

1 BRIAN M. BOYNTON
2 Acting Assistant Attorney General
3 ELIZABETH J. SHAPIRO
4 Deputy Branch Director
5 CRISTEN C. HANDLEY, MO Bar No. 69114
6 MATTHEW SKURNIK, NY Bar No. 5553896
7 Trial Attorneys
8 United States Department of Justice
9 Civil Division, Federal Programs Branch
10 1100 L Street, NW
11 Washington, D.C. 20005
12 (202) 305-2677
13 cristen.handley@usdoj.gov

14 *Counsel for Defendants*

15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO/OAKLAND DIVISION**

18 Zachary NIGHTINGALE, *et al.*,

19 Plaintiffs,

20 v.

21 U.S. CITIZENSHIP AND IMMIGRATION
22 SERVICES, *et al.*,

23 Defendants.

No. 3:19-cv-03512-WHO

DEFENDANTS' COMPLIANCE REPORT

24 Pursuant to this Court's December 17, 2020 Order and Judgment, ECF Nos. 89 & 90,
25 Defendants respectfully submit the following compliance report and accompanying declarations
26 regarding the injunction issued against Defendants in the above-captioned matter.

27 1. This is a certified class action brought under the Freedom of Information Act
28 ("FOIA"). Plaintiffs and class members are noncitizens and attorneys who claim that the U.S.
Department of Homeland Security ("DHS"), U.S. Citizenship and Immigration Services ("USCIS"),
and U.S. Immigration and Customs Enforcement ("ICE") have engaged in an unlawful pattern or

1 practice of failing to make timely determinations on FOIA requests for Alien Files (“A-Files”).

2 2. On December 17, 2020, following briefing and oral argument, this Court entered
3 summary judgment in favor of Plaintiffs on their FOIA pattern or practice claims and issued a
4 nationwide injunction against Defendants. *See* ECF Nos. 89 at 27 & 90 at 1-2.¹ The injunction
5 established the following three requirements:

- 6 (A) **Adhere to FOIA Timing Requirements:** Defendants are permanently
7 enjoined from further failing to adhere to the statutory deadlines for
8 adjudicating A-File FOIA requests, as set forth in 5 U.S.C. §§ 552(a)(6)(A)
9 and (B);
- 10 (B) **Eliminate the Backlogs:** Within sixty (60) days of this order, defendants
11 shall make determinations on all A-File FOIA requests in USCIS’s and ICE’s
12 backlogs; [and]
- 13 (C) **Quarterly Compliance Reports:** Until further order, defendants shall
14 provide this court and class counsel with quarterly reports containing
15 information regarding the number and percentage of A-File FOIA requests
16 that were filed and timely completed as well as the number and percentage of
17 cases that remain pending beyond the twenty or thirty-day statutory periods,
18 respectively 5 U.S.C. §§ 552(a)(6)(A) and (B). The first compliance report is
19 due within ninety (90) days of this order.

20 ECF No. 89 at 27; ECF No. 90 at 1-2.

21 The Court made clear that Defendants are not required to achieve 100% compliance with the
22 injunction but instead must reach “substantial compliance within sixty (60) days” of the Order, by
23 February 16, 2021.² ECF No. 89 at 24.

24 3. In response to the Court’s Order, and through significant efforts detailed in the
25 accompanying declarations and summarized below, both USCIS and ICE have made tremendous
26 progress on their respective A-File FOIA backlogs. *See* Third Declaration of Tammy M. Meckley

27 ¹ Defendants filed a notice of appeal of this Court’s Judgment to the U.S. Court of Appeals for the
28 Ninth Circuit. ECF No. 94. The appeal has been docketed as Case No. 21-15288. ECF No. 95.

² Because February 15, 2021 was a federal holiday, the relevant 60-day deadline falls on February
16, 2021. *See* Fed. R. Civ. P. 6(a)(1)(C).

1 ¶ 9 (“Meckley Decl.”); Third Declaration of Fernando Pineiro ¶ 6 (“Pineiro Decl.”). Specifically,
2 in the last three months, USCIS has reduced its A-File FOIA backlog by approximately 97%, from
3 approximately 21,986 requests as of the Court’s December 2020 Order to approximately 574
4 requests as of the end of the day yesterday, March 16, 2021. Meckley Decl. ¶ 9(b). ICE, for its part,
5 has reached its goal of eliminating its A-File referral backlog entirely, with the exception of 47 A-
6 Files with technical issues³ that ICE continues working to resolve. Pineiro Decl. ¶ 6. In light of this
7 progress, Defendants respectfully submit that they have substantially complied with the Court’s
8 injunction.

9
10 4. At the same time that USCIS has nearly eliminated its A-File backlog, the agency has
11 continued to receive new requests for A-Files and process both USCIS and ICE documents contained
12 within those A-Files.⁴ Specifically, since the Court’s December 2020 Order, USCIS has received a
13 total of 49,001 new FOIA requests for A-Files. Meckley Decl. ¶ 10(a). Of those requests, 32,588⁵
14 were completed, and 23,488 were timely completed, which reflects a timely completion rate of
15 approximately 72%. *Id.* ¶ 10(b). Further, out of 16,987 currently pending A-File requests, 16,413
16 A-File requests remain pending within the statutory period (approximately 96.5% of pending
17 requests); and 574 remain pending beyond the statutory deadline (approximately 3.5% of pending
18 requests). *Id.* ¶ 10(c)-(d). The 574 requests that remain pending beyond the statutory deadline

19
20 ³ These 47 A-Files are comprised of referrals from USCIS that, for technical reasons (*i.e.*, illegible
21 photo scans of records, corrupt files, etc.) cannot be processed at this time. Pineiro Decl. ¶ 7. ICE
22 is working with USCIS to fix the file issues so that ICE can process these remaining referrals. *Id.*

23 ⁴ Pursuant to the 2020 Memorandum of Agreement between USCIS and ICE, USCIS processes all
24 ICE documents that are contained within A-Files rather than referring those documents to ICE for
25 processing. *E.g.*, ECF No. 75-2 ¶ 61.

26 ⁵ This figure was calculated based on the difference between the number of new requests received
27 since December 17, 2020 and the number of pending requests within the statutory time period. It
28 does not take into account the number of new requests that are now in backlog status. Accordingly,
this figure could be off by no more than approximately 574 and the timely completion rate of 72%
could be off by no more than approximately 1%.

1 comprise USICS's current A-File backlog. *Id.* ¶ 10(d).

2 5. In order to make such significant progress on its backlog reduction, as well as to
3 improve its processing times moving forward, USCIS undertook and continues to undertake
4 substantial new efforts toward its overall FOIA program. These efforts are described in detail in the
5 accompanying declaration of Tammy M. Meckley. *See id.* ¶¶ 11-25. To summarize here, USCIS's
6 FOIA Office leadership established a comprehensive backlog reduction project plan identifying key
7 efforts USCIS needs to execute in order to improve its processing times and putting in place action
8 items to meet those needs. *Id.* ¶ 12. Pursuant to that plan, USCIS has made improvements in three
9 key areas:

10 First, USCIS bolstered its FOIA personnel in ways that support the FOIA Office's immediate
11 and long-term needs. Approximately 116 staff members from other DHS components, as well as
12 approximately 20 non-FOIA employees of USCIS, were assigned to support the USCIS FOIA Office
13 and trained to perform USCIS FOIA duties. *Id.* ¶ 16-18. USCIS also realigned its existing FOIA
14 staff who typically respond to requests for non-A-File material to work solely on A-File FOIA
15 requests. *Id.* ¶ 19. Additionally, USCIS leadership approved \$1.26 million to fund employee
16 overtime as well as approximately \$4.057 million in emergency funds, which included \$106,404 for
17 contractor overtime, \$2.2 million to extend USCIS's backlog contract, and \$1.7 million for
18 additional scanning capabilities. *Id.* ¶ 15. Together, these additional resources have enabled USCIS
19 to approve approximately 15,105 hours of overtime by USCIS FOIA staff; fill eight vacancies for
20 permanent positions in its FOIA Office (with 14 additional vacancies in progress to be filled); fill
21 six one-year positions supported by the 2020 Memorandum of Agreement between USCIS and ICE
22 (with 19 additional employment offers extended and awaiting security clearance); increase
23 contractor overtime assistance; and extend USCIS's backlog contract through October 29, 2021. *Id.*
24 ¶ 15(a)-(d).

1 Second, USCIS made and will continue to make unprecedented efforts to increase its FOIA
2 budget. Although USCIS is a fee-funded agency that has not historically received appropriations
3 from Congress for its FOIA operations, in response to the Court’s Order, USCIS submitted a request
4 to DHS for a Congressional appropriation in the amount of \$150 million to support USCIS’s FOIA
5 program for Fiscal Years 2022 through 2026. *Id.* ¶ 21; *see also* ECF No. 89 at 17 (discussing the
6 role of federal agencies to “persuad[e] Congress to . . . provide additional funds to achieve
7 compliance”). The request was not approved for the upcoming Fiscal Year 2022. Meckley Decl. ¶
8 21. USCIS will continue seeking Congressional appropriations for its FOIA program, including by
9 submitting a request for \$188.5 million to DHS this spring to fund Fiscal Years 2023 through 2027.
10 *Id.*

11 Third, USCIS took several measures to address delays in obtaining paper-based A-Files in
12 response to FOIA requests. In order to obtain files more promptly from USCIS and ICE field offices
13 across the country, USCIS implemented a policy requiring field staff to provide responsive A-Files
14 within five business days of receiving a request from USCIS; developed new technology alerting
15 file holders of overdue requests and preventing physical relocation of A-Files subject to a FOIA
16 request until the A-File is received by the USCIS FOIA office; and deployed a new software tool
17 allowing field offices to scan and upload A-Files directly into FIRST rather than physically mailing
18 the files to the National Records Center (“NRC”) for scanning and uploading. *Id.* ¶¶ 22-23. Further,
19 because some documents needed to respond to A-File FOIA requests are located at various Federal
20 Records Centers (“FRCs”) overseen by the National Archive and Records Administration
21 (“NARA”)—many of which have been operating at limited capacity due to COVID-related
22 restrictions—USCIS leadership has worked collaboratively with relevant FRCs to accelerate the
23 transfers of files from the FRCs to USCIS for FOIA processing. *Id.* ¶¶ 24-25. Due in part to this
24 collaboration, almost all of USCIS’s outstanding requests to the FRCs have been resolved, from
25
26

1 approximately 5,187 outstanding requests in December 2020 to just 34 outstanding requests today.
2 *Id.* ¶ 25.

3 6. Moving forward, USCIS expects that its increased resources and system
4 enhancements will continue to yield improvements to its FOIA performance, including maintaining
5 its reduced backlog. *Id.* ¶ 26. USCIS is also committed to making additional and ongoing progress
6 by identifying new areas for improvement, closely monitoring its FOIA response times, and
7 identifying A-File requests or new issues that may require additional resources. *Id.* ¶ 27.

8 7. With respect to ICE's near-elimination of its A-File referral backlog, the agency's
9 success is primarily due to the 2020 MOA between USCIS and ICE, whereby USCIS processes ICE
10 records within A-Files rather than referring those records for processing by ICE. *E.g.*, ECF No. 75-
11 2 ¶ 61. That MOA enabled ICE to focus its existing resources singularly on eliminating its A-File
12 backlog. Pineiro Decl. ¶ 6.

13
14 Dated: March 17, 2021

Respectfully submitted,

15 BRIAN M. BOYNTON
16 Acting Assistant Attorney General

17 ELIZABETH J. SHAPIRO
18 Deputy Branch Director

19 /s/ Cristen C. Handley
20 CRISTEN C. HANDLEY, MO Bar No. 69114
21 MATTHEW SKURNIK, NY Bar No. 5553896
22 Trial Attorneys
23 United States Department of Justice
24 Civil Division, Federal Programs Branch
25 1100 L Street, NW
26 Washington, D.C. 20005
27 (202) 305-2677
28 cristen.handley@usdoj.gov

Counsel for Defendants