

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN IMMIGRATION COUNCIL)
1331 G Street, NW, Suite 200)
Washington, DC 20005-3141)

Plaintiff,)

v.)

CASE NUMBER:)

UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY)
Office of the General Counsel)
20 Massachusetts Avenue, NW)
Washington, DC 20528)

and)

U.S. CUSTOMS AND BORDER)
PROTECTION)
1300 Pennsylvania Avenue, NW)
Washington, DC 20229,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking disclosure of records concerning the enforcement operations and activities of U.S. Customs and Border Protection ("CBP"), a component of the U.S. Department of Homeland Security ("DHS"), related to "voluntary returns" of noncitizens from the United States to their countries of origin. The American Immigration Council ("AIC") seeks declaratory, injunctive, and other appropriate relief with respect to Defendants' unlawful withholding of these records.

2. CBP has broad authority to secure the borders of the United States. To this end, CBP officers routinely admit or exclude individuals seeking entry to the United States, make arrests, issue charging documents, and detain noncitizens. CBP officers also frequently manage the “voluntary return” of noncitizens who are present in the United States in violation of the immigration laws. Voluntary return (also known as “administrative voluntary departure”) is a procedure whereby a CBP officer permits a noncitizen to voluntarily depart the United States at his or her own expense in lieu of being subject to formal removal proceedings. *See* 8 U.S.C. § 1229c(a). Implementing regulations provide that a noncitizen may be granted voluntary return to his or her country of origin after conceding unlawful presence in the United States and knowingly and voluntarily waiving the right to contest removal. *See* 8 C.F.R. §§ 103.2(a)(1), 236.3(f)-(g), 240.25; Forms I-826 and I-770, attached hereto as Exhibit A.

3. Based upon reports from immigration advocates, CBP officers do not always provide noncitizens with information regarding the consequences of accepting administrative voluntary departure and in some cases even compel them to “agree” to “voluntarily” depart. These practices have profound adverse consequences. Some of the individuals subject to voluntary returns are entitled to lawfully remain in the United States or are eligible for immigration relief. By opting for voluntary return, noncitizens may relinquish their claims for relief and/or become barred from lawfully reentering the United States for up to ten years. By effecting “voluntary” returns without informed consent, CBP deprives noncitizens of

the critical right to contest removability and seek lawful status in the United States through mechanisms that Congress has created.

4. DHS reports that CBP manages more than 400,000 voluntary returns each year. Despite the pervasive role voluntary return plays in its immigration enforcement activities, CBP is notorious for its lack of transparency on this issue. As a result, in June 2011 AIC submitted a Freedom of Information Act ("FOIA") request to CBP seeking records regarding voluntary return. CBP's failure to turn over the requested records violates the FOIA and is impeding AIC's efforts to educate the public regarding CBP enforcement operations in general and to educate the immigration bar regarding CBP's voluntary return practices in particular. CBP also is hindering AIC's ability to effectively advocate for justice and fairness for noncitizens subject to these practices.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. This Court has jurisdiction to grant declaratory and further necessary or proper relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et. seq.*

6. Venue properly rests with this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because Plaintiff AIC's principal place of business is in the District of Columbia.

7. Plaintiff AIC has exhausted any and all administrative remedies in connection with its FOIA request.

PARTIES

8. Plaintiff AIC is a nonprofit organization with its principal place of business at 1331 G Street, NW, Suite 200, in Washington DC. Founded in 1987, AIC's mission is to educate the American public about immigrants' contributions to American society, to promote sensible and humane immigration policy, and to advocate for the just and equitable enforcement of the immigration laws. AIC's Immigration Policy Center ("IPC") and Legal Action Center ("LAC") help carry out this mission by reaching out to the public and to attorneys practicing in the immigration arena to promote a better understanding of immigration law, policy and practice. The IPC targets policymakers, the media, and advocates using a range of publications, new media, and presentations to inform the public debate on immigration. The LAC undertakes administrative advocacy, impact litigation, and education to advance the fair administration of the immigration laws.

9. Defendant DHS is a department of the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f). DHS is responsible for enforcing federal immigration laws. DHS has possession and control over the records sought by AIC.

10. Defendant CBP is a component of DHS and is an agency within the meaning of 5 U.S.C. § 552(f). Among other duties, CBP is responsible for enforcing immigration laws at and between ports of entry to the United States and managing voluntary returns of noncitizens from the United States to their countries of origin pursuant to 8 U.S.C. § 1229c(a) and its implementing regulations. CBP has possession and control over the records sought by AIC.

STATEMENT OF FACTS

A. AIC's FOIA Request

11. On June 15, 2011, AIC submitted a FOIA request to CBP seeking:

[A]ny and all records that were prepared, received, transmitted, collected, and/or maintained by the U.S. Department of Homeland Security (DHS) and/or U.S. Customs and Border Protection (CBP) that describe, refer or relate to CBP's enforcement operations and activities within 100 miles of the U.S.-Mexico border aimed at and/or resulting in voluntary returns of individuals to their countries of origin from January 2009 to the present. For purposes of this request, the term "voluntary returns" shall encompass grants of voluntary departure prior to the initiation of removal proceedings pursuant to 8 U.S.C. § 1229c(a).

("AIC's FOIA Request"). A copy of AIC's FOIA Request is attached hereto as Exhibit B.

12. AIC's FOIA Request identified fourteen non-exclusive categories of records that the request encompassed. In summary, parts one through ten indicated these records included DHS and CBP guidance, guidelines, directives, rules, policies, procedures, instructions, criteria, standards, agreements, correspondence, communications, and training materials concerning voluntary returns. Related topics such as arrest and detention, questioning and processing of apprehended individuals, coercive tactics by agents, eligibility for voluntary return, and consent and waivers related to voluntary return also were covered. *See* Exhibit B at 1-2. Parts eleven through fourteen specified that the requested records included documents related to complaints and investigations regarding potential misconduct, coercive tactics and mistreatment of apprehended individuals by DHS or CBP agents within 100 miles of the U.S.-Mexico border. *See* Exhibit B at 2-3.

13. Each part of AIC's FOIA Request reasonably described the records sought and provided sufficient information for CBP to conduct a reasonable search for documents responsive to the request, as required by 5 U.S.C. § 552(a)(3)(A). *See* Exhibit B at 1-3 (describing, in detail, the records sought).

14. AIC's FOIA request also sought a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *See* Exhibit B at 3-5.

15. On August 3, 2011, CBP responded to AIC's FOIA Request. A copy of CBP's August 3, 2011 response letter is attached hereto as Exhibit C.

16. CBP responded to parts one through ten of AIC's FOIA Request by providing a total of two documents, comprising four pages of records – a 2009 memorandum entitled “Juvenile Processing Guidance” and a chart listing, by country, the number of voluntary returns completed by CBP from January 2009 to April 2011. *See* Exhibit C at 4-7.

17. CBP also stated that it would not conduct a search for records responsive to parts eleven through fourteen of AIC's FOIA Request. Instead, CBP indicated that it was “unable to respond to parts 11 through 14” of AIC's FOIA Request and considered these parts “unperfected.” *See* Exhibit C at 2. CBP gave three reasons for this characterization: (1) the “term ‘misconduct’ as used by CBP applies to all incidents that are a violation of the rules and regulations of CBP” and AIC was not sufficiently specific as to the “type of misconduct [it was] interested in”; (2) reports are “primarily retrieved via name, date of birth, SSN or other personal identifiers specific to the employee,” and responsive records could not be retrieved

unless AIC provided specific names of individuals involved in responsive reports; and (3) written consent is required from those individuals “involved in [responsive] reports...per third party privacy laws.” *See id.*

18. CBP’s response to AIC’s FOIA Request did not include any information about the manner of the agency’s search for responsive records and did not seek to explain how a reasonable search for responsive records could have located only the two documents described in paragraph 16 above. *See Exhibit C at 1-3.* CBP also did not assert that any responsive records were withheld because they were subject to exemptions under FOIA. *See id.*

19. CBP’s response to AIC’s FOIA Request did not address AIC’s request for a fee waiver. *See id.*

B. AIC’s Administrative Appeal

20. On September 26, 2011, AIC timely filed an administrative appeal of the decision on AIC’s FOIA Request. A copy of AIC’s September 26, 2011 appeal letter is attached hereto as Exhibit D.

21. In the appeal letter AIC asserted that CBP did not conduct an adequate search for records responsive to AIC’s FOIA Request and did not produce all responsive, non-exempt information in its possession that was not already in the public domain. *See Exhibit D at 4-7.*

22. AIC also contested CBP’s claim that parts eleven through fourteen of AIC’s FOIA Request were unperfected and indicated that 5 U.S.C. § 552(a)(3)(A) required CBP to search for records relevant to these parts of AIC’s FOIA Request as set forth in the original request. *See Exhibit D at 5-6.* Specifically, AIC

demonstrated that it had sufficiently described the records sought in parts eleven through fourteen by citing to parts of the original FOIA Request that limited and defined the term "misconduct." *See id.* AIC also indicated that even if common search parameters would not uncover incident reports, CBP still was obligated to search for responsive records since FOIA §552(a)(3)(D) defines a reasonable search to include both manual and automated review, and publicly available records showed that the number of relevant documents was small enough for CBP to search manually without undue burden. *See Exhibit D at 6. See also* Department of Homeland Security, *Data on Complaints Received* (January 28, 2011), http://www.dhs.gov/xabout/structure/gc_1280851127243.shtm (DHS statistics showing that only 113 complaints were filed against CBP from 2009 to 2010, demonstrating the small universe of documents potentially subject to manual review).

23. AIC further indicated, regarding documents CBP claimed were withheld due to "third party privacy laws," that 5 U.S.C. § 552(b) required CBP to produce the relevant portions of any such records with material subject to a FOIA exemption redacted. *See Exhibit D at 6-7.*

24. On October 13, 2011, CBP acknowledged receipt of AIC's appeal, indicating that it had been assigned to the FOIA Appeals, Policy and Litigation Branch. CBP's letter did not address the substance of AIC's appeal. A copy of CBP's October 13, 2011 letter is attached hereto as Exhibit E.

25. Following CBP's October 13, 2011 letter, CBP's FOIA officer contacted AIC several times to inform AIC that CBP was in the process of conducting a search for additional documents. To date, however, AIC has received neither a substantive written response from CBP regarding its FOIA appeal nor any additional documents.

C. CBP Failed to Conduct an Adequate Search

26. CBP and DHS have not conducted a search reasonably calculated to uncover all records responsive to AIC's FOIA request.

27. CBP acknowledged in its August 3, 2011 letter that it failed entirely to conduct a search for documents responsive to parts eleven through fourteen of AIC's FOIA Request. *See Exhibit C at 2.*

28. CBP had no basis in law to fail altogether to search for documents responsive to parts eleven through fourteen. AIC's description of the documents requested in parts eleven through fourteen was sufficient for CBP to conduct a reasonable search. CBP had a duty to carry out a manual search if an automated search was not possible. Furthermore, CBP was obligated to search for responsive documents and then determine which, if any, documents or parts thereof were exempt from production, rather than to presume such exemption without carrying out a search. *See 5 U.S.C. § 552(b)* (agency must indicate any exemptions claimed regarding withheld records and provide any "reasonably segregable portion" of records subject to an exemption).

29. Additionally, numerous facts strongly support the inference that CBP and DHS have failed to produce all available non-exempt records responsive to parts one through ten of AIC's FOIA Request.

30. DHS and CBP report that that CBP managed more than 600,000 voluntary returns in the time period governing AIC's FOIA Request. *See* Office of Immigration Statistics, U.S. Dept. of Homeland Security, *2010 Yearbook of Immigration Statistics* 94 (August 2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf (reporting that 476,405 voluntary returns occurred in 2010 and most were comprised of Mexican nationals who were apprehended by CBP and returned to Mexico); Exhibit C at 7 (chart produced by CBP in response to AIC's FOIA Request indicating that CBP managed 662,485 voluntary returns of Mexican nationals between January 2009 and April 2011). Since the voluntary return program constitutes a major enforcement program that has resulted in hundreds of thousands of voluntary returns during the relevant time period, any reasonable search presumably would uncover more than two responsive records totaling four pages.

31. This presumption is supported by prior CBP FOIA productions, which show that CBP maintains numerous categories of documents related to enforcement programs, including records regarding individual removable/inadmissible noncitizens. *See e.g.*, Stanford Legal Clinic, *Deportation Without Due Process: Documents Obtained Through Freedom of Information Act Lawsuit About Federal Government's Stipulated Removal Program, Customs and Border Protection* (July

7, 2011), <http://blogs.law.stanford.edu/stipulatedremoval/2011/07/07/customs-and-border-protection> (CBP documents related to stipulated removals showing CBP maintains categories of documents including Delegation Orders, policy documents, training materials, video scripts of videos shown to apprehended individuals, deportation guidelines, and individual records).

32. Moreover, publicly available documents related to the voluntary return program and documents produced by CBP pursuant to prior FOIA litigation show that CBP and DHS are in possession of numerous responsive records beyond the two produced. For example, these documents demonstrate that the agency has policies, procedures, and other records on voluntary returns and maintains records related to individual voluntary returns. These documents include:

- The CBP field manual, which includes general instruction on enforcement operations including voluntary returns, *see* U.S. Customs and Border Protection, U.S. Dept. of Homeland Security, *U.S. Customs and Border Protection Inspector's Field Manual* (made publicly available via the internet on December 9, 2011) *available at* http://foia.cbp.gov/index.asp?ps=1&search=&category=Manuals_and_Instructions;
- Congressional testimony describing voluntary return as part of the "Consequence Delivery System" developed by CBP and ICE "designed to uniquely evaluate each subject [attempting illegal entry] and identify the ideal consequences to deliver to impede and deter further illegal activity," *see Testimony of Michael J. Fisher, Chief, United States Border Patrol, U.S. Customs and Border Protection, Department of Homeland Security, Before H. Comm. on Homeland Security Subcomm. on Border and Maritime Security* (October 4, 2011) *available at* http://www.cbp.gov/xp/cgov/newsroom/congressional_test/fisher_testimony.xml;
- A November 19, 2007 directive to CBP agents to document voluntary return cases in the "ENFORCE VR module, consistent with existing procedures in

the ICE Detention and Removal Manual Section 14.8,” attached hereto as Exhibit F;

- A May 8, 2006 memorandum from David V. Aguilar, Chief, U.S. Border Patrol, to all sector chief patrol agents providing procedures for the use of I-826 Notice of Rights and Request for Disposition forms in voluntary departure cases and directing CBP agents to retain executed forms, attached hereto as Exhibit G; and
- A DHS report describing voluntary return as part of the “Endgame” multi-year strategic enforcement plan that was developed following nine months of analysis by twenty-three DHS officials, *see* Bureau of Immigration and Customs Enforcement, U.S. Dept. of Homeland Security, *ENDGAME: Office of Detention and Removal Strategic Plan, 2003 – 2012: Detention and Removal Strategy for a Secure Homeland* 1-1 to 1-6 (June 27, 2003) available at <http://aclum.org/sites/all/files/education/ice/endgame.pdf>.

See also 8 U.S.C. § 1232 (requiring DHS, *inter alia*, to develop policies and procedures, create a repatriation pilot program, and provide a report to Congress on issues regarding unaccompanied alien children, which would include voluntary return).

33. Publicly available documents also show that CBP has records regarding allegations of misconduct related to voluntary returns and can segregate complaints against CBP agents into specific categories related to agent misconduct.

Illustrative documents include:

- Publicly available DHS data on complaints received against CBP agents, provided by year and by category, with categories that include “abuse of authority,” “discrimination,” “profiling,” and “treatment,” *see* Department of Homeland Security, *Data on Complaints Received* (January 28, 2011), http://www.dhs.gov/xabout/structure/gc_1280851127243.shtm;
- A DHS report providing information about two Significant Incident Reports and a CBP investigation of two unaccompanied minors in California who

alleged CBP officers coerced them into signing voluntary return documents in December 2008, *see* Office for Civil Rights and Civil Liberties, U.S. Dept. of Homeland Security, *Fiscal Year 2010 Annual and Consolidated Quarterly Reports to Congress* 63 (Sept. 20, 2011) *available at* <http://www.dhs.gov/xlibrary/assets/crcl-annual-report-fy-2010.pdf>; and

- A December 2009 letter from the American Civil Liberties Union Foundation of San Diego & Imperial Counties (“ACLU”) and the American Friends Service Committee (“AFSC”), to CBP requesting policy changes for the use of voluntary departure for unaccompanied minors following complaints that CBP effected involuntary voluntary returns of three unaccompanied minors in San Diego in May 2009, *see* Letter from Kevin Keenan, Exec. Director, ACLU, and Pedro Rios, San Diego Area Program Director, AFSC, to Michael J. Fisher, Chief Patrol Agent, U.S. Border Patrol, San Diego Sector (Dec. 10, 2009) *available at* <http://aclusandiego.org/site/wp-content/uploads/article/Border%20Patrol%20Letter%20Requesting%20Policy%20Change%20Final-12-09.pdf>.

34. Based on the foregoing facts, CBP and DHS have wrongfully failed to make reasonable efforts to search for responsive records and to release responsive records to AIC.

CAUSE OF ACTION

Violation of the Freedom of Information Act for Failure to Disclose Responsive Records

35. AIC repeats, alleges, and incorporates the allegations in paragraphs 1-34 as if fully set forth herein.

36. CBP is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for and to produce records responsive to AIC’s FOIA Request. AIC has a legal right to obtain such records, and no legal basis exists for CBP’s failure to search for and disclose them.

37. CBP's failures to conduct a reasonable search for records responsive to AIC's request and to disclose responsive records violates 5 U.S.C. §§ 552(a)(3)(A), (a)(3)(C), and (a)(6)(A), as well as the regulations promulgated thereunder.

38. Unless enjoined by this Court, CBP will continue to violate AIC's statutory rights to receive records under FOIA.

39. AIC is entitled to obtain the requested records immediately at no cost.

40. AIC is entitled to reasonable costs of litigation, including attorneys' fees, pursuant to 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, AIC respectfully requests that this Court enter a judgment:

a. Declaring that Defendants' refusal to conduct a reasonable search for records responsive to AIC's FOIA Request and refusal to disclose such records violated the FOIA;

b. Ordering Defendants and any of Defendants' departments, divisions, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a reasonable search for records responsive to AIC's FOIA Request;

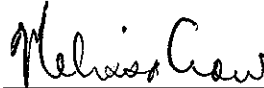
c. Enjoining Defendants and any of Defendants' departments, divisions, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants from withholding records responsive to AIC's FOIA Request and ordering them to promptly produce responsive records to AIC;

d. Ordering Defendants to grant AIC a public interest fee waiver;

- e. Awarding AIC its reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and
- f. Granting all other such relief to AIC as the Court deems just and proper.

Dated: June 7, 2012

Respectfully submitted,



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