



March 24, 2023

VIA U.S. MAIL

Office of the General Counsel
Attn: FOIA Service Center
Executive Office for Immigration Review
5107 Leesburg Pike, Suite 2150
Falls Church, VA 22041

RE: Freedom of Information Act Request

Dear FOIA Officer,

The National Immigration Litigation Alliance (“NILA”), Harvard Immigration and Refugee Clinical Program (“HIRCP”), and the Committee for Public Counsel Services (collectively, “Requestors”) submit this letter as a request for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* In accordance with 5 U.S.C. § 552(a)(6)(A)(i), Requestors seek a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

Records Requested

For the period between March 5, 2002, to the present, Requestors requests records¹ maintained by the Executive Office for Immigration Review (EOIR), including but not limited to immigration courts and the Board of Immigration Appeals, relating to *Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270 (A.G. 2002) (“*Matter of Y-L-*”). That case established that drug trafficking aggravated felony convictions are presumed to be particularly serious crimes, and thus renders a noncitizen respondent ineligible for withholding of removal under 8 U.S.C. § 1231(b)(3), unless an individual meets the criteria to rebut the presumption.

¹ The term “records” as used herein 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, 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.

This request will remain as an ongoing FOIA request until such time as the agency conducts a proper and adequate search. Therefore, any records that come within the possession of the agency prior to the final response to this FOIA request are within the scope of this request.

Requested records include, but are not limited to:

1. Aggregate data of the number of cases in the EOIR system since March 5, 2002, the date of the *Matter of Y-L-* decision, in which:
 - a. The respondent was ineligible for withholding of removal based on an aggravated felony drug trafficking conviction (or convictions) for which the aggregate term of the sentence imposed was less than 5 years (regardless of whether withholding of removal relief was ultimately granted or denied);
 - i. Of these cases, the number of cases citing *Matter of Y-L-*
 - b. The respondent was eligible for withholding of removal notwithstanding having an aggravated felony drug trafficking conviction (or convictions) for which the aggregate term of the sentence imposed was less than 5 years (regardless of whether withholding of removal relief was ultimately granted or denied);
 - i. Of these cases, the number of cases citing *Matter of Y-L-*
2. A copy of all decisions in the EOIR system since March 5, 2002, the date of the *Matter of Y-L-* decisions, in which the respondent was eligible for withholding of removal notwithstanding an aggravated felony drug trafficking conviction (or convictions) for the aggregate term of imprisonment imposed was less than 5 years (whether or not *Matter of Y-L-* is cited); and
3. All policies, memos, correspondence, formal or informal guidance, and training materials related to *Matter of Y-L-*.

Request of Waiver of Fees

Requestors ask that EOIR waive all fees and costs associated with this FOIA request. Such waiver is warranted because disclosure of the information is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor.” 5 U.S.C. § 552(a)(4)(A)(iii).

First, disclosure of the requested records will contribute significantly to the public understanding of government operations and activities related to the application of the presumption set forth in *Matter of Y-L-* that drug trafficking aggravated felonies are particularly serious crimes for purposes of withholding of removal. Such information is of great public concern. *Matter of Y-L-* has impacted thousands of individuals seeking withholding of removal who have drug trafficking convictions. Yet, individuals may only overcome the presumption of a particularly serious crime if they meet, at a minimum, a six-criteria test. Respondents and courts have expressed concern about *Matter of Y-L-*'s six-criteria test and its implementation.

For example, noncitizens have challenged the legal validity of *Matter of Y-L-* on the basis that it impermissibly establishes a per se rule for particularly serious crimes.² In other cases, immigration adjudicators have failed to apply the six-criteria test in the first instance.³ At least one federal appellate court has remanded to the Board for failure to properly apply the *Matter of Y-L-* test and to “provide the Attorney General with an opportunity to consider whether, based on the experience of two decades and Congress’s increasingly nuanced view of drug trafficking offenses, *Matter of Y-L-* may have turned out to over-shoot the mark.”⁴

Furthermore, EOIR does not currently publish all immigration judge and BIA decisions. Although the BIA is, pursuant to a settlement agreement, slated to gradually make all BIA decisions publicly available, this process will not be complete until July 2027 and it does not include immigration judge decisions.⁵ In the meantime, non-public BIA decisions may only be accessed through a FOIA request. The requested information is critically important to assist attorneys, immigrants, and the general public in understanding how *Matter of Y-L-*, which has impacted thousands of individuals fleeing persecution, is implemented.

Requestors have the capacity, intent and demonstrated ability to disseminate the requested information to a broad cross-section of the public. NILA is a non-profit membership organization established to realize systemic change in the immigrant rights’ arena by engaging in impact litigation and by building the capacity of social justice attorneys to litigate in federal court through co-counseling individual cases and providing strategic assistance. In addition to litigation, NILA disseminates records obtained through FOIA on its public website,⁶ disseminates practice materials,⁷ and frequently presents on immigration issues. HIRCP is a not-for-profit law school clinic established to advance immigrants’ rights through litigation in the immigration and federal courts and policy advocacy. The CPCS Immigration Impact Unit provides support to all Massachusetts court appointed counsel representing indigent immigrants in criminal, juvenile, and child welfare cases.

Second, disclosure of the requested records is not primarily in Requestors’ commercial interest. Requestors are seeking the requested records for the purpose of disseminating it to members of

² See, e.g., *DeCarvalho v. Garland*, 18 F.4th 66 (1st Cir. 2021); *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007); *Fernandez Segura v. Rosen*, 832 F. App’x 517 (9th Cir. 2020) (Mem.); *Reyes-Sanchez v. Ashcroft*, 261 F. Supp. 2d 276 (S.D.N.Y. 2003); *Ford v. Bureau of ICE*, 151 F. App’x 152 (3d Cir. 2005) (per curiam).

³ See, e.g., *DeCarvalho*, 18 F.4th at 71; *Sanabria Morales*, 967 F.3d 15, 23–24 (1st Cir. 2020) (Thompson, J., dissenting).

⁴ *DeCarvalho*, 18 F.4th at 71.

⁵ See Exec. Off. for Immigr. Rev. & U.S. DOJ Stipulation of Settlement, N.Y. Legal Assistance Grp. v. BIA, No. 1:18-cv-09495-PAC (Feb. 9, 2022), <https://www.citizen.org/wp-content/uploads/72-Signed-stipulation.pdf?eType=EmailBlastContent&eId=f4497cb8-4bb6-47e0-8d45-62887ae34812>.

⁶ See *NILA’s Transparency Litigation Docket*, NATIONAL IMMIGRATION LITIGATION ALLIANCE, <https://immigrationlitigation.org/transparency-litigation-foia>.

⁷ See *Practice Advisories*, NATIONAL IMMIGRATION LITIGATION ALLIANCE, <https://immigrationlitigation.org/practice-advisories/>.

the public and not for commercial gain.

Accordingly, disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress' legislative intent in amending FOIA. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it is liberally construed in favor of waivers for noncommercial requesters.") (internal quotation omitted).

* * * * *

We look forward to your response to our request within twenty (20) business days, as required under 5 U.S.C. § 552(a)(6)(A)(i).

If you have any questions regarding this request, please contact Trina Realmuto at trina@immigrationlitigation.org or (617) 819-4447. Please furnish copies of all applicable information to:

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10 Griggs Terrace
Brookline, MA 02446
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Thank you for your timely cooperation.

Sincerely,



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