

MATTHEW A. RICHARDS, SBN 233166
mrichards@nixonpeabody.com
CHRISTINA E. FLETES, SBN 312661
cfletes@nixonpeabody.com
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, CA 94111-3600
Tel: 415-984-8200
Fax: 415-984-8300

Attorneys for Plaintiff
HUMAN RIGHTS WATCH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

HUMAN RIGHTS WATCH,

Plaintiff,

vs.

DEPARTMENT OF HOMELAND
SECURITY and UNITED STATES
CITIZENSHIP AND IMMIGRATION
SERVICES,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking disclosure of records held by the United States Citizenship and Immigration Services (“USCIS”), a branch of the Department of Homeland Security (“DHS”), concerning alleged due process violations or other alleged misconduct by another branch of DHS, Customs and Border Protection (“CBP”), of asylum seekers (hereinafter called “alleged violations or other alleged misconduct”). Plaintiff Human Rights Watch (“HRW”) (“Plaintiff”) seeks declaratory, injunctive, and other appropriate relief with respect to USCIS’s unlawful withholding of these records.

The Parties

6. Plaintiff HRW is a non-profit, non-partisan international human rights organization, based in New York, New York, with offices in San Francisco, California. HRW employs more than 400 professionals, among them lawyers, journalists, and academics. These professionals work to uncover and report on human rights issues around the world. In order to reach the broadest possible audience, the organization publishes detailed reports on human rights issues of interest to a wide range of people. Through its domestic and international network of offices and staff, HRW challenges governments and those in power to end abusive practices and to respect international human rights law by enlisting the public and the international community to support the cause of human rights for all.

7. Defendant DHS is a Department of the Executive Branch of the United States Government and is an agency within the meaning of 5 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws. DHS has possession and control over the records sought by Plaintiff.

8. Defendant USCIS is a component of DHS and is an agency within the meaning of 5 U.S.C. § 552(f). USCIS oversees lawful immigration to the United States. As such, USCIS adjudicates a wide range of applications for immigration status in the United States (including lawful permanent residence, asylum, and temporary worker status), as well as applications for U.S. citizenship. USCIS has possession and control over the records sought by Plaintiff.

Plaintiff's FOIA Request

9. On November 17, 2015, Plaintiff submitted a FOIA request to USCIS seeking:

[A]ll records held by the USCIS Asylum Division and prepared by USCIS asylum officers relating to, and/or mentioning or referring to alleged due process violations or other alleged misconduct by Customs and Border Protection (CBP) (hereinafter called "alleged violations or other alleged misconduct"). "Alleged violations or other misconduct" means any alleged or asserted due process violations; alleged conduct inconsistent or in violation of agency policy or regulations; alleged conduct outside the scope of the law, allegations that CBP failed to record fear of return expressed by migrants at the border; and alleged intimidation, coercion and physical abuse. This request include all records referring to due process violations by CBP agents discovered by asylum officers during credible fear interviews with noncitizens.

1 Plaintiff requested documents ranging in time from October 1, 2006 through the present day. A
2 true and correct copy of Plaintiff's November 17, 2015 FOIA request letter is attached hereto as
3 Exhibit 1.

4 10. Plaintiff asked that USCIS waive all fees associated with its FOIA request
5 because disclosure of the records is in the "public interest because it is likely to contribute
6 significantly to public understanding of the operations or activities of the government and is not
7 primarily in the commercial interest of the requester." See Exhibit 1 at page 2.

8 11. On November 24, 2015, USCIS acknowledged receipt of Plaintiff's FOIA
9 request. A true and correct copy of the USCIS November 24, 2015 acknowledgment letter is
10 attached hereto as Exhibit 2.

11 12. On December 13, 2016, USCIS produced 110 documents totaling 229 pages at
12 what it purported to be the conclusion of its review. One hundred-seventy-five of those pages
13 were significantly or fully redacted. Less than a quarter of the produced pages were released in
14 their entirety. A true and correct copy of the USCIS December 13, 2016 letter is attached hereto
15 as Exhibit 3.

16 13. The USCIS production suffers from a number of significant flaws and omissions,
17 evident even on the face of the heavily, and improperly, redacted set of documents released to
18 Plaintiff. For example, USCIS omitted a key spreadsheet mentioned in and originally attached to
19 an email bearing Bates No. USCIS_FOIA000021. A true and correct copy of Bates No.
20 USCIS_FOIA000021 is attached hereto as Exhibit 4. The spreadsheet contains information about
21 "problematic Border Patrol practices that arise in the credible fear context," including an instance
22 where an applicant "was made fun of by officers because she is transgender and was forced to
23 sign documents." See Exhibit 4. While it is apparent that the spreadsheet was originally attached
24 to the email, the spreadsheet itself was not produced. The spreadsheet contains data from 1016
25 cases and includes information about CBP misconduct, data about CBP officers failing to ask
26 applicants about their fear during credible fear interviews, and other improper questioning by
27 officers. See Exhibit 5 (true and correct copy of Bates No. USCIS_FOIA000096).

14. Among other things, USCIS failed to provide any records created prior to 2013. Not a single document in the production is dated during the time period 2006-2012.

15. USCIS also failed to produce documents generated up to the time of its search, as required by FOIA and governing case law.

16. USCIS also improperly relied on 5 U.S.C. § 552(b)(6) (“FOIA Exemption 6”) to redact the vast majority of pages that were produced. Further, USCIS erroneously asserted FOIA Exemption 6, an exemption which is limited to personnel, medical, and similar files, to inappropriately redact every single government employee name and email address in its document production.

17. On March 10, 2017, in response to USCIS’s production, Plaintiff submitted an administrative appeal, asking USCIS to:

- conduct an appropriate search for any and all records referencing or mentioning alleged due process violations or other alleged misconduct by CBP from 2006 through December 13, 2016, according to the parameters described in the original Request;
- produce each responsive document in an original, complete, and comprehensible format; and
- appropriately limit its use of FOIA Exemption 6 to redact only such information as is appropriate and actually subject to that exemption (*i.e.*, personal identifying information such as names, addresses, and Alien Nos., if USCIS is able to make a particularized showing that FOIA Exemption 6 should apply).

A true and correct copy of Plaintiff’s March 10, 2017 FOIA appeal letter is attached hereto as Attachment A to Exhibit 6.

18. On March 14, 2017, USCIS acknowledged the appeal and remanded the request to the National Records Center “for a further search.” Further, USCIS stated that “[i]f records [were] located, those that can be released will be made available.” A true and correct copy of the March 14, 2017 USCIS acknowledgment and remand letter is attached hereto as Exhibit 7.

19. On September 25, 2017, after waiting over six months with no word from USCIS or the National Records Center, Plaintiff once again reached out to USCIS demanding the full and complete production of documents to which it is entitled. A true and correct copy of Plaintiff's September 25, 2017 follow-up letter is attached hereto as Exhibit 6.

20. On February 15, 2018 Plaintiff once again reached out to USCIS but did not receive a response. A true and correct copy of the Plaintiff's February 15, 2018 email is attached hereto as Exhibit 8.

21. Plaintiff has exhausted its administrative remedies. Upon receiving the initial deficient production of documents, Plaintiff appealed to USCIS on March 10, 2017. Although USCIS remanded the FOIA request, USCIS has not produced any additional documents nor communicated with Plaintiff since March 14, 2017. Six months after the initial appeal request, Plaintiff reached out to USCIS once again demanding the full and complete production of documents to which it is entitled. USCIS did not respond. On February 15, 2018, Plaintiff emailed USCIS to inquire about its FOIA request, but received no response from USCIS.

22. To date, USCIS has not produced any further documents responsive to Plaintiff's FOIA request, nor has it reproduced the original production to correct the improper redactions.

23. USCIS and DHS have violated the applicable statutory time limit for the processing of FOIA requests.

24. USCIS and DHS have wrongfully failed to release responsive records to Plaintiff.

25. USCIS and DHS have wrongfully failed to correct improper redactions applied to the original production.

FIRST CAUSE OF ACTION

Violation of Freedom of Information Act, 5 U.S.C. § 552 for Failure to Disclose Responsive Agency Records

26. Plaintiff repeats, alleges and incorporates the allegations in paragraphs 1-25 as if fully set forth herein.

27. Although a fraction of the responsive documents have been produced in response to the Request, Defendants' withholding of the vast majority of responsive documents constitutes a constructive denial of the Request.

4834-7373-1674.4

28. Defendants' unlawful withholding of documents responsive to Plaintiff's request violates 5 U.S.C. §§ 552(a)(3)(A) and (a)(6)(A), as well as the regulations promulgated thereunder.

29. Further, Defendants improperly relied on exemptions under 5 U.S.C. § 552(b)(6) in redacting responsive records. Defendants' improper redaction of the records violates the FOIA, 5 U.S.C. § 552(b).

30. USCIS and DHS are obligated under 5 U.S.C. § 552(a)(3) to produce records responsive to Plaintiff's FOIA request. Plaintiff has a legal right to obtain such records, and no legal basis exists for USCIS's and DHS's failure to disclose unredacted records from October 1, 2006 through December 13, 2016. Nor, critically, has USCIS or DHS ever even attempted to articulate such a legal basis for their failure.

SECOND CAUSE OF ACTION

Violation of Freedom of Information Act, 5 U.S.C. § 552 for Failure to Conduct an Adequate Search of Agency Records

31. Plaintiff repeats, alleges, and incorporates by reference the allegations in paragraphs 1-30 as if fully set forth herein.

32. Even though Defendants produced some documents, the production is incomplete, and Defendants applied an improper time limit to their search. Plaintiff's FOIA request asked for records from October 1, 2006 through December 13, 2016. However, Defendants failed to provide any records dated between 2006 and 2012.

33. USCIS and DHS are obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for and to produce records responsive to Plaintiff's FOIA request. Plaintiff has a legal right to obtain such records, and no legal basis exists for USCIS's and DHS's failure to conduct a reasonable search for records from October 1, 2006 through December 13, 2016.

34. Defendants' failure to conduct a reasonable search for records responsive to Plaintiff's request violates 5 U.S.C. §§ 552(a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

//

//

THIRD CAUSE OF ACTION

Violation of the Administrative Procedure Act (“APA”) for Failure to Timely Respond to Request for Agency Records

35. Plaintiff repeats, alleges, and incorporates by reference the allegations in paragraphs 1-34 as if fully set forth herein.

36. Defendants’ failure to timely respond to Plaintiff’s request for agency records constitutes agency action unlawfully withheld and unreasonably delayed in violation of the APA, 5 U.S.C. §§ 701-06. Defendants’ failure to timely respond is arbitrary, capricious, and an abuse of discretion, not in accordance with law and without observance of procedure required by law, all in violation of the APA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that judgment be entered in that favor and against Defendants USCIS and DHS. Plaintiff further requests that the Court:

(a) Declare unlawful Defendants’ refusal to disclose the records requested by Plaintiff;

(b) Declare that Defendants’ failure to make a determination with respect to Plaintiff’s FOIA request within the statutory time limit and Defendants’ failure to disclose responsive records violates the FOIA;

(c) Declare that Defendants’ failure to timely respond to Plaintiff’s request for agency records violates the APA;

(d) Order Defendants and any of Defendants’ departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a full, adequate, and expeditious search for records responsive to Plaintiff’s FOIA request;

(e) Enjoin Defendants, and any of their departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from withholding non-exempt records responsive to Plaintiff’s FOIA request and order them to promptly produce the same without redaction;

1 (f) Order Defendants to provide within 30 days after service of the Complaint
2 in this action, an itemized, indexed inventory of every agency record or portion thereof
3 responsive to Plaintiff's request which Defendants assert to be exempt from disclosure,
4 accompanied by a detailed justification statement covering each refusal to release records
5 or portions thereof in accordance with the indexing requirements of *Vaughn v. Rosen*, 484
6 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974);

7 (g) Award Plaintiff its reasonable attorneys' fees and costs pursuant to 5 U.S.C. §
8 552(a)(4)(E) and 28 U.S.C. § 2412; and

9 (h) Grant all other such relief to Plaintiff as the Court deems just and equitable.

10
11 Dated: March 26, 2018

Respectfully submitted,

NIXON PEABODY LLP

12
13 By: /s/ Matthew A. Richards

14 MATTHEW A. RICHARDS
15 CHRISTINA E. FLETES
16 *Attorneys for Plaintiff*
17 HUMAN RIGHTS WATCH
18
19
20
21
22
23
24
25
26
27
28