

COMPLAINT

Plaintiff American Center for Law and Justice (“ACLJ”), by and through counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the failure of the Defendant United States Department of State (“DOS”) to issue a determination as to Plaintiff’s FOIA requests within the statutorily prescribed time period and seeking the disclosure and release of agency records improperly withheld by Defendants. In support thereof, Plaintiff alleges and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA, and Plaintiff has exhausted its administrative remedies.

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

3. This Court has authority to award injunctive relief pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

4. This Court has authority to award declaratory relief pursuant to 28 U.S.C. § 2201.

PARTIES

5. Plaintiff, with an office at [REDACTED] is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. Plaintiff’s mission is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. Plaintiff also regularly monitors governmental activity with respect to governmental accountability. Plaintiff seeks to promote integrity,

transparency, and accountability in government and fidelity to the rule of law. In furtherance of its dedication to the rule of law and public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

6. Defendant DHS is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 2707 Martin Luther King Jr Ave SE, Washington, DC 20528-0525. Defendant DHS is in control and possession of the records sought by Plaintiff.

7. Defendant CBP is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 1300 Pennsylvania Ave. NW, Washington, DC 20229. Defendant DHS is in control and possession of the records sought by Plaintiff.

8. Defendant ICE is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 500 12th Street, SW, Mail stop 5900, Washington, DC 20536. Defendant ICE is in control and possession of the records sought by Plaintiff.

9. Defendant USCIS is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at Mail Stop, 5900, Capital Gateway Dr #2040, Camp Springs, MD 20746. Defendant USCIS is in control and possession of the records sought by Plaintiff.

FACTUAL ALLEGATIONS

10. On April 7, 2021 Plaintiff issued a FOIA request to Defendant DHS, CBP, ICE and USCIS. Pl.'s FOIA Request, Ex. A, at 1, incorporated by reference as if fully set forth herein.

11. To summarize, the Plaintiff requested:

records, communications or briefings sent from, prepared by, sent to, received by, reviewed by, or in any way communicated to or by U.S. Department of Homeland Security (“DHS”) Secretary Alejandro Mayorkas, his aides, staff, agents or representatives, or any CBP, ICE, or USCIS official, pertaining to: (1) The administration’s insistence that the present migrant surge at the southern border is a “challenge” and not a “crisis”; (2) what actions are being taken to protect

unaccompanied minors and women from trafficking and/or exploitation; (3) what actions are being taken to stem and discourage the flow of migrants and unaccompanied minors; (4) what actions are being taken to protect Americans from crime, terror, drugs, trafficking or border crossers who are on the terror watch list and records that show the actual numbers of migrants in custody, the actual number of unaccompanied minors, the number of migrants released without a court date, the migrants with a criminal record, the originating country of the migrants and the number apprehended on the terror watch list; (5) DHS employees or DHS components being instructed not to talk to the press about the “challenge” on the Border at all and to avoid calling it a crisis; (6) the number of migrants with COVID, including records showing what number of COVID positive migrants have been released into the United States, with a breakdown by those released without and with a court date, what is being done to track these COVID positive migrants, the detention facilities who have experienced an outbreak, and what steps are being taken to reduce the rate of infection inside the detention facilities; and, (7) any warnings by CBP or DHS staff that an overly rapid repeal of the Trump Administration’s policies could lead to a surge in unaccompanied minors or migrants.”

Pl.’s FOIA Request Ex. A, 2.

12. “Pursuant to DHS FOIA regulation 6 C.F.R. §5.3(b), this Background addresses ‘the date, title or name, author, recipient, and subject matter of the record[s]’ requested, to the extent known.” Pl.’s FOIA Request Ex. A, 2.

13. Plaintiff submitted its FOIA Request to Defendant USCIS via email on April 7, 2021.

14. Plaintiff submitted its FOIA Request to Defendants DHS, CBP and ICE via Federal Express, and delivery confirmations from Federal Express show that these Defendants received Plaintiff’s FOIA Request on April 8, 2021. *See* FedEx Delivery Confirmations attached as Exhibit B and incorporated herein by reference.

15. By letter dated April 9, 2021, attached hereto as Exhibit C and incorporated by reference as if fully set forth herein, Defendant USCIS acknowledged it received Plaintiff’s FOIA request but did not specify on what date it received the FOIA Request. Defendant USCIS advised it had assigned Case Control COW2021001320. Def. USCIS’s Acknowledgement Letter Ex. C, 1.

16. Defendant USCIS asserted:

Although USCIS' goal is to respond within 20 business days of receipt of your request. FOIA does permit a 10-day extension of this time period in certain circumstances. Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Additionally, due to the scope and nature of your request, USCIS will need to locate, compile, and review responsive records from multiple offices, both at headquarters and in the field. USCIS may also need to consult with another agency or other component of the Department of Homeland Security that have a substantial interest in the responsive information. Due to these unusual circumstances, USCIS will invoke a 10-day extension for your request pursuant to 5 U.S.C. § 552(a)(6)(B).

Id.

17. In any event, Defendant USCIS's boilerplate assertions do not comply with the statutory requirements for an agency invoking the "unusual circumstances" 10-day extension. 5 U.S.C. § 552(a)(6)(B).

18. No other correspondence has been received from Defendant USCIS.

19. By letter dated May 6, 2021, attached hereto as Exhibit D and incorporated by reference as if fully set forth herein, Defendant CBP acknowledged it received Plaintiff's FOIA request as of May 6, 2021 – *nearly one full month after the Plaintiff's FOIA Request was submitted* to all Defendants and nearly one full month after Defendant USCIS received and provided an initial, albeit noncompliant, response. Defendant CBP advised it had assigned Case Control CBP-2021-061210. Def. CBP's Acknowledgement Letter Ex. D, 1.

20. Defendant CBP asserted:

Although CBP's goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 §5.5(c). [As your request seeks documents that will require a thorough and wide-ranging search, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 §5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.] **OR** [As your request seeks a voluminous amount of separate and distinct records, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 §5.5(c). If

you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.] **OR** [As the subject matter of your request is of substantial interest to two or more components of CBP or of substantial interest to another agency, we will need to consult with those entities before we issue a final response. Due to these unusual circumstances, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 §5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.]

Id. (bold emphasis in original).

21. The bracketed “OR” statements do not clearly or definitively assert the alleged basis for Defendant CBP’s purported assertion of the 10-day extension “unusual circumstances” provision identified in 6 C.F.R. Part 5 §5.5(c) and 5 U.S.C. § 552(a)(6)(B).

22. In any event, Defendant CBP’s confusing alternative blanket and boilerplate assertions do not comply with the statutory requirements for an agency invoking the “unusual circumstances” 10-day extension. 5 U.S.C. § 552(a)(6)(B).

23. No other correspondence has been received from Defendant CBP.

24. No correspondence of any kind has been received from Defendant DHS or Defendant ICE.

CAUSE OF ACTION

COUNT I

Violation of the Freedom of Information Act

25. Plaintiff realleges and incorporates by reference the preceding paragraphs of this Complaint as if fully stated herein.

26. The federal FOIA establishes a 20-day deadline by which a federal agency must make and issue a decision regarding compliance with a request for records made pursuant to the statute. 5 U.S.C. § 552(a)(6)(A)(i).

27. Pursuant to 5 U.S.C. § 552(a)(6)(A), the Defendant was required to determine whether to comply with Plaintiff's request within twenty (20) days, excepting Saturdays, Sundays, and legal public holidays. Pursuant to this same provision, the Defendant was also required to notify Plaintiff immediately of the determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency.

28. All Defendant's 20-day periods commenced April 9, 2021, and expired on May 7, 2021.

29. As of the date of this Complaint, the Defendants have failed to notify Plaintiff of any determination about whether they will comply with Plaintiff's FOIA request, including the scope of records the Defendants intend to produce, or the scope of records they intend to withhold, and the reasons for any such determination – all clearly required by the FOIA.

30. As of the date of this Complaint, the Defendants have failed to produce any records responsive to the request and have not indicated when (or even whether) any responsive records will be produced, or demonstrate that responsive records are exempt from production – all as clearly required by the FOIA.

31. The Defendants have not requested information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I).

32. The FOIA permits a federal agency, in unusual circumstances, to extend the 20-day response deadline for a period not to exceed ten (10) additional working days. 5 U.S.C. § 552(a)(6)(B)(i).

33. In its noncompliant response, Defendants CBP and USCIS cursorily asserted boilerplate “unusual circumstances,” *see* paras. 16-17 and 20-22, *supra*, but failed to identify “the date on which a determination is expected to be dispatched,” as clearly required by 5 U.S.C. §

552(a)(6)(B)(i), and which shall not be “a date that would result in an extension for more than ten working days.” *Id.*

34. There are no “unusual circumstances” that justify Defendants prolonged delay in responding as required by law to Plaintiff’s lawful FOIA requests, but regardless, Defendants did not comply with the clear statutory requirements to trigger the extension provided by 5 U.S.C. § 552(a)(6)(B).

35. Plaintiff has a statutory right to have Defendants process Plaintiff’s FOIA request in a timely manner and in accordance with the requirements set forth in 5 U.S.C. § 552(a)(6).

36. The Defendants are unlawfully withholding records requested by the Plaintiff American Center for Law and Justice pursuant to the FOIA, 5 U.S.C. § 552.

37. The FOIA provides a cause of action for a complainant from whom a federal agency has withheld requested records. 5 U.S.C. § 552(a)(4)(B).

38. Through continued delay and outright failure to properly respond to Plaintiff’s lawful request for records, and its improper withholding of such requested records, the Defendants have failed to comply with FOIA’s prescribed deadlines for responding to a request for records and has violated Plaintiff’s statutory rights.

39. Pursuant to 5 U.S.C. § 552(a)(6)(C), because the Defendants failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its FOIA request.

40. Plaintiff is being irreparably harmed by reason of the Defendants’ unlawful withholding of requested records, and Plaintiff will continue to be irreparably harmed unless the Defendant is compelled to conform its conduct to the requirements of the law.

41. The FOIA imposes no limits on courts’ equitable powers in enforcing its terms,

and this Court should exercise its equitable powers to compel the Defendant to comply with the clear requirements of the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against the Defendants, and provide Plaintiff with the following relief:

- (a) An Order that the Defendants conduct a diligent, expedited search for any and all records responsive to Plaintiff's FOIA request and demonstrate that they employed reasonable search methods most technologically likely to lead to the discovery of records responsive to Plaintiff's FOIA request, selected from among those methods available to Defendants;
- (b) An Order that the Defendants produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption;
- (c) An Order enjoining the Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- (d) A declaration that the Defendants' actions violated Plaintiff's statutory rights under 5 U.S.C. § 552;
- (e) An Order awarding to Plaintiff its reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- (f) An Order granting to Plaintiff all further relief to which Plaintiff may be entitled.

Dated: May 18, 2021.

Respectfully submitted,

THE AMERICAN CENTER FOR LAW AND JUSTICE

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