

U.S. DEPARTMENT OF HOMELAND SECURITY

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U.S. Department of Homeland Security
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Washington, D.C. 20528-0655

U.S. IMMIGRATION & CUSTOMS ENFORCEMENT

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Sent to DHS by mail and ICE via email November 13, 2018

RE: FOIA Request Regarding Failed Deportation Flight

To Whom It May Concern:

On behalf of Muslim Advocates (“Requestor”), I submit this letter to the **Department of Homeland Security (DHS) and its component Immigration and Customs Enforcement (ICE)** as a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* and related regulations. **Please expedite your response** pursuant to 5 U.S.C. § 552(a)(6)(E) and grant a fee waiver for this request. Please also refer the requests contained in this letter to any other agency or component agency as appropriate.

I. Background: Charter Plane and Failed Deportation

This FOIA request concerns a failed deportation charter flight that was meant to expel more than 90 Somali men and women from the United States. The charter flight staged at or near Alexandria International Airport, Louisiana, and left the United States the morning of December 7th, 2017. The plane made a stopover in Senegal, where it sat on the tarmac for more than 20 hours. By the time the flight returned to Miami, the deportees on board had been in shackles for close to two days and were physically and mentally exhausted and depleted from their undue restraints, physical assault by security officers, inadequate food, lack of access to lavatories. *See* Complaint for Declaratory and Injunctive Relief and Class Petition, *Ibrahim v. Acosta*, No. 1:17-CV-24574-DPG (S.D. Flor. 2018).

This FOIA seeks information from relevant agencies about the December 7-9 flight (“Failed Deportation Flight”). With regard to air transportation of detainees, however, Federal Agency promulgated standards are unclear or nonexistent. As noted in a 2015 Office of the Inspector General Report, for example, ICE Enforcement and Removal Operations had not developed formal policies and procedures for its air transportation program. *ICE Air Transportation of Detainees Could be More Effective*, DHS OIG (Apr. 9, 2015). Similarly, it is not clear what cabin safety regulations or law applies to deportation flights, and whether the federal government has issued any guidance or communications on the subject.

This lack of agency oversight and transparency is shocking given the scale of deportation transports that occur each year. Planes chartered by ICE Air Operations, a component of ICE Enforcement and Removal Operations (ERO), deport more than 100,000 people a year and also transport detainees domestically, sometimes in circuitous paths and on trips that last for days. Catherine E. Shoichet & Curt Merill, *ICE Air: How US Deportation Flights Work*, CNN (May 29, 2017), <https://www.cnn.com/2017/05/26/us/ice-air-deportation-flights-explainer/index.html> (noting that ICE’s five charter contracts provide up to ten aircraft for routine flights); Fernanda Santos, *The Road, or Flight, From Detention to Deportation*, NY Times (Feb. 20, 2017). Given the increasing strain on deportation systems and procedures as the US Government increases enforcement and removal efforts, there is a strong public interest in the speedy disclosure of records responsive to this request.

II. Description of Records

Throughout this request, the term “Failed Deportation Flight” refers to the flight described in the background section above. Requestor hereby requests:

1. Copy of the original requests for proposals (RFPs), signed contracts, and contract modifications and addenda pertaining to or covering the Failed Deportation Flight.
 - a. Please note that the RFPs, contracts, and modifications might or might not be for a specific flight but could specify, for example, services such as an international airlift, or for charter flights for the transportation of aliens from the United States who are subject to final orders of removal, or for charter flights to a country in Africa such as Senegal or Djibouti.
 - b. Please note that in addition to contracts for airlift generally, there may be contracts or RFPs for flight crews, medical crews, and crews of aviation security officers that are covered by the terms of this request.
2. All records maintained by the agency or sub-agencies pertaining to the Failed Deportation Flight, including but not limited to:
 - a. Any information provided to the Contracting Officer Representative by the Failed Deportation Flight operator
 - b. Records of the precise departure and arrival times of the flight, its stopover locations, and what occurred on the flight
 - c. Accident or incident reports pertaining to the Failed Deportation Flight

- d. Failed Deportation Flight’s manifest, containing the names of all passengers, including non-detainees
 - e. Audio, Video or photographic documentation/recording pertaining to the flight
 - f. Records pertaining to the opening of and conduct of an agency investigation of the accidents on the Failed Deportation Flight
 - g. Copies of Failed Deportation Flight operator’s FAA certifications in accordance with 14 CFR Part 121 or Part 135 or other parts of federal code;
 - h. FAA registration number(s) of the Failed Deportation Flight aircraft
 - i. Records identifying the Failed Deportation Flight aircraft owner
 - j. Records showing the number of seats and configuration of the Failed Deportation Flight aircraft
 - k. Records showing the Failed Deportation Flight aircraft make and model
 - l. Copies of insurance and liability and hull insurance coverage of Failed Deportation Flight aircraft, including additional or supplemental insurance for other aspects of the flight or for passengers
 - m. Records regarding Failed Deportation Flight aircraft/operator compliance with the requirements of FAA 117.
 - n. 14 CFR 117.29(e) reports, if any, for the Failed Deportation Flight
3. Manifest containing the names of all passengers for each flight prior to departure provided by US government/DHS/ICE to the contractor/operator of the Failed Deportation Flight.
 4. All summary reports provided to the government regarding the Failed Deportation Flight, including invoice summary reports, monthly and quarterly summary of flights, current pilot and flight current flight attendant rosters, quarterly operational summary Safety Reports, and any and all other complete reports as required under the operator’s contract.
 5. Any and all emails and correspondence regarding the Failed Deportation Flight, created before, during, or after the flight.
 6. Copies or records of any tickets, travel itineraries, or property receipts/bag tags issued to anyone on the flight
 - a. This includes tickets and itineraries for the charter flight as well as any other subsequent flight, e.g. commercial airline tickets from Djibouti to Somalia.
 7. Records of the contract of carriage agreement for each person on the Failed Deportation Flight.
 8. Any and all standards for deportation transportation or transportation generally—whether contractually incorporated or not—on the subject of how to transport ICE detainees, including e.g. protocol for shackling, bathroom breaks, transportation best practices, etc.

9. Any and all protocol or records about ICE special response team (SRT) and their role in deportation transport and flights generally, as well as their role in operating the Failed Deportation Flight. This includes any use of force or incident reports about the Failed Deportation Flight.
10. Any and all records, including but not limited to memos and research documents, about the law applicable on ICE deportation flights. Please also include inter-agency communications about applicable law that are not subject to exemption.
11. Records describing the processing of this request, including but not limited to records sufficient to identify the search terms used and the search queries conducted; records sufficient to identify the locations and custodians searched; any tracking sheets used to track the processing of this request; and any FOIA questionnaires or certifications completed by individual custodians or components used to determine whether they possess responsive materials or to describe how they conducted searches.

III. Description of Processing

The Requestor requests disclosure of any of these records¹ that were prepared, received, transmitted, collected and/or maintained by the Recipients and any other agency components thereof.

Please search all records regarding agency business. Please do not rely solely on custodian-driven searches; the government-wide requirements to manage information electronically by the end of 2016 have rendered it unreasonable to rely exclusively on custodian-driven searches.² However, please do perform custodian-driven searches; agencies may not have

¹ The terms “records” is intended in the broadest possible sense and includes without limitation all records or communications preserved in electronic or written form, including but not limited to correspondence, regulations, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, legal and policy memoranda, minutes or notes of meetings and phone calls, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, text communications between phones or other electronic devices (including, but not limited to, communications sent via SMA or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message), training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well as any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations. No category of material should be omitted from search, collection, and production.

² Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies,

direct access to files stored in .PST files, outside of network drives, in paper format, or in personal email accounts. Please do not exclude searches of files or emails in the personal custody of agency officials, such as personal email accounts; records of official business conducted using unofficial systems or stored outside of official files are subject to the Federal Records Act and FOIA.³ Please do not omit such searches merely because the agency has policies and procedures requiring officials to move records to official systems within a certain period of time; separate searches are still necessary in case the policies or procedures were not followed.⁴ Please use the most up-to-date technologies to search for responsive information and take steps to ensure that the most complete repositories of information are searched.⁵ The Requestor is available to work with you to craft appropriate search terms, if necessary.

Please produce records in electronic form. Where possible, please provide responsive material in electronic format by email to yusuf@muslimadvocates.org Please furnish any responsive material being sent by mail to:

Muslim Advocates
PO Box 34440
Washington, DC 20043

Please produce electronic records in their native format. With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the Requestor requests that responsive electronic records be provided electronically in their native file format, if possible. In particular, please

“Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>.

³ *See Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-50 (D.C. Cir. 2016); *cf. Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955-56 (D.C. Cir. 2016).

⁴ *See Order, Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765,*8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work- related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted)), ECF no. 31.

⁵ For example: agencies that have adopted the National Archives and Records Agency (NARA) Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but the agency’s archiving tools would capture that email under Capstone.

produce electronic files in a format that contains the original metadata of the files.⁶ If the records cannot be produced in their native format, please (1) provide an explanation why the records cannot be so produced; and (2) please produce records electronically in a text-searchable, static-image format (PDF), in the best image quality in the agency’s possession, and in separate, Bates-stamped files.

Please produce documents as they become available. The Requester would prefer a rolling production. I would be happy to discuss a search priority and schedule for production.

If you withhold records or parts of records, please provide the justification for the withholding. If it is your position that any portion of the requested records is exempt from disclosure, please provide an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), and describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁷ Please ensure that the *Vaughn* index “describe[s] each document or portion thereof withheld, and for each withholding . . . discuss[es] the consequences of disclosing the sought-after information.”⁸ Please also “supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁹

If you withhold portions of a record, please produce all segregable portions. In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.¹⁰ Please state claims of non-segregability with the same degree of detail as required

⁶ As a non-exhaustive list of examples: Microsoft Excel spreadsheets are to be produced as files that open in Excel, with all original data and formulas intact; Microsoft Word documents are to be produced in the same file format they are stored in, such that they contain all tracked changes and comments present in the documents; and emails are to be produced with all metadata fields intact, including but not limited to the date and time the email was sent, the full names and email addresses of all recipients, any data contained in the bcc: field, and all attachments.

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).

⁸ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987) (emphasis in original).

⁹ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977)).

¹⁰ *Mead Data Central, Inc.*, 566 F.2d at 261.

for claims of exemptions in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

IV. Application for Expedited Processing

Expedited processing of this request is warranted because: (1) there is an “urgency to inform the public about an actual or alleged Federal Government activity” by organizations, like the Requester, “primarily engaged in disseminating information,” 5 U.S.C. § 552(a)(6)(E)(i) & (v)(II); and (2) the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 5 U.S.C. § 552(a)(6)(E)(ii).

Muslim Advocates is engaged in the dissemination of information as a primary part of its mission. Through its website, its outreach to media organizations, its advocacy in government, and its presentations to the public, Muslim Advocates helps shine a light on government practices that affect the Muslim community and others.

This Request seeks information about the government’s mass deportation flights in general as well as information about one particular failed flight that resulted in serious injuries to the deportees. The information sought in the Request raises serious concerns about the conditions on deportation flights, giving rise to “questions about the government’s integrity” and an “urgency to inform the public.” Further, attorneys and other services providers need to understand the relevant policies, procedures, and practices to effectively serve and advise the population of individuals potentially affected by this initiative—which runs to the many tens of thousands. The requested records seek to inform the public about an urgent issue implicating the privacy and law enforcement prospects of thousands of people, and which has already garnered significant media attention.¹¹

Given the foregoing, the Requester has satisfied the requirements for expedited processing of this Request. Pursuant to applicable statutes and regulations, the Requestor expects a determination regarding expedited processing within 10 days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I).

¹¹ Maryam Saleh, *Excessive Force: ICE Shackled 92 Somalis for 40 Hours on a Failed Deportation Flight*, THE INTERCEPT (MAR. 4, 2018); Jacey Fortin, *U.S. Put 92 Somalis on a Deporttion Flight, Then Brought Them Back*, NY TIMES (Dec. 9, 2017); Carlos Ballesteros, *ICE Kept 92 Immigrants Shackled on a Plane for Two Days in ‘Slave Ship’ Conditions, Advocates Say*, NEWSWEEK (Dec. 14, 2017); *see generally*, Layla Mahmood, *Deported from the US to a Somali Danger Zone*, BBC NEWS (Jul. 4, 2018); Jeremy Redmon, *U.S. Deportation Flighth Returns from Africa with All on Board*, AJC (Dec. 9, 2017); *A Rare Look Inside A Deportation Flight*, CNN (Oct. 11, 2017) (video); Catherine E. Shoichet & Curt Merrill, *ICE Air: How US Deportation Flights Work*, CNN (May 29, 2017);



Through my signature below, I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief. *See* 5 U.S.C. § 552(a)(6)(E)(vi).

V. Application for Waiver or Limitation of Fees

The Requestor requests a waiver of fees for document search, review, and duplication on the grounds that disclosure of the requested records is in the public interest and because disclosure 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). The Requestor also requests a waiver of search fees on the grounds that the Requestor qualifies as a “representative of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

- A. *This request 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 Requestor.*

An agency must waive or limit FOIA-related fees if a request 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). This Request meets both these requirements.

These records will shed light on current government practices pertaining to the conditions of transportation and deportation of thousands of noncitizens. Further, the information in these documents has the potential to either reveal or confirm the absence of government misconduct, which is inherently in the public interest. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313-14 (D.C. Cir. 2003) (“[T]he public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted.”). News accounts¹² underscore the substantial public interest in the records sought through this request. Given the ongoing and widespread media attention to this issue, the records sought will significantly contribute to public understanding of an issue of profound public importance.

The Requestor is not filing this Request to further its commercial interest. Requester Muslim Advocates is a 501(c)(3) non-profit organization. Any information disclosed by the Requestor as a result of this FOIA request will be made available to the public at no cost through a combination of outreach to media outlets and the Requestor’s website (available at www.muslimadvocates.org). Thus, granting a fee waiver for this Request would fulfill Congress’s legislative intent in amending the FOIA. *See Rossotti*, 326 F.3d at 1312 (“Congress

¹² Catherine E. Shoichet & Curt Merrill, *ICE Air: How US Deportation Flights Work*, CNN (May 29, 2017), <https://www.cnn.com/2017/05/26/us/ice-air-deportation-flights-explainer/index.html> (noting that ICE’s five charter contracts provide up to ten aircraft for routine flights); Fernanda Santos, *The Road, or Flight, From Detention to Deportation*, NY Times (Feb. 20, 2017).

amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” (internal quotation marks omitted)).

B. *The Requestor is a representative of the news media and the records are not sought for commercial use.*

The Requestor also requests a waiver of search fees on the grounds that the Requestor qualifies as “representative[s] of the news media” and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). The Requestor meets the statutory and regulatory definitions of “representative[s] of the news media” because they gather information, exercise editorial discretion in selecting and organizing documents, and “distribute the resulting work to the public.” *Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). The Requestor is therefore a “representative of the news media” for the same reasons: it is “primarily engaged in [the] dissemination of information.” 5 U.S.C. § 552(a)(4)(A)(ii)(II), (6)(E)(v)(II).

Courts have found other organizations whose mission, function, publishing, and public education activities are similar in kind to the Requestor’s to be “representative[s] of the news media” as well. The Requestor has pursued FOIA litigation against many agencies that resulted in the disclosure of previously withheld information, including against the FBI in 2009 and multiple suits against DHS in 2017. *Cf. Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch, self-described as a “public interest law firm,” a news media requester); *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11-12 (D.D.C. 2003) (finding legal advocacy non-profit qualifies as news media requester).

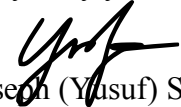
Because these factors weigh in favor of a fee waiver, fees associated with responding to FOIA requests should be waived for the Requestor as a “representative[s] of the news media.”

VI. Conclusion

I would welcome the chance to discuss this matter with you. If you would like to discuss any part of this Request, please contact me.

Thank you for your prompt attention to this matter.

Very truly yours,


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*Admitted in California, supervised by members of the D.C. bar