

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

IMMIGRATION REFORM LAW)
INSTITUTE)
25 Massachusetts Ave., NW, Suite 335)
Washington, DC 20001,)

Plaintiff,)

v.)

Civil Action No.

U.S. IMMIGRATION AND)
CUSTOMS ENFORCEMENT)
500 12th St., SW)
Washington, DC 20024,)

Defendant.)

COMPLAINT

Plaintiff Immigration Reform Law Institute (“IRLI”) brings this action for injunctive and other appropriate relief against United States Immigration and Customs Enforcement (“ICE”) to compel compliance with the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff alleges the following grounds:

JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(A)(vii), 552(a)(4)(B), 552(a)(6)(C)(i) and 28 U.S.C. § 1331. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

2. Plaintiff IRLI (“Plaintiff”) is a non-profit public-interest legal organization organized under the laws of the District of Columbia and having its principal place of business at 25 Massachusetts Ave., NW, Suite 335, Washington, DC 20001. Plaintiff advocates for responsible immigration policies in court, before administrative agencies, and before legislative bodies on behalf of the American people, serving as a watchdog to safeguard against abuses of power and holding the nation’s leaders accountable for enforcing the nation’s immigration laws. Plaintiff also seeks to educate the citizenry on and increase public awareness of immigration issues. In furtherance of its public-interest mission, Plaintiff regularly requests access to the records of federal agencies and widely disseminates its findings to the public.

3. Defendant ICE (“Defendant”) is a component of the United States Department of Homeland Security (“DHS”), established within the Executive Branch of the United States Government, and is headquartered at 500 12th St., SW, Washington, DC 20024. Defendant is an agency within the meaning of 5 U.S.C. § 552(f)(1). Defendant has possession, custody, and control of certain public records to which Plaintiff seeks access.

STATUTORY FRAMEWORK

4. FOIA requires federal agencies, upon request, to make agency records “promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

5. An agency is required to determine whether to comply with a FOIA request within twenty (20) business days of receiving the request and “shall immediately notify the person making such request of such determination and the reasons therefor.” 5 U.S.C. § 552(a)(6)(A)(i).

6. In order for an agency's response to constitute a "determination" within the meaning of FOIA, an agency must: i) gather and review the documents; ii) determine and communicate the scope of the documents it intends to produce or withhold, and the reasons for withholding any documents; and iii) inform the requester that it can appeal whatever portion of the "determination" is adverse. *See Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 186-88 (D.C. Cir. 2013).

7. Although "a 'determination' does not require actual production of the records to the requester at the exact same time that the 'determination' is communicated to the requester," it "must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future." *Id.* at 188.

8. If an agency provides an adverse determination as to a FOIA request, the requester generally must first exhaust administrative remedies by filing an administrative appeal with the agency itself rather than being able to immediately file suit. *See Oglesby v. Dept. of the Army*, 920 F.2d 57 (D.C. Cir. 1990). Once the requester has filed an administrative appeal, the agency then has twenty (20) working days to decide the appeal or the requester may then bring suit. *See* 5 U.S.C. § 552(a)(6)(C)(i).

9. If, however, an agency does not provide a determination at all as to a FOIA request by the statutory deadline, the requester is deemed to have exhausted administrative remedies and may immediately pursue judicial review. *See* 5 U.S.C. §§ 552(a)(6)(C)(i), 552(a)(4)(B). Put another way, when an agency does not comply with FOIA's time limits, the requester can seek immediate judicial review despite not having filed an administrative appeal: courts refer to this as "constructive exhaustion." *Khine v. DHS*, 943 F.3d 959, 966 (D.C. Cir. 2019)(citations omitted).

10. While FOIA allows agencies to charge requesters search, review and duplication fees, and other fees as provided by statute, *see* 5 U.S.C. § 552(a)(4)(A)(vi), it also provides that “fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by ... a representative of the news media”. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

11. FOIA defines “representative of the news media” in pertinent part as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii). *See also Cause of Action v. FTC*, 799 F.3d 1108, 1120 (D.C. Cir. 2015) (explaining that the definition “is readily severable into five criteria that a requester must satisfy to qualify as a ‘representative of the news media.’ A requester must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience.”)

12. An agency’s failure to make a determination as to the issue of fees or fee waivers within the statute’s time limits generally bars the agency from assessing fees. *See* 5 U.S.C. §§ 552(a)(4)(A)(viii)(I) and 552(a)(4)(A)(viii)(II)(aa); *Bensman v. Nat’l Park Serv.*, 806 F.Supp.2d 31 (D.D.C. 2011). In such cases, agency fees may only be charged to a requester if a court determines that “exceptional circumstances exist.” 5 U.S.C. § 552(a)(4)(A)(viii)(II)(cc).

13. Finally, FOIA authorizes a court to “assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. § 552(a)(4)(E)(i). The statute provides that “a complainant has substantially prevailed if the complainant has obtained relief through either—(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial." 5 U.S.C. § 552(a)(4)(E)(ii). While a *pro se* non-attorney plaintiff may not recover attorney fees, *see Benavides v. Bureau of Prisons*, 993 F.2d 257 (D.C. Cir. 1993), a law firm representing itself is eligible for an award of attorney fees. *See Baker & Hostetler LLP v. Dept. of Commerce*, 473 F.3d 312 (D.C. Cir. 2006).

STATEMENT OF FACTS

14. In early 2023, Plaintiff's staff noticed what appeared to be a dramatic decline in Defendant's press releases mentioning the names of foreign nationals who had been either arrested or deported. *See* Immigration Reform Law Institute, *Investigative Report: Immigration and Customs Enforcement's (ICE) media division has, by and large, stopped identifying the alien criminals and other deportees referenced in the agency's press releases* (Feb. 13, 2024), <https://irli.org/wp-content/uploads/2024/02/ICE-Wont-Name-Names.FinalEdition.Tweaked-Version.pdf>.

15. Plaintiff's staff then compared Defendant's press releases from the last year of the Trump Administration to a one-year period under the Biden Administration, August 16, 2022-August 16, 2023, and created a report based on their findings. This report found as follows in pertinent part:

During the one-year period that we examined there were a total of 208 press releases relating to arrests and deportations of foreign nationals. Of those, 140 press releases included names of their subjects. That means ICE named only 67% of the subjects of its press releases during the relevant time interval.

On the other hand, in the course of President Trump's last year in office, there were a total of 110 press releases relating to arrests and deportations of foreign nationals. Of those, 107 press releases included names of their subjects. That's a 97% identification rate. And, in the three cases where names were not furnished ICE appeared unable to confirm the identity of the alien suspect prior to issuing a news release.

Id.

16. Plaintiff's report further noted: "Without the name of the individuals referenced in ICE press releases it is virtually impossible for the public, watchdog groups and the media to determine what action, if any, ICE has taken to remove a violator from the United States." *Id.*

17. On July 20, 2023, seeking the nature and origins of these apparent policy changes, Plaintiff submitted a FOIA request by online FOIA portal to Defendant requesting the following agency records:

1) All policies, rules and procedures concerning the publication of names within Immigration and Customs Enforcement (ICE) news releases and statements, from and including January 20, 2021 up to including July 20, 2023.

2) All emails from or to ICE leadership that pertain to any policy, rule or procedure related to publicizing names, or not publicizing names, in agency news releases and statements, from and including January 20, 2021 up to including July 20, 2023.

18. Plaintiff received an email from Defendant dated August 1, 2023, acknowledging its receipt of Plaintiff's FOIA request and assigning the request the tracking number 2023-ICFO-35268, but not making or providing any determination regarding the request or producing any records in response to the request.

19. Defendant's acknowledgment email invoked the ten-day extension period authorized by FOIA for agencies to make and provide determinations to requesters, pursuant to 5 U.S.C. § 552(a)(6)(B), thus extending its initial deadline from twenty (20) to thirty (30) working days from receipt.

20. After this initial acknowledgment email, Defendant did not make or provide any determination regarding Plaintiff's FOIA request, produce any records in response to the request, or otherwise respond to the request or communicate with Plaintiff regarding the request.

21. Plaintiff emailed Defendant on April 11, 2024, inquiring as to the status of Plaintiff's FOIA request, but as of the date of this Complaint has received no response.

22. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i) and the ten-day extension under 5 U.S.C. § 552(a)(6)(B), Defendant was required to make a determination whether to comply with Plaintiff's FOIA request within thirty (30) working days after receipt and to notify Plaintiff immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. Accordingly, Defendant's determination of Plaintiff's FOIA request was due by approximately September 13, 2023, at the latest.

23. As of the date of this Complaint, approximately seven months after Defendant's determination of Plaintiff's FOIA request was due, Defendant has still failed to: (i) determine whether to comply with the request; (ii) notify Plaintiff of any such determination or the reasons for such determination; (iii) advise Plaintiff of the right to appeal any adverse determination; or (iv) produce any of the requested records or otherwise demonstrate that the requested records are exempt from production.

24. Because Defendant has failed to comply with the time limits set forth in 5 U.S.C. §§ 552(a)(6)(A)(ii), 552(a)(6)(B) and 552(a)(6)(E)(iii) with respect to Plaintiff's FOIA request, Plaintiff is deemed to have exhausted any and all administrative remedies with respect to the request, pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

COUNT I

Violation of FOIA: Failure to Comply With Statutory Deadlines

25. Plaintiff realleges paragraphs 1 through 24 as if fully stated herein.
26. Defendant's failure to make and provide a determination regarding Plaintiff's request has violated and continues to violate the statutory deadlines imposed by FOIA, including the deadlines set forth in 5 U.S.C. §§ 552(a)(6)(A)(ii), 552(a)(6)(B) and 552(a)(6)(E)(iii).

COUNT II

Violation of FOIA: Unlawful Withholding of Agency Records

27. Plaintiff realleges paragraphs 1 through 26 as if fully stated herein.
28. Defendant has failed to make responsive records available to Plaintiff.
29. Defendant has unlawfully withheld any and all responsive agency records from Plaintiff and continues to do so.
30. As a result of Defendant's unlawful withholding, Plaintiff and the public have been denied access to agency records to which Plaintiff is lawfully entitled under FOIA, 5 U.S.C. § 552(a)(3)(A).

COUNT III

Violation of FOIA: Failure to Grant News Media Fee Status

31. Plaintiff realleges paragraphs 1 through 30 as if fully stated herein.
32. In its FOIA request, Plaintiff set forth facts and law in support of a determination that it is entitled to media requester fee status.
33. Defendant has failed to make a determination as to Plaintiff's media requester fee status.
34. Plaintiff is entitled to a determination that it is a media requester for fee waiver purposes as Defendant failed to comply with the time limits under 5 U.S.C. §§ 552(a)(6)(A)(ii) and 552(a)(6)(E)(iii). *See* 5 U.S.C. § 552(a)(4).

COUNT IV

Violation of FOIA: Failure to Grant a Fee Waiver

35. Plaintiff realleges paragraphs 1 through 34 as if fully stated herein.
36. In its FOIA request, Plaintiff set forth facts and law in support of a fee waiver.
37. Defendant has failed to make a determination on Plaintiff's fee waiver request.
38. Plaintiff is entitled to injunctive relief providing for a fee waiver in this matter as a consequence of Defendant's failure to make a determination on the fee waiver request.
39. Plaintiff is also entitled to a fee waiver in this matter as Defendant failed to comply with the time limits under 5 U.S.C. §§ 552(a)(6)(A)(ii), 552(a)(6)(B) and 552(a)(6)(E)(iii). *See* 5 U.S.C. § 552(a)(4)(A)(viii).

REQUESTED RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

(A) order Defendant to conduct a reasonable search for any and all agency records responsive to Plaintiff's FOIA request, and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;

(B) order Defendant to produce, by a date certain, any and all non-exempt agency records responsive to Plaintiff's FOIA request and a detailed *Vaughn* index of any responsive agency records or portions of records withheld under claim of exemption;

(C) enjoin Defendant from continuing to withhold any and all non-exempt agency records responsive to Plaintiff's FOIA request;

(D) order Defendant to grant Plaintiff media requester status;

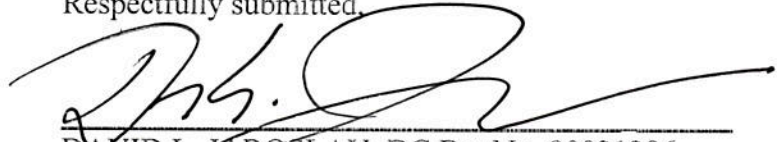
(E) order Defendant to grant Plaintiff a fee waiver;

(F) award Plaintiff its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

(G) grant Plaintiff such other relief as the Court deems just and proper.

Dated: April 18, 2024

Respectfully submitted,



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