

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

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

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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

## **JURISDICTION AND VENUE**

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

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

## **PARTIES**

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

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

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

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

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

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

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

### **FACTUAL ALLEGATIONS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **Army Response**

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

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

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

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

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

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

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

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

*Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

## **COUNT I**

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

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

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

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

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

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

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

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

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

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

## **COUNT II**

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

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

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

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

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

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

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

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

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

### **COUNT III**

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

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

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

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

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

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

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

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

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

### **COUNT IV**

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

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

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

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

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

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

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

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

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

## **COUNT V**

### **(against EOIR)**

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

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

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

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

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

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

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

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

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

### **RELIEF REQUESTED**

WHEREFORE, NIJC prays that this Court:

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

Dated: June 18, 2012

Respectfully submitted,

By: /s/ Samuel Fifer

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