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19
20 **UNITED STATES DISTRICT COURT**
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 CENTER FOR BIOLOGICAL DIVERSITY,
23 Plaintiff,
24
25 v.
26 U.S. DEPARTMENT OF HOMELAND SECURITY
27 and U.S. CUSTOMS AND BORDER PROTECTION,
28 Defendants.

Case No.: '17CV1215 GPC WVG

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Freedom of Information Act,
5 U.S.C. §552)

1
2 **INTRODUCTION**

3 1. Plaintiff Center for Biological Diversity (“the Center”)—an environmental
4 conservation organization that works to protect native wildlife species and their
5 habitats—challenges the failure of the U.S. Department of Homeland Security (“DHS”)
6 and U.S. Customs and Border Protection (“CBP” and, collectively with DHS, “the
7 Agencies”) to provide records of environmental analysis and compliance with other
8 applicable laws prepared for the construction of prototypes for the U.S.-Mexico border
9 wall (“Border Wall”), in violation of the Freedom of Information Act, 5 U.S.C. § 552,
10 *as amended* (“FOIA”), or alternatively, the Administrative Procedure Act, 5 U.S.C. §§
11 701-06 (“APA”).

12 2. On January 25, 2017, President Donald J. Trump issued Executive Order
13 No. 13767, entitled “Border Security and Immigration Enforcement Improvement”
14 (“Executive Order”), which directed DHS to construct a “secure, contiguous, and
15 impassable physical barrier” along the entirety of the nearly 2,000 mile-long U.S.-
16 Mexico border. The Executive Order defined “wall” to mean “a contiguous, physical
17 wall or similarly secure, contiguous, and impassable physical barrier.”

18 3. On February 17, 2017, DHS Secretary John Kelly issued a memorandum
19 regarding “Implementing the President’s Border Security and Immigration Enforcement
20 Improvements Policies” (“Kelly Memorandum”), which directed CBP, a component
21 agency of DHS, to “immediately begin planning, design, construction, and maintenance
22 of a wall, including the attendant lighting, technology (including sensors), as well as
23 patrol and access roads, along the land border with Mexico in accordance with existing
24 law” Further, the Kelly Memorandum directed the DHS Undersecretary for
25 Management, in consultation with CBP, to “immediately identify and allocate all
26 sources of available funding for the planning, design, construction, and maintenance of
27 a wall”
28

1 4. In accordance with the Executive Order and the Kelly Memorandum, on
2 March 17, 2017, DHS released two Requests for Proposals (“RFPs”)—one for a “Solid
3 Concrete Border Wall Prototype” and the second for an “Other Border Wall
4 Prototype”—which provided that prototype designs must meet thresholds of 30 feet in
5 height and at least 6 feet below the ground.¹

6 5. According to the RFPs, the Border Wall prototype construction will take
7 place at “a location in San Diego, California, as determined by the Government.” The
8 Agencies have provided information and tours to select media outlets depicting the
9 construction area to be on federally-owned land in San Diego, California, within the
10 vicinity of Otay Mesa near the base of the Otay Mountain Wilderness and the eastern
11 terminus of the approximately 14-mile long, westernmost segment of the current Border
12 Wall beginning at the Pacific Ocean.²

13 6. The Otay Mesa area, where the presumed Border Wall prototype
14 construction will take place, is of high environmental and natural resources value. It
15 contains several vernal pools and designated critical habitat for numerous listed
16 threatened and endangered species, including the Quino checkerspot butterfly and San
17 Diego fairy shrimp, as well as habitat for non-listed sensitive and rare species, such as
18 the burrowing owl.

19 ¹ *Solid Concrete Border Wall RFP*, DEPARTMENT OF HOMELAND SECURITY, dated
20 Mar. 17, 2017, *available at*: [https://www.fbo.gov/index?s=opportunity&mode=form](https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=daeee003143839cf4c8cd684694812ef&_cview=0)
21 [&tab=core&id=daeee003143839cf4c8cd684694812ef&_cview=0](https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=daeee003143839cf4c8cd684694812ef&_cview=0); *Other Border Wall*
22 *Prototype RFP*, DEPARTMENT OF HOMELAND SECURITY, dated Mar. 17, 2017,
23 *available at*: [https://www.fbo.gov/index?s=opportunity&mode=form&id=c](https://www.fbo.gov/index?s=opportunity&mode=form&id=c0cce0b2ef8d297b22dc251ea14c60d1&tab=core&_cview=0)
24 [0cce0b2ef8d297b22dc251ea14c60d1&tab=core&_cview=0](https://www.fbo.gov/index?s=opportunity&mode=form&id=c0cce0b2ef8d297b22dc251ea14c60d1&tab=core&_cview=0) (“RFP”).

25 ² *See, e.g., CBS8.com, The Border Wall: First Video of Otay Mountain Prototype*
26 *Location*, April 28, 2017, *available at*: [http://www.cbs8.com/story/35282531/the-](http://www.cbs8.com/story/35282531/the-border-wall-first-video-of-otay-mountain-prototype-location)
27 [border-wall-first-video-of-otay-mountain-prototype-location](http://www.cbs8.com/story/35282531/the-border-wall-first-video-of-otay-mountain-prototype-location).
28

1 7. On May 12, 2017, CBP completed a Phase 1 evaluation of submitted
2 proposals and notified finalists to submit Phase 2 proposals by the end of May 2017.
3 CBP is expected to award prototype contracts to approximately 20 bidding companies
4 by mid-June 2017, and winning bidders are expected to commence and complete
5 prototype construction by late summer 2017.³ The RFPs specified that DHS “will be
6 responsible for any legally required environmental impact studies or environmental
7 compliance” with respect to the Border Wall prototype construction.⁴

8 8. The Center filed two requests, one with DHS and one with CBP, pursuant
9 to FOIA seeking records pertaining to any environmental analysis or other compliance
10 documents prepared for the prototype Border Wall construction as part of the RFP
11 process (“the FOIA Requests”).

12 9. Although the Agencies each acknowledged their respective FOIA Request
13 submitted by the Center, they each have failed to provide any responsive records or
14 stated when they might do so.

15 10. The Agencies are unlawfully withholding the records by failing to search
16 for and provide all responsive records to the Center. The Agencies’ failure to search for
17 and release all records related to environmental and other legal compliance records with
18 respect to the Border Wall prototype construction is contrary to FOIA and undermines
19 FOIA’s policy of government transparency.

20 ³ U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, U.S.
21 Senate Report: Wall Costs Could Soar Toward \$70 Billion (April 18, 2017),
22 <https://www.hsgac.senate.gov/border-wall-report>; *see also* United States Cong. House.
23 Committee on Appropriations. *Hearing on Customs and Border Protection &*
24 *Immigration Budget. June 13, 2017*. 115th Cong. 1st sess. Washington: GPO, 2017
25 (statement of Carla Provost, U.S. Border Patrol Acting Chief, U.S. Customs and Border
26 Protection).

27 ⁴ *See* RFP, Amendment 4, at 2.
28

1 11. Because prompt access to these records is necessary to effectuate FOIA's
2 purpose, the Center seeks declaratory relief establishing that the Agencies are in
3 violation of FOIA, or alternatively, the APA. The Center also seeks injunctive relief
4 directing the Agencies to provide the Center with responsive records without any
5 further delay.

6 **JURISDICTION AND VENUE**

7 12. This Court has jurisdiction over this matter pursuant to 5 U.S.C. §
8 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under FOIA, the APA, and
9 the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

10 13. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B),
11 which provides venue for FOIA cases in this district, because a portion of the
12 responsive records may be found in this district.

13 14. Declaratory relief is appropriate under 28 U.S.C. § 2201.

14 15. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. §
15 552(a)(4)(B).

16 **PARTIES**

17 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, non-
18 profit conservation organization with offices throughout the United States. The Center
19 has more than 58,000 members. The Center and its members are harmed by both
20 Agencies' violations of FOIA, or alternatively the APA, as such violations preclude the
21 Center from gaining a full understanding of the activities, decisions, priorities, and
22 communications related to the Border Wall.

23 17. Defendant U.S. DEPARTMENT OF HOMELAND SECURITY ("DHS")
24 is an agency within the executive branch of the U.S. government. DHS is responsible
25 for ensuring border security along the U.S.-Mexico border in accordance with
26 applicable legal requirements, including the National Environmental Policy Act and the
27 Endangered Species Act. DHS is in possession and control of the records that the
28 Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

1 18. Defendant U.S. CUSTOMS AND BORDER PROTECTION (“CBP”) is an
2 agency within DHS of the executive branch of the U.S. government. CBP is
3 responsible for ensuring border security along the U.S.-Mexico border in accordance
4 with applicable legal requirements, including the National Environmental Policy Act
5 and the Endangered Species Act. CBP is in possession and control of the records that
6 the Center seeks, and as such, it is subject to FOIA pursuant to 5 U.S.C. § 552(f).

7 STATUTORY BACKGROUND

8 19. FOIA’s basic purpose is government transparency. It establishes the
9 public’s right to access all federal agency records unless such records may be withheld
10 pursuant to one of nine, narrowly construed FOIA exemptions. 5 U.S.C. § 552(b)(1)-
11 (9).

12 20. FOIA imposes strict and rigorous deadlines on federal agencies when they
13 receive a request for records pursuant to FOIA. Specifically, an agency must determine
14 whether to disclose responsive records and notify the requester of its determination
15 within 20 working days of receiving a FOIA request, and it must make records
16 “promptly” available, unless it can establish that certain unusual circumstances are
17 present and/or that it may lawfully withhold records, or portions thereof, from
18 disclosure. *Id.* § 552(a)(3)(A), (a)(6). Also within 20 working days, the agency must
19 inform the requester that it has a right to appeal the agency’s determination. *Id.* §
20 552(a)(6)(A)(i).

21 21. FOIA places the burden on the agency to prove that it may withhold
22 responsive records from a requester. *Id.* § 552(a)(4)(B).

23 22. Congress has specified limited circumstances in which federal agencies
24 may obtain more time to make the determination that is required by 5 U.S.C. §
25 552(a)(6)(A)(i).

26 23. First, an agency may toll the 20-working-day deadline to seek additional
27 information or clarification from a requester, but that tolling period ends when the
28 agency receives such information or clarification. *Id.* § 552(a)(6)(A).

1 24. Second, an agency may extend the 20-working-day deadline for an
2 additional 10 working days by giving a written notice to the requester that sets forth
3 “unusual circumstances” to justify a deadline extension, which also requires that it
4 provide the date by which the agency expects to make the determination. *Id.* §
5 552(a)(6)(B)(i). However, to invoke such “unusual circumstances,” the agency must
6 provide the requester with “an opportunity to limit the scope of the request so that it
7 may be processed within [20 working days] or an opportunity to arrange with the
8 agency an alternative time frame for processing the request or a modified request.” *Id.*
9 § 552(a)(6)(B)(ii). In addition, when asserting unusual circumstances, the agency “shall
10 make available its FOIA Public Liaison” to “assist in the resolution of any disputes
11 between the requester and the agency.” *Id.*

12 25. FOIA requires each agency to make reasonable efforts to search for
13 records in a manner that is reasonably calculated to locate all records that are responsive
14 to the FOIA request. *Id.* § 552(a)(3)(C)-(D).

15 26. FOIA requires federal agencies to expeditiously disclose requested records,
16 *see id.* § 552, and mandates a policy of broad disclosure of government records. Any
17 inquiry under FOIA brings with it a strong presumption in favor of disclosure.

18 27. Congress recognized that in certain, limited instances, records may be
19 withheld as exempt from FOIA’s broad disclosure mandate, and thus it created nine
20 categories of exemptions. *Id.* § 552(b). These exemptions, however, are narrowly
21 construed in light of FOIA’s dominant objective of disclosure, not secrecy.

22 28. The U.S. district courts have jurisdiction “to enjoin the agency from
23 withholding agency records and to order the production of any agency records
24 improperly withheld from the complainant.” *Id.* § 552(a)(4)(B).

25 29. Alternatively, an agency’s response to a FOIA request is subject to judicial
26 review under the APA, which confers a right of judicial review on any person who is
27 adversely affected by an agency action, 5 U.S.C. § 702, and authorizes district courts to
28 compel agency action that is unlawfully withheld or unreasonably delayed. *Id.* §

1 706(1). District courts must set aside any agency action that is found to be “arbitrary,
2 capricious, an abuse of discretion or otherwise not in accordance with law.” *Id.* §
3 706(2)(A).

4 **FACTUAL BACKGROUND**

5 **DHS FOIA REQUEST**

6 30. On May 2, 2017, the Center submitted via email a FOIA request to DHS
7 for the following information:

8 1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h
9 (“NEPA”) environmental impact statements, environmental assessments,
10 categorical exclusions, and/or other NEPA analysis prepared for
11 “prototype” border wall construction as part of the border wall request
12 for proposal (“RFP”) process. These prototypes will reportedly be
constructed on federal land in San Diego County;

13 2. All other environmental analysis and/or compliance records prepared
14 for prototype border wall construction, including but not limited to
15 analysis conducted pursuant to the Endangered Species Act, 16 U.S.C. §§
16 1531-1544 (“ESA”), Clean Water Act, 33 U.S.C. §§ 1251-1387
17 (“CWA”), and Coastal Zone Management Act, 16 U.S.C. 22 (“CZMA”);
and

18 3. All inter- and intra-agency correspondence records mentioning,
19 referencing and/or including reference to compliance with environmental
20 and/or all other applicable laws relevant to prototype border wall
construction.

21 31. In response, on May 2, 2017, DHS acknowledged the Center’s request and
22 assigned it tracking number 2017-HQFO-00717 (“the DHS FOIA Request”). DHS also
23 invoked a 10-working-day extension pursuant to 5 U.S.C. § 552(a)(6)(B)(i) due to
24 DHS’s claim that the DHS FOIA Request “seeks documents that will require a thorough
25 and wide-ranging search.”

26 32. A determination on the DHS FOIA Request was due by June 14, 2017,
27 which is 30 working days after DHS’s acknowledgement of the DHS FOIA Request.
28

1 33. As of the date of the filing of this complaint, which is past the 30-working-
2 day deadline, DHS has not requested additional time to respond, provided any
3 responsive records, or provided a determination in response to the DHS FOIA Request.

4 34. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply
5 to the records that are responsive to the DHS FOIA Request. *Id.* § 552(b).

6 35. The Center has been required to expend resources to prosecute this action.

7 CBP FOIA REQUEST

8 36. On May 2, 2017, the Center submitted via email a FOIA request to CBP
9 for the following records:

10 1. All National Environmental Policy Act, 42 U.S.C. §§ 4321-4370h
11 (“NEPA”) environmental impact statements, environmental assessments,
12 categorical exclusions, and/or other NEPA analysis prepared for
13 “prototype” border wall construction as part of the border wall request
14 for proposal (“RFP”) process. These prototypes will reportedly be
constructed on federal land in San Diego County;

15 2. All other environmental analysis and/or compliance records prepared
16 for prototype border wall construction, including but not limited to
17 analysis conducted pursuant to the Endangered Species Act, 16 U.S.C. §§
18 1531-1544 (“ESA”), Clean Water Act, 33 U.S.C. §§ 1251-1387
19 (“CWA”), and Coastal Zone Management Act, 16 U.S.C. 22 (“CZMA”);
and

20 3. All inter- and intra-agency correspondence records mentioning,
21 referencing and/or including reference to compliance with environmental
22 and/or all other applicable laws relevant to prototype border wall
construction.

23 37. In response, on May 2, 2017, CBP acknowledged the Center’s request and
24 assigned it the tracking number CBP-2017-053692 (“the CBP FOIA Request”). On
25 May 3, 2017, CBP sent the Center an automated notice stating that the “average time to
26 process a FOIA request related to ‘travel/border incidents’ is a minimum of 3-6
27
28

1 months.” The notice failed to provide any completion date by which CBP is to provide
2 the requested records.

3 38. A determination on the CBP FOIA Request was due by May 31, 2017,
4 which is 20 working days after CBP’s acknowledgement of the CBP FOIA Request.

5 39. As of the date of the filing of this complaint, which is past the 20-working-
6 day deadline, CBP has not requested additional time to respond, provided any
7 responsive records, or provided a determination in response to the CBP FOIA Request.

8 40. None of FOIA’s nine exemptions to the statute’s disclosure mandate apply
9 to the records that are responsive to the CBP FOIA Request. *Id.* § 552(b).

10 41. The Center has been required to expend resources to prosecute this action.

11 **FIRST CLAIM FOR RELIEF**

12 **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

13 **The Agencies Have Failed to Comply with FOIA’s Mandatory Determination**

14 **Deadline**

15 42. The Center re-alleges and incorporates by reference the allegations made in
16 all preceding paragraphs.

17 43. The Agencies have violated FOIA by refusing to disclose records that are
18 responsive to their respective FOIA Requests.

19 44. The Center has a statutory right to a lawful final determination from the
20 Agencies on the FOIA Requests in a manner that complies with FOIA. The Agencies
21 have violated the Center’s rights in this regard by unlawfully delaying their responses
22 beyond the deadlines that FOIA mandates. 5 U.S.C. § 552(a)(6)(A)(i).

23 45. Based on the nature of the Center’s organizational activities, it will
24 undoubtedly continue to employ FOIA’s provisions in record requests to the Agencies
25 in the foreseeable future.

26 46. The Center’s organizational activities will be adversely affected if the
27 Agencies continue to violate FOIA’s disclosure provisions as they have in this case.

28

1 47. Unless enjoined and made subject to a declaration of the Center's legal
2 rights by this Court, the Agencies will continue to violate the Center's rights to receive
3 public records under FOIA.

4 **SECOND CLAIM FOR RELIEF**

5 **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

6 **The Agencies Have Failed to Disclose All Responsive Records to the Center**

7 48. The Center re-alleges and incorporates by reference the allegations made in
8 all preceding paragraphs.

9 49. The Center has a statutory right to the records it seeks, and there is no legal
10 basis for the Agencies to assert that any of FOIA's nine exemptions to mandatory
11 disclosure apply to withhold these records from the Center. *See* 5 U.S.C. § 552(b)(1)-
12 (9).

13 50. The Agencies have violated the Center's rights in this regard by
14 withholding records that are responsive to their respective FOIA Request.

15 51. Based on the nature of the Center's organizational activities, it will
16 undoubtedly continue to employ FOIA's provisions in the FOIA Requests in the
17 foreseeable future.

18 52. The Center's organizational activities will be adversely affected if the
19 Agencies continue to violate FOIA's disclosure provisions as they have in this case.

20 53. Unless enjoined and made subject to a declaration of the Center's legal
21 rights by this Court, the Agencies will continue to violate the Center's rights to receive
22 public records under FOIA.

23 **THIRD CLAIM FOR RELIEF**

24 **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

25 **The Agencies Have Failed to Conduct an Adequate Search for Responsive Records**
26 **to the FOIA Requests**

27 54. The Center re-alleges and incorporates by reference the allegations made in
28 all preceding paragraphs.

1 55. The Center has a statutory right to have the Agencies process the FOIA
2 Requests in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3). The Agencies
3 have violated the Center’s rights in this regard when they unlawfully failed to undertake
4 a search that is reasonably calculated to locate all records that are responsive to their
5 respective FOIA Request.

6 56. Based on the nature of the Center’s organizational activities, it will
7 undoubtedly continue to employ FOIA’s provisions in record requests to the Agencies
8 in the foreseeable future.

9 57. The Center’s organizational activities will be adversely affected if the
10 Agencies continue to violate FOIA’s requirement to undertake a search that is
11 reasonably calculated to locate records that are responsive to their respective FOIA
12 Requests.

13 58. Unless enjoined and made subject to a declaration of the Center’s legal
14 rights by this Court, the Agencies will continue to violate the Center’s rights to receive
15 public records under FOIA.

16 **FOURTH CLAIM FOR RELIEF**

17 **VIOLATION OF THE FREEDOM OF INFORMATION ACT**

18 **The Agencies Have Failed to Provide Reasonably Segregable Portions of Any**
19 **Lawfully Exempt Records**

20 59. The Center re-alleges and incorporates by reference the allegations made in
21 all preceding paragraphs.

22 60. The Center has a statutory right to any reasonably segregable portion of a
23 record that contains information that is subject to any of FOIA’s exemptions. 5 U.S.C.
24 § 552(b).

25 61. The Agencies violated the Center’s rights in this regard by unlawfully
26 withholding reasonably segregable portions of any lawfully exempt records that are
27 responsive to their respective FOIA Request.

1 62. Based on the nature of the Center's organizational activities, it will
2 undoubtedly continue to employ FOIA's provisions in record requests to the Agencies
3 in the foreseeable future.

4 63. The Center's organizational activities will be adversely affected if the
5 Agencies are allowed to continue violating FOIA's disclosure provisions as they have
6 in this case.

7 64. Unless enjoined and made subject to a declaration of the Center's legal
8 rights by this Court, the Agencies will continue to violate the Center's rights to receive
9 public records under FOIA.

10 **FIFTH CLAIM FOR RELIEF**

11 **VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

12 **(In the Alternative to the First through Fourth Claims)**

13 **The Agencies Have Unlawfully Withheld or Unreasonably Delayed Actions that**

14 **FOIA Requires**

15 65. The Center re-alleges and incorporates by reference the allegations made in
16 all preceding paragraphs.

17 66. The Agencies unlawfully withheld agency actions by failing to comply
18 with the mandates of FOIA consequent to each Agency's failure and refusal to: (1)
19 search for and disclose records that are responsive to the respective FOIA Request; (2)
20 make a timely and lawful determination on the respective FOIA Request; (3) conduct a
21 search that is reasonably calculated to locate all records that are responsive to the
22 respective FOIA Request; (4) provide the Center with records that are responsive to the
23 respective FOIA Request that may not be withheld pursuant to any of FOIA's narrowly
24 construed exemptions to mandatory disclosure; and (5) provide the Center with
25 reasonably segregable portions of records responsive to the respective FOIA Request
26 which contains any material that may be lawfully withheld under an exemption(s).

27 67. Alternatively, the Agencies unreasonably delayed agency actions by failing
28 to comply with the mandates of FOIA consequent to each Agency's failure and refusal

1 to: (1) search for and disclose records that are responsive to the respective FOIA
2 Request; (2) make a timely and lawful determination on the respective FOIA Request;
3 (3) conduct a search that is reasonably calculated to locate all records that are
4 responsive to the respective FOIA Request; (4) provide the Center with records that are
5 responsive to the respective FOIA Request that may not be withheld pursuant to any of
6 FOIA's narrowly construed exemptions to mandatory disclosure; and (5) provide the
7 Center with reasonably segregable portions of records responsive to the respective
8 FOIA Request which contains any material that may be lawfully withheld under an
9 exemption(s). The Agencies' failures constitute agency action unreasonably delayed
10 and therefore actionable pursuant to the APA, 5 U.S.C. § 706(1).

11 68. As alleged above, the Agencies' failure to comply with the mandates of
12 FOIA has injured the Center's interests in public oversight of governmental operations
13 and is in violation of each Agency's statutory duties under the APA.

14 69. The Center has suffered a legal wrong as a result of the Agencies' failure
15 to comply with the mandates of FOIA. As alleged above, the Agencies violated their
16 statutory duties under the APA and injured the Center's interests in public oversight of
17 governmental operations.

18 70. The Center has no other adequate remedy at law to redress the violations
19 noted above.

20 71. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

21 **SIXTH CLAIM FOR RELIEF**

22 **VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**

23 **(In the Alternative to the First through Fourth Claims)**

24 **The Agencies' Violations of FOIA's Requirements Are Arbitrary, Capricious,**
25 **an Abuse of Discretion, or Otherwise Not in Accordance with Law**

26 72. The Center re-alleges and incorporates by reference the allegations made in
27 all preceding paragraphs.

28

1 73. The Agencies violated FOIA’s statutory mandates due to each Agency’s
2 failure and refusal to: (1) search for and disclose records that are responsive to the
3 respective FOIA Request; (2) make a timely and lawful determination on the respective
4 FOIA Request; (3) conduct a search that is reasonably calculated to locate all records
5 that are responsive to the respective FOIA Request; (4) provide the Center with records
6 that are responsive to the respective FOIA Request that may not be withheld pursuant to
7 any of FOIA’s narrowly construed exemptions to mandatory disclosure; and (5) provide
8 the Center with reasonably segregable portions of records responsive to the respective
9 FOIA Request which contains any material that may be lawfully withheld under an
10 exemption(s). By repeatedly violating FOIA’s statutory mandates, the Agencies’
11 actions are arbitrary, capricious, an abuse of discretion, or not in accordance with the
12 law and therefore actionable pursuant to the APA, 5 U.S.C. § 706(2)(A).

13 74. As alleged above, the Agencies’ repeated failure to comply with the
14 mandates of FOIA has injured the Center’s interests in public oversight of
15 governmental operations and is in violation of the Agencies’ statutory duties under the
16 APA.

17 75. The Center has suffered a legal wrong as a result of the Agencies’ failure
18 to comply with the mandates of FOIA. As alleged above, the Agencies violated their
19 statutory duties under the APA and injured the Center’s interests in public oversight of
20 governmental operations.

21 76. The Center has no other adequate remedy at law to redress the violations
22 noted above.

23 77. The Center is entitled to judicial review under the APA, 5 U.S.C. § 702.

24 **PRAYER FOR RELIEF**

25 WHEREFORE, the Center prays that this Court:

26 1. Order the Agencies to conduct searches that are reasonably calculated to
27 locate all records responsive to the FOIA Requests, with the cut-off date for such
28 searches being the date that the searches are conducted, and to provide the Center

1 without charge all responsive records and reasonably segregable portions of lawfully
2 exempt records sought in this action by a reasonable date certain.

3 2. Declare that the Agencies' failure to timely make determinations on the
4 FOIA Requests is unlawful under FOIA, 5 U.S.C. § 552(a)(6)(A), or in the alternative,
5 is agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. §
6 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law,
7 5 U.S.C. § 706(2)(A).

8 3. Declare that the Agencies' failure to properly apply FOIA exemptions, 5
9 U.S.C. § 552(b), is unlawful under FOIA, or in the alternative, is agency action that has
10 been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is arbitrary,
11 capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. § 706(2).

12 4. Declare that the Agencies' failure to undertake a search for and disclose to
13 the Center all records that are responsive to the FOIA Requests, as alleged above, are
14 unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i), or in the alternative, is agency action
15 that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. § 706(1), or is
16 arbitrary, capricious, an abuse of discretion, or not in accordance with law, 5 U.S.C. §
17 706(2).

18 5. Declare that the Agencies' failure to provide the Center with reasonably
19 segregable portions of records which may be lawfully subject to a FOIA exemption, as
20 alleged above, is unlawful under FOIA, U.S.C. § 552(a)(7)(b), or in the alternative, is
21 agency action that has been unlawfully withheld or unreasonably delayed, 5 U.S.C. §
22 706(1), or is arbitrary, capricious, an abuse of discretion, or not in accordance with law,
23 5 U.S.C. § 706(2).

24 6. Award the Center its costs and reasonable attorney fees pursuant to 5
25 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

26 7. Grant such other and further relief as the Court may deem just and proper.

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1 DATED: June 15, 2017

Respectfully submitted,

2
3 /s/ Anchun Jean Su

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