

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



U.S. Immigration
and Customs
Enforcement

March 15, 2021

Jeramie Scott
EPIC
1519 New Hampshire Ave NW
Washington, DC 20536

RE: Electronic Privacy Information Center v. ICE; 1:20-cv-03071-TNM
ICE FOIA Case Number 2021-ICLI-00005
Second Interim Release

Dear Mr. Scott:

This letter is the second interim response to your client’s Freedom of Information Act (FOIA) requests to U.S. Immigration and Customs Enforcement (ICE), dated October 26, 2020. Your FOIA request seeking records related to ICE’s use of Clearview AI technology and ICE use of facial recognition software.

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

A total of 500 pages of records were reviewed for this interim production. After review of these documents, ICE has determined that 133 pages are duplicate, and 29 pages are non-responsive. Additionally, 15 pages were sent for consultation. Once a response is received from the third-party company, ICE will process and release the pages subject to appropriate withholdings pursuant to the FOIA. The remaining 323 pages of records were located pursuant to a search of the Office of Homeland Security Investigations (HSI). The responsive 323 pages of records are attached and have been marked 2021-ICLI-00005 245 to 2021-ICLI-00005 567. Upon review, ICE has determined that portions of the 323 pages will be withheld pursuant to Exemptions (b)(4),(b)(5), (b)(6), (b)(7)(C), and (b)(7)(E) of the FOIA.

FOIA Exemption 4 protects “trade secrets and commercial or financial information...[that is] privileged or confidential.” Under the new U.S. Supreme Court precedent, *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), information will be deemed “confidential” for the purposes of protection under Exemption 4 “at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.” I have reviewed the responsive documents, the submitter’s objections to release, and relevant case law, and I have determined that portions of the

responsive records are exempt from disclosure under subsection (b)(4) of the FOIA and must be withheld in order to protect the submitter's proprietary interests.

ICE has applied FOIA Exemption (b)(5) to protect from public disclosure intra-agency documents that contain the recommendations, opinions, and conclusions of agency employees, and portions of the responsive documents which qualify for protection under the deliberative process privilege, the attorney-client privilege, and the attorney work-product privilege.

FOIA Exemption (b)(5) protects from disclosure those inter- or intra-agency documents that are normally privileged in the civil discovery context. The three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. After carefully reviewing the responsive documents, I have determined that portions of the responsive documents qualify for protection under the deliberative process privilege, the attorney-client privilege, or the attorney work-product privilege. The deliberative process privilege protects the integrity of the deliberative or decision-making processes within the agency by exempting from mandatory disclosure opinions, conclusions, and recommendations included within inter-agency or intra-agency memoranda or letters. The release of this internal information would discourage the expression of candid opinions and inhibit the free and frank exchange of information among agency personnel. The attorney work-product privilege protects documents and other memoranda prepared by an attorney in contemplation of litigation. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice. It applies to facts divulged by a client to his attorney, and encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect client-supplied information. The attorney-client privilege is not limited to the context of litigation.

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

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

ICE has applied FOIA Exemption 7(E) to protect from disclosure internal agency law enforcement case numbers contained within the document, internal codes used to identify folders in an internal

ICE task management system, law enforcement database category codes, and law enforcement techniques.

FOIA Exemption 7(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. The disclosure of certain law enforcement sensitive information contained within the responsive records could reasonably be expected to risk circumvention of the law. Additionally, the techniques and procedures at issue are not well known to the public.

If you have any questions about this letter, please contact Assistant United States Attorney Michael A. Tilghman II.

Sincerely,

Senior Paralegal, ICE FOIA for
Fernando Pineiro Jr.
(A)FOIA Officer

Enclosure(s): 323 page(s)

cc: Michael A. Tilghman II
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