elsewhere. More, nonprofits might view FOIA requests as necessary to the nonprofit's specific mission. No one could deny those motivations as reasons for a robust FOIA practice by nonprofits. But FOIA itself offers nonprofits additional inducements to sue.

*First*, the Act limits what an agency can charge noncommercial requesters to cover the costs of any search and response. *See* 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution . . . .”). Requesters can even waive payment of *any* fees if the request “is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii). Because nonprofit organizations by definition have no commercial interests, they will usually qualify for a fee waiver, lowering the barrier to filing a FOIA request in the first place. *See Jud. Watch, Inc. v.*

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<sup>11</sup> All statistics current as of November 9, 2021.

*Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.”) (cleaned up).

*Second*, FOIA requesters may receive attorney’s fees if they “substantially prevail[]” in the ensuing litigation. 5 U.S.C. § 552(a)(4)(E). As the D.C. Circuit has observed, that provision by design encourages requesters to seek judicial review of an agency’s response. *See Davy v. CIA*, 550 F.3d 1155, 1158 (D.C. Cir. 2008) (“A grudging application of this provision, which would dissuade those who have been denied information from invoking their right to judicial review, would be clearly contrary to congressional intent.”) (cleaned up).

Thanks to these two provisions, nonprofit requesters have little to lose when they file a FOIA lawsuit. And much to gain. Both provisions also encourage broadly worded requests. With no fees forcing a nonprofit to internalize the cost of its request, it would have little reason not to request a broader universe of documents. And the odds of an insufficient agency response—and by extension the odds of prevailing in later litigation—increase as the request expands in scope and the agency risks overlooking responsive documents.

The mismatched incentives are clear. Nonprofit litigants like ACLJ have everything to gain and little to lose from posing broad, complicated FOIA requests. Agencies, deprived of fees for their FOIA services, have little reason to prioritize FOIA requests over their other statutory duties. Combine that with the recent explosion of nonprofit FOIA requests, and the agency will fall further and further behind in processing requests. And when the nonprofit requester sues for an overdue response, the parties can endure years of litigation, with the agency ultimately footing the bill. This is the system Congress hath wrought. And which this Court must dutifully implement.

## B.

But even in the above-described environment, this case is an outlier. ACLJ requested “any and all records, communications, or briefings” on eight subjects. The phrase “any and all” is capacious, involving a huge number of potentially responsive documents. But requests for all documents are neither inherently unreasonable nor uncommon. *See Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982) (“the number of records appears to be irrelevant to the determination whether they have been reasonably described”). ACLJ seizes on this point and touts it to suggest the narrowness of its request. *See* Plaintiff’s Opposition to Motion to Dismiss (“Opp’n”) at 17, ECF No. 16 (“Indeed, the essence of Defendants’ Motion to Dismiss seems to be their dislike of the ‘any and all.’”). But the request includes other language, all of which broadens it beyond the bounds of reasonableness.

ACLJ sought documents “referencing or regarding in any way” eight topics. *See* Compl. Ex. 1 at 10–13. A request for documents that merely “reference” certain topics might not be unreasonable. In that scenario, responsive documents could probably be found with a simple keyword search across agency databases. But ACLJ’s request goes further. It also seeks documents that “regard[] in any way” the eight specified topics. That is a much broader request. *See Shapiro v. CIA*, 170 F. Supp. 3d 147, 155 (D.D.C. 2016) (“[T]here is a difference in kind between requests for documents that ‘mention’ or ‘reference’ a specified person or topic and those seeking records ‘pertaining to,’ ‘relating to,’ or ‘concerning’ the same.”).

Such expansive phrasing would sweep in any communication “even remotely related” to the eight categories being requested. Defs.’ MTD at 15. Consider some examples. An email between Border Patrol agents about a migrant who might have COVID-19 (but also might not) could qualify as a record pertaining to “the number of migrants with COVID.” Compl., Ex. 1 at

11. And one might think a briefing to Border Patrol agents on COVID-19 avoidance to “regard[] or referenc[e]” the number of migrants with COVID, given how many migrants the agents encounter every day. Or consider a message between USCIS and DHS about a sex offender who entered the country illegally. ACLJ would have a viable argument that, depending on when the letter was sent, it could “regard” in some way the cancellation of Operation Talon, which might have otherwise snagged that criminal. *Id.* at 12. Finally, as the Government points out, a record need not even discuss a detention at the border to still relate “in any way” to “the arrest or detention of any person at the U.S. Border who is on any government terror-related or no-fly watch list.” Defs.’ MTD at 16.

Those broad descriptions do not allow the agency “to determine precisely what records are being requested.” *Tax Analysts*, 117 F.3d 607, 610 (D.C. Cir. 1997) (quoting *Kowalczyk v. Dep’t of Just.*, 73 F.3d 386, 388 (D.C. Cir. 1997)). Indeed, they leave the unfortunate FOIA processor assigned to such a case in a hopeless muddle without clear guidance about what documents are being sought. Courts in this district have dismissed similarly worded requests on the same basis. *See, e.g., Cable News Network v. FBI*, 271 F. Supp. 3d 108, 112 (D.D.C. 2017) (dismissing as overbroad a request for records that “relate in any way to” certain subject areas); *Dale*, 238 F. Supp. 2d at 104 (finding request for documents “that refer or relate in any way to” subject matter did not reasonably describe records sought).

ACLJ responds with a circular statement that those cases “rejected FOIA requests that were inherently vague and overbroad because they were vague and overbroad.” Opp’n at 17. The Court disagrees—those cases involved requests for documents that relate “in any way” to certain topics. ACLJ offers no meaningful way to distinguish those requests from ACLJ’s identically worded one here.

The scope of ACLJ’s request also would require more than a “reasonable amount of effort” to find responsive documents. *See Truitt*, 897 F.2d at 545, n.36. ACLJ requested records that were “sent from, prepared by, sent to, received by, reviewed by, or in any way communicated to or by” the DHS Secretary and his “aides, staff, representative or agents, or acting predecessor, or any other CBP, ICE, or USCIS official.” Compl. Ex. 1 at 10. The population of the Secretary’s “representative or agents” encompasses each of the Department’s 240,000 employees.<sup>12</sup> They all carry out policy directives as pronounced by him. *See Representative*, Black’s Law Dictionary (11th ed. 2019) (“Someone who stands for or acts on behalf of another.”).

ACLJ counters that, because the request lists “aides” and “staff” before “representative or agents,” the request is therefore limited to an identifiable group of DHS employees: those closest to the Secretary. *See* Opp’n at 11. But the Court, like the agency, must read the request as drafted, not as ACLJ “might wish it was drafted,” *Miller*, 730 F.2d at 777, and the request specifically includes the Secretary’s “representative and agents.” If ACLJ had intended to include only the Secretary’s immediate staff, it should have said so from the start. And ACLJ’s decision to include groups beyond “aids” and “staff” strongly suggests it thought this subset of DHS employees was insufficient.

In any event, the request also applies to communications by “*any* other CBP, ICE, or USCIS official.” Compl. Ex. 1 at 10 (emphasis added). ACLJ does not try to cabin this language to particular employees at those agencies. Nor could it. Anyone employed at those agencies would qualify as an “official.” *See Official*, Black’s Law Dictionary (11th ed. 2019) (“Someone who holds or is invested with a public office.”). Every employee at these three

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<sup>12</sup> For the number of DHS employees, see Defs.’ MTD at 16.

sprawling agencies would therefore be implicated by ACLJ's request, including those that have nothing to do with the border.

For example, USCIS adjudicates visa petitions. An email about a visa petitioner who contracted COVID-19 would qualify as a record "referencing or regarding in any way . . . the number of migrants with COVID," even though the USCIS visa officer has no responsibility or involvement with the southern border. Compl. Ex. 1 at 11. ACLJ has thus failed to limit its search to anyone who "might have had something to do" with the issue that prompted the requests. *Freedom Watch*, 925 F. Supp. 2d at 61. That failure reinforces the unreasonably broad nature of ACLJ's request. *See AFGE v. Dep't of Com.*, 907 F.2d 203, 209 (D.C. Cir. 1990) (rejecting FOIA requests as overly broad when the burden of the search was "largely unnecessary to the [requester's] purpose").

Finally, ACLJ's request is not at all limited to certain records. The request instead defines "record" as "any information that qualifies under [FOIA] and includes, but is not limited to, the original or any full, complete, and unedited copy" of 19 types of written communication. Compl. Ex. 1 at 9. "Briefing" has a similarly capacious definition, "includ[ing], but [ ] not limited to, any in-person meeting, teleconference, electronic communication, or other means of gathering or communicating by which information was conveyed to more than one person." *Id.* at 10. Such descriptions are not uncommon in a FOIA request. Yet when paired with ACLJ's other language, they only further broaden ACLJ's request.

To be sure, ACLJ limited its request in one regard. It sought records from only November 4, 2020 to May 18, 2021. *See* Compl. Ex. 1 at 10. Although that temporal limitation is important, it does not change ACLJ's use of broad language to identify the records sought nor the applicability of that language to all DHS employees. Consider: a request for a week's worth

of all records about President Biden would be significantly vaguer and broader than a similarly worded request for a month's worth of records about his public statements on the Supreme Court. A shorter timeframe does not necessarily cure an overly broad description of the records. And the description is what matters. *See* 5 U.S.C. § 552(a)(3)(A) (agency must respond to a FOIA request that "reasonably describes" the requested records); *see also Machado Amadis v. Dep't of State*, 971 F.3d 364, 370 (D.C. Cir. 2020) ("Agencies must read FOIA requests as drafted."). ACLJ's descriptions here are too broad to describe, much less "reasonably," the records requested. *Id.*

The Court thus agrees with the Government that any search responsive to the plain language of ACLJ's request would require, at a minimum, a review of communications by "any and all employees" at three agencies (ICE, CBP, and USCIS) that might be "remotely related" to ACLJ's eight categories, "without any limitation on the method or form of communication." Defs.' MTD at 15. And recall that all DHS employees would likely need to be included. That type of search would be "unduly burdensome," *see Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978), and would be a "massive undertaking," *see Nat'l Sec. Cnslrs. v. CIA*, 969 F.3d 406, 410 (D.C. Cir. 2020). The agency need not respond to such a request. *See AFGE*, 907 F.2d at 208–09; *Krohn v. DOJ*, 628 F.2d 195, 198 (D.C. Cir. 1980) (holding as overly broad a FOIA request that would have required review of "each and every . . . criminal case in order to determine whether it contains any evidence of the data" requested) (cleaned up).

ACLJ responds by comparing its request to one at issue in a previous case. *See* Opp'n at 9–10. In *Freedom Watch v. Department of State*, 925 F. Supp. 2d 55 (D.D.C. 2013), the court held that the plaintiff's requests for "all records that refer or relate" to 63 categories of records did not reasonably describe the records being sought. *Id.* at 56, 61–62. The plaintiff there



requested all records relating or referring to “any and all communications to or from President Obama, his administration, or the White House in general” about China. *Id.* at 61. ACLJ argues that because its request is less broad than those in *Freedom Watch*, the Court should reach an opposite result. *See Opp’n* at 10.

Not so. Decisions from a district court do not create a floor for what a FOIA request must do to pass muster. To say that ACLJ’s request is narrower than in another case does not answer whether ACLJ’s request here meets FOIA’s requirements.

In any event, ACLJ overlooks obvious similarities between its request and those in *Freedom Watch*. Both requests sweep in employees who do not deal with the particular issue named in the request. *See id.* at 61 (“Aside from the clarity of ‘President Obama,’ the request did not in any limit the scope of ‘his administration’ or ‘the White House in general’ to those persons, for instance, who might have had something to do with China . . .”). And the plaintiff in *Freedom Watch* requested all records that “refer[red] or relate[d]” to a particular category—language much like ACLJ’s request, which adds the expansive phrase “in any way” to its descriptions of the requested records. *See id.* at 57. To be sure, the requests in *Freedom Watch* dealt with 63 categories of records, not eight. But the near-identical language in the requests makes the two cases much closer than ACLJ believes.

ACLJ also argues that the Government cannot move to dismiss a FOIA request without first coordinating with the plaintiff to narrow the request. *See Opp’n* at 9, 11–12, 17. ACLJ’s brief cites no authority for that proposition, relying instead on the author’s “years of practicing.” *Id.* at 12. With respect, counsel’s experience does not matter. A request by the Government to narrow the scope of a FOIA request might be “permissible.” *Id.* at 8 (quoting *Rugiero v. DOJ*, 257 F.3d 534, 538 (6th Cir. 2001)). It might even be preferable. But nothing in FOIA requires

such an action. That agencies have negotiated the scope of past requests does not graft a new requirement onto FOIA's express terms.<sup>13</sup> ACLJ cites no authority to the contrary, nor is the Court aware of any.

In sum, ACLJ has not "reasonably described" the requested records. ACLJ could have done so—for example, it could have limited the request to members of the Secretary's office or to documents referencing fewer subjects. But ACLJ is the master of its request and instead chose to include broad language encompassing many other employees and documents. The Court must read that request as drafted. *See Amadis*, 971 F.3d at 370.


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FOIA provides an important check against the abuses of government. Nonprofits have wielded FOIA in that laudable spirit, often to positive effect for all concerned about how government operates. But FOIA also encourages the same nonprofits requesters to push further. And many have, some persistently. Those incentives breed requests like this one—imposing crushing burdens on limited agency resources with no clear scope or result. FOIA envisions that applicants will reasonably describe the records they seek, and agencies are entitled to demand it.

#### IV.

For these reasons, Defendants' Motion to Dismiss will be granted. ACLJ's Complaint will be dismissed without prejudice. A separate Order will issue.

Dated: November 10, 2021


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 TREVOR N. McFADDEN, U.S.D.J.

<sup>13</sup> ACLJ also fails to mention DHS's accommodating response to the request. Although DHS did not negotiate to narrow, it did invite ACLJ to "resubmit [the] request containing a reasonable description of the records." Defs.' Reply, Ex. 1 at 3.