

**EXHIBIT E**



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September 28, 2018

Office of Information Policy  
U.S. Department of Justice  
Suite 11050  
1425 New York Avenue, N.W.  
Washington, D.C. 20530-0001

Re: **FOIA Administrative Appeal of Response to Request for Records re: Attorney General's Decision to Certify to Himself the *Matter of A-B-*, 27 I. & N. Dec. 227 (A.G. 2018)**

**FOIA Reference No. DOJ-2018-005746 (AG)**

Dear OIP Personnel,

Pursuant to 5 U.S.C. § 552(a)(6)(A) and 28 C.F.R. § 16.8, our client, ██████ B ██████, hereby appeals the U.S. Department of Justice's ("DOJ") failure to timely respond to the FOIA Request with the tracking number DOJ-2018-005746 (AG) ("the Request").

The DOJ has failed to timely respond to the Request. The Agency's six-month estimate of the time needed to complete the search for responsive documents is unreasonable, unjustified, and in violation of statute. Any further delay in processing the Request will prejudice Ms. B ██████.

I. Facts and Procedural History

Ms. B ██████, a Salvadoran woman, was brutalized by her husband in her home country for fifteen years. Her abuser subjected her to extreme physical, sexual, and emotional violence, from which the Salvadoran state was unable or unwilling to protect her, despite her efforts to secure protection. Fearing for her life and safety, Ms. B ██████ fled to the United States. She applied for asylum within the one-year period, but her application was denied by Immigration Judge V. Stuart Couch. *Matter of A-B-*, Decision Denying Asylum Application, (Immig. Ct. Dec. 1, 2015). Ms. B ██████ appealed to the Board of Immigration Appeals (BIA), which overturned the denial and sent the case back to Judge Couch with instructions to complete security checks and grant asylum. *Matter of A-B-*, (BIA Dec. 8, 2016). Without any explanation, Judge Couch held on to the case and refused to grant asylum as directed, instead "certifying" the case back to the BIA in a decision that defied the holdings of the higher court.

Then, on March 7, 2018, Attorney General Jefferson Sessions referred the BIA's decision to himself "for review of issues relating to whether being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum and withholding of removal . . . ." *Matter of A-B-*, 27 I. & N. Dec. 227 (A.G. 2018). The Attorney



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General ruled against Ms. B [REDACTED] on June 11, 2018, vacating the BIA's favorable decision in her case and remanding Ms. B [REDACTED]'s case to the immigration judge. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The Attorney General's decision also overruled BIA precedent which recognized that people like Ms. B [REDACTED] – victims of domestic violence whom their governments could not protect – could show persecution on account of a “particular social group” and secure asylum or withholding of removal protection. *See id.* at 317 (overruling *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (BIA 2014)).

## II. The Request

On March 26, 2018, Ms. B [REDACTED] made a FOIA request addressed to the DOJ's Mail Referral Unit. This request sought all records<sup>1</sup> that were prepared, received, transmitted, collected and/or maintained by DOJ that contain, discuss, refer to, or are related to the Attorney General's decision to certify to himself Ms. B [REDACTED]'s asylum case. The request sought expedited treatment pursuant to 5 U.S.C. § 552(a)(6)(E)(ii) and 28 CFR § 16.5(e)(1).

On May 25, 2018 – two months after the initial request was made – the DOJ's FOIA officer directed Ms. B [REDACTED]'s counsel to re-file her request directly with OIP, which they promptly did on May 30, 2018. The second request sought the following:

All records<sup>2</sup> that were prepared, received, transmitted, collected and/or maintained by the Department of Justice (DOJ) that contain, discuss, refer to, or are related to [REDACTED] B [REDACTED]'s asylum case within, between, or made by the following individuals and/or entities:

- Immigration Judge Stuart V. Couch;
- The Executive Office for Immigration Review, including but not limited to its clerks, officials, and Director;
- The Board of Immigration Appeals, including but not limited to its clerk's office;

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<sup>1</sup> The term “records” was defined to include all records or communications preserved in electronic or written form, including but not limited to correspondence, regulations, directives, documents, data, videotapes, audiotapes, emails, faxes, files, guidance, guidelines, standards, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials or studies, including records kept in written form, or electronic format on computers and/or other electronic storage devices, electronic communications and/or videotapes, as well any reproductions thereof that differ in any way from any other reproduction, such as copies containing marginal notations.

<sup>2</sup> The term “records” was defined substantially the same way as in the first request.



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- Attorney General Jefferson Sessions;
- Internal, outside, or informal advisors of the Attorney General;
- Employees of the Department of Justice.

These include but are not limited to any communications relating to the Attorney General's awareness of and consideration of any aspect of [REDACTED] B [REDACTED]'s asylum case. *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

This request covers the time period of December 8, 2016 to the date of search, up through and including the date of any searches that follow an initial search.

Like the initial request, the second request sought expedited processing under 28 C.F.R. § 16.5(d)(1). Without this information, Ms. B [REDACTED] faced the "loss of substantial due process rights" in her case. Absent the requested information on the Attorney General's decision to certify the case to himself, Ms. B [REDACTED] faced the risk of being unable to fully raise and articulate due process concerns around the certification decision, risking waiver of the issues for any further federal court appeal. Ms. B [REDACTED] pointed out that her asylum appeal was last sustained by the Agency, but that she now faces the requirement of having to re-litigate her merits case, which itself implicates substantial due process concerns.

### III. The DOJ's Dilatory Response to the Request

As discussed above, the Agency's response to the Request was marked by delay from the outset, as it took the FOIA officer two months to instruct Ms. B [REDACTED]'s counsel to re-file her Request with OIP. After she re-filed, the DOJ on June 8, 2018 denied Ms. B [REDACTED]'s request for expedited processing.

The letter denying expedited processing stated that the Request "has been assigned to an analyst in this Office and our processing of it has been initiated," but the DOJ failed to provide a response by the twenty-working-day deadline under 5 U.S.C. § 552(a)(6)(A)(i). Nor did the Agency issue a decision notifying the Requesters that it was invoking an extension due to "unusual circumstances" under 5 U.S.C. § 552(a)(6)(B) and 28 C.F.R. 16.5(c).

Having heard nothing from the DOJ since the denial of expedited processing and the passing of the Agency's statutory deadline to respond to the Request, counsel for Ms. B [REDACTED] contacted Brittne Baker, the FOIA officer assigned to the Request, on July 11, 2018. Ms. Baker stated that the Request was on a "complex track," but could not provide an estimated time for the initial results. She promised to calculate that time and inform Ms. B [REDACTED]'s counsel.



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After Ms. B [REDACTED]'s counsel followed up with her, Ms. Baker responded via email on July 30, 2018. She stated that "it is estimated that it will take at least 6 months for the search to be completed. It will then take another few months to review and process any responsive records that may be located, depending on the volume of records located in the search." Ms. Baker did not explain why the Request – which apparently did not merit "unusual circumstances" treatment – would require such a lengthy search period, not to mention a potentially even longer review period.

Since Ms. Baker's July 30, 2018 email, Requesters have received no communication from the Agency regarding the processing of their Request.

IV. The DOJ's Estimate of the Time Necessary to Complete the Search is Unreasonable and Unjustified.

The Agency has failed to respond to the Request within the statutory timeframe. Even if the DOJ had invoked the ten-working-day extension under 5 U.S.C. § 552(a)(6)(B) and 28 C.F.R. 16.5(c), that period would have ended on July 12, 2018. Ms. Baker's July 30, 2018 email does not constitute a proper determination under FOIA, because the DOJ did not "indicate within the relevant time period the scope of the documents it will produce and the exemptions it will claim with respect to any withheld documents." See *CREW v. FEC*, 711 F.3d 180, 182-83 (D.C. Cir. 2013). The courts have found that "an agency's failure to comply with the FOIA's time limits is, by itself, a violation of the FOIA, and is an improper withholding of the requested documents." *Gilmore v. U.S. Dept. of Energy*, 33 F. Supp. 2d 1184, 1187 (N.D. Cal. 1998).

Nor did the Agency explain why it would take six months to respond to a request that focused on records pertaining to one individual's asylum case. And the DOJ failed entirely to justify its claim that following a six-month search, another "few months" will be required to review the records.

It is not even clear what "few months" means in this context. Three months? Eight months? Ms. B [REDACTED] should not be forced to wait in bureaucratic limbo while the production of documents crucial to her immigration case is being delayed indefinitely. See *Munger, Tolles & Olson LLP ex rel. American Management Services LLC v. U.S. Dept. of Army*, 58 F. Supp. 3d 1050 (C.D. Cal. 2014) (Army's three-month delay in producing records in response to a FOIA request and eleven-month delay in responding to an appeal challenging the initial production violated FOIA's timeliness requirements, even though the delay appeared to have been the result of bureaucratic mishandling rather than intentional obfuscation).

The Request is key to Ms. B [REDACTED]'s efforts to secure asylum, raise due process challenges in her case, and avoid having to return to a place where she would face mortal danger. Failure to process the Request in a timely manner threatens to deny Ms. B [REDACTED] the ability to fully raise



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and articulate due process concerns around the Attorney General's certification decision, and thereby greatly prejudice her asylum claim, which is currently pending before the immigration court. This would deprive Ms. B [REDACTED] of substantial due process rights. *See Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1226 (9th Cir. 2002) (due process violation occurs in deportation proceedings when "the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case"). It would therefore increase the likelihood that Ms. B [REDACTED] will be deported to El Salvador, where she would face an imminent threat to her life and physical safety from her husband.

V. Conclusion

The DOJ's delay in processing and responding to the Request threatens substantial prejudice to Ms. B [REDACTED]. The Agency has violated the FOIA by failing to provide a timely response to the Request. Its estimate of the time needed to conduct the search and review the records is far out of proportion with the scope of the request. Ms. B [REDACTED] asks that the DOJ conduct the search, review, and production of responsive documents in a reasonably timely manner.

University of California Hastings College of the Law  
Center for Gender & Refugee Studies

A handwritten signature in blue ink, appearing to read "Eunice Lee".

Eunice Lee, Esq.  
Attorney for Requester A [REDACTED] B [REDACTED]

Riley Safer Holmes & Cancila LLP  
[REDACTED] [REDACTED]

A handwritten signature in blue ink, appearing to read "Yakov P. Wiegmann".

Yakov P. Wiegmann  
Attorney for Requester A [REDACTED] B [REDACTED]

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