

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANDREW TOWER,
18725 Valade Street
Riverview, MI 48193

Plaintiff,

v.

UNITED STATES CUSTOMS AND
BORDER PROTECTION,
1300 Pennsylvania Avenue, NW
Washington, DC 20229

Defendant.

No. 1:23-cv-204

COMPLAINT

INTRODUCTION

1. This is a Freedom of Information Act (“FOIA”) and Privacy Act suit by which Plaintiff Andrew Tower (“Tower”) seeks records from Defendant United States Customs and Border Protection (“CBP”). 5 U.S.C. § 552; *id.* § 552a. These records and the information they contain are necessary to help Tower understand why CBP failed for months to stop forcibly deducting dues from his paychecks for the benefit of the National Treasury Employees Union (“NTEU”) even though NTEU determined that he was no longer a member in good standing.

2. Tower submitted a combined FOIA and Privacy Act request to CBP on November 7, 2022 (“Tower’s Request” or “Request”). CBP failed to respond to Tower’s Request in any way and has thus missed its deadline of December 7, 2022. 5 U.S.C. § 552(a)(6)(A)(i); *id.* § 552a(d)(1); 6 C.F.R. § 5.6(c); *id.* § 5.23(c).

3. Tower accordingly sues to compel a response from CBP that is consistent with its FOIA and Privacy Act obligations.

JURISDICTION AND VENUE

4. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552a(g)(1)(B), and 28 U.S.C. § 1331. The Court may grant declaratory relief pursuant to 28 U.S.C. §§ 2201–02, and award costs and counsel fees pursuant to 5 U.S.C. § 552(a)(4)(E) and 5 U.S.C. § 552a(g)(3)(B).

5. Venue is proper in this District pursuant to 5 U.S.C. § 552(a)(4)(B) (any FOIA suit can be brought in this District), 5 U.S.C. § 552a(g)(5) (any Privacy Act suit can be brought in this District), and 28 U.S.C. § 1391(e)(1)(A) (because the defendant resides in this District).

PARTIES

6. Plaintiff Andrew Tower is a Customs and Border Protection Officer employed by CBP. Tower is a United States citizen.

7. Defendant CBP is a component agency of the United States Department of Homeland Security (“DHS”). 6 U.S.C. § 211(a).

8. CBP has possession, custody, or control of the records to which Tower seeks access under FOIA and the Privacy Act.

FACTS

9. FOIA requires federal agencies, including CBP, to promptly release agency records to any member of the public who asks. 5 U.S.C. § 552(a)(3)(A); *see also id.* § 551(1) (definition of “agency”); 19 C.F.R. § 103.2 (“CBP applies the [DHS] FOIA regulations . . .”). CBP is required to respond to a FOIA request within 20 working days. 6 C.F.R. § 5.6(c).

10. The Privacy Act requires federal agencies, including CBP, which maintain a system of records, to give “any individual” access to “his record or to any information pertaining to him which is contained in the system,” and permit review and copying of the same. 5 U.S.C. § 552a(d)(1); *see also id.* § 552a(a)(1) (definition of “agency”). CBP “applies the [DHS] Privacy Act

regulations . . .” 19 C.F.R. § 103.3. DHS’s Privacy Act regulations require that CBP respond to a Privacy Act request within 20 working days. 6 C.F.R. § 5.23(c).

11. Tower’s Request is about CBP’s continuing to deduct union dues from his pay at the behest of NTEU, despite NTEU changing Tower’s union membership status from “member in good standing” to “member not in good standing.”

12. Tower became a member of NTEU and authorized CBP to begin deducting dues from his biweekly pay on August 28, 2019.

13. On or about September 27, 2021, Tower attempted to exercise his right to refrain from NTEU membership and other related activities by resigning his union membership and revoking his union dues authorization. *See* 5 U.S.C. § 7102.

14. Despite Tower’s attempted resignation of his union membership, NTEU kept him a union member against his will and began considering him a “member not in good standing” on or about February 11, 2022.

15. Pursuant to the collective bargaining agreement between NTEU and CBP, NTEU was required to inform CBP that Tower was “no longer a member in good standing . . . within ten (10) business days of such final determination . . .” Ex. A. (“CBA”) art. 25, sec. 2.C.¹

16. Pursuant to the CBA, CBP has a duty to “[t]erminate[] dues allotments for employees due to loss of membership in good standing” in NTEU. CBA art. 25, sec. 4.E.

17. Despite its duty, CBP continued deducting union dues from Tower’s pay for NTEU’s benefit after Tower became a “member not in good standing” until August 28, 2022.

18. The records Tower seeks will help him to understand why he became a “member not in good standing,” what it means to be a “member not in good standing,” how NTEU and CBP respond when a person becomes a “member not in good standing,” and why CBP continued

¹ Ex. A contains relevant excerpts of the CBA.

deducting union dues from his pay despite his change in membership status. These records will help him better enforce his constitutional and statutory rights to refrain from union membership, subsidy, and other related activity.

Tower’s Efforts to Obtain Records from CBP via FOIA and the Privacy Act

19. On November 7, 2022, Tower submitted his Request to CBP by letter in compliance with DHS’s FOIA and Privacy Act regulations. Ex. B at 1. He did so by submitting a letter through FOIA.gov. Ex B at 1; Ex. C at 1. The letter requested:

[A] copy of documents containing information related to U.S. Customs and Border Protection Office /NTEU Chapter 173 President Robert Holland’s communication sent and/or received between the dates of 11 February 2022 and present date containing any variations of the following contents, names, or terms: Andrew Tower, Tower, CBPO Tower, Member not in good standing, member not in good standing, Members not in good standing, members not in good standing, good standing.

Ex. B at 1.

20. After Tower submitted his Request through FOIA.gov, the website produced a receipt. Ex. C at 1–3. The receipt says: “Success! Your FOIA request has been created and is being sent to the U.S. Customs & Border Protection.” *Id.* at 1. The receipt contains a “Submission ID” of 483751. *Id.* It also calls that same number a “confirmation ID” and says it “acts as a receipt to show that you submitted a request using FOIA.gov.” *Id.* at 2.

21. CBP’s FOIA website says that CBP accepts FOIA requests through FOIA.gov.²

22. DHS’s Privacy Act regulations permit submission of Privacy Act requests online at the same place at which DHS purportedly accepts FOIA requests. 6 C.F.R. § 5.21(a)(2) (“An

² U.S. Customs & Border Prot., *Freedom of Information Act (FOIA)*, <https://www.cbp.gov/site-policy-notices/foia> [<https://perma.cc/N69A-XAUK>] (last modified Oct. 28, 2022) (“U.S. Customs and Border Protection (CBP) ended participation in FOIAonline on September 30, 2022 for new requests. New requests can be sent in the physical mail to: 90 K ST NE MS 1181, Washington DC 20229 or submitted via FOIA.gov.”).

individual may make a request for access to a Department of Homeland Security record about that individual covered by a DHS or Component system of records notice (SORN) by writing directly to the Department component that maintains the record at the address listed in appendix A to this part or via the internet at <http://www.dhs.gov/dhs-foia-request-submission-form>.”³

23. The deadline for CBP to respond to Tower’s Request was December 7, 2022.

24. Not only did CBP not respond to or deny Tower’s Request by the deadline, but CBP has not communicated with Tower about his Request in any way.

25. As of the date of this complaint, CBP has failed to: (a) produce the requested records or demonstrate that they are lawfully exempt from production; (b) notify Tower of the scope of any responsive records CBP intends to produce or withhold and the reasons for any withholdings; or (c) inform Tower that he may appeal any adequately specific adverse determination. *See* 5 U.S.C. § 552(a)(6)(A); 6 C.F.R. § 5.6(c)–(e).

26. Although more than 20 working days have passed since CBP received Tower’s Request, CBP has not notified Tower as to whether it will fully comply or even respond at all. Thus, under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(C)(i), Tower has exhausted FOIA’s administrative remedies.

27. Tower has the right of prompt access to the requested records under 5 U.S.C. § 552(a)(3)(A), 5 U.S.C. § 552a(d)(1), and 6 C.F.R. § 5.23(c), but CBP has wrongfully withheld them.

³ Upon information and belief, this website is defunct. Navigating to it shows a “Page Not Found” result, says that “K-9 Scout [a DHS service animal] wasn’t able to find the page that you are searching for,” and says the page “may have been moved, deleted, or is otherwise unavailable.” U.S. Dep’t Homeland Sec., *Page Not Found*, <http://www.dhs.gov/dhs-foia-request-submission-form> [<https://perma.cc/6HAV-DX8A>] (last visited Jan. 25, 2023). Accordingly, it appears that FOIA.gov is the appropriate place to submit both FOIA and Privacy Act requests to CBP and that DHS has not yet updated its relevant regulations.

CLAIMS FOR RELIEF

COUNT ONE

Violation of FOIA, 5 U.S.C. § 552

28. Tower re-alleges and incorporates by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

29. CBP is subject to FOIA and must promptly release in response to Tower's Request non-exempted, non-excluded records and provide a lawful reason(s) for withholding any records or parts thereof.

30. FOIA required CBP to determine whether to comply with Tower's Request within twenty working days after he submitted it and to "immediately notify" him of "such determination and the reasons therefor[.]" 5 U.S.C. § 552(a)(6)(A); *see also* 6 C.F.R. § 5.6(c).

31. Tower submitted his Request to CBP on November 7, 2022. CBP's deadline to respond to Tower's Request was accordingly not later than December 7, 2022.

32. CBP did not respond to Tower's Request by the deadline. CBP did not respond to Tower's Request at all.

33. CBP's failure to timely respond to Tower's Request and to provide non-exempted, non-excluded records violated FOIA.

34. Because CBP failed to comply with FOIA's time limit, Tower has exhausted his administrative remedies with respect to his Request. 5 U.S.C. § 552(a)(6)(C)(i).

35. Tower is therefore entitled to declaratory and injunctive relief requiring CBP to promptly produce all non-exempted, non-excluded records responsive to his Request. 5 U.S.C. § 552(a)(4)(B).

COUNT TWO

Violation of the Privacy Act, 5 U.S.C. § 552a

36. Tower re-alleges and incorporates by reference all allegations contained in the foregoing paragraphs of this Complaint as if fully set forth herein.

37. CBP is subject to the Privacy Act and must release in response to Tower's Request non-excluded, non-exempted records and provide a lawful reason(s) for withholding any records or parts thereof.

38. DHS's Privacy Act regulations say that CBP will respond to Privacy Act requests within 20 working days. 6 C.F.R. § 5.23(c).

39. Tower submitted his Request to CBP on November 7, 2022. CBP's deadline to respond to Tower's Request was accordingly not later than December 7, 2022.

40. CBP did not respond to Tower's Request by the deadline. CBP did not respond to Tower's Request at all.

41. CBP's failure to timely respond to Tower's Request and to provide non-exempted, non-excluded records for his review and copying violated the Privacy Act.

42. Tower is therefore entitled to declaratory and injunctive relief requiring CBP to promptly produce all non-exempted, non-excluded records responsive to his Request. 5 U.S.C. § 552a(g)(3)(A).

PRAYER FOR RELIEF

WHEREFORE, Tower prays that this Court:

A. Declare that CBP has violated FOIA and the Privacy Act by failing to timely respond to Tower's Request;

B. Order CBP to conduct good-faith searches immediately for any and all records that are responsive to Tower's Request and to demonstrate that CBP employed search methods that are

reasonably expected to produce the information Tower requested pursuant to 5 U.S.C.

§ 552(a)(4)(B) and 5 U.S.C. § 552a(g)(3)(A);

C. Order CBP to produce by a date certain any and all non-exempted non-excluded records that are responsive to Tower's Request and a *Vaughn* index of any responsive records withheld under claim of exemption;

D. Enjoin CBP from continuing to withhold any and all non-exempted, non-excluded records responsive to Tower's Request pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(3)(A);

E. Grant Tower an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E), and the Privacy Act, 5 U.S.C. § 552a(g)(3)(B); and

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

Respectfully submitted,

Dated: January 25, 2023

s/ David R. Dorey

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*admission pending