

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



U.S. Immigration
and Customs
Enforcement

July 29, 2020

Ashley Gorski
American Civil Liberties Union
125 Broad Street
18th Floor
New York, NY 10004

**RE: ACLU v. DHS et al.; 1:20-cv-02213
ICE FOIA Case Number 2020-ICLI-00031
Second Interim Release**

Dear Ms. Gorsky,

This is the second interim response to your client's Freedom of Information Act (FOIA) request to U.S. Immigration and Customs Enforcement (ICE), dated March 3, 2020. Your client is seeking the following:

- all policies, procedures, guidelines, formal or informal guidance, advisories, directives, and memoranda concerning the acquisition, processing, retention, or dissemination of data collected or generated through CBP's biometric services and infrastructure, including biometric templates.

ICE has considered your request under the FOIA, 5 U.S.C. § 552.

A search of the ICE Office of Information Governance and Privacy (IGP), Homeland Security Investigations (HSI) and the Office of Policy located records that were potentially responsive to the request. For this production, ICE reviewed 312 pages of potentially responsive records. ICE has determined that 202 pages of records are non-responsive and 23 pages are duplicative in nature. Additionally, 16 pages require consultation with CBP and 5 pages require consultation with the DHS Privacy Office. Lastly, 24 and 40 pages will be referred to CBP and the DHS Privacy Office, respectively for direct response to you. The remaining responsive pages of records have been marked 2020-ICLI-00031 71 through 2020-ICLI-00031 72. Upon review ICE has determined that portions of these 2 pages be withheld pursuant to Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E) of the FOIA, 5 U.S.C. § 552 as described below.

ICE has applied Exemption 5 to protect from disclosure intra-agency documents that contain the recommendations, opinions, and conclusions of agency employees. The disclosure of these

communications would discourage the expression of candid opinions and inhibit the free and frank exchange of information and opinions among agency personnel on important agency decision-making by having a chilling effect on the agency's deliberative process.

FOIA Exemption 5 protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, ICE has determined that portions of the responsive documents qualify for protection under the deliberative process privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel. ICE has applied FOIA Exemptions 6 and 7(C) to protect from disclosure the names, e-mail addresses, and phone numbers of ICE and DHS employees contained within the documents, as well as the names, and other personally identifiable information of other individuals contained within the records.

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 employees, suspects, witnesses, or investigators, in not being unwarrantedly associated with alleged criminal activity. That interest extends to persons who are not only the subjects of an investigation, but those who may have their privacy invaded by having their identities and information about them revealed in connection with an investigation and potentially exposing them to threats and/or harassment. 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, ICE has 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.

The ICE FOIA Office applied FOIA Exemption (b)(7)(E) to protect from disclosure internal law enforcement sensitive investigative techniques. The release of this information would disclose investigative techniques and procedures that are not well known to the public and could be reasonably expected to risk circumvention of the law.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or

prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. ICE has determined that disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

If you have any questions about this letter, please contact Assistant U.S. Attorney, Jennifer Jude at Jennifer.jude@usdoj.gov or (212) 637-2663.

Sincerely,

A handwritten signature in cursive script that reads "Dexter E. Johnson/for".

Catrina Pavlik-Keenan
FOIA Officer

Enclosure: 2 pages

From: (b)(6); (b)(7)(C)
Sent: 28 Jan 2020 18:08:53 +0000
To: (b)(6); (b)(7)(C)
Subject: RE: HSI facial recognition issues.

Great thanks for working on this. We have made multiple requests to CBP this week alone for trafficking victims. I'm sure they would rather work on their own stuff. If you guys get to a point where you need me to speak to everyone as to the operational need just let me know. My experience in working at HQ is to many people assume they are all on the same page and actually aren't. Even the same words have different meanings.

Let me know if you need anything from me,

Sent with BlackBerry Work
(www.blackberry.com)

From: (b)(6); (b)(7)(C)
Date: Tuesday, Jan 28, 2020, 12:31 PM
To: (b)(6); (b)(7)(C)
Subject: RE: HSI facial recognition issues.

Good afternoon (b)(6);

I followed up again with CBP on HSI access to the facial recognition capabilities in ATS. They say they are keeping access limited to select officers in CBP at this time. I heard we might have a call with OBIM this week. Hopefully we can figure out a way forward with them.

Best,

(b)(6); (b)(7)(C)

Mobile (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, January 17, 2020 12:55 PM
To: (b)(6); (b)(7)(C)
Subject: RE: HSI facial recognition issues.

This is great news. Thanks for staying on this. You were right privacy seemed more concern about facial collections as opposed to our ability to query our own images. I think they are more interested in reviewing what answer we come up with. I have a few outstanding emails with ICE LESIM people to see what has been tried (if anything) and why things failed.

Obviously I'll let you know if I hear anything.

Sent with BlackBerry Work
(www.blackberry.com)

From: (b)(6); (b)(7)(C)
Date: Friday, Jan 17, 2020, 12:17 PM
To: (b)(6); (b)(7)(C)
Subject: RE: HSI facial recognition issues.

Hi (b)(6);

I wanted to give you a quick update. I reached out to OBIM and CBP to see what was going on.

(b)(5)

(b)(5) I'm also working with OBIM to see when DHS Privacy will allow them to run facial recognition searches and what we might have to do before we can start submitting probe photos to IDENT directly. It might take a little time, but I'll keep on it.

Best,

(b)(6); (b)(7)(C)

Mobile (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, January 15, 2020 10:27 AM
To: (b)(6); (b)(7)(C)
Subject: RE: HSI facial recognition issues.

(b)(7)(E)