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11 HUMAN RIGHTS WATCH

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 HUMAN RIGHTS WATCH,

15 Plaintiff,

16 vs.

17 DEPARTMENT OF HOMELAND
18 SECURITY and UNITES STATES
19 CITIZENSHIP AND IMMIGRATION
20 SERVICES,

21 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

22 **INTRODUCTION**

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

1 2. The information sought is of significant value to the public. Plaintiff seeks
2 information that would illustrate how United States immigration officers with CPB are treating
3 asylum seekers. Further, Plaintiff seeks to obtain and synthesize information about the
4 characteristics and handling of instances of alleged misconduct and/or due process violations
5 committed by CBP officials. The general public will gain meaningful understanding of
6 government policies and practices relating to treatment of migrants at U.S. borders. Among
7 other things, the requested information will inform the public on the procedures for referring
8 asylum seekers to credible fear interviews to assess their asylum claims. The requested
9 information, therefore, is likely to contribute to an understanding of government operations and
10 activities.

11 3. USCIS's failure to turn over requested records violates the FOIA, and is impeding
12 Plaintiff's efforts to educate the public regarding the treatment of asylum seekers by government
13 officials at the U.S. border. There is no comparable source of information or analysis of
14 complaints against CBP heard by USCIS officers by would-be asylum seekers. Upon
15 information and belief, the information would increase the public's understanding about how the
16 borders are being managed and operated by government agencies, and more specifically, how
17 CPB abuses reported to USCIS asylum officers are handled. Further, the information would
18 increase the public's understanding of how its tax dollars are being expended. The requested
19 information has a strong potential to significantly contribute to the public's understanding of
20 government operations and activities.

21 **Jurisdiction and Venue**

22 4. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §
23 552(a)(4)(B), 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331. This Court has jurisdiction to grant
24 declaratory and further necessary or proper relief pursuant to 28 U.S.C. §§ 2201-2202 and Federal
25 Rules of Civil Procedure 57 and 65.

26 5. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §
27 1391(e)(1)(C) in that Plaintiff HRW has an office in San Francisco, California.

1 **The Parties**

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

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

15 8. Defendant USCIS is a component of DHS and is an agency within the meaning of
16 5 U.S.C. § 552(f). USCIS oversees lawful immigration to the United States. As such, USCIS
17 adjudicates a wide range of applications for immigration status in the United States (including
18 lawful permanent residence, asylum, and temporary worker status), as well as applications for
19 U.S. citizenship. USCIS has possession and control over the records sought by Plaintiff.

20 **Plaintiff's FOIA Request**

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

22 [A]ll records held by the USCIS Asylum Division and prepared by
23 USCIS asylum officers relating to, and/or mentioning or referring to
24 alleged due process violations or other alleged misconduct by
25 Customs and Border Protection (CBP) (hereinafter called "alleged
26 violations or other alleged misconduct"). "Alleged violations or other
27 misconduct" means any alleged or asserted due process violations;
28 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 November 17, 2015.
2 A 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 of
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 holds 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).

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

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

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

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

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

22 A true and correct copy of Plaintiff’s March 10, 2017 FOIA appeal letter is attached hereto as
23 Exhibit 6 at page 23.

24 18. On March 14, 2017, USCIS acknowledged the appeal and remanded the request
25 to the National Records Center “for a further search.” Further, USCIS stated that “[i]f records
26 [were] located, those that can be released will be made available.” A true and correct copy of the
27 March 14, 2017 USCIS acknowledgment and remand letter is attached hereto as Exhibit 7.
28

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

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

6 30. USCIS and DHS are obligated under 5 U.S.C. § 552(a)(3) to produce records
7 responsive to Plaintiff's FOIA request. Plaintiff has a legal right to obtain such records, and no
8 legal basis exists for USCIS's and DHS's failure to disclose unredacted records from October 1,
9 2006 through December 13, 2016. Nor, critically, has USCIS or DHS ever even attempted to
10 articulate such a legal basis for their failure.

11 **SECOND CAUSE OF ACTION**

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

14 31. Plaintiff repeats, alleges, and incorporates by reference the allegations in paragraphs
15 1-30 as if fully set forth herein.

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

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

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

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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 violate 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.

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11 Dated: March 26, 2018

Respectfully submitted,
NIXON PEABODY LLP

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13 By: /s/ Matthew A. Richards
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17 HUMAN RIGHTS WATCH
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