

**UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

AMERICAN-ARAB ANTI-DISCRIMINATION)
COMMITTEE)
1732 Wisconsin Avenue, NW)
Washington, DC 20007)

Plaintiff,)

v.)

Civil Action No.:)

UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY)
Washington, D.C. 20528)

IMMIGRATION AND CUSTOMS)
ENFORCEMENT)
425 I Street, NW)
Washington, D.C. 20536)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Nature of Action

1. This action seeks to vindicate the public’s fundamental right to know whether the government is telling them the truth about how it has been conducting law enforcement in the post-9/11 era. In particular, this lawsuit under Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552 *et seq.*, seeks data that would either validate or dispel the widespread perception that Defendants Department of Homeland Security (“DHS”) and Immigration and Customs Enforcement (“ICE”) have been misusing information from the National Security Entry/Exit Registration System (“NSEERS”) to impermissibly target, or “profile,” Arab-Americans and Muslims for general law enforcement purposes, in direct contravention of NSEERS’s stated purpose and despite Defendants’ repeated public representations to the contrary. To that end, this suit demands the immediate disclosure of government records concerning the national origin, ethnicity, race, religion, and gender of the more than 230 individuals detained by the government in connection with a law enforcement operation known as the “October Plan.”

2. FOIA requires all federal agencies, including Defendants, to make agency information available to the public upon request, unless such information is specifically exempted under one or more of the exceptions set forth in 5 U.S.C. § 552(b). Any person denied access to requested information, like Plaintiff American-Arab Anti-Discrimination Committee (“ADC”), may file a complaint in this Court, and this Court has jurisdiction both to enjoin the agency from withholding such information and to order its immediate production. This Court reviews the agency’s denial of access to agency information *de novo*, and may examine the contents of requested agency records *in camera* to determine whether such records, or any part thereof, may be withheld under a § 552(b) exemption.

3. To be clear: the present action does not attempt to subvert or in anyway undermine the October Plan and any related pending or potential future investigations. It merely seeks generalized data for which no exception to FOIA’s broad disclosure requirements applies and whose public import is manifest.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and 552(a)(6)(E)(iii), respectively. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

Parties

5. Plaintiff American-Arab Anti-Discrimination Committee is a nonprofit, civil rights organization, committed to defending the rights of, and addressing discrimination and bias against, Americans of Arab descent. ADC is non-partisan and non-sectarian. ADC is the largest Arab-American grassroots civil rights organization in the United States, with members in all 50 states, chapters nationwide, staff offices in Boston, MA, Dearborn, MI, Los Angeles, CA, New York, NY, San Francisco, CA, and San Diego, CA, and national headquarters in Washington, DC. ADC was founded in 1980 by former United States Senator James Abourezk. Former United States Congresswoman Mary Rose Oakar is currently ADC President. ADC submitted the FOIA requests, denied by Defendants DHS and ICE that are the subject of this action.

6. Defendant Department of Homeland Security is an agency of the United States. It has possession of, and control over, the information sought by Plaintiff ADC under FOIA, and it has withheld said information from Plaintiff ADC.

7. Defendant Immigration and Customs Enforcement is an agency of the United States within the Department of Homeland Security. It has possession of, and control over, the information sought by Plaintiff ADC under FOIA, and has withheld said information from Plaintiff ADC.

The National Security Entry/Exit Registration System (“NSEERS”)

8. On June 6, 2002, then-Attorney General John Ashcroft proposed the creation of a new federal program to be known as the National Security Entry-Exit Registration System (“NSEERS”). *See* Attorney General Prepared Remarks on the National Security Entry-Exit Registration System, June 6, 2002, at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm>; *see also* Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 40581 (proposed rule June 12, 2002). As finally constituted, NSEERS required nationals of certain countries, as designated by the Attorney General, to submit to fingerprinting and photography upon entry into the United States, to register periodically with the Immigration and Naturalization Service (“INS”), and to comply with certain exit controls when they departed the country. Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,584, 52,591-93 (final rule Aug. 12, 2002) (amending 8 CFR § 264.1(f)). That aspect of NSEERS was called “Special Registration.” *See id.*

9. Despite widespread concerns that the government would use information obtained through the NSEERS Special Registration program to discriminatorily target “specific minority ethnic groups and members of a specific religion, *i.e.*, Arabs and Muslims,” *id.* at 52585, the Department of Justice announced that it “remains firmly committed to protecting the civil rights of all individuals in the United States while seeking to prevent acts of terrorism. The Department unequivocally rejects the notion that the requirements of the final rule, or the criteria for application of the final rule, to nonimmigrant aliens subject to special registration are, or are intended to be, invidiously discriminatory.” *Id.*

10. Despite those pronouncements, Attorney General Ashcroft eventually required male nationals from just 25 countries—24 of which are predominantly Muslim (the other being North Korea)—to appear at INS offices for questioning, fingerprinting, and photographing. *See* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 67,766, 67,766 (Nov. 6, 2002) (Iran, Iraq, Libya, Sudan, and Syria); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 70,526, 70,526 (Nov. 22, 2002) (Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen); Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77,642, 77,643 (Dec. 18, 2002) (Pakistan and Saudi Arabia); Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363, 2364 (Jan. 16, 2003) (Bangladesh, Egypt, Indonesia, Jordan, and Kuwait).

11. Within weeks, the government detained more than 1100 people as a result of NSEERS. *See* Kris Kobach, Counsel to the Attorney General, Department of Justice, Foreign Press Center Briefing (Jan. 17, 2003), at <http://fpc.state.gov/fpc/16739.htm>.

**The “October Plan” for Interrogations, Surveillance,
and Detentions Prior to the 2004 Presidential Election**

12. On September 17, 2004, CBS News reported that the Federal Bureau of Investigation (“FBI”) had sent an internal e-mail advisory to supervisory agents detailing “a massive counter-offensive of interrogations, surveillance and possible detentions” that was designed to “disrupt [any] terrorist plans” targeting the presidential election. *See* CBS News, “FBI’s Anti-Terror ‘October Plan,’” Sept. 17, 2004, at <http://www.cbsnews.com/stories/2004/09/17/eveningnews/printable644096.shtml> (attached as Ex. 1). CBS News reported that, according to the FBI’s e-mail advisory, “‘extraordinary measures’ ... will go into place ‘beginning the first week of October through the elections.’” *Id.*

Specifically, the [October] plan calls for “aggressive—even obvious—surveillance” techniques to be used on a short list of people suspected of being terrorist sympathizers, *but who have not committed a crime*. Other “persons of interest,” *including their family members*, may also be brought in for questioning....

Id. (emphasis added). CBS News also reported that the FBI “expect[ed] to be criticized for the strategy if it goes too far,” and noted that “some officials fear[ed] ... a wave of protests from Arab-Americans and civil libertarians.” *Id.*

13. On September 30, 2004, DHS and ICE (the “largest investigative arm of the Department of Homeland Security”), referred to the October Plan in a press release titled “Terrorist Threat and Disruption Efforts by ICE.” *See* Ex. 2. The press release reported that “ICE has been working for the past several months at a heightened level in direct support of the government-wide Interagency Security Plan that will remain in effect through the 2005 Presidential Inauguration.” *Id.* The press release further asserted that “[t]his initiative builds upon ICE’s continued efforts to target immigration status violators in America—*without regard to race, ethnicity or religion,*” and claimed that ICE “is *not* conducting a ‘round-up’ or a ‘sweep’ in any community,” “is *not* profiling based on race or religious affiliation,” and, “is *not* instituting a blanket detention policy.” *Id.* (emphasis added). Despite those disclaimers, the press release acknowledged that “ICE’s Compliance Enforcement Unit routinely researches and assigns immigration status violator leads to ICE field office nationwide based on data from ... the National Security Entry/Exit Registration System (NSEERS).” *Id.*

14. That same day, ADC issued a press release stating that “officials from the Department of Homeland Security (DHS) and ICE” had responded to ADC’s concerns about the October Plan by “stress[ing] their commitment to continuing to build their working relationship with the Arab and Muslim American communities.” *See* ADC, Press Release, “ICE Responds to ADC’s Concerns,” Sept. 30, 2004 (attached as Ex. 3). ADC’s press release further indicated that government officials had “*emphasized that their initiative is not based on racial profiling.*” *Id.* (emphasis added). Nonetheless, ADC’s press release expressed its concern that the government might use NSEERS to select targets for October Plan surveillance, and that NSEERS-based “national origin profiling” might cause “the ICE initiative [to] be selectively carried out against Arabs and Muslims.” *Id.*

15. On November 4, 2004, DHS and ICE issued a press release titled “ICE Threat Disruption Effort Results in More Than 230 Arrests—More Than 900 Investigations Completed.” *See* Ex. 4. That

press release reported that “in a one-month period beginning October 1, 2004, ICE has arrested 237 immigration status violators nationwide as part of the government-wide Interagency Security Plan that will remain in effect through the 2005 Presidential Inauguration.” *Id.* The press release further asserted that “leads ha[d] been sent to ICE field offices for immediate investigation and potential arrests—*without regard to race, ethnicity, or religion.*” *Id.* (emphasis added). In contrast to the September 30 press release, ICE omitted any mention of its reliance on NSEERS. *Id.*

16. Notably, the November 4, 2004 press release *disclosed the nationalities of eight of the detainees*, four of whom were from Arab or Muslim countries, including a Saudi national, Jordanian national, Lebanese national, and Pakistani national. *See id.*

ADC’s FOIA Request for Nationality Data on Persons Detained under the “October Plan”

17. By letter dated December 14, 2004, ADC requested that DHS release “data on nationality of those 230 individuals detained” in connection with the enforcement efforts described in DHS’s November 4, 2004 press release (“the October Plan detainees”). *See ADC FOIA Request, Dec. 14, 2004* (attached as Ex. 5). ADC’s President, former Congresswoman Mary Rose Oakar, reiterated ADC’s concern that reliance on NSEERS data might result in selective enforcement of the October Plan against Arab-Americans and Muslims. *Id.* ADC explained that “[i]n order to alleviate these concerns, which have since been echoed by numerous members of the Arab-American and Muslim communities, it is our sincere hope that ICE will release the nationality breakdown of those arrested in order to assure the Arab-American and Muslim communities, along with the rest of our nation, that immigration enforcement is not resulting in a disproportionate impact on individuals from Arab or Muslim countries.” *Id.*

18. On February 14, 2005, DHS denied ADC’s request for data on the nationalities of the October Plan detainees—notwithstanding the fact that DHS and ICE had voluntarily disclosed some of that very information in its November 4, 2004 press release. In marked contrast to its prior conduct, DHS purported to base its denial of ADC’s FOIA request on the ground that the requested data is exempt from disclosure under 5 U.S.C. § 522(b)(7)(A), which commonly is known as the “law enforcement exemption.”

19. By letter dated March 3, 2005, ADC appealed DHS's denial of ADC's FOIA Request. *See* ADC FOIA Appeal, Mar. 3, 2005 (attached as Ex. 6). ADC explained that mere information on the October Plan detainees' nationalities could not possibly interfere with potential law enforcement proceedings: "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." *Id.*

20. On September 5, 2005, DHS denied ADC's appeal—again, notwithstanding the fact that DHA's November 4, 2004 press release had voluntarily disclosed some of the very information ADC sought in its FOIA request. *See* DHS Denial of ADC FOIA Appeal, Sept. 5, 2005 (attached as Ex. 7); *see also* Ex. 4. In addition to asserting that the requested nationality data were exempt from disclosure under the law enforcement exception, *see id.* (citing 5 U.S.C. § 552(b)(7)(A)), DHS further asserted that the data ADC sought were exempted from disclosure by 5 U.S.C. § 552(b)(7)(E), which covers information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

21. Given that ADC's FOIA request merely sought generalized data on the nationalities of the October Plan detainees, DHS's assertion that the release of such data "would disclose techniques and procedures for law enforcement" all but conceded that Defendants have been, and presumably still are, engaged in national origin profiling.

**ADC's FOIA Request for Race, Ethnicity, Religion, and Gender Data
on Persons Detained under the October Plan**

22. On February 8, 2006, ADC filed a second FOIA request with ICE. That request sought generalized data on the race, ethnicity, religion, and gender of the October Plan detainees, and was intended to assure Arab-Americans and Muslims that their communities were not being selectively targeted and that Defendants were not engaged in racial, ethnic, or religious profiling. *See* Ex. 8.

23. ADC reiterated that it was not seeking particularized information about any individual October Plan detainee, such as their name, other personal information, the particular allegations and/or

charges of wrongdoing levied against them, or the date and location of their arrest. As a result, there was no reasonable possibility that disclosure of the requested data could interfere with ongoing law enforcement proceedings, nor that such information would disclose any of the techniques, procedures, or guidelines used for law enforcement investigations and/or prosecutions—unless, of course, the government was using racial, ethnic, or religious profiling as an investigatory or prosecutorial tactic. Instead, the information sought was (and remains) crucial to determining whether the government is discharging its law enforcement duties uniformly and neutrally, without regard to race, ethnicity, gender, or religious affiliation.

24. As of the date of the filing of this complaint, despite inquiries from ADC regarding the status of its request, and in gross disregard of the statutory twenty-day response time, 5 U.S.C. § 552(a)(6)(A)(i), ICE has neither responded to ADC or its counsel, nor identified any “unusual circumstances” that might warrant an extension, nor given any indication of the “date on which a determination is expected to be dispatched.” 5 U.S.C. § 552(a)(6)(B)(i). ADC’s February 8, 2006 FOIA request is thus ripe for judicial adjudication. 5 U.S.C. § 552(a)(6)(C).

The Denial Of ADC’s FOIA Request By DHS And ICE Is Unlawful

25. FOIA “mandates a ‘strong presumption in favor of disclosure.’” *Nat’l Ass’n of Homebuilders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2003) (quoting *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991)). Indeed, “FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.” *Id.* Thus, “[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden ‘on the agency to sustain its action’ and directs the district courts to ‘determine the matter de novo.’” *Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)).

Exemption 7(A) Is Inapplicable

26. Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, *but only to the extent that production of such law enforcement records or*

information ... could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). The exemption is not meant to “endlessly protect material simply because it was in an investigatory file.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

27. FOIA obligates the government to demonstrate “with specificity a logical connection between the information held and identified investigations.” *City of Chicago v. U.S. Dep’t of the Treasury*, 287 F.3d 628, 633 (7th Cir. 2002); *see also Am. Friends Serv. Comm. v. Dept. of Defense*, 831 F.2d 441, 444 (3d Cir. 1987). To establish that disclosure would interfere with open or prospective proceedings, the agency must show that disclosure of the requested materials would “hinder an agency’s ability to control its investigation, enable suspects to elude detection and intimidate witnesses, or prematurely reveal evidence or strategy.” *City of Chicago*, 287 F.3d at 634.

28. The national origin information sought by ADC cannot possibly satisfy this rigorous test. ADC merely sought generalized data on the demographic characteristics of the October Plan detainees as a group. It did not request the names of, or any other identifying information regarding, the October Plan detainees, and did not seek any information regarding the DHS employees that were involved in, or any law enforcement techniques, sources, or procedures used by DHS in connection with, the October Plan detentions. Put simply, the information ADC requested—data on the nationalities of a specific population of detainees—is of such a generalized and innocuous nature that its release cannot reasonably be expected to interfere with ongoing or prospective enforcement proceedings. Nor can the disclosure of the race, ethnicity, religion, and sex of those detainees. To the contrary, and to reiterate, while such data would reveal whether or not the government is discharging its law enforcement duties uniformly and neutrally, as it must, or instead is engaged in racial, religious, ethnic, gender-based, or national origin profiling, it cannot possibly interfere with a past, present, or future law enforcement proceeding.

Exemption 7(E) Is Inapplicable

29. Exemption 7(E) authorizes the withholding of law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose

guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

30. The agency withholding information pursuant to Exemption 7(E) must establish that releasing the information sought would “be expected to risk circumvention of the law.” *See PHE, Inc. v. U.S. Dep’t of Justice*, 983 F.2d 248 (D.C. Cir. 1993).

31. By itself and without more, mere disclosure of the nationalities of the October Plan detainees cannot possibly interfere with an investigation or facilitate a target’s circumvention of the law in any of the ways contemplated by Exemption (7) or recognized by any court. So too with information regarding the race, ethnicity, religion, and sex of the October Plan detainees.

32. Indeed, the only way that revealing the nationality, race, ethnicity, religion, or sex of the October Plan detainees could possibly disclose a law enforcement technique or procedure is if DHS and ICE are making law enforcement determinations *based on nationality, race, ethnicity, religion, or sex—that is, if DHS and ICE are engaged in the very sort of profiling they have repeatedly disclaimed.*

The Court Should Grant ADC The Relief Sought

33. ADC has a statutory right to the national origin data that it has requested under FOIA, and there is no legal basis for the Department of Homeland Security’s refusal to disclose this information.

34. ADC has a statutory right to the ethnicity, race, religion, and gender data it has requested under FOIA. The Department of Homeland Security’s failure to provide a response is in violation of Congressional mandate. 5 U.S.C. § 552 (a)(6)(A)(ii).

35. The public’s fear that our government has engaged in discriminatory profiling since 9/11—be it national origin-related, ethnic, racial, religious, or gender-based—has caused the Department of Homeland Security to repeatedly offer public assurances that it does not engage in such profiling. *See, e.g.*, Sept. 30, 2004 Press Release, Ex. 2 (stating that “ICE’s continued efforts to target immigration status violators in America [are] *without regard to race, ethnicity or religion,*” and that ICE “is *not* profiling based on race or religious affiliation”) (emphasis added); Nov. 4, 2004 Press Release, Ex. 4 (stating that

