

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

FEDERATION FOR AMERICAN	)	
IMMIGRATION REFORM,	)	
25 Massachusetts Ave., NW, Suite 330,	)	
Washington, D.C. 20001,	)	Civil Action No.
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
U.S. CUSTOMS AND	)	
BORDER PROTECTION	)	
1300 Pennsylvania Ave, N.W.,	)	
Washington, D.C. 20229,	)	
	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT**

Plaintiff Federation for American Immigration Reform (“FAIR”) brings this action for injunctive and other appropriate relief against United States Customs and Border Protection (“CBP”) 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 FAIR (“Plaintiff”) is a non-profit educational foundation organized under the laws of the District of Columbia and having its principal place of business at 25 Massachusetts Ave., NW, Suite 330, Washington, DC 20001. Plaintiff seeks to educate the citizenry on and increase public awareness of immigration issues, and to hold the nation’s leaders accountable for enforcing the nation’s immigration laws. In furtherance of its public interest mission, Plaintiff regularly requests access to the public records of federal agencies, entities, and offices, and widely disseminates its findings to the public.

3. Defendant CBP 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 1300 Pennsylvania Ave., NW, Washington, DC 20229. CBP is an agency within the meaning of 5 U.S.C. § 552(f)(1). CBP 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 and 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 Wash. v. FEC*, 711 F.3d 180 (D.C. Cir. 2013); *Oglesby v. Dep't of the Army*, 920 F.2d 57 (D.C. Cir. 1990)).

### **STATEMENT OF FACTS**

9. On January 3, 2023, Plaintiff submitted a FOIA request by online FOIA portal to CBP requesting the following agency records:



1. The total number of family units, or those claiming to be a member of a family unit, separated by CBP, from and including January 1, 2022 up to and including December 31, 2022.

2. The total number of minors separated from a relative or other alleged family unit by CBP, from and including January 1, 2022 up to and including December 31, 2022

10. In Plaintiff's FOIA request, Plaintiff also requested that CBP 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.

11. Plaintiff received an email from CBP dated January 4, 2023, acknowledging CBP's receipt of Plaintiff's FOIA request and assigning the request the tracking number CBP-FO-2023-025023, but not making or providing any determination regarding the request or producing any records in response to the request.

12. After this initial acknowledgment email, CBP 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.

13. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), CBP was required to make a determination whether to comply with Plaintiff's FOIA request within twenty (20) working days after receipt and to notify Plaintiff immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. Accordingly, CBP's determination of Plaintiff's FOIA request was due by February 2, 2023, at the latest.

14. As of the date of this Complaint, more than seven months after CBP's determination of Plaintiff's FOIA request was due, CBP 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.

15. Because CBP has failed to comply with the time limits set forth in 5 U.S.C. §§ 552(a)(6)(A)(ii) and 552(a)(6)(E)(iii) with respect to the 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**

16. Plaintiff realleges paragraphs 1 through 15 as if fully stated herein.

17. CBP'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) and 552(a)(6)(E)(iii).

### **COUNT II**

#### **Violation of FOIA: Unlawful Withholding of Agency Records**

18. Plaintiff realleges paragraphs 1 through 17 as if fully stated herein.

19. As described above, CBP has failed to make responsive records available to Plaintiff.

20. CBP has unlawfully withheld any and all responsive agency records from Plaintiff and continues to do so.

21. As a result of CBP'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**

22. Plaintiff realleges paragraphs 1 through 21 as if fully stated herein.

23. In its FOIA request, Plaintiff set forth facts and law in support of a determination that it is entitled to media requester fee status.

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

25. 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**

26. Plaintiff realleges paragraphs 1 through 25 as if fully stated herein.

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

28. By its non-response, CBP has failed to make a determination on Plaintiff's fee waiver request.

29. Plaintiff is entitled to injunctive relief providing for a fee waiver in this matter as a consequence of CBP's failure to make a determination on the fee waiver request.

30. Plaintiff is also entitled to a fee waiver in this matter as CBP 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)(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: September 13, 2023

Respectfully submitted,

  
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