

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

NO. SJ-2014-0005

KEVIN BRIDGEMAN,
and others

v.

DISTRICT ATTORNEY FOR THE SUFFOLK DISTRICT,
and others

Affidavit of Adriana Lafaille

I, Adriana Lafaille, state as follows:

1. I am a staff attorney with the American Civil Liberties Union Foundation of Massachusetts (ACLU).

2. I submit this affidavit to provide documents that, in light of the recent submissions by the respondent District Attorneys, might bear on the Court's consideration of this case.

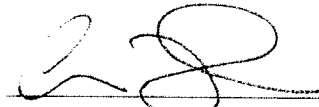
3. Attached as Exhibit 1 is an example of an individualized notice letter that the U.S. Attorney's Office in Boston sent to an attorney in the Office of the Federal Public Defender in September 2012.

4. Attached as Exhibit 2 is a December 2012 Freedom of Information Act request on behalf of the Committee for Public Counsel Services to U.S. Immigration and Customs Enforcement (ICE), seeking the names and other information about individuals who had been removed or were facing removal proceedings

because of a Massachusetts drug conviction.

5. Attached as Exhibit 3 is ICE's January 2013 response to this public records request.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS
15th DAY OF AUGUST, 2016.

A handwritten signature in black ink, appearing to read 'Adriana', is written over a horizontal line.

Adriana Lafaille
BBO # 680210
Staff Attorney
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS
211 Congress Street
Boston, MA 02110
(617) 482-3170

EXHIBIT 1



U.S. Department of Justice
Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception; (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

September 19, 2012

██████████
Office of the Federal Defender
51 Sleeper Street
Boston, MA 02210

Re: United States v. ██████████
Criminal No. ██████████

Dear ██████████:

We have notified you that Annie Dookhan's name appears on Drug Certification(s) issued in the above-captioned matter. As you know, Ms. Dookhan has been the subject of an ongoing investigation being conducted by Massachusetts Attorney General's Office into alleged malfeasance while Ms. Dookhan was employed at the State Drug Laboratory in Jamaica Plain ("the State Lab").

We have obtained from the Attorney General a group of investigatory reports regarding interviews of Ms. Dookhan and others in connection with this ongoing investigation (hereinafter, "the Investigatory Reports") all as listed on attached Exhibit A. We are willing to provide you with the Investigatory Reports to assist you in evaluating any impact recent revelations about the State Lab may have on the above-captioned matter. However, because of the ongoing nature of the Attorney General's investigation and personal information contained in the Investigatory Reports, we will do so only upon your execution of this protective order agreement.

1. Except as provided in paragraphs 2-5, below, you shall not give, provide, duplicate or otherwise distribute the Investigatory Reports or any information they contain to any other person.

2. Notwithstanding the provisions of paragraph 1, you may provide the Investigatory Reports to persons employed by you who

are directly involved in assisting you in the defense of the above-captioned case provided that they review this letter and indicate in writing that they agree to be bound by it.

3. Notwithstanding the provisions of paragraph 1, you may discuss the substance of the Investigatory Reports with the defendant but under no circumstances shall provide the defendant or any other person except those individuals described in paragraph 2, above with copies of the Investigatory Reports.

4. In the event that you believe it necessary to provide the Investigatory Reports or any information they contain that is not generally available from published reports in the media to the Court in connection with future motions filed by you in the above-captioned matter, you shall do so only after seeking leave of court to file the pleadings under seal. Moreover, if one or more of the Investigative reports are attached to any pleading, those reports shall also be filed only after seeking leave to file them under seal.

5. Notwithstanding the provisions of paragraph 1, if your client is currently incarcerated outside Massachusetts or Rhode Island, you may discuss in writing or orally the substance of the Investigatory Reports with the defendant, without disclosing personal information regarding the chemist but under no circumstances shall provide the defendant or any other person except those individuals described in paragraph 2, above with copies of the Investigatory Reports.

6. Upon execution of this agreement, the parties shall file this agreement in the applicable matter, and shall assent to the entry of the terms of this agreement as a protective order.

Please indicate your acceptance of the terms and conditions of this letter by signing below and returning it to me.

Very truly yours,

CARMEN M. ORTIZ
United States Attorney

By: _____

Assistant U.S. Attorney

AGREED TO:

Attorney for _____

EXHIBIT 2



Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

617 832 1000 *main*
617 832 7000 *fax*

Neil Austin
617 832 3051 *direct*
naustin@foleyhoag.com

December 21, 2012

URGENT FOIA REQUEST

Via FedEx

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

Re: FOIA Request - Expedited Processing and Fee Waiver Requested

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 and related Department of Homeland Security regulations, 6 C.F.R. § 5.1, *et seq.*, we write on behalf of our clients the Political Asylum/Immigration Representation Project ("PAIR") and Committee for Public Counsel Services ("CPCS") to request the following records:

1. Documents sufficient to provide the name, alien registration number, date of birth, last known address, and last known telephone number for all individuals in each of the following categories:
 - A. All individuals who were served with a Notice to Appear ("NTA"), at any time, where: (i) a ground for removability was related to a controlled substance conviction from Massachusetts, pursuant to Massachusetts General Laws chapter 94C ("M.G.L. ch. 94C"), and (ii) the Massachusetts prosecution was initiated between 2003 and 2012;
 - B. All individuals who were served with an NTA at any time, where: (i) the NTA does not include a controlled substance ground of removability, and (ii) at the time of removal proceedings, the individual had a Massachusetts controlled substance conviction, pursuant to M.G.L. ch. 94C, based on a prosecution initiated between 2003 and 2012;

- C. All individuals who were served with an NTA at any time, where: (i) a ground of removability was that there was reason to believe that the individual was a drug trafficker, (ii) the "reason to believe" ground of removability was based on that individual having been prosecuted for a controlled substance offense in Massachusetts pursuant to M.G.L. ch. 94C, and (iii) the prosecution for the controlled substance offense was initiated between 2003 and 2012 and did not result in a conviction; and
- D. All individuals who have been found ineligible for relief from removal because the Immigration Judge found that there was reason to believe that the individual was a drug trafficker and for whom both of the following statements are true: (i) the individual was not charged on his or her NTA as being removable on account of any drug trafficking offense, and (ii) the "reason to believe" finding was based on the fact that the individual had been prosecuted for a controlled substance offense in Massachusetts pursuant to M.G.L. ch. 94C, where the prosecution was initiated between 2003 and 2012 and no conviction resulted.

If it would help expedite the processing of this request, we would be willing to accept, in lieu of the requested documents, lists containing the name, alien registration number, date of birth, last known address, and last known telephone number for all individuals in each of the above-described categories.

- 2. All documents concerning Department of Homeland Security ("DHS") or Immigration and Customs Enforcement ("ICE") policies or practices regarding aliens impacted in any way by the actions from 2003-2012 of any employees at the Massachusetts Department of Public Health Hinton crime lab in Jamaica Plain, MA ("DPH crime lab"), including any such actions of former Hinton lab chemist Annie Dookhan.

This request is not being made for commercial, educational, non-commercial scientific or news media related purposes. Rather, this request is being made so that: (1) PAIR will have the information needed to locate and contact the affected individuals for the purpose of informing them of the law governing reopening removal proceedings, providing them referrals to legal services to assist with reopening removal proceedings, and, as organizational resources permit, arranging *pro bono* representation in immigration court for those who meet indigence and other eligibility criteria and (2) CPCS, the Massachusetts public defenders agency, will be able to identify individuals who qualify for court-appointed counsel to represent them in criminal court on post-conviction motions to vacate convictions and/or motions for new trials in cases where the prosecutions were based on tainted evidence and the convictions were obtained in violation of due process rights. PAIR and CPCS intend to provide legal information, referrals and representation to affected individuals for the purposes of challenging unconstitutionally-obtained convictions and seeking reopening of

removal proceedings where the removal order was based on controlled substance prosecutions pursued and/or convictions obtained through the use of falsified evidence.

In this context, disclosure of the requested information is clearly warranted. This is not a situation where disclosure of individuals' identifying information could cause them harm. On the contrary, disclosure is in the interests of those individuals so that they can have the requestors' help in alleviating the harm already caused them by government impropriety and in preventing ICE from causing further harm by removing them from the United States. Under the circumstances, it is the refusal to disclose that would be truly harmful.

Request for Expedited Processing

We seek expedited processing of this request because it involves circumstances that are reasonably expected to pose an imminent threat to the life or physical safety of the individuals about whom information is requested, and because those individuals will suffer the loss of substantial due process rights if this request is not processed on an expedited basis.

This request is necessary because of the actions of DPH crime lab chemist Annie Dookhan, who has been accused of faking or forging results on thousands of drug screening tests used in the prosecution and conviction of drug-related crimes. Ms. Dookhan worked at the DPH crime lab for nine years and handled at least 50,000 samples used in at least 34,000 cases. Moreover, evidence continues to mount which suggests that, due to lax supervision and failure to follow proper procedures to ensure accuracy and reliability, all drug samples tested at the DPH crime lab from 2003-2012 were potentially tainted and all test results from the lab during that period of time are unreliable. The DPH crime lab tested approximately 180,000-200,000 drug samples during that period of time which are all subject to scrutiny based on recently-discovered improprieties. Defendants who were prosecuted, convicted, or pled guilty in any cases involving drug samples tested at the DPH crime lab have substantial due process grounds on which to challenge their prosecutions and/or convictions. In turn, any defendants who had removal proceedings brought against them, have been detained, or have been denied relief from removal on the basis of such prosecutions and/or convictions also have due process grounds to challenge their removal orders and/or detention. If any defendant is removed as a result of such a prosecution or conviction, such removal will constitute an additional violation of substantial due process rights.

For more than three months, the Commonwealth of Massachusetts has been working to resolve the many legal entanglements resulting from Ms. Dookhan's conduct and the failings of the DPH crime lab. These efforts include the appointment of an independent investigator, designation of special criminal court sessions to conduct hearings regarding incarcerated defendants, and the appointment of several special magistrates. Nevertheless, the Commonwealth still has not been able to comprehensively identify all individuals affected, and even if it had, it would not be in a position to identify those individuals who face removal from the United States as a result of tainted drug prosecutions or convictions.

It is beyond dispute that the affected defendants are entitled to have their convictions overturned and removal orders vacated. However, if a defendant is removed before having an opportunity to contest the removal order, then that individual's ability to seek restoration of lawful immigration status will be crippled. Further, defendants who are removed could face threats to life and safety due to persecution in the countries of removal. ICE has been on notice of this situation for several months. Its insistence on proceeding with removals under these extraordinary circumstances constitutes an additional violation of substantial due process rights.

These violations of due process rights and threats to life and safety will only worsen if this request is not processed expeditiously. Every day, another detainee in ICE custody could be unjustly removed due to tainted prosecutions and/or convictions. It is imperative that we receive the requested information as soon as possible so that we may provide needed legal information, referrals, and *pro bono* legal representation to affected individuals before they are removed. Without such assistance, these individuals will not have a chance to challenge their removal orders and underlying convictions before it is too late. But we cannot offer them representation and other assistance without first knowing who they are. Therefore, this request requires urgent attention.

Undersigned counsel hereby certifies that the reasons given for this request for expedited processing are true and correct to the best of his knowledge and belief.

Request for Waiver of Fees

We request a waiver of fees because disclosure of the requested information is in the public interest, as it is likely to contribute significantly to public understanding of the operations or activities of the government, and because it is not in the commercial interests of the requestors.

The subject of this request concerns the operations and activities of the federal government pertaining to removal of aliens based on tainted state law prosecutions or convictions in Massachusetts and in violation of those aliens' civil rights. As discussed above, the purpose of this request is to contact affected individuals, inform them of their legal rights, and, as organizational resources permit, arrange *pro bono* representation. The public has a significant interest in efforts to alleviate the harm caused by the conduct of Annie Dookhan and others at the DPH crime lab. The public also has an interest in preventing the government from exacerbating that harm by removing people who were prosecuted unjustly. Fulfillment of this request will allow the requestors to focus their efforts on those who are eligible for relief from removal. It will thereby spare the requestors from having to waste finite taxpayer and *pro bono* resources in a broader-based, less-focused search for qualified individuals.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Austin", with a stylized flourish at the end.

Neil Austin

NA:ct

EXHIBIT 3



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

January 7, 2013

Mr. Neil Austin
Foley Hoag LLP
Seaport West
155 Seaport Blvd.
Boston, MA 02210-2600

RE: ICE FOIA Case Number 2013FOIA08126

Dear Mr. Austin:

This letter acknowledges the receipt of, and is in response to, your Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated December 21, 2012. You have requested "documents sufficient to provide the name, alien registration number, date of birth, last known address, and last known telephone number for all individuals" in four specific categories. A copy of your FOIA request is enclosed.

The information you have requested about these individuals (name, alien registration number, date of birth, last known address, and last known telephone number) is specifically exempt from public disclosure pursuant to Exemptions 6 and 7(C) of the FOIA. Absent the explicit consent of these individuals, ICE cannot release the information you have requested pursuant to the Freedom of Information Act.

FOIA Exemption 6 exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right to privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

FOIA Exemption 7(C) protects records or information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy. This exemption takes particular note of the strong interests of individuals, whether they are suspects, witnesses, or investigators, in not being unwarrantably associated with alleged criminal activity. That interest extends to persons who are not only the subjects of the investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation. Based upon the traditional recognition of strong privacy interest in law enforcement records, categorical withholding of information that identifies third parties in law enforcement records is ordinarily appropriate. As such, I have determined that the privacy interest in the identities of individuals in the records you have requested clearly outweigh any minimal public

interest in disclosure of the information. Please note that any private interest you may have in that information does not factor into this determination.

You have the right to appeal ICE's determination. Should you wish to do so, send your appeal and a copy of this letter to: U.S. Immigration Customs Enforcement, Office of Principal Legal Advisor, U.S. Department of Homeland Security, Freedom of Information Office, 500 12th Street, S.W., Stop 5009 Washington, D.C. 20536-5009, following the procedures outlined in the DHS regulations at 6 C.F.R. § 5.9. Your appeal must be received within 60 days of the date of this letter. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Provisions of the FOIA allow us to recover part of the cost of complying with your request. In this instance, because the cost is below the \$14 minimum, there is no charge.¹

If you need to contact our office about this matter, please refer to FOIA case number **2013FOIA08126**. This office can be reached at (866) 633-1182.

Sincerely,



Catrina M. Pavlik-Keenan
FOIA Officer

Enclosure(s): Your December 21, 2012 FOIA Request

¹ 6 CFR § 5.11(d)(4).