

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

JUST FUTURES LAW,
95 Washington St., Ste. 104-149
Canton, MA 02021,

CENTER FOR MEDIA JUSTICE,
436 14th St., Suite 500
Oakland, CA 94612,

MIJENTE SUPPORT COMMITTEE,
734 W Polk St.
Phoenix, AZ 85007,

and

IMMIGRANT DEFENSE PROJECT,
121 Avenue of the Americas, 6th Floor
New York, NY 10013,

Plaintiffs,

v.

**U.S. DEPARTMENT OF HOMELAND
SECURITY,**
245 Murray Lane, S.W.
Washington, D.C., 20528,

and

**U.S. DEPARTMENT OF HEALTH AND
HUMAN SERVICES,**
200 Independence Avenue, S.W.
Washington, D.C. 20201,

Defendants.

Case No.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiffs seeks the expedited processing and release of

records that Plaintiffs requested from Defendants Department of Homeland Security (“DHS”) and Department of Health and Human Services (“HHS”) concerning COVID-19-related surveillance and data analysis.

PARTIES

2. Plaintiff Just Futures Law (“JFL”), a non-for-profit corporation established under the laws of Delaware, is an immigration lawyering organization that provides legal support for grassroots organizations engaged in making critical interventions in the United States’ deportation and detention systems and policies. JFL maintains close relationships with organizations and activists who seek to understand and educate the public about the scope and range of government surveillance and criminalization. JFL staff have decades of experience in providing expert legal advice, legal resources, and training for immigration attorneys and criminal defense attorneys on the immigration consequences of the criminal legal system, including a number of recently-published reports on government surveillance in connection with COVID-19. JFL has a significant interest in the administration of government surveillance and data collection.

3. Plaintiff Center for Media Justice (“MJ”), a non-for-profit corporation established under the laws of California, is a nationally recognized organizing hub representing the media policy interests of hundreds of social justice groups across the United States. MJ includes a network of nearly 100 affiliates, over 75% of which are local, regional, or statewide social justice organizations based in under-represented communities, comprising the largest racial justice network for media rights, access, and representation in the United States. Its mission is to create media and cultural conditions that strengthen movements for racial justice, economic equity, and human rights. MJ has a focus on government surveillance of communities of color, particularly the unequal and historic surveillance of Black people, Muslims, migrants, and the social movements that represent them.

4. Plaintiff Mijente Support Committee (“MSC”), a non-for-profit corporation established under the laws of Arizona, is a national organization that coordinates and organizes

with its members in several states to address issues relating to immigration enforcement and Latinx political participation. Founded by community organizers, its focus is on developing and sparking social change with respect to immigration and other social justice issues in the Latinx community and beyond.

5. Plaintiff Immigrant Defense Project (“IDP”), is fiscally sponsored by the Fund for the City of New York, a non-for-profit corporation established under the laws of New York. IDP’s mission is to promote fundamental fairness for immigrants accused or convicted of criminal offenses. IDP works to protect and expand the rights of immigrants who have contact with the criminal legal system, including: 1) working to transform unjust deportation laws and policies; 2) minimizing the harsh and disproportionate immigration consequences of contact with the criminal legal system; and 3) educating and advising community members, criminal defenders, and other advocates.

6. Defendant DHS is an agency of the Executive Branch of the United States Government. DHS is an “agency” within the meaning of 5 U.S.C. § 552(f).

7. Defendant HHS is an agency of the Executive Branch of the United States Government. HHS is an “agency” within the meaning of 5 U.S.C. § 552(f).

JURISDICTION AND VENUE

8. This Court has both 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)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

BACKGROUND

10. For decades, the United States has relied on the National Healthcare Safety Network (“NHSN”) operated by the Centers for Disease Control and Prevention (“CDC”) to

collect and track healthcare-associated infection data. Today, more than 25,000 medical facilities report healthcare-associated infection data to the NHSN.¹

11. The federal government has also worked with private sector companies for many years to develop technologies to track the physical location, biometrics data, and online data of individuals. Many technology companies, such as Palantir, Amazon, and Google already sell massive data collection or analytics services to government agencies, including police departments and Immigration and Customs Enforcement (“ICE”). Nevertheless, the federal government has until recently required that healthcare-associated infection data be reported to the CDC-operated NHSN.

12. In 2020, HHS contracted with Palantir to build a new system, HHS Protect, to track COVID-19 infection data. According to HHS this system “brings together “more than 200 disparate data sources . . . into one ecosystem that integrates data across federal, state, and local governments and the healthcare industry.”² HHS Protect became operational on April 10, 2020.

13. On July 15, 2020, HHS changed reporting procedures to require that COVID-19 infection data go to HHS Protect instead of the NHSN operated by the CDC. Under the new procedure, hospitals are required to submit COVID-19 data to HHS either through a private contractor, TeleTracking, or state health departments and hospital associations.³

14. To date, HHS has provided the public with little to no information about COVID-19 data collection and tracking, including on the more than 200 data sources included in HHS Protect, limits on the accessibility and use of data collected for COVID-19 tracking, and the duration of COVID-19 data retention. Without this information, the public cannot evaluate either the efficacy of these invasive technologies at addressing the immediate crisis or the risks they pose to the millions of people whose personal health information may be tracked.

¹ CDC, *National Health Safety Network*, <https://www.cdc.gov/nhsn/about-nhsn/index.html>.

² HHS, *HHS Protect: Frequently Asked Questions*, <https://www.hhs.gov/about/news/2020/07/20/hhs-protect-frequently-asked-questions.html>.

³ *Id.*

15. While some types of data may have established public health purposes, we are still learning what types are useful for COVID-19 tracking—for example, location data from mobile phones and contact-tracing apps have not been shown to mitigate disease spread. The potential privacy impact of this data surveillance is deeply alarming. The government and private companies are collecting, storing, and accessing personal health information at a massive scale. Even if personal information is “anonymized,” multiple studies have shown that industry standards for de-identified data (e.g., sharing so-called “aggregated” mobile location data) fail to preserve anonymity and can still lead to privacy breaches.⁴

16. Excessive data collection practices are not only invasive of individual privacy, they are also detrimental to public health. Reports already show that concerns about the privacy of COVID-19 data are deterring people from seeking care and other essential health services.⁵

17. The public needs to know how this country’s COVID-19 data is being collected, stored, used, and protected during this public health crisis as the government and tech companies appear to be dramatically accelerating mass surveillance of individuals in this country. In the coming months and years, HHS is set to spend \$500 million from Congress’s stimulus package on health surveillance and data technologies.⁶

18. As former CDC Director Tom Frieden, MD, has stated: “The new White House/HHS data process raises fundamental concerns. What data will be collected, how, by whom, with what standards, under what authority? What quality checks and privacy safeguards will be

⁴ Kelsey Campbell-Dollaghan, *Sorry, your data can still be identified even if it’s anonymized*, Fast Company (Dec. 10, 2018), <https://www.fastcompany.com/90278465/sorry-your-data-can-still-be-identified-even-its-anonymized>.

⁵ Miriam Jordan, *‘We’re Petrified’: Immigrants Afraid to Seek Medical Care for Coronavirus*, N.Y. Times (Mar. 18, 2020) (updated May 12, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-immigrants.html>.

⁶ CDC, *Public Health Data Modernization Initiative*, <https://www.cdc.gov/budget/documents/covid-19/COVID-19-Data-Modernization-Initiative-Fact-Sheet.pdf>.

implemented? How will the institutions collecting the data be supported?”⁷

FOIA REQUESTS

A. June 11 HHS Request (#2020-01098-FOIA-OS)

19. In an email dated June 11, 2020, Plaintiffs submitted a request under the FOIA, 5 U.S.C. § 552, to HHS (“June 11 HHS Request”) for records pertaining to the agency’s expansion of surveillance during the COVID-19 pandemic, and to what extent governments and companies are collecting and sharing this data for possible uses beyond addressing the immediate health crisis.

20. The request sought five categories of records: (1) Data Sources and Collection Methods; (2) Technology and Intelligence Companies; (3) Data-Anonymization; (4) Data-Sharing and Use Limitations; and (5) Data-Retention.

21. Plaintiffs’ request sought expedited processing under 5 U.S.C. § 552(a)(6)(E) and 45 CFR § 5.27. Plaintiffs further requested that HHS grant them a waiver of all fees related to their request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii).

22. On June 12, 2020 HHS acknowledged receipt of the request in an email. In that email, HHS assigned the tracking number 2020-01098-FOIA-OS.

23. On June 18, 2020 HHS referred plaintiffs’ request to the CDC.

24. On July 31, Plaintiffs requested that HHS search its own records and those of other sub-agencies, in addition to referring the request to CDC.

25. On August 11, 2020 HHS informed plaintiffs that the request was “in process.”

26. On December 8, 2020 HHS provided an “interim response” and informed Plaintiffs that Plaintiffs’ request for expedited processing had been granted. HHS also informed Plaintiffs that it had not made a decision with respect to the Plaintiffs’ fee waiver request.

27. To date, HHS has not produced any records responsive to Plaintiffs’ request.

⁷ @DrTomFrieden, *Twitter*, July 15, 2020, 10:28 a.m., <https://twitter.com/DrTomFrieden/status/1283453349866635264?s=20>.

28. HHS has wrongfully withheld the requested records from Plaintiffs.

B. June 13 DHS Request (#2020-HQFO-01290)

29. In an email dated June 13, 2020, Plaintiffs submitted a request under the FOIA, 5 U.S.C. § 552, to DHS, including operational and support components, (“June 13 DHS Request”) for records pertaining to the agency’s expansion of surveillance during the COVID-19 pandemic, and to what extent governments and companies are collecting and sharing this data for possible uses beyond addressing the immediate health crisis.

30. The request sought five categories of records: (1) Data Sources and Collection Methods; (2) Technology and Intelligence Companies; (3) Data-Anonymization; (4) Data-Sharing and Use Limitations; and (5) Data-Retention.

31. Plaintiffs’ FOIA request sought expedited processing under 5 U.S.C. § 552(a)(6)(E) and 6 CFR § 5.5(e)(1)(ii). Plaintiffs further requested that DHS grant them a waiver of all fees related to their request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii).

32. On June 18, 2020, DHS acknowledged receipt of the request in an email. DHS granted Plaintiffs’ request for expedited treatment and conditionally granted a fee waiver. That email assigned the tracking number 2020-HQFO-01290.

33. On August 12, 2020, DHS informed Plaintiffs that the COVID-19 pandemic had “affected [the agency’s] response time” and that the agency was “working as expeditiously as possible to complete [Plaintiffs’] request.”

34. On August 27, 2020, FEMA and Plaintiff Just Futures Law met via Zoom teleconference. At that time, FEMA officials said they would send proposed search terms to Plaintiffs for approval before conducting a search.

35. On November 4, 2020 Plaintiffs informed FEMA that they had received no response or proposed search terms.

36. On November 18, 2020, FEMA informed Plaintiffs that a search for the terms

“COVID-19,” “Protect Now,” “HHS Protect,” “Palantir,” and “Clearview” produced over 133GB of data, and that the program office had suggested searching for “COVID-19” in combination with each of the other four terms.

37. On November 30 2020, FEMA confirmed that the program office’s suggestion was to search for the following terms:

- “Protect Now” + "COVID-19”;
- “HHS Protect” + "COVID-19”;
- “Palantir” + "COVID-19”; and
- “Clearview” + "COVID-19.”

38. On February 12, 2021, DHS informed Plaintiffs via email that the agency had decided to handle the request at the component-level, transferred it to components ICE, FEMA, and CBP, and noted that these components were “in the process of searching for potentially responsive records to your request.”.

39. To date, DHS has not produced any records responsive to Plaintiffs’ request.

40. DHS has wrongfully withheld the requested records from Plaintiffs.

C. July 16 HHS Request

41. In an email dated July 16, 2020, Plaintiffs submitted a request (“July 16 HHS Request”) under the FOIA, 5 U.S.C. § 552, to HHS for records related to three contracts: (1) Contract Award ID # 75A50120C00042 to Teletracking Technologies, Inc. for COVID-19 rapid deployment plan; (2) Contract Award ID # 75P00120F80084 to Palantir Technologies for Gotham Licenses; and (3) Contract Award ID # 75P00120F80091 to Palantir Technologies for HHS Protect Platform Services.

42. Plaintiffs’ request sought expedited processing under 5 U.S.C. § 552(a)(6)(E) and 45 CFR § 5.27. Plaintiffs further requested that they be granted a waiver of all fees related to their request because disclosure of the requested information is in the public interest within the meaning

of 5 U.S.C. § 552(a)(4)(A)(iii).

43. On July 22, 2020, HHS acknowledged receipt of the request in a letter. HHS did not provide an assigned tracking number at that time or thereafter.

44. To date, HHS has not produced any records responsive to Plaintiffs' request.

45. HHS has wrongfully withheld the requested records from Plaintiffs.

CAUSES OF ACTION

Count 1

Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records – June 11 HHS FOIA

46. Plaintiffs repeat and reallege paragraphs 1- 45.

47. Defendant HHS has wrongfully withheld agency records requested by Plaintiffs.

48. Plaintiffs have exhausted the applicable administrative remedies with respect to Defendant HHS's wrongful withholding of the requested records.

49. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure of the requested records.

Violation of the Freedom of Information Act for Wrongful Denial of Requests for a Waiver of All Processing Fees – June 11 HHS FOIA

50. Plaintiffs repeat and reallege paragraphs 1- 49.

51. Defendant HHS has wrongfully denied Plaintiffs' request for a waiver of all processing fees by failing to comply with the statutory time limit for responding to Plaintiffs' requests.

52. Plaintiffs are entitled to injunctive relief with respect to their request for a waiver of all processing fees.

Count 2

**Violation of the Freedom of Information Act for Wrongful
Withholding of Agency Records – June 13 DHS FOIA**

53. Plaintiffs repeat and reallege paragraphs 1-52.
54. Defendant DHS has wrongfully withheld agency records requested by Plaintiffs.
55. Plaintiffs have exhausted the applicable administrative remedies with respect to Defendant DHS's wrongful withholding of the requested records.
56. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure of the requested records.

Count 3

**Violation of the Freedom of Information Act for Wrongful
Withholding of Agency Records – July 16 HHS FOIA**

57. Plaintiffs repeat and reallege paragraphs 1-56.
58. Defendant HHS has wrongfully withheld agency records requested by Plaintiffs.
59. Plaintiffs have exhausted the applicable administrative remedies with respect to Defendant HHS's wrongful withholding of the requested records.
60. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure of the requested records.

**Violation of the Freedom of Information Act for Wrongful Denial
of Requests for a Waiver of All Processing Fees – July 16 HHS FOIA**

61. Plaintiffs repeat and reallege paragraphs 1-60.
62. Defendant HHS has wrongfully denied Plaintiffs' request for a waiver of all processing fees by failing to comply with the statutory time limit for responding to Plaintiffs' request for a waiver of all processing fees.
63. Plaintiffs are entitled to injunctive relief with respect to their request for a waiver of all processing fees.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Order Defendants immediately to make a full, adequate, and expedited search for the requested records;
2. Order Defendants HHS and DHS to process immediately the requested records in their entirety;
3. Order Defendants HHS and DHS upon completion of such processing, to disclose the requested records in their entirety and make copies available to Plaintiffs;
4. Order Defendant HHS to grant Plaintiffs' requests for a waiver of all processing fees;
5. Provide for expeditious proceedings in this action;
6. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action as provided by 5 U.S.C. § 552(a)(4)(E); and
7. Grant such relief as the Court may deem just and proper.

DATED: February 19, 2021

Respectfully submitted,

/s/ David L. Sobel
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