

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

AMERICAN CIVIL LIBERTIES UNION and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

v.

DEPARTMENT OF DEFENSE,
DEPARTMENT OF JUSTICE, and
DEPARTMENT OF STATE,

Defendants.

**COMPLAINT FOR
INJUNCTIVE RELIEF**

Case No. 1:17-cv-09972

Hon. _____

Hina Shamsi
Brett Max Kaufman
Anna Diakun
American Civil Liberties Union
Foundation
125 Broad Street—18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

December 21, 2017

COMPLAINT FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief. Plaintiffs the American Civil Liberties Union and the American Civil Liberties Union Foundation (together, the “ACLU”) seek the immediate processing and timely release of agency records from Defendants Department of Defense (“DOD”), Department of Justice (“DOJ”), and Department of State (“State Department”).

2. On October 30, 2017, Plaintiffs submitted a FOIA request (the “Request”) to DOD, DOJ, and the State Department seeking the Trump administration’s rules governing the use of lethal force abroad, known as the “Principles, Standards, and Procedures,” or “PSP.”¹ These rules replace the Obama administration’s policies, publicly released in 2016, called the “Presidential Policy Guidance,” or “PPG.”

3. Public disclosure of the PSP is particularly urgent because media reports indicate that these rules eliminate a number of the PPG’s safeguards against civilian deaths. The changes in the PSP are expected to result in more strikes, against individuals with “no special skills or leadership roles,” in more places outside recognized battlefields. *See* Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, N.Y. Times, Sept. 21, 2017, <https://nyti.ms/2jPwvnB> (“Savage & Schmitt Article”). The U.S. lethal force program has long been a subject of public debate and criticism because of its asserted legal basis and resulting civilian deaths. *See id.*; *see also* Paul D. Shinkman, ‘*Areas of Active Hostilities*’: *Trump’s Troubling Increases to Obama’s Wars*, U.S. News, May 16, 2017, <https://www.usnews.com/news/world/articles/2017-05-16/areas-of-active-hostilities-trumps->

¹ A copy of the Request is attached hereto as Exhibit A.

troubling-increases-to-obamas-wars. Changes to PPG safeguards intended to limit harm may have further disastrous human rights consequences for impacted communities, together with a negative impact on U.S. national security policies and practices, especially given reports that the Trump administration's new rules expand DOD and CIA authority to conduct the already-controversial strikes.

4. The Request seeks information necessary for the public to fully understand the Trump administration's policies governing the use of lethal force abroad and how those rules differ from the public PPG, which governed the use of lethal force outside "areas of active hostilities" from May 2013 to at least September 2017.

5. To date, none of the Defendants has released any responsive record.

6. Plaintiffs now ask the Court for an injunction requiring DOD, DOJ, and the State Department to process the Request immediately. Plaintiffs also seek an order enjoining Defendants from assessing fees for the processing of the Request.

JURISDICTION AND VENUE

7. The Court has subject-matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii). The Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701–706.

8. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

9. Plaintiff American Civil Liberties Union is a nationwide non-profit and non-partisan 501(c)(4) organization with more than 1.6 million members dedicated to the constitutional principles of liberty and equality. The American Civil Liberties Union is committed to ensuring that the U.S. government complies with the Constitution and laws of this

country, including its international legal obligations, in matters that affect civil liberties and human rights. The American Civil Liberties Union is also committed to principles of transparency and accountability in government, and seeks to ensure that the American public is informed about the conduct of its government in matters that affect civil liberties and human rights. Obtaining information about governmental activity, analyzing that information, and widely publishing and disseminating it to the press and the public is a critical and substantial component of the American Civil Liberties Union's work and one of its primary activities. The American Civil Liberties Union is incorporated in New York State and its principal place of business is in New York City.

10. Plaintiff American Civil Liberties Union Foundation is a separate 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. It is incorporated in New York State and its principal place of business is in New York City.

11. Defendant DOD is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Office of the Secretary of Defense and Joint Staff, from which the ACLU requested records, is a component of DOD.

12. Defendant DOJ is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Office of Legal Counsel, the Office of Information Policy, the Office of the Attorney General, the Office of the Deputy Attorney General, and the National Security Division, from which the ACLU requested records, are components of DOJ.

13. Defendant State Department is a department of the executive branch of the U.S. government and is an agency within the meaning of 5 U.S.C. § 552(f)(1).

FACTUAL BACKGROUND

Rules Governing the Use of Lethal Force Abroad

14. The U.S. government began conducting lethal strikes abroad, including through the use of armed drones, in 2001. The government has since carried out hundreds of these strikes in areas far from any traditional battlefield, outside what it calls “areas of active hostilities.” These strikes have killed hundreds of civilians, including children.

15. For years, the U.S. lethal strike program operated without formal rules. After backlash, and following promises of more transparency and stricter controls for the program, the Obama administration issued the Presidential Policy Guidance, or “PPG,” in May 2013. When President Obama announced these new rules, he stated that his “[a]dministration has worked vigorously to establish a framework that governs [the United States’] use of force against terrorists—insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance.” Barack Obama, President, Remarks of President Barack Obama at the National Defense University (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-barack-obama>.

16. In August 2016, the ACLU obtained the PPG through an ongoing FOIA lawsuit.

17. Beginning early in President Trump’s administration, news reports indicated that the administration was working to rewrite the PPG. After months of speculation, a “cabinet-level committee of the top leaders of national-security agencies and departments” approved a new set of rules to replace the PPG on or about September 14, 2017. *See* Savage & Schmitt Article. On October 28, 2017, the *New York Times* reported that President Trump had signed the proposed new rules. Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, N.Y. Times, Oct. 28, 2017, <https://nyti.ms/2BbxmDC> (“Savage Article”). According to the *Times*,

these new rules—the PSP—now govern the United States’ use of lethal force outside recognized war zones in place of the PPG.

18. The PSP reportedly eliminates several of the PPG’s safeguards intended to prevent civilian deaths. For example, under the PPG, the government could typically only conduct lethal strikes against individuals who posed a “continuing, imminent threat to U.S. persons.” *See* Procedures for Approving Direct Action Against Terrorist Targets Located Outside of the United States and Areas of Active Hostilities (May 22, 2013), https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download. The new PSP rules reportedly eliminate this “continuing imminence” requirement and permit lethal force to be used against a broader category of people, including those who do not pose a specific threat. *See* Savage Article. Although the new rules reportedly maintain the PPG’s requirement that there be “near certainty” that no civilians will be killed in any planned strike, they now only require a “reasonable certainty” that the targeted individual be present, rather than the “near certainty” required under the PPG. *See id.*

19. Additionally, the PSP reportedly eliminates the high-level vetting required for each individual strike under the PPG, instead requiring only “higher-level approval” of “country plans” that will be reviewed annually. *See* Savage & Schmitt Article. It is unknown whether the PSP maintains other PPG safeguards, such as the requirement of a finding that capture of a suspect is not feasible before using lethal force.

20. The changes implemented by the PSP will likely increase the number of strikes the U.S. government carries out and expand the areas in which these strikes occur. Because of the potentially grave consequences these strikes have, the reported changes to the government’s

rules governing the use of lethal force abroad are the subject of widespread media attention and public controversy.

The FOIA Request

21. On October 30, 2017, the ACLU submitted identical FOIA Requests to the DOD (specifically, its component the Office of the Secretary of Defense and Joint Staff), the DOJ (specifically, its components the Office of Legal Counsel, the Office of Information Policy, the Office of the Attorney General, the Office of the Deputy Attorney General, and the National Security Division), and the State Department seeking “the release of the Trump administration’s rules governing the use of lethal force abroad, known as the ‘Principles, Standards, and Procedures,’ as well as any cover letter or other document attached thereto.” Request at 5–6. The Request clarified that it “should be construed to include the record containing the Trump administration’s rules governing the use of lethal force as described in Part I [of the Request], even if the final version of this document bears a different title or form than that specifically requested.” Request at 6 n.21.

22. Plaintiffs sought expedited processing of the Request on the ground that there is a “compelling need” for these records because the information requested is urgently needed by an organization primarily engaged in disseminating information in order to inform the public about actual or alleged federal government activity. 5 U.S.C. § 522(a)(6)(E).

23. Plaintiffs sought a waiver of search, review, and reproduction fees on the ground that disclosure of the requested records is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii).

24. Plaintiffs also sought a waiver of search and review fees on the grounds that the ACLU qualifies as a “representative of the news media” and that the records are not sought for commercial use. *Id.* § 552(a)(4)(A)(ii).

Defendants’ Responses to the Request

25. Despite the urgent public interest in the PSP, none of the Defendants has released any record in response to the Request. Some of the Defendants have granted the ACLU’s requests for expedited processing and waiver of fees, while others have denied or failed to respond to those same requests.

26. Under the FOIA, Defendants have twenty working days to respond to a request. 5 U.S.C. § 552(a)(6)(A)(i). If there are “unusual circumstances,” an agency may extend the time limit by no more than ten working days. *Id.* § 552(a)(6)(B)(i). More than thirty working days have passed since Plaintiffs filed the Request. Thus, these statutory time periods have elapsed.

DOD

Office of the Secretary of Defense and Joint Staff

27. By letter dated November 7, 2017, the DOD Office of Freedom of Information acknowledged the Office of the Secretary of Defense and Joint Staff’s receipt of the Request on October 31, 2017, and assigned it case number 18-F-0159. The letter granted Plaintiffs’ request for expedited processing.

28. The Office of Freedom of Information additionally informed Plaintiffs that because of “unusual circumstances which impact [its] ability to quickly process [Plaintiffs’] request,” it would not be able to respond within the twenty-day statutory time period under the FOIA.

29. The November 7, 2017 letter did not address Plaintiffs’ request for a fee waiver.

30. To date, the Office of the Secretary of Defense and Joint Staff has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the Office of the Secretary of Defense and Joint Staff has failed to comply with the time limit for responding to the Request under the FOIA.

31. The Office of the Secretary of Defense and Joint Staff continues to wrongfully withhold the requested records from Plaintiffs.

DOJ

Office of Legal Counsel

32. By letter dated November 17, 2017, the Office of Legal Counsel acknowledged receipt of the Request on October 30, 2017, and assigned it tracking number FY18-020. The Office of Legal Counsel denied Plaintiffs' request for expedited processing and deferred its decision on Plaintiffs' request for a fee waiver.

33. The Office of Legal Counsel "tentatively" assigned the Request to the "complex" processing track, and noted that it was "likely that [it] will be unable to respond to [Plaintiffs'] request within the twenty-day statutory deadline."

34. To date, the Office of Legal Counsel has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the Office of Legal Counsel has failed to comply with the time limit for responding to the Request under the FOIA.

35. The Office of Legal Counsel continues to wrongfully withhold the requested records from Plaintiffs.

*Office of Information Policy, Office of the Attorney General,
and Office of the Deputy Attorney General*

36. By email dated October 31, 2017, the Office of Information Policy acknowledged receipt of the Request on October 30, 2017, and assigned it tracking number DOJ-2018-000520.

37. By letter dated November 9, 2017, the Office of Information Policy, on behalf of the Offices of the Attorney General and the Deputy Attorney General, denied Plaintiffs' request for expedited processing and deferred its decision on Plaintiffs' request for a fee waiver. The letter referenced two tracking numbers: DOJ-2018-000520 (AG) and DOJ-2018-000807 (DAG).

38. The Office of Information Policy additionally informed Plaintiffs that because "[t]he records [Plaintiffs] seek require a search in and/or consultation with another Office, . . . [Plaintiffs'] request falls within 'unusual circumstances,'" and that "[b]ecause of these unusual circumstances, [it] need[s] to extend the time limit to respond to [Plaintiffs'] request beyond the ten additional days provided by the statute." The Office of Information Policy assigned the Request to the "complex" track.

39. To date, none of these offices has released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the Office of Information Policy, the Office of the Attorney General, and the Office of the Deputy Attorney General have failed to comply with the time limit for responding to the Request under the FOIA.

40. The Office of Information Policy, the Office of the Attorney General, and the Office of the Deputy Attorney General continue to wrongfully withhold the requested records from Plaintiffs.

National Security Division

41. By email dated November 28, 2017, the National Security Division acknowledged receipt of the Request on October 30, 2017, and assigned it tracking number FOIA/PA #18-025.

The National Security Division denied Plaintiffs' request for expedited processing and deferred its decision on Plaintiffs' request for a fee waiver.

42. To date, the National Security Division has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the National Security Division has failed to comply with the time limit for responding to the Request under the FOIA.

43. The National Security Division continues to wrongfully withhold the requested records from Plaintiffs.

State Department

44. By letter dated November 8, 2017, the Requester Communications Branch of the Office of Information Programs and Services acknowledged it had received the Request on October 30, 2017, and assigned it case control number F-2017-16659. The letter denied Plaintiffs' request for expedited processing and deferred its decision on Plaintiffs' request for a fee waiver.

45. To date, the State Department has neither released responsive records nor explained its failure to do so. Plaintiffs have exhausted all administrative remedies because the State Department has failed to comply with the time limit for responding to the Request under the FOIA.

46. The State Department continues to wrongfully withhold the requested records from Plaintiffs.

CAUSES OF ACTION

47. The failure of Defendants to make a reasonable effort to search for records responsive to the Request violates the FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations.

48. The failure of Defendants to promptly make available the records sought by the Request violates the FOIA, 5 U.S.C. § 552(a)(3)(A), (a)(6)(A), and Defendants' corresponding regulations.

49. The failure of Defendants to process Plaintiffs' request expeditiously and as soon as practicable violates the FOIA, 5 U.S.C. § 552(a)(6)(E), and Defendants' corresponding regulations.

50. The failure of Defendants to grant Plaintiffs' request for a waiver of search, review, and duplication fees violates the FOIA, 5 U.S.C. § 552(a)(4), (a)(6), and Defendants' corresponding regulations.

51. The failure of Defendants to grant Plaintiffs' request for a limitation of fees violates the FOIA, 5 U.S.C. § 552(a)(4), (a)(6), and Defendants' corresponding regulations.

REQUESTED RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Order Defendants to conduct a thorough search for all responsive records;
 - B. Order Defendants to immediately process and release any responsive records;
 - C. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;
 - D. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action;
- and

E. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Hina Shamsi
Hina Shamsi
Brett Max Kaufman
Anna Diakun
American Civil Liberties Union
Foundation
125 Broad Street—18th Floor
New York, New York 10004
Phone: (212) 549-2500
Fax: (212) 549-2654
hshamsi@aclu.org

December 21, 2017