

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

<hr/>		)	
NATIONAL IMMIGRATION PROJECT OF	)	)	
THE NATIONAL LAWYERS GUILD and	)	)	
AMERICAN CIVIL LIBERTIES UNION,	)	)	
	)	)	
Plaintiffs,	)	)	
	)	)	C.A. No. 15-11583-NMG
v.	)	)	
	)	)	
U.S. DEPARTMENT OF HOMELAND	)	)	
SECURITY and U.S. IMMIGRATION AND	)	)	
CUSTOMS ENFORCEMENT,	)	)	
	)	)	
Defendants.	)	)	
<hr/>		)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY  
DEFENDANT U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT**

This is a Freedom of Information Act (“FOIA”) case brought against the U.S. Department of Homeland Security (“DHS”) and one of its components, U.S. Immigration and Customs Enforcement (“ICE”). ICE did not receive the plaintiffs’ FOIA request before this lawsuit was filed. Accordingly, ICE was not afforded the opportunity to process the plaintiffs’ request at the administrative level. Because the plaintiffs failed to exhaust their administrative remedies with respect to ICE, their claims against ICE should be dismissed without prejudice to the plaintiffs’ right to re-file those claims after they exhaust their administrative remedies.

**FACTS**

On February 18, 2014, the plaintiffs sent DHS a FOIA request seeking eleven categories of immigration-related statistical and policy documents. Comp. (DN 15), ¶ 24 & DN 15-1.

On March 21, 2014, DHS responded to the plaintiffs’ request. DHS answered on its own behalf. DN 3. It added:

Additionally, we have transferred your request to U.S. Immigration and Customs Enforcement (ICE) .... If such records exist, they may be under the purview of ICE ..... You may contact [that] office[] at:

[United States Immigration & Customs Enforcement \(ICE\)](#)

Freedom of Information Act Office  
500 12th Street, SW, Stop 5009  
Washington, D.C. 20536-5009  
FOIA Officer: Catrina Pavlik-Keenan  
FOIA Requester Service Center Contact: Ryan Law  
Phone: 866-633-1182  
Fax: 202-732-0660  
E-mail: [ice-foia@dhs.gov](mailto:ice-foia@dhs.gov)

DN 3 at 3-4.

However, a thorough search of ICE systems indicates the ICE FOIA Office has no record of receiving the plaintiffs' request, either from the plaintiffs or as a referral from DHS.

Fernando Pineiro Decl. (Exhibit A attached hereto), ¶ 7. The ICE FOIA Office searched FOIAXpress (ICE's database for managing and processing FOIA requests), and ICE FOIA's predecessor database, FileMaker, using the name of the FOIA requestor, the date of the request, and a description of the requested documents to ascertain whether ICE FOIA received the FOIA request. Id. The results of this search showed that the ICE FOIA Office has no record of receiving the plaintiffs' request, or any record indicating that the plaintiffs tried to contact ICE in the approximate year-long period between the date when they submitted their FOIA request to DHS and the date they filed suit. Id. ¶¶ 7, 9. The ICE FOIA Office was not alerted to the plaintiffs' FOIA request until the complaint was served on the government and counsel for DHS contacted ICE, on April 17, 2015. Id. ¶ 8.

When the ICE FOIA Office receives a FOIA request, its first step is to identify which program offices within ICE are likely to possess records responsive to that request, and to initiate searches within those program offices. Once the ICE FOIA Office determines the appropriate

program office(s) for a given request, it provides the points of contact within each of those program offices with a copy of the FOIA request, and instructs them to conduct a search for responsive records. Once searches are completed, any potentially responsive documentation located is provided to the ICE FOIA Office. The ICE FOIA Office then reviews the potentially responsive documentation for responsiveness and proper withholdings pursuant to the FOIA and Privacy Act.

On May 6, 2015, the ICE FOIA Office tasked various program offices within ICE to review their paper and electronic records and identify and collect all documents potentially responsive to the plaintiffs' request. When the ICE FOIA Office receives a reply from each tasked program office, it will review the documentation for responsiveness and possible withholdings pursuant to one or more FOIA exemptions and withholdings under the Privacy Act. The ICE FOIA Office will then issue its final determination regarding the plaintiffs' FOIA request. If the plaintiffs are dissatisfied with the documentation released and/or the withholdings applied, they may appeal the adverse determination. See 6 C.F.R. § 5.9. ICE will perform a *de novo* review of any appeal and issue a decision in writing. Per 6 C.F.R. § 5.9(c), the plaintiffs must first administratively appeal any adverse determination before they may challenge ICE's response in court.

### **ARGUMENT**

The FOIA, 5 U.S.C. § 552, “vests jurisdiction in federal courts to enjoin an ‘agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.’” Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 139 (1980) (quoting 5 U.S.C. § 552(a)(4)(B)). “‘It cannot be said, however, that an agency improperly withheld records if the agency did not receive a request for those records.’”

Kottori v. FBI, 784 F. Supp. 2d 83, 85 (D. Mass. 2011) (quoting Banks v. Dep't of Justice, 538 F. Supp. 2d 228, 234 (D.D.C. 2008)). If the agency did not receive the request, the FOIA claim is subject to dismissal for failure to exhaust administrative remedies. See, e.g., Hull v. I.R.S., U.S. Dept. of Treasury, 656 F.3d 1174, 1179 (10th Cir. 2011); Hidalgo v. FBI, 344 F.3d 1256, 1259 (D.C. Cir. 2003); Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994); In re Steele, 799 F.2d 461, 465 (9th Cir. 1986); Brumley v. United States Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (per curiam); Dresser Indus. v. United States, 596 F.2d 1231, 1238 (5th Cir. 1979); Kottori, 784 F. Supp. at 85 (dismissing FOIA claim against the FBI because the FBI did not receive the request before plaintiff filed suit); Union Leader Corp. v. U.S. Dep't of Homeland Security, 2012 WL 1000333, at \*3 (D.N.H. Mar. 23, 2012) (dismissing FOIA claim against ICE because ICE did not receive the request before plaintiff filed suit) (unpublished); see also Town of Winthrop v. F.A.A., 328 F. App'x 1, 2 n.2 (1st Cir. 2009) (“We have suggested without deciding that exhaustion ... of administrative remedies is required to initiate FOIA proceedings in this circuit.”). “[E]xhaustion, although not jurisdictional, is [a] ‘condition precedent’ to filing suit” under FOIA. Hidalgo, 344 F.3d at 1259 (citing Taylor, 30 F.3d at 1367-68 & n.3). “The exhaustion requirement serves important public interests. It provides the agency with an ‘opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision.’ It also allows agency supervisors an opportunity to correct mistaken denials of meritorious FOIA requests, thereby obviating the need for judicial review by the courts.” Union Leader Corp., 2012 WL 1000333, at \*2 (quoting Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 61 (D.C. Cir.1990)).

The plaintiffs complied with the applicable regulation, which states in relevant part, “If you cannot determine where within [DHS] to send your request, you may send it to the

Departmental Disclosure Officer, Department of Homeland Security, Washington, DC 20528. That office will forward your request to the component(s) it believes most likely to have the records that you want.” 6 C.F.R. § 5.3(a). DHS has asserted that the plaintiffs’ FOIA request was referred to ICE for processing and direct response to the requestor. Nevertheless, a thorough search of the ICE FOIA Office’s systems and records indicates ICE did not receive the FOIA request. Receipt by DHS is not the same as receipt by ICE. See id. (“Your request will be considered received as of the date it is received by the proper component’s FOIA office.”).

Because ICE did not receive the plaintiffs’ request before this action was filed, it has not yet had the opportunity to respond. Once it has that opportunity, the plaintiffs may be satisfied and have no need for litigation against ICE. If they are not satisfied, and if they lose their administrative appeal, they may then refile their claims against ICE.

#### **CONCLUSION**

For the foregoing reasons, ICE respectfully requests that the Court dismiss the claims against it without prejudice to the plaintiffs’ right to re-file those claims after they have exhausted their administrative remedies.

Respectfully submitted,

U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT

By its attorney,

CARMEN M. ORTIZ  
United States Attorney

By: /s/ Christine J. Wichers  
Christine J. Wichers (BBO#631857)  
Assistant U.S. Attorney  
One Courthouse Way  
Boston, MA 02210  
(617) 748-3278  
[christine.wichers@usdoj.gov](mailto:christine.wichers@usdoj.gov)

Dated: May 15, 2015

**Certificate of Service**

I certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants, on May 15, 2015.

/s/ Christine J. Wichers  
Christine J. Wichers