

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

AMERICAN CIVIL LIBERTIES UNION OF
FLORIDA,

Plaintiff,

v.

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

Defendants.

) Case No. _____

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

INTRODUCTION

1. The American Civil Liberties Union of Florida (“Plaintiff” or “ACLU”) brings 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 two FOIA requests sent by Plaintiff on February 2, 2017 (individually, “Request,” and collectively, “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, “Executive Orders”).

3. Specifically, the first Request seeks records concerning CBP’s local implementation of the Executive Orders at sites within the purview of CBP’s Miami Field Office, which includes the Miami International Airport and various ports of entry. A true and correct copy of this Request is attached as **Exhibit A**.

1 4. The second Request seeks records concerning CBP’s local implementation of the
2 Executive Orders at sites within the purview of CBP’s Tampa Field Office, which includes the
3 Orlando International Airport and various ports of entry. A true and correct copy of this Request is
4 attached as **Exhibit B**.

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

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

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

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

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

21 _____
22 ¹ *Vayeghan v. Kelly*, No. CV 17-0702, 2017 WL 396531 (C.D. Cal. Jan. 29, 2017); *Tootkaboni v.*
23 *Trump*, No. 17-CV-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Doe v. Trump*, No. C17-
24 126, 2017 WL 388532 (W.D. Wash. Jan. 28, 2017); *Aziz v. Trump*, No. 1:17-CV-116, 2017 WL
25 386549 (E.D. Va. Jan. 28, 2017); *Darweesh v. Trump*, No. 17 CIV. 480 (AMD), 2017 WL 388504
26 (E.D.N.Y. Jan. 28, 2017).

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

28 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/>.

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

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

11 11. The Miami Field Office oversees five ports of entry including Miami International
12 Airport. Miami International Airport ranks nationally as the second busiest airport for international
13 passengers (21.2 million in 2015), and tenth busiest airport for total passengers (44.4 million in
14 2015).⁹ Globally, it is the twenty-eighth busiest airport for total passengers, and twenty-ninth
15 busiest airport for international passengers.¹⁰

16 12. The Tampa Field Office oversees seventeen ports of entry including Orlando
17 International Airport. Orlando International Airport ranks nationally as the fourteenth busiest
18 airport both for total passengers (38.7 million in 2015) and for international passengers (5.5

22 <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

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

25 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
26 <https://theintercept.com/2017/02/01/homeland-security-inspector-general-opens-investigation-of-muslim-ban-rollout-orders-document-preservation/>.

27 ⁸ *Id.*

28 ⁹ *Miami International Airport: U.S. and Worldwide Airport Rankings*, MIAMI-DADE AVIATION DEP’T (Sep. 29, 2016), available at [http://www.miami-airport.com/pdfdoc/2015_Rankings-US_and_Worldwide_\(Final\).pdf](http://www.miami-airport.com/pdfdoc/2015_Rankings-US_and_Worldwide_(Final).pdf).

¹⁰ *Id.*

1 million in 2015),¹¹ with year-round direct flights to and from a large number of cities abroad,
2 including Dubai, in the United Arab Emirates.¹²

3 13. Disclosure of the records Plaintiff seeks through this action would facilitate the
4 public's understanding of how Defendants implemented and enforced the Executive Orders in the
5 Miami Field Office, including at Miami International Airport in particular, and in the Tampa Field
6 Office, including at the Orlando International Airport in particular. Such information is critical to
7 the public's ability to hold the government accountable.

8 14. This action is necessary because Defendants have failed to provide Plaintiff with a
9 determination as to whether they will comply with the Requests, although more than 20 business
10 days have elapsed since Defendants received the Requests.

11 **JURISDICTION**

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

14 **VENUE**

15 16. Venue in the United States District Court for the Southern District of Florida is
16 proper under 5 U.S.C. § 552(a)(4)(B) as at least some of the requested agency records are, upon
17 information and belief, situated at CBP facilities within this district, and because Plaintiff ACLU
18 of Florida's principal place of business is in the Southern District. For the same reasons, venue
19 also is proper under 28 U.S.C. § 1391(e).

20 **PARTIES**

21 17. Plaintiff is a non-profit, 501(c)(4) membership organization that educates the public
22 about the civil liberties implications of pending and proposed state and federal legislation,
23 provides analysis of pending and proposed legislation, directly lobbies legislators, and mobilizes
24 its members to lobby its legislators.

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

27 _____
28 ¹¹ *Id.*

¹² *International Service*, GREATER ORLANDO AVIATION AUTHORITY (April 10, 2017),
available at <https://www.orlandoairports.net/flights/international-service/>.

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

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

5 **FACTS**

6 21. On February 2, 2017, Plaintiff sent the Requests to CBP's Miami Field Office and
7 Tampa Field Office, as well as to CBP's FOIA Officer at CBP Headquarters, via United States
8 Postal Service Priority mail, with tracking numbers 9505 5122 3416 7033 0679 15, 9505 5122
9 3416 7033 0679 22, and 9505 5122 3416 7033 0679 08, respectively. *See Exhibit C.*

10 22. The Requests sought copies of CBP's local interpretation and enforcement of the
11 Executive Order at: 1) certain airports specified in the Requests, including Miami International
12 Airport and Orlando International Airport ("Local International Airports"); and 2) certain Port of
13 Entry offices specified in the Requests, including the Port of Entry Office corresponding to Miami
14 International Airport and the Port of Entry Office corresponding to Orlando International Airport
15 ("Port of Entry Offices"). The Requests expressly did *not* seek information held in the records of
16 CBP Headquarters.

17 23. Specifically, each Request sought the following:

- 18 1. "Records created on or after January 27, 2017 concerning CBP's interpretation,
19 enforcement, and implementation of the following at Local International Airport:
20 a. President Trump's Executive Order, signed on January 27, 2017 and titled
21 'Protecting the Nation From Foreign Terrorist Entry Into the United States';
22 b. Any guidance 'provided to DHS field personnel shortly' after President
23 Trump signed the Executive Order, as referenced in CBP's online FAQ;¹³
24
25

26 ¹³ To assist CBP in responding, the Request included the following information in a footnote for
27 reference: "*Protecting the Nation from Foreign Terrorist Entry into the United States*, U.S.
28 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)."

- 1 c. Associate Director of Field Operations for U.S. Citizenship and
2 Immigration Services Daniel M. Renaud’s email, sent at 11:12 A.M. on
3 January 27, 2017, instructing DHS employees that they could not adjudicate
4 any immigration claims from the seven targeted countries;¹⁴
- 5 d. Judge Donnelly’s Decision and Order granting an Emergency Motion for
6 Stay of Removal, issued in the Eastern District of New York on January 28,
7 2017, including records related to CBP’s efforts to comply with the court’s
8 oral order requiring prompt production of a list of all class members
9 detained by CBP;¹⁵
- 10 e. Judge Brinkema’s Temporary Restraining Order, issued in the Eastern
11 District of Virginia on January 28, 2017;¹⁶
- 12 f. Judge Zilly’s Order Granting Emergency Motion for Stay of Removal,
13 issued in the Western District of Washington on January 28, 2017;¹⁷
- 14 g. Judge Burroughs’ Temporary Restraining Order, issued in the District of
15 Massachusetts on January 29, 2017;¹⁸
- 16 h. Judge Gee’s Order granting an Amended *Ex Parte* Application for
17 Temporary Restraining Order, issued in the Central District of California on
18 January 29, 2017;¹⁹

19 _____
20 ¹⁴ 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/>.”

21
22 ¹⁵ 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>.”

23
24 ¹⁶ 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>.”

25
26 ¹⁷ 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/wp-content/uploads/2017/01/Seattle-Order.pdf>.”

27
28 ¹⁸ 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>.”

¹⁹ The following footnote was included for reference: “Order, *Vayeghan v. Trump*, No. CV 17-

- 1 i. Assurances from the U.S. Attorney’s Office for the Eastern District of
 - 2 Pennsylvania that all individuals detained at Philadelphia International
 - 3 Airport under the Executive Order would be admitted to the United States
 - 4 and released from custody on Sunday, January 29, 2017;
 - 5 j. DHS’s ‘Response to Recent Litigation’ statement, issued on January 29,
 - 6 2017;²⁰
 - 7 k. DHS Secretary John Kelly’s ‘Statement on the Entry of Lawful Permanent
 - 8 Residents Into the United States,’ issued on January 29, 2017;²¹
 - 9 l. DHS’s ‘Statement on Compliance with Court Orders and the President’s
 - 10 Executive Order,’ issued on January 29, 2017;²² and
 - 11 m. Any other judicial order or executive directive issued regarding the
 - 12 Executive Order on or after January 27, 2017.
- 13 2. Records concerning the number of individuals who were detained or subjected to
- 14 secondary screening, extending questioning, an enforcement examination, or
- 15 consideration for a waiver at Local International Airport pursuant to the Executive
- 16 Order, including:
- 17 a. The total number of individuals who remain detained or subject to
 - 18 secondary screening, extending questioning, an enforcement examination,
 - 19 or consideration for a waiver at Local International Airport both as of the
 - 20

21 0702 (C.D. Cal. Jan. 29, 2017), *available at*
22 https://www.aclusocal.org/sites/default/files/vayeghan_-_order_re_tro.pdf.”

23 ²⁰ The following footnote was included for reference: “*Department of Homeland Security*
24 *Response to Recent Litigation*, DEP’T OF HOMELAND SECURITY (Jan. 29, 2017), *available at*
25 <https://www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation>.”

26 ²¹ *Statement By Secretary John Kelly On The Entry Of Lawful Permanent Residents Into The*
27 *United States*, DEP’T OF HOMELAND SECURITY (Jan. 29, 2017), *available at*
28 <https://www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states>.

²² 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>.”

- 1 date of this request and as of the date on which this request is processed;
2 and
- 3 b. The total number of individuals who have been detained or subjected to
4 secondary screening, extending questioning, an enforcement examination,
5 or consideration for a waiver for any length of time at Local International
6 Airport since January 27, 2017, including the number of individuals who
7 have been
- 8 i. released,
9 ii. transferred into immigration detention, or
10 iii. removed from the United States;
- 11 3. Records concerning the number of individuals who have been removed from Local
12 International Airport from January 27, 2017 to date pursuant to the Executive
13 Order;
- 14 4. Records concerning the number of individuals who arrived at Local International
15 Airport from January 27, 2017 to date with valid visas or green cards who
16 subsequently agreed voluntarily to return; and
- 17 5. Records containing the ‘guidance’ that was ‘provided to DHS field personnel
18 shortly’ after President Trump signed the Executive Order.”²³

19 Exh. A at 6-9; Exh. B at 6-9.

20 24. Each Request included an application for expedited processing, on the grounds that
21 there is a “compelling need” for these records under 5 U.S.C. § 552(a)(6)(E)(v)(II) because the
22 information requested is “urgen[tly]” needed by an organization primarily engaged in
23 disseminating information “to inform the public concerning actual or alleged Federal Government
24 activity.” Exh. A at 13; Exh. B at 13.

25
26 _____
27 ²³ The following footnote was included for reference: “*Protecting the Nation from Foreign*
28 *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).”

1 25. Each Request provided detail showing that the ACLU is primarily engaged in
2 disseminating information within the meaning of 5 U.S.C. § 552(a)(6)(E)(v), given that a critical
3 and substantial aspect of the ACLU’s mission is to obtain information about government activity,
4 analyze that information, and publish and disseminate that information widely to the press and
5 public. Exh. A at 11-13; Exh. B at 11-13.

6 26. Each Request described examples of the ACLU’s information-dissemination
7 function. Exh. A at 11-13; Exh. B at 11-13.

8 27. Each Request also included an application for a fee waiver or limitation under 5
9 U.S.C. § 552(a)(4)(A)(iii) on the grounds that disclosure of the requested records is in the public
10 interest and is “likely to contribute significantly to public understanding of the operations or
11 activities of the government and is not primarily in the commercial interest of the requester.” In
12 particular, the ACLU emphasized that the Requests would significantly contribute to public
13 understanding on a matter of profound public importance about which scant specific information
14 had been made public, *i.e.*, how local CBP Field Offices had enforced, and continue to enforce, the
15 Executive Orders. Each Request also made clear that the ACLU plans to disseminate the
16 information disclosed as a result of the Request to the public at no cost. Exh. A at 14; Exh. B at
17 14.

18 28. Each Request also applied for a waiver of search fees under 5 U.S.C.
19 § 552(a)(4)(A)(ii)(II) on the grounds that Plaintiff qualifies as “representatives of the news media”
20 and the records are not sought for commercial use, given the ACLU’s non-profit mission and
21 substantial activities to publish information for dissemination to the public, as discussed in greater
22 detail in ¶ 25 above. Exh. A at 14-15; Exh. B at 14-15.

23 29. CBP’s Miami Field Office received the Request addressed to it on February 6,
24 2017. *See Exhibit D.*

25 30. CBP’s Tampa Field Office received the Request addressed to it on February 6,
26 2017. *See Exhibit E.*

27 31. CBP’s FOIA Officer at CBP Headquarters received the Request addressed to it on
28 February 6, 2017. *See Exhibit F.*

1 32. On February 10, 2017, CBP acknowledged via email its receipt of the Request
2 delivered to the Miami Field Office. A true and correct copy of CBP’s acknowledgement of
3 receipt is attached as **Exhibit G**.

4 33. In its acknowledgement of receipt, CBP indicated that the Request was assigned a
5 tracking number (CBP-2017-030015). However, CBP did not provide a determination as to
6 whether, or when, CBP would comply with the Request. *See* Exh. F.

7 34. On the same date (February 10, 2017), CBP notified Plaintiff that the Request
8 delivered to the Miami Field Office had its tracking number changed from CBP-2017-030015 to
9 CBP-OFO-2017-030015, which, the letter explained, “is normally due to the request being
10 transferred to another agency (for example, EPA to Dept. of Commerce) or to a sub-agency to
11 process it.” *See* **Exhibit H**.

12 35. On February 22, 2017, CBP acknowledged via email its receipt of the Request
13 delivered to the Tampa Field Office. A true and correct copy of CBP’s acknowledgement of
14 receipt is attached as **Exhibit I**.

15 36. In its acknowledgement of receipt, CBP indicated that the Request was assigned a
16 tracking number (CBP-2017-033092). However, CBP did not provide a determination as to
17 whether, or when, CBP would comply with the Request. *See* Exh. H.

18 37. On March 08, 2017, CBP notified Plaintiff that the Request delivered to the Miami
19 Field Office, whose tracking number had been changed from CBP-2017-030015 to CBP-OFO-
20 2017-030015, would be changed again back to CBP-2017-030015, once again explaining that this
21 “is normally due to the request being transferred to another agency (for example, EPA to Dept. of
22 Commerce) or to a sub-agency to process it.” *See* **Exhibit J**.

23 38. As of April 12, 2017 (the filing date of this Complaint), Plaintiff has not received
24 any notification of any change made to the tracking number for the Request delivered to the
25 Tampa Field Office.

26 39. As of the filing date of this Complaint, more than 20 days (excepting Saturdays,
27 Sundays, and legal public holidays) have elapsed since CBP received the Requests.

28

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

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3 49. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 41
4 above, inclusive.

5 50. Defendants have a legal duty under FOIA to determine whether to provide
6 expedited processing, and to provide notice of that determination to Plaintiff, within 10 days after
7 the date of the Requests.

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

11 52. Because Defendants have not provided a complete response to the Requests, this
12 Court has jurisdiction under FOIA, 5 U.S.C. § 552(a)(6)(E)(iv) to review Defendants' failure to
13 make a determination concerning Plaintiff's Requests for expedited processing.

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

15 1. Declare that Defendants violated FOIA by failing to determine whether to comply
16 with the Requests within 20 business days and by failing to immediately thereafter notify Plaintiff
17 of such determination and the reasons therefor;

18 2. Declare that Defendants violated FOIA by unlawfully withholding the requested
19 records;

20 3. Declare that Defendants violated FOIA by failing to determine whether to provide
21 expedited processing, and to provide notice of that determination to Plaintiff, within 10 days;

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

26 5. Award Plaintiff its reasonable costs and attorneys' fees; and
27
28

