

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**National Council of La Raza,
American Civil Liberties Union,
New York Immigration Coalition,
National Employment Law Project,
American Immigration Lawyers Association,
National Immigration Law Center,
National Immigration Forum,
National Immigration Project of the National
Lawyers Guild, and
Massachusetts Immigrant and Refugee
Advocacy Coalition,**

Plaintiffs,

v.

Department of Justice,

Defendant.

No. 03-CV-2559 (LAK)

AMENDED COMPLAINT

Introduction

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief and to obtain the disclosure and release of agency records improperly withheld from plaintiffs by defendant Department of Justice (“DOJ” or the “Department”).

2. The documents that plaintiffs seek set forth Department policy on a matter of great public concern, namely the extent to which state and local police agencies possess inherent

authority to enforce the federal immigration laws. Until 2002, there was no doubt that DOJ had definitively concluded that state and local police lack inherent authority to enforce non-criminal immigration laws. That policy was set forth in a publicly available memorandum issued in 1996. In 2002, the actions of the Department and the public statements of the Attorney General raised questions about whether DOJ policy had changed. These actions included the official withdrawal of the relevant part of the published memorandum.

3. In response to these actions and pronouncements, plaintiffs National Council of La Raza, New York Immigration Coalition, American Immigration Lawyers Association, National Immigration Law Center, National Immigration Forum, National Immigration Project of the National Lawyers Guild, and Massachusetts Immigrant and Refugee Advocacy Coalition sought, pursuant to the FOIA, the specific documents reportedly embodying the Department's new policy. DOJ admitted the existence of responsive documents but has refused to identify or disclose those documents.

4. In a second FOIA request, plaintiffs National Council of La Raza, American Civil Liberties Union, National Employment Law Project, American Immigration Lawyers Association, National Immigration Law Center, National Immigration Forum, National Immigration Project of the National Lawyers Guild, and Massachusetts Immigrant and Refugee Advocacy Coalition further sought all documents reflecting or constituting the basis for the Department's new policy. Three DOJ components have failed to timely respond to this further request.

5. A new policy that state and local police possess some degree of inherent authority to arrest and detain individuals believed to be in violation of civil, non-criminal provisions of the federal immigration laws would constitute a dramatic departure from prior policy and practice on an issue of national importance, with profound consequences for citizens and immigrants alike.

6. The analysis contained in the 1996 policy memorandum strongly suggests that a policy providing for greater state and local enforcement of civil immigration laws would be contrary to federal law. In addition, such a policy would have serious implications for public safety and civil rights. In the opinion of many police officials, and of the plaintiffs in this action, local enforcement of the immigration laws would deter crime victims and witnesses from reporting crimes (including domestic violence) to the police and from cooperating in investigations, making the entire community less safe. It would deter immigrant workers from exercising their rights under the labor laws, and provide lawbreaking employers with another means to threaten and harass workers. It would divert scarce local law enforcement resources from public safety needs. Moreover, it would subject citizens and non-citizens to an increased risk of civil rights violations, including improper arrest, because state and local officers generally lack training and expertise in the application of complex immigration laws.

7. The issue here, however, is not the validity or wisdom of the new DOJ policy. It is whether the documents setting forth that policy and its basis may be withheld from public scrutiny under the FOIA.

Jurisdiction and Venue

8. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-06. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and under 28 U.S.C. § 1391(e).

The Parties

9. Plaintiff National Council of La Raza (“NCLR”) is a private, nonprofit, nonpartisan, tax-exempt organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR is now the largest national constituency-based Hispanic civil rights organization in the United States. Along with its 300 affiliate organizations throughout the nation, including ten in New York, NCLR is extremely concerned about state and local enforcement of immigration laws because of its impact on community-police relations and on public safety, as well as the inherent potential for civil rights violations. NCLR requested the documents reportedly embodying defendant’s new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ’s new policy on or about March 5, 2003. NCLR has exhausted the available administrative remedies.

10. Plaintiff American Civil Liberties Union (the “ACLU”) is a nationwide, non-partisan organization of approximately 400,000 members dedicated to enforcing the fundamental rights guaranteed by the Constitution and laws of the United States on behalf of all persons. The ACLU is a not-for-profit corporation incorporated in Washington, D.C. Its principal place of business is New York, New York. The ACLU requested documents reflecting or constituting the basis for

DOJ's new policy from defendant on or about March 5, 2003. The ACLU has exhausted the available administrative remedies.

11. Plaintiff New York Immigration Coalition ("NYIC") is an umbrella advocacy organization of approximately 150 New York State groups that work with immigrants, refugees, and asylees. NYIC's membership includes community-based ethnic not-for-profit organizations, not-for-profit health and human services organizations, immigrant community organizations, immigrants' rights advocates, and leaders from organized labor, academia and the law. With its multi-ethnic, multi-racial and multi-sector base, NYIC provides a unique opportunity for members to collaborate on the creation and implementation of strategies addressing their common concerns. NYIC is a New York non-profit corporation. Its principal place of business is New York, New York. NYIC requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002. NYIC has exhausted the available administrative remedies.

12. Plaintiff National Employment Law Project ("NELP") is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP is extremely concerned about state and local enforcement of immigration laws because of its chilling effect on workplace organizing. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual's status as an immigrant, a participant in a workforce development program, or a worker in a nonstandard relationship such as part-time, temporary, or sub-contracted work. NELP's area of expertise includes the workplace rights of documented and undocumented immigrant workers under federal employment and labor laws.

NELP has litigated and participated as amicus in numerous cases addressing the rights of immigrant workers under the Fair Labor Standards Act and the National Labor Relations Act. NELP also provides legal assistance to labor unions and immigrant worker organizations. NELP is a New York non-profit corporation. Its principal place of business is New York, New York. NELP requested documents reflecting or constituting the basis for DOJ's new policy from defendant on or about March 5, 2003. NELP has exhausted the available administrative remedies.

13. Plaintiff American Immigration Lawyers Association ("AILA") is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association. AILA was founded in 1946 and now has more than 8,000 members organized in 35 chapters across the United States and in Canada. AILA's members and their clients are directly and severely affected by DOJ's policy on state and local immigration enforcement. AILA requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ's new policy on or about March 5, 2003. AILA has exhausted the available administrative remedies.

14. Plaintiff National Immigration Law Center ("NILC") is a national nonprofit legal support center whose mission is to protect and promote the rights and opportunities of low-income immigrants and their family members. NILC staff specialize in immigration law and in the employment and public benefits rights of immigrants. NILC conducts policy analysis and impact litigation and provides publications, technical advice, and trainings to a broad constituency of legal aid agencies, community groups, and pro bono attorneys. NILC is

extremely concerned about state and local enforcement of immigration laws and believes that if immigrants fear that reporting crime will lead to their deportation, they will avoid contact with law enforcement officers. NILC believes that such a policy will ultimately erode public safety. NILC requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ's new policy on or about March 5, 2003. NILC has exhausted the available administrative remedies.

15. Plaintiff National Immigration Forum (the "Forum") is a pro-immigrant advocacy organization based in Washington, DC. Established in 1982 as a private, non-partisan, nonprofit, and tax-exempt organization, the Forum educates both the public and policy-makers on the contributions of immigrants and the benefits of immigration to the United States. Working with its 260 member organizations around the United States, the Forum advocates and builds support for public policies that welcome immigrants and refugees and are fair and supportive to newcomers in the United States. The Forum has been a central actor in efforts to ascertain the Justice Department's current policy regarding the enforcement of federal immigration laws by state and local police. The Forum requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ's new policy on or about March 5, 2003. The Forum has exhausted the available administrative remedies.

16. Plaintiff National Immigration Project of the National Lawyers Guild ("NIP") is a national membership organization of attorneys, law students, and paralegals that exists to promote a fair and humane administration of United States immigration laws and respect for the

civil and constitutional rights of all persons. NIP provides continuing legal education seminars and publishes books and other material regarding the scope of immigration law enforcement. In addition, many of NIP's members represent non-citizens who will be significantly affected by the issues raised in this case. NIP requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ's new policy on or about March 5, 2003. NIP has exhausted the available administrative remedies.

17. Plaintiff Massachusetts Immigrant and Refugee Advocacy Coalition ("MIRA") was formed in 1987 by individuals and organizations concerned with preserving the civil and human rights of Massachusetts's immigrants and refugees. MIRA is a multi-ethnic, multi-racial coalition that actively involves 160 grassroots immigrant organizations, human service agencies, legal service providers, labor unions, religious organizations, health care providers, state and federal agencies and human rights groups in cooperative efforts. Its mission is to promote and enhance the rights and opportunities of immigrants and refugees to shape the public policies that affect their lives. MIRA requested the documents reportedly embodying defendant's new policy from defendant on or about August 21, 2002, and requested further documents reflecting or constituting the basis for DOJ's new policy on or about March 5, 2003. MIRA has exhausted the available administrative remedies.

18. Defendant Department of Justice ("DOJ") is a Department of the Executive Branch of the United States Government, and includes the Office of the Attorney General ("OAG"), Office of the Deputy Attorney General ("ODAG"), Office of the Associate Attorney General

(“OAAG”), Office of Information and Privacy (“OIP”), and Office of Legal Counsel (“OLC”).

DOJ is an agency within the meaning of 5 U.S.C. § 552(f)(1).

DOJ’s Failure to Release its Current Policy Regarding
State and Local Enforcement of the Immigration Laws

19. Prior to 2002 and the requests at issue here, DOJ had adopted the policy that state and local law enforcement agents lack inherent authority to detain or arrest individuals on suspicion that they have violated the non-criminal provisions of the immigration laws. DOJ’s complete policy on state and local immigration enforcement was embodied in a publicly available Office of Legal Counsel memorandum dated February 5, 1996. DOJ published the 1996 policy memorandum in its official “Opinions of the Office of Legal Counsel” and made it available on the DOJ website, Lexis, and Westlaw.

20. The 1996 policy memorandum, which is over twenty single-spaced pages long, includes extensive legal analysis and reasoning, identifies elements of relevant standards, and explains the implications of DOJ’s analysis with respect to several different factual scenarios that law enforcement officers might encounter.

21. In 2002, DOJ withdrew the section of the governing OLC policy memorandum dealing with state and local enforcement of civil immigration laws by adding an editor’s note to the memorandum. The editor’s note withdraws the relevant portion of the OLC policy memorandum. The note does not refer the reader to any new policy document or analysis. In April, 2002, various media sources reported that OLC had prepared an opinion concluding that state and local governments had “inherent authority” to enforce immigration laws.

22. On or about June 5, 2002, Attorney General John Ashcroft indicated that the Department had adopted a new policy at variance with its previous policy. At a press conference, the Attorney General expressed the view that state and local law enforcement agencies have inherent authority to enforce civil immigration laws whenever an individual's name appears in the federal National Crime Information Center ("NCIC") database. The NCIC is a computerized information system maintained by the Federal Bureau of Investigation ("FBI"). FBI statistics indicate that the NCIC is accessed millions of times per day by federal, state and local law enforcement officials.

23. At the June 2002 press conference, the Attorney General did not explain how his position related to the standards and analysis set forth in the 1996 policy memorandum and did not set forth any new policy outlining the circumstances under which state and local police could or could not enforce civil immigration laws.

24. At the June 2002 press conference, the Attorney General specifically stated that the "Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission ... is within the inherent authority of the states," indicating that the referenced analysis constituted the new policy of the Department.

25. On or about June 24, 2002, White House Counsel Alberto R. Gonzales issued a letter that echoed the Attorney General's remarks. The letter specified that "the Attorney General recently announced that [OLC] has concluded that state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws and whose names have been placed in the [NCIC]." (Emphasis omitted.) Mr. Gonzales's letter makes no mention of the

pre-existing 1996 policy memorandum, offers no explanation for reconciling the prior policy with his pronouncement, and does not articulate the Department's actual policy regarding state and local immigration enforcement.

26. On information and belief, DOJ has adopted an OLC memorandum that has not been released to the public as its new policy and operative law regarding the authority of state and local law enforcement officials to enforce the civil provisions of immigration law. DOJ's new policy supersedes the 1996 policy with respect to enforcement of civil immigration provisions.

27. On information and belief, DOJ has informed state and/or local law enforcement officials and/or associations of such officials that such officials have the inherent authority to arrest and detain individuals who are in violation of civil immigration laws and are listed in the NCIC.

28. On information and belief, DOJ's new policy on state and local enforcement of civil immigration laws constitutes the basis for other DOJ actions and decisions, including the decision to include certain individuals alleged to have violated civil immigration provisions in the NCIC, and governs the activity of DOJ personnel with respect to state and local enforcement issues.

Plaintiffs' FOIA Requests

29. On or about August 21, 2002, thirty-four organizations, including plaintiffs NCLR, NYIC, AILA, NILC, Forum, NIP, and MIRA, submitted a FOIA request to DOJ asking DOJ to clarify its policy on state and local enforcement of immigration laws and to release the most recent OLC opinion on that subject.

30. Defendant responded to plaintiffs' August 2002 FOIA request by letter dated September 9, 2002. Defendant admitted that a search of OLC's files had found two agency records responsive to the request. Defendant stated that it was withholding those records pursuant to Exemption Five of the FOIA, 5 U.S.C. § 552(b)(5), on the ground that they fell within the deliberative process privilege.

31. Defendant's response to the August 2002 FOIA request did not identify the documents being withheld, release segregable non-exempt material, or explain why defendant believes that the deliberative process privilege encompasses the withheld records.

32. On or about October 15, 2002, plaintiffs NCLR, NYIC, AILA, NILC, Forum, NIP, and MIRA, along with other requesters, administratively appealed defendant's denial of their August 2002 FOIA request to OIP, in accordance with defendant's procedures for such appeals.

33. On or about February 20, 2003, the Co-Director of OIP affirmed the denial of the August 2002 FOIA request, on the ground that the withheld documents fell within the deliberative process privilege.

34. OIP's determination of the administrative appeal did not identify the documents being withheld, release segregable non-exempt material, or explain why defendant believes that the deliberative process privilege encompasses the withheld records.

35. On or about March 5, 2003, plaintiffs NCLR, ACLU, NELP, AILA, NILC, Forum, NIP, and MIRA, along with other requesters, submitted a FOIA request to the DOJ officials responsible handling such requests on behalf of OAG, ODAG, OAAG, and OLC. The March 5, 2003 request sought the release of all records in those offices that: (1) constitute the basis for the

Attorney General's June 2002 press conference statement regarding the inherent authority of the states to arrest aliens who have violated the civil provisions of the Immigration Act; (2) set forth, refer to or discuss that Attorney General statement; or (3) communicate to state or local law enforcement agencies the DOJ's position on the enforcement of civil provisions of the immigration laws by state or local officials, as announced in that Attorney General statement.

36. Apparently in further response to plaintiffs' August 2002 request, the Attorney General wrote a letter on or about March 11, 2003 purporting to "state clearly the policy of the Department on this issue." The Attorney General's letter is just over one page long. It again specifically relies on a new OLC policy memorandum but adds little to the sketch-like description of DOJ policy provided in the Attorney General's June 2002 remarks. The March 11 letter does not fully set forth the DOJ's current policy regarding state and local enforcement of civil immigration provisions, does not relate the Attorney General's view to the analysis and standards set forth in the 1996 policy memorandum, and does not provide any legal basis for the Attorney General's views or for the Department's withdrawal of its prior policy memorandum. The only explanation the Attorney General's letter offers is that DOJ considers individuals listed in the NCIC to have "been determined by federal authorities to pose special risks."

37. The Attorney General's June 2002 statement and March 2003 letter, as well as Mr. Gonzales's June 2002 letter, explicitly rely on, refer to, and thereby incorporate OLC's new, unreleased memorandum on state and local immigration enforcement authority.

38. The Attorney General's March 2003 letter confirmed that he had referred plaintiffs' August 2002 FOIA request to OIP for "evaluation and appropriate action" and did not indicate

that any further action could or would be taken on that FOIA request, which DOJ had already denied twice.

39. By letter dated March 13, 2003, Melanie Ann Pustay, the Deputy Director of OIP, responded to plaintiffs' March 5, 2003 FOIA request on behalf of OAG, ODAG, and OAAG. Ms. Pustay acknowledged that OIP had received the request on March 10, 2003. She further stated that OIP would be "unable to comply with the twenty-working-day time limit in this case, as well as the ten additional days provided by the statute."

40. On or about April 10, 2003, Ms. Pustay indicated that no records responsive to the March 5, 2003 request were located in OAAG. To date, OAG, ODAG, and OLC have not provided substantive responses to plaintiffs' March 2003 FOIA request, despite the statutory requirement that all requests must be processed within twenty working days, 5 U.S.C. § 552(a)(6)(A)(i).

41. Plaintiffs have exhausted the available administrative remedies.

42. Defendant is improperly withholding the records sought by plaintiffs' FOIA requests.

CAUSES OF ACTION

First Cause of Action:

Violation of the FOIA for Failure to Disclose the Records Sought by Plaintiffs' FOIA Requests

43. Plaintiffs repeat and reallege paragraphs 1-42.

44. Defendant's failure to disclose the records requested by plaintiffs violates 5 U.S.C. § 552(a)(3)(A).

Second Cause of Action:
Violation of the FOIA for Failure to Affirmatively Disclose
the Department's New Policy

45. Plaintiffs repeat and reallege paragraphs 1-42.

46. Defendant's failure to make its new policy documents available to the public violates 5 U.S.C. § 552(a)(1)-(2).

Requested Relief

WHEREFORE, plaintiffs respectfully request that this Court:

- A. order defendant to disclose the withheld records in their entireties and make copies available to plaintiffs;
- B. order defendant immediately to process plaintiffs' outstanding FOIA request and to disclose the required records;
- C. order defendant to make its new policy available to the public;
- D. provide for expeditious proceedings in this action;

- E. award plaintiffs their costs and reasonable fees incurred in this action; and
- F. grant such other relief as the Court may deem just and proper.

Respectfully submitted,

Dated: April 29, 2003
New York, New York

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