

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HUMAN RIGHTS WATCH,

Plaintiff,

v.

U.S. CENTRAL COMMAND, U.S.
DEPARTMENT OF THE AIR FORCE, U.S.
DEPARTMENT OF THE ARMY, U.S.
DEPARTMENT OF DEFENSE OFFICE OF
THE INSPECTOR GENERAL, U.S.
MARINE CORPS, U.S. DEPARTMENT OF
THE NAVY, and OFFICE OF THE
SECRETARY OF DEFENSE,

Defendants.

Civil Action No. 18-cv-11503
ECF Case

COMPLAINT

INTRODUCTION

Plaintiff Human Rights Watch, by its undersigned attorneys, alleges:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, for declaratory, injunctive, and other appropriate relief.
2. By this action, Plaintiff seeks to compel Defendants, the U.S. Central Command (“CENTCOM”), the U.S. Department of the Air Force (“Air Force”), the U.S. Department of the Army (“Army”), the U.S. Department of Defense Office of the Inspector General (DOD-OIG), the U.S. Department of the Navy (“Navy”), the U.S. Marine Corps (“Marines”), and the Office of the Secretary of Defense (“OSD”) to release records responsive to FOIA requests properly made by Plaintiff.
3. The FOIA requests underlying this action seek records of alleged mistreatment or injuries of detainees held by U.S. military forces in Afghanistan.

PARTIES

4. Plaintiff Human Rights Watch, Inc. is a non-profit 501(c)(3) organization that seeks to advance human rights around the world, and is headquartered in this judicial district at 350 Fifth Avenue, 34th Floor, New York, New York, 10118.

5. Defendants CENTCOM, the Army, the Air Force, DOD-OIG, the Navy, the Marines, and OSD are federal government agencies within the meaning of 5 U.S.C. § 552(f)(1) and 5 U.S.C. § 551 that have possession and control of the records that Plaintiff seeks.

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction over this action and personal jurisdiction over Defendant pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

7. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B).

8. Defendants have failed to meet the statutory deadline set by FOIA or have failed to meet the statutory deadline to respond to the Plaintiff's appeals. *See* 5 U.S.C. § 552(a)(6)(A)-(B), (E). Plaintiff has therefore exhausted all administrative remedies, pursuant to 5 U.S.C. § 552(a)(6)(C), (E).

FACTUAL ALLEGATIONS

A. ICC Investigation Into Alleged U.S. Detainee Abuse

9. On November 20, 2017, the Office of the Prosecutor of the International Criminal Court requested authorization to begin an investigation into crimes committed during the U.S. War in Afghanistan, including alleged mistreatment of detainees by members of the U.S. Armed Forces.¹

¹ Situation in the Islamic Republic of Afghanistan, ICC-02/17, Request for Authorisation of an Investigation Pursuant to Article 15 (Nov. 20, 2017), http://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

10. This investigation would include whether the United States has thoroughly and sufficiently investigated alleged detainee abuse.²

11. On September 10, 2018, the United States National Security Advisor, John Bolton, disparaged and threatened the ICC over the potential investigation of U.S. actions in Afghanistan related to torture and mistreatment of detainees. He declared that “[t]he United States will use any means necessary to protect our citizens and those of our allies from unjust prosecution by” the ICC.³ He further stated that “the International Criminal Court is superfluous” because the United States is “a democratic nation, with the most robust system of investigation, accountability, and transparency in the world,” and “[w]hen violations of law do occur, the United States takes appropriate and swift action to hold perpetrators accountable.”⁴

12. The United States government has reported that the U.S. Department of Defense has conducted thousands of investigations into detainee abuse and disciplined hundreds of service members.⁵

13. The United States government has reported that more than seventy of these investigations led to trials by courts-martial⁶ and that “[a]ll courts-martial are a matter of public record.”⁷

² *Id.*

³ John Bolton, United States National Security Advisor, Remarks to the Federalist Society: Protecting American Constitutionalism and Sovereignty from International Threats (Sept. 10, 2018) (transcript available at <https://www.lawfareblog.com/national-security-adviser-john-bolton-remarks-federalist-society>).

⁴ *Id.*

⁵ United States of America, One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports on Implementation of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, ¶ 31, U.N. Doc. CAT/C/USA/CO/3-5/Add.1 (Jan. 14, 2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/005/39/PDF/G1600539.pdf>.

⁶ *Id.*

⁷ *Id.* ¶ 21.

B. Plaintiff's FOIA Requests

14. Between March 22, 2018, and October 24, 2018, Plaintiff submitted a FOIA request to each Defendant seeking “[a]ny records produced or held by the [Defendant] to the alleged mistreatment or injury of detainees held by US military forces in Afghanistan, including those held in shared custody with Afghan authorities, from September 11, 2001 until the date of this request.” A true and correct copy of a representative request is annexed hereto as Exhibit A.

15. The requests sought expedited processing because Plaintiff demonstrated a compelling need for the records based on their connection to the public debate about detainee mistreatment and the proposed ICC investigation.⁸

16. The requests further sought a fee waiver because the requests were filed pursuant to Human Rights Watch's mission as a research and advocacy entity and representative of the news media within the meaning of 5 U.S.C. § 552(a)(4)(A)(ii)(II), and because the records sought concerned a matter of great public interest and concern and Human Rights Watch would not put them to commercial use.

U.S. Central Command

17. On March 22, 2018, Plaintiff submitted its FOIA request to CENTCOM. This request was substantially similar to the request referenced *supra* ¶ 14.

⁸ John Bolton's recent comments provide confirmation of the urgent nature of this request, which is a matter of current public controversy. *See, e.g.,* Ayesha Rascoe, *John Bolton: International Criminal Court Will Face Repercussions If Americans Prosecuted*, Nat'l Pub. Radio, Sept. 10, 2018, <https://www.npr.org/2018/09/10/646321536/bolton-icc-will-face-repercussions-if-action-taken-against-americans>; Billy Perrigo, “*Already Dead to Us*”: *Why the Trump Administration Has a Problem with the International Criminal Court*, Time, Sept. 12, 2018, <http://time.com/5393624/john-bolton-international-criminal-court>; Matt Apuzzo and Marlise Simons, *U.S. Attack on I.C.C. Is Seen as Bolstering World's Despots*, N.Y. Times, Sept. 13, 2018, <https://www.nytimes.com/2018/09/13/world/europe/icc-burundi-bolton.html>.

18. On June 5, 2018, CENTCOM acknowledged receipt of Plaintiff's FOIA request. CENTCOM did not respond to Plaintiff's request for a fee waiver or Plaintiff's request for expedited processing.

19. As of the filing of this Complaint, Human Rights Watch has received no further information or communication from CENTCOM concerning the request.

U.S. Department of the Air Force

20. On October 24, 2018, Plaintiff submitted its FOIA request to the Air Force. A true and correct copy of this request is annexed hereto as Exhibit B.

21. As of the filing of this Complaint, Plaintiff has received no further information or communication from the Air Force concerning the request.

U.S. Department of the Army

22. On March 22, 2018, Plaintiff submitted its FOIA request to the Army (No. FA 18-0852 / FP 18-013980). This request was substantially similar to the request referenced *supra* ¶ 14.

23. On April 3, 2018, the Army acknowledged receipt of Plaintiff's FOIA request and also forwarded the request to four Army agencies: Headquarters, U.S. Army Central; the Office of the Inspector General; the Office of the Judge Advocate General; and the U.S. Army Legal Services Agency. The Army did not respond to Plaintiff's request for a fee waiver or Plaintiff's request for expedited processing.

24. On April 6, 2018, the Army forwarded Plaintiff's request to three additional Army agencies: the Office of the Provost Marshal General, the U.S. Army Human Resources Command ("USAHRC"), and the Army Review Boards Agency.

25. Headquarters, U.S. Army Central has yet to respond to the forwarded request.

26. On July 12, 2018, the Office of the Inspector General acknowledged receipt of the request, assigned it tracking number 18-451, and indicated that it had been assigned to the “complex” processing track. It did not state whether or not it had made a determination on the request for a fee waiver or the request for expedited processing.

27. On May 2, 2018, the U.S. Army Claims Service (USARCS) and the International and Operational Law Division (IOLD), both components of the Office of the Judge Advocate General (JAG), responded to the request and claimed to have found no records responsive to the request.

28. On July 31, 2018, Plaintiff, through counsel, timely filed administrative appeals challenging the adequacy of the JAG’s search for responsive records. Plaintiff argued that JAG’s failure to find responsive records, despite the Government’s public statements that the armed forces disciplined hundreds of service members and conducted more than seventy courts-martial, demonstrates that JAG must have either delegated the request to the wrong components or that those components must have failed to adequately search their records. Plaintiff also sought more information about why the Army had forwarded the request to the specific components it chose, including JAG; why JAG had delegated the request to USARCS and IOLD; and how USARCS and IOLD had searched for the records. A true and correct copy of these appeals is annexed hereto as Exhibit C. On October 4, 2018, the Office of the Army General Counsel acknowledged receipt of these appeals and informed Plaintiff that the estimated date of completion for the appeals would be April or May of 2019.

29. The U.S. Army Legal Services Agency has yet to respond to the forwarded request.

30. On April 6, 2018, the Office of the Provost Marshal General acknowledged receipt of the forwarded request, assigned it control number FA-18-0011, and informed Plaintiff that processing of the request may take more than twenty days.

31. On May 10, 2018, U.S. Army Human Resources Command (“HRC”) responded to the request, assigned it control numbers FP-18-015313 and FA-18-1651, and claimed to have found no records responsive to the request. A true and correct copy of this response is annexed hereto as Exhibit D.

32. On August 8, 2018, Plaintiff, through counsel, timely filed an administrative appeal challenging the adequacy of HRC’s search for responsive records. On August 24, 2018, Plaintiff resubmitted the appeal to the correct address. On September 5, 2018, HRC acknowledged receipt of the appeal, stating that the appeal was received in the office on September 4, 2018. Plaintiff has received no further response.

33. After acknowledging receipt of the appeal, HRC informed Plaintiff’s counsel that Plaintiff would need to request a formal written determination of its FOIA request and would only then be entitled to file an administrative appeal. Plaintiff’s counsel subsequently learned that HRC had withdrawn the pending administrative appeal. Plaintiff believes the appeal was valid and that an additional written request was not necessary under FOIA. *See* 5 U.S.C. § 552; Exhibit D (“[B]ecause a ‘no records’ determination may be considered adverse, you may appeal this determination . . .”). Nevertheless, on September 28, 2018, Plaintiff submitted the written request as directed by HRC. As of the filing of this Complaint, HRC has not responded to Plaintiff’s request for a formal determination.

34. On April 20, 2018, the Army Review Boards Agency acknowledged receipt of the forwarded request, assigned it control numbers FP-18-016282 and FA-18-0007, and denied

expedited processing. The Agency informed Plaintiff that processing could take “weeks or months.”

35. On October 19, 2018, Plaintiff submitted a second FOIA request to the Army Review Boards Agency, providing further justification of the need for expedited processing. As of the filing of this Complaint, Human Rights Watch has received no further information or communication from the Army Review Boards Agency concerning the request.

U.S. Department of Defense Office of the Inspector General

36. On March 22, 2018, Plaintiff submitted its FOIA request to DOD-OIG (No. DODOIG-2018-000461). This request was substantially similar to the request referenced *supra* ¶ 14.

37. On March 23, 2018, DOD-OIG acknowledged receipt of Plaintiff’s request. On March 26, 2018, DOD-OIG denied Plaintiff’s request for expedited processing. Neither of these letters responded to Plaintiff’s request for a fee waiver.

38. On June 25, 2018, Plaintiff timely filed an administrative appeal of DOD-OIG’s denial of expedited processing. A true and correct copy of this appeal is annexed hereto as Exhibit E.

39. On June 27, 2018, before it had responded to Plaintiff’s administrative appeal, DOD-OIG informed Plaintiff that two of its components—Administrative Investigations and Intelligence & Special Programs Assessments—had discovered documents responsive to Plaintiff’s request. It directed Plaintiff to two of these documents, which are publicly available in DOD-OIG’s online FOIA reading room, and informed Plaintiff that the remaining documents required clearance from other agencies before DOD-OIG could release them to Plaintiff.

40. On August 15, 2018, the Appellate Authority for DOD-OIG, Brian Yonish, informed Plaintiff that he was granting Plaintiff's request for expedited processing. In this letter, Yonish referenced DOD-OIG's June 27, 2018, interim response and repeated that DOD-OIG needed to consult with other agencies before releasing the responsive documents.

41. As of the filing of this Complaint, Plaintiff has received no further information or communication from DOD-OIG concerning the request. DOD-OIG has released no responsive documents except for the two documents already available through its FOIA reading room. None of the other DOD-OIG components—including Criminal Investigations—has responded to Plaintiff's request.

U.S. Department of the Navy

42. On March 22, 2018, Plaintiff submitted its FOIA request to the Navy (No. DON-NAVY-2018-005780). This request was substantially similar to the request referenced *supra* ¶ 14.

43. On March 22, 2018, the Navy acknowledged receipt of Plaintiff's FOIA request. It did not respond to Plaintiff's request for a fee waiver or Plaintiff's request for expedited processing.

44. As of the filing of this Complaint, Plaintiff has received no further information or communication from the Navy concerning the request.

U.S. Marine Corps

45. On March 22, 2018, Plaintiff submitted its FOIA request to the Marines (No. DON-USMC-2018-005781). This request was substantially similar to the request referenced *supra* ¶ 14.

46. On March 28, 2018, the Marines acknowledged receipt of Plaintiff's request and denied Plaintiff's request for expedited processing and request for a fee waiver. The Marines did not provide a reason for these denials.

47. By letter dated June 29, 2018, Plaintiff, through counsel, appealed the Marines' denial of Plaintiff's requests for expedited processing and a fee waiver. A true and correct copy of Plaintiff's appeal is annexed hereto as Exhibit E.

48. As of the filing of this Complaint, Plaintiff has received no further information or communication from the Marines concerning the request or the appeal.

Office of the Secretary of Defense

49. On March 22, 2018, Plaintiff submitted its FOIA request to the Secretary (No. 18-F-0760). This request was substantially similar to the request referenced *supra* ¶ 14.

50. On April 18, 2018, the Secretary acknowledged receipt of Plaintiff's FOIA request, denied Plaintiff's request for expedited processing, and informed Plaintiff that it did not expect to be able to respond to Plaintiff's request within the statutory twenty-day response period.

51. On October 19, 2018, Plaintiff submitted a second FOIA request to the Office of the Secretary of Defense (No. 19-F-0166). This second request included an explanation of how public concern about the ICC investigation has only grown since US National Security Adviser John Bolton's made his recent remarks disparaging and threatening the ICC—demonstrating the urgency underlying Plaintiff's request for expedited processing. This request was substantially similar to the request referenced *supra* ¶ 20.

52. On October 22, 2018, OSD acknowledged receipt of Plaintiff's second request.

53. On November 5, 2018, OSD closed Plaintiff's second request without responding to it, describing it as "duplicative or similar to [Plaintiff's] open case number 18-F-0760."

FIRST CLAIM

Violation of FOIA by all Defendants for wrongful withholding of agency records

54. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

55. Defendants and Defendant Army's components are subject to FOIA and must therefore release in response to a FOIA request any disclosable records in their possession at the time of the request and provide a lawful reason for withholding any materials as to which they are claiming an exception.

56. Defendants and Defendant Army's components have failed to act on Plaintiff's requests within the twenty business days required by FOIA, have failed to respond to Plaintiff's administrative appeals within the twenty business days required by FOIA, or have failed to promptly make available to Plaintiff responsive records as required by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)-(B), (C), (E). Plaintiff has therefore exhausted all administrative remedies, pursuant to 5 U.S.C. § 552(a)(6)(C), (E).

57. Defendants have no lawful basis for declining to release the records requested by Plaintiff under FOIA.

58. Accordingly, Plaintiff is entitled to an order compelling Defendants to produce records responsive to its FOIA request.

SECOND CLAIM

Violation of FOIA by all Defendants for failure to grant fee waiver

59. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

60. Defendants' and Defendant Army's components' failure to grant Plaintiff's request for a public interest fee waiver violates FOIA. 5 U.S.C. § 552(a)(4)(A)(iii).

61. Accordingly, Plaintiff is entitled to an order compelling Defendants to grant Human Rights Watch a public interest fee waiver.

THIRD CLAIM

Violation of FOIA by U.S. Central Command, U.S. Department of the Army (and its components), U.S. Department of the Air Force, U.S. Department of the Navy, U.S. Marine Corps, and Office of the Secretary of Defense for failure to grant expedited processing

62. Plaintiff repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

63. The failure of Defendants U.S. Central Command, U.S. Department of the Army (and its components), U.S. Department of the Air Force, U.S. Department of the Navy, U.S. Marine Corps, and Office of the Secretary of Defense to grant Plaintiff's request for expedited processing violates FOIA. 5 U.S.C. § 552(a)(6)(E) and implementing regulation 32 C.F.R. § 286.8.

64. Accordingly, Plaintiff is entitled to an order compelling Defendants to grant Plaintiff's request for expedited processing.

* * * * *

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests this Court to:

1. Declare that the records sought in Plaintiff's FOIA request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

2. Order Defendants to provide the requested documents to Plaintiff within twenty business days of the Court's order;
3. Declare that Plaintiff is entitled to public interest fee waivers;
4. Declare that Plaintiff is entitled to expedited processing where appropriate;
5. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and
6. Grant such other and further relief as the Court deems just and proper.

Dated: December 10, 2018
New York, New York

Respectfully submitted,

/s/ John Langford
John Langford (JL-2367)
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