

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

DAVID ELLIOTT GLUCKMAN,)
)
2527 Lauderdale Drive)
Richmond, VA 23233)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY,)
)
c/o Office of the General Counsel)
U.S. Department of Homeland Security)
Washington, DC 20528)
)
Defendant.)
)

Civil No. 3:15 CV 0213

COMPLAINT

1. Plaintiff, David E. Gluckman, by counsel, files this Complaint for injunctive and other appropriate relief against Defendant, the United States Department of Homeland Security (“DHS”), pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq.

2. Defendant’s component, Immigration and Customs Enforcement (“ICE”), has failed to produce documents Plaintiff requested under FOIA within the statutory time limit prescribed under 5 U.S.C. § 552(a)(6).

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

4. Venue properly lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B), as the Plaintiff resides within this district.

PARTIES

5. Plaintiff is a citizen of the United States and resides in Henrico County, Virginia.

6. Defendant 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)(1).

7. ICE is an entity within Defendant.

8. Section 274A(b) of the Immigration and Nationality Act (“INA”), codified at 8 U.S.C. § 1324a(b), requires employers to verify the identity and employment eligibility of all individuals hired in the United States after November 6, 1986. To document this verification, employers are responsible for ensuring the completion of an Employment Eligibility Verification Form I-9 (“Form I-9”) for each employee hired in the United States after November 6, 1986. *See, e.g.*, 8 C.F.R. § 274a.2(a)(2).

9. Employers are required by law to maintain original Form I-9s for all current employees for inspection. For former employees, employers must retain Form I-9s for a period of at least three years from the date of hire or for one year after the employee is no longer employed, whichever is later.

10. ICE’s responsibilities include conducting inspections of employers’ Form I-9s to evaluate compliance. Failure to properly complete the Form I-9 for an employee—or failing to complete a Form I-9 altogether—constitutes a “paperwork violation.” Paperwork violations are classified as either “technical” or “substantive.” When “technical” violations are found during an inspection, ICE gives an employer ten business days to correct the violation. *See* INA § 274A(b)(6)(A) & (B), 8 U.S.C. § 1324a(b)(6)(A) & (B).

11. ICE may impose a monetary fine on an employer for all substantive paperwork violations, as well as for all uncorrected technical violations. Civil penalties for paperwork

violations that occurred on or after September 29, 1999 can range from \$110 to \$1,100 for each violation. *See* 8 C.F.R. § 274a.10(b). In determining penalty amounts, ICE considers five factors: the size of the business of the employer, the employer's good faith, the seriousness of the violation, whether or not the violation involved unauthorized workers, and the employer's history of previous violations. *See* INA § 274A(e)(5), 8 U.S.C. § 1324a(e)(5).

FACTS

12. On October 9, 2013, Plaintiff filed a FOIA request with Defendant for certain records relating to ICE's Form I-9 inspections, including how it classifies paperwork violations and how it calculates fine amounts. *See* **Exhibit A**.

13. Specifically, Plaintiff requested:

Any and all records containing instruction, guidance, or direction for ICE employees, investigators, field offices, or contractors working with, for, or under the direction of ICE, when conducting Form I-9 inspections, related to classifying Form I-9 violations as "technical" or "substantive," created, developed, maintained, used, implemented, and/or disseminated (internally or externally) by ICE on or after November 25, 2008; and

Any and all records containing instruction, guidance, or direction for ICE employees, investigators, field offices, or contractors working with, for, or under the direction of ICE, when conducting Form I-9 inspections, related to calculating fine amounts for Form I-9 violations, that were created, developed, maintained, used, implemented, and/or disseminated (internally or externally) by ICE on or after November 25, 2008.

See **Exhibit A**.

14. In a communication dated October 29, 2013, Defendant acknowledged receipt of Plaintiff's request and stated that his request had been assigned to the FOIA office for ICE on October 25, 2013. Defendant assigned tracking number 2014FOIA1723 to Plaintiff's request. Defendant also purported to invoke the ten-day extension of time to respond to Plaintiff's request contained in 5 U.S.C. § 552(a)(6)(B).

15. Beginning on November 29, 2013, Plaintiff made numerous attempts, both by electronic mail and by phone, to inquire about the status of his request with the FOIA Coordinator for ICE and with Defendant's FOIA Public Liaison, including, but not limited to, the following dates:

- a. November 29, 2013;
- b. December 31, 2013;
- c. January 31, 2014;
- d. February 14, 2014;
- e. March 12, 2014;
- f. April 11, 2014; and
- g. April 23, 2014. *See, e.g., Exhibit B.*

16. Plaintiff did not receive any documents from Defendant in response to these inquiries.

17. As a result, Plaintiff retained counsel and a demand letter was sent to Defendant on May 16, 2014. Four days later, on May 20, 2014, Defendant issued a "final response" to Plaintiff's FOIA request. *See Exhibit C.* Defendant stated that a search produced a single Microsoft Excel spreadsheet and 36 pages of responsive records. According to Defendant's letter, portions of thirteen pages of these records were withheld pursuant to FOIA Exemptions (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E).

18. After receiving the May 20, 2014 response, Plaintiff, through counsel, contacted Defendant by telephone in an attempt to resolve deficiencies and improper withholdings. The Deputy Assistant Director of ICE's Freedom of Information Act Office told Plaintiff that these issues could not be addressed unless Plaintiff filed an administrative appeal.

19. On June 11, 2014, Plaintiff appealed Defendant's May 20, 2014 "final response" to Plaintiff's FOIA request. Plaintiff appealed two aspects of Defendant's response: the adequacy and reasonableness of the search for responsive records, as well as Defendant's redactions/withholdings.

20. On July 9, 2014, Defendant issued a decision on Plaintiff's appeal. *See Exhibit D*. Acknowledging that "it is likely that additional responsive records may be found in locations the agency has not yet searched," the decision remanded the appeal to ICE FOIA to conduct additional searches.

21. The appeal decision affirmed all of Defendant's withholdings pursuant to FOIA Exemptions (b)(6), (b)(7)(C), and (b)(7)(E). The decision noted that "no information was withheld pursuant to Exemption (b)(5)."

22. On July 23, 2014, Plaintiff, through counsel, contacted Defendant by e-mail in response to the decision on Plaintiff's administrative appeal. *See Exhibit E*. Plaintiff noted his objections to the decision on the withholdings and pointed out a clear factual error—that, contrary to the statement in the appeal decision, Defendant had withheld information pursuant to Exemption (b)(5). Plaintiff also requested that Defendant inform him as to when he could expect to receive the results of Defendant's additional search for responsive records.

23. Defendant did not respond to Plaintiff's July 23, 2014 e-mail.

24. Since July 23, 2014, Plaintiff, through counsel, has contacted Defendant numerous times to follow up on the status of his FOIA request and to request an update. *See, e.g., Exhibit F*. However, to date, Defendant has not produced any additional responsive records, nor has Defendant provided any information as to when Plaintiff could expect to receive additional responsive records.

25. Specifically, the dates that Plaintiff, through counsel, contacted Defendant include the following:

- a. September 23, 2014;
- b. September 26, 2014;
- c. November 13, 2014;
- d. November 21, 2014;
- e. December 9, 2014;
- f. December 15, 2014; and
- g. December 22, 2014.

26. Since the July 9, 2014 decision on Plaintiff's administrative appeal, Defendant has not produced any responsive records to Plaintiff.

27. Since the July 9, 2014 decision on Plaintiff's administrative appeal, Defendant has not provided any information to Plaintiff about when it anticipates completing searches for responsive records. Nor has it asserted any justification for withholding any additional records responsive to Plaintiff's FOIA request.

28. More than twenty business days have passed since Defendant issued a decision on Plaintiff's administrative appeal.

29. Defendant has not complied with the time limits outlined in FOIA. Additionally, the decision on Plaintiff's administrative appeal constituted a final determination as to Defendant's withholdings from the May 20, 2014 "final response" to Plaintiff's FOIA request. As a result, Plaintiff has exhausted his administrative remedies under 5 U.S.C. § 552(a)(6)(C).

CAUSE OF ACTION

COUNT ONE:
Violation of the Freedom of Information Act

30. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 29 above as if fully stated herein.

31. Plaintiff's FOIA request reasonably described the records at issue and adhered to all applicable rules and regulations.

32. The records requested by Plaintiff are within Defendant's control.

33. The requested records do not fall within any FOIA exception or exemption.

34. Defendant has violated FOIA, 5 U.S.C. § 552, by failing to conduct a legally sufficient search for records responsive to Plaintiff's FOIA request and by failing to timely and fully produce the records that Plaintiff requested.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks the Court to:

1. Order Defendant to produce, by a date certain, any and all records that are responsive to Plaintiff's FOIA request and a *Vaughn* index of any and all responsive records withheld under claim of exemption;

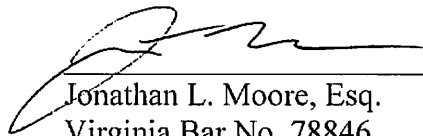
2. Enjoin Defendant from withholding any and all non-exempt records that are responsive to Plaintiff's FOIA request;

3. Award Plaintiff attorneys' fees and other costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); and

4. Grant such other relief as the Court deems just and proper.

Dated: April 6, 2015

Respectfully Submitted,



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