

May 20, 2022

VIA ELECTRONIC MAIL

David Neal, Director (david.neal@usdoj.gov)
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike
Falls Church, VA 22041

**Re: Follow up Petition to Ensure Timely and Comprehensive Access to EOIR
Records of Proceedings and Digital Audio Recordings**

Dear Director Neal,

We write to you again on behalf of 30 organizations whose staff and members provide legal services, including direct representation and *pro se* assistance, to both detained and non-detained immigrants in removal proceedings across the country. On December 9, 2021, we sent the Executive Office for Immigration Review (EOIR), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) a petition (attached) in which we requested that EOIR revise its policies and procedures for providing access to records of proceedings (ROPs) and digital audio recordings (DARs) in immigration courts across the nation and the Board of Immigration Appeals (BIA). We are thankful for the nationwide changes that EOIR announced on March 7, 2022, to its ROP and DAR request policies, which allow noncitizens and their counsel to request these records in person, by mail, and by email (“the new records policy”). *See* EOIR Policy Manual Part II § 1.5(c), Part III § 1.5(d). This is a major step forward in improving records access and responds to many of the concerns in our petition.

We applaud EOIR for implementing these proactive and important steps, which we hope will go a long way in increasing meaningful and timely access to records. In that same vein, we urge you to fully realize the promise of these new policies by ensuring that they are uniformly applied in all immigration courts and the BIA and that they benefit all respondents in removal proceedings.

Since the release of the new records policy two and a half months ago, we have encountered serious problems with its implementation, including EOIR staff refusing to comply with the new policy and instead instructing noncitizens and their counsel to submit Freedom of Information Act (FOIA) requests or schedule in-person review of records. We thus urge EOIR to mandate that all immigration courts and the BIA follow the new policy.

We further petition EOIR to implement standardized procedures guaranteeing (1) meaningful access for *pro se* and detained individuals, as well as those assisting them, and (2) timely disclosure of records within 20 business days of requests—the same timeline as FOIA requests, both of which are currently absent from the EOIR Policy Manual.

Finally, we request that EOIR respond within 45 days of this letter to schedule a meeting to discuss its records access policies with a select group of legal service providers who can provide input from their on-the-ground experience regarding the implementation of the policy for *pro se* and detained individuals.

The effectiveness of the new records policy should be measured by its benefit to the most vulnerable individuals in the immigration court system, not just those who are represented by counsel and free from detention. We remain optimistic that EOIR will address these issues comprehensively and continue to build on its commitment to expanding access to records in removal proceedings. To that end, we are fully ready and willing to assist with ensuring that this new policy is implemented in a meaningful manner.

I. Universal Compliance with the New Records Policy

We first urge EOIR to ensure widespread compliance with the new records policy. Implementation of and compliance with the new policy has been inconsistent across and even within immigration courts and the BIA. Of the 22 signee organizations who have requested records under the new policy, 17 organizations have been unable to obtain a single ROP or DAR, with 6 organizations receiving direct refusals from EOIR staff to process records requests. Moreover, 14 of the organizations who have signed on have received records request instructions from EOIR staff that conflict with the new records policy, as well as the instructions of other staff members from the same immigration court. For the new records policy to make a meaningful difference, it must be applied universally in all immigration courts and the BIA.

II. *Pro Se* Access and *Pro Se* Assistance Access to Records

Further, as we highlighted in our previous letter, *pro se* respondents and the legal service providers assisting them face unique challenges regarding records access. For example, absent outside assistance, most *pro se* respondents are unlikely to be aware of EOIR's new records policy, let alone their right to access their records at all. And when records for *pro se* individuals are difficult or impossible for legal service providers to access in a timely manner, such organizations are unable to assess viability for pro bono representation, resulting in *pro se* individuals remaining *pro se* in their removal proceedings. Five of the 22 organizations who have signed on and requested records have been unable to request records on behalf of *pro se* respondents using the new records policy, even with proper authorization from the individuals.

Despite the significant barriers to records access for these groups, the new records policy is silent on access for *pro se* individuals, individuals in detention, and legal service providers providing *pro se* assistance. These access to records issues only further compound the disparate outcomes that *pro se* respondents face in seeking relief compared to noncitizens with legal representation. *See* Ingrid V. Eagly & Steven Shafer, A National Study of Access to Counsel in Immigration Court, 164 U. Pa. L. Rev. 1, 49 (2015) (noting that from 2007 to 2012, represented "detained respondents, when compared to their *pro se* counterparts, were ten-and-a-half times more likely to succeed, released respondents were five-and-a-half times more likely to succeed, and never detained respondents were three-and-a-half times more likely to succeed").

Issues with records access are particularly acute for noncitizens who are detained, given that the vast majority of detained immigrants are forced to proceed *pro se* in their removal proceedings. *See id.* at 32 (observing that “only 14% of detained respondents were represented,” compared to 66% of non-detained respondents). Many detained respondents are held in remote detention facilities, where access to pro bono assistance or even paid legal counsel is simply not an option, leaving respondents with no choice but to proceed *pro se*. *Pro se* respondents who are detained lack internet access and often the ability to use CDs, making access to electronic records impossible without external assistance. Moreover, *pro se* individuals are only able to file records requests in the first place if they are informed of their ability to seek records and the precise procedures for doing so. Ironically, it is often *pro se* respondents in detention who most urgently need access to their records, given the speed with which their cases are typically decided and the challenges they already face in gathering corroborating evidence and preparing for their cases.

For legal service providers providing assistance to *pro se* individuals, having access to these individuals’ full ROPs and all of their DARs is crucial to providing meaningful assistance. This is particularly the case for vulnerable populations, including children and individuals with mental health challenges who do not remember what happened in their prior hearings. Review of these records is necessary for such organizations with limited resources to engage in legal services such as (1) determining which cases are viable for pro bono placement at both the Immigration Judge and BIA levels, (2) explaining proceedings to *pro se* individuals and advising them on potential relief, and (3) submitting supplemental third-party filings to the court on behalf of *pro se* individuals, regarding issues such as competency. But as written, EOIR’s new records policy is solely limited to “parties to a proceeding, and their representatives,” without clarification as to whether legal service providers providing critical *pro se* assistance are included. EOIR Policy Manual Part II § 1.5(c), Part III § 1.5(d).

To that end, we urge EOIR to meaningfully address the specific concerns of *pro se* individuals, especially those in detention, in its records policies. While the new records policy is an undeniably positive change, unless it is supplemented with details on access for *pro se* individuals—especially *pro se* individuals who are detained—and assisting legal service providers, its overall impact will be severely limited and inconsistent across immigration courts.

Accordingly, while EOIR has taken the initial step of posting records request information online, we encourage EOIR to further inform all *pro se* respondents at their master calendar hearings, both orally and in writing, of their right to access their records and the procedures for doing so, in addition to prominently posting this information physically in immigration courts, at the BIA, and in immigration detention facilities. Such measures would incur little cost or burden to the government but would go a long way in allowing *pro se* individuals to assert their rights and benefit from the new records policy as well as promoting judicial efficiency. Additionally, EOIR should provide paper ROPs to *pro se* respondents in detention and other *pro se* respondents without internet access, so that they are not limited by their lack of internet access in being able to meaningfully prepare for and participate in their immigration proceedings.

Furthermore, organizations providing assistance to *pro se* respondents, but not necessarily representing them, should not have to resort to filing FOIA requests in order to obtain access to records. EOIR should amend its new records policy to clarify that organizations engaging in *pro se* assistance may access a *pro se* individual’s ROP and DARs upon showing authorization from

the individual, rather than requiring these organizations to enter an appearance as counsel to review records. This same policy should apply for cases under ECAS with an eROP, which are currently only accessible by counsel of record.

III. Disclosure of Records within 20 Business Days

Finally, in order to respect the due process rights of noncitizens in immigration proceedings, EOIR must also ensure that noncitizens and their counsel are able to obtain access to their records within a reasonable period of time. Sixteen of the 22 signee organizations who have requested records have experienced extended delays in receiving records using the new records request procedures. If noncitizens do not receive their records in time for filing deadlines or hearing dates, the records are of no use. Delayed, untimely access to records denies noncitizens the right to fundamental fairness in their immigration proceedings, by making it impossible for them to adequately prepare for their hearings or respond to any charges or claims from the government.

As the Ninth Circuit has observed, “[i]t would indeed be unconstitutional if the law entitled [a noncitizen] in removal proceedings to his [immigration records] but denied him access to it until it was too late to use it. That would unreasonably impute to Congress and the agency a Kafkaesque sense of humor about noncitizens’ rights.” *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010). Courts have emphasized the importance of timely responses to immigration records requests in the FOIA context, even when doing so may present logistical challenges for agencies. *Nightingale v. USCIS*, 507 F. Supp. 3d 1193, 1198 (N.D. Cal. 2020) (internal quotation marks omitted) (“Although courts recognize that resources for FOIA compliance may be heavily taxed by the quantity and depth of FOIA requests (especially in light of budget constraints that limit personnel and resources assigned to an agency), that does not grant the agency carte blanche to repeatedly violate congressionally mandated deadlines.”). While expeditious records access implicates the due process rights of all noncitizens in removal proceedings, it is particularly vital for individuals detained in ICE custody, whose cases proceed on an accelerated timeline that gives them even less time to prepare for their hearings, and who often lack access to counsel. Additionally, as we highlighted in our previous letter, immigration courts around the country have differed wildly in the time with which they have disclosed records, if even sharing them at all.

With these due process concerns in mind, we urge EOIR to ensure that records are provided to noncitizens and their counsel in a timely manner, with specific 20-business day response targets incorporated into EOIR’s nationwide records access policies. This means implementing a standardized timeline where EOIR provides copies of ROPs and DARs to noncitizens and their counsel within 20 business days of receiving requests for records. The new records policy already reflects the nationwide significance of access to records and its impact upon the due process rights of the more than 1.7 million noncitizens currently in removal proceedings.¹ For these changes to be truly meaningful, all immigration courts must provide records in a timely and efficient manner to create a level playing field for noncitizens and their counsel—regardless of where in the country the cases are heard.

¹ Transactional Records Access Clearinghouse (TRAC) of Syracuse University, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Mar. 29, 2022).

We recognize that EOIR's new records policy will work the most efficiently when EOIR is not attempting to simultaneously respond to FOIA requests, which have, until now, been the primary means for obtaining records. Consistently responding to records requests through the new system within the FOIA request timeline of 20 business days removes any incentive for respondents and their counsel to submit dual requests, saving EOIR time and resources, and is key to ensuring that respondents and their counsel rely solely on the new system for records access. Providing records within this set timeframe will further promote efficiency in immigration court and BIA proceedings by significantly reducing the need for respondents to seek continuances or briefing extensions while they are awaiting records.

We again reiterate our gratitude to EOIR for implementing the new records policy, which significantly expands access to records for noncitizens who are not detained and their counsel. These improvements are invaluable steps in ensuring that removal proceedings respect noncitizens' due process rights and allow for their meaningful participation. At the same time, we urge EOIR to ensure uniform compliance with the new policy and to incorporate our proposed changes regarding timeliness of access and access for *pro se* respondents, including detained individuals, and those assisting them.

We request a meeting with EOIR officials to discuss these issues and identify how to work collaboratively to address the outlined concerns in greater detail. Please contact Sam Hsieh, Managing Attorney at CAIR Coalition, sam@caircoalition.org to schedule a meeting. Absent any response or further action on these issues within 45 days, we will view EOIR as having rejected the requests described in this letter and our previously submitted petition and will proceed accordingly.

Sincerely,

American Immigration Lawyers Association

Americans for Immigrant Justice

Ana T Jacobs & Associates PC

Ayuda

Black Alliance for Just Immigration (BAJI)

Brooklyn Defender Services

Calderon Seguin PLC

Capital Area Immigrants' Rights (CAIR) Coalition

Chacon Center for Immigrant Justice at Maryland Carey Law

David Claros

Florence Immigrant & Refugee Rights Project

Immigrant Legal Defense

Immigration Clinic, University of Texas School of Law (affiliation for identification purposes only)

Immigration Equality

Innovation Law Lab

Just Neighbors

Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Aid Justice Center

Mariposa Legal, program of COMMON Foundation

Mississippi Center for Justice

National Immigrant Justice Center

National Immigration Project of NLG

North Carolina Justice Center

RAICES

Rainbow Beginnings

Rocky Mountain Immigrant Advocacy Network

Sanctuary for Families

Tahirih Justice Center

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