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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' FOURTH
COMPLIANCE REPORT**

Pursuant to this Court's December 17, 2020 Order and Judgment, ECF Nos. 89 & 90, and its October 4, 2021 Order, ECF No. 116, Defendants respectfully submit the following Fourth Compliance Report and accompanying declaration 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

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

2 **The Court’s Injunction**

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

- 7 (A) **Adhere to FOIA Timing Requirements:** Defendants are permanently
8 enjoined from further failing to adhere to the statutory deadlines for
9 adjudicating A-File FOIA requests, as set forth in 5 U.S.C. §§ 552(a)(6)(A)
10 and (B);
- 11 (B) **Eliminate the Backlogs:** Within sixty (60) days of this order, defendants
12 shall make determinations on all A-File FOIA requests in USCIS’s and ICE’s
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
cases that remain pending beyond the twenty or thirty-day statutory periods,
17 respectively 5 U.S.C. §§ 552(a)(6)(A) and (B). The first compliance report is
due within ninety (90) days of this order.

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

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

22 **Defendants’ Substantial Compliance in the Previous Reporting Period**

23 3. At the conclusion of the prior reporting period, the parties and the Court agreed that
24 Defendants were in substantial compliance with the Court’s injunction. *See* Joint Status Report at

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

1 3, ECF No. 105; Minute Order, ECF No. 116. At that time, USCIS had reduced its A-File FOIA
2 backlog by approximately 99.58% since the Court's Order and Judgment on December 17, 2020,
3 from around 21,987 requests to around 92 requests. *See* 3rd Compliance Report ¶ 4, ECF No. 113
4 (citing Fifth Declaration of Tammy M. Meckley ("5th Meckley Decl.") ¶ 6). USCIS had also
5 achieved a timely completion rate of approximately 99.14% for the 47,965 requests received and
6 processed during the third reporting period. *Id.* ¶ 5 (citing 5th Meckley Decl. ¶ 8(a)). ICE, for its
7 part, had maintained its zero backlog, and had renewed its memorandum of agreement with USCIS
8 for the following fiscal year. *Id.* ¶¶ 6 (citing 5th Meckley Decl. ¶ 9(c); Fifth Declaration of Fernando
9 Pineiro ("5th Pineiro Decl.") ¶ 7, respectively).

10 **Defendants' Continued Substantial Compliance in the Present Reporting Period**

11 4. During the latest reporting period, ICE's A-File referral backlog has remained at zero.
12 However, due to several factors discussed below, USCIS's A-File backlog has increased and its
13 compliance rate has decreased. *See* Sixth Declaration of Tammy M. Meckley ("6th Meckley Decl.")
14 ¶ 5. Specifically, as of the end of the day yesterday, USCIS's A-File backlog consisted of
15 approximately 2,978 requests. *Id.* ¶ 8. Although this figure is greater than the backlog reported at
16 the end of the prior compliance period, it still marks an approximately 86.46% reduction from the
17 Court's Order and Judgment on December 17, 2020. *Id.*

18 5. During the current reporting period, the agency's compliance rate has also decreased.
19 Since September 15, 2021, USCIS received approximately 65,612 new requests for A-Files. *Id.* ¶
20 6. Of those requests, approximately 41,545 were completed and approximately 21,374 were timely
21 completed, reflecting a timely completion rate of approximately 51.45% for the current reporting
22 period. *Id.* Although that figure is nearly half of what it was three months ago, the actual impact to
23 processing times has been far less significant. Specifically, for requests seeking specific or limited
24 records (*i.e.*, Track 1 requests), USCIS on average processed the requests in 21.3 business days. *Id.*

1 ¶ 6(a). And for complex requests, or those seeking more than a few pages of documents (*i.e.*, Track
2 2 requests), USCIS on average processed the requests in 31.89 business days. *Id.* ¶ 6(b). In other
3 words, although nearly half of A-File requests were not completed within the applicable 20- or 30-
4 business-day deadlines, on average USCIS only exceeded those deadlines by less than two business
5 days. What is more, for requesters who demonstrated they had an upcoming scheduled immigration
6 hearing (*i.e.*, Track 3 requests), USCIS on average processed the requests in 11.97 business days—
7 well under the applicable statutory deadlines. *Id.* ¶ 6(c).

8 6. At this time, approximately 21,122 requests remain pending within the statutory
9 timeframe (approximately 87.64% of pending requests), *id.* ¶ 7, and approximately 2,978 requests
10 remain pending beyond the statutory timeframe (approximately 12.36% of pending requests), *id.* ¶
11 8. The approximately 2,978 requests that remain pending beyond the statutory timeframe comprise
12 USCIS’s current A-File FOIA backlog. *Id.*

13 7. The change in USCIS’s compliance figures is the result of several overlapping
14 factors, some of which are temporary or beyond USCIS’s control, and most of which USCIS has
15 already taken steps to address. *Id.* ¶ 5. First, at the end of the fiscal year on September 30, 2021,
16 USCIS lost authorization to provide overtime funding for FOIA processing, in light of competing
17 budget priorities related to USCIS’s immigration adjudication workload. *Id.* ¶ 9(a). On November
18 7, 2021, USCIS regained the ability to authorize some overtime for FOIA processing, but the amount
19 was still limited. *Id.* This is in contrast to prior reporting periods, when USCIS’s FOIA staff
20 averaged around 4,800 overtime hours per month. The lack of overtime funding during the current
21 reporting period has had a significant impact on USCIS’s ability to process incoming A-File
22 requests. *Id.* However, in response to this issue, last week, on December 9, 2021, USCIS’s Chief
23 Financial Officer authorized full overtime work funding for the FOIA Office for the remainder of
24 fiscal year 2022, *i.e.*, until September 30, 2022. *Id.* Accordingly, USCIS anticipates that it will be
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1 able to increase its use of overtime in future reporting periods. *Id.*

2 8. USCIS's FOIA office has also experienced staffing shortages during the current
3 reporting period as a result of end-of-year leave. *Id.* ¶ 9(b). Due in part to the high workload
4 associated with achieving compliance with the Court's injunction, for most of calendar year 2021
5 USCIS's FOIA staff voluntarily limited their use of leave. *Id.* However, most of the USCIS FOIA
6 staff have "use or lose" leave that must be taken by the end of the calendar year. *Id.* With the end
7 of the calendar year approaching, the FOIA staff have taken significantly more leave than in prior
8 compliance periods, thus impacting USCIS's FOIA performance. *Id.* For example, during
9 September 2021, staff within the FOIA office used only 386 total days of leave. *Id.* In November
10 2021, however, the USCIS FOIA staff used over 760 days of leave. *Id.* Indeed, the percentage of
11 staff on leave on an average day increased from 4.5% to 8.6% from the prior to the current reporting
12 period. *Id.* Although FOIA staff will likely continue to take leave over the next several weeks in
13 light of upcoming holidays, USCIS anticipates that FOIA staff will decrease their use of leave in
14 early 2022, as they have in prior years. *Id.*

15 9. At the same time that USCIS's FOIA office has experienced limited overtime funding
16 and an increase in staff leave, the office has also faced a substantial increase in FOIA requests
17 compared to the same period in prior years. *Id.* ¶ 9(d). That is, the approximately 65,612 A-File
18 requests USCIS received from September 30, 2021 to December 14, 2021 represent a 44.2% increase
19 from the same period in 2020 (45,500 requests), and a 23.51% increase from the same period in
20 2019 (53,122 requests). *Id.* This unexpected increase in incoming requests has directly impacted
21 USCIS's ongoing FOIA operations.

22 10. Moreover, this increase has occurred at a time when USICS is facing multiple
23 competing national priorities, all of which pull from a limited pool of resources and staffing. *Id.* ¶
24 9(c). For example, USCIS refugee officers who had been detailed to the FOIA office following
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1 entry of the Court's injunction had to return to their jobs processing refugee applications in order to
2 implement the up to 125,000 refugee admissions authorized for Fiscal Year 2022. *Id.* These
3 detailees previously assisted the FOIA office with approximately 66,234 A-File cases and roughly
4 15% of all processing time, but by the end of the fiscal year, all of them had to return to their primary
5 functions and have not been able to be re-detailed to the FOIA office. *Id.* Other national priorities
6 similarly impacted the USCIS FOIA program's ability to obtain new detailees from other parts of
7 the agency. *Id.* For example, in recent months personnel throughout USCIS have been detailed to
8 eight military bases across the country in support of Operation Allies Welcome, which supported
9 the humanitarian parole of 50,000-plus Afghans entering the United States, including resettlement
10 work and processing employment authorization applications. *Id.* Personnel across USCIS have also
11 been detailed to support DHS efforts on the southwest border, including assisting with processing
12 and casework associated with border crossings. *Id.* Each of these priorities, along with others that
13 support immigration application and petition adjudication, significantly limits the availability of
14 USCIS staff to take on new details to assist the FOIA program. *Id.* Nonetheless, despite these
15 constraints, the USCIS FOIA office has worked with DHS and its components to obtain any
16 available resources to assist in its backlog reduction efforts. *Id.* ¶ 10(b). As a result, USCIS has
17 obtained two detailees from ICE, as well as support from two contractors from the DHS Privacy
18 Office. *Id.*

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20 11. Finally, USCIS has experienced significant staff turnover during this compliance
21 period. *Id.* ¶ 9(e). Specifically, ten permanent positions have been vacated, resulting in 11 total
22 vacancies of permanent positions, including the one vacancy that existed at the end of the last
23 reporting period. *Id.* In addition, of the 25 one-year term positions authorized by the ICE
24 Memorandum of Agreement, USCIS currently has 10 vacancies. USCIS has responded by
25 conducting additional hiring, including issuing employment offers to four individuals for one-year
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1 term positions. *Id.*

2 11. In short, while USCIS's backlog has recently increased, its backlog is still far lower
3 than it was at the time the Court issued its injunction. And while USCIS's timely completion rate
4 has dropped, that figure does not reflect the fact that, on average, USCIS is only exceeding the 20-
5 and 30-business-day deadlines by less than two days. USCIS's changed compliance figures are the
6 result of a confluence of circumstances, including a temporary loss of overtime funding, an increase
7 in end-of-year leave, a significantly higher than expected number of incoming requests, competing
8 national priorities, and high staff turnover. The agency, in response, has taken active steps to address
9 these difficulties, such as obtaining full overtime funding through September 30, 2022, conducting
10 additional hiring, and obtaining support from ICE detailees and DHS contractors. Accordingly, if
11 the volume of requests received and the resources to process those requests is consistent with
12 USCIS's projections, USCIS anticipates that it will report lower backlog totals by the next
13 compliance report. *Id.* ¶ 13.

14 12. In light of USCIS's continued efforts, the temporary nature of some of the difficulties
15 facing the agency, and the undeniable progress both USCIS and ICE have made since the Court's
16 Order and Judgment, Defendants respectfully submit that they remain in substantial compliance with
17 the Court's injunction.
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19 Dated: December 15, 2021

Respectfully submitted,

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