

Exhibit 5



U.S. Customs and
Border Protection

OT:RR:RDL:FAB
CBP-AP-2023-000379 JHS

January 5, 2023

Mirian Albert
Lawyers for Civil Rights
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61 Batterymarch Street
Boston, MA 02110

**Re: Freedom of Information Act Request CBP-2022-023877/CBP-AP-2023-000379:
Humanitarian Parole at Arizona Points of Entry**

Dear Mirian Albert:

This letter responds to the administrative appeal you filed with this office challenging U.S. Customs and Border Protection's ("CBP") incorrect claim that your Freedom of Information Act ("FOIA") request was closed and the failure to respond to the FOIA request you submitted to the agency on December 14, 2021. By this letter, we apologize for the misinformation that your initial request was closed and concur with your assessment that the case was not responded to in a timely fashion. Based on the search and review conducted by the CBP FOIA Division, we are remanding your case file back to the CBP FOIA Division for immediate processing of your request.

In your initial request, you sought "guidance and directives on humanitarian parole applications and adjudication as described in the attached request." The information relates to humanitarian parole in all ports of entry in Arizona. As of December 13, 2022, FOIA Division, the office responsible for responding to initial FOIA requests, has not yet responded to your request.

Your appeal is based on the fact that the agency has failed to provide a timely response within the statutorily provided guidelines. We concur. The FOIA itself requires that each agency, absent unusual or exceptional circumstances, "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request." 5 U.S.C. § 552 (a)(6)(A)(i). As CBP's FOIA Division has not responded to your FOIA request within this statutory timeframe, we agree that the agency is delinquent in responding to your request.

However, we find that an administrative appeal is an inappropriate cure in this instance. Indeed, a requester "shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph." 5 U.S.C. § 552(a)(6)(C)(i). Instead, a constructive denial allows a requester to proceed directly to

district court if an agency fails to respond to an initial request within the prescribed time period. This determination is consistent with the language of the FOIA itself and the DHS regulations governing FOIA requests.

Under the FOIA's administrative appeal provision, a requester has the right to administratively appeal any adverse determination that an agency makes on his or her FOIA request. See 5 U.S.C. § 552 (a)(6)(A). Under DHS regulations, adverse determinations include denials of records in full or in part, "no records" responses, denials of requests for fee waivers and denials of requests for expedited processing. See 6 CFR 5.6(c)¹. We note that the definition does not explicitly include a failure to respond.

The administrative appeal process is important to agencies and requesters because the appeal process provides an agency with an opportunity to review its initial action taken in response to a request to determine whether corrective steps are necessary. The appeals process allows CBP to correct mistakes made at lower levels and thereby obviates unnecessary judicial review. In this case, there is no administrative record to review because FOIA Division has not yet concluded processing the request. Accordingly, we are remanding your request to FOIA Division for processing.

As mentioned above, you may immediately challenge FOIA Division's failure to respond to your request in district court. Pursuant to 5 U.S.C. §552(a)(4)(B), you may do so in the U.S. District Court in the district in which you reside or have a principle place of business, or in which the agency records are situated, or in the U.S. District Court for the District of Columbia.

Alternatively, the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

Mary Beth McLoughlin

For Shari Suzuki
FOIA Appeals and Policy Branch
Regulations and Rulings Directorate
Office of Trade
Customs and Border Protection

¹ 6 CFR 5.6(c) states: Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that a record is not readily reproducible in the form or format sought by the requester; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver; and a denial of a request for expedited processing.