



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION



August 4, 2020

U.S. Department of Justice  
Executive Office for Immigration Review

Via email: [EOIR.FOIARequests@usdoj.gov](mailto:EOIR.FOIARequests@usdoj.gov)

**Re: Freedom of Information Act Request for COVID-19-related Records**

Dear Sir or Madam:

The American Immigration Council (Council), the American Immigration Lawyers Association (AILA) and the National Lawyers Project for the National Lawyers Guild (NIPNLG) ("Requesters") submit this request for information under the Freedom of Information Act (FOIA), 5 U.S.C. §552, *et. seq.*

**I. RECORDS SOUGHT**

Requesters seek the following records<sup>1</sup> from the Executive Office for Immigration Review (EOIR):

*Agency Guidance issued between February 1, 2020 and the present*

1. Guidance issued by the U.S. Department of Justice (DOJ), the Executive Office for Immigration Review (EOIR), and the U.S. General Services Administration (GSA) regarding policies and procedures immigration courts and immigration adjudication centers should follow in response to COVID-19, including health and safety measures that must be followed, criteria to be considered when deciding to open or close courts and adjudication centers, and protocols outlining final decision-making authority for court operations in response to COVID-19.
2. Information provided by the DOJ and EOIR court staff about persons at immigration courts and immigration adjudication centers who may have been exposed to COVID-19 or who had suspected or confirmed cases of COVID-19;

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<sup>1</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 such as cell phones, 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.

3. Policies and procedures adopted at each immigration court and immigration adjudication center for responding to COVID-19, including guidance regarding the handling of removal cases, including the issuance of *in absentia* orders during the period of state and/or federal COVID emergencies; health and safety measures that must be followed; and criteria to be considered when deciding to open or close immigration courts;
4. Updates by each immigration court and immigration adjudication center to court staff about individuals at the immigration court or immigration adjudication center who may have been exposed to COVID-19 or who had suspected or confirmed cases of COVID-19;

*Correspondence between February 1, 2020 and the present*

5. Correspondence sent or received by EOIR officials including, but not limited to, Director, Acting Deputy Director, Chief Immigration Judge (including acting), Deputy Chief Immigration Judges, Assistant Chief Immigration Judges, Court Administrators, Assistant Director for the Office of Policy, and Public Information Officers, regarding health and safety concerns related to COVID-19 (correspondence requested here would include correspondence with White House officials);
6. Correspondence among EOIR officials and U.S. Immigration and Customs (ICE) officials, including ICE counsel and ICE officers in charge of select locations, regarding health and safety concerns related to COVID-19;
7. Correspondence among EOIR officials and the U.S. General Services Administration (GSA) officials regarding cleaning and or sanitizing immigration courts and immigration adjudication centers in response to COVID-19;
8. Correspondence sent or received by EOIR officials (including correspondence with White House officials) regarding criteria for closing and opening immigration courts and immigration adjudication centers in response to COVID-19;
9. Correspondence sent or received by EOIR officials (including correspondence with White House officials) regarding individuals at immigration courts and immigration adjudication centers who may have been exposed to COVID-19 or who had suspected or confirmed cases of COVID-19;
10. Correspondence among immigration court personnel, including immigration judges and court administrators, regarding health and safety concerns related to COVID-19;
11. Correspondence among immigration court personnel, including immigration judges and court administrators, regarding criteria for closing and opening immigration courts and immigration adjudication centers in response to COVID-19; and

12. Correspondence among immigration court personnel, including immigration judges and court administrators, regarding individuals at immigration courts and immigration adjudication centers who may have been exposed to COVID-19 or who had suspected or confirmed cases of COVID-19.

Please construe this as an ongoing FOIA request, so that any records that come within the possession of the agency prior to your final response to this FOIA request be considered within the scope of the request until such time as a proper and adequate search is conducted.

## **II. Public Interest Waiver of All Fees**

Requesters ask that EOIR waive all fees in connection with this FOIA request in accordance with 5 U.S.C. §552(a)(4)(A)(iii). Disclosure “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government,” and AILA and the Council do not seek the records for a commercial purpose.

In the sections that follow, Requesters address each factor relevant to the public interest fee waiver inquiry.<sup>2</sup>

### ***The subject of the requested records concerns the operations and activities of the government.***

The requested records clearly concern the operations and activities of the government. The DOJ is a cabinet level department of the federal government. DOJ is organized into a number of bureaus, divisions, offices, and boards, which are referred to as components. EOIR is a component of the DOJ.

### ***Disclosure is likely to contribute to an understanding of government operations or activities.***

In the months since COVID-19 has impacted all aspects of daily life, media outlets have reported on disparate guidance at immigration courts throughout the country and widespread confusion about the criteria used to make decisions about opening and closing immigration courts.<sup>3</sup> The immigration judge’s union and the union representing ICE attorneys have issued public statements calling for the nationwide closure of immigration courts.<sup>4</sup> Lawmakers have also

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<sup>2</sup> See 28 C.F.R. §16.10(k)(2).

<sup>3</sup> Liz Robbins, THE APPEAL, *As Coronavirus Spreads, So Does Panic and Confusion in Immigration Courts Across the U.S.*, April 3, 2020, <https://theappeal.org/as-coronavirus-spreads-so-does-panic-and-confusion-at-immigration-courts-across-the-u-s/>; Dara Lind, PROPUBLICA, *Immigration Courts Are Telling Employees to Come to Work – Ignoring Health Risks and Local Shelter-in-Place Orders*, March 20, 2020, <https://www.propublica.org/article/immigration-courts-are-telling-employees-to-come-to-work-ignoring-health-risks-and-local-shelter-in-place-orders>.

<sup>4</sup> American Federation of Government Employees (AFGE), Press Release, *Immigration Judges, Prosecutors and Attorneys Call for the Nationwide Closure of All Immigration Courts*, March 15, 2020,

expressed concern about the courts reopening, inquiring about EOIR's process for making the decisions to resume non-detained hearings, and how that information was communicated.<sup>5</sup> As the number of stakeholders concerned about the status of the immigration courts has grown, so have the troubling reports about individuals who have contracted COVID-19 and appeared in immigration court where they may infect others.<sup>6</sup> The information sought in this FOIA will address a significant gap in understanding EOIR's operations during the COVID-19 health crisis.

***Disclosure of the information will contribute to the understanding of the public at large and the contribution will be significant.***

The requested information is integral to understanding whether there are provisions or procedures in place that may affect an immigration judge's ability to remain independent and impartial. The Council and AILA have the capacity, intent and demonstrated ability to disseminate the requested information to a broad cross-section of the public. This information will be of significant value to those who affected by the operations of our immigration court system during the COVID-19 pandemic, including but not limited to: individuals who must appear in immigration court to defend themselves against removal; immigration practitioners who practice in immigration courts; the media and the general public, many of whom are concerned about the spread of COVID-19.

The Council will disseminate widely the information obtained through this FOIA. The Council has consistently demonstrated the ability to disseminate information received in response to FOIA requests to a broad public audience.<sup>7</sup> The Council will analyze and post the information on its publicly accessible website. Between June 1, 2019 and the present, the Council has received more than 2.6 million pageviews from more than 1.6 million visitors. If the responsive information is voluminous, the Council also will publish a summary analysis of the records and will disseminate that summary through its established networks. The Council also has regular contact with

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<https://www.afge.org/publication/immigration-judges-prosecutors-and-attorneys-call-for-the-nationwide-closure-of-all-immigration-courts/>.

<sup>5</sup> Letter to James McHenry, Director of the Executive Office for Immigration Review, from United States Senators, June 23, 2020, <https://www.warren.senate.gov/imo/media/doc/Letter%20to%20EOIR%20re.%20reopening%20-%20final%20-%206.23.2020.pdf>.

<sup>6</sup> Kate Morrissey, Andrea Lopez-Villafana, *Employees at Otay Mesa Detention Center tests positive for COVID-19*, March 31, 2020, <https://www.sandiegouniontribune.com/news/immigration/story/2020-03-31/employee-at-otay-mesa-detention-center-being-tested-for-covid-19-after-showing-symptoms>.

<sup>7</sup> See, e.g., *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel*, a report summarizing certain key documents released by DHS agencies in response to FOIA requests regarding noncitizens' access to counsel, available at <https://www.americanimmigrationcouncil.org/research/behind-closed-doors-overview-dhs-restrictions-access-counsel>; *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program*, a report analyzing data obtained from ICE to provide a fuller picture of CAP's evolution, operations, and outcomes between fiscal years 2010 and 2013, all of which was previously unknown to the public, available at [https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement\\_overdrive\\_a\\_comprehensive\\_assessment\\_of\\_ices\\_criminal\\_alien\\_program\\_final.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf); and *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered*, a report examining records of alleged misconduct by Border Patrol agents and supervisors, available at <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

national print and news media and will share information from FOIA disclosures with interested media.

AILA also has the capacity and intent to widely disseminate the requested information to the public and its members. AILA will post the released documents on its website in a form that is accessible by any member of the public. Those who visit AILA's website include immigration attorneys and their individual and employer clients, media representatives, U.S. businesses, foreign nationals, law students, and other interested members of the public. Moreover, information posted to AILA's website is often linked to the websites of other organizations and immigration law firms. AILA also will disseminate the information through its newsletters and other print and electronic publications. Consequently, our dissemination of the requested information will reach a broad segment of the public that is interested in U.S. immigration issues.

NIPNLG is primarily engaged in disseminating information to the public. It is the author of four treatises on immigration law published by Thomson Reuters. NIPNLG provides technical and litigation assistance, participates in impact litigation, advocates for fair and just policies and legislation, provides legal training to the bar and the bench, and regularly publishes practice advisories and community resources on immigration law topics that are disseminated to its members and a large public audience through its website, [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).

***Disclosure of the Information is Not Primarily in the Commercial Interest of AILA, the Council, or NIPNLG.***

The Council is a not-for-profit organization and has no commercial interest in the present request. See e.g. 6 C.F.R. § 5.11(k)(3)(i)-(ii). This request furthers the Council's work to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. As with all other reports and information available on the Council's website, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, and other interested members of the public free of charge.

AILA is a nonpartisan, 501(c)(6) tax-exempt not-for-profit organization with no commercial interest in the present request. AILA provides its members and the public with continuing legal education, information, and resources, primarily through its website, [www.aila.org](http://www.aila.org), that is updated daily with the latest immigration news and information, including agency guidance, interpretations, and policy memoranda. As described above, AILA seeks the requested information for the purpose of disseminating it to the general public, free of charge.

NIPNLG is a national nonprofit organization dedicated to providing legal assistance and support to immigrant communities and advocating on behalf of noncitizens. NIPNLG has no commercial interest in the present request. Members and supporters of NIPNLG include attorneys, legal workers, law students, judges, jailhouse lawyers, grassroots advocates, community organizations, and others seeking to defend and expand the rights of immigrants in the United

States. As described above, NIPNLG is primarily engaged in disseminating information to the public. It is the author of four treatises on immigration law published by Thomson Reuters, provides technical and litigation assistance, participates in impact litigation, advocates for fair and just policies and legislation, provides legal training to the bar and the bench, and regularly publishes practice advisories and community resources on immigration law topics that are disseminated to its members and a large public audience through its website, [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).

### III. Request to Expedite

Requesters also asks that EOIR expedite the Request. Expedited treatment is warranted under the statute and governing regulations. See 5 U.S.C. § 552(a)(6)(E)(i); 28 C.F.R. § 16.5(e).

A request qualifies for expedited treatment if one of the following criteria are met:

“(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 that affect public confidence.”

28 C.F.R. § 16.5(e)(1)(i)-(iv). A FOIA request need meet only one of the four criteria for expedited treatment. Here, the lack of expedited processing poses a significant threat to the lives of individuals appearing in immigration court and a heightened threat to a vulnerable segment of these individuals. 28 C.F.R. § 16.5(e)(1)(i).

The COVID-19 virus has impacted every aspect of daily life. Since the World Health Organization (WHO) labeled the highly contagious disease a pandemic<sup>8</sup> in early March, it has quickly spread with devastating effect through cities and states across the nation. According to information released by the WHO, the highly contagious disease spreads from one person to another person by coughing, sneezing or speaking and the virus can live on surfaces for hours or days.<sup>9</sup> Those who contract the virus may not have any symptoms, but still may infect others.<sup>10</sup> Those who do suffer from symptoms of the virus can experience severe flu-like symptoms. Approximately one out of every five people who contracts COVID-19 will become very ill and eventually have

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<sup>8</sup> Bill Chappell, *Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says*, NPR, March 11, 2020, <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

<sup>9</sup> WORLD HEALTH ORGANIZATION, *Q&A on coronavirus (COVID-19)*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last updated April 17, 2020).

<sup>10</sup> *Id.*

difficulty breathing.<sup>11</sup> The disease not only damages the lungs. Lack of oxygen and inflammation also can damage other organs such as the kidneys, liver, heart, and brain.<sup>12</sup>

The virus's impact can have deadly consequences for individuals of advanced age or with certain underlying health conditions such as respiratory complications, diabetes, and heart disease.<sup>13</sup> People of all ages, however, may become seriously ill.<sup>14</sup>

The Centers for Disease Control and Prevention has stated that the best way to prevent the spread of the virus is to avoid close contact with individuals, including maintaining a distance of six feet from other individuals.<sup>15</sup> Because it is not always possible to maintain safe social distancing measures in immigration courts, it is critical to immediately understand steps EOIR has taken and plans to take to respond to the COVID-19 outbreak. The information requested here will inform individuals who appear in immigration court, particularly older adults and those with severe underlying chronic medical conditions who are at greater risk of suffering severe complications if they contract COVID-19,<sup>16</sup> about treatment they can expect at ICE facilities.

The information sought in this FOIA will assist individuals who must appear in immigration courts to defend against removal, immigration practitioners and family members who appear in court alongside those in removal proceedings, immigration court employees, ICE prosecutors, immigration judges as well as members of the public understand the factors DOJ and EOIR are considering when making determinations about whether to open or close immigration courts. The public has a right to know how DOJ and EOIR intend to safeguard thousands of individuals who are still reporting to work in immigration courts throughout the country and help prevent their unnecessary illness and possible death.

The Requesters also meet the second prong for expedite treatment. 28 C.F.R. § 16.5(e)(1)(ii). They are primarily engaged in the dissemination of information and intend to make the information it receives in response to the Request available to the public.<sup>17</sup> EOIR has released only general information to the public regarding its plans for detained individuals. The lack of information has generated confusion and concern as well as litigation seeking the release of

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<sup>11</sup> *Id.*

<sup>12</sup> Kelly Servick, SCIENCE, *For Survivors of severe COVID-19, beating the virus is just the beginning*, April 8, 2020, <https://www.sciencemag.org/news/2020/04/survivors-severe-covid-19-beating-virus-just-beginning>.

<sup>13</sup> WORLD HEALTH ORGANIZATION, *Q&A on coronavirus (COVID-19)*, <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses> (last updated April 17, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> Centers for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19), How to Protect Yourself*, March 18, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prepare/prevention.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *See supra*, Section II.

detained individuals at high risk of illness or death if they were to contract COVID-19.<sup>18</sup> Given the risk to detained individuals, the lack of transparency regarding ICE's readiness to react to a COVID-10 outbreak, and concern about lack of adequate medical treatment for detained individuals in immigration court, there is an urgent need for the public to understand the information sought in this FOIA.

The third prong for expedited treatment also is met here because the subject of the FOIA involves a "A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(e)(1)(iv). Widely covered by the media and impacting thousands of individuals who appear in immigration courts, the openings and closures of immigration courts during the COVID-19 pandemic often have often occurred without even basic explanations to the public.<sup>19</sup> Ashley Tabaddor, head of the National Association of Immigration Judges union (NAIJ) representing about 470 immigration judges working in more than 65 courts, stated recently "virtually no explanation on what public health data it is using to determine if courtrooms are safe."<sup>20</sup> She stated explicitly "[P]eople don't have trust that the agency is doing the right thing."<sup>21</sup> Early on in the public health crisis, concerns regarding EOIR's motives in its response to the pandemic were raised. As one example, leadership at EOIR told staff to remove posters developed by the Centers for Disease Control and Prevention (CDC) explaining how to prevent catching and spreading COVID-19, a move that Senators Elizabeth Warren and Edward Markey attributed to "publicity-related - rather than public health - considerations."<sup>22</sup> Requesters have demonstrated that the

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<sup>18</sup> *Dawson v. Asher*, No. 2:20-cv-409 (W.D. Wash. March 16, 2020), available at <https://www.aclu.org/legal-document/dawson-v-asher-complaint>.

<sup>19</sup> Caroline Reppert, *The DOJ's Immigration Court Failure Amid the Coronavirus Crisis*, CENTER FOR AMERICAN PROGRESS, July 22, 2020, <https://www.americanprogress.org/issues/democracy/news/2020/07/22/487923/dojs-immigration-court-failure-amid-coronavirus-crisis/>;

<sup>20</sup> Shannon Dooling, WBUR, *After Increasing Its Caseload, Attorneys Say Boston's Immigration Court Is In 'Disarray'*, July 24, 2020, <https://www.wbur.org/news/2020/07/24/boston-immigration-court-disarray>; Regina Garcia Cano, Julie Watson, AP NEWS, *Immigration Courts Reopen Despite Rising Coronavirus Cases*, July 13, 2020, <https://apnews.com/31b47e3ff83d14c226e638fd29eb0fc7>; Daniel Connolly, Maria Clark, USA Today, *Amid COVID-19, Trump administration keeps immigration courts open, putting judges, lawyers and immigrants at risk*, July 2, 2020, <https://www.usatoday.com/story/news/nation/2020/07/02/trump-immigration-courts-open-despite-covid-19-risks/5362169002/>; Tal Kopan, San Francisco Chronicle, *Immigration courts in 'chaos,' with coronavirus effects to last years*, May 18, 2020, <https://www.sfchronicle.com/politics/article/Immigration-courts-in-chaos-with-15276743.php>; and Priscilla Alvarez, CNN, *Justice Department watchdog reviewing decision to keep immigration courts open during pandemic*, May 7, 2020, <https://www.cnn.com/2020/05/07/politics/immigration-court-coronavirus-inspector-general-justice-department/index.html>.

<sup>21</sup> *Id.*

<sup>22</sup> Letter to James McHenry, Director, Executive Office for Immigration Review from U.S. Senators Elizabeth Warren and Edward Markey, March 11, 2020, <https://www.warren.senate.gov/imo/media/doc/2020.03.11%20Letter%20to%20Executive%20Office%20for%20Immigration%20Review,%20re.%20COVID-19%20guidance%20in%20immigration%20courtrooms.pdf>; see also Cristian Farias, New York Magazine, *The Trump DOJ's Crazy Back-and-Forth on Coronavirus Prevention Posters*, March 10, 2020, <https://nymag.com/intelligencer/2020/03/what-was-trump-dojs-problem-with-covid-prevention->

documents requested meet the exceptional media interest prong where EOIR's decision-making process for opening and closing courts and ensuring the health and safety of individuals in immigration court has been widely viewed as ad hoc, not transparent and in some cases, politically motivated.

Pursuant to 5 U.S.C. § 552(a)(6)(E)(vi), I, Laura Lynch, certify the statement in support of the request for expedited treatment to be true and correct to the best of my knowledge and belief.

If you have any questions, please contact me at (202) 507-7627 or by email at [llynch@aila.org](mailto:llynch@aila.org).

Sincerely,



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[posters.html](#); The Editorial Board, Coronavirus Doesn't Care Where You Come From. Trump Still Does." THE NEW YORK TIMES, March 31, 2020, <https://www.nytimes.com/2020/03/31/opinion/immigration-coronavirus-border.html>.



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