

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ASYLUM SEEKERS TRYING  
TO ASSURE THEIR SAFETY,

*Plaintiffs,*

v.

TAE D. JOHNSON, in his official capacity as  
Acting Director of U.S. Immigration, *et al.*,

*Defendants.*

Civil Action No.: No. 23-cv-163-RCL

**PLAINTIFFS' MOTION TO COMPEL  
PURSUANT TO LOCAL CIVIL RULE  
7(n) AND MEMORANDUM IN  
SUPPORT**

Pursuant to Fed. R. Civ. Pro. § 37(a), Plaintiffs ROE #1- ROE #49 (“Plaintiffs”), by and through the undersigned counsel, hereby move this Court in the above-captioned case, for an Order, compelling Defendants TAE D. JOHNSON, ALEJANDRO MAYORKAS, MERRICK GARLAND, and JOHN DOE 1 (“Defendants”) to produce a certified list of the administrative record or Certified Administrative Record (“CAR”) pursuant to Local Civil Rule 7(n). For the reasons set forth in the accompanying Memorandum below, the pleadings and papers filed in this action; any hearings that may be scheduled by the court, and the entire record, Plaintiffs respectfully request the Court grant their motion and Order Defendants to comply with Local Rule 7(n). A proposed order is attached.

**Statement Pursuant to Local Rules 7(m)**

Pursuant to Local Civil Rule 7(m), this motion is made in good faith that Plaintiffs by counsel conferred with Defendants’ counsel regarding their failure to produce a certified list of the administrative record or CAR according to LCvR 7(n)(1). Fed. R. Civ. Pro. § 37(a)(1). On April 5, 2023, Plaintiffs’ counsel emailed Defendants’ counsel seeking position on the motion to compel pursuant to Local Rule 7(n). Following an exchange of emails discussing the motion, on April 5,

at 3:30 PM EST, Parties had a telephonic meet and confer. Following that call, the parties continued to exchange emails in hopes of resolving the dispute, but the parties could not come to an agreement, and Defendants' counsel oppose this motion.

### **INTRODUCTION**

Pursuant to this Court's Local Civil Rules,

[i]n cases involving the judicial review of administrative agency actions, unless otherwise ordered by the Court, the agency must file a certified list of the contents of the administrative record with the Court within 30 days following service of the answer to the complaint or **simultaneously with the filing of a dispositive motion**, whichever occurs first.

Local Civ. Rule 7(n)(1) (emphasis added). This rule is intended to assist the Court in cases "by providing the Court with copies of relevant portions of the record relied upon in any dispositive motion." *See* Comment to LCvR 7(n). Defendants filed Motion to Dismiss, a dispositive motion, on June 21, 2022 without providing a certified list of the administrative record or CAR.

### **BACKGROUND**

On November 28, 2022, unknown Defendant JOHN DOE 1 published the PII of 6,252 noncitizens in, or formerly in, ICE custody to the ICE public-facing website, [ice.gov](https://www.ice.gov).<sup>1</sup> JOHN DOE 1 published the PII on a page where ICE regularly publishes detention statistics. The published PII included the names, countries of origin, dates of birth, A-numbers, and detention locations in the United States of noncitizens identified as asylum seekers who were initially in expedited removal

---

<sup>1</sup> Unintentional Disclosures of Personally Identifiable Information on November 28 and December 7, 2022 (January 12, 2023), U.S. Immigration and Customs Enforcement, <https://www.ice.gov/pii>.

proceedings. Plaintiffs, who were among the affected 6,252 noncitizens, came to the United States to seek asylum and were thereafter detained in ICE custody at 10 different facilities. ECF No. 6, First Amended Complaint (“FAC”), ¶ 1; Exhibits 1-49 to FAC, Plaintiff Declarations, ¶ 1. Plaintiffs are natives of Colombia, Dominican Republic, Ecuador, El Salvador, France, Guatemala, Haiti, Honduras, India, Jamaica, Mexico, Nicaragua, Peru, Tunisia, and Venezuela. *Id.*

In their amended complaint, Plaintiffs bring four causes of action:

FIRST CLAIM FOR RELIEF: Privacy Act of 1974, 5 U.S.C. Sec. 552a(b)

SECOND CLAIM FOR RELIEF: Administrative Procedure Act, 5 U.S.C. §§706(2)(A), 706(2)(D)

THIRD CLAIM FOR RELIEF: Violation of the *Accardi* Doctrine

FOURTH CLAIM FOR RELIEF: Violation of Equal Protection Principles Embedded in the Fifth Amendment pursuant to *DeShaney*

FAC, 26, 29, 30, 33.

On April 4, 2023, Defendants filed a Motion to Dismiss, a dispositive motion without providing a certified list of the administrative record or CAR.

### **ARGUMENT**

#### **I. Defendants are required to produce a certified list of the administrative record timely**

Pursuant to Local Civil Rule 7(n), Defendants are required to file a certified list of the administrative record. LCvR. 7(n)(1). The Local Rule also provided the timing of such requirement: “within 30 days following service of the answer to the complaint or **simultaneously with the filing of a dispositive motion**, whichever occurs first”, which is already triggered. *Id.* (emphasis added). This requirement can only be excused by court’s leave. *Id.* However, Defendants did not seek relief from the Court.

**II. This Court must review the CAR for two final agency actions to rule on Defendants’ motion to dismiss.**

The CAR is required to resolve Defendants’ dispositive motion.

First, the decision for JOHN DOE 1 to publish the PII was a final agency action. In their motion, Defendants suggested their affirmative and reviewable act was “inadvertent” 35 times, yet they offer no evidence supporting this bald speculation. Defendants are not entitled to this presumption. Here, the CAR should show all the records leading to the affirmative act. For example, if there were communications to or from JOHN DOE 1 about the affirmative act before it was made, those should be included in the CAR. Without the index, Plaintiffs and the Court are left to suspect these communications exist, and the Defendants withhold the index to conceal their existence. The CAR should also contain evidence to confirm or rebut Plaintiffs’ allegation that “Defendants did not establish appropriate administrative, technical, and physical safeguards to prevent the data breach.” FAC at ¶ 119. Similarly, the CAR should also contain evidence to confirm or rebut Plaintiffs’ allegation that “Defendants’ failure to safeguard Plaintiffs’ personal information from public disclosure constitutes agency action.” FAC at ¶ 127. The CAR should also contain the established confidentiality protections that Defendants have for asylum seekers if Defendants dispute that they “flagrantly violate[d]” them or “failed to implement sufficient procedural or technical barriers to prevent public disclosure.” FAC at ¶¶ 144, 165.

Second, Plaintiffs here also challenge ICE’s insufficient actions to mitigate the state-created danger, which are also final agency actions. The Equal Protection Clause imposes an affirmative duty of care and protection on Defendants toward Plaintiffs. FAC at ¶¶ 155, 167. Defendants’ mitigation can be broken down into what appear to be two major decisions: the

November 30, 2022 mitigation,<sup>2</sup> and the January 12, 2023 mitigation.<sup>3</sup> To the extent that Defendants came to their own conclusion that its affirmative act was inadvertent, what they have based this conclusion on should be included in the CAR. These records are relevant to Plaintiffs' challenge about the insufficiency of Defendants' mitigation. For example, ICE communications related to mitigation belong in the CAR.<sup>4</sup> Similarly, if Defendants relied upon the investigation announced on November 30, 2022 for its insufficient mitigation actions, that investigation itself should be included in the CAR. FAC, ¶ 73.<sup>5</sup> Similarly, Defendants' responses to the December 15, 2022 questions from members of Congress should also be part of that CAR. FAC, ¶ 79.<sup>6</sup>

Here, Defendants' insufficient mitigation efforts increased their risks to danger, and that's all over Plaintiffs' FAC. For example, "Defendants have not offered to bear the cost of legal representation, making it likely that the majority of those affected have not sought legal counsel [to raise concerns about enhanced risks of danger as a result of the breach]." FAC at ¶ 123. "DOJ's failure to account for the harms to Plaintiffs and proceed with removal processes despite those

---

<sup>2</sup> ICE, *Statement on improper disclosure of noncitizen personally identifiable information* (November 30, 2022), <https://www.ice.gov/news/releases/statement-improper-disclosure-noncitizen-personally-identifiable-information>. Note: this webpage says it was updated January 18, 2023, but that update was merely removing a link to "<https://www.ice.gov/pii>" that was added on January 12, 2023.

<sup>3</sup> See FN 1.

<sup>4</sup> See FN 1, ("ICE notified the DHS Chief Privacy Officer and other DHS oversight bodies of the accidental disclosure of PII," and "ICE notified EOIR and USCIS of the accidental disclosure of PII.")

<sup>5</sup> See FN 2, ("Though unintentional, this release of information is a breach of policy and the agency is investigating the incident and taking all corrective actions necessary.").

<sup>6</sup> December 15, 2022 Letter from Rep. Torres and other members of Congress to JOHNSON, [https://torres.house.gov/sites/torres.house.gov/files/221215%20ICE%20Letter%20re\\_%20Release%20of%20Asylum%20Seeker%20Information%20FINAL.pdf](https://torres.house.gov/sites/torres.house.gov/files/221215%20ICE%20Letter%20re_%20Release%20of%20Asylum%20Seeker%20Information%20FINAL.pdf).

harms constitutes an abuse of discretion.” FAC at ¶ 130. “Defendants have thrown Plaintiffs ‘into the snake pits,’ and thus owe them a duty of protection.” FAC at ¶ 155. “The insufficient protection initially offered, a mere 30-day reprieve from deportation, still exposed the Plaintiffs to ongoing dangers and fails to meet the obligations owed to them. Defendants’ subsequent measures fail to meet the moment as well.” FAC at ¶ 155.

In *Gomez v. Trump*, the plaintiffs consisted of diversity visa lottery selectees and their beneficiaries. No. 20-cv-01419 (APM), 2020 U.S. Dist. LEXIS 261958, at \*17 (D.D.C. Aug. 13, 2020). The *Gomez* plaintiffs challenged State Department’s policies. That court ordered the Department “to produce [...] a certified administrative record containing all policies, guidance, directives, orders, cables, or communications by the United States Department of State that implement, carry out, or administer [the Departments’ challenged policies]”. *Id.* at 18. The court reasoned that it “requires those communications, and any others like them, to assess whether [the p]laintiffs are substantially likely to succeed on the merits of their APA claims.” *Id.* The court further held that because, “Defendants [were] poised to argue that [the p]laintiffs have identified no final agency action, ... the court cannot resolve any such challenge without an administrative record.” *Id.*

Similarly in *Naveed v. Blinken*, the plaintiffs were ten U.S. citizens and their Pakistani spouses experiencing unreasonable delays for their immigrant visa interview interviews. No. 22-3579 (RBW), (February 7, 2023). Attached as **Exhibit A, Naveed v Blinken Order**. Judge Reggie Walton denied government defendants’ motion for leave from Local Rule 7(n) after denying plaintiffs’ motion for preliminary injunction, “particularly because the defendants move to dismiss based upon a lack of standing.” *Id.* at 2, (citing *Sierra Club v. Env’tl. Prot. Agency*, 292 F.3d 895, 900–01 (D.C. Cir. 2002) (noting the necessity of the administrative record in determining whether the plaintiff has standing to seek review of an administrative action); *Jordan v. Fed. Bureau of*

*Prisons*, No. 20-cv-1478 (CKK), 2021 WL 4148549, at \*1 (D.D.C. Sept. 13, 2021) (stating that the Court, in a separate order, denied the defendant agency’s motion for relief from Local Civil Rule 7(n)(1) because its “Rule 12(b)(1) argument as to [the plaintiff’s] lack of standing required the submission of the full administrative record, in order to properly assess the issue”)).

Like in *Gomez* and *Naveed*, this Court requires the administrative record to assess whether Plaintiffs’ claims can survive Defendants’ motion to dismiss. This Court *cannot* best determine whether Plaintiffs have standing or if there is agency action without the administrative record. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002, (D.C. Cir. 2008) (quoting 5 U.S.C. § 706 (1966)) (The Administrative Procedures Act, 5 U.S.C. § 706, directs a court reviewing an agency decision to “review ‘the whole record or those parts of it cited by a party.’”) Here, Plaintiffs maintain there were reviewable agency actions and Defendants maintain there were not. Conserving agency resources by not providing full CAR in this present case would highly prejudice Plaintiffs as this Court will not have the requisite documents to determine whether Plaintiffs’ claims can survive Defendants’ dispositive motion. *Cnty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 998 (D.C. Cir. 1990) (Judicial review of administrative action “should normally be based on the full administrative record that was before a decision maker at the time the challenged action was taken.”).

### **III. Plaintiffs will suffer severe prejudice if the CAR is not provided by Defendants and there is no prejudice to Defendants to prepare the CAR for this case.**

The production of the index, and subsequently the CAR does not impose any undue burden on Defendants given the ease of producing the record, the vast resources of the U.S. government, and the sophistication of government counsels. Because a CAR only consists of documents considered or relied upon in selecting an action, it is completed and compiled once the agency has

selected and implemented the action. The record is kept during the action's formulation. Defendants need not compile the record *post hoc*. Defendants are legally required to compile and retain data and information. *See* “The Federal Records Act”, 44 U.S.C.A. § 3101 (stating that “the head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities”).

In contrast, the stakes for Plaintiffs are high and are a matter of extreme urgency. Most Plaintiffs are facing removal proceedings with the risk of removal from the United States. ROE #21 was already removed a few weeks ago.

Defendants will not be prejudiced in any way by providing this Court with a certified list of the contents of the administrative record, pursuant to Local Rule 7(n)(1).

### **CONCLUSION**

For the above reasons, this Court should grant Plaintiffs’ Motion to Compel Pursuant to Local Civil Rule 7(n)(1) and compel Defendants’ immediate compliance with the rule.



Dated: April 7, 2023

Respectfully submitted,

Sarah W. H. Owings\*  
**Owings MacNorlin LLC**  
P.O. Box 18396  
Atlanta, Georgia 30316  
[sarah@omimm.com](mailto:sarah@omimm.com)  
(470) 444-9531

/s/ Curtis Lee Morrison  
  
Curtis Lee Morrison, Esq.  
**Morrison Urena, L.C.**  
8910 University Center Lane, Suite 400  
San Diego, CA 92122  
[curtis@morrisonurena.com](mailto:curtis@morrisonurena.com)  
(323) 489-5688  
D.C Bar ID: 1631896

Ogor Winnie Okoye\*  
**BOS Legal, LLC**  
Attorneys & Counselors At Law  
41 Ocean Street, Unit 1  
Lynn, MA 01902  
[owo@boslegals.com](mailto:owo@boslegals.com)  
(781) 596-0151

Ndeto K. Mwose (IN-Bar# 31765-71)\*  
**Mwose Law Office**  
2610 E. Jefferson Blvd.  
South Bend, IN 46615  
[ndeto@mwoaselaw.com](mailto:ndeto@mwoaselaw.com)  
877-648-8472

Tehmina Avagyan, Esq.\*  
**Attorney at Law**  
116 E. Broadway Ste 203  
Glendale, CA 91205  
[tehmina@avagyanlaw.com](mailto:tehmina@avagyanlaw.com)  
(805) 600-0006

Samantha L. Begovich, Esq.\*  
**Begovich Law & Mediation**  
A Professional Corporation  
9984 Scripps Ranch Blvd., Suite 511  
San Diego, CA 92131  
[BegovichLaw@gmail.com](mailto:BegovichLaw@gmail.com)  
(786) 505-6323  
CA State Bar ID: 172225  
*\*Motion for Pro Hac Vice Forthcoming*

Michael Begovich, Esq.\*  
**Begovich Law & Mediation**  
A Professional Corporation  
9984 Scripps Ranch Blvd., Suite 511  
San Diego, CA 92131  
[BegovichLaw1@gmail.com](mailto:BegovichLaw1@gmail.com)  
(786) 565-8543  
CA State Bar ID: 134967

*Attorneys for Plaintiffs*  
*\*Pro Hac Vice*  
*\*\* Pro Hac Vice Pending*

**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2023, service of the foregoing **PLAINTIFFS' MOTION TO COMPEL PURSUANT TO LOCAL CIVIL RULE 7(n) AND MEMORANDUM IN SUPPORT** has been made on counsel of record through the Court's ECF system.

\_\_\_\_/s/ Curtis Lee Morrison