

death was MDMA (ecstasy) toxicity. U.S. Immigr. & Customs Enf't, *Detainee Death Report: OKPU, Frankline 2* (2024).¹

2. On May 23, 2024, Plaintiff, the American Civil Liberties Union of Pennsylvania (“ACLU”), filed a FOIA request to ICE on behalf of Queen Malle Cynthia, Mr. Okpu’s widow and next-of-kin. The documents requested include Mr. Okpu’s detention file, medical records, autopsy report, witness statements, and investigations into Mr. Okpu’s death, as well as relevant agency and institutional policies and procedures in effect at the time. These records will provide Ms. Malle Cynthia with closure and a more thorough account of her husband’s untimely death.

3. ICE’s failure to produce any of the requested documents or information violates the FOIA. Plaintiff, on behalf of Ms. Malle Cynthia, now seeks declaratory, injunctive, and other appropriate relief to compel the prompt production of agency records improperly withheld by ICE.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action, including the authority “to enjoin [an] agency from withholding agency records and to order the production of any agency records improperly withheld” from Plaintiff under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. *See also* 28 U.S.C. § 2202.

5. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B) because Plaintiff’s principal place of business is in the Eastern District of Pennsylvania. For the same reason, venue is proper under 28 U.S.C. § 1391(e)(1)(C).

6. Declaratory relief is appropriate under 28 U.S.C. § 2201(a).

¹ Available at: <https://www.ice.gov/doclib/foia/reports/ddrFranklineOkpu.pdf>.

PARTIES

7. Plaintiff ACLU of Pennsylvania is a 501(c)(3) nonprofit organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and works to advance those important protections through various forms of advocacy and public education across the Commonwealth. Since its founding, the ACLU of Pennsylvania has been deeply committed to ensuring that citizens and noncitizens alike receive the due-process protections afforded to them by the Constitution. This work includes promoting transparency at both the state and federal level, often by seeking records under FOIA. ACLU of Pennsylvania represents Ms. Malle Cynthia and submitted the FOIA request at issue in this matter on her behalf.

8. Defendant ICE is a sub-agency within the Department of Homeland Security (“DHS”). ICE is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). ICE is responsible for enforcing federal immigration laws, including through the apprehension, detention, and removal of individuals it alleges are unlawfully present in the United States. In furtherance of that responsibility, ICE oversees civil immigration detention facilities, including Moshannon, which hold noncitizens to secure their presence for immigration proceedings or removal from the United States. ICE held Mr. Okpu in its custody from approximately March 29, 2023, to December 6, 2023, the date of his death. ICE has possession, custody, and control over the records requested by Plaintiff.

STATUTORY AND LEGAL FRAMEWORK

9. “The Freedom of Information Act was enacted to facilitate public access to Government documents.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989)). Its basic purpose is to “ensure an informed citizenry”, which is “vital to the functioning of a democratic society” and needed as a check against corruption and to hold the government accountable to the governed. *See Nat’l Lab. Rel. Bd. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Consistent with this purpose, the FOIA statute creates a “strong presumption in favor of disclosure [and] places the burden on the agency to justify the withholding of [] requested documents.” *Ray*, 502 U.S. at 173.

10. FOIA requires federal agencies to disclose records in response to a member of the public’s request, unless those records fall within one of nine narrow statutory exemptions. 5 U.S.C. §§ 552(a)(3)(A), 552(b)(1)–(9).

11. FOIA requires an agency to make an adequate search for responsive records that is “reasonably calculated to uncover all relevant documents.” *U.S. ex. rel. Mistick PBT v. Hous. Auth. of Pittsburgh*, 186 F.3d 376, 384 (3d Cir. 1999).

12. An agency must respond within 20 working days after receipt of a FOIA request, notifying the requester of the agency’s determination whether or not to fulfill the request, providing the reasons for its determination, and informing the requester of his or her right to appeal the agency’s determination to the agency head. *See* 5 U.S.C. § 552(a)(6)(A)(i).

13. In “unusual circumstances,” an agency may postpone its response to a FOIA request or appeal, but it must provide notice and the date on which a determination is expected to be dispatched. *See* 5 U.S.C. § 552(a)(6)(B). Generally, such notice shall not result in an extension of more than 10 working days. *See id.*

14. If the agency fails to comply with a request within the statutory time period, a FOIA requester is deemed to have exhausted its administrative remedies and can proceed directly to the district court, where the agency must show “exceptional circumstances” justifying its untimeliness and due diligence in remedying the violation. *See* 5 U.S.C. § 552(a)(6)(C). Per the FOIA statute, “the term ‘exceptional circumstances’ does not include a delay that results from a predictable agency workload of requests under this section” 5 U.S.C. § 552(a)(6)(C)(ii).

15. A district court has jurisdiction to enjoin the agency from withholding records and to order production of records that are subject to disclosure. *See* 5 U.S.C. § 552(a)(4)(B).

16. A FOIA requester can seek a waiver of search and review fees on the ground that the disclosure of the information is in the public interest because it is likely to contribute significantly to the public’s understanding of the operations and activities of the government, and is not primarily in the commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Requests for fee waivers are to be “liberally construed in favor of waivers for noncommercial requesters.” *Jud. Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282 (9th Cir. 1987) and 132 Cong. Rec. 27, 190 (1986) (Sen. Leahy)).

17. A FOIA requester can also seek a waiver of search and review fees on the grounds that the requester is a “representative of the news media,” and the records are not sought for a commercial purpose. *See* 5 U.S.C. § 552(a)(4)(A)(ii). A representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.*

STATEMENT OF FACTS

ICE Possesses the Records Requested by the ACLU

18. On or about December 6, 2023, Mr. Frankline Okpu, a Cameroonian national who had recently won immigration relief, was found unresponsive in a solitary confinement cell in the Special Housing Unit (“SHU”) at Moshannon. Mr. Okpu had been sent to the SHU two days earlier following a disciplinary incident. Shortly after the incident, Moshannon staff reported that Mr. Okpu may have ingested an illicit substance. Detainee Death Report at 2. As a result, the physician on staff at Moshannon ordered fifteen-minute wellness checks by custody staff. *Id.*

19. According to ICE, these checks continued every fifteen minutes for nearly 48 hours. *Id.* But ICE only publicly accounted for the results of two of these checks: One at 1:43 pm on December 4, 2023, and another at 12:30 pm on December 5, 2023. *Id.* The last 23 hours of Mr. Okpu’s life are a black box due to ICE’s failure to produce records or provide additional public details.

20. The information that the ACLU of Pennsylvania requested on behalf of Ms. Malle Cynthia is within ICE’s possession and control.

21. ICE and its agents are obligated to create and maintain a variety of records related to individuals in its custody. Moshannon operates under the 2011 Performance-Based National Detention Standards (revised 2016) (“PBNDs”), which require the facility to maintain a detention file containing “all significant information” about an individual in its custody. U.S. Immigr. & Customs Enf’t, *Performance-Based National Detention Standards* 441 (2011), rev. 2016.²

22. PBNDs 7.1 requires the detention file to include all documents generated during the intake process at the facility, as well as documents generated during a noncitizen’s time in

² Available at: <https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf>.

custody. *Id.* at 442. The documents generated during a noncitizen’s detention include: special requests to the facility or ICE, disciplinary forms, grievances, strip search forms, staff reports about the detained person’s behavior, and other records. *Id.* The facility staff maintains the file during a detained noncitizen’s stay at a facility and archives the file upon transfer or release. *Id.* at 443. Importantly, facilities such as Moshannon, which operate under an Intergovernmental Services Agreement, “shall make inactive detention files available to ICE/ERO personnel,” upon request. *Id.* at 443.

23. Furthermore, PBNDS 4.3 requires a detention facility to maintain a medical record file separate from the detention file. *Id.* at 259. This medical file contains a log of a detained noncitizen’s interactions with health staff, such as a medical and mental health intake screening form, a comprehensive health assessment, physical and mental health treatments received, records of medical/psychiatric alerts and holds, records of administration of prescription and nonprescription medicines, denial of treatment forms, and referrals for outside treatment. *See generally id.* at 257-81. Per this standard, “Inactive health record files shall be retained as permanent records. . . .” *Id.* at 278.

24. In the event of a noncitizen’s death at an immigration detention facility, each facility shall have policies or procedures for contacting a local coroner, and scheduling and making arrangements for an autopsy. *Id.* at 342.

25. Additionally, after the death of a noncitizen in ICE custody, specified agencies within and outside of the Department of Homeland Security must be notified and various investigations are required. *See U.S. Immigr. & Customs Enf’t, Notification, Review, and Reporting Requirements for Detainee Deaths, ICE Directive 11003.5* (Oct. 25, 2021).³ These

³ Available at: <https://www.ice.gov/doclib/detention/directive11003-5.pdf>.

investigations include, among others, an ICE Health Service Corps Mortality Review, an Office of Professional Responsibility Detainee Death Review, and a Significant Incident Report. *Id.*

26. As detailed in the following section, each of Plaintiff's requests fall into the above categories of records maintained by ICE or its contractors, or into general categories of facility operation mandated by the PBNDS. *See, e.g.*, PBNDS at 81 (requiring the facility administrator to develop and document a comprehensive staffing analysis or staffing plan); *id.* at 115 (requiring each facility to operate pursuant to written post-orders outlining the procedures, responsibilities, and duties of each security post); *id.* at 179-80 (requiring staff to maintain a log pertaining to people detained in the Special Management Unit, including "any unusual activity or behavior of an individual detainee.").

27. Thus, the records requested are in the custody, possession, or control of ICE.

Plaintiff's FOIA Request

28. On May 23, 2024, Plaintiff submitted its Request to ICE via the SecureRelease Portal. *See* 6 C.F.R. § 5.3 (stating that all DHS components "have the capability to receive requests electronically, either through email or a web portal."). *See also FOIA Contact Information*, Dep't Homeland Sec. (Oct. 4, 2024) (directing FOIA requesters seeking records in the possession of ICE to the DHS SecureRelease Portal).⁴ A copy of the Request is attached as Exhibit 1.

29. The Request seeks "any and all records prepared, received, transmitted, collected, and/or maintained by [ICE] which describe, refer, or relate to Mr. Frankline Okpu, who was held in ICE custody on or about March 29, 2023, until his death on or about December 6, 2023, at Moshannon Valley Processing Center." Exhibit 1, FOIA Request at 1. Plaintiff included a copy of Mr. Okpu's death certificate and a copy of ICE's Detainee Death Report as proof of Mr. Okpu's

⁴ Available at: <https://www.dhs.gov/foia-contact-information>.

death, and a declaration from Ms. Malle Cynthia, Mr. Okpu's next-of-kin, authorizing Plaintiff to request the records on her behalf.

30. All requested records are in ICE's custody and control.

31. Indeed, ICE has produced these same types of records in other FOIA cases involving the death of an ICE detainee. *See generally* Am. Civ. Liberties Union et. al, *Deadly Failures: Preventable Deaths in U.S. Immigration Detention* (analyzing the types of records produced by ICE in FOIA cases involving deaths in detention)⁵; *id.* at 19-20, figs. 3-4 (2024) (listing documents routinely created upon the death of a noncitizen in immigration detention, and other records in the possession of ICE related to that individual's detention). *See also* Am. Oversight v. Dep't Homeland Sec., 691 F.Supp.3d 109 (D.D.C. 2023) (compelling the production of several reports routinely conducted in the course of investigating detainee deaths, such as healthcare reports, draft and final detainee death reviews including recommendations from draft reports, and root cause analyses.); *Transgender L. Ctr. v. Immigr. & Customs Enf't*, 46 F.4th 771 (9th Cir. 2022) (finding that the Agency improperly withheld records related to the death of a detained migrant such as a draft mortality review, emails between various DHS subagencies related to the death, and staffing and procedures at a detention center; also referencing the existence of other documents such as a final mortality or morbidity review and the "disappearance" of video footage from the facility that would have been subject to FOIA); *Owen v. Immigr. & Customs Enf't*, No. CV 22-0550 DSF (AFMx), 2023 WL 9470904 (C.D. Cal. Jan. 12, 2023) (noting that ICE produced documents in a "meta-FOIA" request – or a FOIA request about related FOIA requests – related to the in-custody death of a non-citizen).

⁵ Available at: <https://www.aclu.org/publications/deadly-failures-preventable-deaths-in-us-immigrant-detention>.

32. The request, in more detail than described here, seeks the following twelve categories of records: (1) detention file/disciplinary records; (2) medical care records; (3) the autopsy report and related documents; (4) videos and photographs; (5) all call records related to Mr. Okpu's ICE detention, including call records to first responders on or around December 6, 2023; (6) witness statements related to Mr. Okpu's death and any suspected or alleged disciplinary infraction prompting his placement in the SHU; (7) investigation records involving Mr. Okpu; (8) written correspondence, including emails between various DHS sub agencies and contractors, regarding Mr. Okpu's custody, discipline, and death; (9) records about Moshannon's ICE-contract compliance after Mr. Okpu's death; (10) records documenting Moshannon staffing on and around Mr. Okpu's death; (11) policies, procedures, and training related to the placement, supervision, and management of people in segregation at Moshannon; and (12) any public records requests made and fulfilled regarding Mr. Okpu between December 6, 2023 and the date a search was conducted. *See* Exhibit 1 for the full text of the request. Each category involves documents routinely created and maintained by ICE.

33. The Request also includes an application for a fee waiver or limitation under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k) on the grounds that disclosure of the requested records is in the public interest because it 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 requester." Exhibit 1, FOIA Request at 9. The matter has already generated substantial media coverage in local, national, and international media. *Id.* at 10. The requested records on Mr. Okpu's death at Moshannon, one of the newest and largest detention facilities in the northeast United States, would contribute significantly to the public understanding of ICE's activities at the facility. *Id.* at 9-10.

34. The Request explains that the ACLU of Pennsylvania plans to disseminate the information and make it available to the public through various mediums at no cost. *Id.* at 10-11. Indeed, the ACLU and its affiliates, including the ACLU of Pennsylvania, are non-profit organizations with a longstanding history of disseminating information requested through FOIA at no cost and without a “commercial interest.” 6 C.F.R. § 5.11(k)(1)(ii). As such, the ACLU of Pennsylvania satisfies the test for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k).

35. Additionally, the Request applies for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiff qualifies as a “representative of the news media” and that the records are not sought for commercial use, given the ACLU’s non-profit mission and substantial activities to publish information for dissemination to the public. Exhibit 1, FOIA Request at 10–11. As part of its regular activities, the ACLU and ACLU of Pennsylvania regularly publish magazines, press releases, reports, and social media posts describing and analyzing information obtained about government activities, including through FOIA requests. *Id.* at 11. The ACLU of Pennsylvania qualifies as a “representative of the news media” because it “gather[s] information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III).

Defendant’s Response

36. Under the FOIA statute, ICE is obligated to respond to FOIA requests within 20 working days, 5 U.S.C. § 552(a)(6)(A), making ICE’s response deadline June 24, 2024.

37. On May 31, 2024, ICE emailed Counsel to acknowledge receipt of the FOIA request, assigning it tracking number 2024-ICFO-37908. ICE also invoked the ten-day extension

permitted by 5 U.S.C. § 552(a)(6)(B), because the Request “seeks numerous documents that will necessitate a thorough and wide-ranging search.” A copy of ICE’s acknowledgment email is attached as Exhibit 2. According to the SecureRelease Portal, the request was assigned to the “Complex” processing track.⁶

38. ICE has not corresponded with Plaintiff since sending this acknowledgment on May 31, 2024.

39. The ten-day extension lapsed on July 9, 2024.

40. To date, ICE has failed to produce records responsive to Plaintiff’s request within the statutory time period, document the steps it has undertaken to conduct an adequate search, or respond to Plaintiff’s request for a fee waiver.

CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

Freedom of Information Act, 5 U.S.C. § 552(a)(6): Failure to Respond to FOIA Request Within Statutory Time Period

41. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

42. Plaintiff has a legal right under FOIA to the timely search and release of responsive, non-exempt agency records in response to its May 23, 2024, FOIA request.

⁶ DHS regulations explain that its multitrack processing approach is intended to “distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request.” 6 C.F.R. § 5.5(b). Regardless which track the Agency assigns the request, however, all FOIA requests are still subject to the 20-day response deadline under normal circumstances, 5 U.S.C. § 552(a)(6)(A), plus the 10-day extension permitted by § 552(a)(6)(B) in unusual circumstances.

43. On information and belief, Defendant currently has possession, custody, or control of the requested records.

44. No legal basis exists for ICE's failure to timely search for and release responsive agency records in compliance with FOIA's time limits.

45. ICE had, under 5 U.S.C. § 552(a)(6), 20 working days from the date of receipt of Plaintiff's FOIA request to make a determination on the request or to request an additional 10 days under unusual circumstances.

46. ICE invoked the 10-day extension permitted by 5 U.S.C. § 552(a)(6)(B), requiring it to respond to Plaintiff's FOIA request by July 9, 2024.

47. That time has since expired.

48. To date, ICE has not produced the requested records or otherwise responded to Plaintiff's FOIA request.

49. Because Defendant has failed to comply with FOIA's time limits, ACLU-PA has constructively exhausted all applicable administrative remedies.

50. ICE's failure to comply with the statutory deadlines violates 5 U.S.C. § 552(a)(6).

SECOND CLAIM FOR RELIEF
Freedom of Information Act, 5 U.S.C. § 552(a)(3)(C):
Failure to Conduct Adequate Search

51. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

52. Defendant is obligated to make reasonable efforts to search for the records requested by Plaintiff under 5 U.S.C. § 552(a)(3)(C).

53. On information and belief, ICE currently has possession, custody, or control of the requested records.

54. To date, ICE has not met its burden to show that it has made a reasonable, good-faith search for the records requested: the agency has not produced any documents responsive to Plaintiff's request, provided any declarations indicating the steps it has undertaken in its search, otherwise documented the adequacy of its search, or provided any indication that a search has taken place at all.

55. ICE's failure to conduct an adequate search violates 5 U.S.C. § 552(a)(3)(C).

THIRD CLAIM FOR RELIEF
Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A):
Improper Withholding of Agency Records

56. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

57. Plaintiff has a legal right under FOIA to the timely search and release of responsive, non-exempt agency records in response to its May 23, 2024, FOIA request.

58. Under 5 U.S.C. § 552(a)(3)(A), ICE is obligated to make properly requested records promptly available to a requester.

59. On information and belief, ICE currently has possession, custody, or control of the requested records.

60. To date, ICE has not made any records available to Requester, nor produced a Vaughn index.

61. ICE has violated its obligations under FOIA by withholding requested records in its possession that are not exempt from disclosure under 5 U.S.C. § 552(b).

FOURTH CLAIM FOR RELIEF

**Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii) and 5 U.S.C. § 552(a)(4)(A)(ii)(II):
Improper Denial or Failure to Respond to Request for Fee Waiver**

62. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

63. Defendant ICE has not responded to Plaintiff's fee-waiver request for its May 23, 2024, FOIA Request.

64. Plaintiff has constructively exhausted its administrative remedies with request to a fee waiver from Defendant ICE for the May 23, 2024, FOIA Request.

65. Defendant has violated Plaintiff's right to a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) and 5 U.S.C. § 552(a)(4)(A)(ii)(II) and under Defendant's own regulations, 6 C.F.R. 5.11(k), for Plaintiff's May 23, 2024, FOIA request.

REQUESTED RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Assume jurisdiction over this matter;
2. Declare that Defendant violated FOIA by failing to respond to Plaintiff's FOIA request, failing to undertake an adequate search, unlawfully withholding the requested records, and failing to respond to or deny the request for a fee waiver;
3. Order Defendant to immediately conduct a search of any and all responsive records to Plaintiff's May 2024 FOIA Request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA requests, including production of "FOIA Search Staffing Sheets" for all searchers;
4. Enjoin Defendant from assessing fees or costs for the processing of the FOIA Request;

5. Award Plaintiff its costs and reasonable attorneys' fees incurred in this action, as provided by 5 U.S.C. § 552(a)(4)(E); and

6. Grant such other and further relief as this Court may deem just and proper.

Dated: October 24, 2024

Respectfully submitted,

/s/ Keith Armstrong

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