

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**HUMAN RIGHTS WATCH**  
1275 K Street, N.W., Suite 1100  
Washington, D.C. 20005

Plaintiff,

Civil Action No. \_\_\_\_\_

v.

**DEPARTMENT OF HOMELAND SECURITY**  
Office of General Counsel  
2707 Martin Luther King Jr Ave SE, Stop 0485  
Washington, D.C. 20528-0485

**U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT**  
Freedom of Information Act Office  
500 12th Street SW, Stop 5009  
Washington, D.C. 20536-5009

Defendants.  
\_\_\_\_\_ /

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiff Human Rights Watch (“HRW”) hereby sues Defendants the Department of Homeland Security (“DHS”) and the United States Immigration and Customs Enforcement (“ICE”), for disclosure of agency records unlawfully withheld. HRW alleges as follows:

**INTRODUCTION**

1. This is an action under the federal Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*
2. HRW made the original FOIA requests at issue in this action to DHS on December 12, 2018, and to ICE on December 13, 2018. Those requests sought records referring to the “700 Eritrean nationals residing in the US who are subject to final orders of removal” as

mentioned in a DHS press release of September 13, 2017. In the press release, DHS announced that it would begin repatriation of approximately 700 Eritrean nationals as of that date. See <https://www.dhs.gov/news/2017/09/13/dhs-announces-implementation-visa-sanctions-four-countries>. Eritrea, often referred to as “the North Korea of Africa” is one of the worst abusers of human rights in the world. See U.N. Human Rights Council, Report of the Commission of Inquiry on Human rights in Eritrea ( 2015, A/HRC/29/42), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A\\_HRC\\_32\\_CRP.1\\_E.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/A_HRC_32_CRP.1_E.docx); HRW, *They Are Making Slaves of Us, Not Educating Us*, (2019), <https://www.hrw.org/report/2019/08/08/they-are-making-us-slaves-not-educating-us/how-indefinite-conscription-restricts>; HRW World Reports for 2020, 2019, 2018, Eritrea chapters: <https://www.hrw.org/world-report/2020/country-chapters/eritrea><https://www.hrw.org/world-report/2019/country-chapters/eritrea>; <https://www.hrw.org/world-report/2018/country-chapters/eritrea>.

3. Earlier this month, the U.S. Department of State released its annual assessment of human rights conditions in each country as of last year, including Eritrea. The Eritrea chapter’s synopsis echoes the finding by the U.N. Human Rights Council and by HRW over the years. See <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/eritrea>:

Significant human rights issues included: forced disappearance, torture, and arbitrary detention, the preceding three actions, all committed by the government; harsh and life-threatening prison and detention center conditions; political prisoners; arbitrary or unlawful interference with privacy; serious problems with the independence of the judiciary; the worst forms of restrictions on free expression and the press, including censorship and the existence of criminal libel laws; substantial interference with the rights of peaceful assembly and freedom of association; severe restrictions on religious freedom; widespread restrictions on freedom of movement; restrictions on political participation; trafficking in persons; criminalization of consensual same-sex sexual conduct; and forced labor, including forced participation in the country’s national service program, routinely for periods beyond the 18-month legal obligation.

4. Well over a year since the HRW inquiries, neither DHS nor ICE have produced a single responsive record. Media reported that one Eritrean committed suicide at the Cairo airport as he was being repatriated. See <https://apnews.com/59bb49db54984d30bdf9da3e37b989e3>. How many others have been forcibly repatriated or remain threatened with repatriation to one of the most repressive countries on earth is at the heart of the FOIA requests at issue.

5. HRW is left with no choice but to bring this lawsuit to obtain disclosure.

### **PARTIES**

6. Founded in 1978 as “Helsinki Watch,” Human Rights Watch began investigating rights abuses in countries that signed the Helsinki Accords, most notably those behind the Iron Curtain. Since then, HRW’s work has expanded worldwide. HRW believes that wherever tyranny, repression, and repression hides, its research will expose it. By focusing international attention where human rights are violated, Human Rights Watch gives voice to the oppressed through its reporting, and thereby focuses international attention on rights violations, the first step in holding oppressors accountable for their crimes. It pressures governments and other human rights abusers to denounce abuse and respect human rights. Its investigations bring into public view abuses all sorts of oppression ranging from censorship, to baseless arrests of activists and political opposition figures, to government confiscation of media, to massacres, and genocides. Its work involves the defense of those individuals likely to face discrimination, including women, LGBT people, and people with disabilities. HRW has promoted the rule of law in the form of protective legislation, prosecutions, treaties, and international courts to help victims of human rights abuse find justice when they have no hope of justice at home. HRW is a U.S. 501(c)(3) charitable corporation incorporated and headquartered in New York. It maintains offices or presences covering 90 countries. currently

7. The information sought in this case may permit HRW to obtain help for Eritreans still subject to repatriation by the United States. It will also call attention to its policy of sending asylum seekers and refugees back to the country whose severe oppression they fled and where those being returned are likely to face imprisonment, forced labor, and torture.

8. DHS is an executive-branch department; ICE is a DHS component. Both are agencies as defined at 5 U.S.C. § 552(f)(1). Defendants are the custodian of the records at issue in this action and maintain possession and control over them. Both are headquartered in Washington, D.C.

### **JURISDICTION AND VENUE**

9. This Court has subject matter and personal jurisdiction over this action and both DHS and ICE are agencies pursuant to 5 U.S.C. § 552(a)(4)(B) and (a)(6)(C)(i), and 28 U.S.C. § 1331.

10. Venue is proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

11. HRW has exhausted all administrative remedies under 5 U.S.C. § 552(a)(6)(C)(i) because Defendants have failed to comply with the statutorily mandated time limit to provide responsive records once a FOIA request has been made.

### **FACTUAL ALLEGATIONS**

#### **The Original FOIA Requests, Successful Appeal, and a Year Plus of Delay**

12. On December 12, 2018, HRW made a FOIA request to DHS that is the subject of this lawsuit. It requested disclosure of “[a]ll records in DHS’ possession, including but not limited to orders, cables, reports, or other government writings from July 1, 2017, to the present that refer in whole or in part to the ‘700 Eritrean nationals residing in the US who are subject to final orders of removal’ mentioned in the Department of Homeland Security press release of

September 13, 2017.” (The DHS release had announced it would begin repatriation of approximately 700 Eritrean nationals as of that date). In particular the HRW request asked for “all records” in the DHS’s possession that disclosed:

- a. The number of Eritrean nationals referred to in the Department announcement that have been repatriated since September 13, 2017;
- b. The names and address of each detention center, if any, where any Eritrean national subject to a final order of removal is being held as of the date of this request; and
- c. All U.S. District Court or Court of Appeals orders since September 13, 2017,
  - (i) ordering the release from detention of any Eritrean national included in the 700 referred to in the Department announcement or (ii) affirming an order by the Board of Immigration Appeals, or any immigration court or panel ordering the repatriation of any Eritrean national included in the 700 referred to in the Department announcement; and (iii) each amendment of a final order for removal of an Eritrean national by administrative action by the Department, its subdivisions, the Board of Immigration Appeals, or any other immigration court or panel since September 13, 2017.

13. In its request to DHS, HRW asked for “electronic copies of the data” be provided “either as a csv file or divided into multiple xls files.” HRW specifically requested that it receive “current translation files for any fields containing code entries.” HRW also requested that DHS omit from its search and review “copies of press and media reports as well as all Department of Homeland Security press statements and press releases relating to the September 13, 2017, announcement and its enforcement.”

14. As a nongovernmental organization working world-wide, HRW requested a “waiver of all fees related to this request because disclosure of the information to HRW is in the

public interest by likely contributing significantly to public understanding of the problems faced by Eritreans trying to flee an oppressive regime. HRW will use this information to inform the public about what can be done to improve human rights for Eritreans living in Eritrea and abroad. HRW plans to analyze and disseminate to the public the information gathered through this request at no cost. Nothing requested will be used to further commercial interests.” A true and correct copy of HRW’s original FOIA request to DHS is attached as **Exhibit A**.

15. On December 13, 2018, HRW made the identically-worded request to ICE, seeking the same records, asking that responsive records be produced to HRW in the same electronic formats and asking for a waiver of all fees. This request is also the subject of this lawsuit. A true and correct copy of HRW’s FOIA request to ICE is attached as **Exhibit B**.

16. On July 5, 2019, in a letter addressed to HRW, DHS provided a “final response” to HRW’s December 12, 2018, request, initially acknowledging that the request was received by DHS on December 20, 2018. After confirming the wording of HRW’s request, DHS wrote that it “conducted a comprehensive search of files within the Department of Homeland Security’s *Office of Policy* (PLCY) for records that would be responsive to your request. Unfortunately, we were unable to locate or identify any responsive records.” In this letter, DHS transferred the request “to the FOIA Officer for ICE, for proceeding under the FOIA and direct response to you.” After insisting that “an adequate search was conducted” by DHS, the agency advised that HRW had “the right to appeal this determination.” A true and correct copy of this letter is attached as **Exhibit C**.

17. Having heard nothing from ICE, on July 26, 2019, HRW send a follow-up request to ICE to inquire about the status of its FOIA request. On November 20, 2019, HRW received an email from ICE saying: “Good morning. We apologize for the delay of the status update

request. Your request, 2019-ICFO-24570, is currently assigned to processor. Once processing is complete, a final correspondence will be sent to you. We appreciate your continued patience.”

To date, ICE has provided no other responses to HRW’s FOIA request.

18. On August 2, 2019, HRW appealed DHS’ determination. In this letter, HRW objected that DHS had performed an inadequate search and that DHS “either misinterpreted the request or did not address all of its aspects” because it “wasn’t plausible that the Department had *no* recoverable information about implementation of a policy that it had announced almost two years earlier.” HRW wrote “although the Office of Policy might have no records, it is unbelievable that no relevant records weren’t available elsewhere in Department files.” A true and correct copy of this letter is attached as **Exhibit D**.

19. On October 25, 2019, following a “review of the entire record,” HRW’s appeal was granted. “After a thorough review of your appeal,” Stuart A. Keefe, an attorney on the staff of Chief Administrative Law Judge of the U.S. Coast Guard, acting under a memorandum of understanding with the DHS, found “the appeal file does not contain sufficient information whether DHS conducted a proper search.” HRW’s request was remanded to DHS for additional information to be provided within 30 days. A true and correct copy of this letter is attached as **Exhibit E**.

20. On December 20, 2019, Mr. Keefe wrote to HRW noting that the “deadline” for DHS to provide records and/or additional information within 30 days of October 25, 2019 “has passed, and DHS has failed to provide the undersigned with any additional information.” Accordingly, Mr. Keefe’s letter said it constituted “final action of the Department of Homeland Security concerning [HRW’s] Freedom of Information Act (FOIA) request 2019-HQFO-00243 (designated as 2019-HQAP-00389 on appeal),” and informed HRW that it may “now pursue this

appeal in United States District Court.” A true and correct copy of this letter is attached as

**Exhibit F.**

21. To date, no records responsive to HRW’s FOIA requests to DHS and ICE for the same records have been produced.

**COUNT I**

**Declaratory and Injunctive Relief:**

**Violation of the federal Freedom of Information Act, 5 U.S.C. § 552,**

22. HRW realleges and incorporates the allegations contained in the preceding Paragraphs as if fully set forth herein.

23. The FOIA confers on this Court “jurisdiction to enjoin the agency [here DHS and ICE] from withholding agency records and to order the production of any agency records improperly held from the complainant.” 5 U.S.C. § 552(a)(4)(B).

24. HRW’s requests to DHS and ICE are “agency” records and within these agencies’ custody and control.

25. DHS and ICE failed to issue a full response to HRW’s requests within the applicable 20-day statutory response deadlines under FOIA. See 5 U.S.C. § 552(a)(6)(a)(i).

26. Both DHS and ICE failed to produce any responsive records to HRW’s FOIA requests.

27. No “exceptional circumstances” exist under FOIA to extend the response deadline or to justify the agencies’ continued delay in disclosure in response to FOIA requests made on December 12 and 13, 2018, respectively. See 5 U.S.C. § 552(a)(6)(a)(i)-(ii).

28. HRW has exhausted all administrative remedies under FOIA regarding DHS and ICE’s failure to produce records responsive to HRW’s requests. See 5 U.S.C. § 552(a)(6)(a)(i)



29. The agencies' failure to meet their response deadlines means that they cannot charge HRW duplication fees in fulfillment of the FOIA requests. See 5 U.S.C. § 552(a)(4)(A)(viii).

30. HRW is entitled to declaratory relief finding that DHS and ICE have violated FOIA and that it is immediately entitled to receive all records responsive to its requests with all fees waived.

31. HRW is further entitled to injunctive relief, ordering DHS and ICE to immediately produce electronic copies of all records responsive to HRW's FOIA requests without further delay.

**RELIEF REQUESTED**

**WHEREFORE**, Human Rights Watch respectfully requests that this Court:

- a. declare that DHS and ICE's delay in providing records responsive to the requests is unlawful and in violation of FOIA;
- b. enter an injunction requiring DHS and ICE immediately to disclose complete copies of all records responsive to HRW's requests, with all fees waived;
- c. award HRW its costs and attorneys' fees under 5 U.S.C. § 552(a)(4)(E) and/or 28 U.S.C. § 2412;
- d. expedite this action; and
- e. grant such additional and further relief as this Court deems just and proper.

Dated: April 16 , 2020

Respectfully submitted,

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