

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC. and AMERICAN OVERSIGHT,)	
)	
Plaintiffs,)	Civil Action No. _____
)	
v.)	
)	COMPLAINT
U.S. DEPARTMENT OF HOMELAND SECURITY,)	
)	
Defendant.)	

COMPLAINT

1. Plaintiffs American Civil Liberties Union of Massachusetts, Inc. and American Oversight bring this action against the U.S. Department of Homeland Security under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

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

4. Because Defendant has failed to comply with the applicable time-limit provisions of the FOIA, American Civil Liberties Union of Massachusetts, Inc. and American Oversight are deemed to have exhausted their administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i)

and are now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

PARTIES

5. Plaintiff American Civil Liberties Union of Massachusetts, Inc. (ACLU) is a Massachusetts non-profit corporation with its principal place of business in Boston, Massachusetts. ACLU's mission is to defend freedoms guaranteed in the Constitution and Bill of Rights and to educate the public about civil liberties and civil rights. ACLU is committed to principles of transparency and accountability in government. Obtaining information about government activity, analyzing that information, and widely publishing and disseminating it to the press and the public is a critical and substantial component of the ACLU's work and one of its primary activities.

6. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information gathered, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

7. Defendant U.S. Department of Homeland Security (DHS) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DHS has possession, custody, and control of the records that Plaintiffs seek.

STATEMENT OF FACTS

8. The Department of Homeland Security Appropriations Act for 2018, contained in Division F of the Consolidated Appropriations Act of 2018, provides in Section 231 of Title II that “[n]ot later than 180 days after the date of the enactment of this Act, the Secretary [of Homeland Security] shall submit to the Committees on Appropriations of the Senate and the House of Representatives a risk-based plan for improving security along the borders of the United States, including the use of personnel, fencing, other forms of tactical infrastructure, and technology,” and further including certain enumerated categories of information.

9. According to a February 5, 2019 letter from the Congressional Hispanic Caucus to the Department of Homeland Security Conference Committee, DHS submitted such a plan (the “Border Security Plan”) to Congress on December 21, 2018.¹

10. On March 11, 2019, ACLUM and American Oversight submitted a FOIA request to DHS requesting a copy of the Border Security Plan.

11. Plaintiffs described the Border Security Plan in their FOIA request with reference to the Department of Homeland Security Appropriations Act for 2018 as quoted in Paragraph 8 of this Complaint, as well as reference and citation to the February 5, 2019 letter from the Congressional Hispanic Caucus described in Paragraph 9 of this Complaint.

12. On March 19, 2019, DHS sent a letter acknowledging its receipt of this request. DHS assigned the request tracking number 2019-HQFO-00486.

¹ See Ltr. from Cong. Hispanic Caucus to Dep’t of Homeland Sec. Conference Comm. at 2, Feb. 5, 2019, available at <https://congressionalhispaniccaucus-castro.house.gov/sites/congressionalhispaniccaucus.house.gov/files/Letter%20to%20Conferees.pdf>.

13. In its March 19, 2019 letter, DHS informed Plaintiffs that “[a]s [their] request seeks documents that will require a thorough and wide-ranging search, DHS will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c).”

14. Plaintiffs attempted to contact DHS by telephone and email to address their disagreement with DHS’s determination that the request for a single document, described in detail, would “require a thorough and wide-ranging search.”

15. As of the date of this Complaint, DHS has not responded to Plaintiff’s communications.

Exhaustion of Administrative Remedies

16. As of the date of this complaint, DHS has failed to (a) notify either ACLUM or American Oversight of any determination regarding their FOIA request, including the scope of any responsive records DHS intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

17. Through DHS’s failure to respond to Plaintiffs’ FOIA request within the time period required by law, ACLUM and American Oversight have constructively exhausted their administrative remedies and seek immediate judicial review.

COUNT I
Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct Adequate Search for Responsive Records

18. Plaintiffs repeat the allegations in the foregoing paragraphs and incorporate them as though fully set forth herein.

19. Plaintiffs properly requested records within the possession, custody, and control of DHS.

20. DHS is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

21. DHS has failed to promptly review agency records for the purpose of locating those records that are responsive to Plaintiffs' FOIA request.

22. DHS's failure to conduct an adequate search for responsive records violates FOIA.

23. Plaintiffs are therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to Plaintiffs' FOIA request.

COUNT II
Violation of FOIA, 5 U.S.C. § 552
Wrongful Withholding of Non-Exempt Responsive Records

24. Plaintiffs repeat the allegations in the foregoing paragraphs and incorporate them as though fully set forth herein.

25. Plaintiffs properly requested records within the possession, custody, and control of DHS.

26. DHS is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

27. DHS is wrongfully withholding non-exempt agency records requested by Plaintiffs by failing to produce non-exempt records responsive to their FOIA request.

28. DHS is wrongfully withholding non-exempt agency records requested by Plaintiffs by failing to segregate exempt information in otherwise non-exempt records responsive to their FOIA request.

29. DHS's failure to provide all non-exempt responsive records violates FOIA.

30. Plaintiffs are therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to their respective FOIA requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

REQUESTED RELIEF

WHEREFORE, ACLUM and American Oversight respectfully request the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to Plaintiffs' FOIA request;
- (2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to Plaintiffs' FOIA request and indexes justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiffs' FOIA request;
- (4) Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant Plaintiffs such other relief as the Court deems just and proper.

Dated: April 23, 2019

Respectfully submitted,

/s/ Daniel L. McFadden

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