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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

9 AMERICAN CIVIL LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES,
10

10-CV-0544-BEN WVG

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; UNITED STATES
14 BUREAU OF IMMIGRATION AND CUSTOMS
ENFORCEMENT,

15 Defendants.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF: FAILURE
TO COMPLY WITH THE
FREEDOM OF INFORMATION
ACT**

INTRODUCTION

19 1. On December 18, 2009, the American Civil Liberties Union of San Diego &
20 Imperial Counties ("ACLU-SDIC") submitted a request to the United States Bureau of
21 Immigration and Customs Enforcement ("ICE"), seeking disclosure of records relating to a
22 massive statewide immigration enforcement operation that ICE conducted in California earlier
23 that month ("Request"). ICE has still not substantively responded to the Request by stating
24 whether and when it will produce any requested records.

25 2. ACLU-SDIC brings this civil action to compel ICE to respond to the Request,
26 perform an adequate search for records responsive to the Request, disclose all records, and all
27 portions of records, not clearly exempted from disclosure under FOIA, process the Request on an
28 expedited basis, waive any fees associated with the Request and comply with the other applicable

OR

1 provisions of FOIA.

2 **THE PARTIES**

3 3. Plaintiff ACLU-SDIC is a 501(c)(3) non-profit organization dedicated to the
4 defense of civil rights and civil liberties. It has approximately 8,000 members and is a regional
5 affiliate of the national American Civil Liberties Union. ACLU-SDIC is particularly concerned
6 with issues of immigration enforcement, privacy, and freedom of association, expression, and
7 religion. ACLU-SDIC publishes a newsletter and maintains a website at www.aclusandiego.org
8 that disseminates information of public concern at no charge on civil liberties issues. The office
9 of the ACLU-SDIC is located in San Diego, California, within the venue of this Court.

10 4. Defendant ICE is an agency of the United States government within the meaning
11 of 5 U.S.C. § 552(f)(1).

12 5. Defendant United States Department of Homeland Security is an agency of the
13 United States government within the meaning of 5 U.S.C. § 552(f)(1). The Department of
14 Homeland Security is made up of several agencies, including ICE.

15 **JURISDICTION AND VENUE**

16 6. This Court has subject matter jurisdiction over the claims in this action pursuant to
17 28 U.S.C. § 1331 because they arise under the laws of the United States, in particular the
18 Freedom of Information Act ("FOIA") (5 U.S.C. § 552). FOIA also contains a specific provision
19 providing for this Court's subject matter jurisdiction. 5 U.S.C. § 552(a)(4)(B).

20 7. Venue is proper in this court pursuant to 28 U.S.C. § 1391(e) and/or 5 U.S.C. §
21 552(a)(4)(B).

22 8. This Court has the power to grant declaratory relief pursuant to 28 U.S.C. §§ 2201
23 and 2202 and Federal Rule of Civil Procedure 57.

24 9. This Court has the power to grant injunctive relief pursuant to 5 U.S.C. §
25 552(a)(4)(B) and Federal Rule of Civil Procedure 65. It also has the power to issue any writ
26 necessary or appropriate in aid of its jurisdiction over this case pursuant to 28 U.S.C. § 1651.

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1 of the information is in the public interest because it is likely to contribute significantly to public
2 understanding of the operations or activities of the government and is not primarily in the
3 commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

4 18. FOIA provides that “fees shall be limited to reasonable standard charges for
5 document duplication when records are not sought for commercial use and the request is made
6 by....a representative of the news media,” and 6 C.F.R. § 5.11(d)(1) provides that search fees
7 shall not be charged to members of the news media. A representative of the news media does not
8 have to be a member of the traditional news media; it is “any person or entity that gathers
9 information of potential interest to a segment of the public, uses its editorial skills to turn the raw
10 materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. §
11 552(a)(4)(A)(ii).

12 19. FOIA also requires an agency to produce records on an expedited basis when there
13 is a “compelling need” for expedition. 5 U.S.C. § 552(a)(6)(E)(i). A compelling need is
14 established if a person “primarily engaged in disseminating information” shows an “urgency to
15 inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. §
16 552(a)(6)(E)(v)(ii); 6 C.F.R. § 5.5(d).

17 20. A FOIA requestor need not exhaust administrative remedies before bringing a
18 complaint alleging that an agency improperly denied a request for expedited processing. 5 U.S.C.
19 § 552(a)(6)(E)(iii); *ACLU v. DOJ*, 321 F. Supp. 2d 24, 28-29 (D.D.C. 2004).

20 21. Any requirement to exhaust administrative remedies with respect to the adequacy
21 of a search, disclosure of documents, or waiver or limitation of fees is excused by an agency’s
22 failure to timely and properly address these issues. 5 U.S.C. § 552(a)(6)(C)(i); *Spannaus v. DOJ*,
23 824 F.2d 52, 58 (D.C. Cir. 1987).

24 **STATEMENT OF FACTS**

25 22. On December 18, 2009, Plaintiff mailed the Request to ICE. A copy of the
26 Request is attached as Exhibit A to this complaint and is incorporated by reference.

27 23. Plaintiff’s request was prompted by ICE’s massive enforcement operation that
28 targeted alleged “criminal aliens” across the state of California from December 8 through

1 December 10, 2009. In a December 11, 2009 news release, ICE reported that it had arrested 286
2 aliens in California – 71 of them in San Diego and Imperial Counties – during a “three day
3 enforcement surge” that concluded on December 10, 2009 (hereafter, “California Enforcement
4 Operation”). ICE touted this as its “biggest operation targeting at large criminal aliens.” ICE
5 also reported that more than 80 percent of the “criminal aliens” arrested had prior convictions for
6 serious or violent crimes. The news release is available at
7 <http://www.ice.gov/pi/nr/0912/091211losangeles.htm> (last accessed on March 5, 2010), and is
8 attached as Exhibit B.

9 24. ICE’s enforcement operations ostensibly targeting “criminal aliens” have
10 historically resulted in a disproportionate number of arrests of individuals without any criminal
11 records at all and of individuals with only minor criminal convictions. For example, despite a
12 mandate to arrest dangerous fugitives, 73 percent of the individuals apprehended by ICE’s
13 fugitive operations teams between 2003 and February 2008 had no criminal conviction. Margot
14 Mendelson, Shayna Strom & Michael Wishnie, *Collateral Damage: An Examination of ICE’s*
15 *Fugitive Operations Program*, Migration Policy Institute 1 (2009), available at
16 http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf (last accessed on March 8, 2010).
17 Though ICE’s budget for fugitive operations grew from \$9 million in 2003 to over \$183 million
18 in 2008, the proportion of aliens with a criminal conviction arrested by fugitive operations teams
19 dropped from 32 percent in 2003 to nine percent in 2007. *Id.* Despite these figures, then-ICE
20 chief Julie Myers stated in August 2008 that the targets of fugitive operations teams were
21 individuals with a criminal conviction. *Id.* at 12. With respect to ICE criminal alien enforcement
22 program, there has been “a significant disparity between the program’s stated goals and its actual
23 results.” *Id.* at 18. Against this historical backdrop, there are serious questions of public concern
24 about the manner in which ICE engages in immigration enforcement ostensibly targeting criminal
25 aliens.

26 25. ACLU-SDIC’s Request seeks information and documents relating to a number of
27 questions of serious public concern regarding the California Enforcement Operation. Were the
28 individuals arrested during the California Enforcement Operation really “criminal aliens”? What

1 crimes had they committed? Were the crimes serious? How long ago did the crimes occur?
2 How did ICE decide who to target or otherwise arrest through and during the California
3 Enforcement Operation? Were all the persons arrested as a result of the California Enforcement
4 Operation specifically targeted, or were other individuals arrested as well? Did state, county, city
5 or other sub-national agencies cooperate, participate, or know about the California Enforcement
6 Operation? What proportion of the individuals arrested had a final prior order of removal?
7 Plaintiff's Request was carefully targeted to uncover information from ICE about the California
8 Enforcement Operation in order to answer these questions. FOIA was enacted specifically to give
9 the public access to just such information.

10 26. Plaintiff sought expedited processing of its Request. It explained that its Request
11 implicated matters of urgent public concern for two reasons. First, government enforcement
12 activity on the scale of the California Enforcement Operation may not be tailored to achieve its
13 purported goals of arresting dangerous criminal aliens. Second, such enforcement activity may
14 infringe upon the public's freedoms of privacy and security against unreasonable searches and
15 seizures which are guaranteed by the First, Fourth and Fifth Amendments to the United States
16 Constitution. There is an urgency to expose any misuse of government resources and potential
17 constitutional violations so that they immediately cease.

18 27. In connection with its request for expedited processing, Plaintiff also explained
19 that it is primarily engaged in disseminating information. For example, the ACLU-SDIC sends
20 out newsletters, issues news briefings, and maintains a website that publishes information of
21 public concern at no charge.

22 28. Plaintiff explained that the records covered by its Request relate to a matter of
23 widespread and exceptional media interest, as evidenced by articles covering the California
24 Enforcement Operation in all the major national newspapers, including the *Los Angeles Times*,
25 the *New York Times*, the *Wall Street Journal*, and the *Washington Post*. Plaintiff noted that a
26 number of regional newspapers also covered the California Enforcement Operation, and similar
27 incidents have been of intense public concern for years.

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1 29. Plaintiff's request also sought a waiver of search and review fees because it is not
2 seeking the information for a commercial purpose and is a non-profit that intends to disseminate
3 the information gathered by the Request to the public at no cost. In addition, Plaintiff is a
4 representative of the news media because it gathers information of potential interest to a segment
5 of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes
6 that work to an audience.

7 30. Finally, Plaintiff's request sought a waiver or reduction of all costs because the
8 information request was not for commercial use, will be disseminated to the public at no cost, and
9 disclosure of the information is in the public interest and may contribute to public understanding
10 of ICE policies and practices regarding immigration enforcement.

11 31. When ACLU-SDIC counsel telephoned the ICE FOIA office on Friday, January
12 29, 2010, he was informed ICE received the Request on December 29, 2009. ICE did not provide
13 any information about whether and when it would produce any requested records.

14 32. On January 8, 2010, ICE sent a letter addressing *only* the requests for a waiver of
15 fees and the expedited processing of the FOIA request. The letter is attached as Exhibit C.¹ The
16 letter informed ACLU-SDIC that the fee waiver request would be held in abeyance, and denied
17 the request for expedited processing. The letter informed ACLU-SDIC that it might appeal the
18 decision denying expedited processing and holding the fee waiver in abeyance. However, the
19 letter did not indicate whether and when the agency would definitively rule on the fee waiver
20 issue or comply with the FOIA Request itself.

21 33. On March 8, 2010, ACLU-SDIC administratively appealed ICE's denial of
22 expedited processing and failure to decide its request for a fee waiver, though this administrative
23 appeal was precautionary and does not constitute a concession that exhaustion of administrative
24 remedies on those issues is necessary. ACLU-SDIC noted that there was urgency to inform the
25 public of the government's immigration enforcement activities, particularly in light of ongoing
26 debates about national immigration reform and the proper allocation of enforcement resources in
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28 ¹ ICE's letter states that our FOIA request was dated May 2, 2008. This is clearly a clerical error.

1 such a scheme for reform. The administrative appeal is attached as Exhibit D and incorporated by
2 reference. ICE has not ruled on the administrative appeal.

3 34. ICE has not substantively responded to the Request by stating whether and when it
4 will produce any requested records, even though the 20 business day statutory deadline for such a
5 response fell on January 28, 2010. See 5 U.S.C. § 552(a)(6)(A)(i).

6 **CLAIMS FOR RELIEF**

7 **First Count**

8 **Violation of FOIA for Improper Denial of Request for Expedited Processing**

9 35. Plaintiff realleges and incorporates, as though fully set forth herein, each and every
10 allegation contained in the above paragraphs.

11 36. Defendants' denial of Plaintiff's request for expedited processing of the Request
12 violates 5 U.S.C. § 552(a)(6)(E)(v)(II) and 6 C.F.R. § 5.5(d).

13 **Second Count**

14 **Violation of FOIA for Failure to Respond to Request for Records**

15 37. Plaintiff realleges and incorporates, as though fully set forth herein, each and every
16 allegation contained in the above paragraphs.

17 38. Defendants' failure to respond to Plaintiff's Request violates 5 U.S.C. §
18 552(a)(6)(A)(i).

19 **Third Count**

20 **Violation of FOIA for Failure to Adequately Search for and Promptly Release Records**

21 39. Plaintiff realleges and incorporates, as though fully set forth herein, each and every
22 allegation contained in the above paragraphs.

23 40. Defendants failed to make an adequate search for records responsive to Plaintiff's
24 FOIA request and to promptly release the responsive records sought by Plaintiff, in violation of 5
25 U.S.C. § 552(a)(3)(A)-(D).

26 **Fourth Count**

27 **Violation of FOIA for Improper Disposition of Fee Limitation or Waiver Request**

28 41. Plaintiff realleges and incorporates, as though fully set forth herein, each and every

1 allegation contained in the above paragraphs.

2 42. Defendants failed to grant Plaintiff's fee limitation or waiver request in violation
3 of 5 U.S.C. § 552(a)(4)(A)(ii)(II); § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(d)(I).

4 **PRAYER FOR RELIEF**

5 Wherefore, Plaintiff prays that this Court:

- 6 a) Order Defendants to process Plaintiff's FOIA request immediately and
7 expeditiously and, upon such processing, to make available the requested records to Plaintiff.
8 b) Declare that Defendants' failure to disclose the records requested by Plaintiff is
9 unlawful;
10 c) Grant Plaintiff's request for a fee waiver or limitation;
11 d) Award Plaintiff costs and reasonable attorney fees incurred in this action pursuant
12 to 5 U.S.C. § 552(a)(4)(E);
13 e) Grant such other relief as the Court may deem just and proper.

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Dated: March 15, 2010


SEAN RIORDAN
Attorney for Plaintiff