

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

)
AMERICAN CIVIL LIBERTIES UNION)
FOUNDATION OF MARYLAND,)
3600 Clipper Mill Rd. Suite 350)
Baltimore, MD 21211)

Plaintiff,)

v.)

Case No. _____

)
U.S. DEPARTMENT OF HOMELAND)
SECURITY)
3801 Nebraska Ave. NW)
Washington, DC 20016)

and)

)
U.S. IMMIGRATION)
AND CUSTOMS ENFORCEMENT,)
500 12th St. SW)
Washington, DC 20536)

Defendants.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. The American Civil Liberties Union Foundation of Maryland (“Plaintiff” or “ACLU Maryland”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq., as amended, to obtain injunctive and other appropriate relief regarding Defendants’ U.S. Department of Homeland Security (“DHS”) and U.S. Immigration and Customs Enforcement (“ICE”) (collectively, “Defendants”) failure to produce, and unlawful withholding, of responsive records in response to a FOIA request submitted by Plaintiff on November 29, 2017 (“FOIA Request”). A true and correct copy of the Request is attached as Exhibit 1.

2. As described therein, the FOIA Request sought records concerning (i) the annual results of the Harford County Sheriff's Office 287(g) program, including specifically information regarding 105 individuals who were subjected to further immigration screening; and (ii) policies or memoranda used to identify these individuals as people of special interest.

3. The Harford County Sheriff's Office claimed in a press release on November 27, 2017 that the 287(g) program has been a success for public safety, but has provided little to no specific information that would allow the public to evaluate that claim.

4. ACLU Maryland sent the FOIA Request to obtain information about the individuals identified in the press release that have gone through the program to gain a better understanding of how Harford County is operating its 287(g) program. It has been reported that many 287(g) programs across the country have encouraged racial profiling, including in nearby Frederick County, and the information requested will allow ACLU Maryland and the public to evaluate whether the Harford County program is being operated consistently with civil and constitutional rights.¹ Without the requested information, it is impossible to understand how the 287(g) program impacts communities of color and non-U.S. citizen communities, and whether the claims made by the Sheriff regarding the success of the program are grounded in substantiated fact.

¹ Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 JOURNAL ON MIGRATION AND HUMAN SECURITY 645 (2017), Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POLICY INSTITUTE, 21, 19,24 (2011), available at <http://www.migrationpolicy.org/pubs/287g-divergence.pdf>; Nicholas C. Stern, *Group to sue Frederick County Sheriff for racial profiling*, FREDERICK NEWS POST, Nov. 9, 2009, available at http://www.fredericknewspost.com/archive/group-to-suefrederick-county-sheriff-for-racial-profiling/article_0faf5116-e7bc-526d-9159-e90264b05a03.html; Megan Cassidy, *Former Maricopa County Sheriff Joe Arpaio Guilty of Criminal Contempt*, AZCENTRAL, available at <https://www.azcentral.com/story/news/local/phoenix/2017/07/31/maricopa-county-sheriff-joe-arpaio-found-guilty-criminal-contempt-court/486278001/>.

5. In order to be held accountable to the community the Harford County Sheriff serves, the public must be aware of who the program is targeting, what communities are being prioritized for immigration enforcement, and how that targeting and prioritization is being implemented.

6. Transparency through the release of public documents is a means of holding elected officials accountable for the manner in which they carry out their public duties and for the claims they make to the public about those duties. Releasing records regarding who and how the Harford County Sheriff targets particular non-citizen communities is important information for voters to consider, especially since County taxpayer money is being diverted from fulfilling the local criminal enforcement² needs of the community, and on a purely voluntary basis, the Sheriff is assuming immigration enforcement responsibilities of the federal government.

7. This action is necessary because Defendants have failed to provide the requested records to which Plaintiff and the public are entitled.

JURISDICTION

8. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701–706, and 28 U.S.C. § 1331.

VENUE

9. Venue in the District of Maryland is proper under 5 U.S.C. § 552(a)(4)(B) as the requested agency records are, upon information and belief, situated within this District at ICE

² Memorandum of Agreement between ICE and the Harford County Sheriff's Office, 6 available at: <https://www.ice.gov/doclib/287gMOA/HarfordCountyMoa10-26-2016.pdf> (agreeing to pay for, at no cost to ICE, inter alia personnel expenses, salaries, benefits, overtime, training, travel, an office within HCSO facilities, expenses related to cabling and power upgrades, administrative supplies, and security equipment, despite the new responsibilities HCSO officers will undertake as deputized ICE officers).

facilities at or near the Baltimore Field Office or Enforcement and Removal Operations office, 31 Hopkins Plaza 7th Floor, Baltimore MD, 21201, and local records are collected and kept at the Harford County Sheriff's Office, 45 South Main Street, Bel Air MD, 21014.

10. Plaintiff's principal place of business is in the District of Maryland. For the same reasons, venue also is proper under 28 U.S.C. § 1391(e).

PARTIES

11. Plaintiff is a nonprofit, 501(c)(3) membership organization that educates the public about the civil liberties implications of government practices and proposed local, state and federal policies and legislation, provides analysis of such practices and policies, and mobilizes its members against policies that put individual civil rights and civil liberties at risk. Plaintiff regularly disseminates information about the impact of government practices and policies on constitutional rights to over 40,000 members and supporters.

12. Defendant U.S. Department of Homeland Security ("DHS") is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

13. Defendant Immigration and Customs Enforcement ("ICE") is an executive agency of the U.S. government and is principally responsible for enforcing federal immigration laws. ICE is an agency within the meaning of 5 U.S.C. § 552(f)(1) and an agency within DHS.

14. Plaintiff is informed and believes that Defendants have possession, custody or control of the requested records.

FACTS

15. On November 27, 2017, the Harford County Sheriff's Office issued a press release called "287(g) Successful in First Year of Implementation," claiming that 105 individuals

were identified for further screening, 44 as being removable and a priority for ICE. The countries of origin included individuals from El Salvador, Italy, Mexico, Kenya, Cuba, Vietnam, and Jamaica, but the number of individuals from each of these countries was not identified.

16. The press release quotes Harford County Sheriff, Jeffrey Gahler, saying “the stats speak for themselves. . . without question, adding this tool to our crime fighting tool belt helps protect Harford County residents. . . without this program, violent criminals including four members of a violent gang could still be free and in our community,” without releasing the “stats” to the public.

17. On November 28, 2017 ACLU Maryland contacted the Harford County Sheriff’s Office for more information regarding the information contained in the press release by electronic mail, and was instructed to make a Freedom of Information Act request to the Washington, D.C. ICE FOIA Office, since the requested data was collected through a federal program.

18. ACLU Maryland sent a formal FOIA request to the ICE FOIA Office on November 29, 2017.

19. Specifically, the FOIA Request sought:

a. Information on the 105 arrested individuals who were identified for further screening, including but not limited to:

1. Name;
2. Age;
3. Race and/or ethnicity;
4. Sex;
5. Date and location of arrest;

6. Country of origin;
7. Immigration status;
8. Basis for arrest, e.g. charges brought against the individual;
9. Criminal history;
10. Arresting law enforcement agency, e.g. HCSO, Maryland State Police, Bel Air Police, etc.;

b. Policies and memoranda explaining:

1. How agents flagged these 105 individuals for additional screening;
2. The priority categories used to identify a smaller group of 44 individuals as removal priorities;
3. How agents identified the five gang members mentioned in the press release, e.g. the individual had visible tattoos, the individual was entered into a gang database, etc.

20. The ICE FOIA Office acknowledged receipt of ACLU Maryland's FOIA Request on December 12, 2017, granted Plaintiff's request for a fee waiver, issued FOIA case number 2018-ICFO-10938, and requested an extension of ten business days, a request that was granted by the ACLU Maryland. Notwithstanding, ICE did not respond to ACLU Maryland's FOIA Request within the statutorily mandated 20-business-day deadline plus the ten-day extension.

21. On February 5, 2018, 36 business days after ICE acknowledged receipt of the FOIA Request, ACLU Maryland administratively appealed ICE's constructive denial of the FOIA Request.

22. The February 5 appeal letter referenced exhibits that were inadvertently not attached to the letter, so ACLU Maryland sent an addendum on February 6, 2018 that included

the referenced exhibits, including the original FOIA request, the response from the ICE FOIA Office, and the U.S. Postal Service tracking information. The ICE FOIA Office acknowledged receipt of the appeal on February 14, 2018.

23. Seventeen (17) days later, on March 12, 2018, the ICE Law Division responded to the appeal and attempted to excuse its failure to answer the FOIA Request within the statutory mandated 20-days by claiming that “in many instances, an agency cannot meet [the 20 day deadline].” It then stated that the appeal was being remanded to the ICE FOIA Office to complete the search for the requested records.

24. On April 4, 2018, ACLU Maryland received a response to the FOIA request that consisted only of a formal letter and an Excel spreadsheet containing entries for 71 individuals, even though the Harford County Sheriff’s Office stated that 105 individuals were processed through the 287(g) program in their press release.

25. The spreadsheet included the citizenship, primary language, English literacy, English proficiency, and gender of the 71 individuals, but exempted most of the requested material as follows:

- a. Name: pursuant to Exemptions 6 and 7(C) of FOIA, 5 U.S.C. §§ 552(b)(6) and 552(7)(C)
- b. Alien number: pursuant to Exemptions 6 and 7(C); and
- c. Birth date: pursuant to Exemptions 6 and 7(C).

26. The spreadsheet did not include any information, as requested by ACLU Maryland, regarding race or ethnicity, date and location of the arrest, immigration status, basis for arrest, criminal history, or the arresting law enforcement agency (e.g. Harford County Sheriff, Maryland State Police etc.). In addition, nothing was provided in response to ACLU Maryland’s

request for policies and memoranda explaining how agents flagged the 105 individuals mentioned in the HSCO press release, the priority categories used to identify the 44 individuals labeled as removal priorities, or how agents identified the five gang members, and no specific exemption was claimed for withholding this information, although Defendants generally claimed exemption 7(E) applied to the disclosure of “certain law enforcement sensitive information.”

27. Defendants also generally claimed exemptions 6 and 7(C) to “protect from disclosure the names, e-mail addresses, and phone numbers of DHS employees contained within the documents” and exemption 7(E) to “protect from disclosure internal agency case numbers contained within the document.”

28. On April 30, 2018, ACLU Maryland appealed Defendants’ failure to produce all records and the unlawful withholding of responsive records based on the inappropriate application of FOIA Exemptions 6, 7(C), and 7(E), and without providing a proper a proper basis for why or how those exemptions applied.

29. On May 9, 2018, in a response that did not reference the April 30 appeal letter, Defendants provided ACLU Maryland a copy of President Trump’s Executive Order 13768 titled “Enhancing Public Safety in the Interior of the United States,” in apparent response to ACLU Maryland’s Request for policies and memoranda regarding “(1) how agents flagged these 105 individuals. . .(2) the priority categories used to identify smaller group of 44 individuals as removal priorities; (3) How agents identified the five gang members.” The Executive Order is wholly unresponsive to the request for specific policies and procedures regarding the implementation of Harford County’s 287(g) program and represents a cynical and cavalier approach to compliance with the requirements of FOIA and to identifying records that are actually responsive to ACLU Maryland’s request.

30. ACLU Maryland has also attempted to obtain the requested information through a request directly to the Harford County Sheriff's Office, by submitting a request through the Maryland Public Information Act on April 30, 2018, but that request was denied on the grounds that the information is in ICE's custody.

31. ACLU Maryland has exhausted all administrative appeals under 5 U.S.C. § 552(a)(6)(A)(ii) seeking redress of Defendants' failure to conduct a proper search for all responsive records, to produce all responsive records, and for unlawful withholding responsive records under FOIA Exemptions 6, 7(C), and 7(E).

CLAIM FOR RELIEF

Violation of FOIA for Failure to Make Records Available

32. Plaintiff incorporates by reference the allegations in the foregoing paragraphs as though set forth fully herein.

33. Plaintiff has a legal right under FOIA to obtain the specific agency records requested on November 29, 2018, and there exists no legal basis for Defendants' to deny and withhold the requested records from the Plaintiff, its members, and the public.

34. Defendants' failure to promptly make the requested records available violates FOIA, 5 U.S.C. § 552(a)(3)(A), and applicable regulations promulgated thereunder.

35. On information and belief, Defendants currently have possession, custody, or control of the requested records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Declare that Defendants violated FOIA by unlawfully withholding the requested records;

- B. Order Defendants to immediately make the requested records available to the Plaintiff without charge for any search or duplication fees;
- C. Award Plaintiff its reasonable costs and attorneys' fees as provided by 5 U.S.C. § 552(a)(4)(E); and
- D. Grant such other relief as the Court may deem just and proper.

Dated this 25th day of July, 2018.

Respectfully Submitted,

/s/ Nick Steiner
Nick Steiner, Esq. (Fed Bar No. 19670)
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
Telephone No. 410-889-8550
Email: steiner@aclu-md.org

/s/ Steven R. Johnson
Steven R. Johnson, Esq.
(Fed. Bar No. 15163)
Timothy F McCormack
(Fed Bar No. 03565)
Ballard Spahr LLP
300 East Lombard Street, 18th Floor
Baltimore, MD 21201
Telephone No. 410-528-5531
Email: johnsonsr@ballardspahr.com
mccormackt@ballardspahr.com