

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

Civil Action No.

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 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. ICE is an agency within the meaning of 5 U.S.C. § 552(f)(1). ICE 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 does not provide a determination 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. Dep't of Homeland Sec.*, 943 F.3d 959, 966 (D.C. Cir. 2019)(citing *Citizens for Responsibility & Ethics in Washington v. FEC, supra*; *Oglesby v. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990)).

STATEMENT OF FACTS

9. ICE describes the 287(g) program on the agency's own website as follows:

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 added Section 287(g) to the Immigration and Nationality Act (INA) — authorizing U.S. Immigration and Customs Enforcement (ICE) to delegate to state and local law

enforcement officers the authority to perform specified immigration officer functions under the agency's direction and oversight.

The 287(g) Program enhances the safety and security of our nation's communities by allowing ICE Enforcement and Removal Operations (ERO) to partner with state and local law enforcement agencies to identify and remove incarcerated criminal noncitizens who are amenable to removal from the U.S. before they are released into the community.

ICE recognizes the importance of its relationships with its law enforcement partners to carry out its critical mission.

The 287(g) program allows ICE — through the delegation of specified immigration officer duties — to enhance collaboration with state and local law enforcement partners to protect the homeland through the arrest and removal of noncitizens who undermine the safety of our nation's communities and the integrity of U.S. immigration laws.

287(g) Program Models

ICE Enforcement and Removal Operations operates two 287(g) models:

- The Jail Enforcement Model [JEM] is designed to identify and process removable noncitizens — with criminal or pending criminal charges — who are arrested by state or local law enforcement agencies.
- The Warrant Service Officer [WSO] program allows ICE to train, certify and authorize state and local law enforcement officers to serve and execute administrative warrants on noncitizens in their agency's jail.

Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <https://www.ice.gov/identify-and-arrest/287g> (last visited January 11, 2024)

10. According to ICE's website, as of the date of this Complaint, ICE has operational 287(g) agreements with 137 state and local law enforcement agencies. *See id.*

11. Of these 137 operational agreements, none have been entered into in 2021 or later. *See id.*

12. In August 2023, the Center for Immigration Studies ("CIS") reported that ICE "admitted that it put a "hold or pause on onboarding any new partners to the 287(g) program" and admitted further that 23 pending partnerships "are not operational" despite having already been signed by both ICE and a sheriff's department. This admission was on ICE's website for

only about a week before it was taken down.” John Feere, *Biden Admin Changes ICE’s 287(g) Webpage, Admits There’s a ‘Hold’ On the Program*, Center For Immigration Studies (August 25, 2023), <https://cis.org/Feere/Biden-Admin-Changes-ICEs-287g-Webpage-Admits-Theres-Hold-Program> (last visited January 11, 2024)

13. More specifically, ICE’s August 2023 admission on its website stated in pertinent part:

Program Hold

In January 2021, ICE placed a temporary hold or pause on onboarding any new partners to the 287(g) program. While this hold is still in place, ICE remains committed to cooperating with its state and local partners in furthering critical mission efforts. Currently, five JEM and 18 WSO programs have signed [Memoranda of Agreement] that are not operational, pending this program hold. The 287(g) Unit at ICE Headquarters continues to receive letters of interest from law enforcement agencies, showing interest in partnering with ICE through the JEM and WSO programs.

Id.

14. At least insofar as Plaintiff is aware, ICE has never undertaken any official agency action authorized under (or required by) the Administrative Procedure Act (“APA”), 5 U.S.C. § 500 *et seq.*, or any other statute in order to create or impose this “program hold,” nor even publicly acknowledged its existence prior to August 2023, more than two and a half years after its apparent inception.

15. While this admission is no longer on ICE’s website, as of the date of this Complaint there is no indication that the “program hold” it described has been lifted or modified, as no new 287(g) agreements have become operational since.

16. On September 11, 2023, seeking the origins of the “program hold,” Plaintiff submitted a FOIA request by online FOIA portal to ICE requesting the following agency records:

All ICE employee emails that mention the “287(g)” program, from and including January 20, 2021 up to and including April 20, 2021. These emails can be limited to emails sent to or from: Patrick J. Lechleitner, Tae Johnson, Staci A. Barrera, Deborah Fleischaker, Corey A. Price, Katrina W. Berger, Susan Dunbar, Erik P. Breitzke, and Kerry E. Doyle.

17. In Plaintiff’s FOIA request, Plaintiff also requested that ICE waive all fees because Plaintiff qualifies as a “representative of the news media, or news media requester” under 5 U.S.C. § 552(a)(4)(A)(ii)(II), and set forth facts and law in support of its status as such and its request for a fee waiver.

18. Plaintiff received an email from ICE dated September 12, 2023, refusing to assign Plaintiff’s FOIA request a tracking number and stating in pertinent part:

After careful review of your FOIA request, we determined that your request is too broad in scope, did not specifically identify the records which you are seeking, or only posed questions to the agency. Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area to locate records without placing an unreasonable burden upon the agency. For this reason, §5.3(b) of the DHS regulations, 6 C.F.R. Part 5, require that you describe the records you are seeking with as much information as possible to ensure that our search can locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each record sought, such as the date, title or name, author, recipients, and subject matter of the records, if known, or the ICE program office you believe created and/or controls the record. The FOIA does not require an agency to create new records, answer questions posed by requesters, or attempt to interpret a request that does not identify specific records. As you did not provide the necessary information described above, we are unable to accept this request.

Please identify a subject matter regarding the 287g program in order for us to perform a search.

Please resubmit your request containing the necessary information.

19. By email to ICE dated September 12, 2023, Plaintiff objected to ICE’s previous assertions regarding Plaintiff’s FOIA request, stating in pertinent part:

No, I cannot be more specific on the subject matter. The 287(g) program is the subject at hand. There's nothing more to specify.

This request is not "too broad in scope" by any description of that phrase. That I limited the time limitations to just three months -- and specified the names of the employees -- should be more than enough to make this request manageable.

It is my belief that this request is being arbitrarily rejected without proper consideration.

20. Plaintiff received an email from ICE dated September 13, 2023, acknowledging ICE's receipt of Plaintiff's FOIA request on September 11, 2023, and assigning the request the tracking number 2023-ICFO-42736, but not making or providing any determination regarding the request or producing any records in response to the request.

21. ICE'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) days from receipt.

22. ICE's acknowledgment email granted Plaintiff's request for a fee waiver, but only "conditionally," stating in pertinent part:

The DHS FOIA Regulations at 6 CFR § 5.11(k)(2) set forth six factors ICE must evaluate to determine whether the applicable legal standard for a fee waiver has been met: (1) Whether the subject of the requested records concerns "the operations or activities of the government," (2) Whether the disclosure is "likely to contribute" to an understanding of government operations or activities, (3) Whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons, (4) Whether the contribution to public understanding of government operations or activities will be "significant," (5) Whether the requester has a commercial interest that would be furthered by the requested disclosure, and (6) Whether the magnitude of any identified commercial interest to the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

Upon review of the subject matter of your request, and an evaluation of the six factors identified above, ICE has determined that it will conditionally grant your request for a fee waiver. The fee waiver determination will be based upon a sampling of the responsive documents received from the various ICE program offices as a result of the searches conducted in response to your FOIA request. ICE will, pursuant to DHS regulations applicable to media requesters, process the first 100 pages. If upon review of these documents, ICE determines that the disclosure of the information contained in those documents does not meet the factors permitting ICE to waive the fees, then ICE will at that time either deny your request for a fee waiver entirely, or will allow for a percentage reduction in the amount of the fees corresponding to the amount of relevant material found that meets the factors allowing for a fee waiver. In either case, ICE will promptly notify you of its final decision regarding your request for a fee waiver and provide you with the responsive records as required by applicable law.

In the event that your fee waiver is denied, and you determine that you still want the records, provisions of the FOIA allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS Interim FOIA regulations as they apply to media requestors. As a media requester you will be charged 10 cents per page for duplication; the first 100 pages are free. In the event that your fee waiver is denied, we will construe the submission of your request as an agreement to pay up to \$25.00. This office will contact you before accruing any additional fees.

23. After this initial acknowledgment email, ICE 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.

24. 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), ICE 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, ICE's determination of Plaintiff's FOIA request was due by October 24, 2023, at the latest.

25. As of the date of this Complaint, approximately four months after Plaintiff's FOIA request was submitted and almost three months after ICE's determination of Plaintiff's FOIA request was due, ICE 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.

26. Because ICE 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

27. Plaintiff realleges paragraphs 1 through 26 as if fully stated herein.
28. ICE'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

29. Plaintiff realleges paragraphs 1 through 28 as if fully stated herein.
30. As described above, ICE has failed to make responsive records available to Plaintiff.
31. ICE has unlawfully withheld any and all responsive agency records from Plaintiff and continues to do so.
32. As a result of ICE'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

33. Plaintiff realleges paragraphs 1 through 32 as if fully stated herein.
34. In its FOIA request, Plaintiff set forth facts and law in support of a determination that it is entitled to media requester fee status.

35. By its non-response, ICE has failed to make a determination as to Plaintiff's media requester fee status.

36. Plaintiff is entitled to a determination that it is a media requester for fee waiver purposes as the agency 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

37. Plaintiff realleges paragraphs 1 through 36 as if fully stated herein.

38. In its FOIA request, Plaintiff set forth facts and law in support of a fee waiver.

39. By its conditional response, ICE has failed to make a determination on Plaintiff's fee waiver request.

40. Plaintiff is entitled to injunctive relief providing for a full, complete and unconditional fee waiver in this matter as a consequence of ICE's failure to make a determination on the fee waiver request.

41. Plaintiff is also entitled to a fee waiver in this matter as ICE 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;

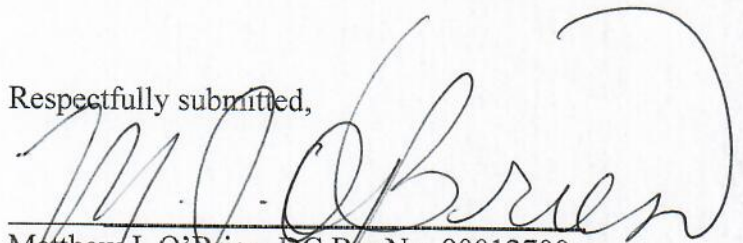
(E) order Defendant to grant Plaintiff a full, complete and unconditional fee waiver;

(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: January 11, 2024

Respectfully submitted,



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