

would be threatened; it provides a process through which an individual can apply for protection if an IJ designates a country of removal to which the individual fears persecution or torture. *See* 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 1240.10(f), 1240.11(c).

3. In this case, Plaintiff National Immigration Litigation Alliance (NILA) seeks records related to Defendant's efforts to remove withholding or CAT grantees to countries other than the designated countries of removal. On May 28, 2022, Plaintiff submitted a FOIA request to Defendant, requesting records related to such efforts, including policies and guidance related to Defendant's obligation to assess an individual's fear of persecution or torture in a non-designated country prior to deportation and its responsibilities when an individual expresses a fear of deportation to the non-designated country. *See* Exhibit A (FOIA Request). Despite its statutory obligation to do so, Defendant has failed to substantively respond to the FOIA Request or produce any records in response to it. Accordingly, Plaintiff now asks this Court to order Defendant to locate and release all records responsive to the FOIA Request.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction under 5 U.S.C. § 552 *et seq.* (FOIA statute), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. §§ 2201-02 (Declaratory Judgment Act).

5. Venue is proper in this District under 5 U.S.C. § 552(a)(4)(B) because Plaintiff has its principal place of business in this District; venue is also proper under 28 U.S.C. § 1391(e) because this is a civil action in which Defendant is a federal agency, there is no real property involved in this action, and Plaintiff resides in this District.

6. Because Defendant failed to comply with the applicable time limitations in responding to the FOIA Request, Plaintiff is deemed to have exhausted administrative remedies

in connection with the request. 5 U.S.C. § 552(a)(6)(C)(i).

PARTIES

7. Plaintiff NILA is a tax-exempt, not-for-profit charitable organization under section 501(c)(3) of the Internal Revenue Code, with its principal place of business at 10 Griggs Terrace, in Brookline, Massachusetts. Founded in 2020, NILA was established to realize systemic change in the immigrant rights' arena by engaging in impact litigation and by building the capacity of social justice attorneys to litigate in federal court through co-counseling in individual cases and providing strategic assistance. In addition to litigation, NILA disseminates practice materials on its public website and frequently presents on immigration issues.

8. Defendant ICE is a component agency of the Department of Homeland Security and an agency within the meaning of 5 U.S.C. § 552(f)(1). Among other duties, ICE is responsible for initiating and prosecuting removal proceedings and executing final removal orders. ICE has possession and control over the records Plaintiff seeks.

FACTUAL ALLEGATIONS

Removal of Withholding and CAT Grantees

9. Pursuant to the Immigration and Nationality Act (INA), there is a statutory process for designating the country or countries to which ICE will remove individuals if they are ordered removed from United States. *See* 8 U.S.C. § 1231(b). In the first instance, in an immigration court hearing, the noncitizen may select a country of removal. 8 U.S.C. § 1231(b)(2)(A); 8 C.F.R. § 1240.10(f). However, if the individual does not select a country or if the individual's designated country does not accept the individual for deportation, the IJ may designate a country where the individual is "a subject, national, or citizen." 8 U.S.C. § 1231(b)(2)(D). Furthermore, the IJ may designate additional alternative countries as set out by 8 U.S.C. § 1231(b)(2)(E).

10. The designation statute has a specific carve-out prohibiting removal of noncitizens to countries where their life or freedom would be threatened. 8 U.S.C. § 1231(b)(3)(A). Thus, individuals who fear persecution or torture if removed to their designated countries of removal may seek protection from removal to that country or countries in the form of withholding of removal and/or CAT protection. *See, e.g.*, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. §§ 1208.16, 1208.17. To ensure that individuals in removal proceedings have the opportunity to seek such protection, IJs must designate countries of removal on the record, with enough notice and time to permit individuals to apply for protection if they fear persecution or torture in those countries. *See* 8 C.F.R. §§ 1240.10(f), 1240.11(c); *see also* U.S. Const. amend. V.

11. ICE's authority to remove a noncitizen is contingent on compliance with 8 U.S.C. § 1231(b), the Convention Against Torture, the Due Process Clause of the Fifth Amendment, and applicable immigration regulations and case law. Under these authorities, both individually and collectively, ICE cannot deport an individual to a country where they likely will be persecuted or tortured. And ICE cannot know whether an individual likely would be persecuted or tortured in a certain country unless they provide the individual with notice of ICE's intention to deport them to that country and an opportunity to present a protection claim.

12. ICE is aware of this obligation, but ICE's policies regarding deportation of withholding and CAT grantees to non-designated (third) countries is not public. In some instances, ICE has informed noncitizens who have won withholding of removal of its intention to deport them to an alternative country that is not designated on the removal order and, in addition, that the individual has a right to seek protection if they believe their life would be in danger in that country. In other cases, ICE has informed these noncitizens that, if they have a fear-based claim from the alternative country, ICE will move to reopen removal proceedings for the sole

purpose of considering the protection claim.

Plaintiff's FOIA Request

13. On May 28, 2022, Plaintiff submitted the FOIA Request to Defendant, requesting records related to the removal of withholding and CAT grantees to non-designated countries. *See* Exhibit A. Specifically, Plaintiff requested four non-exhaustive categories of records:

- a. All formal and informal guidance or policies regarding ICE's screening and/or processing of withholding/CAT grantees for deportation/removal to non-designated countries.
- b. All formal and informal guidance or policies regarding what obligations, if any, ICE has to ask a withholding/CAT grantee whether he/she/they has a fear of deportation/removal to a non-designated country before deporting the withholding/CAT grantee to a non-designated country.
- c. All formal and informal guidance or policies regarding what actions, if any, ICE is to take if a withholding/CAT grantee expresses a fear of deportation/removal to a non-designated country to which ICE has sought or is seeking deportation.
- d. All formal and informal guidance or policies regarding ICE's obligation, if any, to move to reopen removal proceedings before deporting/removing a withholding/CAT grantee to a non-designated country to which he/she/they has expressed a fear of deportation.

Id. at 2.

14. Together with the request, Plaintiff sought a waiver of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). *See* Exhibit A at 2-3.

15. By email dated June 6, 2022, Defendant acknowledged receipt of the FOIA Request. *See* Exhibit B.

16. Defendant did not notify Plaintiff whether it determined to comply with the FOIA Request by the deadlines set forth in 5 U.S.C. § 552(a)(6)(A)(i). Defendant also did not determine whether it would grant Plaintiff's fee waiver request. Defendant has failed to produce any records or make any substantive response to the FOIA Request.

CLAIMS FOR RELIEF

COUNT ONE

**Violation of FOIA, 5 U.S.C. § 552
Failure to Timely Respond**

17. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

18. Pursuant to 5 U.S.C. § 552(a)(6)(A) and (B), Defendant was obligated to promptly produce records responsive to Plaintiff's FOIA Request.

19. Plaintiff submitted the FOIA Request on May 28, 2022. Defendant failed to issue a response, including a determination of whether to comply with the request and the reasons therefore, in the time provided under 5 U.S.C. § 552(a)(6)(A)(i) (20 days, excluding Saturdays, Sundays, and legal public holidays) or within the time permitted in certain unusual circumstances pursuant to 5 U.S.C. § 552(a)(6)(B)(i) and 6 C.F.R. § 5.5(c) (10 additional working days).

20. Defendant's failure to disclose all responsive records within the statutory time period violates, at a minimum, 5 U.S.C. § 552(a)(6)(A) and (B) and the corresponding regulations.

COUNT TWO

**Violation of FOIA, 5 U.S.C. § 552
Failure to Conduct an Adequate Search and to Disclose Responsive Records**

21. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

22. Defendant is obligated under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to the FOIA Request and to promptly produce those records to Plaintiff.

23. Upon information and belief, Defendant has not conducted any search for records responsive to the FOIA Request. Defendant has not produced any records responsive to the FOIA Request. Plaintiff has a legal right to obtain such records, and no legal basis exists for Defendant's failure to search for them.

24. Defendant's failure to conduct a reasonable search and disclose all records responsive to the FOIA Request violates, at a minimum, 5 U.S.C. § 552(a)(3) and the corresponding regulations.

COUNT THREE

Violation of FOIA, 5 U.S.C. § 552 Failure to Grant Plaintiff's Public Interest Fee Waiver Request

25. All of the foregoing allegations are repeated and realleged as though fully set forth herein

26. Plaintiff is entitled to a waiver of processing fees associated with responding to the FOIA Request pursuant to 5 U.S.C. § 552(a)(4)(A)(viii).

27. Defendant has failed to make a determination on Plaintiff's request for a fee waiver. In accordance with 5 U.S.C. § 552(a)(4)(A)(iii), the Court should order Defendant to waive processing fees associated with responding to the FOIA Request.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

- a. Assume jurisdiction over this action;
- b. Declare unlawful Defendant's failure to make a determination on the FOIA Request within the statutory time frame, failure to conduct an adequate search for the records requested by Plaintiff, and failure to disclose the records requested by Plaintiff;
- c. Order Defendant to make a full, adequate, and expeditious search for the

requested records;

d. Order Defendant to expeditiously process and disclose all responsive, nonexempt records, and enjoin Defendant from improperly withholding the requested records;

e. Order Defendant to waive search fees in accordance with 5 U.S.C.

§ 552(a)(4)(A)(viii) because they failed to timely respond to the FOIA Request;

f. Award Plaintiff costs and reasonable attorneys' fees under 5 U.S.C.

§ 552(a)(4)(E), the Equal Access to Justice Act, and any other applicable statute or regulation; and

g. Grant such further relief as the Court deems just, equitable, and appropriate.

Respectfully submitted,

/s/ Stephanie Marzouk

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**Pro hac vice applications forthcoming*

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