

deaths of immigrants in DHS custody, including any reports of investigations into such deaths (the “Request”).

3. The ACLU submitted the Request after learning from press reports and other public information of the deaths of certain immigration detainees in DHS’s custody. Several of these deaths had been attributed to deficient medical care provided to those detainees despite the Government’s duty to supply adequate medical care and treatment to them. The press reports indicated that in-custody deaths are not reported publicly and are not tracked or consistently investigated by any government agency. The reports also came on the heels of an audit by the Defendant OIG finding serious problems with the delivery of health care at four of five detention facilities reviewed.

4. The ACLU requested expedited processing of its Request under the applicable FOIA provisions, citing both the ongoing risk of death or serious bodily injury to the hundreds of thousands of people detained by ICE each year, and the public’s urgent need to be informed of the federal government’s activities in this area. The little information already available to the public suggested strongly that the federal government—which is ultimately responsible for the health and welfare of persons detained pursuant to its authority—may need to do more to ensure that immigration detainees are not caused to suffer and die by deficient health care.

5. Despite the importance of the issues underlying the Request, ICE and OIG – the DHS agencies charged with primary responsibility for identifying and producing the records called for by the Request – have not fulfilled their obligations under FOIA. Although ICE has provided the ACLU with certain documents responsive to the Request, press reports that detail documents obtained by the media, as well as

Defendants' own policies and procedures, indicate that many documents responsive to the Request have not been identified or produced.

6. Moreover, despite ICE's agreement with the ACLU that the significant public attention directed to the issues underlying the Request warranted expedited processing, OIG refused to grant expedited processing of the Request without justification. Expedited processing is statutorily required for any FOIA request where a delay could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or where the request is made by a person primarily engaged in disseminating information and urgency exists to inform the public concerning actual or alleged governmental activity. 5 U.S.C. §552(a)(6)(v)(III) and (II). Nonetheless, nearly a year after the ACLU submitted the Request, OIG has yet to produce *any* responsive records to the ACLU or otherwise provide a final response to the Request, despite its presumptive obligation under FOIA to do so within 20 days of the Request.

7. Deaths of in-custody immigration detainees, and the medical care and treatment afforded to those detainees, have been the subject of recent Congressional inquiries and proposed legislation. In addition, a number of front-page stories in major national newspapers demonstrate that the government activity that is the subject of the Request is of ongoing and increasing public concern. The public's urgent need to know about the federal government's activities with respect to this problem is impeded by the Defendants' refusal to comply with their obligations under the FOIA. While the agencies delay, in clear violation of the FOIA, more immigration detainees are being imperiled by the ongoing and apparently pervasive nature of the agencies' actions and inactions regarding immigration detainee health care. The ACLU accordingly files this Complaint

to obtain prompt judicial intervention to order the Defendants' compliance with its obligations under the FOIA.

JURISDICTION AND VENUE

8. 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). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C §§ 701-706. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff ACLU is a nationwide, non-profit and non-partisan organization with over 500,000 members. Its primary functions include educating the public on a broad array of issues affecting protections and guarantees extended by the United States Constitution and engaging in various advocacy efforts related to the promotion of individual rights. The ACLU publishes newsletters, news briefings, right-to-know handbooks, and other materials that are disseminated to the public. The ACLU also disseminates information to the public through its website. The website addresses civil liberties issues in depth, provides features on civil liberties issues in the news, and contains hundreds of documents that relate to the issues addressed by the ACLU. The website includes features on information obtained through the FOIA.

10. Founded in 1972 by the ACLU, the National Prison Project ("NPP") seeks to ensure constitutional conditions of confinement and strengthen prisoners' and detainees' rights through class action litigation, advocacy, and public education. The NPP's policy priorities include preventing domestic torture; protecting prisoners' and detainees' health, safety, and human dignity; assuring domestic oversight

of prisons, jails, and immigration detention facilities; and promoting sound correctional policies. The NPP publishes a semiannual journal, coordinates a nationwide network of litigators and advocates, and provides expert advice and technical assistance to local community groups and lawyers throughout the country.

11. Defendant DHS is a department within the executive branch of the United States Government. Defendants ICE and OIG are components within DHS. All Defendants are executive departments or other establishments in the executive branch of the Government and, therefore, are “agencies” within the meaning of 5 U.S.C. § 552(f)(1). Upon information and belief, Defendants have custody or control of the records that Plaintiff seeks.

12. Defendant ICE was formed pursuant to the Homeland Security Act of 2002, P.L. 107-296, and merged, in whole or in part, the United States Customs Service, United States Immigration and Naturalization Service and United States Federal Protective Service. As such, ICE is the largest investigative arm of DHS. (*About Us: ICE Operations, available at www.ice.gov/about/operations.htm*) (last visited on June 25, 2008). ICE operates and oversees other federal, state and private organizations’ operation of, detention centers throughout the United States in which many immigrants are detained pending resolution of their immigration proceedings. (ICE Fact Sheet *Public Information: Immigration Detention Facilities, May 29, 2008, available at www.ice.gov/pi/dro/facilities.htm*) (last visited on June 25, 2008). ICE is responsible for ensuring safe and humane conditions of confinement for its detainees, including the provision of reliable, consistent, appropriate and cost-effective health services. (ICE Fact Sheet *DRO: Detainee Health Care, May 7, 2008, available at www.ice.gov/pi/news/*

factsheets/detaineehealthcare.htm) (last visited on June 25, 2008). Since the creation of ICE in 2003, ICE has detained nearly 1.5 million individuals. (*Id.*) On any given day, ICE and the facilities under its supervision house approximately 33,000 immigration detainees at over 300 detention centers nationwide. (*Id.*)

13. Defendant OIG was formed pursuant to the Homeland Security Act of 2002, P.L. 107-296, and is responsible for conducting and supervising independent and objective audits, investigations and inspections relating to the programs and operations of DHS, including the health care services provided at the detention facilities operated by ICE. (*See* DHS Office of Inspector General, *Purpose and Mission Statement*, available at www.dhs.gov/xoig) (last visited on June 25, 2008).

14. PHS is a division of the United States Department of Health and Human Services run by the Surgeon General, who reports to the Assistant Secretary for Health and, in turn, the Secretary of the Department of Health and Human Services (“HHS”). (*See* USPHS, *Questions and Answers: Overview*, available at www.usphs.gov/questionsanswers/overview.aspx) (last visited on June 25, 2008). PHS is charged with protecting, promoting and advancing health and safety within the United States. (*See* USPHS, *About the Commissioned Corps: Mission*, available at www.usphs.gov/AboutUs/mission.aspx) (last visited on June 25, 2008).

15. HHS is the principal agency of the United States government charged with protecting the health of Americans and providing essential human services. (*See* Mike Leavitt, *HHS: What We Do*, available at www.hhs.gov/about/whatwedo.html) (last visited on June 25, 2008). HHS’s programs are administered by eight agencies within PHS and three human services agencies. (*Id.*)

16. HRSA is an agency within the HHS that is primarily charged with improving access to health care services for people who are uninsured, isolated or medically vulnerable. (See HRSA, *About HRSA*, available at www.hrsa.gov/about/default.htm) (last visited on June 25, 2008).

17. The Division of Immigration Health Services (“DIHS”) provides or arranges for health care services for immigration detainees in ICE custody. (See DIHS, *About Us*, available at www.icehealth.org/aboutUs/aboutUs.shtm) (last visited on June 25, 2008).

THE FOIA REQUEST

18. On June 13, 2007, the ACLU filed a class action Complaint on behalf of immigration detainees at the San Diego Correctional Facility (“SDCF”), one of the many detention facilities that are used to house immigrants in the custody of ICE. Citing numerous examples based on the personal experiences of the eleven named plaintiffs as well as other current and former SDCF detainees, the Complaint contained detailed allegations of grossly inadequate health care and treatment provided to immigrants detained at the facility, and the needless suffering and avoidable death that they continually faced.

19. On the same day, the Washington Post published an article regarding the medical care received by immigration detainees at detention facilities run by Defendant ICE. (Darryl Fears, *Illegal Immigrants Received Poor Care In Jail, Lawyers Say*, Wash. Post, June 13, 2007.) The article chronicled the lack of adequate medical treatment afforded to certain current and former immigration detainees, and quoted a report by OIG that found “instances of non-compliance” regarding the provision

of health care, “including timely initial and responsive medical care,” in four of five detention facilities studied. (*Id.*)

20. On June 26, 2007, the New York Times published a related front-page article regarding DHS’s failure to enforce standards of adequate medical care for immigration detainees. (Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. Times, June 26, 2007.) The article quoted a sworn declaration of the warden of one of the largest detention facilities used by ICE, the York County Prison in Pennsylvania, stating that DHS “has made it difficult, if not impossible, to meet the constitutional requirements of providing adequate health care to inmates that have a serious need for that care.” (*Id.*) The article stated that, since 2004, 62 immigration detainees had died while in ICE custody, and that ICE declined to release any information about these deaths. (*Id.*) According to the article “[g]etting details about those who die in custody is a difficult undertaking.” (*Id.*) The article also noted that OIG had announced a “special review” of two immigration detainees’ deaths. (*Id.*)

21. The next day, on June 27, 2007, Tom Jawetz, Immigration Detention Staff Attorney for the NPP, submitted the FOIA Request to DHS, HRSA and PHS, detailing the need for public disclosure of information concerning the circumstances surrounding, and investigations related to, immigration detainee deaths. (Exhibit 1.) By the Request, Plaintiff sought disclosure by DHS, HRSA and PHS of six categories of records (the “Records”):

- (1) A complete list of individuals who have died while detained in ICE custody since January 1, 2004. For each death listed, Plaintiff asked DHS, HRSA and PHS to include:
 - (a) Complete name;

- (b) Alien number;
 - (c) Date on which detention began;
 - (d) Date of death;
 - (e) List of all facilities where the detainee was housed along with dates of detention; and
 - (f) Location at time of death.
- (2) For each individual whose death is included in (1), all records:
- (a) Pertaining to the cause of death;
 - (b) Pertaining to requests for medical help by anyone, including the deceased, his/her family members, and fellow detainees;
 - (c) Pertaining to Treatment Authorization Requests (TARs) submitted to the Division of Immigration Health Services (DIHS), including any DIHS responses to those TARs;
 - (d) Pertaining to reports of investigations into the circumstances surrounding the death, including all after-action reports and critical incident reports;
 - (e) Pertaining to whether any of the detainees who died were diagnosed with terminal illnesses while in immigration detention or beforehand;
 - (f) Pertaining to whether any of the detainees who died were taken to outside hospitals for treatment, and if so, the names of those hospitals and the dates of treatment;
 - (g) Pertaining to whether and how ICE notified families of the deaths of detained family members;
 - (h) Pertaining to whether and how ICE notified consular officials of the deaths of detained persons;
 - (i) Pertaining to whether and how state, county, local officials and review boards were notified of the deaths;
- (3) All records, including written and electronic correspondence, pertaining to deaths in ICE custody;
- (4) All records, including policies, procedures, or guidelines provided to or maintained by Contract Detention Facilities, Service Processing Centers, and Intergovernmental Service Agreement facilities relating to deaths in detention, including memoranda and training materials;
- (5) All records identifying the manner by which Defendant agencies or any of their components track deaths in detention; and

- (6) All records, including written and electronic correspondence, generated in response to requests for information from the Washington Post and the New York Times about immigrant detainee medical care and deaths, and in reaction to those articles. This request pertains specifically to records generated in preparation for and in response to two articles: (a) Darryl Fears, *Illegal Immigrants Received Poor Care in Jail, Lawyers Say*, Washington Post, June 13, 2007; and (b) Nina Bernstein, *New Scrutiny as Immigrants Die in Custody*, N.Y. Times, June 26, 2007.

22. The ACLU asked for expedited processing of the Request pursuant to 5 U.S.C. § 552(a)(6)(E) and applicable regulations. This request, if granted, would have required the agencies to prioritize the Request over other, less urgent FOIA requests. The ACLU explained that the Request qualified for expedited processing on two independent grounds. First, the Request satisfied 5 U.S.C. § 552(a)(6)(E)(v)(I) because a lack of expedited disclosure of the Records could “reasonably be expected to pose an imminent threat to the life or physical safety” of immigrants in ICE custody. Second, the Request satisfied 5 U.S.C. § 552(a)(6)(E)(v)(II) and warranted expedited processing because, as the recent media attention had demonstrated, there was an urgency to provide information to the public about actual or alleged government activities surrounding immigration detainee deaths. In addition, the Request established that the ACLU is an organization primarily engaged in disseminating information and, therefore, is entitled to expedited treatment of its Request for that information.

DEFENDANTS’ INITIAL RESPONSE AND INCREASED PUBLIC SCRUTINY

23. By letter dated June 28, 2007, PHS acknowledged receipt of the ACLU’s Request, indicated that it had initiated a search for responsive records, and notified the ACLU that it was granting the ACLU a limited fee waiver. By letter dated

July 20, 2007, HHS informed the ACLU that PHS had searched the Office of the Surgeon General and had not located any responsive documents.

24. By letter dated July 10, 2007, HRSA acknowledged receipt of the ACLU's Request and suggested that the ACLU contact it again in twenty days to determine the status of HRSA's response.

25. By letter dated July 11, 2007, DHS acknowledged receipt of the Request. (Exhibit 2.) DHS declined to grant the request for expedited treatment alleging, without explanation, that the ACLU had "failed to demonstrate a particular urgency to inform the public about the government activity involved in the request beyond the public's right to know about government activity generally." (*Id.*) The letter informed the ACLU that DHS had referred the Request to ICE and OIG for "processing and direct response," and that it would also "query the DHS Executive Secretariat for records responsive" to the Request. (*Id.*)

26. On or about July 12, 2007, ICE's Public Affairs Office issued a document entitled "Public Affairs Guidance" in response to the FOIA Request and in recognition of the increased media coverage of, and public attention to, the deficient medical care provided to immigration detainees and the circumstances surrounding immigration detainee deaths. (Exhibit 3.)

27. By letter dated July 18, 2007, OIG acknowledged receipt of the Request. (Exhibit 4.) OIG also declined to grant the ACLU's request for expedited treatment, claiming that the ACLU had "not provided any evidence that information dissemination is [its] main professional activity," and had not "adequately demonstrated a particular urgency to inform the public regarding the subject matter" of the Request. (*Id.*)

28. By letter dated July 24, 2007, ICE's FOIA Office acknowledged receipt of the Request through DHS. (Exhibit 5.) ICE's FOIA Office also declined to grant the Request expedited treatment, copying the wording of DHS's July 11 letter.

29. By letter dated July 30, 2007, ICE informed the ACLU that ICE "may" encounter some delay in processing the Request and noted that, although its goal was to respond within the 20 business days required by 5 U.S.C. § 552(a)(6)(A)(i), it was invoking the maximum 10-day extension to reply, applicable in "unusual circumstances," under 5 U.S.C. 552(a)(6)(B), and that "there are currently 2352 open requests ahead of yours."

30. By letter dated August 7, 2007, HRSA notified the ACLU that it had located only eight pages of documents responsive to the Request, through DIHS, and enclosed those pages. (Exhibit 6.) The pages consist of three *revised* Standard Operating Procedures, promulgated August 2006, regarding the process by which the agencies were to be notified of detainee deaths, the manner and database in which those deaths were tracked, and the investigations and reviews of those deaths that were to be undertaken. (*Id.*) HRSA further informed the ACLU that ICE has sole ownership of all immigration detainee medical records. (*Id.*)

31. By letter dated September 27, 2007, OIG, on behalf of the DHS Privacy Office, released to the ACLU a single page of records responsive to the Request.

32. On October 4, 2007, the United States House of Representatives Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law (the "Subcommittee") held a hearing on "Detention and Removal: Immigration Detainee Medical Care."

33. On or about October 26, 2007, ICE responded to requests by Representatives Thompson, Sanchez, Jackson Lee and Clarke, all of whom were members of the United States House of Representatives' Committee on Homeland Security, for information regarding the medical care that immigrants receive while in ICE's custody. (Exhibit 7.) Among other things, ICE disclosed that, since Fiscal Year 2004, 69 immigration detainees had died while in its custody. ICE did not disclose names or other identifying information for those 69 detainees. (*Id.*)

**THE ACLU REQUESTS RECONSIDERATION OF THE
DEFENDANTS' DECISIONS NOT TO GRANT EXPEDITED PROCESSING**

34. On or about November 5, 2007, the ACLU sent letters to OIG and ICE requesting reconsideration of the Defendants' initial denial of the ACLU's request for expedited processing of the FOIA Request. In support of its request for reconsideration, and as evidence of the urgency and public importance of the Request, the ACLU cited the recent Congressional hearing on the adequacy of health care provided to immigration detainees and the increasing media coverage since the FOIA Request had been filed. (Exhibits 8 and 9.) The ACLU also requested reconsideration of OIG and ICE's determination that the ACLU's Request did not qualify for expedited processing because of Defendants' claim that the ACLU is not primarily engaged in disseminating information. (*Id.*)

35. By letter dated November 15, 2007, ICE notified the ACLU that it had reconsidered its decision to deny expedited processing to the Request and had now determined that the Request qualified for expedited treatment because the subject of the Request "exceed[s] the public's right to know about government activity generally."

(Exhibit 10.) ICE also determined that the Request qualified for expedited processing on the basis that there was an urgent need to inform the public about the subject of the Request. In this respect, ICE noted that “news coverage” is a “good gauge of public interest ... and a preliminary search of the internet and other sources does reveal that the subject of deaths in the custody of [ICE] is a topic of substantial news coverage.” (*Id.*)

DEFENDANT ICE’S UNREASONABLE SEARCH AND INSUFFICIENT PRODUCTION

36. By letter dated January 4, 2008, ICE provided its “final response” to the FOIA Request and produced approximately 800 pages of documents to the ACLU. ICE provided this final response not only on behalf of itself, but also on behalf of the Division of Immigration Health Services, which had been placed under its control for purposes of responding to FOIA requests. (Exhibit 11.)

37. ICE improperly redacted certain information from the documents it produced and improperly withheld at least 18 pages of responsive records in their entirety. ICE cited multiple FOIA provisions that permit agencies responding to FOIA requests to exempt certain types of records from disclosure, but ICE did not explain the application of those exemptions to the specific records withheld or redacted in its January 4 letter. In fact, eight of the pages of responsive records withheld by ICE appear to be the eight pages of *revised* Standard Operating Procedures, promulgated August 2006, that HRSA had produced to the ACLU several months earlier. Neither HRSA nor ICE, however, produced or identified the standard operating procedures in effect prior to August 2006, although these documents were responsive to the ACLU’s Request.

38. One of the documents produced to the ACLU by ICE is a list entitled “Detainee Deaths – 2004 – November 2007” (the “Detainee Death List”). That list includes the names of 66 immigration detainees who died while in the custody of ICE, as well as certain other information sought by the Request, including “Location of Last Detention,” date of birth, date of death, “Location of Death,” and “Cause of Death” for each individual listed. The Detainee Death List, which ICE apparently used to limit the scope of its search and production, appears to identify only the detainees who had died during the period from January 1, 2004 through August 13, 2007. In fact, an individual in ICE custody died on December 5, 2007, one month prior to ICE’s response to the Request. (*See* Sandra Hernandez, *Decision to Expand Detention Center Follows Man’s Death*, the L.A. Daily Journal, December 21, 2007.) Accordingly, upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have located other detainees who died prior to ICE’s final response.

39. The majority of the records produced to the ACLU by ICE consist of, in ICE’s words, “(1) Detainee Treatment, Authorization and Consultation Forms, (2) Detainee Medical records, and (3) Significant Event Notification Reports.” (Exhibit 12.) ICE’s January 4, 2008 letter admitted that it had failed to locate or produce any such documents (or any other requested documents) specific to three detainees that were included among the 66 individuals identified in the Detainee Death List: Cezar Rioz-Martinez, Samou Fankeu and Ignacio Sarabia-Vallasenor. (*Id.*) The January 4 letter and the enclosed documents demonstrate that ICE is aware of the deaths of Messrs. Rioz-Martinez, Fankeu and Sarabia-Vallasenor, and the details provided in the Detainee Death List (*e.g.*, “Cause of Death”) strongly suggest that documentation relating to these deaths

must exist. Upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have located such documents.

40. ICE states that it “medically screen[s]” each detainee “after arriving in ICE custody.” (Exhibit 3.) Accordingly, upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have located medical records pertaining to each of the detainees who died while in ICE’s custody. However, despite its apparent reliance on the production of “Medical Records” in lieu of the specific documents sought by the Request, ICE failed to produce any medical records for the majority of those detainees. ICE did not identify any exemption from the disclosure requirements of the FOIA that would justify withholding medical records of any of the deceased detainees.

41. ICE identified only 35 pages of records generated in response to requests for information from, or in reaction to the identified articles published by, the Washington Post and the New York Times about immigration detainee medical care and deaths. Upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have located additional responsive documents, including internal ICE electronic communications generated in reaction to the articles published by the New York Times and the Washington Post that were identified in the Request.

42. ICE unjustifiably withheld ten of the 35 pages that it identified as responsive to the request for documents related to the New York Times and Washington Post articles. According to an e-mail sent to the ACLU by the ICE FOIA office, the “ten pages are specific to one individual’s medical care, which you do not have consent to have” and were withheld in reliance on 5 U.S.C. § 552 of the FOIA. (Exhibit 12.)

Section 552 exempts medical files from disclosure if disclosure would constitute a clearly unwarranted invasion of personal privacy. *See* 5 U.S.C. § 552. ICE provided no explanation for withholding these documents while producing a number of medical records related to other deceased detainees.

43. As part of a highly publicized four-part series detailing the deficient medical care and treatment provided to immigration detainees, the Washington Post recently published a number of documents that appear to have been under the custody and control of ICE. (*See, generally*, <http://www.washingtonpost.com/carelessdetention>, last visited on June 25, 2008.) Many of these documents are encompassed by ACLU's requests for records pertaining to any requests for medical treatment made by or on behalf of detainees who subsequently died and for "[a]ll records, including written and electronic correspondence, pertaining to deaths in ICE custody." (*See* Exhibit 13 (ICE-internal email regarding medical treatment of a detainee identified on ICE's Detainee Death List noting that his death is "[a]nother death that needs to be added to the roster..."); Exhibit 14 ("Sick Call Slip" submitted by detainee identified on ICE's Detainee Death List to request medical treatment).)

44. Accordingly, upon information and belief, a reasonable search of documents in the custody or control of ICE would have located additional documents responsive to these requests. However, ICE did not produce any "Sick Call Slips" or any other requests for medical treatment by or on behalf of detainees who subsequently died, nor did ICE produce the emails published by the Washington Post or any similar documents. In fact, ICE produced only 45 pages of documents in response to the ACLU's request for all records, including emails, related to detainee deaths.

45. ICE did not identify any exemption from the disclosure requirements of FOIA that would justify withholding the documents referenced in paragraphs 42 and 43.

46. In August 2006, ICE issued a revised Standard Operating Procedure on internal "Mortality Notification" to "establish and maintain a database of All Deaths Among ICE-Detention and Removal Operations (DRO) Detainees" (the "Mortality Notification Standard Operating Procedures"). (Exhibit 15.) Also in August 2006, ICE issued a revised Standard Operating Procedure on an internal "Mortality Database" to "maintain a current ICE mortality database and electronic mortality files on ICE detainee deaths" (the "Mortality Database Standard Operating Procedures"). (Exhibit 16.) However, neither these Standard Operating Procedures (prior to the 2006 revisions) nor any documents generated pursuant to them were produced by ICE.

47. In fact, ICE claimed that a search of DIHS records produced only eight records responsive to the Request, and that they were being withheld in their entirety. Upon information and belief, these eight records withheld by ICE are among the records already produced to the ACLU by DIHS, which include the Standard Operating Procedures referenced above. Accordingly, upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have returned additional documents responsive to the ACLU's specific request for documents relating to the manner or procedures by which DHS or any of its components track detainee deaths.

48. ICE did not identify any exemption from the disclosure requirements of the FOIA that would justify withholding the documents referenced in paragraph 47.

49. The Mortality Notification Standard Operating Procedures required the generation of “Mortality Reviews,” including summaries of cases, past medical records and autopsy reports, for each detainee who died while in ICE’s custody. (*See* Exhibit 15.) In August 2006, a revised Standard Operating Procedure on internal “Mortality Review” was issued to “establish a procedure for ensuring mortality review of all detainee deaths that occur in ICE custody” (the “Mortality Review Standard Operating Procedures”). (*See* Exhibit 17.) The Mortality Review Standard Operating Procedures required the generation and dissemination of “Mortality Reviews” and Summary Memoranda to the Deputy Assistant Director, Detention Management, including “(i) the deceased’s medical history, (ii) cause of death, (iii) identified strengths, weaknesses, and/or errors in IDH and/or ICE policies and procedures, and (iv) medical recommendations for corrective action.” (*Id.*)

50. Upon information and belief, certain documents that were produced pursuant to these or other procedures have been published by the Washington Post. (*See* Exhibit 18 (excerpts of an ICE report into the circumstances surrounding Yusif Osman’s death while in ICE custody); Exhibit 19 (excerpts of a DHS report into the circumstances surrounding Joseph Dantica’s death while in ICE custody); Exhibit 20 (excerpts of an ICE report into the circumstances surrounding Victor Alfonso Arellano’s death while in ICE custody. Accordingly, upon information and belief, a reasonable search of documents in the custody or under the control of ICE would have located

records encompassed by the ACLU's specific request for documents relating to reports of investigation into the circumstances surrounding the deaths of the 66 detainees it identified as having died while in its custody. ICE did not produce any such documents.

51. ICE did not identify any exemption to the disclosure requirements of the FOIA that would justify withholding documents relating to investigations into the circumstances surrounding detainee deaths.

52. Documents generated in connection with ICE's Mortality Notification, Mortality Review and Mortality Database Standard Operating Procedures would be responsive to the ACLU's specific request for electronic records relating to detainee deaths. Furthermore, certain documents responsive to the ACLU's request for electronic records relating to immigration detainee deaths have been published by the Washington Post. (*See Exhibit 21* (excerpts from a deputy warden complaining of "quite a few problems" with DIHS and noting that detainee deaths would be blamed on local facilities.) Accordingly, upon information and belief, a reasonable search of the records in the custody or under the control of ICE would have returned additional responsive documents. ICE did not produce any electronic records generated pursuant to the revised Standard Operating Procedures.

53. On May 5, 2008, the New York Times published a lengthy article on the death of Boubacar Bah, a Guinean man who died on May 30, 2007 after being severely injured four months earlier while in custody in an ICE detention facility. Upon information and belief, the New York Times obtained from Mr. Bah's lawyer a set of records that were produced by ICE in response to the lawyer's FOIA request. Those records included 57 pages of documents that had been generated and marked "proprietary

information – not for distribution” by Corrections Corporation of America, Inc., the company running the detention facility on behalf of ICE. (Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times, May 5, 2008.) These documents detail, *inter alia*, how guards and government employees, after Bah fell and injured his head, “shackled and pinned [Bah] to the floor of the medical unit as he moaned and vomited, then left [him] in a disciplinary cell for more than 13 hours, despite repeated notations that he was unresponsive and intermittently foaming at the mouth.” (*Id.*)

54. Documents generated by Corrections Corporation of America, Inc. in connection with the death of Mr. Bah after sustaining an injury while in custody in an ICE detention facility are responsive to the ACLU’s specific request for written or electronic records pertaining to detainee deaths in ICE’s custody. Accordingly, upon information and belief, a reasonable search of documents in the custody or under the control of ICE would have located records encompassed by the ACLU’s Request. ICE did not produce any such documents.

55. ICE did not identify any exemption to the disclosure requirements of the FOIA that would justify withholding documents relating to detainee deaths in ICE’s custody.

56. In October 2007, ICE advised Representatives Sanchez and Thompson in writing that ICE “[a]s soon as practicable ... prepares a letter of condolence for the next of kin” upon the death of a detainee in its custody. (Exhibit 7.) Accordingly, upon information and belief, a reasonable search of documents in the custody or under the control of ICE would have located documents responsive to the ACLU’s specific request for documents relating to the notification of the families or consular officials of

detainees who died while in ICE's custody. However, ICE did not produce any documents responsive to that specific request.

57. ICE did not identify any exemption to the disclosure requirements of the FOIA that would justify withholding the documents referenced in paragraph 56.

58. On or about March 3, 2008, the ACLU filed an administrative appeal of ICE's final response to the FOIA Request, challenging both the thoroughness of the search and ICE's decision to withhold, in full or in part, various records (the "ICE Appeal"). (*See Exhibit 22.*)

59. By letter dated March 5, 2008, DHS's Office of General Counsel acknowledged receipt of the ICE Appeal. (*See Exhibit 23.*)

60. To date, ICE has not issued any decision or determination regarding the ICE Appeal.

**DEFENDANT OIG'S UNREASONABLE FAILURE TO GRANT EXPEDITED
PROCESSING, CONDUCT AN ADEQUATE SEARCH OR TIMELY PRODUCE
DOCUMENTS**

61. On or about November 14, 2007, while the ACLU's request for reconsideration of OIG's initial denial of expedited processing remained pending, OIG called Mr. Jawetz to discuss the FOIA Request. (*See Exhibit 24.*) OIG claimed that the search necessary to respond to the Request would be difficult because of the breadth of the Request. OIG suggested that a list of specific names of individuals who had died while in ICE custody would be helpful to OIG's search efforts. (*See id.*) OIG also advised Mr. Jawetz that, should the ACLU limit the Request to only "Reports of Investigation" prepared by OIG (excluding exhibits to such reports and related documents), the Request could be processed on a "fast-track" basis. (*See id.*)

62. On November 16, 2007, the ACLU provided OIG, by e-mail, a list of names or other identifying information for 24 of the at least 66 individuals who had died while in ICE custody since 2004, noting that the ACLU was aware that the OIG had investigated, or had received requests to investigate, the deaths of several of the identified individuals. The ACLU emphasized that, while the provided information could assist OIG in its search for records responsive to the Request, a search for those names alone would be insufficient because the list was incomplete and the Request sought, in part, to uncover the very information—identification of all of the detainees who died while in ICE custody—that OIG claimed was necessary to conduct a search for responsive records. The ACLU further confirmed that it was not modifying its FOIA Request and continued to seek all records, including written and electronic correspondence, pertaining to deaths in ICE custody. (*Id.*)

63. On November 28, 2007, OIG responded to the ACLU by e-mail, suggesting that it would limit its search to records relating to the individuals identified by the ACLU on November 21. OIG also said that its previous offer to produce only its Reports of Investigation on a “fast-track” basis was not meant to imply that OIG had granted the ACLU’s request for reconsideration of OIG’s denial of expedited processing and that, because the ACLU had not agreed to forego its right to other responsive records, OIG would not commit to “fast-track” treatment of the Request. (*Id.*)

64. On December 3, 2007, the ACLU contacted OIG again by e-mail to ascertain the status of the ACLU’s request that OIG reconsider its initial denial of expedited processing. The ACLU noted that ICE had since responded to the ACLU’s identical request for reconsideration of that agency’s initial denial of expedited

processing and had properly reversed its decision. The ACLU also noted that DHS and ICE were in possession of information unavailable to the ACLU or the public, including names and other identifying information for all individuals who had died while in ICE custody, and that OIG should be able to ascertain that information without the ACLU's assistance. (*Id.*) In fact, by letter dated November 16, 2007, ICE already had provided its list of 66 names of detainees who died while in its custody from January 2004 to November 2007 to the New York Times, in response to a separate FOIA Request. (Exhibit 25.) That information was not provided to the ACLU until January 4, 2008. (*See supra*, ¶ 36 (Detainee Death List identifying immigration detainees who died during period from January 1, 2004 through August 13, 2007).)

65. On December 7, 2007, OIG informed the ACLU that it would not entertain the request for reconsideration of OIG's refusal to grant the FOIA Request expedited processing, and that the request for reconsideration should have been directed to the DHS Associate General Counsel. (Exhibit 24.)

66. Accordingly, by letter dated that same day, the ACLU filed a formal appeal of OIG's determination not to grant the FOIA Request expedited processing with the DHS Associate General Counsel (the "OIG Appeal"). The OIG Appeal detailed the growing significance and public importance of deaths of immigrants detained by DHS, as demonstrated by increasing Congressional and media attention, as well as ICE's decision to reverse its earlier denial of expedited processing with respect to the same Request. The OIG Appeal also reemphasized that the ACLU is an organization primarily engaged in the dissemination of information to the public. (Exhibit 26.)

67. By letter dated January 4, 2008, the DHS Office of General Counsel denied the OIG Appeal, purportedly because that Appeal had not been filed within 60 days of OIG's initial determination. (Exhibit 27.) The letter also advised the ACLU that DHS's denial of the OIG Appeal was DHS's final action on the matter and that the ACLU could obtain judicial review of this decision. The letter did not address the merits of the OIG Appeal.

68. By e-mail dated January 25, 2008, the ACLU provided OIG with the purportedly complete list of the 66 immigration detainees that had died while in ICE's custody from January 2004 to November 2007, along with the name of an additional detainee who had died on December 5, 2007, for the purpose of providing further assistance to OIG in its search for records responsive to the Request. (Exhibit 28.)

69. On February 15, 2008, the ACLU contacted OIG by e-mail to inquire about the status of OIG's search for records responsive to the Request and the expected timing of its production of those records. (*Id.*) Later that day, OIG responded and indicated that it had "received some interim search responses, but it is not completely done." (*Id.*)

70. By e-mail dated March 18, 2008, the ACLU again sought information concerning the status of OIG's search. (*Id.*) The next day, OIG informed the ACLU that OIG had "completed [its] search for records responsive to [the ACLU's] request . . . and [had] determined that OIG has approximately 500 pages of documents responsive to your request as it is written," but that, because of the "volume and complexity" of the responsive records, the Request would be placed "back in the queue to await processing." OIG again offered to "process the request in a more timely manner" if

the ACLU would agree to limit the scope of the Request to only the formal Reports of Investigation produced by OIG. OIG clarified in subsequent e-mails that it would not agree to produce the Reports of Investigation quickly unless the ACLU agreed to abandon the remainder of the Request or file a separate request for documents other than the Reports of Investigation, which request would be “treated as a March 2008 request” and placed at the back of the line. Accordingly, by e-mail dated March 26, 2008, the ACLU rejected OIG’s proposal. (*Id.*)

71. On April 24, 2008, the ACLU again requested, by e-mail, an update on the status of OIG’s response to the Request. (*Id.*) The e-mail also informed OIG that the ACLU had recently learned of the death of another immigration detainee, Mr. Ahmed Tender, in September 2005, and sought assurances that any records pertaining to Mr. Tender would be included in OIG’s production.

72. On April 25, 2008, OIG responded to the ACLU, claiming that “there are several requests still ahead of yours in the queue” and that it remained unable to estimate when the records responsive to the Request would be reviewed and produced to the ACLU. (*Id.*) OIG also refused to include in its eventual production any records relating to Mr. Tender, ostensibly because OIG had already conducted its search. Although records relating to Mr. Tender’s death were encompassed by the ACLU’s Request, OIG advised the ACLU that it “will need to submit a separate FOIA request for that information.”

73. On May 5, 2008, the New York Times printed a front-page story highlighting, among other things, the lack of transparency concerning the circumstances surrounding the deaths of immigration detainees in ICE custody, focusing on the

particularly disturbing story of the death of Mr. Boubacar Bah at the Elizabeth Detention Center in New Jersey in February 2007. (*Few Details on Immigrants Who Died in U.S. Custody*, N.Y. Times, May 5, 2008.) That morning, the ACLU forwarded a copy of the New York Times article to OIG by e-mail and again requested reconsideration of OIG's denial of the ACLU's request for expedited processing, noting that "the New York Times story today again demonstrates that the government's efforts to investigate deaths in custody are of special importance to the public." (*Id.*)

74. On May 11, 2008, the investigative broadcast news magazine 60 Minutes aired a detailed story concerning immigration detainee deaths and the lack of publicly available information relating to those deaths. That same day, the Washington Post began to publish a highly publicized four-part series detailing the deficient medical care and treatment provided to immigration detainees. (Dana Priest, Amy Goldstein, *System of Neglect: As Tighter Immigration Policies Strain Federal Agencies, The Detainees in Their Care Often Pay a Heavy Cost*, Wash. Post, May 11, 2008; Dana Priest, Amy Goldstein, *In Custody, In Pain: Beset by Medical Problems as She Fights Deportation, A U.S. Resident Struggles to Get the Treatment She Needs*, Wash. Post, May 12, 2008; Dana Priest, Amy Goldstein, *Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System*, Wash. Post, May 13, 2008; Dana Priest, Amy Goldstein, *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*, Wash. Post, May 14, 2008.) The entire series, along with additional articles, internal ICE and DIHS records, and multimedia presentations can be found at <http://www.washingtonpost.com/carelessdetention>.

75. On May 12, 2008, OIG responded by e-mail to the ACLU's May 5 request for reconsideration of the previous denials of the ACLU's request for expedited processing. OIG recognized that "this issue has received quite a bit of media attention of late" but claimed that only the DHS Office of General Counsel could reverse the previous determination. Notwithstanding the refusal to reconsider denial of expedited processing, OIG claimed that the Request was suddenly "up in [its] queue" and that OIG had "begun processing the records" for production to the ACLU. However, OIG also indicated that it likely would still take a significant amount of time to produce the Records to the ACLU. By e-mail also dated May 12, 2008, an employee of OIG who was copied on OIG's response further delaying the agency's production of records to the ACLU replied to that e-mail by stating: "WELL DONE!" (emphasis in original). (Exhibit 28.)

76. As of the date of this Complaint, OIG still has not produced any records responsive to the Request to the ACLU.

77. Public interest in immigration detainees' deaths while in ICE custody, in the meantime, has only increased. Indeed, on June 4, 2008, the Subcommittee held a second hearing on "Problems with Immigration Detainee Medical Care," at which Julie Myers, Assistant Secretary for Homeland Security for ICE, was called to testify under oath about immigration detainee medical care and deaths. (See U.S. House of Representatives, Committee on the Judiciary, *June 4, 2008 Hearing Information*, available at <http://judiciary.house.gov/oversight.aspx?ID=447> (last visited on June 25, 2008).)

CAUSES OF ACTION

78. Plaintiff hereby incorporates paragraphs 1-77 of this Complaint as if fully set forth herein.

79. Defendants DHS, ICE and OIG's failure to make promptly available the records sought by the ACLU's Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(A)(i), and Defendants' corresponding regulations. The ACLU has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

80. Defendants DHS, ICE and OIG's failure to timely respond to the ACLU's Request violates the FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and the Defendants' corresponding regulations. The ACLU has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

81. Defendant OIG's failure to grant the ACLU's request for expedited processing violates the FOIA, 5 U.S.C. § 552(a)(6)(E) and Defendant DHS and OIG's corresponding regulations. The ACLU has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(E)(iii).

82. Defendant DHS, ICE and OIG's failure to make a reasonable effort to search for records responsive to the ACLU's Request violates the FOIA, 5 U.S.C. § 552(a)(a)(3)(C), and Defendants' corresponding regulations. The ACLU has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

83. Order Defendants DHS, ICE and OIG to expedite the proceedings
in this action;

84. Enjoin Defendants from withholding the requested Records;

85. Order Defendants to produce the Records, which have been
improperly withheld from Plaintiff;

86. Award Plaintiff its costs and reasonable attorney fees in this action,
pursuant to 5 U.S.C. § 552(a)(4)(E); and

87. Grant such other and further relief as the Court may deem just and
proper.

Dated: Washington, D.C.
June 25, 2008

Respectfully submitted,

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