

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, AMERICAN CIVIL LIBERTIES UNION OF VERMONT, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, AMERICAN CIVIL LIBERTIES UNION OF CONNECTICUT, and AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND,

Case No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR VIOLATION OF THE FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552 et seq.

Plaintiffs,

v.

U.S. CUSTOMS AND BORDER PROTECTION and U.S. DEPARTMENT OF HOMELAND SECURITY

Defendants.

INTRODUCTION

1. The American Civil Liberties Union of Maine, American Civil Liberties Union of New Hampshire, American Civil Liberties Union of Vermont, American Civil Liberties Union of Massachusetts, American Civil Liberties Union of Connecticut, and American Civil Liberties Union of Rhode Island (collectively, “Plaintiffs” or “ACLU”) bring this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended, to obtain injunctive and other appropriate relief requiring Defendants U.S. Department of Homeland Security (“DHS”) and U.S. Customs and Border Protection (“CBP”) (collectively, “Defendants”) to respond to a FOIA request sent by Plaintiffs on February 2, 2017 (“Request”), and to promptly disclose the requested records.

2. The Request seeks records concerning CBP’s local implementation of President Trump’s January 27, 2017 Executive Order titled “Protecting the Nation From Foreign Terrorist Entry Into the United States,” Exec. Order No. 13769, 82 Fed. Reg. 8977 (Feb. 1, 2017) (“Executive Order No. 1”), as well as any other judicial order or executive directive issued regarding Executive Order No.1, including President Trump’s March 6, 2017 Executive Order,

identically titled, Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (“Executive Order No. 2”) (collectively, “Executive Orders”). A true and correct copy of the Request is attached as **Exhibit A**.

3. Specifically, the Request seeks records concerning CBP’s local implementation of the Executive Orders at sites within the purview of CBP’s Boston Field Office. These include Bradley International Airport, Bangor International Airport, Logan International Airport, Manchester International Airport, TF Green Airport, and Burlington International Airport (“Local International Airports) and the Hartford, Bangor, Boston, Manchester, Providence, and Burlington ports of entry (“Port of Entry Offices”).

4. Among other things, the Executive Orders purport to halt refugee admissions and bar entrants from several predominantly Muslim countries from entering the United States.

5. Defendants’ implementation of the Executive Orders has been the subject of significant public concern, as reflected by mass protests around the country, substantial news coverage, and numerous lawsuits filed following the President’s signing of each Executive Order.

6. Over the weekend of January 27–29, 2017, at least five lawsuits resulted in emergency court orders enjoining implementation of various sections of Executive Order No. 1.¹ On March 15, 2017, a district court enjoined implementation of Sections 2 and 6 of Executive Order No. 2.²

7. News reports described Defendants’ implementation of the Executive Orders as “chaotic” and “total[ly] lack[ing] . . . clarity and direction.”³

¹ *Vayeghan v. Kelly*, No. CV 17-0702, 2017 WL 396531 (C.D. Cal. Jan. 29, 2017); *Tootkaboni v. Trump*, No. 17-CV-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Doe v. Trump*, No. C17-126, 2017 WL 388532 (W.D. Wash. Jan. 28, 2017); *Aziz v. Trump*, No. 1:17-CV-116, 2017 WL 386549 (E.D. Va. Jan. 28, 2017); *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017).

² *Hawai’i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017).

³ See, e.g., Ryan Devereaux *et al.*, *Homeland Security Inspector General Opens Investigation of Muslim Ban, Orders Document Preservation*, THE INTERCEPT, Feb. 1, 2017, available at <https://theintercept.com/2017/02/01/homeland-security-inspector-general-opens-investigation-of-muslim-ban-rollout-orders-document-preservation/>.

8. Official DHS statements reflected this confusion. For example, DHS stated on January 28 that Executive Order No. 1 would “bar green card holders.”⁴ The next day, however, DHS Secretary John Kelly deemed “the entry of lawful permanent residents to be in the national interest”⁵ and the government purported to clarify that Executive Order No. 1 did *not* apply to green card holders.⁶

9. Reportedly spurred by this chaos, on January 29, Senators Tammy Duckworth and Dick Durbin called upon the Office of the Inspector General of the Department of Homeland Security to investigate Defendants’ implementation of Executive Order No. 1.⁷ The Senators specifically sought information regarding: any guidance Defendants provided to the White House in developing the order; any directions that were provided to Defendants in implementing it; whether CBP officers complied with the relevant court orders; and whether DHS and CBP officers kept a list of individuals that they had detained at ports of entry under the order. In response, the Inspector General directed Defendants’ personnel to preserve all records “that might reasonably lead to the discovery of relevant information relating the implementation of” Executive Order No. 1.⁸

10. At Boston’s Logan International Airport, implementation of the order harmed both individuals and institutions. Scholars and academics from Boston-area institutions were denied entry into the United States.⁹ Doctors from New England hospitals and patients seeking medical care were delayed, denied entry, or subjected to unnecessary anguish.¹⁰

⁴ See Max Greenwood, *Immigration Ban Includes Green Card Holders: DHS*, THE HILL, Jan. 28, 2017, available at <http://thehill.com/policy/national-security/316670-trump-refugee-ban-bars-green-card-holders-report>.

⁵ *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States*, DEP’T OF HOMELAND SECURITY (Jan. 29, 2017), available at <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

⁶ See Robert Mackey, *As Protests Escalate, Trump Retreats From Barring Green Card Holders*, THE INTERCEPT, Jan. 29, 2017, available at <https://theintercept.com/2017/01/29/trumps-executive-order-no-longer-bars-green-card-holders/>.

⁷ See Ryan Devereaux *et al.*, *Homeland Security Inspector General Opens Investigation of Muslim Ban, Orders Document Preservation*, THE INTERCEPT, Feb. 1, 2017, available at <https://theintercept.com/2017/02/01/homeland-security-inspector-general-opens-investigation-of-muslim-ban-rollout-orders-document-preservation/>.

⁸ *Id.*

⁹ See Laura Crimaldi, *et al.*, *Boston-area academics face bans on entering US*, THE BOSTON GLOBE, Jan. 28, 2017, available at <http://www.bostonglobe.com/metro/2017/01/28/boston-area->

11. Disclosure of the records Plaintiffs seek through this action would thus facilitate the public's understanding of how Defendants implemented and enforced the Executive Orders through the Boston Field Office, including in particular at Logan International Airport. Such information is critical to the public's ability to hold the government accountable.

12. This action is necessary because Defendants have failed to provide Plaintiffs with a determination as to whether they will comply with the Request, although more than 20 business days have elapsed since Defendants received the Request.

JURISDICTION

13. This Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701–706, and 28 U.S.C. § 1331.

VENUE

14. Venue in the District of Maine is proper under 5 U.S.C. § 552(a)(4)(B) as the requested agency records are, upon information and belief, situated within this District at CBP facilities at or near Bangor International Airport and Portland International Jetport, and because Plaintiff ACLU of Maine's principal place of business is in the District of Maine. For the same reasons, venue also is proper under 28 U.S.C. § 1391(e).

PARTIES

15. Plaintiffs American Civil Liberties Union of Maine, American Civil Liberties Union of New Hampshire, American Civil Liberties Union of Vermont, American Civil Liberties Union of Massachusetts, American Civil Liberties Union of Connecticut, and American Civil Liberties Union of Rhode Island are non-profit, 501(c)(4) membership organizations that educate the public about the civil liberties implications of pending and proposed state and federal legislation, provide analysis of pending and proposed legislation, directly lobby legislators, and mobilize their members to lobby their legislators.

academics-facing-bans-entering/StddgeCOncofRfEFVG7LTL/story.html?event=event25.
¹⁰ See Eli Rosenberg, et al., *Protesters Rally as Doctors, Students Blocked From Entering Country After Trump's Orders*, NBC BOSTON CHANNEL 10, Jan. 28, 2017, available at <http://www.nbcboston.com/news/local/Immigrants-Blocked-From-Entering-Country-After-Trumps-Orders--412049273.html>

16. Defendant U.S. Customs and Border Protection is a component of DHS and is a federal agency within the meaning of 5 U.S.C. § 552(f)(1).

17. Defendant Department of Homeland Security is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

18. Plaintiffs are informed and therefore believe that Defendants have possession, custody, or control of the requested records.

FACTS

19. On February 2, 2017 Plaintiffs sent the Request via certified, trackable mail to CBP's Boston Field Office (tracking number 7016 0340 0001 0884 6901) and CBP's FOIA Officer at CBP Headquarters (tracking number 7016 0340 0001 0884 6918).

20. The Request sought copies of CBP's local interpretation and enforcement of the Executive Order at: 1) certain airports specified in the Request, including Bradley International Airport, Bangor International Airport, Logan International Airport, Manchester International Airport, TF Green Airport, and Burlington International Airport ("Local International Airports"); and 2) certain Port of Entry offices specified in the Request, including Hartford, Bangor, Boston, Manchester, Providence, and Burlington ("Port of Entry Offices"). The Request expressly did *not* seek information held in the records of CBP Headquarters.

21. Specifically, the Request sought the following:

1. "Records created on or after January 27, 2017 concerning CBP's interpretation, enforcement, and implementation of the following at Local International Airports:
 - a. President Trump's Executive Order, signed on January 27, 2017 and titled 'Protecting the Nation From Foreign Terrorist Entry Into the United States';
 - b. Any guidance 'provided to DHS field personnel shortly' after President Trump signed the Executive Order, as referenced in CBP's online FAQ;¹¹

¹¹ To assist CBP in responding, the Request included the following information in a footnote for reference: "*Protecting the Nation from Foreign Terrorist Entry into the United States*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 31, 2017), available at <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states> ('The Executive Order and the instructions therein were effective at the time of the order's signing. *Guidance was provided to*

- c. Associate Director of Field Operations for U.S. Citizenship and Immigration Services Daniel M. Renaud’s email, sent at 11:12 A.M. on January 27, 2017, instructing DHS employees that they could not adjudicate any immigration claims from the seven targeted countries;¹²
- d. Judge Donnelly’s Decision and Order granting an Emergency Motion for Stay of Removal, issued in the Eastern District of New York on January 28, 2017, including records related to CBP’s efforts to comply with the court’s oral order requiring prompt production of a list of all class members detained by CBP;¹³
- e. Judge Brinkema’s Temporary Restraining Order, issued in the Eastern District of Virginia on January 28, 2017;¹⁴
- f. Judge Zilly’s Order Granting Emergency Motion for Stay of Removal, issued in the Western District of Washington on January 28, 2017;¹⁵
- g. Judge Burroughs’ Temporary Restraining Order, issued in the District of Massachusetts on January 29, 2017;¹⁶

DHS field personnel shortly thereafter.’) (emphasis added).”

¹² The following footnote was included for reference: “*See Alice Speri and Ryan Devereaux, Turmoil at DHS and State Department—‘There Are People Literally Crying in the Office Here,’* THE INTERCEPT, Jan. 30, 2017, available at <https://theintercept.com/2017/01/30/asylum-officials-and-state-department-in-turmoil-there-are-people-literally-crying-in-the-office-here/>.”

¹³ The following footnote was included for reference: “Decision and Order, *Darweesh v. Trump*, No. 17 Civ. 480 (AMD) (E.D.N.Y. Jan. 28, 2017), available at <https://www.aclu.org/legal-document/darweesh-v-trump-decision-and-order>.”

¹⁴ The following footnote was included for reference: “Temporary Restraining Order, *Aziz v. Trump*, No. 1:17-cv-116 (E.D. Va. Jan. 28, 2017), available at <https://www.justice4all.org/wp-content/uploads/2017/01/TRO-order-signed.pdf>.”

¹⁵ The following footnote was included for reference: “Order Granting Emergency Motion for Stay of Removal, *Doe v. Trump*, No. C17-126 (W.D. Wash. Jan. 28, 2017), available at <https://www.justsecurity.org/wpcontent/uploads/2017/01/Seattle-Order.pdf>.”

¹⁶ The following footnote was included for reference: “Temporary Restraining Order, *Tootkaboni v. Trump*, No. 17-cv-10154 (D. Mass. Jan. 29, 2017), available at <https://aclum.org/wp-content/uploads/2017/01/6-TRO-Jan-29-2017.pdf>.”

- h. Judge Gee's Order granting an Amended *Ex Parte* Application for Temporary Restraining Order, issued in the Central District of California on January 29, 2017;¹⁷
 - i. Assurances from the U.S. Attorney's Office for the Eastern District of Pennsylvania that all individuals detained at Philadelphia International Airport under the Executive Order would be admitted to the United States and released from custody on Sunday, January 29, 2017;
 - j. DHS's 'Response to Recent Litigation' statement, issued on January 29, 2017;¹⁸
 - k. DHS Secretary John Kelly's 'Statement on the Entry of Lawful Permanent Residents Into the United States,' issued on January 29, 2017;¹⁹
 - l. DHS's 'Statement on Compliance with Court Orders and the President's Executive Order,' issued on January 29, 2017;²⁰ and
 - m. Any other judicial order or executive directive issued regarding the Executive Order on or after January 27, 2017.
2. Records concerning the number of individuals who were detained or subjected to secondary screening, extending questioning, an enforcement examination, or consideration for a waiver at Local International Airports pursuant to the

¹⁷ The following footnote was included for reference: "Order, *Vayeghan v. Trump*, No. CV 17-0702 (C.D. Cal. Jan. 29, 2017), available at https://www.aclusocal.org/sites/default/files/vayeghan_-_order_re_tro.pdf."

¹⁸ The following footnote was included for reference: "*Department of Homeland Security Response to Recent Litigation*, DEP'T OF HOMELAND SECURITY (Jan. 29, 2017), available at <https://www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation>."

¹⁹ *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The United States*, DEP'T OF HOMELAND SECURITY (Jan. 29, 2017), available at <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

²⁰ The following footnote was included for reference: "*DHS Statement On Compliance With Court Orders And The President's Executive Order*, DEP'T OF HOMELAND SECURITY (Jan. 29, 2017), available at <https://www.dhs.gov/news/2017/01/29/dhs-statement-compliance-court-orders-and-presidents-executive-order>."

Executive Order, including:

- a. The total number of individuals who remain detained or subject to secondary screening, extending questioning, an enforcement examination, or consideration for a waiver at Local International Airports both as of the date of this request and as of the date on which this request is processed; and
- b. The total number of individuals who have been detained or subjected to secondary screening, extending questioning, an enforcement examination, or consideration for a waiver for any length of time at Local International Airports since January 27, 2017, including the number of individuals who have been
 - i. released,
 - ii. transferred into immigration detention, or
 - iii. removed from the United States;
3. Records concerning the number of individuals who have been removed from Local International Airports from January 27, 2017 to date pursuant to the Executive Order;
4. Records concerning the number of individuals who arrived at Local International Airports from January 27, 2017 to date with valid visas or green cards who subsequently agreed voluntarily to return; and
5. Records containing the ‘guidance’ that was ‘provided to DHS field personnel shortly’ after President Trump signed the Executive Order.”²¹

Exh. A at 5–7.

²¹ The following footnote was included for reference: “*Protecting the Nation from Foreign Terrorist Entry into the United States*, U.S. CUSTOMS AND BORDER PROTECTION (Jan. 31, 2017), available at <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states> (‘The Executive Order and the instructions therein were effective at the time of the order’s signing. *Guidance was provided to DHS field personnel shortly thereafter.*’) (emphasis added).”

22. The Request included an application for expedited processing, on the grounds that there is a “compelling need” for these records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because the information requested is “urgen[tly]” needed by an organization primarily engaged in disseminating information “to inform the public concerning actual or alleged Federal Government activity.” Exh. A at 8–11.

23. The Request provided detail showing that the ACLU is primarily engaged in disseminating information within the meaning of 5 U.S.C. § 552(a)(6)(E)(v), given that a critical and substantial aspect of the ACLU’s mission is to obtain information about government activity, analyze that information, and publish and disseminate that information widely to the press and public. Exh. A at 8.

24. The Request described examples of the ACLU’s information-dissemination function. Exh. A at 8–11.

25. The Request also included an application for a fee waiver or limitation under 5 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records is in the public interest and is “likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” In particular, the ACLU emphasized that the Request would significantly contribute to public understanding on a matter of profound public importance about which scant specific information had been made public, *i.e.*, how local CBP Field Offices had enforced, and continue to enforce, the Executive Orders. The Request also made clear that the ACLU plans to disseminate the information disclosed as a result of the Request to the public at no cost. Exh. A at 11–12.

26. The Request also applied for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiffs qualify as “representatives of the news media” and the records are not sought for commercial use, given the ACLU’s non-profit mission and substantial activities to publish information for dissemination to the public, as discussed in greater detail in ¶ 24 above. Exh. A at 12-13.

27. CBP received the Request sent to CBP’s FOIA Officer at CBP Headquarters on February 7, 2017. CBP received the Request sent to CBP’s Boston Field Office on February 10,

2017. Copies of the United States Postal Service tracking information indicating receipt is attached as **Exhibit B**.

28. CBP has not acknowledged receipt of the Request.

29. As of the filing date of this Complaint, Defendants have not notified Plaintiffs of a determination as to whether Defendants will comply with the Request.

30. Because Defendants failed to comply with the 20-business-day time limit provision of FOIA, 5 U.S.C. § 552(a)(6)(A)(i), Plaintiffs are deemed to have exhausted their administrative remedies with respect to the Request under 5 U.S.C. § 552(a)(6)(C)(i).

**Violation of FOIA for Failure
to Provide a Determination
Within 20 Business Days**

31. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 30 above, inclusive.

32. Defendants have a legal duty under FOIA to determine whether to comply with a request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receiving the request, and also have a legal duty to immediately notify a requester of the agency's determination and the reasons therefor.

33. Defendants' failure to determine whether to comply with the Request within 20 business days after receiving it violates FOIA, 5 U.S.C. § 552(a)(6)(A)(i), and applicable regulations promulgated thereunder.

**Violation of FOIA for Failure
to Make Records Available**

34. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 30 above, inclusive.

35. Plaintiffs have a legal right under FOIA to obtain the specific agency records requested on February 2, 2017 and there exists no legal basis for Defendants' failure to promptly make the requested records available to Plaintiffs, their members, and the public.

36. Defendants' failure to promptly make available the records sought by the Request violates FOIA, 5 U.S.C. § 552(a)(3)(A), and applicable regulations promulgated thereunder.

37. On information and belief, Defendants currently have possession, custody or control of the requested records.

**Violation of FOIA for Failure to
Provide a Determination As To
Expedited Processing Within 10 Days**

38. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through 30 above, inclusive.

39. Defendants have a legal duty under FOIA to determine whether to provide expedited processing, and to provide notice of that determination to Plaintiffs, within 10 days after the date of the Request.

40. Defendants' failure determine whether to provide expedited processing and to provide notice of that determination to Plaintiffs within 10 days after the date of the Request violates FOIA, 5 U.S.C. § 552(a)(6)(E)(ii)(I), and applicable regulations promulgated thereunder.

41. Because Defendants have not provided a complete response to the Request, this Court has jurisdiction under FOIA, 5 U.S.C. § 552(a)(6)(E)(iv) to review Defendants' failure to make a determination concerning Plaintiffs' request for expedited processing.

WHEREFORE, Plaintiffs request that the Court award them the following relief:

1. Declare that Defendants violated FOIA by failing to determine whether to comply with the Request within 20 business days and by failing to immediately thereafter notify Plaintiffs of such determination and the reasons therefor;
2. Declare that Defendants violated FOIA by unlawfully withholding the requested records;
3. Declare that Defendants violated FOIA by failing to determine whether to provide expedited processing, and to provide notice of that determination to Plaintiffs, within 10 days;
4. Order Defendants to immediately disclose the requested records to the public and make copies immediately available to Plaintiffs without charge for any search or duplication fees, or, in the alternative, provide for expedited proceedings to adjudicate Plaintiffs' rights

under FOIA;

5. Award Plaintiffs their reasonable costs and attorneys' fees; and
6. Grant such other relief as the Court may deem just and proper.

DATED this 12th day of April, 2017.

Respectfully submitted,
/s/ Zachary L. Heiden
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