UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 11-1972 (JEB)**
	)	
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
	)	
Defendants	)	
	)	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, United States Department of Homeland Security, U.S. Customs and Border Protection ("CBP"), by and through undersigned counsel, respectfully move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment in favor of Defendants on the grounds that no genuine issue as to any material fact exists, and defendant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In support of this motion, the Court is respectfully referred to the accompanying Declaration of Ms. Shari Suzuki, with exhibits attached thereto, a Statement of Material Facts as to Which There Is No Genuine Issue, and the Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment. A proposed Order consistent with the relief sought herein is also attached.

Respectfully submitted,

RONALD C. MACHEN JR.
D.C. Bar # 447889
United States Attorney

RUDOLPH CONTRERAS
D.C. Bar # 434122
Chief, Civil Division

BY: /s/ Marian L. Borum
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Of Counsel:

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DEFENDANTS' STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Pursuant to Local Rule 7.1(h), Defendants hereby submit the following Statement of Material Facts as to Which There is No Genuine Dispute. The attached Declaration of Ms. Shari Suzuki, Freedom of Information Act ("FOIA") Appeals Officer, and Chief of the FOIA Appeals, Policy and Litigation Branch ("FAPL"), Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection ("CBP"), United States Department of Homeland Security supports this statement. See Attachment 1.

1. By letter dated March 14, 2011, Plaintiff, American Immigration Council ("AIC"), submitted a Freedom of Information Act request to CBP seeking:

> Any and all records which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:
>
> - Attorney's ability to be present during their clients' interactions with CBP;
>
> - What role attorneys may play during their clients' interactions with CBP;

- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

See Attachment 1 (Declaration of Shari Suzuki (Suzuki Decl.")) at ¶ 7; Exhibit A.

2. In response to AIC's initial FOIA request, CBP's FOIA Division collected and reviewed responsive records and concluded that "much of the information AIC requested was already publicly available." In its response dated May 12, 2011 under FOIA Division File No. 2011F08147, the FOIA Division stated that responsive information could be found in the Code of Federal Regulations, the Personal Search Handbook, and the Inspector's Field Manual ("IFM") Plaintiff also was informed that "once the IFM is approved for release," it will be available via the internet on the CBP Reading Library. Id. at ¶ 8. See Exhibit B.

3. By letter dated May 26, 2011 to CBP, Plaintiff appealed the FOIA Division's May 12, 2011 response. See Exhibit C. In its May 26, 2011 letter, AIC appealed the decision of the FOIA Division questioning the adequacy of CBP's search for responsive records, as well as CBP's denial of its request for fee waiver. See id. at ¶ 9 and Exhibit D.

4. On June 10, 2011, Ms. Suzuki acknowledged receipt of Plaintiff's appeal letter. See Exhibit E.

5. On June 23, 2011, a CBP attorney with FAPL confirmed, in a telephone call with Plaintiff, that the FOIA request seeking records regarding CBP policies, directives and guidance relating to the accessibility of counsel was limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry, not the policies, directives and guidance concerning the permissible roles of attorneys in the myriad trade matters within the purview of CBP. Id. at ¶ 11.

6. On September 29, 2011, CBP issued the final administrative appeal decision in FAPL Branch case number H170224, granting Plaintiff's request for a fee waiver, and providing Plaintiff with two pages of unredacted records as enclosures. See Exhibit F. In the letter, after citing the guiding statutes and implementing regulation (8 U.S.C. § 1357, 8 U.S.C. § 287.3(c) and 8 C.F.R. § 292.5) which state unequivocally that generally[1] "applicants for admission" into the United States have no right to counsel, CBP noted that:

> Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject – it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.

Notwithstanding, CBP released two pages of responsive information. See Exhibit G. The records released to AIC included:

1) the Inspector's Field Manual (IFM) Chapter 2.9 "Dealing with Attorneys and Other Representatives";

2) IFM Chapter 17.1.g "Attorney Representation at Deferred Inspection";

3) IFM Chapter 17.9.11.2 "Notification for Detainees in Baggage Control Secondary";

4) a section captioned "Solicitation of Services" from The Officers' Handbook, M68; and Warnings Required Following Administrative Arrest" from the Search and Seizure

[1] Exceptions are made for instances in which the applicant has become the focus of a criminal investigation or is detained.

Manual, M69. Id. at ¶ 11.

7. Defendant filed the instant complaint on November 8, 2011. See Docket Entry No. 1.

Respectfully submitted,

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United States Attorney

RUDOLPH CONTRERAS
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Chief, Civil Division

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This action was commenced by Plaintiff, American Immigration Council, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking disclosures of records regarding "individual's access to counsel during their interactions with CBP." Complaint ("Compl") at p. 1. Plaintiff's sole claim is that Defendant, United States Customs and Border Protection ("CBP"), has failed to conduct a reasonable search for, and to produce, records responsive to its request. Id. at 25. However, the accompanying Declaration of Shari Suzuki, Freedom of Information Act Appeals Officer, and Chief of the FOIA Appeals, Policy and Litigation Branch ("FAPL"), Regulations and Rulings, Office of International Trade ("TO"), U.S. Customs and Border Protection clearly establishes that the Defendant has fully complied with its obligation pursuant to FOIA, including conducting a reasonable and adequate search for documents responsive to plaintiff's request. See Attachment A, Declaration of Shari Suzuki ("Suzuki Dec."). This declaration also recounts the specific steps that CBP undertook to process AIC's request, including how CBP conducted a detailed search for records of all the CBP offices where

responsive records would likely be found. See id. at ¶¶ 14-22. The Declaration demonstrates unequivocally that CBP's search for records was reasonable and adequate, and that CBP made a good faith effort to locate records responsive to Plaintiff's request. All responsive records identified by CBP have been produced to the plaintiff without redactions. Accordingly, based on the declaration, and for the reasons set forth below, Defendants submit that they are entitled to summary judgment as a matter of law.

II. APPLICABLE LEGAL STANDARDS

A. Motions for Summary Judgment

Where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is required by Rule 56(a) of the Federal Rules of Civil Procedure. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986)(interpreting Rule 56(c), the prior version of Rule 56(a)); Gaujacq v. EDF, Inc., 601 F.3d 565, 575 (D.C. Cir. 2010). A genuine issue of material fact is one that would change the outcome of the litigation. Anderson, 477 U.S. at 248. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247-248 (emphasis in original).

The burden on the party moving for summary judgment "may be discharged by 'showing' -- that is, pointing out to the [Court] -- that there is an absence of evidence to support the non-moving party's case." Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the non-movant may not rest on mere allegations, but must "make a sufficient showing on an essential element of [his] case" to

establish a genuine dispute. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); Burke v. Gould, 286 F.3d 513, 517-20 (D.C. Cir. 2002) (requiring a showing of specific, material facts). "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U.S. at 252. Thus, to avoid summary judgment, the plaintiff must present some objective evidence that would enable the court to find he is entitled to relief. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See also Laningham v. Navy, 813 F.2d 1236, 1242 (D.C. Cir. 1987) (non-moving party is "required to provide evidence that would permit a reasonable jury to find" in its favor). In Celotex, the Supreme Court instructed that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

B. FOIA Actions and Summary Judgment

The summary judgment standards set forth above also apply to FOIA cases, which are typically decided on motions for summary judgment. See Harrison v. Exec. Office for U.S. Attorneys, 377 F. Supp. 2d 141, 145 (D.D.C. 2005)(FOIA cases are typically and appropriately decided on motions for summary judgment.). In a FOIA suit, an agency is entitled to summary judgment once it demonstrates that no material facts are in dispute and that each document that falls within the class requested either has been produced, not withheld, is unidentifiable, or is exempt from disclosure. Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001).

An agency satisfies the summary judgment requirements in a FOIA case by providing the Court and the plaintiff with affidavits or declarations and other evidence which show that the documents are exempt from disclosure. Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv , 608 F.2d 1381, 1386 (D.C. Cir. 1979), cert. denied, 446 U.S. 937 (1980). The district court is required to accord substantial weight to declarations submitted by an agency in support of the claimed exemptions, 5 U.S.C. § 552(a)(4)(B), and such declarations are presumed to be submitted in good faith. SafeCard Servs., Inc. v. Securities and Exchange Comm'n, 926 F.2d 1197, 1200 (D.C. Cir. 1991). If the affidavits or declarations are reasonably specific, rather than merely conclusory, and they are not called into doubt by contradictory evidence or evidence of agency bad faith, the court must grant summary judgment based upon them. See Gardels v. Cent. Intelligence Agency, 689 F.2d 1100, 1104-05 (D.C. Cir. 1982); Windels, Marx, Davies & Ives v. Dep't of Commerce, 576 F. Supp. 405, 409 (D.D.C. 1983).

III. ARGUMENT

A. The U.S. Customs and Border Protection Conducted a Search Reasonably Calculated to Recover Responsive Records.

In responding to a FOIA request, an agency is under a duty to conduct a reasonable search for responsive records. Oglesby v. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990). The established reasonableness standard by which FOIA searches are judged "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." Miller v. Dep't of State, 779 F.2d 1378, 1384-85 (8th Cir. 1986); accord Maynard v. Cent. Intelligence Agency, 986 F.2d 547, 559 (1st Cir. 1993)(the agency "must show that 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."); Oglesby, 920 F.2d at 68; Maynard, 986 F.2d at 559; SafeCard Servs., 926 F.2d at 2101. An agency demonstrates that it conducted a reasonable search by showing "that it made a good faith effort to conduct a FOIA search for requested records by using methods that can reasonably be expected to produce the information requested." W. Ctr. for Journalism v. Internal Revenue Serv., 116 F. Supp.2d 1, 9 (D.D.C. 2000), aff'd 22 Fed. Appx. 14 (D.C. Cir. 2001); Oglesby, 920 F.2d at 68. Conducting a "reasonable" search is a process that requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise" and is "hardly an area in which the courts should attempt to micro-manage the executive branch." Schrecker v. Dep't of Justice, 349 F.3d 657, 662 (D.C. Cir. 2003). Thus, "the issue in a FOIA case is not whether the agencies' searches uncovered responsive documents, but rather whether the searches were reasonable." Moore v. Aspin, 916 F. Supp. 32, 35 (D.D.C. 1996); see also Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986). Hence, the fundamental question is not "'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)). See Burnes v. Cent. Intelligence Agency, No. 05-242, U.S. Dist LEXIS 20114 at *2-7 (D.D.C. Sept. 14, 2005). (In FOIA cases, "the Court's inquiry regarding the adequacy of the search focuses on the search itself, not its results."). Accord Nation Magazine v. Customs Serv., 71 F.3d 885, 892 n.7 (D.C. Cir. 1995); Meeropol, 790 F.2d at 952-53.

In order to prove that its search was adequate, the agency is entitled to rely upon affidavits, provided that they are "relatively detailed, nonconclusory, and submitted in good faith." Pollack

v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); accord Weisberg v. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Such affidavits should show "that the search method was reasonably calculated to uncover all relevant documents," and should "explain how the search was conducted." Oglesby, 920 F.2d at 68; and see Maynard, 986 F.2d at 559. Significantly, the search need only be reasonable; it does not have to be exhaustive. Miller v. Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985). Merely because an agency is unable to find a particular document a requestor believes that it should have, does not render its search inadequate. Wilbur v. CIA, 355 F.3d 675, 678, (D.C. Cir. 2004); Nation Magazine, Washington Bureau v. U.S. Customs, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995).

In evaluating the adequacy of a search, courts accord agency declarations "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" SafeCard Servs., Inc., 926 F.2d at 1200. The statute does not require "meticulous documentation [of] the details of an epic search." Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982). Declarations that "explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate compliance with the obligations imposed by the FOIA." Id. See generally Davis v. Dep't of Justice, 460 F.3d 92, 103 (D.C. Cir. 2006) ("adequacy of an agency's search is measured by a standard of reasonableness, and is dependent upon the circumstances of the case. And we expressly cautioned that it would be inappropriate for the court to mandate a bright-line set of steps for an agency to take in this situation, because FOIA requires both systemic and case-specific exercises of discretion and administrative judgment and expertise") (internal citations and quotations omitted).

Once the Court determines that the declarations are sufficient, it need not inquire further. See Students Against Genocide v. Dep't of State, 257 F.3d 828, 833 (D.C. Cir. 2001). A court "may award summary judgment [in a FOIA case] solely on the basis of information provided by the department or agency affidavits or declarations. Burnes v. Cent. Intelligence Agency, No. 05-242 (GK), 2005 U.S. Dist LEXIS 20114 (D.D.C. Sept. 14, 2005). As explained in the Suzuki Declaration, CBP conducted a reasonable, diligent, and adequate search which utilized methods reasonably expected to locate records responsive to plaintiff's FOIA request.

B. Unredacted Copies of Responsive Records Were Provided to Plaintiff.

By letter dated March 14, 2011, Plaintiff submitted a FOIA request to CBP seeking:

> Any and all records which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:
>
> · Attorney's ability to be present during their clients' interactions with CBP;
> · What role attorneys may play during their clients' interactions with CBP;
> · Attorney conduct during interactions with CBP on behalf of their clients;
> · Attorney appearances at CBP offices or other facilities.

Suzuki Decl. at ¶ 7 By letter dated May 12, 2011, under FOIA Division File No. 2011F08147, the FOIA Division informed AIC that responsive information could be found in the Code of Federal Regulations, the Personal Search Handbook, and the Inspector's Field Manual ("IFM").[2] Id. ¶ 8 and Exhibit 8.

By letter dated May 26, 2011, AIC appealed CBP's initial response to its FOIA request,

[2]Plaintiff also was informed that "once the IFM is approved for release," it will be available via the internet on the CBP Reading Library. Id.

arguing that CBP had not conducted an adequate search for responsive records and that its request for fee waiver should have been granted. Id. at ¶ 9 and Exhibit C. On June 23, a CBP attorney conferred with plaintiff to clarify AIC's request for records. See id. at ¶ 11. In response to AIC's claim that CBP's initial search was inadequate, FAPL contacted several offices within CBP where responsive records would most likely be found, including the Office of Border Patrol ("OBP"), Office of Field Operations ("OFO"), and Office of Chief Counsel ("OCC"). Id. at ¶ 14. These offices were determined to be the offices where responsive records would have been created and maintained due to the offices' duties and functions. Id.

It was determined that OBP was likely to have responsive records "because of the nexus between the information requested . . . and OBP's mission and daily function to prevent, interdict and interview persons who attempt to make illegal entry into the United States . . . ." Suzuki Dec. at ¶ 15. It was determined that OFO as well as its program offices, Admissibility and Passenger Programs ("APP") and Enforcement Programs Division ("EPD") were likely to have responsive records "because of the nexus between the information requested . . . and OFO's mission and daily function to interdict and interview persons at ports of entry . . . ." Id. at ¶ 17. Finally, it was determined that OCC was likely to have responsive records because of its familiarity with the issues raised by [Plaintiff] and its function as legal representative to CBP in its border enforcement efforts . . . ." Id. at ¶ 21.

As a result of OBP's search, it located and "provided information from two of its manuals, 'the Officers' Handbook' and "the Law of Arrest; Search and Seizure Manual . . . ." Id. at ¶ 16. As a result of OFO's search, it located and provided portions of the Inspector's Field Manual. Id. at ¶ 18. OFO's program offices, APP and EDP, also identified portions of the Inspector's Field

Manual as responsive to Plaintiff's FOIA request. OCC reviewed the responsive documents that were located, "conducted a separate search and confirmed that no other responsive records exist[ed]." Id. at ¶ 21.

On September 29, 2011 CBP issued a final administrative appeal decision in response to Plaintiff's appeal, granting Plaintiff's request for a fee waiver, and providing unredacted copies of the responsive records identified during the searches. Id. at ¶ 12 and Exhibits F and G. The records released were:

(1) the Inspector's Field Manual (IFM) Chapter 2.9, "Dealing with Attorneys and Other Representatives";

(2) IFM Chapter 17.1g "Attorney Representation at Deferred Inspection";

(3) IFM Chapter 17.9.11.2 "Notification for Detainees in Baggage Control Secondary";

(4) a section captioned "Solicitation for Services" from The Officers' Handbook, M68; and

(5) from the Law of Arrest, a section captioned "b. Warning Required Following Administrative Arrest" from the Search and Seizure Manual, M69. Suzuki Decl. at ¶ 12. CBP has been unable to identify or locate any other records that would be responsive to Plaintiff's request.

In Plaintiff's Complaint, it is not alleging that CBP failed to respond to its FOIA request or that it improperly withheld responsive information, but rather that there must be some additional information out there which CBP has failed to turn over to the requester. Plaintiff's justification for questioning the adequacy of the search conducted by CBP is premised solely on the idea that there must be additional information "out there" which CBP is impermissibly withholding. However, the fundamental issue in assessing the adequacy of the government's search is not whether any responsive documents might exist, but rather, whether the government's search for

responsive materials was adequate. Perry, 684 F.2d at 128; see Steinberg, 23 F.3d at 551 ("the question is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those records was adequate.")

Ms. Suzuki's Declaration establishes that CBP's search method to locate records was reasonably calculated to uncover all information responsive to Plaintiff's request. CBP released unredacted copies of all responsive records located. Despite the searches and requests made to components within CBP, CBP has been unable to locate further responsive information to Plaintiff's request. This result is not at all surprising or suspicious because there is no reason to believe that any additional information exists.[3] Suzuki Decl. at ¶ 22. The fact that CBP may have been unsuccessful in locating particular documents AIC speculates CBP should have, does not render CBP's efforts to locate responsive documents inadequate. Wilbur, 355 F.3d at 678. Moreover, as our Circuit Court has noted, if the declaration is reasonably specific, rather than merely conclusory, and it is not called into doubt by contradictory evidence or evidence of agency bad faith, the court must grant summary judgment based upon them. See Gardels, 689 F.2d at 1104-05. Here, Plaintiff has not demonstrated, and cannot demonstrate, contradictory evidence or bad faith on the part of the Defendant. Therefore, Defendant's request for summary judgment should be granted.

[3]Even if additional information might exist, the Defendants' search was reasonably calculated to uncover all relevant documents, and its search was adequate. See Weisberg, 745 F.2d at 1485 ("'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'")

IV. CONCLUSION

As demonstrated in the Suzuki Declaration, CBP's search for documents responsive to AIC's FOIA request was both adequate and reasonable. In addition, CBP has provided an unredacted copy of all the responsive records that it found in its search. For the foregoing reasons, Defendant respectfully requests that its Motion for Summary Judgment be granted because there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a).

Respectfully submitted,

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United States Attorney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 26th day of January, 2012, the foregoing was served upon Plaintiff's counsel, via the Court's Electronic Filing System, as follows:

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/s/
MARIAN L. BORUM
Assistant United States Attorney

UNITED STATES DISTRICT COURT
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U.S. DEPARTMENT OF HOMELAND SECURITY, et al.,	)	
	)	
Defendants	)	
	)	

ORDER

Upon consideration of Defendants' Motion for Summary Judgment, Plaintiff's Opposition, and the entire record herein, it is this _____ day of _____, 2012,

ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED.

_____
United States District Judge

Copies to:

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AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

ATTACHMENT 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil Action No. 11-1972 (JEB)**
U.S. DEPARTMENT OF HOMELAND SECURITY, et al.	)	
	)	
Defendants	)	
	)	

DECLARATION OF SHARI SUZUKI

I, Shari Suzuki, declare as follows:

1. I am the Freedom of Information Act (FOIA) Appeals Officer, and Chief of the FOIA Appeals, Policy and Litigation (FAPL) Branch, Regulations and Rulings (RR), Office of International Trade (OT), U.S. Customs and Border Protection (CBP), U.S. Department of Homeland Security (DHS). The FAPL Branch is the office within DHS/CBP that is charged, at all times pertinent to this litigation, with the responsibility of managing and responding to administrative appeals of initial responses to information access requests made pursuant to the FOIA, 5 U.S.C. § 552. I submit this declaration in support of Defendant's Motion for Summary Judgment.

2. As the Chief of the FAPL Branch, I am responsible for the overall supervision and management of the FAPL Branch, and I serve as the official with the following duties and responsibilities, *inter alia*: 1) giving guidance and instructions to the personnel in CBP regarding the processing of FOIA requests; 2) adjudicating administrative appeals that concern FOIA requests; and, 3) overseeing all CBP activities related to information

disclosure. I have held this position since April 2, 2006.

3. U.S. Customs and Border Protection is the unified border agency within the Department of Homeland Security charged with the management, control and protection of our nation's borders at and between the official ports of entry. CBP is a law enforcement agency charged with keeping terrorists and terrorist weapons out of the country while enforcing hundreds of U.S. laws. CBP has enforcement responsibilities for over 400 Federal statutes on behalf of over 40 different federal agencies. CBP's mission is to protect the borders of the United States against terrorists and the instruments of terror, to enforce the customs and immigration laws of the United States, and to foster our Nation's economy by facilitating lawful international trade and travel. Our mission includes the inspection and processing of passengers, conveyances, and merchandise entering, transiting and departing the United States. The creation and implementation of effective law enforcement policies and procedures is paramount to achieving this mission. The programs, policies and procedures at issue in this case are directly related to CBP's law enforcement activities and are all used for border security and enforcement purposes.

4. I am familiar with the American Immigration Council's (hereinafter "AIC" or "Plaintiff") request and subsequent appeal for information from CBP pursuant to the FOIA. All information contained herein is based upon information furnished to me in my official capacities of FOIA Appeals Officer and FAPL Branch Chief. The statements I make in this declaration are based on my personal knowledge, which includes knowledge acquired through attorneys in my branch, and agency files that I personally reviewed in the course of my official duties.

5. The purpose of this Declaration is to describe CBP's handling of Plaintiff's FOIA request and subsequent appeal. Given that we disclosed unredacted copies of the responsive records that we identified on appeal, there is no need to provide a *Vaughn* Index identifying information responsive to Plaintiff's FOIA requests in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

6. This Declaration consists of: (i) a summary of the relevant facts and correspondence regarding Plaintiff's FOIA requests and (ii) a statement regarding the adequacy and reasonableness of the searches conducted for information responsive to the request.

I. SUMMARY OF RELEVANT FACTS AND CORRESPONDENCE CONCERNING PLAINTIFF'S FOIA REQUEST

7. Plaintiff made its initial FOIA Request to CBP by letter dated March 14, 2011, which requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

AIC elaborated via an itemized list in the initial request and its appeal that the above records may include, but are not limited to:

> 1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;
>
> 2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during

questioning in secondary inspection, or what role the attorney may play during such questioning;

3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;

4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;

5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;

6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS)[1], or what role the attorney may play during such questioning;

7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such

[1] With regard to AIC's request for NSEERS information (see item # 6 in immediately above), we noted in the response letter that effective April 28, 2011, DHS no longer registered aliens under NSEERS. See Federal Register Volume 76, Number 82 (Thursday, April 28, 2011) at *http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm.*

questioning;

8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP's intention to question their clients;

9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;

10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

See Exhibit A.

8. In response to AIC's initial FOIA request, CBP's FOIA Division collected and reviewed responsive records and concluded that "much of the information [AIC is] seeking is already publicly available." In its response dated May 12, 2011 under FOIA Division File No. 2011F08147, the FOIA Division stated that responsive information could be found online in the Code of Federal Regulations (CFR), the Personal Search Handbook, and the Inspector's Field Manual (IFM) (which, "once the IFM is approved for release," will be available via the internet on the CBP Reading Library). **See Exhibit B.**

9. Via letter dated May 26, 2011 to CBP, Plaintiff appealed the FOIA Division's May 12, 2011 response. **See Exhibit C.** Within the May 26, 2011 letter, AIC also noted

the appeal of the March 29, 2011 decision of the FOIA Division, **see Exhibit D**, which denied its request for a fee waiver. AIC appealed the decision of the FOIA Division which directed AIC to what the FOIA Division determined to be "public information" in response to AIC's original FOIA request. On appeal, AIC questioned the adequacy of the FOIA Division's search for responsive records and requested reconsideration of the denial of its request for fee waiver.

10. On June 10, 2011, I acknowledged my receipt of the appeal via letter to the Plaintiff. **See Exhibit E.**

11. On June 23, 2011, an attorney on my staff confirmed in a telephone call with AIC that its request for information regarding CBP policies, directives and guidance relating to the accessibility of counsel is limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry, not the policies, directives and guidance concerning the permissible roles of attorneys in the myriad trade matters within the purview of CBP.

12. On September 29, 2011, I issued the final administrative appeal decision in FAPL Branch case number H170224, which granted Plaintiff's request for a fee waiver and provided Plaintiff with two pages of unredacted records as enclosures. **See Exhibit F.** After citing the guiding statutes and implementing regulation (8 U.S.C. § 1357, 8 U.S.C. § 287.3(c) and 8 CFR § 292.5) which state unequivocally that generally[2] "applicants for admission" into the United States have no right to counsel, I noted that:

> Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance governing attorney

[2] Exceptions are made for instances in which the applicant has become the focus of a criminal investigation or is taken into custody. See the disclosed records attached hereto as an Appendix.

> representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject – it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.

Notwithstanding, I released two pages of responsive information (attached hereto as **Exhibit G**). The records released include:

1) the Inspector's Field Manual (IFM) Chapter 2.9 "Dealing with Attorneys and Other Representatives";

2) IFM Chapter 17.1.g "Attorney Representation at Deferred Inspection";

3) IFM Chapter 17.9.11.2 "Notification for Detainees in Baggage Control Secondary";

4) a section captioned "Solicitation of Services" from The Officers' Handbook, M68; and

5) from The Law of Arrest a section captioned "b. Warnings Required Following Administrative Arrest" from the Search and Seizure Manual, M69.

13. On November 29, 2011, I was notified that Plaintiff filed the instant disclosure lawsuit.

II. THE SEARCH FOR RESPONSIVE RECORDS WAS ADEQUATE AND REASONABLE

14. In response to AIC's appeal and contentions that the search conducted in response to the initial request was inadequate, an attorney on my staff contacted several offices within CBP in which responsive records could likely be found: the Office of Border Patrol (OBP), the Office of Field Operations (OFO), and the Office of Chief Counsel (OCC). The aforementioned offices were determined to be the offices in which

responsive records were likely to have been created and be maintained because of their duties and functions as described below. Thus, I directed my staff attorney to contact those offices and request that each of those offices search for records in response to the AIC appeal.

15. OBP is the organization within CBP responsible for preventing the entry of terrorists and terrorist weapons from entering the United States between official U.S. Customs and Border Protection ports of entry. OBP's traditional mission is to enforce immigration laws and to detect, interdict and apprehend those who attempt to illegally enter or smuggle people or contraband across U.S. borders between official ports of entry. This mission is accomplished by maintaining surveillance, following up leads, responding to electronic sensor alarms and aircraft sightings, and interpreting and following tracks. Some of the major activities include maintaining traffic checkpoints along highways leading from border areas, conducting city patrol and transportation check, and anti-smuggling investigations. It was because of the nexus between the information requested regarding immigrants' access to attorneys and OBP's mission and daily function to prevent, interdict and interview persons who attempt to make illegal entry into the United States that I forwarded a copy of the appeal to OBP and asked that that office search for responsive records.

16. OBP provided information from two of its manuals, "the Officers' Handbook" and "the Law of Arrest; Search and Seizure Manual" that are responsive to the Plaintiff's FOIA request and which I provided to the Plaintiff on appeal.

17. Whereas OBP's primary function is to police the areas *between* ports of entry, CBP's OFO is the largest component within CBP and that component is responsible for

securing the U.S. border and preventing terrorists and terrorist weapons from entering the United States *at* its ports of entry. OFO manages core CBP programs and operations at 20 Field Operations offices; 327 ports of entry; 15 preclearance stations in Canada, Ireland and the Caribbean; Immigration policy and programs; and Agricultural Quarantine Inspection (AQI) at all ports of entry in order to protect the health of U.S. plant and animal resources. OFO has primary operational responsibility for trade and passenger facilitation, interdiction and enforcement programs. It was because of the nexus between the information requested regarding immigrants' access to attorneys and OFO's mission and daily function to interdict and interview persons at ports of entry who would make requests for the assistance of counsel that I forwarded a copy of the appeal to OFO and asked that that office search for responsive records.

18. OFO identified and provided portions of the Inspector's Field Manual that are responsive to the Plaintiff's FOIA request and which I provided to the Plaintiff on appeal.

19. In addition to sending a request directly to the OFO headquarters office, we contacted the Admissibility and Passenger Programs (APP) Office within OFO. APP oversees, among other things, the integral programs[3] and policies that regulate the admission of international travelers into the United States. One of program offices within APP which searched for responsive records is the Enforcement Programs Division (EPD). The EPD provides operational oversight of seaport, airport and land border enforcement policy, including the oversight of policy and programs related to the screening of arriving international travelers, admissibility and implementation of

[3] The internal programs overseen by APP include the following Director-level program offices: the Admissibility Review Office, Alien Smuggling Interdiction, Electronic Systems Travel Authorization Program Management Office, Fraudulent Document Analysis Unit, the Land Border Integration Program Management Office, Passenger Programs, Traveler Entry Programs, Traveler Policy and Trusted Traveler Programs.

statutory and regulatory requirements. Additionally, the EPD provides processing and procedure Field guidance to the ports of entry as well as guidance to internal and external stakeholders on new policies and programs. It was because of the nexus between the information requested regarding immigrants' access to attorneys and EPD's mission and daily function to process arriving passengers and interview persons who would make requests for the assistance of counsel that I forwarded a copy of the appeal to OFO/APP/EPD and asked that that office search for responsive records.

20. APP and EPD identified portions of the Inspector's Field Manual that are responsive to the Plaintiff's FOIA request and which I provided to the Plaintiff on appeal.

21. OCC provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. OCC is also responsible for reviewing proposed actions to ensure compliance with legal requirements, preparing formal legal opinions, preparing or reviewing responses in all court actions, civil or criminal, involving CBP, and developing, implementing, and evaluating nationwide programs, policies, and procedures within its functional areas. It was because of its familiarity with the issues raised by AIC and its function as legal representative to CBP in its border enforcement efforts that we consulted with OCC regarding the information requested.

22. OCC reviewed the aforementioned documents, conducted a separate search, and confirmed that no other responsive records exist. I appended copies of the responsive records to the September 29, 2011 response letter and provided electronic copies on a disc as requested by the Plaintiff.

23. Despite the searches and requests to components and offices within CBP, we were unable to find responsive records beyond those identified above. I was unable to provide

further responsive information to the Plaintiff because no such information exists.

JURAT CLAUSE

I declare under penalty of perjury that the statements made in the forgoing Declaration are true and correct to the best of my knowledge, information and belief.

Signed this 26th day of January, 2012 in Washington, D.C.

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch
Regulations and Rulings
Office of International Trade
U.S. Customs and Border Protection
U.S. Department of Homeland Security

RESPONSIVE RECORDS

Inspector's Field Manual (IFM) Chapter 2.9 Dealing with Attorneys and Other Representatives.

No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney - unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action.

IFM Chapter 17.1.g Attorney Representation at Deferred Inspection.

(g) Attorney Representation at Deferred Inspection. At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory CBPO on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant. Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel. In general, applicants for admission in primary and secondary processing are not entitled to representation. See 8 CFR 292.5(b).

IFM Chapter 17.9.11.2 Notification for Detainees in Baggage Control Secondary.

9.11.2.1 Any person detained for more than two hours after a personal search is conducted will be given the opportunity to have OFO personnel notify someone, including an attorney, of his or her delay unless probable cause has been established. The two hour notification process is only used during a continuation of the personal search process. Officers will utilize Attachment 2 of the Personal Search Handbook to complete the notification.

9.11.2.2 When the two hour notification period has elapsed, the supervisor will notify the ICE duty agent and/or a CBP enforcement officer prior to the notification. The detainee will not be given the opportunity to consult with an attorney at any time before *Miranda* warnings are required and such right is invoked by the detainee.

From The Officers' Handbook, M68

SOLICITATION OF SERVICES
An alien who is detained or an alien or other person who has official business with the Service may ask you whether it is necessary or desirable to seek the services of an attorney or other representative. In no case should he be informed that he should not obtain an attorney. The person making such inquiry should be informed that he has the right to be represented at his own expense by an attorney in proceedings before the Service. However, he should also be informed that the determination whether be should obtain an attorney is one that he must make himself and that Service employees may not make such determination for him. If such a person states he would like to be represented by an attorney but that be cannot afford the expense involved, he may be referred to a voluntary social agency or a legal aid organization or a Bar Association. Also you may be requested to suggest the name of an attorney or bonding company. A person requesting the name of an attorney should be referred to a Bar Association or to a telephone directory which lists the names and addresses of attorneys. A person requesting the name of a bonding company should be referred to a telephone directory which lists the names of bonding companies. In no instance should a person be referred to a specific attorney or firm.

From The Law of Arrest; Search and Seizure Manual, M69

b. Warnings Required Following Administrative Arrest.

Once the examining officer determines that formal exclusion or deportation proceedings will be instituted, certain advisals must be given to the alien. The alien must be informed of the reason for the arrest, of the right to be represented by counsel of his or her choice at no expense to the government, and of the availability of free legal services programs and of organizations recognized pursuant to 8 C.F.R. 292.210 located in the district where the proceedings are to be held. The alien must be given a list of such programs and organizations. The alien also must be advised that any statement made may be used against him or her in a subsequent proceeding 28. If arrested without a warrant, the alien must be advised that a decision will be made within 24 hours whether custody will be continued or whether release on bond or on personal recognizance will be available 29. The 1-221 (Order to Show Cause) provides the required warnings to aliens placed in deportation proceedings or granted administrative voluntary departure. Miranda warnings need not be given where the only contemplated legal action against the alien is exclusion, deportation, or voluntary departure.

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT A

2011FOI8147

AMERICAN IMMIGRATION COUNCIL

COMMUNITY EDUCATION CENTER • IMMIGRATION POLICY CENTER • INTERNATIONAL EXCHANGE CENTER • LEGAL ACTION CENTER

2011 MAR 21 P 12:18

March 14, 2011

U.S. Customs and Border Protection
FOIA Division
799 9th Street NW, Mint Annex
Washington, DC 20229-1181

Re: Freedom of Information Act Request

Dear Sir or Madam:

The American Immigration Council (AIC) submits this letter as a request for information under the Freedom of Information Act (FOIA), 5 U.S.C. §552, *et. seq.*

1. RECORDS SOUGHT

AIC requests any and all records[1] which have been prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP), whether issued or maintained by CBP Headquarters offices, including any divisions, subdivisions or sections therein; CBP field operations offices, including any divisions, subdivisions or sections therein; CBP offices at ports of entry, including any divisions, subdivisions or sections therein; and/or any other CBP organizational structure; and which relate or refer in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

The above records may include, but are not limited to:

1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;

2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;

[1] The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies.

Suite 200, 1331 G Street, NW, Washington, DC 20005-3141 • Telephone: 202.507.7500 • Fax: 202.742.5619

3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;

4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;

5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;

6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;

7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;

8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP's intention to question their clients;

9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP's decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;

10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

AIC requests that records existing in electronic form be provided in electronic format or on a compact disc. If any of the requested records or information is not in a succinct format, we request the opportunity to view the documents in your offices.

If under applicable law any of the information requested is considered exempt, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the information is withheld, and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

2. REQUEST FOR WAIVER OF ALL COSTS

AIC requests that all fees associated with this FOIA request be waived. AIC is entitled to a waiver of all costs because disclosure of the information is "...likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). *See also* 6 C.F.R. § 5.11 (k) (Records furnished without charge or at a reduced rate if the information is in the public interest, and disclosure is not in commercial interest of institution). In addition, AIC has the ability to widely disseminate the requested information. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requester explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received).

i. Disclosure of the Information Is in the Public Interest

AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media. The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. Relevant to this FOIA request, the LAC has historically focused on access to counsel issues. Specifically, the LAC educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its sub-agencies.

Disclosure of the requested information will contribute significantly to public understanding of non-citizens' access to counsel in interactions with ICE. The disclosed records will inform attorneys who represent non-citizens at risk of removal from the United States, the noncitizens themselves, and other members of the public who are concerned with immigration agency proceedings and policies. Because there is no available comprehensive guidance governing attorney representation and conduct in interactions with CBP, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP. AIC has the capacity and intent to disseminate widely the requested information to the public. To this end, the LAC and the IPC will post the information on the AIC website, a website that is accessible by any member of the public. In addition, the LAC and IPC will publish this information in an LAC report, an LAC newsletter and an IPC blog. The LAC newsletter is directly distributed to 12,000 recipients and the IPC blog is distributed to 25,000 recipients. These publications also are available on the AIC website.

ii. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requester

AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization. Immigration attorneys, noncitizens and any other interested member of the public may obtain information about counsel-related issues on AIC's frequently updated website. AIC seeks the requested information for the purpose of disseminating it to members of the public who access AIC's website and other AIC publications, and not for the purpose of commercial gain.

Please inform us if the charges for this FOIA production will exceed $25.00.

Thank you in advance for your response to this request within twenty working days, as FOIA requires. *See* 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions, please feel free to contact me at (202) 507-7505.

Sincerely,

Emily Creighton
Staff Attorney
American Immigration Council
Suite 200
1331 G Street, NW
Washington, DC 20005-3141
Telephone: (202) 507-7505
Fax: (202) 742-5619
E-mail: ecreighton@immcouncil.org

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT B

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

DIS-2:OT:CTE:FD PH
2011F08147

May 12, 2011

Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005

Dear Ms. Creighton:

This is a final response to your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

Upon consultation with several component offices within CBP, much of the information you are seeking is already publicly available. Responsive information may be found in the Code of Federal Regulations, specifically 8 CFR 292.5(b), which may be found at the following website:

http://law.justia.com/cfr/title08/8-1.0.1.2.59.0.1.5.html

Further responsive information may be found within the Personal Search Handbook, which you may view at the following website:

http://foia.cbp.gov/index.asp?category=Manuals_and_Instructions&ps=1&search=

Further information may be found in the Inspector's Field Manual (IFM) which is currently under review for determination and release. Once approved for release, you will be able to view this document on the CBP Reading Library.

You have a right to appeal our determination. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 799 Ninth Street, NW, 5th Floor, Washington, DC 20229-1179, following the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. 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 are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call (877) 684-6448.

This office may be reached at (202) 325-0150. Please notate file number 2011F08147 on any future correspondence to CBP related to this request.

Sincerely,

Dorothy Pullo
Director, FOIA Division
Office of International Trade

Enclosure(s)

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT C

6/6/11
FAPL

AMERICAN IMMIGRATION COUNCIL

IMMIGRATION POLICY CENTER • IMMIGRATION LEGAL RESOURCE CENTER

May 26, 2011

FOIA Appeals, Policy and Litigation Branch
U.S. Customs and Border Protection
799 Ninth Street, NW, 5th Floor
Washington, DC 20229-1179

Re: Freedom of Information Act Request Reference Number 2011F08147

Dear Sir or Madam:

We are in receipt of your letter dated May 12, 2011, acknowledging our March 14, 2011, FOIA request for all records from CBP including but not limited to records prepared, received, transmitted, collected and/or maintained by the U.S. Department of Homeland Security and/or U.S. Customs and Border Protection (CBP) which relate or refer in any way to any of the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities.

Your letter states that "much of the information [we] are seeking is already publicly available." It refers us to three "records": 1) Section 292.5(b) of Title 8 of the Code of Federal Regulations; 2) a document titled the Personal Search Handbook (July 2004), available on CBP's website and 3) the Inspector's Field Manual, which the letter indicates is "currently under review for determination and release" and will be available for review at some point in the future on the "CBP Reading Library."

We also are in receipt of your letter dated March 29, 2011, denying the American Immigration Council's (AIC) fee waiver included in AIC's March 14, 2011, FOIA request.

Please consider this letter an appeal of both determinations: the final response to our FOIA request and the denial of our fee waiver request. This appeal is filed within 60 days of both the March 29, 2011, and May 12, 2011, letters pursuant to 6 C.F.R. § 5.25.

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1. APPEAL OF THE MAY 12, 2011 RESPONSE LETTER

a. CBP Did Not Conduct an Adequate Search.

CBP did not conduct an adequate search for records responsive to our comprehensive request for guidance related to noncitizens' access to counsel before CBP pursuant to 5 U.S.C. § 552(a)(3).

An agency must carry out a reasonable search for records responsive to the FOIA request. *See Oglesby v. Army,* 920 F.2d 57, 68 (D.C. Cir. 1990). It must show that its search was reasonably calculated to uncover relevant documents. *Steinberg v. U.S. Dept. of Justice,* 23 F.3d 548, 551 (D.C. Cir. 1994) (quotations omitted). An agency's search need not be exhaustive, merely reasonable. *See W. Ctr. for Journalism v. Internal Revenue Serv.,* 116 F. Supp. 2d 1, 8 (D.D.C. 2000).

We are aware of 8 C.F.R. § 292.5(b) and the language referencing counsel in that provision. We also have reviewed the Inspector's Field Manual and the provisions relating to counsel in a version of the manual updated through January 2007. In addition, we have reviewed the Personal Search Handbook (July 2004) available on your website. We do not think these documents reflect a search reasonably calculated to uncover relevant documents.

Our request for "records" related to the role of counsel in CBP settings encompasses all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies. Given the varied circumstances in which noncitizens and their attorneys interact with CBP, it is very unlikely that the three documents referenced in your May 12, 2011, letter reflect a search reasonably calculated to uncover documents relevant to the role of counsel in CBP settings. We indicated in our FOIA request that the interactions among CBP officers, attorneys and their noncitizen clients take place in different settings such as secondary and deferred inspection. In addition, the reasons for the interview or interaction may vary significantly. As stated in the request, among other reasons, the interaction may stem from a CBP officer's inquiry related to a person's alleged abandonment of U.S. residence or it may relate to CBP's decision to return an unaccompanied alien child to Mexico. The May 12, 2011, response merely includes general documents that are publicly available and does not reflect a search reasonably calculated to uncover documents relevant to the guidance outlined in the request.

b. CBP Must Produce All Responsive, Non-Exempt Information in its Possession That Is Not Already in the Public Domain.

You indicate that "responsive" information is contained in the Inspector's Field Manual which is currently under review for determination and release. Assuming that this manual is not in draft form or subject to exemptions under 5 U.S.C. §§ 552(b)(1)-(9), CBP has an obligation to produce relevant portions with appropriate redactions in response to this FOIA request. 5 U.S.C. § 552(a)(3).

2. APPEAL OF THE MARCH 29, 2011 RESPONSE LETTER

a. *AIC Meets the Requirements for a Public Interest Fee Waiver and Is not a Commercial Requester.*[1]

We also appeal the denial of the fee waiver request and the commercial requester designation. Your March 29, 2011, letter states that AIC's fee waiver request was "deficient" because disclosure of the information requested 1) "will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s)," and 2) will not "contribute significantly to the public understanding of government operations or activities." Thus, the letter determined that AIC "failed to satisfy each of the required factors" set forth at 6 C.F.R. § 5.11(k)(2) and denied the request. The letter does not explain why AIC failed to meet these two factors. In addition, the letter categorizes the request as "commercial" and states that AIC would be charged for duplication of records in accordance with 6 C.F.R § 5.11. The letter does not explain or provide support for its determination that AIC is a commercial requester.

i. Disclosure of the Information Is in the Public Interest.

In the event that responsive records are located, AIC is entitled to a public interest fee waiver. The FOIA Office wrongly determined that AIC's request for a fee waiver was deficient. Under 6 C.F.R. §5.11(k)(1), fees may be waived where the requester has demonstrated that (i) disclosure of the information is in the public interest in that it is likely to contribute significantly to public understanding of the operations or activities of the government; and (ii) disclosure of the information is not primarily in the commercial interest of the requester.

DHS considers four factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is in the public interest:

(1) "Whether the subject of the request concerns the 'operations or activities of the government,'"
(2) "Whether the disclosure 'is likely to contribute' to an understanding of government operations or activities,"
(3) "Whether disclosure of the requested information will contribute to 'public understanding'" as opposed to the individual understanding of the requestor or a narrow segment of interested persons; and
(4) "Whether the disclosure is likely to contribute 'significantly' to public understanding of government operations or activities."

[1] Significantly, USCIS recently granted AIC's public interest fee waiver request after AIC sent a similar FOIA request to USCIS requesting records relating to attorneys' role before USCIS. USCIS responded on May 2, 2011, that AIC qualified for a fee waiver request.

For a request to be considered in the public interest, all four criteria must be satisfied. The March 29, 2011, letter appears to deny our request only on the basis of the third and fourth factors. For the sake of clarity and completeness, we address each factor in turn.

1. *The subject of the requested records concerns the operations and activities of the government.*

The March 29, 2011, letter does not dispute that the subject of the requested records concerns the operations and activities of the government. The requested records clearly concern the operations or activities of the government. U.S. Customs and Border Protection is a component of the U.S. Department of Homeland Security, a cabinet level department of the federal government. CBP is responsible, in part, for protecting our nation's borders and inspecting individuals seeking admission to the United States. The records we seek relate to CBP's policies regarding a noncitizen's access to counsel in interactions with the agency. Such interactions are very clearly "operations and activities" of CBP.

2. *Disclosure is likely to contribute to an understanding of government operations or activities.*

The March 29, 2011, letter does not dispute that the subject of the requested records will contribute to an understanding of government operations or activities. However, a further understanding of this second factor informs the third and fourth factors. In short, disclosure of the requested documents will contribute to a deeper understanding of the role of counsel before CBP.

The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) reach out to lawyers and the general public to promote a better understanding of immigration law, policy and practice. The IPC researches issues related to immigration (such as the impact of immigration on the economy, jobs and crime), and regularly provides information to leaders on Capitol Hill and the media. *See* http://www.immigrationpolicy.org/. The LAC works with other immigrants' rights organizations and immigration attorneys across the United States to advance the fair administration of immigration laws. *See* http://www.legalactioncenter.org/. Relevant to this FOIA request, the LAC has historically focused on access to counsel issues. Specifically, the LAC educates the public about the law surrounding access to counsel for immigrants in removal proceedings, advocates for fair standards and procedures to remedy the effects of ineffective assistance of counsel, and encourages better access to counsel in proceedings before the Department of Homeland Security and its components.

As discussed above, disclosure of the requested records is likely to contribute to a better understanding of government operations or activities related to the role of counsel in interactions with CBP. Beyond the three documents mentioned in the May 12, 2011, letter, AIC is not aware of any publicly available documents explaining how and why CBP limits access to counsel in various settings. Because this information is not already in the public domain, its release will significantly increase understanding of CBP's policies involving counsel.

3. *Disclosure will contribute to public understanding of government operations or activities.*

Disclosure of the requested information also will contribute to "public understanding," as opposed to understanding of a narrow segment of interested persons. Release of this information to AIC will significantly advance the general public's understanding of CBP's policies toward counsel. AIC has the capacity, legal expertise, and intention to review, analyze and synthesize this information and make it accessible to a broader public audience. In addition to providing all released information on its website, AIC plans to draft one or more summary reports of the records received in response to the FOIA request. AIC has the intent and capacity to disseminate the reports by posting them on the AIC website which contains immigration-related information and news and is accessible by any member of the public. AIC's website receives more than 58,000 monthly visitors, and information available on the website is shared and re-posted on other websites with large audiences, including Alternet, a website with 2.3 million monthly visitors. AIC also will distribute the summary reports to our mailing list of over 33,000 supporters and will publish them in the LAC newsletter, which is directly distributed to 12,000 recipients and available to the public on the AIC website. Finally, AIC has regular contact with national print and news media and plans to continue to share information about this process with interested media.

4. *Disclosure of the requested information will contribute significantly to public understanding of non-citizens' access to counsel in interactions with CBP.*

The disclosure of the requested information will contribute significantly to public understanding about CBP practices related to counsel. This issue is of sufficient importance that a regulation, 8 C.F.R. § 292.5(b), has been adopted to address the role of counsel before CBP, and counsel is mentioned several times throughout the Inspector's Field Manual.

Interviews and interactions with CBP officers often can be intimidating and confusing, and noncitizens seek assistance from attorneys to help navigate these encounters. It is critical that noncitizens understand when and for what reasons access to counsel is limited before CBP. In addition, U.S. citizens may be subject to the same treatment as noncitizens if their citizenship is questioned by a CBP officer. Thus, U.S. citizens have an equally important stake in understanding CBP policies related to counsel.

The disclosed records will inform attorneys who represent noncitizens at risk of removal from the United States, the noncitizens themselves, and other members of the public who are concerned with the fairness of immigration agency proceedings and policies. Because there is no publicly available comprehensive CBP guidance governing attorney representation and conduct, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP. The disclosure and dissemination of the requested documents also will help explain disparate treatment by CBP of attorneys and their noncitizen clients throughout the country. Finally, this information will inform non-profit and international organizations interested in the treatment of noncitizens at the border and in other settings before CBP.

b. Disclosure of the Information Is Not Primarily in the Commercial Interest of the Requestor.

DHS considers two factors set forth in 6 C.F.R. § 5.11(k)(2) when determining whether disclosure of the information is primarily in the commercial interest of the requester:

(1) "Whether the requester has a commercial interest that would be furthered by the requested disclosure," and
(2) "Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure," thereby rendering the disclosure "primarily in the commercial interest of the requester."

AIC is a 501(c)(3), tax-exempt, not-for-profit educational and charitable organization. AIC seeks the requested information for the purpose of disseminating it to the general public and not for the purpose of commercial gain. The LAC has a long track record of administrative advocacy on issues related to counsel in immigration proceedings. Like all other reports and information available on the AIC website, information about counsel received in response to this FOIA request will be widely distributed to immigration attorneys, noncitizens and other interested members of the public free of charge. Given that FOIA's fee waiver requirements are to "be liberally construed in favor of waivers for noncommercial requesters," a waiver of all fees is justified and warranted in this case. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003).

Sincerely,

Emily Creighton
Staff Attorney
American Immigration Council
Suite 200
1331 G Street, NW
Washington, DC 20005-3141
Telephone: (202) 507-7505
Fax: (202) 742-5619
E-mail: ecreighton@immcouncil.org

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT D

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

DIS 2:OT:CTE:FD PH
2011F08147

March 29, 2011

Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005

Dear Ms. Creighton:

This is an acknowledgement of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP). You requested the all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;
- Attorney appearances at CBP offices or other facilities;

As it relates to your fee waiver request, we have reviewed your letter and have determined that you have not presented a convincing argument you are entitled to a blanket waiver of fees.

The DHS FOIA Regulations, 6 CFR § 5.11(k)(2), set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. We will consider these factors in our evaluation of your request for a fee waiver:

(1) Whether the subject of the requested records concerns "the operations or activities of the government;"

(2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;

(3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons;

(4) Whether the contribution to public understanding of government operations or activities will be "significant;"

(5) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(6) Whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor.

As a requester, you bear the burden under the FOIA of showing that the fee waiver requirements have been met. Based on our review of your request and for the reasons stated herein, we have determined that your fee waiver request is deficient because disclosure of this information will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s), and it will not contribute significantly to the public understanding of government operations or activities. Since your request for a fee waiver has failed to satisfy each of the required factors, we are denying the request.

Your request has been categorized as commercial. In accordance with 6 C.F.R. § 5.11, U.S., commercial requestors are responsible to pay 10-cents per page for duplication of records. Further, you will be required to pay for search and review time at the per quarter-hour rate of the searcher and reviewer. You state you are willing to pay fees up to $25. Please be advised that if costs exceed this amount, you will be contacted in writing.

You have a right to appeal determination of your fee category. Should you wish to do so, you must send your appeal and a copy of this letter, within 60 days of the date of this letter, to:

FOIA Appeals, Policy and Litigation Branch
U.S. Customs and Border Protection
799 Ninth Street, NW, 5th Floor
Washington, DC 20229-1179

Please follow the procedures outlined in the DHS regulations at Title 6 C.F.R. § 5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and DHS regulations are available at www.dhs.gov/foia.

Your request has been assigned reference number 2011F08147. Please refer to this identifier in any future correspondence. If you have any questions, you may contact this office at 202-325-0150.

Sincerely,

Dorothy Pullo
Director, FOIA Division
Office of International Trade

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT E

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

OT:RR:FAPL
H170224

June 10, 2011

Emily Creighton
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005-3141

Dear Ms. Creighton:

This acknowledges receipt of your correspondence dated May 26, 2011, concerning the FOIA appeal.

The matter has been assigned to the FOIA Appeals, Policy and Litigation Branch for review and preparation of a response. Although we make every effort to promptly complete our review and prepare a response, multiple issue inquiries, or those requiring other agency input, may delay our response.

Your inquiry has been assigned to Andrew Langreich. If it becomes necessary to contact us regarding this matter, you may call him on 202-325-0089, or write to us at U.S. Customs and Border Protection, FOIA Appeals, Policy and Litigation Branch, Regulations and Rulings, 799 9th Street, NW, Washington, DC 20229-1179. In any future correspondence, please refer to the file number in the upper right corner of this letter.

Any questions regarding substantive legal issues involved in your inquiry may be raised with the person to whom it is assigned. All questions regarding the priority or status of the processing should be raised with undersigned.

Sincerely,

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch

EXHIBIT E

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT F

1300 Pennsylvania Avenue NW
Washington, DC 20229

U.S. Customs and Border Protection

SEP 29 2011

DIS-3 OT:RR:RDL:FAPL
H170224 AML

Ms. Emily Creighton, Staff Attorney
American Immigration Council
1331 G Street, N.W., Suite 200
Washington, D.C. 20005-3141

RE: Freedom of Information Act Appeal; Request for information concerning the availability and role(s) of attorneys during noncitizen clients' interactions with CBP; Denial of Fee Waiver Request; CBP FOIA Division File No. 2011F08147

Dear Ms. Creighton:

This is in reply to your letter of May 26, 2011, with which you appeal, on behalf of your organization, the American Immigration Council (hereinafter "AIC"), the response you received from the Director, Freedom of Information Act (FOIA) Division, U.S. Customs and Border Protection (CBP) dated May 12, 2011 (FOIA Division File No. 2011F08147) to your FOIA request. Within the May 26, 2011 letter, you also note the appeal of the March 29, 2011 decision of the FOIA Division to deny your request for a fee waiver. You appeal the decision of the FOIA Division which directed you to what it determined to be "public information" in response to your original FOIA request and question the adequacy of the FOIA Division's search for responsive records.

On June 23, 2011, you confirmed in a telephone call with an attorney on my staff that your request for information regarding CBP policies, directives and guidance relating to the accessibility of counsel is limited to noncitizens' interactions with CBP in immigration encounters at ports of entry and between ports of entry, rather than the policies, directives and guidance concerning the permissible roles of attorneys in CBP's myriad trade matters.

In the initial FOIA request to CBP dated March 14, 2011, you requested all records from CBP which relate or refer to the following:

- Attorneys' ability to be present during their clients' interactions with CBP;
- What role attorneys may play during their clients' interactions with CBP;
- Attorney conduct during interactions with CBP on behalf of their clients;

• Attorney appearances at CBP offices or other facilities.[12]

In response to your request, the FOIA Division collected and reviewed responsive records and concluded that "much of the information you are seeking is already publicly available." The FOIA Division stated that responsive information could be found in the Code of Federal Regulations (CFR), the Personal Search Handbook, and the Inspector's Field Manual (IFM) (which, "once the IFM is approved for release," will be available via the internet on the CBP Reading Library).

On appeal, you contend that "CBP did not conduct an adequate search for records responsive to our comprehensive request for guidance related to noncitizens' access to counsel before CBP pursuant to 5 U.S.C. § 552(a)(3)." You elaborate that:

> [Y]our request for "records" related to the role of counsel in CBP settings encompasses all records or communications preserved in electronic or written form, including but not limited to correspondence, documents,

---

[1] You explained via an itemized list in the initial request that the above records may include, but are not limited to:
1) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in primary inspection, or what role the attorney may play during such questioning;
2) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in secondary inspection, or what role the attorney may play during such questioning;
3) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning in deferred inspection, or what role the attorney may play during such questioning;
4) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged abandonment of U.S. residence, or what role the attorney may play during such questioning;
5) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to alleged lack of proper immigration documents, or what role the attorney may play during such questioning;
6) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during questioning related to the National Security Entry-Exit Registration System (NSEERS), or what role the attorney may play during such questioning;
7) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may accompany a client during any other questioning by a CBP agent, or what role the attorney may play during such questioning;
8) Guidance or any information obtained by the agency regarding procedures for notification of attorneys with Form G-28 and/or EOIR-28 on file of CBP's intention to question their clients;
9) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in the CBP's decision to return an unaccompanied alien child to Mexico without referring the child to ICE or HHS/ ORR/ Department of Unaccompanied Children;
10) Guidance or any information obtained by the agency regarding the circumstances under which an attorney may be involved in CBP's decision to release an unaccompanied immigrant child to a responsible adult who is not a family member.

[2] With regard to your request for NSEERS information (see item # 6 in footnote 1 immediately above), we note that effective April 28, 2011, DHS will no longer register aliens under NSEERS. See Federal Register Volume 76, Number 82 (Thursday, April 28, 2011) at *http://www.gpo.gov/fdsys/pkg/FR-2011-04-28/html/2011-10305.htm.*

> data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies. Given the varied circumstances in which noncitizens and their attorneys interact with CBP, it is very unlikely that the three documents referenced in your May 12, 2011, letter reflect a search reasonably calculated to uncover documents relevant to the role of counsel in CBP settings. We indicated in our FOIA request that the interactions among CBP officers, attorneys and their noncitizen clients take place in different settings such as secondary and deferred inspection. In addition, the reasons for the interview or interaction may vary significantly.

You conclude your contentions regarding this issue by stating that "the May 12, 2011, response merely includes general documents that are publicly available and does not reflect a search reasonably calculated to uncover documents relevant to the guidance outlined in the request."

You "also appeal the denial of the fee waiver request and the commercial requester designation." The March 29, 2011, FOIA Division letter denying the fee waiver request concludes that the request was "deficient" because disclosure of the information requested 1) "will not contribute to the understanding of the public at large but to the understanding of a narrow segment of interested person(s)," and 2) will not "contribute significantly to the public understanding of government operations or activities." Thus, the letter determined that AIC "failed to satisfy each of the required factors" set forth at 6 C.F.R. § 5.11(k)(2) and denied the request for fee waiver.

Initially, we reconsider your request for fee waiver. You indicate that "AIC is a 501(c)(3), tax-exempt, not-for-profit educational, charitable organization . . . [that] seeks the requested information for the purpose of disseminating it to members of the public who access AIC's website and other AIC publications, and not for the purpose of commercial gain." You state that:

> AIC is entitled to a waiver of all costs because disclosure of the information is "... likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). See also 6 C.F.R. § 5.1(k).

You explain that:

> Because there is no available comprehensive guidance governing attorney representation and conduct in interactions with CBP, the dissemination of these records will significantly inform public understanding of the scope of representation permitted before CBP.

The Department of Homeland Security (DHS) FOIA regulation which governs fee waivers, 6 CFR § 5.11(k), provides in relevant part that:

> (k) Requirements for waiver or reduction of fees. (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that:
>
> > (i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and
> >
> > (ii) Disclosure of the information is not primarily in the commercial interest of the requester.

The regulation then provides guidance about the factors to be considered in making a fee waiver determination.

> (2) To determine whether the first fee waiver requirement is met, components will consider the following factors:
>
> > (i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.
> >
> > (ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.
> >
> > (iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding." The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as

opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, components will consider the following factors:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure. Components shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester." A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

In compliance with the regulation set forth above, we apply the factors set forth in 6 CFR § 5.11(k) to the contentions you make in support of your fee waiver request.

In support of the contention that disclosure of the information requested would be in the public interest, you state that:

> AIC educates citizens about the enduring contributions of America's immigrants, supports sensible and humane immigration policies that reflect American values, and works to ensure that immigration laws are enacted and implemented in compliance with fundamental constitutional and human rights. The AIC's Immigration Policy Center (IPC) and Legal Action Center (LAC) help carry out this mission by reaching out to the general public to promote a better understanding of immigration law, policy and practice.

Therefore , we consider whether "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and whether "disclosure of the information is not primarily in the commercial interest of the requester."

In order to make the "public interest" determination, the regulation requires consideration of (i) whether the subject of the requested records concerns "the operations or activities of the government"; (ii) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (iii) whether disclosure of the requested information will contribute to "public understanding"; and (iv) whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

In consideration of the first public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry "concerns the operations or activities of the government." CBP is the federal agency charged with protecting the borders and enforcing the immigration and customs laws. Your request for certain information related to the agency's enforcement of the immigration laws, *i.e.*, whether travelers or immigrants will be permitted access to attorneys in their interactions with border enforcement personnel, is an inquiry regarding an operation and activity of the government.

In consideration of the second public interest factor, we conclude that the request for information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry is "likely to contribute" to an understanding of government operations or activities. Immigration has been and continues to be a significant issue in the United States. The disclosure of non-exempt portions of the CBP policies, directives and guidance regarding immigrant access to attorneys during interactions at ports of entry is "likely to contribute" to an increased public understanding of those CBP operations or activities.

In consideration of the third public interest factor, we conclude that the disclosure of information regarding individual's access to attorneys during interactions with personnel at CBP ports of entry will contribute to "public understanding." Given your

representations that your organization has expertise in the subject area and the ability and intention to effectively disseminate the information to the public, we are persuaded that disclosure will contribute to the understanding of a reasonably broad audience of persons interested in immigration issues.

In consideration of the fourth public interest factor, we conclude that the disclosure is likely to contribute "significantly" to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

In *Manley v. Dep't of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008), the United States District Court for the Southern District of Ohio, in reversing the denial of a fee waiver request, held that:

> The Navy's argument is premised on the assumption that the information must be disseminated to the public-at-large before a waiver is appropriate. However, "[i]nformation need not actually reach a broad cross-section of the public in order to benefit the public at large." *Carney v. Department of Justice*, 19 F.3d 807, 815 (2d Cir.), cert. denied, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994). See also *Judicial Watch, Inc. v. General Services Admin.*, 2000 U.S. Dist. LEXIS 22872, 2000 WL 35538030, *7 (D.D.C. 2000). Courts have rejected the narrow interpretation urged by the Navy in light of the legislative history of the FOIA which suggests a more focused group: "A request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter." 32 Cong. Rec. S14,270-01 (daily ed. Sept. 30, 1986) (comments of Senator Leahy). For example, in *Carney v. Department of Justice*, 19 F.3d 807 (2d Cir.), *cert. denied*, 513 U.S. 823, 115 S. Ct. 86, 130 L. Ed. 2d 38 (1994), the Second Circuit rejected as "not realistic" the position that a requester was required to disseminate the information to "a large cross-section of the public." *Id.* at 814. "The relevant inquiry . . . is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject." *Carney*, 19 F.3d at 815 (finding sufficiently "public" that a doctoral student in political science planned to publish a dissertation and write scholarly articles; while usually not reaching a general audience, the dissertation would enlighten interested scholars and be of great benefit to the public at large). Likewise, the court in *Community Legal Services, Inc. v. U.S. Dept. of Housing and Urban Development*, 405 F. Supp.2d 553 (E.D. Pa. 2005), determined that while the Legal Services work was unlikely to reach a very general audience, there was nevertheless a segment of the public interested in its work, to wit, a reasonably large segment of Philadelphia's low- and moderate-income families. *Id.* at 556 -557. In other words, the relevant

> issue is whether "the requester will disseminate the disclosed records to a reasonably broad *audience of persons interested in the subject.*" *Carney*, 19 F.3d at 815 (emphasis added [in original]). *Manley v. Dep't of the Navy*, 2008 U.S. Dist. LEXIS 111499, 22-24 (S.D. Ohio Sept. 19, 2008).

We conclude based on the rationale set forth in *Manley* that there is sufficient public interest among the segment of the public with interest in immigration issues ("a reasonably broad audience of persons interested in the subject") to satisfy the "public interest" factors set forth in the relevant DHS regulation.

With regard to whether AIC has a commercial interest in the disclosure of the information, we consider whether AIC has any commercial interest that would be furthered by the requested disclosure. Given that your organization is a non-profit organization and the stated purpose for requesting the information is to distribute and disseminate it via the internet and mailing lists without charge (for example, you state unequivocally in the appeal letter that "[l]ike all other reports and information available on the AIC website, information about counsel received in response to this FOIA request will be widely distributed to immigration attorneys, noncitizens and other interested members of the public free of charge."), we are persuaded that AIC does not have a commercial interest that would be furthered by release of the information requested.

In light of the foregoing, we conclude that the public interest standard is satisfied and that the disclosure is not in the commercial interest of the requester, AIC. Therefore, the fee waiver pursuant to 6 CFR § 5.11(k) is justified and we reverse the decision of the FOIA Division to deny the request for fee waiver.

In consideration of your appeal, we note that the subject matter of the FOIA request – the availability and role(s) of attorneys during noncitizen clients' interactions with government personnel at U.S. borders – is governed by statute and regulation.

8 U.S.C. § 1357 provides that:

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant-
>
> (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;
>
> (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained

> for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;
>
> (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

8 U.S.C. § 287.3(c) provides:

> (c) Notifications and information. Except in the case of an alien subject to the expedited removal provisions of section 235(b)(1)(A) of the Act, an alien arrested without warrant and placed in formal proceedings under section 238 or 240 of the Act will be advised of the reasons for his or her arrest and the right to be represented at no expense to the Government. The examining officer will provide the alien with a list of the available free legal services provided by organizations and attorneys qualified under 8 CFR part 1003 and organizations recognized under §292.2 of this chapter or 8 CFR 1292.2 that are located in the district where the hearing will be held. The examining officer shall note on Form I–862 that such a list was provided to the alien. The officer will also advise the alien that any statement made may be used against him or her in a subsequent proceeding.

8 CFR § 292.5, captioned "Service upon and action by attorney or representative of record" provides:

> (b) Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs. **Provided, that nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.** (Bold emphasis added.)

Barring an individual being the focus of a criminal investigation, applicants for admission do not have the right to legal representation. Thus, it is logical that CBP does not have extensive responsive documents concerning the subject; comprehensive CBP guidance

governing attorney representation and conduct, where in most instances applicants for admission have no such right, is unnecessary. That is, where there is no substantive right to representation in primary and secondary inspections, the agency need not provide detailed instructions or guidance regarding the subject – it is sufficient for CBP personnel to be informed that generally there is no right to counsel at the border.

In response to your appeal and contention that the search conducted in response to the initial request was inadequate, we contacted several offices within CBP in which responsive records could likely be found: the Office of the Border Patrol (OBP), the Office of Field Operations (OFO), and the Office of Chief Counsel (OCC). OBP is the organization within CBP responsible for preventing the entry of terrorists and terrorist weapons from entering the United States between official U.S. Customs and Border Protection ports of entry. OBP's traditional mission is to enforce immigration laws and to detect, interdict and apprehend those who attempt to illegally enter or smuggle people or contraband across U.S. borders between official ports of entry. OFO manages core CBP programs and operations at 20 Field Operations offices; 327 ports of entry; 15 preclearance stations in Canada, Ireland and the Caribbean; Immigration policy and programs; and Agricultural Quarantine Inspection (AQI) at all ports of entry in order to protect the health of U.S. plant and animal resources. OFO has primary operational responsibility for trade and passenger facilitation, interdiction and enforcement programs. OCC provides legal advice to, and legal representation of, CBP officers in matters relating to the activities and functions of CBP. OCC is also responsible for reviewing proposed actions to ensure compliance with legal requirements, preparing formal legal opinions, preparing or reviewing responses in all court actions, civil or criminal, involving CBP, and developing, implementing, and evaluating nationwide programs, policies, and procedures within its functional areas. Accordingly, these offices were determined to be the offices in which responsive records were likely to have been created and be maintained.

OFO provided information, some of which had been previously provided to you in response to the initial request by the FOIA Division, taken from the Inspector's Field Manual. OBP provided information from two of its manuals, the "Officers' Handbook" and "The Law of Arrest, Search and Seizure Manual". OCC reviewed the aforementioned documents, conducted a separate search, and confirmed that no other responsive records exist. We have appended copies of the responsive records to this letter and provided electronic copies on a disc as you requested.

Despite the searches and requests to components and offices within CBP, we have been unable to find responsive records beyond those identified above. We are unable to provide you with any further information because no such information exists.

If you have questions or concerns regarding this matter, please contact Andrew Langreich of my staff at (202) 325-0089.

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §

552(a)(4)(B) in the United States District Court in the district in which you reside, in the district where the agency records are situated, or in the United States District Court for the District of Columbia.

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 are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

Shari Suzuki, Chief
FOIA Appeals, Policy & Litigation Branch

Attachments

AMERICAN IMMIGRATION COUNCIL,
Plaintiff

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, et al.,
Defendants

CIVIL ACTION NO. 11-1972 (JEB)

EXHIBIT G

RESPONSIVE RECORDS

Inspector's Field Manual (IFM) Chapter 2.9 Dealing with Attorneys and Other Representatives.

No applicant for admission, either during primary or secondary inspection has a right to be represented by an attorney - unless the applicant has become the focus of a criminal investigation and has been taken into custody. An attorney who attempts to impede in any way your inspection should be courteously advised of this regulation. This does not preclude you, as an inspecting officer, to permit a relative, friend, or representative access to the inspectional area to provide assistance when the situation warrants such action.

IFM Chapter 17.1.g Attorney Representation at Deferred Inspection.

(g) Attorney Representation at Deferred Inspection. At a deferred inspection, an applicant for admission is not entitled to representation. See 8 CFR 292.5(b). However, an attorney may be allowed to be present upon request if the supervisory CBPO on duty deems it appropriate. The role of the attorney in such a situation is limited to that of observer and consultant to the applicant. Any questions regarding attorney presence in the deferred inspection process may be referred to CBP Field Counsel. In general, applicants for admission in primary and secondary processing are not entitled to representation. See 8 CFR 292.5(b).

IFM Chapter 17.9.11.2 Notification for Detainees in Baggage Control Secondary.

9.11.2.1 Any person detained for more than two hours after a personal search is conducted will be given the opportunity to have OFO personnel notify someone, including an attorney, of his or her delay unless probable cause has been established. The two hour notification process is only used during a continuation of the personal search process. Officers will utilize Attachment 2 of the Personal Search Handbook to complete the notification.

9.11.2.2 When the two hour notification period has elapsed, the supervisor will notify the ICE duty agent and/or a CBP enforcement officer prior to the notification. The detainee will not be given the opportunity to consult with an attorney at any time before *Miranda* warnings are required and such right is invoked by the detainee.

From The Officers' Handbook, M68

SOLICITATION OF SERVICES
An alien who is detained or an alien or other person who has official business with the Service may ask you whether it is necessary or desirable to seek the services of an attorney or other representative. In no case should he be informed that he should not obtain an attorney. The person making such inquiry should be informed that he has the right to be represented at his own expense by an attorney in proceedings before the Service. However, he should also be informed that the determination whether be should obtain an attorney is one that he must make himself and that Service employees may not make such determination for him. If such a person states he would like to be represented by an attorney but that be cannot afford the expense involved, he may be referred to a voluntary social agency or a legal aid organization or a Bar Association. Also you may be requested to suggest the name of an attorney or bonding company. A person requesting the name of an attorney should be referred to a Bar Association or to a telephone directory which lists the names and addresses of attorneys. A person requesting the name of a bonding company should be referred to a telephone directory which lists the names of bonding companies. In no instance should a person be referred to a specific attorney or firm.

From The Law of Arrest; Search and Seizure Manual, M69

b. Warnings Required Following Administrative Arrest.

Once the examining officer determines that formal exclusion or deportation proceedings will be instituted, certain advisals must be given to the alien. The alien must be informed of the reason for the arrest, of the right to be represented by counsel of his or her choice at no expense to the government, and of the availability of free legal services programs and of organizations recognized pursuant to 8 C.F.R. 292.210 located in the district where the proceedings are to be held. The alien must be given a list of such programs and organizations. The alien also must be advised that any statement made may be used against him or her in a subsequent proceeding 28. If arrested without a warrant, the alien must be advised that a decision will be made within 24 hours whether custody will be continued or whether release on bond or on personal recognizance will be available 29. The 1-221 (Order to Show Cause) provides the required warnings to aliens placed in deportation proceedings or granted administrative voluntary departure. Miranda warnings need not be given where the only contemplated legal action against the alien is exclusion, deportation, or voluntary departure.