

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> U.S. DEPARTMENT OF HOMELAND SECURITY and U.S. CUSTOMS AND BORDER PROTECTION, <p style="text-align: center;">Defendants.</p>) Case No.))))))))
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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF FOR
VIOLATION OF THE FREEDOM OF INFORMATION ACT,
5 U.S.C. § 552 et seq.**

I. INTRODUCTION

1. The American Civil Liberties Union of Michigan (“Plaintiff” or “ACLU”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, as amended, to obtain declaratory, 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 FOIA requests sent by Plaintiff on February 2, 2017 (the “Airport Request”), and February 10, 2017 (the “Ports of Entry Request”) (collectively, the “Requests”), and to promptly disclose the requested records.

2. The Requests seek 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, the "Executive Orders").

3. The Airport Request seeks records concerning CBP's local implementation of the Executive Orders at sites within the purview of CBP's Detroit Field Office. These include Detroit Metropolitan Airport and Detroit Metropolitan Airport Port of Entry Office. A true and correct copy of the Airport Request is attached as Exhibit A.

4. The Ports of Entry Request seeks records concerning CBP's local implementation of the Executive Orders at other ports of entry within the purview of the Detroit Field Office. These other ports of entry include the Detroit-Windsor Tunnel, the Ambassador Bridge in Detroit, and the Blue Water Bridge in Port Huron (collectively, with the Detroit Airport Port of Entry Office, "Ports of Entry"). A true and correct copy of the Ports of Entry Request is attached as Exhibit B.

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

6. 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 following the President's signing of each Executive Order.

7. 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 February 2, 2017, the District Court for the Eastern District of Michigan (Roberts, J.) enjoined application of sections 3(c) and 3(e) against lawful permanent residents of the United States.² On March 15, 2017, the District Court of Hawai'i enjoined implementation of sections 2 and 6 of Executive Order No. 2.³

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 *Arab American Civil Rights League v. Trump*, No. CV17-10310 (E.D. Mich. Feb. 2, 2017).

³ *Hawai'i v. Trump*, No. CV 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017).

8. News reports described Defendants' implementation of the Executive Orders as "chaotic" and "total[ly] lack[ing] . . . clarity and direction."⁴

9. Official DHS statements reflected this confusion. For example, DHS stated on January 28 that Executive Order No. 1 would "bar green card holders."⁵ The next day, however, DHS Secretary John Kelly deemed "the entry of lawful permanent residents to be in the national interest,"⁶ and the government clarified that Executive Order No. 1 did *not* apply to green card holders.⁷

10. 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

⁴ 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/>.

⁵ 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>.

⁶ *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>.

⁷ 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/>.

Executive Order No. 1.⁸ 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. 1.⁹

11. At Detroit Metropolitan Airport, confusion over the implementation of the Executive Orders reportedly led to the detention of travelers.¹⁰ Fueling the discord, CBP officials would not respond to requests for information about how many travelers had been detained at the airport.¹¹

⁸ 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/>.

⁹ *Id.*

¹⁰ See, e.g., Joanna Walters, Edward Helmore, and Saeed Dehghan, *US Airports on Frontline as Donald Trump's Travel Ban Causes Chaos and Protests*, THE GUARDIAN (Jan. 28, 2017), <https://www.theguardian.com/us-news/2017/jan/28/airports-us-immigration-ban-muslim-countries-trump>.

¹¹ See, e.g., Niraj Warikoo, David Jesse, and Eric Lawrence, *West Bloomfield Couple Targeted at Border Amid Immigration Ban Tumult*, DETROIT FREE PRESS (Jan. 28, 2017), <http://www.freep.com/story/news/local/michigan/2017/01/28/university->

12. Local attorneys flocked to the airport to provide services to travelers, as government agents reportedly subjected green card holders to invasive searches of their belongings, electronic devices, text messages, and e-mail accounts in what was described as a chaotic scene with “very little protocols or rules set in place.”¹²

13. Detroit Metropolitan Airport (DTW) ranks as the nineteenth busiest airport in the United States.¹³ The airport is the second largest airport in the Midwest by passenger traffic,¹⁴ as well as a key hub and market for Delta Airlines and Spirit Airlines.¹⁵ In 2016, DTW serviced over 35 million international and domestic

michigan-students-immigration-status/97183426/.

¹² See, e.g., Tresa Baldas, *Travelers’ Texts, Emails Searched at Detroit Metro Airport*, DETROIT FREE PRESS (Jan. 30, 2017), <http://www.freep.com/story/news/local/michigan/wayne/2017/01/30/travelers-texts-emails-searched-detroit-metro-airport/97257722/>.

¹³ *2015 North American (ACI-NA) Top 50 airports (includes Passenger, Cargo and Movements)*, AIRPORTS COUNCIL INT’L., http://www.aci-na.org/sites/default/files/nam2015_top_50.xlsx (last visited Apr. 12, 2017).

¹⁴ *Id.*

¹⁵ *Corporate Stats and Facts*, DELTA NEWS HUB (Mar. 31, 2016), <http://news.delta.com/corporate-stats-and-facts>; Leonard Fleming, *Spirit Airlines to build new hangar at Metro Airport*, THE DETROIT NEWS (June 26, 2015), <http://www.detroitnews.com/story/business/2015/06/26/spirit-airlines-metro-airport/29333367/> (announcing that Spirit Airlines would build its third largest maintenance hangar at DTW).

passengers.¹⁶ In 2016, 1,474,873 passengers deplaned from international flights at DTW.¹⁷

14. The confusion was also manifest at Michigan's Ports of Entry. At the Port Huron port of entry, for example, a U.S. citizen and a permanent resident from Canada were detained shortly after the issuance of the Executive Order No. 1. CBP agents reportedly told travelers that they "[didn't] know what's going on" and that "[t]he order [was] not clear."¹⁸

15. The Ambassador Bridge and the Detroit-Windsor Tunnel are, respectively, the busiest and second-busiest border crossing between the United States and Canada.¹⁹

¹⁶ *Passenger Traffic Up in 2016 at Detroit Metro Airport*, DETROIT FREE PRESS, (Feb. 7, 2017), <http://www.freep.com/story/travel/2017/02/07/detroit-metro-airport-dtw-traffic/97606540/>.

¹⁷ *Annual Year End Aviation Report – Calendar Year 2016*, WAYNE COUNTY AIRPORT AUTHORITY, *available at* [http://wcaa.us/Portals/WCAACorp/Full_Report\(CY\)_Final_2016.pdf](http://wcaa.us/Portals/WCAACorp/Full_Report(CY)_Final_2016.pdf) (last visited Apr. 12, 2017).

¹⁸ *See, e.g., Niraj Warikoo, David Jesse, and Eric Lawrence, West Bloomfield Couple Targeted at Border Amid Immigration Ban Tumult*, DETROIT FREE PRESS (Jan. 28, 2017), <http://www.freep.com/story/news/local/michigan/2017/01/28/university-michigan-students-immigration-status/97183426/>.

¹⁹ *See Ambassador Bridge*, MDOT, http://www.michigan.gov/mdot/0,1607,7-151-9618_11088---,00.html (last visited Apr. 12, 2017); *Detroit-Windsor Tunnel*, MDOT, http://www.michigan.gov/mdot/0,1607,7-151-9618_11089---,00.html (last visited Apr. 12, 2017).

16. Upon information and belief, Michigan residents were among those most severely impacted by the Executive Orders, which barred entry to individuals from certain predominantly Muslim countries. Of the major metropolitan areas in the United States, Detroit has the highest number of residents per capita from the seven countries barred under Executive Order No. 1.²⁰ Michigan also ranks fourth among states resettling refugees, having welcomed more than 4,250 individuals in fiscal year 2016.²¹

17. Disclosure of the records Plaintiff seeks through this action would facilitate the public's understanding of how Defendants implemented and enforced the Executive Orders through the Detroit Field Office, particularly at Detroit Metropolitan Airport and at Michigan's border crossings with Canada. Such information is critical to the public's ability to hold the government accountable.

18. This action is necessary because Defendants have failed to provide Plaintiff with a determination as to whether they will comply with the Requests,

²⁰ Alan Berube, *These Communities Have a Lot at Stake in Trump's Executive Order on Immigration*, BROOKINGS INSTITUTE (Jan. 30, 2017), <https://www.brookings.edu/blog/the-avenue/2017/01/30/these-communities-have-a-lot-at-stake-in-trumps-executive-order-on-immigration/>.

²¹ *Key Facts About Refugees to the U.S.*, PEW RESEARCH CENTER (Jan. 30, 2017), <http://www.pewresearch.org/fact-tank/2017/01/30/key-facts-about-refugees-to-the-u-s/>.

although more than 20 business days have elapsed since Defendants received the Requests.

II. PARTIES, JURISDICTION, AND VENUE

19. Plaintiff American Civil Liberties Union of Michigan is a non-profit, 501(c)(4) membership organization that educates the public about the civil liberties implications of pending and proposed state and federal legislation, provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes its members to lobby their legislators.

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

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

22. Plaintiff is informed and therefore believes that Defendants have possession, custody, or control of the requested records.

23. 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.

24. Venue in the Eastern District of Michigan is proper under 5 U.S.C. § 552(a)(4)(B), as the majority of the requested agency records are, upon

information and belief, situated within this District at CBP facilities at or near Detroit Metropolitan Airport and Port of Entry Offices in Detroit and Port Huron. Plaintiff ACLU of Michigan's principal place of business is also in the Eastern District of Michigan. For the same reasons, venue also is proper under 28 U.S.C. § 1391(e).

III. STATEMENT OF FACTS

A. The Airport Request

25. On February 2, 2017, Plaintiff sent the Airport Request to CBP's Detroit Field Office via certified, trackable U.S. mail, with a tracking number of 70161370000064302167, and to CBP's FOIA Officer at CBP Headquarters via certified, trackable U.S. mail, with a tracking number of 70160340000042466043.

26. The Airport Request sought copies of CBP's local interpretation and enforcement of the Executive Order at Detroit Metropolitan Airport and the Detroit Metropolitan Airport Port of Entry Office. The Airport Request expressly did *not* seek information held in the records of CBP Headquarters.

27. Specifically, the Airport 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;²²
- 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;²³
- 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;²⁴
- e. Judge Brinkema’s Temporary Restraining Order, issued in the Eastern District of Virginia on January 28, 2017;²⁵

²² 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 DHS field personnel shortly thereafter.*’) (emphasis added).”

²³ 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/>.”

²⁴ 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>.”

²⁵ 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>.”

- f. Judge Zilly’s Order Granting Emergency Motion for Stay of Removal, issued in the Western District of Washington on January 28, 2017;²⁶
- g. Judge Burroughs’ Temporary Restraining Order, issued in the District of Massachusetts on January 29, 2017;²⁷
- 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;²⁸
- 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;²⁹
- k. DHS Secretary John Kelly’s ‘Statement on the Entry of Lawful Permanent Residents Into the United States,’ issued on January 29, 2017;³⁰

²⁶ 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>.”

²⁷ 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>.”

²⁸ The following footnote was included for reference: “Order, *Vayeghan v. Trump*, No. CV 17-0702 (C.D. Cal. Jan. 28, 2017), available at https://www.aclusocal.org/sites/default/files/vayeghan_-_order_re_tro.pdf.”

²⁹ 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>.”

³⁰ The following footnote was included for reference: “*Statement from Secretary*

1. DHS's 'Statement on Compliance with Court Orders and the President's Executive Order,' issued on January 29, 2017;³¹ 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 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;

Kelly on the President's Appointment of Thomas D. Homan as Acting ICE Director, DEP'T OF HOMELAND SECURITY (Jan. 30, 2017), available at <https://www.dhs.gov/news/2017/01/30/statement-secretary-kelly-presidents-appointment-thomas-d-homan-acting-ice-director>."

³¹ 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>."*

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.”³²

See Ex. A at 5-7.

28. The Airport 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.” *See* Ex. A at 8.

29. The Airport 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

³² 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).”

publish and disseminate that information widely to the press and public. *See* Ex. A at 8.

30. The Airport Request described examples of the ACLU's information-dissemination function, including, among other things:

- a. Employment of an investigative reporter who regularly utilizes records obtained through FOIA to educate the public;
- b. Regular issuance of press releases, reports and analysis of information obtained through FOIA;
- c. Dissemination of information to some 63,000 email subscribers, some 25,000 Facebook followers, and some 24,000 print subscribers;
- d. Publication of Know Your Rights materials, fact sheets, and educational brochures; and
- e. Publication of information on the ACLU of Michigan's heavily-visited website.

See Ex. A at 8-12.

31. The Airport 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 Airport 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 Airport 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. *See* Ex. A at 13.

32. The Airport Request also applied for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiff qualifies 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 paragraph 28 above. *See* Ex. A at 13.

33. The CBP Detroit Field Office received the Airport Request on February 7, 2017 and the CBP Headquarters FOIA Officer received the Airport Request on February 9, 2017. *See* Ex. C.

34. CBP’s Detroit Field Office acknowledged receipt of the Airport Request in a letter dated February 16, 2017. A true and correct copy of the Airport Request acknowledgment letter is attached as Exhibit E. The letter stated that CBP “shall charge [Plaintiff] for records in accordance with the DHA FOIA regulations outlined on the DHS website” and that the average FOIA processing time for “travel/border incidents” is a minimum of six months. The letter did not otherwise comment on Plaintiff’s requests for a fee waiver or expedited processing, nor did

Defendants make any final, definitive determination regarding those requests. *See* Ex. E.

35. In its acknowledgement of receipt, CBP did not provide a determination as to whether, or when, CBP would comply with the Airport Request. *See* Ex. E.

B. The Ports of Entry Request

36. On February 10, 2017, Plaintiff sent the Ports of Entry Request to CBP's Detroit Field Office and CBP's FOIA Officer at CBP Headquarters via certified, trackable mail, with tracking numbers of, respectively, 70162070000038799894 and 70162070000038799900.

37. The Ports of Entry Request sought copies of CBP's local interpretation and enforcement of the Executive Order at certain Port of Entry offices specified in the Request, including at the Detroit-Windsor Tunnel, Detroit, the Ambassador Bridge, Detroit, the International Bridge, and the Blue Water Bridge, Port Huron ("Port of Entry Offices"). The Ports of Entry Request expressly did *not* seek information held in the records of CBP Headquarters.

38. Specifically, the Ports of Entry Request sought the following:

1. "Records created on or after January 27, 2017 concerning CBP's interpretation, enforcement, and implementation of the following at the Michigan POEs:
 - 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;³³
- 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;³⁴
- 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;³⁵
- e. Judge Brinkema’s Temporary Restraining Order, issued in the Eastern District of Virginia on January 28, 2017;³⁶

³³ 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 DHS field personnel shortly thereafter.*’) (emphasis added).”

³⁴ 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/>.”

³⁵ The following footnote was included for reference: “*Decision and Order, Darweesh v. Trump*, No. 17 Civ. 480 (AMD) (E.D.N.Y. Jan. 29, 2017), available at <https://www.aclu.org/legal-document/darweesh-v-trump-decision-and-order>.”

³⁶ 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>.”

- f. Judge Zilly’s Order Granting Emergency Motion for Stay of Removal, issued in the Western District of Washington on January 28, 2017;³⁷
- g. Judge Burroughs’ Temporary Restraining Order, issued in the District of Massachusetts on January 29, 2017;³⁸
- 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;³⁹
- i. Judge Birotte Jr. Order Granting Emergency Motion for Temporary Restraining Order and Preliminary Injunction, issued in the Central District of California on January 31, 2017;⁴⁰
- j. 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;
- k. DHS’s ‘Response to Recent Litigation’ statement, issued on January 29, 2017;⁴¹

³⁷ 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>.”

³⁸ 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>.”

³⁹ 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.”

⁴⁰ The following footnote was included for reference: “Decision and Order, *Mohammed v. United States*, No. 17-cv-786 (C.D. Cal. Jan. 31, 2017), available at <http://www.politico.com/f/?id=00000159-fbb7-d439-a3db-ffbf10cb0001>.”

⁴¹ The following footnote was included for reference: “*Department of Homeland Security Response to Recent Litigation*, DEP’T OF HOMELAND SECURITY (Jan. 29,

- l. DHS Secretary John Kelly’s ‘Statement on the Entry of Lawful Permanent Residents Into the United States,’ issued on January 29, 2017;⁴²
- m. DHS’s ‘Statement on Compliance with Court Orders and the President’s Executive Order,’ issued on January 29, 2017;⁴³
- n. Judge Roberts’ Order Regarding Plaintiff’s Motion for Temporary Restraining Order, issued February 2, 2017;⁴⁴
- o. Judge Robart’s Temporary Restraining Order issued in the Western District of Washington on February 3, 2017;⁴⁵
- p. The Ninth Circuit Court of Appeals’ decision on the federal government’s appeal of Judge Robart’s Temporary Restraining Order;⁴⁶ and

2017), *available at* <https://www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation>.”

⁴² The following footnote was included for reference: “*Statement from Secretary Kelly on the President’s Appointment of Thomas D. Homan as Acting ICE Director*, DEP’T OF HOMELAND SECURITY (Jan. 30, 2017), *available at* <https://www.dhs.gov/news/2017/01/30/statement-secretary-kelly-presidents-appointment-thomas-d-homan-acting-ice-director>.”

⁴³ 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>.”

⁴⁴ The following footnote was included for reference: “*Order Regarding Plaintiffs’ Motion for Temporary Restraining Order*, No. 17-10310 (E.D. Mich. Feb. 2, 2017), *available at* <https://www.clearinghouse.net/chDocs/public/IM-MI-0004-0003.pdf>.”

⁴⁵ The following footnote was included for reference: “*Temporary Restraining Order*, *State of Washington v. Trump*, No. C17-0141 (W.D. Wash. Feb. 3, 2017), *available at* <https://www.clearinghouse.net/chDocs/public/IM-WA-0029-0005.pdf>.”

⁴⁶ The following footnote was included for reference: “*Washington v. Trump*, ___ F.3d ___, 2017 WL 526497 (Feb. 9, 2017).”

- q. 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 Michigan POEs pursuant to the 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 Michigan POEs 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 Michigan POEs 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 Michigan POEs from January 27, 2017 to date pursuant to the Executive Order;
4. Records concerning the number of individuals who arrived at Michigan POEs 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.”⁴⁷

⁴⁷ 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

See Ex. B at 5-8.

39. The Ports of Entry 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.” See Ex. B at 9.

40. The Ports of Entry 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. See Ex. B at 9.

41. The Ports of Entry Request described examples of the ACLU’s information-dissemination function, including, among other things:

- a. Employment of an investigative reporter who regularly utilizes records obtained through FOIA to educate the public;
- b. Regular issuance of press releases, reports and analysis of information obtained through FOIA;

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).”

- c. Dissemination of information to some 63,000 email subscribers, some 25,000 Facebook followers, and some 24,000 print subscribers;
- d. Publication of Know Your Rights materials, fact sheets, and educational brochures; and
- e. Publication of information on the ACLU of Michigan's heavily-visited website.

See Ex. B at 9-13.

42. The Ports of Entry 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 Ports of Entry 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 Ports of Entry Request also made clear that the ACLU planned to disseminate the information disclosed as a result of the request to the public at no cost. *See* Ex. B at 14.

43. The Ports of Entry Request also applied for a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiff qualifies 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 paragraph 34 above. *See* Ex. B at 15.

44. The CBP Detroit Field Office received the Ports of Entry Request on February 13, 2017 and the CBP Headquarters FOIA Officer received the Ports of Entry Request on February 17, 2017. *See* Ex. D.

45. CBP's Detroit Field Office acknowledged receipt of the Port of Entry Request in a letter dated February 16, 2017. A true and correct copy of the Ports of Entry acknowledgement letter is attached as Exhibit F. The acknowledgement of receipt stated that CBP "shall charge [Plaintiff] for records in accordance with the DHS FOIA regulations outlined on the DHS website" and that the average FOIA processing time for "travel/border incidents" is a minimum of six months. The acknowledgement of receipt did not otherwise comment on Plaintiff's requests for a fee waiver or expedited processing, nor did Defendants make any final, definitive determination regarding those requests. *See* Exs. E and F.

46. In its acknowledgements of receipt, CBP did not provide a determination as to whether, or when, CBP would comply with the Ports of Entry Request. *See* Ex. F.

C. This Lawsuit

47. As of April 12, 2017, more than 20 days (excepting Saturdays, Sundays, and legal public holidays) have elapsed since CBP received the Airport Request and Ports of Entry Request.

48. As of the filing date of this Complaint, Defendants have not notified Plaintiff of a determination as to whether Defendants would comply with the Requests.

49. Because Defendants failed to comply with the 20-business-day time limit provision of FOIA, 5 U.S.C. § 552(a)(6)(A)(i), Plaintiff is deemed to have exhausted its administrative remedies with respect to the Requests under 5 U.S.C. § 552(a)(6)(C)(i).

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

50. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 49 above, inclusive.

51. 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.

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

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

COUNT II
Violation of FOIA for Failure to Make Records Available

54. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 49 above, inclusive.

55. Plaintiff has a legal right under FOIA to obtain the specific agency records requested on February 2, 2017 and February 10, 2017 and there exists no legal basis for Defendants' failure to promptly make the requested records available to Plaintiff, its members, and the public.

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

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

58. On information and belief, Defendants currently have possession,

custody or control of the requested records.

COUNT III

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

59. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 49 above, inclusive.

60. Defendants have a legal duty under FOIA to determine whether to provide expedited processing, and to provide notice of that determination to Plaintiff, within 10 days after the date of the Airport Request and the Ports of Entry Request.

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

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

63. Because Defendants have not provided a complete response to the Airport Request and the Ports of Entry 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 Plaintiff's request for expedited processing.

CONCLUSION

WHEREFORE, Plaintiff requests that the Court award it the following relief:

1. Declare that Defendants violated FOIA by failing to determine whether to comply with the Airport Request and the Ports of Entry Request within 20 business days and by failing to immediately thereafter notify Plaintiff 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 Plaintiff, within 10 days;

4. Order Defendants to immediately disclose the requested records to the public and make copies immediately available to Plaintiff without charge for any search or duplication fees, or, in the alternative, provide for expedited proceedings to adjudicate Plaintiff's rights under FOIA;

5. Award Plaintiff its 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,

By: /s/ Gabriel E. Bedoya

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