

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

SAFE PASSAGE PROJECT, Plaintiff,)	
)	
v.)	Civil Action No. 21-3288
)	
U.S. CUSTOMS AND BORDER PROTECTION and U.S. CITIZENSHIP AND IMMIGRATION SERVICES, Defendants.)	
)	

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, seeking the immediate release of Defendant U.S. Customs and Border Protection (“CBP”) and Defendant U.S. Citizenship and Immigration Services (“USCIS”) records related to CBP Form 93, the “Unaccompanied Alien Child¹ Screening Addendum.” CBP Form 93 is a primary tool Defendants use to document experiences with human trafficking and fear of persecution and torture for unaccompanied immigrant children (“UCs”).

2. The information contained in CBP Form 93s—including evidence of whether Defendant CBP complied with its screening and information sharing obligations in a particular case and/or whether a child may be eligible to remain in the United States—can be vital to preparing a child’s defense in removal proceedings. However, in response to individual FOIA requests on behalf of UCs in removal proceedings, Defendants regularly fail to provide a copy of the child’s CBP Form 93 or

¹ This term, as defined in 6 U.S.C. § 276(g)(2), refers to children under 18 years old without lawful immigration status and without a parent or legal guardian in the United States available to provide care and physical custody. Hereinafter, Plaintiff will use the term unaccompanied immigrant children when referring to children described by 6 U.S.C. § 276(g)(2).

provide a copy only after redacting large swaths of information.

3. As a result, Plaintiff Safe Passage Project submitted FOIA requests to CBP and USCIS, both components of the U.S. Department of Homeland Security (DHS) involved in the production and/or maintenance of CBP Form 93s, requesting the release of the complete current version of CBP Form 93 and records related to guidance on the disclosure or redaction of CBP Form 93.² See Exhibit A, FOIA Request to CBP, dated November 4, 2020; Exhibit B, FOIA Request to USCIS, dated November 4, 2020.

4. Now, more than 5 months later, neither Defendant has produced any records or other substantive response to the requests, in violation of their obligations under FOIA.

5. Plaintiff now asks this Court to order Defendants to locate and release all records responsive to the requests.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. § 552, *et. seq.* (FOIA statute), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. §§ 2201-02 (Declaratory Judgment Act).

7. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1), because Plaintiff's principal place of business is in this district and no real property is involved in the action.

8. Because Defendants failed to comply with the applicable time limitations in responding to Plaintiff's FOIA requests, Plaintiff is deemed to have exhausted administrative remedies in connection with the requests. 5 U.S.C. § 552(a)(6)(C)(i).

PARTIES

9. Plaintiff Safe Passage Project is a 26 U.S.C. § 501(c)(3) organization with its principal place of business at 185 West Broadway, New York, NY 10013. Plaintiff provides free lawyers to refugee

² The Kathryn O. Greenberg Immigration Justice Clinic of the Benjamin N. Cardozo School of Law was a co-requestor on each of the FOIA requests.

and immigrant children in the New York City area who face deportation back to life-threatening situations, despite strong legal claims to stay in the United States. It disseminates information about issues facing refugee and immigrant children to governments, policy makers, and the general public. Plaintiff conducts trainings about these issues with law firms, non-profit organizations, and government agencies. Plaintiff also manages a large pro bono program, where mentor attorneys supervise the pro bono attorney volunteers and provide them with up-to-date information and best practices in representing UCs in their immigration proceedings.

10. Defendant CBP is a component agency of DHS and is an agency within the meaning of 5 U.S.C. § 552(f)(1). Among other duties, Defendant CBP is responsible for screening UCs they encounter for fear of persecution and torture and experiences of human trafficking and for documenting those screenings on CBP Form 93. *See, e.g.*, 8 U.S.C. § 1232(a)(2)(A). Upon information and belief, Defendant CBP has in its possession, custody, and control records requested by Plaintiff.

11. Defendant USCIS is a component agency of DHS and is an agency within the meaning of 5 U.S.C. § 552(f)(1). Among other duties, Defendant USCIS is responsible for maintaining files reflecting individuals' interactions with immigration authorities, which include, where applicable, CBP Form 93, and for adjudicating applications for immigration benefits and services. Upon information and belief, Defendant USCIS has in its possession, custody, and control records requested by Plaintiff.

FACTS

CBP Form 93

12. Under the Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA 2008"), Pub. L. No. 110-457, CBP has the duty to screen UCs that they encounter for both fear of return to the child's home country and for experiences of human trafficking. *See, e.g.*, 8 U.S.C. § 1232(a)(2)(A). Those screenings are documented via CBP Form 93. CBP also has the duty to

notify sister agencies, including the Department of Health and Human Services' Office of Refugee Resettlement ("ORR"), of human trafficking indicators that CBP has identified in a particular UC's case following a screening. *See, e.g.*, 8 U.S.C. § 1232(b)(2). Those notifications are likewise documented in CBP Form 93.

13. Once the CBP Form 93 is completed by a CBP agent, a copy is placed in the UC's "A-file" which is maintained by USCIS.

14. As recently as 2015, the U.S. Government Accountability Office found that CBP agents "who screen [UCs] have not consistently applied the required screening criteria or documented the rationales for decisions resulting from screening. . . . [A]gents made inconsistent screening decisions, had varying levels of awareness about how they were to assess certain screening criteria, and did not consistently document the rationales for their decisions."³ Upon information and belief, CBP agents do not properly or adequately screen all UCs for fear of return or experiences of human trafficking, and CBP does not timely notify its sister agencies of all UCs with fear of return or human trafficking experiences.

15. Generally, to obtain these and other critical records necessary to represent UCs in removal proceedings, UCs and their attorneys must file individual FOIA requests. Moreover, upon information and belief, CBP has a policy or practice of not including CBP Form 93s in the agency's responses to FOIA requests for CBP records relating to individual UCs. Even when the agency does produce a Form 93 in response to a FOIA request, CBP routinely redacts the vast majority of each form.

16. Similarly, upon information and belief, USCIS has a policy or practice of releasing only a heavily redacted version of the CBP Form 93 as part of its response to FOIA requests for the A-files of individual UCs.

³ U.S. Government Accountability Office, GAO-15-521, *Unaccompanied Alien Children: Actions Needed to Ensure Children Receive Required Care in DHS Custody*, at 2 (2015), <https://www.gao.gov/assets/680/671393.pdf>.

17. As a result, individual UCs and their attorneys are denied the opportunity to present a full defense of the child in removal proceedings and may be unable to access benefits under the Trafficking Victims Assistance Program. *See, e.g.*, 22 U.S.C. § 7105(b)(1)(C), (G). Furthermore, without access to Defendants' policies regarding disclosure or redaction of CBP Form 93 in response to individual FOIA requests, UCs and their attorneys are unable to effectively challenge failure to produce CBP Form 93s in individual FOIA requests that may be inconsistent or contrary to Defendants' policies.

CBP FOIA Request

18. On November 4, 2020, Plaintiff submitted a FOIA request to CBP seeking records related to the CBP Form 93. *See* Exhibit A. Specifically, Plaintiff requested “[a] full and complete copy of CBP Form 93,” not related to any particular individual, as well as “[a]ny guidance memoranda or other policy guidance to CBP FOIA officers/employees regarding the disclosure/redaction of records pertaining to the ‘Unaccompanied Alien Child Screening Addendum,’ ‘CBP Form 93,’ and/or ‘suggested trafficking questions.’” *Id.* at 2.

19. Together with the request, Plaintiff sought expedited processing and a waiver of processing fees. *See id.* at 2-5.

20. On November 6, 2020, CBP acknowledged Plaintiff's request and invoked a 10-day extension for responding to FOIA requests provided at 6 C.F.R. § 5.5(c). *See* Exhibit C. That same day, CBP denied the Plaintiff's request for expedited processing, but fully granted Plaintiff's fee waiver request. *See* Exhibit D (fee waiver notification); Exhibit E (expedited processing notification).

21. Even without expediting the request, CBP was statutorily required to respond to Plaintiff's FOIA request within 30 business days, *i.e.* by December 21, 2020, but it has not provided any documents in response to Plaintiff's request to date. *See* 5 U.S.C. § 552(a)(6)(A), (B).

USCIS FOIA Request

22. On November 4, 2020, Plaintiff submitted a FOIA request to USCIS seeking records related to the CBP Form 93. *See* Exhibit B. Specifically, Plaintiff requested “[a]ny guidance memoranda or other policy guidance to USCIS FOIA officers/employees (to include, employees of the National Records Center) regarding the disclosure/redaction of records pertaining to the ‘Unaccompanied Alien Child Screening Addendum,’ ‘CBP Form 93,’ and/or ‘suggested trafficking questions.’” *Id.* at 2.

23. Together with the request, Plaintiff sought expedited processing and a waiver of processing fees. *See id.* at 2-5.

24. By letter dated November 12, 2020, USCIS acknowledged receipt of the Plaintiff’s FOIA request and invoked a 10-day extension for responding to FOIA requests provided at 5 U.S.C. § 552(a)(6)(B). *See* Exhibit F at 2. In that same letter, USCIS denied Plaintiff’s request for expedited processing, but granted Plaintiff’s fee waiver request. *See id.* at 1, 2.

25. Even without expediting the request, USCIS was statutorily required to respond to Plaintiff’s FOIA request within 30 business days, *i.e.* by December 21, 2020, but it has not provided any documents in response to Plaintiff’s request to date. *See* 5 U.S.C. § 552(a)(6)(A), (B).

CAUSES OF ACTION

COUNT ONE

Violation of FOIA, 5 U.S.C. § 552 Failure to Timely Respond

26. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

27. Pursuant to 5 U.S.C. § 552(a)(6)(A) and (B), Defendants were obligated to promptly produce records responsive to Plaintiff’s FOIA requests.

28. Plaintiff submitted the FOIA requests on November 4, 2020. Defendants failed to issue a response, including a determination of whether to comply with the request and the reasons therefore,

in the time provided under 5 U.S.C. § 552(a)(6)(A)(i) (20 days, excluding Saturdays, Sundays, and legal public holidays) or within the time permitted in certain unusual circumstances pursuant to 5 U.S.C. § 552(a)(6)(B)(i) and 6 C.F.R. § 5.5(c) (10 additional working days).

29. Defendants' failure to disclose all responsive records within the statutory time period therefore violates, at a minimum, 5 U.S.C. § 552(a)(6)(A) and (B) and the corresponding regulations.

COUNT TWO

Violation of FOIA, 5 U.S.C. § 552

Failure to Conduct an Adequate Search and to Disclose Responsive Records

30. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

31. Under 5 U.S.C. § 552(a)(3), Defendants are obligated to conduct a reasonable search for records responsive to Plaintiff's FOIA requests and to promptly produce those records to Plaintiff.

32. Upon information and belief, Defendants have not conducted any search for responsive records to Plaintiff's FOIA requests. Defendants have not produced any records responsive to the FOIA requests to Plaintiff. Plaintiff has a legal right to obtain such records, and no basis exists for Defendants' failure to search for them.

33. Defendants' failure to conduct a reasonable search and disclose all records responsive to Plaintiff's FOIA requests violates, at a minimum, 5 U.S.C. § 552(a)(3)(C) and the corresponding regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Assume jurisdiction over this action;
2. Declare that Defendants' failure to make a determination on Plaintiff's FOIA requests within the statutory time frame, failure to conduct an adequate search for the records requested by Plaintiff, and failure to disclose the records requested by Plaintiff is unlawful;
5. Order Defendants to make a full, adequate, and expeditious search for the requested

records;

6. Order Defendants to expeditiously process and disclose all responsive, nonexempt records, and enjoin Defendants from improperly withholding the requested records;
7. Award Plaintiff costs and reasonable attorneys' fees under 5 U.S.C. § 552(a)(4)(E), the Equal Access to Justice Act, and any other applicable statute or regulation; and
8. Grant such further relief as the Court deems just, equitable, and appropriate.

Dated: April 15, 2021

s/ Lindsay Nash

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*Application for admission pro hac vice
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