

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SKYLIGHT ENGAGEMENT, INC. and
AMERICAN IMMIGRATION COUNCIL,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HOMELAND SECURITY

and

UNITED STATES CUSTOMS AND BORDER
PROTECTION

Defendants.

Case No. 21 Civ. 00922

COMPLAINT

Introduction

1. This action seeks to compel the United States Customs and Border Protection (“CBP”), a component of the United States Department of Homeland Security (“DHS”), to disclose records that Plaintiffs Skylight Engagement, Inc. (“Skylight”) and American Immigration Council (“Immigration Council”) (Skylight and Immigration Council, collectively, the “Plaintiffs”) requested under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, regarding the actions of CBP personnel at and around a humanitarian aid station near Arivaca, Arizona between June 13-15, 2017, July 30-31, 2020, and October 3-5, 2020.

2. For approximately 17 years, No More Deaths/No Más Muertes has been carrying out its mission of supplying medical care, food, and water to migrants who have crossed the

border but have succumbed to the dangerously hot and dry climate in the area. Among other things, No More Deaths operates an aid station near Arivaca, Arizona, approximately 11 miles from the border (the “Aid Station”).

3. CBP is the largest law enforcement agency in the United States; its United States Border Patrol (“USBP”) division alone employed nearly 20,000 agents in fiscal year 2020. Despite numerous reports of abuse and misconduct by USBP agents over the years, CBP rarely has been held accountable for the misconduct of its agents and has often tried to shield wrongdoing from public scrutiny.

4. Plaintiffs are seeking records and other information regarding three hyper-aggressive raids on the Aid Station undertaken by members of the U.S. Border Patrol, including its specialized border patrol units such as the Border Patrol Tactical Unit (“BORTAC”); the Border Patrol, Search, Trauma, and Rescue Unit (“BORSTAR”); and Special Response teams (collectively, “CBP Personnel”).

5. CBP Personnel conducted the first raid on June 15, 2017, the second raid on July 31, 2020, and the third raid on October 5, 2020.

6. Many of the actions taken by CBP Personnel during these raids, including encounters, interrogations, temporary detentions, and/or arrests, were documented by CBP. The manner in which CBP conducted these raids as they executed government policy is plainly a matter of public concern. And it is of particular concern to the American Immigration Council, which is dedicated to working toward a more fair and just immigration system, and to Skylight, a human rights media organization that produces narratives about social justice issues in order to educate the public. Accordingly, Plaintiffs seek declaratory, injunctive, and other appropriate relief to remedy Defendants’ unlawful withholding of these documents.

Jurisdiction and Venue

7. This Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

8. Venue properly rests with this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1)(C) because Plaintiff Skylight Engagement's principal place of business is located in this District at 147 Prince Street, Brooklyn, New York.

9. This case is ripe for judicial determination under 5 U.S.C. § 552(a)(6)(C)(i) because Defendants failed to respond to the FOIA Request within the time required by law.

The Parties

10. Plaintiffs—Skylight and the Immigration Council—are tax-exempt, not-for-profit educational and charitable organizations under Internal Revenue Code § 501(c)(3).

11. Skylight is a not-for-profit human rights media organization. Its mission is to combine cinematic arts with the quest for justice to inspire the defense of democracy. Skylight's work has focused on creating feature-length documentary films to educate, inform, and entertain, as well as a range of digital media projects and laboratories to create a media ecosystem that strengthens a culture of rights and engaged citizenship worldwide.

12. The Immigration Council is a not-for-profit organization established to increase public understanding of immigration law and policy. The Immigration Council advocates for the fair and just administration of U.S. immigration laws, protects the legal rights of noncitizens and citizens, and educates the public about the enduring contributions of immigrants. Through the pursuit of transparency and impact litigation, the Immigration Council seeks to hold the government accountable for unlawful conduct, restrictive interpretations of the law, and for failing to ensure that the immigration laws are implemented and executed in a manner that

comports with due process.

13. Defendant DHS is a department of the executive branch of the United States government and is an agency within the meaning of 5 U.S.C. § 552(f).

14. DHS is responsible for enforcing federal immigration laws.

15. Upon information and belief, DHS has possession and control over the records sought by the Plaintiffs in the FOIA Request.

16. Defendant CBP is a branch of DHS and is likewise an agency within the meaning of 5 U.S.C. § 552(f).

17. Among other duties, CBP is responsible for enforcing immigration laws at the borders and other ports of entry to the United States.

18. CBP inspects individuals seeking entry into the United States, including U.S. citizens, lawful permanent residents, nonimmigrants, and asylum seekers.

19. Upon information and belief, CBP has possession of and control over records requested by Plaintiffs.

The FOIA Request

20. On October 14, 2020, Plaintiffs submitted detailed requests under the Freedom of Information Act regarding three raids (the “FOIA Request”). The FOIA Request is attached as Exhibit A and incorporated herein by reference.

21. With respect to the raid conducted by CBP Personnel on June 15, 2017, Plaintiffs sought the following information:

1. Video footage, still photographs, or other media that CBP recorded, prepared, transmitted, and/or collected that document CBP personnel presence and actions at and around the [Aid Station] on June 15, 2017. . . . includ[ing] official or unofficial content on cell phones and/or recorded by drones; and

2. Communications and/or correspondence—including emails, email attachments, cell phone texts, and images—received or sent by any CBP personnel, regarding the deployment of CBP personnel—including BORTAC—to the [Aid Station] on June 15, 2017. . . includ[ing] records relating to search warrants.” *See* Exhibit A (FOIA Request) at 1-2.

22. With respect to the raid conducted by CBP Personnel on July 31, 2020, Plaintiffs sought:

1. Video footage, still photographs, or other media that CBP recorded, prepared, transmitted, and/or collected that document CBP personnel presence and actions at and around the [Aid Station] on July 31, 2020. . . . includ[ing] official or unofficial content on cell phones and/or recorded by drones; and
2. Communications and/or correspondence—including emails, email attachments, cell phone texts, and images—received or sent by any CBP personnel, regarding the deployment of CBP personnel—including BORTAC—to the [Aid Station] on July 31, 2020. . . includ[ing] records relating to search warrants. *Id.* at 2.

23. With respect to the raid conducted by CBP Personnel on October 5, 2020, Plaintiffs sought:

1. Video footage, still photographs, or other media that CBP recorded, prepared, transmitted, and/or collected that document CBP personnel presence and actions at and around the [Aid Station] on October 5, 2020. . . includ[ing] official or unofficial content on cell phones and/or recorded by drones; and
2. Communications and/or correspondence—including emails, email attachments, cell phone texts, and images—received or sent by any CBP personnel, regarding the deployment of CBP personnel—including BORTAC—to the [Aid Station] on October 5, 2020. . . includ[ing] records relating to search warrants. *Id.* at 2-3.

24. There is no question that CBP and DHS possess relevant data and documents regarding all three raids. The FOIA Request cited numerous news reports and other evidence regarding the fact that CBP personnel documented on video and other media some of their activities in raiding the Aid Station on all three occasions. *See id.* at 2 n. 4 (CBP video-recorded portions of the June 15, 2017 raid); *id.* at n. 6 (CBP video-recorded portions of the July 31, 2020

raid); *id.* at n. 7 (senior CBP officer made social media posts regarding July 31, 2020 raid); *id.* at 3, n. 8 (senior CBP officer made social media posts regarding the October 5, 2020 raid).

CBP's Failure to Respond as Required

25. On October 19, 2020, CBP sent the Immigration Council a letter acknowledging receipt of the FOIA Request. (A copy of CBP's letter is attached as Exhibit B.)

26. The letter acknowledged that the FOIA Request "has been received by CBP and will be processed in the order it was received." It further noted that though CBP would strive to respond to the FOIA Request within 20 days as required by statute, it suggested it might seek to avail itself of a 10-day extension permitted under 6 C.F.R. Part 5 § 5.5(c). Finally, CBP's letter stated that its "FOIA Division is working hard to reduce the amount of time necessary to respond to FOIA requests. Currently, the average time to process a FOIA request related to 'travel/border incidents' is a minimum of 3-6 months. We truly appreciate your continued patience."

27. On October 26, 2020, CBP sent an electronic message to the Immigration Council noting that Plaintiffs' application for a waiver of fees in connection with the FOIA Request had been granted in full. (That communication is attached as Exhibit C.)

28. On October 26, 2020, Miranda D. Oyler sent a message through CBP's "FOIA Online" system requesting a direct contact number for the requestors (*i.e.*, the Plaintiffs). The Immigration Council responded via email with the requested information. On October 27, 2020, the Immigration Council received a "bounce back" email message and proceeded to send a message to CBP through the FOIA Online system providing the requested phone number and indicating that the attempt to make email contact had failed. Plaintiffs also called CBP twice to request an update about compliance with the FOIA Request. Plaintiffs left messages both times

but did not receive a response from the agency. *See* Exhibit C at 2-3.

29. Plaintiffs have not received any communication or other response to the FOIA Request since October 26, 2020.

30. As noted above, this action is ripe for adjudication because CBP's mere acknowledgement of receipt of a FOIA request is not a "determination" under FOIA that would require Plaintiffs to exhaust their administrative remedies. *See Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180 (D.C. Cir. 2013) (Kavanaugh, J.).

FIRST CAUSE OF ACTION

Violation of Freedom of Information Act for Failure to Respond within the Time Required

31. Plaintiffs hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

32. Within 20 days (excluding Saturdays, Sundays, and legal public holidays) after receiving the FOIA Request, CBP was required under 5 U.S.C. § 552(a)(6)(A)(i) to determine whether to comply with the request and to notify the Plaintiffs of its determination and the reasons therefor and of their rights to appeal any adverse determination administratively.

33. None of the communications that the Plaintiffs received from CBP in October 2020 contained the notification required by 5 U.S.C. § 552(a)(6)(A)(i).

34. CBP has not subsequently provided the requisite determination to Plaintiffs as required by 5 U.S.C. § 552(a)(6)(A)(i).

35. Defendants' failure to respond within the statutory time limit violated 5 U.S.C. § 552(a)(6)(A), as well as the regulations promulgated thereunder.

SECOND CAUSE OF ACTION

Violation of Freedom of Information Act for Failure to Conduct a Reasonable Search and to Disclose Responsive Records

36. Plaintiffs hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

37. Defendants were required under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to the FOIA Request, and promptly to produce them to Plaintiffs, including in the format specified in the FOIA Request if the records are readily reproducible in that format.

38. CBP has not conducted a reasonable search for records responsive to the FOIA Request.

39. CBP has not produced any records responsive to the FOIA Request.

40. CBP has not produced any responsive records in the format requested by Plaintiffs.

41. Plaintiffs have a legal right to obtain the records requested in the FOIA Request, and no legal basis exists for Defendants' failure to search for and disclose them.

42. Defendants' failure to conduct a reasonable search for and to produce records responsive to Plaintiffs' request violates 5 U.S.C. § 552(a)(3), as well as the regulations promulgated thereunder.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against Defendants, and that the Court:

(a) Declare that Defendants' failure to respond to the FOIA Request within the statutory time limit, their failure to search for records responsive to the Plaintiffs' request, and

their failure to disclose such responsive records violate FOIA;

(b) Order Defendants and any of Defendants' departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of Defendants to conduct a prompt, reasonable search for records responsive to the FOIA Request;

(c) Enjoin Defendants and any of Defendants' departments, components, other organizational structures, agents, or other persons acting by, through, for, or on behalf of either Defendant from withholding records responsive to the FOIA Request and order Defendants promptly to produce the same;

(d) Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and

(e) Grant all other such relief to the Plaintiffs as the Court deems just and equitable.

Dated: February 19, 2021

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