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DEPARTMENT OF JUSTICE



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September 11, 2018

VIA ELECTRONIC DELIVERY AND U.S. MAIL

Dorothy Lee
Office of Justice Programs
Office of the General Counsel
Attention: FOIA Staff
810 7th Street, NW
Room 5400
Washington, DC 20531
FOIAOJP@usdoj.gov

RE: Freedom of Information Act Request Regarding FY 2018 Edward Byrne Memorial Justice Assistance Grant Program Solicitation and Certification Requirements

Dear Ms. Lee:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as amended, and its implementing regulations, I hereby make this request for records on behalf of the Attorney General of California regarding the Edward Byrne Memorial Justice Assistance Grant Program (“JAG”). This request describes: (1) the records sought; and (2) our request for a fee waiver for production of these records.

The State of California, and its local jurisdictions, is expected to receive \$28.9 million pursuant to the FY 2018 JAG program. On July 20, 2018, the U.S. Department of Justice’s Office of Justice Programs (“DOJ OJP”) released the FY 2018 State Solicitation for JAG. The JAG State Solicitation kept at least one condition, the requirement to comply with 8 U.S.C. § 1373, a requirement that courts have struck down in connection with FY 2017 funding because of the unconstitutionality of the statute, and includes two conditions that are described as substantively similar as the Access and Notification Conditions that were added to FY 2017 funding that have also been struck down by courts. DOJ OJP also requires, for the first time, that the State certify compliance with six laws that DOJ OJP identifies as “applicable” to JAG: 8 U.S.C. §§ 1226(a) & (c), 1231(a)(4), 1324(a), 1357(g), 1366(1) & (3), and 1644 (with the requirement to certify compliance with 8 U.S.C. § 1373, the “FY 2018 Certification Requirements.”). The same requirements exist in the FY 2018 Local Solicitation for JAG. The

FY 2018 JAG Local Solicitation and FY 2018 JAG State Solicitation will be referred to here, collectively, as the “JAG Solicitations.” At no point has DOJ OJP explained the basis for these Certification Requirements.

The State of California is challenging the FY 2017 immigration enforcement conditions in the Northern District of California in *State of California ex rel. Xavier Becerra v. Sessions*, No. 17-cv-4701. On August 23, 2018, the State of California filed a new lawsuit challenging the FY 2018 Certification Requirements in the Northern District of California. *State of California ex rel. Xavier Becerra v. Sessions*, No. 18-cv-5169. Moreover, the federal government filed a lawsuit against the State in the Eastern District of California claiming that California Senate Bill 54 violated 8 U.S.C. § 1373. *United States v. California*, No. 18-cv-490. The court in that case rejected the federal government’s interpretation of § 1373, determined that Senate Bill 54 does not directly conflict with 8 U.S.C. § 1373, and found the constitutionality of 8 U.S.C. § 1373 to be “highly suspect.” *United States v. California*, 314 F. Supp. 3d 1077, 1101-04 (E.D. Cal. 2018).

We are concerned with USDOJ’s actions, including DOJ OJP’s lack of transparency in explaining the need for these conditions, how these conditions relate to the purpose that Congress intended when creating the JAG program, and DOJ OJP’s disregard for federal courts that have found that these and similar funding requirements imposed on JAG are unconstitutional.

Request for Records

To better understand DOJ OJP’s justification in imposing these Certification Requirements, the Attorney General of California respectfully requests that DOJ OJP produce a copy of all of the records enumerated below relating to OJP’s decision to introduce the Certification Requirements. As you are aware, DOJ OJP is subject to the requirements of FOIA.

In particular, we request all records, as that term has been defined by the Act and interpreted by the courts (e.g., 5 U.S.C. § 552(f)(2)). Please provide these records on a rolling basis and in a readily-accessible, electronic format, either in “.pdf,” or native form for Excel spreadsheets, or in print version if an electronic version is not available. *See* 5 U.S.C. § 552(a)(3)(B). If DOJ OJP has destroyed or otherwise deems any requested record or portion of a record exempt from disclosure pursuant to one or more 5 U.S.C. § 552(b) exemptions, please provide an explanation for the destruction or the basis for withholding the record or portion of a record, including: (i) basic factual information about each destroyed or withheld record (author(s), recipient(s), date, length, subject matter, and location); (ii) the justification for the destruction or claimed exemption(s); and (iii) the interest protected by the exemption(s) that disclosure would harm. 5 U.S.C. § 552(a)(8)(A). The words “and” and “or” below have both conjunctive and disjunctive meanings.

The Attorney General of California respectfully requests the following records:

1. All records relating to the decision to keep 8 U.S.C. § 1373 an “applicable law” in the FY 2018 JAG Solicitations;

2. All records relating to the decision to add 8 U.S.C. §§ 1226(a) & (c), 1231(a)(4), 1324(a), 1357(g), 1366(1) & (3), and 1644 as “applicable laws” in the FY 2018 JAG Solicitations;
3. All records containing any explanation as to how 8 U.S.C. §§ 1226(a) & (c), 1231(a)(4), 1324(a), 1357(g), 1366(1) & (3), and 1644 are “applicable” to the JAG authorizing statute, or to Congress’s intent in authorizing JAG;
4. All records, including but not limited to, studies, data, evidence, or other materials that DOJ OJP considered in relation to the decision to make 8 U.S.C. §§ 1226(a) & (c), 1231(a)(4), 1324(a), 1357(g), 1366(1) & (3), and 1644 “applicable laws” in the FY 2018 JAG Solicitations;
5. All records identifying or explaining the statutory authority that DOJ OJP relies on to include 8 U.S.C. §§ 1226(a) & (c), 1231(a)(4), 1324(a), 1357(g), 1366(1) & (3), and 1644 as “applicable laws” in the FY 2018 JAG Solicitations;
6. All documents reflecting that DOJ OJP considered the decisions in *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2017); *City of Chicago v. Sessions*, No. 17-cv-5720, --- F. Supp. 3d ---, 2018 WL 3608564 (N.D. Ill. July 27, 2018); *United States v. California*, 314 F. Supp. 3d 1077 (E.D. Cal. 2018); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018); and *City of Philadelphia v. Sessions*, 280 F. Supp. 3d 579 (E.D. Pa. 2017), prior to releasing the FY 2018 JAG Solicitations;
7. All “annual reports” as described in 8 U.S.C. § 1366 that were submitted to Congress from 2013 to the present.

The Attorney General believes that the documents sought are publicly available, of great public interest, and not exempt from required disclosure under FOIA. Please forward this request to any other offices that may be in possession of the requested documents. In addition, given that disclosure of these records would be in the public interest, even if you determine that certain of the documents sought are exempt under FOIA, the Attorney General requests that you disclose these documents as a matter of agency discretion.

Request for a Fee Waiver

The California Attorney General’s Office is a noncommercial organization not subject to review fees. In addition, the Attorney General requests a waiver of searching and copying fees associated with these requests. Under FOIA, agencies must waive such fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii). DOJ has incorporated this requirement in its regulations for responding to FOIA requests. 28 C.F.R. § 16.10. Under the criteria set forth in the USDOJ regulations, such a waiver is appropriate here, as explained below.

“Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” 28 C.F.R. § 16.10(k)(2)(i).

These requests explicitly concern only the operation or activities of the federal government. Specifically, they concern the decision of the federal DOJ OJP to include a number of substantive immigration enforcement Certification Requirements on the disbursement of federal funds to states and localities. These are direct and clear actions by the federal government that have a direct impact on state and local governments.

“Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities.” 28 C.F.R. § 16.10(k)(2)(ii).

This disclosure would be likely to contribute significantly to the public understanding of the federal government’s decision to impose these new substantive Certification Requirements on the disbursement of federal funds appropriated by Congress. The 2018 JAG Solicitations include no explanation of these new Certification Requirements or the reasoning behind their imposition, nor has DOJ OJP identified the evidence that it relied on in making this decision. Thus, this information is not already in the public domain. *See* 28 C.F.R. § 16.10(k)(2)(ii)(A).

Moreover, the disclosure will contribute to the understanding of a broad audience of persons interested in the subject. *See* 28 C.F.R. § 16.10(k)(2)(ii)(B). There is no question that the distribution of federal funds itself is a matter of significant public interest, and impacts all residents of California (and the other 49 states), whose state and local law enforcement entities rely on this funding to enhance public safety. The California Attorney General, who is the chief law officer for the State of California and its more than 39 million residents, has a role in determining whether state and local policies are in compliance with these new substantive conditions. At a minimum, we intend to share the disclosed records with other JAG grantees and subgrantees, something that will be of “great benefit to the public at large” as we continue to advocate for strong public safety policies. In addition, our office engages regularly with the public and serves as a source of information to promote the public’s understanding through speaking engagements, press releases, and other social media. Those public outreach actions, coupled with our expertise in both administrative and criminal justice law, make our office well suited to disseminate more broadly, which we also plan to do, any notable records disclosed as part of this request.

“The disclosure must not be primarily in the commercial interest of the requester.” 28 C.F.R. § 16.10(k)(2)(iii).

The California Attorney General is a public officer acting on behalf of the State and the public pursuant to the California Constitution, statutory authority, and common law. *See* Cal. Const. art. V, § 13; Cal. Gov’t Code § 12511; *D’Amico v. Board of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The information sought in this FOIA request will assist the Attorney General in representing the 39 million people of California. Disclosure of the documents sought

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“is likely to contribute significantly to public understanding of the operations or activities of the Government,” and the materials requested are not sought for any commercial purpose.

Please send all requested materials to my attention, at the address provided above, within 20 business days as required by FOIA. Please call me at 213-269-6404 if you have any questions about this request.

Sincerely,

A handwritten signature in blue ink that reads "Lee I. Sherman". The signature is written in a cursive style with a large initial "L".

LEE I. SHERMAN
Deputy Attorney General

For XAVIER BECERRA
Attorney General