



IMMIGRANT  
LEGAL  
DEFENSE

***Via DHS and ICE Online FOIA Portals***

November 9, 2023

U.S. Department of Homeland Security  
Privacy Office, Mail Stop 0655  
Department of Homeland Security  
2707 Martin Luther King Jr. Ave. SE  
Washington, DC 20528-065

U.S. Immigration and Customs Enforcement  
Office of the Principal Legal Advisor  
500 12th Street SW, Stop 2900  
Washington, DC 20536-5900

**Re: Freedom of Information Act Request Regarding DHS and ICE Data Breach**

Dear DHS and ICE FOIA Officers,

This is a request for records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(3), on behalf of Immigrant Legal Defense (ILD or Requester). In accordance with 5 U.S.C. § 552(a)(6)(A)(i), I expect a response to this request within 20 working days, unless otherwise permitted by statute.

**Records Request:**

On or about November 28, 2022, Immigration and Customs Enforcement (ICE) posted personally identifiable information (PII) for approximately 6,252 individuals seeking protection-based relief in the United States on its website.<sup>1</sup> The Department of Homeland Security (DHS) further compromised this PII on approximately December 7, 2022.<sup>2</sup>

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<sup>1</sup> See U.S. Immigration and Customs Enforcement, *Unintentional Disclosures of Personally Identifiable Information on November 28 and December 7, 2022* (June 20, 2023), <https://www.ice.gov/pii>; see also Hamed Aleaziz, *ICE releases thousands of migrants affected by data breach*, Los Angeles Times (Jan. 19, 2023), <https://www.latimes.com/world-nation/story/2023-01-19/ice-leak-personal-information-immigrants-asylum>.

<sup>2</sup> *Id.*

On February 22, 2023, ICE responded to a query by Congresswoman Norma J. Torres to address its data breach involving the PII of the thousands of individuals in its custody.<sup>3</sup> According to ICE, the breach of data was due to “human error.”<sup>4</sup> Further, ICE posted the breached data for approximately 5 hours before removing the information from its website within 11 minutes of being notified of its posting by a U.S.-based non-governmental organization.<sup>5</sup> In its response to Congresswoman Torres’s query, ICE assured members of Congress that individuals’ privacy rights are safeguarded through training to employees, contractors and field personnel on preserving confidentiality over PII and asylum-related information.<sup>6</sup> With regard to the data breach, ICE reported: “The file was downloaded 18 times, 12 of which were from within the DHS network.”<sup>7</sup> However, ICE “respectfully decline[d] to provide information about the locations from which the remaining six downloads originated.”<sup>8</sup>

Based on the foregoing, ILD requests that DHS and ICE produce all physical and electronic records<sup>9</sup> in DHS’s and ICE’s possession pertaining to the data breach described above as follows:

- Communications between DHS and ICE employees, between DHS and/or ICE employees and employees of other DHS subagencies, between DHS and/or ICE employees and employees of the Department of Justice (DOJ) subagencies, including the Executive Office of Immigration Review (EOIR), and between DHS and/or ICE employees and third parties, relating to:
  - The public sharing of personally identifying information (PII) on or about November 28, 2022, and/or on or about December 7, 2022, and/or on any other date on which DHS and/or ICE disclosed PII relating to individuals in ICE custody, whether purposefully or inadvertently;
- Any investigation by DHS and/or ICE or any other component under DHS into the public release of individuals’ PII on or about November 28, 2022 and/or on or about December 7, 2022, and/or on any other date on which DHS and/or ICE purposefully or inadvertently caused PII for individuals in ICE custody to be publicly released;
- The identity, IP addresses, and/or geographic location of all non-DHS parties that accessed, downloaded or in any manner retrieved PII for individuals in ICE custody directly from

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<sup>3</sup> U.S. Immigration and Customs Enforcement, Response to Query by Congresswoman Norma J. Torres (Feb. 23, 2023).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup>The term “records” in this request includes, but is not limited to: communications, correspondence, directives, documents, data, videotapes, audiotapes, e-mails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and 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.

DHS's and/or ICE's websites on or about November 28, 2022, and/or on or about December 7, 2022, and/or on any other date on which DHS and/or ICE records reflect third parties accessed, downloaded, or in any manner retrieved PII for individuals in ICE custody directly from DHS and/or ICE's websites;

- Records reflecting any efforts by DHS and/or ICE to admonish third parties regarding the unauthorized use of the PII accessed on the dates referenced above, including any “clawback” letters that DHS and/or ICE may have issued to such third parties;
- Any non-exempt written drafts and/or final conclusions, legal or otherwise, by DHS and/or ICE as to:
  - How the referenced data breach occurred;
  - Whether and if so, how the data breach compromised the right to privacy and/or right to confidentiality under 8 C.F.R. § 208.6 for individuals in ICE custody;
  - Any duty, obligation and/or efforts by DHS and/or ICE to remedy its breach of individuals' right to privacy and/or right to confidentiality under 8 C.F.R. § 208.6; and
  - Specific recommendations by and/or to DHS and/or ICE employees as to appropriate remedial steps in individual cases in response to the data breach (e.g., release from custody, termination of removal proceedings) and what criteria, if any, DHS and/or ICE considered in taking remedial steps as to individuals whose PII was disclosed;
- Materials (written, audio and/or video) for “the annual privacy training that covers the proper handling (e.g., collection, use, disclosure) of personally identifiable information (PII)” offered to ICE employees and its contractors, as referenced in ICE's February 22, 2023 response to Congresswoman Torres's query; and
- Materials (written, audio and/or video) for the ICE Basic Immigration Enforcement Training Program, as referenced in ICE's February 22, 2023 response to Congresswoman Torres's query.

To the extent that Requester has not identified a specific record that DHS and/or ICE has in its possession and that is responsive to the present request, DHS and/or ICE must liberally construe this reasonably described request as part of its obligation to produce all responsive records. *See Truitt v. Department of State*, 897 F.2d 540, 544–45 (D.C. Cir. 1990).

Please note that this request does not include any records which DHS and/or ICE have already made publicly available.

**Fee Waiver Request:**

Requester seeks a fee waiver because the information it seeks 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 [requesters]....” 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1); (k)(2)(i)–(iii).

### *I. Disclosure Will Contribute to Public Understanding of DHS and ICE Operations*

The nature, scope, and ramifications of the DHS and ICE data breaches are precisely the type of governmental operations about which the public has a strong interest in understanding. Further, given the high stakes at issue for asylum-seekers, information regarding how DHS and ICE have addressed the data breach – and how these agencies generally protect highly sensitive information – is necessary to assure the public that impacted individuals are safeguarded and the agencies have taken appropriate remedial measures.

Applications for asylum and other protection-based claims, such as those arising under the Convention Against Torture (CAT), are subject to stringent confidentiality protections under U.S. law. *See* 8 C.F.R. § 208.6 (“Information contained in or pertaining to any [referenced] application . . . shall not be disclosed without the written consent of the applicant,” except in narrow circumstances not relevant here). DHS has elsewhere noted, that the “regulations safeguard information that, if disclosed publicly, could subject the claimant to retaliatory measures by government authorities or non-state actors in the event that the claimant is repatriated, or endanger the security of the claimant’s family members who may still be residing in the country of origin.” *Amin v. Mukasey*, 535 F.3d 243, 253 (4th Cir. 2008) (citation omitted). There can be no question that DHS’s and ICE’s data breach violated these asylum-seekers’ confidentiality rights.

Moreover, while DHS and ICE purported to implement remedial measures to lessen the adverse impact of the data breach, these measures have been non-transparent and haphazard. In Requester’s experience and to its knowledge, ICE provided scant written notice to impacted individuals. Crucially, neither DHS nor ICE have provided concrete information as to what unauthorized parties accessed the PII of impacted individuals – including whether individuals’ home countries accessed the data. This is particularly troubling given the purpose of 8 C.F.R. § 208.6, as the agency itself recognizes. In fact, public reporting shows that the government of Cuba was at least one of the unauthorized parties that accessed the breached information, which contained the identities of Cuban nationals that had sought asylum in the United States.<sup>10</sup> While ICE claimed in some notices that it would keep the impacted noncitizen apprised of its investigation, no impacted individual has received further information in their case from DHS or ICE to Requester’s knowledge.

Further, other unauthorized parties beyond foreign governments are also cause for concern. Many asylum applicants fear persecution or torture by non-governmental actors, such as organized cartels with the well-accepted ability and willingness to persecute and/or torture individuals. *See, e.g., Hermosillo v. Garland*, 80 F.4th 1127 (9th Cir. 2023). Further, entities such as cartels are

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<sup>10</sup> Hamed Aleaziz, *DHS accidentally informed Cuba that deportees had sought protection in U.S.*, Los Angeles Times (Dec. 19, 2022), <https://www.latimes.com/world-nation/story/2022-12-19/cuba-immigrants-deported-asylum-leak>.

known to have sophisticated technological capabilities, which can target innocent individuals.<sup>11</sup> For this additional reason, records clarifying what entities accessed the breached data that is the subject of this request is crucial for countless members of the public, including affected individuals, their attorneys, and those who advocate for meaningful transparency and due process for asylum-seekers.

Affected noncitizens and their attorneys have attempted to obtain information via other channels, such as requests for subpoenas from immigration judges, FOIA requests for individuals and requests to agency officials. These efforts have had mixed results and yielded no concrete information regarding how individuals' information was accessed and, importantly, whether individuals' home countries or third parties who can cause persecution or torture to asylum-seekers, accessed the data. In its letter to Congresswoman Torres's query, ICE responded that it "respectfully declines to provide information about the locations from which the remaining six downloads originated."<sup>12</sup> ICE cited no exemption to disclosure for this position and in Requester's view, disclosure on this point, as well as other aspects of the DHS and ICE data breach, is warranted under the FOIA.

## *II. Disclosure of Records Is Not in the Commercial Interest of Requester*

ILD is a not-for-profit organization and has no commercial interest in the present request. Rather, this request for information furthers ILD's interests in safeguarding due process and the privacy and confidentiality rights of noncitizens seeking asylum, including ILD clients, as well as in securing transparency by DHS and ICE in addressing this highly concerning breach of data and confidentiality involving thousands of asylum-seekers. ILD intends to share the information it receives in response to this request with members of the public at no cost.

### **Request to Expedite:**

This request for records meets the criteria for expedited treatment. *See* 5 U.S.C. § 552(a)(6)(E)(i); 6 C.F.R. § 5.5(e). A request qualifies for expedited treatment if it involves one of the following criteria:

- (i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person who is primarily engaged in disseminating information; (iii) The loss of substantial due process rights; or (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

6 C.F.R. § 5.5(e)(1)(i)-(iv). Here, ILD's present request meets at least two of the criteria for expedited processing: one, a lack of expedited processing poses "an imminent threat" to the life

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<sup>11</sup> *See, e.g.,* Cecile Schilis-Gallego and Nina Lakhani, "It's a free-for-all": how hi-tech spyware ends up in the hands of Mexico's cartels, *The Guardian* (Dec. 7, 2020),

<https://www.theguardian.com/world/2020/dec/07/mexico-cartels-drugs-spying-corruption>.

<sup>12</sup> *Supra*, n. 3.

and physical safety of individuals impacted by the data breach, including individuals who remain in ICE custody, and two, absent expedited processing, individuals face “the loss of substantial due process rights.”

Currently, many asylum applicants continue to litigate their asylum claims in immigration court. These claims are all based on a fear of persecution or torture by their home government, or on their home government’s inability or unwillingness to prevent persecution or its acquiescence to torture. As noted previously, these claims can also involve non-state actors with powerful and technologically sophisticated networks. For these reasons, records related to this request are material to claims that implicate an “imminent threat to life.” Moreover, for similar reasons, information regarding DHS’s and ICE’s breach of privacy and/or confidentiality in these cases raises due process concerns and as such, an obligation by the U.S. government to provide all relevant information. *See, e.g., Amin*, 535 F.3d at 255-56. ILD thus urges that DHS and ICE must release all records in an expeditious matter.

### **Exemptions:**

In the spirit of transparency, the FOIA Improvement Act of 2016 incorporated a “reasonably foreseeable harm” provision to the FOIA statute.<sup>13</sup> Under 5 U.S.C. § 522(a)(8)(A)(i), DHS and ICE may withhold records only “the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.” Requester urges that DHS and ICE should exercise full transparency on this matter of crucial importance and, in addition to conducting an adequate search, produce records in keeping with this important amendment to the FOIA statute.

If DHS and/or ICE conclude that statutory exemptions apply to any of the information requested, 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. Moreover, even if DHS and/or ICE invoke exemptions to responsive records, DHS and/or ICE must still “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible” and “take reasonable steps necessary to segregate and release nonexempt information.” 5 U.S.C. § 522(a)(8)(A)(ii); *see also* 5 U.S.C. § 522(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”), Nonetheless, Requester reserves the right to challenge any claimed exemptions as permitted under the FOIA statute.

Thank you for your attention to this request. Please do not hesitate to contact me as needed.

Sincerely,



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<sup>13</sup> FOIA Improvement Act of 2016, Pub. L. No. 114-185 (2016).