

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

AMERICAN CENTER FOR LAW AND JUSTICE,)
)

[REDACTED])
[REDACTED])

Plaintiff,)

vs.)

Case Action No. 16-cv-2516 (JEB)

UNITED STATES DEPARTMENT OF STATE,)

**[PROPOSED] AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

The Executive Office)

[REDACTED])
[REDACTED])
[REDACTED])

Defendant.)

**[PROPOSED] AMENDED COMPLAINT FOR DECLARTAORY
AND INJUNCTIVE RELIEF**

Plaintiff American Center for Law and Justice (“ACLJ”), by and through counsel, brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, challenging the failure of Defendant, the United States Department of State (“DOS”), to respond to Plaintiff’s FOIA request within the statutorily prescribed time period, and seeking the disclosure and release of agency records improperly withheld by Defendant. In support thereof, Plaintiff alleges and states as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA, and Plaintiff has exhausted its administrative remedies.

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

3. This Court has authority to award injunctive relief pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

4. This Court has authority to award declaratory relief pursuant to 28 U.S.C. § 2201.

PARTIES

5. Plaintiff, with offices at 201 Maryland Avenue, N.E., Washington, DC 20002, is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. Plaintiff's mission is to educate, promulgate, conciliate, and where necessary, litigate, to ensure that those rights are protected under the law. Plaintiff also regularly monitors governmental activity with respect to governmental accountability. Plaintiff seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. In furtherance of its dedication to the rule of law and public interest mission, Plaintiff regularly requests access to the public records of federal, state, and local government agencies, entities, and offices, and disseminates its findings to the public.

6. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 2201 C Street, N.W., Washington, DC 20520. Defendant is in control and possession of the records sought by Plaintiff.

FACTUAL ALLEGATIONS

7. On July 25, 2016, Plaintiff issued Defendant a FOIA request and summarized its request as follows: "the numbered requests contained herein seek any and all records pertaining in any way to the grant funds awarded by the U.S. Department of State (DOS) to OneVoice Israel and OneVoice Palestine, where said organizations campaigned to "take [Netanyahu] down" in the

2015 Israeli elections, seeking the election of “anybody but Bibi.” Pl.’s FOIA Request, Ex. A, at 1. Plaintiff’s FOIA Request is hereby incorporated as if fully set forth herein.

8. “Pursuant to State Department FOIA regulation 22 C.F.R. § 171.4(b),” Plaintiff set forth a “Background address[ing] ‘the subject, timeframe, names of any individuals involved, a contract number (if applicable), and reasons why the requester believes the Department may have records on the subject of the request.’” Pl.’s FOIA Request Ex. A, 1-2 (quoting 22 C.F.R. § 171.4(b)). Said Background is hereby incorporated as if fully set forth herein.

9. Plaintiff identified, in its FOIA request, the specific records it seeks. Pl.’s Ex. A, at 5-9.

10. In its FOIA request, Plaintiff specified that the term “record” includes “any information” that qualifies under 5 U.S.C. § 552(f), and provided a non-exhaustive list of types of information to be included in the terms “record.” *See* Pl.’s Ex. A, at 7.

11. Plaintiff further specified in its FOIA request the applicable definitions of the terms “briefing,” and “DOS official.” *See* Pl.’s Ex. A, at 8.

12. Plaintiff specified in its FOIA request that the timeframe of records requested “herein is January 1, 2013 to the date this Request is processed.” Pl.’s Ex. A, 8.

13. In its FOIA request, Plaintiff requested that the Defendant support all denials by reference to specific FOIA exemptions and provide any judicially required explanatory information, including but not limited to, a Vaughn Index. Pl.’s Ex. A, at 14.

14. In its FOIA request, Plaintiff asserted its entitlement to expedited processing and a waiver of all associated fees, as explained in a memorandum accompanying each request and referenced therein, and reserved its right to appeal any agency withholding of records and/or any

agency denial of Plaintiff's requests for expedited processing and a waiver of fees. Pl.'s Ex. A, at 14.

15. By letter dated July 28, 2016, attached hereto as Exhibit B and incorporated by reference as if fully set forth herein, Defendant acknowledged receipt of Plaintiff's FOIA request on July 26, 2016. Def.'s Acknowledgement Letter Ex. B, 1. Defendant advised it had assigned Case Control Number F-2016-09051. *Id.* at 1.

16. Defendant's July 28, 2016 also stated that Defendant "will begin the processing of your request based upon the information provided in your communication." Pl.'s Ex. B, 1. It did *not* include a date on which the Defendant would provide an actual response to the request. *Id.*

17. In this same letter, Defendant denied Plaintiff's request for expedited processing, and granted Plaintiff's request for a fee waiver. Pl.'s Ex. B, 1.

18. Following Defendant's letter of July 28, 2016, and prior to the filing of Plaintiff's lawsuit, Plaintiff never received any further communication from Defendant about its FOIA request.

19. Defendant did not notify Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request, or anytime thereafter of Defendant's determination and the reasons therefor.

20. Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request, or anytime thereafter, of the scope of the documents Defendant had determined it would produce.

21. Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request, or anytime thereafter, of the scope of the documents Defendant had determined it would withhold under any FOIA exemptions.

22. Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sunday, and legal public holidays) of receipt of Plaintiff's request, or anytime thereafter, of Plaintiff's right to seek assistance from Defendant's FOIA public liaison.

23. Defendant did not inform Plaintiff of any unusual circumstances requiring an extension of the 20-day time period referenced in the four preceding paragraphs.

24. On December 26, 2016, and only after receiving no further response whatsoever from Defendant for almost five months, Plaintiff filed the instant suit.

25. This is not the first instance in which Plaintiff issued a FOIA request to this Defendant and, aside from acknowledgment of receipt of and assignment of a control number to Plaintiff's FOIA request, received no further response from Defendant until after Plaintiff filed a lawsuit.

26. On or about May 13, 2016, Plaintiff issued a FOIA request seeking records from Defendant regarding a video of a daily press briefing that took place December 2, 2013. Just as in the current lawsuit, Defendant acknowledged receipt of Plaintiff's FOIA requests and assigned a case control number on May 18, 2016, but never provided any further response to Plaintiff's FOIA request until after Plaintiff filed suit. *See* Complaint, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1355 (D.D.C. June 28, 2016), ECF No. 1.

27. After Plaintiff filed suit in Civil Action No. 1:16-cv-1355, and almost immediately after the Court's entry of a minute order, Defendant notified Plaintiff and the Court that it had begun reviewing potentially responsive documents and estimated that all responsive documents could be produced by December 6, 2016. *See* Minute Entry, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1355 (D.D.C. Sep. 12, 2016); Joint Status Report, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1355 (D.D.C. Sep. 27, 2016), ECF No. 18.

28. On July 18, 2016, Plaintiff issued another FOIA request to Defendant regarding its actions to address or otherwise oppose the genocide committed by ISIS in Iraq and Syria. Just as in the current lawsuit, Defendant, while acknowledging receipt of Plaintiff's FOIA request on August 4, 2016, and assigning a case control number, never provided any further response to Plaintiff's FOIA request until after Plaintiff filed suit. *See Complaint, American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1751 (CKK) (D.D.C. Aug. 30, 2016), ECF No. 1; Answer ¶¶ 35-36, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1751 (CKK) (D.D.C. Sep. 30, 2016), ECF No. 17 (admitting Defendant did not issue a determination responsive to Plaintiff's FOIA request).

29. After the filing of Plaintiff's suit in Civil Action No. 1:16-cv-1751 and entry of an order by the Court on October 3, 2016 requiring the parties to meet and confer, Defendant agreed to begin producing documents on a rolling monthly basis, with the first production of responsive documents occurring on December 28, 2016. Joint Status Report, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1751 (CKK) (D.D.C. Oct. 31, 2016), ECF No. 18.

30. On August 15, 2016, Plaintiff issued a FOIA request to Defendant requesting documents and records pertaining to certain emails obtained by Judicial Watch as part of a public records lawsuit. Just as in the current lawsuit, Defendant simply acknowledged receipt of Plaintiff's FOIA request and assigned a case control number by letter dated August 18, 2016. Defendant never responded to Plaintiff's FOIA request with a determination, a request for an extension and/or never produced any responsive records until after Plaintiff filed suit. *See Complaint, American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1975 (D.D.C. Oct. 5, 2016), ECF No. 1.

31. After Plaintiff filed suit, and the Court entered an Order requiring the parties to

file a joint scheduling order no later than January 7, 2017 addressing, among other things (1) the anticipated number of documents responsive to Plaintiff's FOIA request, and (2) the anticipated date(s) for release of documents, Defendant, remarkably, agreed to make its first production of responsive documents on January 19, 2017, and to provide monthly, rolling productions thereafter. *See* Standing FOIA Order, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1975 (D.D.C. December 7, 2016); Joint Status Report, *American Center for Law & Justice v. Dep't of State*, No. 1:16-cv-1975 (D.D.C. January 06, 2016), ECF No. 14.

32. In addition to the FOIA requests detailed above, which are currently the subject of pending lawsuits, Plaintiff has issued two (2) other FOIA requests to Defendant – both of which have gone unanswered by Defendant.

33. On January 4, 2017, Plaintiff issued a FOIA request to Defendant requesting certain records regarding United Nations Security Council Resolution 2334. Just as in the present case, Defendant acknowledged receipt of Plaintiff's request and assigned a case control number by letter dated January 6, 2017. As of the date of this Amended Complaint, Defendant has failed to provide any further response to Plaintiff's request.

34. As to Plaintiff's January 4, 2017 request, Defendant did not notify Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of Defendant's determination and the reasons therefor.

35. As to Plaintiff's January 4, 2017 request, Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of the scope of the documents Defendant had determined it would produce.

36. As to Plaintiff's January 4, 2017 request, Defendant did not inform Plaintiff,

within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of the scope of the documents Defendant had determined it would withhold under any FOIA exemptions.

37. As to Plaintiff's January 4, 2017 request, Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sunday, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of Plaintiff's right to seek assistance from Defendant's FOIA public liaison.

38. As to Plaintiff's January 4, 2017 request, Defendant did not inform Plaintiff of any unusual circumstances requiring an extension of the 20-day time period referenced in the four preceding paragraphs.

39. On December 19, 2016, Plaintiff issued a FOIA request to Defendant requesting certain records regarding the decision to accept a number of refugee applicants from Australia. As of the date of this Amended Complaint, Defendant has failed to respond to Plaintiff's request in a timely and lawful manner under FOIA.

40. As to Plaintiff's December 19, 2016 request, Defendant did not notify Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of Defendant's determination and the reasons therefor.

41. As to Plaintiff's December 19, 2016 request, Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of the scope of the documents Defendant had determined it would produce.

42. As to Plaintiff's December 19, 2016 request, Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sundays, and legal public holidays) of receipt of Plaintiff's

Request (or at any time thereafter), of the scope of the documents Defendant had determined it would withhold under any FOIA exemptions.

43. As to Plaintiff's December 19, 2016 request, Defendant did not inform Plaintiff, within 20 days (excepting Saturdays, Sunday, and legal public holidays) of receipt of Plaintiff's request (or at any time thereafter), of Plaintiff's right to seek assistance from Defendant's FOIA public liaison.

44. As to Plaintiff's December 19, 2016 request, Defendant did not inform Plaintiff of any unusual circumstances requiring an extension of the 20-day time period referenced in the four preceding paragraphs.

45. Defendant has a well-known public reputation for failing to timely respond to FOIA requests.

46. Multiple federal agencies have issued public reports regarding Defendant's systemic failure to respond to FOIA requests as required by the statute, noting that Defendant has not only refused to take steps to correct this systemic problem, but has actually taken affirmative steps that have exacerbated the issue.

47. The United States Department of Justice recently published a document entitled U.S. DEP'T OF JUSTICE, SUMMARY OF AGENCY CHIEF FOIA OFFICER REPORTS FOR 2016 AND ASSESSMENT OF AGENCY PROGRESS IN IMPLEMENTING THE PRESIDENT'S FOIA MEMORANDUM AND DEPARTMENT OF JUSTICE FOIA GUIDELINES, in which the Department found that Defendant took 111 days on average to respond to FOIA requests in 2014, far longer than any other agency and the time specified by statute, and that only 10 percent of Defendant's FOIA officers took required training, the worst attendance record of any major agency.

48. In January 2016, the Office of Inspector General (OIG) issued a report entitled

EVALUATION OF THE DEPARTMENT OF STATE'S FOIA PROCESSES FOR REQUESTS INVOLVING THE OFFICE OF THE SECRETARY ("2016 OIG Report"), in which OIG referenced a prior OIG Report from 2012 identifying numerous deficiencies within the State Department in responding to FOIA requests in a timely and lawful manner, including understaffing of employees assigned to processing FOIA requests, inconsistent monitoring and oversight by management, insufficient training of FOIA staff/employees, and inaccurate and incomplete searches.

49. In the 2016 OIG Report, which followed a re-evaluation of Defendant's FOIA processes, OIG found, once again (four years after Defendant was first put on notice of these deficiencies) that Defendant's current FOIA processes remain woefully inadequate.

50. Specifically, the 2016 OIG Report found that "searches performed by S/ES [Office of the Secretary's Executive Secretariat] do not consistently meet statutory and regulatory requirements for completeness and rarely meet requirements for timeliness."

51. The 2016 OIG Report found that Defendant had failed to comply with many of OIG's recommendations from 2012. For example, in 2012, the OIG noted the small number of staff devoted to processing Department-wide FOIA requests. In 2016, despite these findings and a continuing increase in FOIA requests, the OIG found that "the Department has allocated fewer employees to handle them."

52. The 2016 OIG Report further noted that little progress has been made by Defendant to date to resolve the personnel shortage and, although the Office of Information Programs and Services (IPS) has attempted to address the personnel issue in each of the past 3 years by requesting additional personnel, the Defendant has ignored these requests and "has not provided any additional permanent personnel."

53. The 2016 OIG Report also found that the Defendant still lacks a "sound process to

develop its information systems,” and despite other agencies’ recommendations to have written policies and procedures for searching for FOIA requests, the Defendant has failed to develop any such policies, procedures or criteria for conducting proper FOIA searches.

54. The 2016 OIG Report also noted that the Department’s “rules do not require staff to notify requesters when processing [of a FOIA request] is delayed, even though this is mandated by law.”

55. The 2016 OIG Report stated that the Defendant has not sent out a notice or memorandum reminding employees of their FOIA responsibilities since March 2009.

56. In November 2015, and as noted in the 2016 OIG Report, Defendant was instructed by OIG to “identify necessary permanent personnel as part of FOIA workforce planning efforts and quickly acquire those resources so the Department can comply with applicable law and improve the timeliness of FOIA searches and responses”; however, there is no indication that Defendant complied with this instruction.

57. In direct defiance of OIG’s recommendations, Defendant has actually reduced its FOIA staff, despite a predictable and steady increase in FOIA requests in recent years and has failed to provide its staff with proper guidelines and training.

58. Upon information and belief, Defendant – while communicating to the OIG that its fiscal year 2017 budget would include funding for two additional permanent positions for FOIA – has not increased its FOIA staff this year.

59. Upon information and belief, Defendant’s refusals to respond properly to Plaintiff’s FOIA requests, as detailed herein, are pursuant to an intentional practice/policy, whether formal or informal, and Defendant has had no intention of responding with anything other than a letter of acknowledgment or receipt unless and until Plaintiff files a lawsuit to

compel such response.

61. Defendant's practice of not properly searching for responsive documents, not providing proper notifications to FOIA requesters, and delaying FOIA responses for exorbitantly long periods has been applied to each FOIA request Plaintiff has submitted to Defendant, including the request that is the subject of this litigation.

62. Upon information and belief, Defendant has no intention of complying with its FOIA obligations unless compelled to do so by a federal court (*i.e.*, unless a requester files a lawsuit).

CAUSES OF ACTION

COUNT I

Violation of the Freedom of Information Act

63. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 62 of this Complaint as if fully stated herein.

64. The federal FOIA establishes a 20-day deadline by which a federal agency must make and issue a decision regarding compliance with a request for records made pursuant to the statute. 5 U.S.C. § 552(a)(6)(A)(i).

65. Pursuant to 5 U.S.C. § 552(a)(6)(A), Defendant was required to determine whether to comply to Plaintiff's request within twenty (20) days, excepting Saturdays, Sundays, and legal public holidays. Pursuant to this same provision, Defendant also was required to notify Plaintiff immediately of the determination, the reasons therefore, and the right to appeal any adverse determination to the head of the agency.

66. Plaintiff sent its FOIA request to Defendant's Office of Information Programs and Services, the component of Defendant designated by Defendant to receive FOIA requests directed to Defendant, and Plaintiff's FOIA request was received by that component on July 26, 2016.

67. Pursuant to 5 U.S.C. § 552(a)(6)(A), the 20-day period commenced on July 27, 2016. Excluding weekends, Defendant was required to make its determination and provide Plaintiff with the requisite notifications by August 26, 2016.

68. As of the date of filing of Plaintiff's initial Complaint, Defendant failed to notify Plaintiff of any determination about whether Defendant will comply with Plaintiff's FOIA request, the reasons for any such determination, Plaintiff's right to seek assistance from Defendant's FOIA public liaison, or Plaintiff's right to appeal any adverse determination to the head of the agency.

69. As of the date of filing of Plaintiff's initial Complaint, Defendant failed to produce any records responsive to Plaintiff's request, indicate when any responsive records will be produced, or demonstrate that responsive records are exempt from production.

70. Defendant requested no information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I).

71. FOIA permits a federal agency, in unusual circumstances, to extend the 20-day response deadline for a period not to exceed ten (10) additional working days. 5 U.S.C. § 552(a)(6)(B).

72. Defendant did not, either in its letter of July 28, 2016, or at any other time during the applicable 20-day time period, assert the existence of "unusual circumstances." Def.'s Acknowledgement Letter Ex. B. As such, Defendant has not implicated the tolling provision set forth in 5 U.S.C. § 552(a)(6)(B)(i).

73. There are no “unusual circumstances” that justify State Department’s prolonged delay in responding to Plaintiff’s lawful FOIA request.

74. Plaintiff has a statutory right to have Defendant State Department process its FOIA request in a timely manner and in accordance with the requirements set forth in 5 U.S.C. § 552(a)(6).

75. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

76. FOIA provides a cause of action for a complainant from whom a federal agency has improperly withheld requested records. 5 U.S.C. § 552(a)(4)(B).

77. Through its continued delay in responding to ACLJ’s lawful request for records, and its improper withholding of such requested records, Defendant has failed to comply with FOIA’s prescribed deadlines for responding to a request for records and has violated ACLJ’s statutory rights.

78. Pursuant to 5 U.S.C. § 552(a)(6)(C), because Defendant failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its FOIA request.

79. Plaintiff is being irreparably harmed by reason of Defendant’s unlawful withholding of requested records, and ACLJ will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

COUNT II

Impermissible Practice, Pattern and Practice, and/or Policy of Violating The Freedom of Information Act

80. Plaintiff re-alleges and incorporates by reference paragraphs 1 through 79 of

this Complaint as if fully stated herein.

81. Defendant has adopted and is engaged in a policy and practice of violating FOIA's procedural requirements when processing FOIA requests by intentionally refusing to issue a determination, produce documents and/or respond in any manner required under 5 U.S.C. § 552(a)(6) unless and until Plaintiff files suit.

82. Defendant's repeated unreasonable delays and intentional refusals to issue a determination and/or produce non-exempt documents, even when expedited processing is granted, violates the intent and purpose of the FOIA.

83. Defendant's repeated and intentional actions have resulted, and will continue to result, in the untimely access to information to which Plaintiff is entitled, and the production of stale information that is of little value and, yet, more costly than fresh information ought to be. *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988).

84. Defendant's repeated failures to abide by the terms of FOIA are not attributable to an unpredictable influx in FOIA requests or other reasonable delay.

85. Defendant has demonstrated, through relatively expedient productions of documents once Plaintiff files suit, that it can respond to Plaintiff's FOIA request, but that it will do so only after a lawsuit is filed and, thus, for Plaintiff, suing is more expedient than waiting.

86. Defendant's conduct in failing to respond to Plaintiff's six (6) FOIA requests in a manner required by the FOIA – regardless of the time allotted for Defendant to respond which, in Plaintiffs' case, ranges from one month to five months – demonstrates that no time would be sufficient for Defendant to comply with FOIA, and that, unless and until Plaintiff files suit, Defendant will not respond appropriately to Plaintiff's FOIA requests.

87. Despite Defendant receiving notice and instruction by the OIG as early as 2012

as to the woeful deficiencies in its FOIA processing and responses, Defendant has refused to comply with OIG's recommendations to increase FOIA staff; update guidelines, job descriptions and work commitments to reflect FOIA responsibilities; and ensure proper oversight of the FOIA process.

88. Defendant's failure to respond in a manner required under FOIA until after Plaintiff filed this suit was not a mistake or isolated incident. The non-compliant letter Defendant sent to Plaintiff in response to Plaintiff's FOIA request is the same as (or substantially similar to) letters sent to Plaintiff on *multiple* other occasions. All such letters, while acknowledging receipt of Plaintiff's FOIA request and assigning a control case number, are devoid of a timeframe for processing of Plaintiff's FOIA request, a determination, or any request for extension of time.

89. As demonstrated by Defendant on at least five (5) occasions, Defendant's issuance of these non-compliant letters serves no other purpose than for Defendant to maintain the appearance of compliance and mislead Plaintiff to believe that its FOIA requests are being processed.

90. In this case, just as in the *three* other FOIA cases Plaintiff has filed against this Defendant, Plaintiff's FOIA request went unanswered and Defendant refused to respond in any manner required by FOIA within the deadline(s) mandated by FOIA or anytime thereafter. Only after Plaintiff filed suit in each case did Defendant agree to produce responsive, non-exempt documents.

91. Defendant's impermissible practice, policy, and pattern of refusing to issue a determination and/or produce responsive documents unless and until Plaintiff files suit, warrants declaratory and injunctive relief under *Payne Enterprises, Inc. v. United States*, 837

F.2d 486, 494 (D.C. Cir. 1988); *see Muttitt v. United States Cent. Command*, 813 F. Supp. 2d 221, 229-31 (D.D.C. 2011).

92. Defendant's pattern or practice of unlawful conduct in violation of the FOIA's clear requirements unless and until this Plaintiff files a lawsuit is likely to recur absent intervention by this Court.

93. Defendant's policy or practice has impaired, and will continue to impair Plaintiff ACLJ's lawful access to information in the future.

94. Defendant's policy or practice exists, whether formal or informal in nature.

95. The FOIA imposes no limits on courts' equitable powers in enforcing its terms, and this Court should exercise its equitable powers to compel Defendant to comply with the clear requirements of the FOIA and prevent it from continuing to apply its unlawful FOIA practice/policy.

PRAYER FOR RELIEF

96. WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant, and provide Plaintiff with the following relief:

- (a) An Order that Defendant shall conduct a diligent search for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed reasonable search methods most technologically likely to lead to the discovery of records responsive to Plaintiff's FOIA request, selected from among those methods available to Defendant;
- (b) An Order enjoining Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
- (c) An Order that Defendant produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records, or portions thereof, withheld under claim of exemption;
- (d) A Declaration that Defendant's actions violated Plaintiff's statutory rights under 5 U.S.C. § 552;

- (e) Relief pursuant to this Court's equitable powers, as recognized in *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 D.C. Cir. 1988) (citing *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 19-20 (1974)), including a Declaration that Defendant has implemented an impermissible practice/policy of untimely and noncompliant responses to FOIA requests and an Order enjoining Defendant from continuing to implement that practice/policy;
- (f) An Order awarding to Plaintiff its reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and,
- (g) An Order granting to Plaintiff all further relief to which Plaintiff may be entitled.

Dated: April 24, 2017

Respectfully submitted,

THE AMERICAN CENTER FOR LAW AND JUSTICE

JAY ALAN SEKULOW

[REDACTED]
STUART J. ROTH [REDACTED]

COLBY M. MAY [REDACTED]

CRAIG L. PARSHALL*

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