

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

AMERICAN CIVIL LIBERTIES UNION OF)
MAINE FOUNDATION,)
) Case No. _____
)
) Plaintiff,)
)
) **COMPLAINT FOR DECLARATORY**
v.) **AND INJUNCTIVE RELIEF FOR**
) **VIOLATION OF THE FREEDOM OF**
U.S. CITIZENSHIP AND) **INFORMATION ACT, 5 U.S.C. § 552**
IMMIGRATION SERVICES,)
)
) Defendant.)
)
_____)

INTRODUCTION

1. The American Civil Liberties Union of Maine Foundation (“Plaintiff” or “ACLU of Maine”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, to obtain injunctive and other appropriate relief requiring Defendant United States Citizenship and Immigration Services (“USCIS” or “Defendant”) to respond to a FOIA request sent by Plaintiff on July 12, 2019 (“Request”), and to promptly disclose the requested records.

2. Over the past several years, Plaintiff and impacted communities have witnessed a decrease in the number of affirmative asylum applications granted arising out of the USCIS Newark Asylum Office and Boston Sub-Office. While USCIS’s national average approval rate for affirmative asylum cases is around 30%, the approval rate for the Boston Sub-office has been as low as approximately 8%.¹ At the same time, the number of referrals and denials arising out of the Boston Sub-Office has risen in recent years, particularly for asylum seekers from certain central African countries. Many of the asylum applicants who are referred or denied by USCIS Newark Asylum Office and Boston Sub-Office are later granted asylum by the courts, which shows their asylum application has merit. These patterns of disproportionate denials and referrals

¹ See generally U.S. Citizenship & Immigration Serv., USCIS Asylum Division Quarterly Stakeholder Reports (2019).

have led to lengthy immigration court proceedings that burden the immigration court system, and delay work permits and family reunification.

3. While the public is aware of the result (an increase in referrals and denials arising out of the Boston Sub-Office), the lack of transparency of the policies, procedures, objectives, and training materials in the USCIS Newark Asylum Office and Boston Sub-Office has resulted in significant gaps in the public's knowledge and understanding of the affirmative asylum decision-making process of both offices. The public has an interest in understanding the root cause of this burdensome delay to the applicants and cost to the public. These records are also necessary for the public to ensure these asylum offices are complying with U.S. domestic law with respect to the protection of refugees as well as U.S. treaty obligations.

4. Given the need for information about these harms, Plaintiff filed the Request in July 2019, seeking all USCIS records concerning approvals, referrals, and denials of affirmative asylum cases arising out of the Newark Asylum Office and Boston Sub-Office, as well as records pertaining to policies, procedures, objectives, and training materials from these offices. A true and correct copy of the Request is attached as **Exhibit A**.

5. In the more than one year since acknowledging receipt of the Request, USCIS has provided no responsive records, and has provided no response indicating that it will comply with the Request.

6. In that same period of time, the need for the documents has only become more acute. Applicants who are denied asylum or referred to immigration court are subjected to even longer delays than normal, including delays in immigration courts attributable to COVID-19, all of which further delay work permits and family reunification.

7. This action is necessary to require USCIS to produce all responsive records as soon as practicable and to otherwise enforce USCIS's obligations under the FOIA.

JURISDICTION

8. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331.

VENUE

9. Venue in the District of Maine is proper under 5 U.S.C. § 552(a)(4)(B), including because Plaintiff’s principal place of business is in the District of Maine.

PARTIES

10. Plaintiff ACLU of Maine is a non-profit 26 U.S.C. § 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil rights and civil liberties cases and educates the public about civil rights and civil liberties issues across the country.

11. Defendant U.S. Citizenship and Immigration Services (“USCIS”) is a component of Department of Homeland Security, a department of the executive branch of the U.S. government, and is a federal agency within the meaning of 5 U.S.C. § 552(f)(1).

12. Plaintiff is informed and therefore believes that USCIS has possession, custody, or control of the requested records.

FACTS

I. Public Concern with USCIS’s Increase in Affirmative Asylum Referrals to Immigration Court

13. Plaintiff filed the FOIA request after witnessing an increase in the number of cases being denied or referred to the Boston Immigration Court, particularly for asylum seekers from certain central African countries. Available data indicates that asylum approval rates in the Boston Sub-Office are consistently far below the national average. Referrals of these cases to Immigration Court results in lengthy, expensive, and onerous litigation, leading to delays in work permits and family unification.

14. These challenges are currently compounded by the COVID-19 pandemic, which has disproportionately impacted immigrant communities. The pandemic has also drastically slowed down proceedings in immigration courts, further delaying adjudication for asylum seekers.

15. The records and information requested will be used to better understand the policies, procedures, and objectives that have led to these results.

II. Plaintiff's FOIA Request

16. This lawsuit stems from USCIS's failure to respond timely to Plaintiff's FOIA request seeking information relevant to the public interest regarding practices, policies, and procedures at the USCIS Newark Asylum Office and Boston Asylum Sub-Office, the USCIS offices responsible for reviewing affirmative asylum applications from people residing in the District of Maine.

17. On July 12, 2019, the ACLU of Maine submitted the FOIA Request via United States Certified Mail to the USCIS National Records Center in Lee's Summit, Missouri. (Ex. A.)

18. The Request seeks all records regarding the Boston and Newark Asylum Offices' policies, procedures, objectives, and decisions rendered in the affirmative asylum decision-making process, regarding affirmative asylum applicants since January 2010 who applied for affirmative asylum at the Newark or Boston Asylum Offices. Because no adequate search has yet been completed, the period covered by the Request is ongoing.

19. Specifically, the Request seeks:

Any and all Records, excluding confidential information from individual Alien files, containing data or statistics prepared, compiled, or maintained or that which could readily be prepared, compiled, or maintained based upon information, records, or documentation in the Newark and Boston Asylum Offices' actual or constructive possession and/or control, pertaining to affirmative asylum interviews. Such Records include, but are not limited to:

- a. Case file information and Records for each affirmative asylum application processed by the Newark Asylum Office from January 1, 2010 to present and by the Boston Asylum Office from January 1, 2015 to present.
- b. Records regarding Supervisory Asylum Officers' returns and adjudicator logs underlying affirmative asylum denials, referrals, approvals, notices of intent

to deny, and assessments to approve, deny, or refer from the Newark Asylum Office from January 1, 2010 until the present and the Boston Asylum Sub-Office since January 1, 2015, including assessments and reasonings regarding why returns were given and/or the reasons behind the resulting referrals and denials;

- c. Records regarding communications related to referrals, denials, approvals, notices of intent to deny, and assessments to approve, deny, or refer from the Newark Asylum Office from January 1, 2010 until the present and the Boston Asylum Sub-Office since January 1, 2015;
- d. Any and all related records not specifically outlined above.

Any and all Records, received, maintained, or created by any governmental agency or subdivision, related to procedures, policies, or objectives of the Newark Asylum Office controlling the decision-making process of affirmative asylum cases from January 1, 2010 until the present. Additionally, Requesters seek Records received, maintained, or created by any governmental agency or subdivision, as well as Records related to procedures, policies, or objectives from the Boston Asylum Sub-Office, including documents created on or after January 1, 2015. Records include, but are not limited to:

- a. Any and all Records referencing, discussing, detailing, explaining, or otherwise addressing the purposes, goals, objectives, responsibilities, implementation, and deployment strategy of the Boston or Newark Asylum Office's policies, procedures, and objectives regarding the affirmative asylum process
- b. Any and all Records regarding approval notices, referral notices, notices of intent to deny, and denial notices from within the Boston and Newark Offices.
- c. Any and all Records related to Boston and Newark Asylum Offices' Policies and Procedures.
- d. Any and all Records regarding training or explanatory materials for the Boston and Newark Offices.
- e. Any and all information pertaining to the technology system used regarding affirmative asylum cases in the Boston and Newark Offices.
- f. Information pertaining to the number of cases and employee workload in the Boston and Newark Offices.
- g. Information pertaining to cases coming from Maine that have been handled by the Boston and Newark Offices.
- h. Records pertaining to applicants from Angola, Burundi, Democratic Republic of Congo, and Rwanda.

20. The Request includes an application for expedited processing based upon a "compelling need" for the requested records under 5 U.S.C. § 552(a)(6)(E)(v)(II), because the

ACLU of Maine is an organization “primarily engaged in disseminating information,” and because of the urgency “to inform the public concerning actual or alleged government activity.” (Ex. A at 9-10).

21. The Request explains that the ACLU is primarily engaged in disseminating information within the meaning of 5 U.S.C. § 552(a)(6)(E)(v), given that a critical and substantial aspect of the ACLU’s mission is to obtain information about government activity, analyze that information, and publish and disseminate it widely to the press and public. (Ex. A at 8).

22. The Request also includes an application for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” (Ex. A at 7-8).

III. Agency’s Response

23. The agency has a legal duty under FOIA to determine whether to comply with a request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receiving the request, and also has a legal duty to notify a requester of the agency’s determination and the reasons therefor within the same 20 days. 5 U.S.C. § 552(a)(6)(A)(i).

24. In other words, “[t]he statute requires that, within the relevant time period, an agency must determine whether to comply with a request—*that is, whether a requester will receive all the documents the requester seeks.*” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013) (emphasis added).

25. On August 14, 2019, USCIS responded in a letter denying Plaintiff’s request for expedited processing and granting the requested fee waiver. (Ex. B). In denying Plaintiff’s request for expedited processing, Defendant simply stated that based on the information provided, a determination had been made that expedited processing was not warranted. Ex. B at 4. This response from Defendant contained no statement or determination as to whether

Defendant intended to comply with the FOIA Request, timing of any production of requested records, or whether USCIS would provide some or all of the requested records. (Ex. B).

26. On November 7, 2019, Plaintiff filed a timely appeal to the Defendant's adverse determination to deny expedited processing, and to the projected deadline of April 2020 for processing the Request. (Ex. C). This appeal made an affirmative showing as to the compelling need for the records requested, and outlined numerous examples of the urgency to the public of the Request. The appeal specifically highlighted the issue of asylum claims being denied and referred to the immigration judge that otherwise may have been approved had the asylum application been submitted in another USCIS jurisdiction. (Ex. C at 7-8).

27. USCIS denied the appeal on November 13, 2019, simply restating its belief that sufficient evidence had not been presented that would establish an urgent need for the public to receive the information requested. (Ex. D at 5).

28. Months passed nothing but silence from the agency. Plaintiff made a final attempt to obtain information relating to the Request on August 11, 2020, by contacting the FOIA Ombudsman for an update on the processing of the Request. (Ex. E). A receipt of the August 11, 2020 request for information was received the same day, stating that a response would be forthcoming. (Ex. F). Yet USCIS has provided no response to date.

29. USCIS's records confirm that it has missed even its internal estimates regarding the time necessary to provide responsive records. The internal FOIA tracking number assigned to the Request is COW2019500947. Using the online FOIA tracking tool available directly through the USCIS website shows a submission date of 08/05/2019.² The government FOIA website further states that the estimated date of completion for tracking number COW2019500947 passed on November 29, 2019.³ At the time of filing the appeal, moreover, the estimated completion

² USCIS, Request Details, <https://first.uscis.gov/#/check-status> (enter FOIA control number COW2019500947) (last visited Nov. 12, 2020) (attached as Exhibit G).

³ *Id.*

date for the Request was April 20, 2020. (*See* Ex. C at 2). Both of those estimated deadlines passed without any responsive records from USCIS.

30. In short, as of the date of this Complaint, USCIS has failed to provide any determination with respect to whether to comply with the Request. Accordingly, they have violated their statutory deadlines under FOIA.

31. Because USCIS failed to comply with the 20-business-day time limit provision of FOIA, requiring a response within 20 days regarding whether to comply with the request, 5 U.S.C. § 552(a)(6)(A)(i), the Plaintiff is deemed to have exhausted its administrative remedies with respect to the Request under 5 U.S.C. § 552(a)(6)(C)(i).

32. Additionally, USCIS has violated its substantive obligations under the FOIA. It has failed to make the requested records “promptly available” as required by law. *See* 5 U.S.C. § 552(a)(6)(C). Plaintiff has made every effort to obtain responsive records, and USCIS’s ongoing delay is tantamount to a wholesale denial of the request.

FIRST CAUSE OF ACTION
Violation of FOIA for Failure
to Provide a Determination
Within 20 Business Days

33. Defendant has a legal duty under FOIA to determine whether to comply with a request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receiving the request, and also has a legal duty to immediately notify a requester of the agency’s determination and the reasons therefor. 5 U.S.C. § 552(a)(6)(A)(i).

34. In violation of 5 U.S.C. § 552(a)(6)(A)(i), and applicable regulations promulgated thereunder, Defendant USCIS failed to determine whether to comply with the Request within 20 business days after receiving the Request.

SECOND CAUSE OF ACTION
Violation of FOIA for Failure
To Make Records Promptly Available

35. Plaintiff has a legal right under FOIA to obtain the specific agency records requested on July 12, 2019, and there exists no legal basis for Defendant's failure to make the requested records "promptly available" to Plaintiff, its members, and the public. 5 U.S.C. § 552(a)(3)(A).

36. On information and belief, Defendant currently has possession, custody, or control of the requested records.

37. Defendant has failed to make reasonable efforts to search for records sought by the Request.

38. Defendant has failed to promptly make available the records sought in the Request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that the Court award the following relief:

1. Declare that Defendant USCIS violated FOIA by failing to make a determination whether to comply with the Request within 20 business days;
2. Declare that Defendant USCIS violated FOIA by unlawfully withholding the requested records;
3. Order Defendant to immediately produce the requested records, or alternatively to produce the requested records on an expedited schedule established by the Court, without charge for any search, review, processing, or duplication fees;
4. Award Plaintiff's reasonable costs and attorneys' fees; and
5. Grant such other relief as the Court may deem just and proper.

DATED this 12th day of November, 2020

Respectfully submitted,

/s/ Emma E. Bond

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