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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

Zachary NIGHTINGALE, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. 3:19-cv-03512-WHO

DEFENDANTS' SIXTH COMPLIANCE REPORT

Pursuant to this Court's December 17, 2020 Order and Judgment, ECF Nos. 89 & 90, and its April 12, 2022 Order, ECF No. 130, Defendants respectfully submit the following Sixth Compliance Report and accompanying declarations regarding the injunction issued against Defendants in the above-captioned matter.

1. This is a certified class action brought under the Freedom of Information Act ("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

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

The Court's Injunction

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

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

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

The Court made clear that Defendants are not required to achieve 100% compliance with the injunction, but instead must reach "substantial compliance within sixty (60) days" of the Order. ECF No. 89 at 24.

Defendants' Substantial Compliance in the Previous Reporting Period

3. In the fifth compliance period, USCIS reported that it had taken steps to address prior temporary challenges, and as a result had achieved substantial improvements in its backlog and

[1] Defendants filed a notice of appeal of this Court's Judgment to the U.S. Court of Appeals for the Ninth Circuit. ECF No. 94. Defendants have since voluntarily dismissed the appeal. ECF No. 114.

compliance rate. Namely, USCIS had reduced its A-File backlog to approximately 120 requests—a significant improvement from the prior compliance quarter and in line with the low backlogs reported during the first three quarters under the Court's injunction. *See* Seventh Declaration of Tammy M. Meckley ("7th Meckley Decl.") ¶ 5, ECF No. 125-1. For its part, ICE's A-File referral backlog remained at zero.

4. At the same time that USCIS had once again nearly eliminated its A-File backlog, the agency had continued to receive new requests for A-Files, and had achieved a timely completion rate of approximately 72.13%. *Id*. ¶ 6. The Court stated that it was "pleased with the latest status report regarding the government's improved compliance with the injunction." Minute Order (April 12, 2022), ECF No. 130.

ICE's Discovery of Misrouted A-File Requests

5. On May 9, 2022, prior to the end of the sixth compliance period, Defendants filed a Notice alerting the Court that ICE had recently discovered a large volume of misrouted A-File FOIA requests that had been improperly submitted to ICE rather than USCIS, and that the discovery "may impact Defendants' compliance with the Court's injunction." Notice 1, ECF No. 131 (citing Decl. of Kenneth N. Clark ("Clark Decl.") ¶ 5, ECF No. 131-1).

6. As background, Defendants explained that because USCIS is the custodian of A-Files, Defendants direct requesters to submit FOIA requests for A-Files to USCIS rather than other DHS components, such as ICE. *Id*. at 2. Nonetheless, when a DHS component other than USCIS receives an A-File request, it is required to "route" the request to USCIS within ten business days. *Id.* (citing 6 C.F.R. §§ 5.4(c), 5.5(a)).

7. Defendants explained that, on or about April 18, 2022, ICE discovered that approximately 10,000 FOIA requests for A-Files had been improperly submitted to ICE and then inadvertently not forwarded to USCIS. *Id.* (citing Clark Decl. ¶ 5). The accumulation of these

requests within the ICE FOIA Office—without forwarding to USCIS—appeared to have resulted from staffing shortfalls, significant personnel turnover, and a surge of new FOIA requests submitted to ICE for non-A-File materials. *Id.* (citing Clark Decl. ¶ 5). Upon discovery of the issue, ICE immediately reassigned personnel to review, log, and properly route the A-File requests to USCIS for processing, and also detailed additional personnel to USCIS to assist in its review of the requests. *Id.* (citing Clark Decl. ¶ 5). ICE further undertook specific reforms in its FOIA office to prevent the issue from arising again, including redistributing its FOIA intake operations across four experienced FOIA processing supervisors, under the direct supervision of a senior official within the ICE FOIA Office. *Id.* at 3 (citing Clark Decl. ¶ 6).

8. Defendants' May 9, 2022 Notice stated that they were assessing the impact the misdirected requests may have on Defendants' overall A-File FOIA backlogs and timely processing rates, and that they would update the Court on the issue either in the June 15, 2022 compliance report or sooner, if appropriate. *Id.* (citing Clark Decl. ¶ 7).

Further Efforts To Address Misrouted A-File Requests

9. Following Defendants' May 9 Notice, ICE conducted an additional review of its electronic repositories and physical mail to verify ICE's initial accounting of misrouted requests. Second Decl. of Kenneth N. Clark ("2nd Clark Decl.") ¶ 5. This review discovered certain additional misrouted A-File requests, which ICE promptly transferred to USCIS. *Id.* In total, ICE has now identified and transferred to USCIS approximately 13,597 such requests. *Id.*

10. After receiving those requests, USCIS first reviewed each request to determine whether it was a duplicate of a request USCIS had previously received in the same timeframe. Eighth Declaration of Tammy M. Meckley ("8th Meckley Decl.") ¶ 10. This process proved "time-consuming," because it involved comparing individual requests to one another to ensure the requester, subject of the request, and nature of the request were all the same. *Id.* Based on a

painstaking review, USCIS determined that approximately 5,918 requests were non-duplicates and should be uploaded to USCIS's FOIA processing system, FIRST. *Id.* ¶ 10–11. That itself was time consuming, as it involved scanning and uploading all of the paper requests and converting all of the email requests to PDF files for uploading. *Id.* ¶ 11.

11. After the requests were uploaded into FIRST, USCIS began processing the requests according to their standard procedures—*i.e.*, the FOIA staff would locate and retrieve the relevant A-File or portion of an A-File; scan the file into digital format; review the file closely for exempt material; to the extent necessary, coordinate with other agencies or DHS components (including coordinating with ICE pursuant to the Memorandum of Agreement); and produce all responsive, non-exempt records. *Id.* ¶ 12.

12. USCIS, ICE, and DHS have each contributed substantial resources to USCIS's efforts to review for duplicates, upload the requests to FIRST, and begin processing the requests. While the total number of staff members dedicated to this effort has varied, USCIS initially pulled approximately 40 staff members from their usual FOIA duties to work solely on the misrouted requests, ICE provided 10 ICE staff members to USCIS as temporary detailees, and DHS provided multiple DHS staff members. *Id.* ¶ 10; 2nd Clark Decl. ¶ 6.

13. Notwithstanding these substantial resources, due to the efforts necessary to first identify and exclude duplicates and upload A-Files into FIRST, the agency is still working to complete its processing of the requests. At this time, approximately 4,552 of the approximately 5,918 nonduplicate misrouted requests had been fully processed, meaning that all responsive, non-exempt records had been sent to the requesters, and approximately 1,366 of the nonduplicate misrouted requests remain in processing. 8th Meckley Decl. ¶ 12.

Defendants' Substantial Compliance in the Present Reporting Period

14. The discovery of the misrouted A-File requests at ICE, combined with an unexpected

increase in other incoming requests for A-Files, regrettably has resulted in a decrease in USCIS's compliance during the latest reporting period. Specifically, excluding the misrouted ICE requests, as of the end of the day yesterday, June 14, 2022, USCIS's A-File backlog consisted of approximately 1,884 requests. *Id.* ¶ 5.

15. As noted, this increased backlog is due in part to the necessity of dedicating resources to address the misrouted ICE requests. However, it is also the result of an unexpected significant increase in A-File FOIA requests submitted directly to USCIS. During the year-long period covering the second, third, fourth, and fifth compliance periods, USCIS received approximately between 62,000 and 68,000 new requests for A-Files per quarter. *See* Joint Status Report 3, ECF No. 126 (chart of compliance figures over time). During this latest quarter, however, not including the misrouted ICE requests, USCIS received approximately 80,000 new requests for A-Files, an approximately 25% increase from the prior compliance period. 8th Meckley Decl. ¶ 6. Of the newly received requests, approximately 49,551 were completed and approximately 29,852 were timely completed, reflecting a timely completion rate of approximately 60.25% for the current reporting period. *Id.*

16. Although the timely completion rate has decreased from the prior reporting period, the actual impact on processing times has been far less significant. Specifically, for requests seeking specific or limited records (*i.e.*, Track 1 requests), USCIS on average processed the requests in 17.91 business days. *Id.* ¶ 7(a). And for complex requests, or those seeking more than a few pages of documents (i.e., Track 2 requests), USCIS on average processed the requests in 24.27 business days. *Id.* ¶ 7(b). Finally, for the requesters Plaintiffs have repeatedly highlighted as the most vulnerable—those with an upcoming scheduled immigration hearing (*i.e.*, Track 3 requests)—USCIS on average processed the requests in 16.41 business days, well in advance of any statutory deadlines. *Id.* ¶ 7(c).

17. For ICE's part, notwithstanding its discovery of the misrouted requests, its A-File

referral backlog remains at zero, due to the Memorandum of Agreement between ICE and USCIS. 2nd Clark Decl. ¶ 8.

18. USCIS also continues to make progress on long-term changes to enable it to maintain its compliance with the Court's injunction. Defendants previously reported that USCIS had converted the 25 term positions under the Memorandum of Agreement to 25 permanent positions, in an effort to aid in retention and decrease turn-over and training time. 8th Meckley Decl. ¶ 16. Defendants can now report that all hiring for those 25 positions has been completed, and all 25 new personnel are starting in the USCIS FOIA Office by the end of this month. *Id.*

19. Defendants also previously reported that USCIS's FOIA office had separately received authorization for a significant personnel increase of 24 new positions. *Id.* ¶ 17. All of those positions have now been announced and the hiring process for those positions has begun. *Id.*

20. The USCIS FOIA office continues to utilize overtime, with staff working 17,694 hours of overtime this compliance period, including overtime work performed by personnel in USCIS's Refugee, Asylum, and International Operations directorate who have been trained in approving FOIA cases. *Id.* ¶ 14. Likewise, the USCIS FOIA Office continues to seek out and obtain detailees from throughout the agency, *id.* ¶ 15, and the FOIA Office has streamlined its hiring process for certain positions, reducing hiring times, *id.* ¶ 18.

16. In light of USCIS's long-term changes to increase personnel, its past record of compliance, and the extensive efforts from all three Defendants to address the misrouted ICE requests, Defendants respectfully submit that they remain in substantial compliance with the Court's injunction. In addition, USCIS states that, after addressing the immediate influx of misrouted requests from ICE, it expects it will be "back on track to report low backlogs, as it has during most of the past one and one-half years." *Id.* ¶ 19.

Dated: June 15, 2022 Respectfully submitted,

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