

American-Arab Anti-Discrimination Committee
Celebrating 25 Years of Dedicated Service to Civil
and Human Rights

March 3, 2005

Privacy Office
US Department of Homeland Security (DHS)
FOIA Appeals
245 Murray Lane SW, Building 410
Washington, DC 20528

VIA FACSIMILE 202-772-5036 AND UNITED STATES POSTAL SERVICE

To Whom It May Concern:

I am writing as President of the American-Arab Anti-Discrimination Committee (ADC) headquartered at 4201 Connecticut Avenue, NW, Suite 300, Washington, DC 20008. I am writing to appeal a Freedom of Information Act request made pursuant to 5 U.S.C. § 522 (2000) (FOIA). I received a denial letter on February 14, 2005 (*Encl. 1*) to my request of December 14, 2004.

On September 30, 2004, ICE released a statement entitled, "Terrorist Threat and Disruption Efforts by ICE," (*Encl. 2*) and on November 4, 2004, ICE issued a press release entitled, "ICE Threat Disruption Effort Results in More than 230 Arrests" (*Encl. 3*). ADC became concerned that ICE was using NSEERS in the reprioritization of leads in enforcing our nation's immigration laws. To alleviate our concerns we requested that DHS release the nationality breakdown of those arrested in order to assure the Arab-American and Muslim communities that they are not being impacted on a disproportionate basis. To be clear our request did not seek, and is not seeking, the names or individual private information of any kind on the detainees, nor did we attempt to gain information of a particularized nature with respect to the investigation. However, this request was denied.

ICE is withholding the data we requested pursuant to Exemption 5 U.S.C. § 522 (b) (7) (A) of FOIA. This exemption states that "pursuant to 5 U.S.C. 552 (b), the Freedom of Information Act does not apply to matters that are--records of information compiled for law enforcement purposes, but only to the extent that the production of such records or information could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 522 (b) (7) (A).

ADC does not believe that Exemption 7 (A) applies to this matter because nationality data on a specific population of detainees is of such a generalized and innocuous nature that its release cannot be reasonably be expected to interfere with enforcement proceedings. To be exempted from release under 7 (A), the information must be compiled for law enforcement purposes and whose release could reasonably be expected to interfere with enforcement proceedings. Although your agency only provided a generalized statement about an ongoing investigation, we do not challenge the veracity of that assertion. However, we do not believe that the data we are requesting and that is in question was compiled for law enforcement. Instead the data was compiled upon our request, and as such does not fall into the exemption.

Furthermore, information may be withheld only when release of the information could reasonably be expected to interfere with enforcement proceedings. DHS, in denying our request, failed to establish how release of generalized data about the nationality of the detainees would interfere with its ongoing investigation. The exemption does not cover information merely because it was compiled for law enforcement purposes. *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1037 (7th Cir. 1998). Data on

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detainee nationality may have been available before apprehension of the detainees but was unlikely to have any relevance in determining whether a particular detainee was in violation of immigration law.

Nationality data provides little if any information on the propensity to violate immigration laws and therefore cannot be said to contribute to either the investigation or enforcement.

Information that cannot be reasonably expected to interfere with enforcement proceedings loses the protection afforded by Exemption 7 (A) and is, therefore, releasable.

Moreover, Exemption 7 is inapplicable in denying this request because DHS has failed to demonstrate that an articulable and distinct harm will result from release of the requested information. Courts have established a two-step analysis in determining applicability of Exemption 7 (A), focusing on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about it can be expected to cause some articulable harm. *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995). The denial letter failed to articulate the harm that will result from the release of the detainee's nationality data. Mere pendency of an investigation is an inadequate basis for invoking a 7 (A) Exemption, *Scheer v. United States Dep't of Justice*, 35 F. Supp. 2d 9, 13 (D.D.C. 1999) (holding that an agency must first prove the existence of a law enforcement proceeding and then prove the harm).

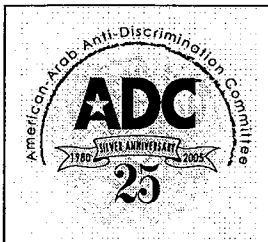
The arrest of the 230 detainees suggests that an investigation is either ongoing or completed. However, that is not sufficient to deny the requested information. Nationality of the detainees is a factual matter uncontested and unrelated to determinations of guilt or innocence. Nationality, though probably relevant in keeping statistics and determining trends, fails to carry the necessary burden of showing interference with enforcement proceedings, *Miller v. USDA*, 13 F.3d 260, 263 (8th Cir. 1993) (holding that government must make specific showing of why disclosure of documents could reasonably be expected to interfere with enforcement proceedings). The standard in measuring the harm is based not on conclusory statements, *Grasso v. IRS*, 785 F.2d 70, 77 (3d Cir. 1986), but whether disclosure can reasonably be expected to interfere in a "palpable, particular way" with enforcement proceedings, *North v. Walsh*, 881 F.2d 1088, 1100 (D.C.C. 1989). DHS has provided nothing more than a conclusory statement concerning the unreleasability of the requested data because of an investigation. DHS has failed to show that an articulable and distinct harm will result from release of the requested data. Accordingly, Exemption 7 (A) cannot operate to prevent release of the requested nationality data.

A generic application of the exemption may not be made because the requested data does not fit into a functionally harmful category of information or documents whose release will threaten law enforcement proceedings. Although determination of the exemption's application may be made generically based on the categorical types of records involved, *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (U.S. 1978), the withholding agency is still required to identify a distinct category to which the requested data belongs and why that category is exempt. Courts are united in holding that an agency invoking the 7 (A) Exemption must provide at least a general, functional description of the types of documents at issue sufficient to indicate the type of interference threatening the law enforcement proceeding. See *Lion Raisins Inc. v. USDA*, 354 F.3d 1072, 1084 (9th Cir. 2004). DHS simply declared an ongoing investigation and invoked a blanket exemption. No distinct category was identified to which the requested data belongs. Moreover, no articulable harm was provided exempting the unidentified putative category. All that DHS has provided is a blanket reason as the basis for the exemption.

In *Robbins*, the Supreme Court recognized that the purpose of the 1974 Amendment to Exemption 7 (A) of FOIA was designed to eliminate blanket exemptions of government records simply because they were found in investigatory files. *Robbins*, 437 U.S. at 236. By invoking the investigation argument DHS has

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effectively placed all information related to this matter out of reach. Congress did not intend to create an exemption that swallows the FOIA law. But that is precisely what DHS has done in this case. The requested information is of little investigatory value. It provides no indication as to the likelihood of past or future violations of immigration law. On the other hand, national origin is of great relevance in determining whether the government is discharging its law enforcement duties uniformly and neutrally, indifferent to national origin, color, race, or religious affiliation.

The purpose of the FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to hold government accountable to the governed. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975). Invocation of the investigation exemption to prevent release of nationality data circumvents the very purpose for which FOIA was created. The exemption shield provided by the investigation exemption exists to protect the integrity of investigations and enforcement of the law. Nationality data does not threaten or harm legitimate investigations and enforcement even by the strictest investigatory standards.

DHS also stated in their denial letter that Exemption (b) (7) (A) is temporal in nature; however, once all pending or related matters are resolved there are other exemptions that are applicable to these records. ADC does not believe that these other exemptions listed by DHS can be applied to this FIOA request for the following reasons.

Exemption (b) 2 states that matters that are related solely to the internal personnel rules and practices of an agency are exempt from disclosure. However, the data that ADC has requested is unrelated to internal personnel rules and practices of DHS. The request does not require any practice of law enforcement to be defined but merely asks for data relating to the populations affected by this particular law enforcement program. Thus, this exemption cannot apply.

Exemption (b) (7) (C) states that information compiled for law enforcement purposes that could reasonably be expected to constitute an unwarranted invasion of personal privacy cannot be disclosed. In *Judicial Watch Inc. v U.S. Department of Commerce*, 337 F. Supp 2d. 146, 180 (D.D.C. Sept. 30, 2004), the court stated that Exemption 7 (C) protects against the unwarranted invasion of privacy and protects the identities of suspects and others of investigatory interest who are identified in agency records in connection with law enforcement investigations. ADC's request for the nationality breakdown is not an unwarranted invasion of privacy, ADC does not ask for names or individual information of the detainees. The information ADC requested could in no way be considered an unwarranted invasion of personal privacy since nationality in and of itself cannot determine which individuals are involved in this investigation. Furthermore, ADC's request calls for the numbers of individuals detained from each country. Thus, this exemption cannot apply.

Exemption (b) (7) (D) of FOIA allows the withholding of records if their disclosure "could reasonably be expected to disclose the identity of a confidential source...." When using this objection, an agency must demonstrate, through the use of reasonably-detailed affidavits, that the information was compiled for a law enforcement purpose. *Carbe v. Bureau of Alcohol, Tobacco and Firearms*, 2004 WL 2051359 (D.D.C.). Furthermore, the agency must demonstrate that an informant provided the information under either an express or implied promise of confidentiality and that disclosure could reasonably be expected to disclose the source's identity. *Id.* However, ADC is not asking for information that involves a confidential source, the information is provided through a database and not an individual. Thus, this exemption cannot apply.

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Exemption (b) (7) (E) is pertaining to techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. In *Judicial Watch*, 337 F. Supp 2d. at 181, the court states that 7 (E)'s protection is generally limited to techniques or procedures that are not well-known to the public. However, this exemption does not apply because ADC is not requesting information concerning techniques and procedures used in law enforcement, instead ADC requests data indicating which populations, by nationality, are affected by certain law enforcement practices. Thus, this exemption cannot apply.

Exemption (b) (7) (F) protects the identity of an individual if release of that information "could reasonably be expected to endanger the life or physical safety of any individual." In *Carbe*, 2004 WL 2051359, the court describes this exemption as permitting the withholding names of identifying information of federal employees and third persons who may be unknown to the requester in connection with a particular law enforcement matter. ADC has not asked for the names or identifying information of anyone, including federal employees and third persons. Thus, this exemption cannot apply.

In conclusion, I would like to appeal the decision of DHS to deny the release of the breakdown of the nationalities from the arrests made by ICE for the reasons described above. I look forward to hearing from you soon on this important and timely matter.

Sincerely,

Hon. Mary Rose Oakar
President

Kareem W. Shora, JD, LL.M.
Director, Legal Policy

Cc: Daniel Sutherland, Officer for Civil Rights and Civil Liberties, DHS
Legal Department files

Encl: 1: Denial Letter
2: ICE Statement
3: ICE Press Release

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