

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

AMERICAN CENTER FOR LAW AND)
JUSTICE,)
[REDACTED])
[REDACTED])

Plaintiff,)

vs.)

Case Action No. 21-cv-3083

UNITED STATES DEPARTMENT OF)
STATE,)
The Executive Office)
Office of the Legal Adviser, Suite 5.600)
600 19th Street NW)
Washington DC 20522,)

Defendant,)

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

UNITED STATES OFFICE OF THE)
DIRECTOR OF NATIONAL)
INTELLIGENCE,)
Washington, DC 20511,)

Defendant,)

UNITED STATES DEPARTMENT OF)
DEFENSE, DEFENSE INTELLIGENCE)
AGENCY,)
7400 Pentagon,)
Washington, DC 20301-7400)

Defendant,)

UNITED STATES CENTRAL COMMAND,)
7115 South Boundary Blvd., MacDill Air Force)
Base, FL, 33621-5101,)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff American Center for Law and Justice (“ACLJ”), by and through counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the failure of the Defendants United States Department of State (“DOS”), the Office of the Director of National Intelligence (“ODNI”), the United States Department of Defense, Defense Intelligence Agency (“DIA”), and the United States Central Command (“USCENTCOM”), to issue a determination as to Plaintiff’s FOIA requests within the statutorily prescribed time period and seeking the disclosure and release of agency records improperly withheld by Defendants. In support thereof, Plaintiff alleges and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA, and Plaintiff has exhausted its administrative remedies.

2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

3. This Court has authority to award injunctive relief pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

4. This Court has authority to award declaratory relief pursuant to 28 U.S.C. § 2201.

PARTIES

5. Plaintiff, with an office at [REDACTED], is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. Plaintiff’s mission is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. Plaintiff also regularly monitors governmental

activity with respect to governmental accountability. Plaintiff seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its dedication to the rule of law and public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

6. Defendant DOS is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 2201 C Street, N.W., Washington, D.C. 20520. Defendant is in control and possession of the records sought by Plaintiff.

7. Defendant ODNI is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at Washington, DC 20511. Defendant ODNI is in control and possession of the records sought by Plaintiff.

8. Defendant DIA is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 7400 Pentagon, Washington, DC 20301-7400. Defendant DIA is in control and possession of the records sought by Plaintiff.

9. Defendant USCENTCOM is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 7115 South Boundary Blvd., MacDill Air Force Base, FL, 33621-5101. Defendant USCENTCOM is in control and possession of the records sought by Plaintiff.

FACTUAL ALLEGATIONS

10. On August 30, 2021, Plaintiff ACLJ issued a FOIA request to Defendants DOS, ODNI, DIA, and USCENTCOM. Pl.'s FOIA Request, Ex. A, at 1, incorporated by reference as if fully set forth herein.

11. To summarize, the Plaintiff requested:

Records pertaining to communications, knowledge and efforts surrounding the failure unfolding in Afghanistan and the communications had between agencies in the months leading up to the national security and humanitarian catastrophe. Specific examples of records sought include those surrounding the breaking story that the State Department canceled, evidenced by a memo “marked sensitive but unclassified and was signed by Deputy Secretary Brian McKeon, approved the ‘discontinuation of the establishment, and termination of, the Contingency and Crisis Response Bureau (CCR).’” Another example is this: “About two dozen diplomats working at the U.S. Embassy in Afghanistan warned Secretary of State Antony Blinken in July that Kabul risked falling to the Taliban shortly after the military’s withdrawal, according to a report from The Wall Street Journal.” The ACLJ also seeks records surrounding the issue of withdrawal of American troops before all Americans, allies, and Afghans supporting America’s mission, were evacuated; abandoning U.S. bases and military equipment, and the Biden White House’s and Pentagon’s blaming of U.S. Intelligence Community for the shocking failures the world is witnessing.

Pl.’s FOIA Request Ex. A, 2.

12. Pursuant to the relevant FOIA regulations, the FOIA request included a Background section that addressed the particulars and relevant factual circumstances underlying the FOIA request. See Pl.’s FOIA Request Ex. A, 2 (referencing the DOS’s regulation, 22 C.F.R. § 171.4(b)).

13. Plaintiff submitted its FOIA Request to Defendant DOS via Federal Express on August 30, 2021, and delivery was accomplished August 31, 2021. *See* Exhibit B to Complaint (FedEx delivery confirmation).

14. Plaintiff submitted its FOIA Request to Defendants ODNI, DIA, and USCENTCOM, via email on August 30, 2021. *See* Exhibit C to Complaint (copies of emails sent to Defendants ODNI, DIA, and USCENTCOM).

15. By letter dated October 21, 2021, attached hereto as Exhibit D and incorporated by reference as if fully set forth herein, Defendant DOS acknowledged it received Plaintiff’s FOIA request on September 3, 2021. Defendant DOS advised it had assigned eighteen individual case

numbers, one for each of the eighteen subparts of the FOIA request. Exh. D, Def. DOS's Acknowledgement Letter.

16. Defendant DOS granted Plaintiff's request for expedited processing and request for fee waiver, and provided no notice of any administrative appeal right. *Id.*

17. No other correspondence has been received from Defendant DOS.

18. By letter dated September 9, 2021, attached hereto as Exhibit E, pp. 1-2, and incorporated by reference as if fully set forth herein, Defendant ODNI acknowledged it received Plaintiff's FOIA request as of August 31, 2021. Defendant ODNI advised it had assigned Case Control DF-2021-00334. Exh. E, p. 1, Def. ODNI's Acknowledgement Letter.

19. Defendant ODNI granted Plaintiff's request for fee waiver but denied its request for expedited processing, and asserted:

The time needed to process your request necessarily depends on a variety of factors, including the complexity of our records search, the volume and complexity of any records located, and the order of receipt of your request. Accordingly, ODNI uses a multitrack processing system. Your request *may* require the need to consult with internal and external agencies or components. *See* 5 U.S.C. 552 § (a)(6)(B)(i)-(iii). Because of these unusual circumstances, we need to extend the time limit to respond to your request beyond the ten additional days provided by statute. As a result, we have assigned your request to the complex track.

Id. (emphasis added).

20. The ODNI's use of "may" renders this assertion an invalid attempt to invoke the extension provision of 5 U.S.C. 552 § (a)(6)(B)(i)-(iii), and this assertion does not clearly or definitively assert an actual alleged basis for Defendant ODNI's purported assertion of the 10-day extension "unusual circumstances" provision identified in 6 C.F.R. Part 5 §5.5(c) and 5 U.S.C. § 552(a)(6)(B).

21. In any event, Defendant ODNI's confusing blanket and boilerplate assertions of a *possible* need to consult with another agency do not comply with the statutory requirements for an

agency invoking the “unusual circumstances” 10-day extension. 5 U.S.C. § 552(a)(6)(B)(i) (deadline “may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched).

22. Qualifying its assertion with “may,” the ODNI failed to set forth an actual unusual circumstance.

23. The ODNI failed to set forth the date on which a determination is expected to be dispatched.

24. No other correspondence has been received from Defendant ODNI.

25. By letter dated September 8, 2021, attached hereto as Exhibit E, pp. 3-5, and incorporated by reference as if fully set forth herein, Defendant USCENTCOM acknowledged it received Plaintiff’s FOIA request as of August 30, 2021. Defendant USCENTCOM advised it had assigned case #21-0517. Exh. E, p. 4, Def. ODNI’s Acknowledgement Letter.

26. Defendant USCENTCOM granted Plaintiff’s request for fee waiver but denied its request for expedited processing, and asserted:

The actual processing time for these documents will depend upon consultation with other DoD components, stateside, overseas, or other agencies. . . . The USCENTCOM FOIA Requester Service Center receives numerous FOIA requests and has a substantial number of pending FOIA cases. Therefore, we process requests in a multi-track processing system based on the date of receipt and complexity of the request.

Id.

27. Defendant USCENTCOM’s response failed to set forth the Defendant’s determination and the reasons therefore. *Id.*; see 5 U.S.C. § 552(a)(6)(A).

28. No other correspondence has been received from Defendant USCENTCOM.

29. No correspondence of any kind has been received from Defendant DIA.

CAUSE OF ACTION

COUNT I

Violation of the Freedom of Information Act

30. Plaintiff realleges and incorporates by reference the preceding paragraphs of this Complaint as if fully stated herein.

31. The federal FOIA establishes a 20-day deadline by which a federal agency must make and issue a decision regarding compliance with a request for records made pursuant to the statute. 5 U.S.C. § 552(a)(6)(A)(i).

32. Pursuant to 5 U.S.C. § 552(a)(6)(A), each Defendant was required to determine whether to comply with Plaintiff's request within twenty (20) days, excepting Saturdays, Sundays, and legal public holidays. Pursuant to this same provision, each Defendant was also required to notify Plaintiff immediately of the determination, the reasons therefor, and the right to appeal any adverse determination to the head of the agency.

33. Defendant DOS's 20-day period commenced September 4, 2021, and expired on October 5, 2021.

34. Defendant ODNI's 20-day period commenced September 1, 2021, and expired on September 29, 2021.

35. Defendant USCENTCOM's 20-day period commenced August 31, 2021, and expired on September 28, 2021.

36. Defendant DIA's 20-day period commenced August 31, 2021, and expired on September 28, 2021.

37. As of the date of this Complaint, the Defendants have failed to notify Plaintiff of any determination about whether they will comply with Plaintiff's FOIA request, including the scope of records the Defendants intend to produce, or the scope of records they intend to withhold, and the reasons for any such determination – all clearly required by the FOIA.

38. As of the date of this Complaint, the Defendants have failed to produce any records responsive to the request and have not indicated when (or even whether) any responsive records will be produced, or demonstrate that responsive records are exempt from production – all as clearly required by the FOIA.

39. The Defendants have not requested information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I).

40. The FOIA permits a federal agency, in unusual circumstances, to extend the 20-day response deadline for a period not to exceed ten (10) additional working days. 5 U.S.C. § 552(a)(6)(B)(i).

41. In its noncompliant response, Defendant ODNI cursorily asserted boilerplate “unusual circumstances” phrases, *see* paras. 19-23, *supra*, but failed to identify “the date on which a determination is expected to be dispatched,” as clearly required by 5 U.S.C. § 552(a)(6)(B)(i), and which shall not be “a date that would result in an extension for more than ten working days.”

Id.

42. There are no “unusual circumstances” that justify Defendant ODNI or any Defendant's prolonged delay in responding as required by law to Plaintiff's lawful FOIA requests, but regardless, no Defendant complied with the clear statutory requirements to trigger the extension provided by 5 U.S.C. § 552(a)(6)(B).

43. Plaintiff has a statutory right to have Defendants process Plaintiff's FOIA request in a timely manner and in accordance with the requirements set forth in 5 U.S.C. § 552(a)(6).

44. The Defendants are unlawfully withholding records requested by the Plaintiff American Center for Law and Justice pursuant to the FOIA, 5 U.S.C. § 552.

45. The FOIA provides a cause of action for a complainant from whom a federal agency has withheld requested records. 5 U.S.C. § 552(a)(4)(B).

46. Through continued delay and outright failure to properly respond to Plaintiff's lawful request for records, and its improper withholding of such requested records, the Defendants have failed to comply with FOIA's prescribed deadlines for responding to a request for records and has violated Plaintiff's statutory rights.

47. Pursuant to 5 U.S.C. § 552(a)(6)(C), because the Defendants failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its FOIA request.

48. Plaintiff is being irreparably harmed by reason of the Defendants' unlawful withholding of requested records, and Plaintiff will continue to be irreparably harmed unless the Defendants are compelled to conform their conduct to the requirements of the law.

49. The FOIA imposes no limits on courts' equitable powers in enforcing its terms, and this Court should exercise its equitable powers to compel the Defendants to comply with the clear requirements of the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against the Defendants, and provide Plaintiff with the following relief:

- (a) An Order that the Defendants conduct a diligent, expedited search for any and all records responsive to Plaintiff's FOIA request and demonstrate that they employed

reasonable search methods most technologically likely to lead to the discovery of records responsive to Plaintiff's FOIA request, selected from among those methods available to Defendants;

- (b) An Order that the Defendants produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption;
- (c) An Order enjoining the Defendants from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- (d) A declaration that the Defendants' actions violated Plaintiff's statutory rights under 5 U.S.C. § 552;
- (e) An Order awarding to Plaintiff its reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- (f) An Order granting to Plaintiff all further relief to which Plaintiff may be entitled.

Dated: November 22, 2021.

Respectfully submitted,

THE AMERICAN CENTER FOR LAW AND JUSTICE

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