

and two decade occupation of Afghanistan.¹ *See* Exhibit A. Because of their service to this country, these brave Afghan men and women – together with their families – have become targets for brutal reprisals from our enemies, including facing threats, abductions, torture, and assassination.

3. In order to obtain SIV visas, Afghan allies who were not directly employed by the U.S. government or International Security Assistance Force are required to submit evidence sufficient to establish that they were contracted or subcontracted to do work for the United States government. This information is not typically in their possession nor is it publicly available. Project Rabbit was used to streamline the visa processing of current or former Afghan allies. Specifically, DOD and Department of State (“DOS”) partnered on Project Rabbit to simplify the SIV employment verification process for Afghan applicants.² Pursuant to Project Rabbit, DOD gathered employment records from DOD contractors, reviewed DOD biometric databases, and matched those records with data from pending SIV applicants to help move those applicants forward in the SIV process.³

4. The records sought by this lawsuit are essential for ensuring transparency and accountability of an agency with a wide-ranging mandate. The great interest in the government management of the withdrawal of Afghanistan and the need for clarity on the U.S. government’s

¹ Recognizing the magnitude of risk these Afghan allies have taken in service to the United States, in 2009, Congress enacted the Afghan Allies Protection Act (8 U.S.C. § 1101, n. § 601-02). The Afghan Allies Protection Act provides a path to safety for Afghans who faithfully served the United States and now find themselves at risk because of that service. Under the amended statute, Afghan allies are eligible to receive a visa to come to the United States if they can demonstrate, among other requirements, that they provided faithful and valuable service to the United States, worked for at least one year in a qualifying capacity, and face serious and ongoing threats because of their work.

² U.S. Department of State, U.S. Visas, *Special Immigrant Visas for Afghans – Who Were Employed by/on Behalf of the U.S. Government*, <https://travel.state.gov/content/travel/en/us-visas/immigrate/special-immg-visa-afghans-employed-us-gov.html>

³ Letter from Colin H. Kahl to Honorable Tammy Duckworth (Oct. 28, 2021), <https://www.duckworth.senate.gov/imo/media/doc/21.09.28%20-%20DOD%20Response%20to%20Senator%20Duckworth%20Letter%20to%20State%20and%20DOD%20-%20Afghan%20SIV%20Program%20Employment%20Verification%20Alternatives.pdf>

processing of SIV applications for endangered Afghan allies renders the public interest at stake in the requested FOIA records of the utmost importance.

5. The Freedom of Information Act “focuses on the citizens’ right to be informed about ‘what their government is up to’” by requiring the release of “[o]fficial information that sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted). “[D]isclosure, not secrecy, is the dominant objective” of FOIA. *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (citation omitted).

6. Defendant DOD has flouted its obligations under FOIA. As of the date of this filing, Defendant has not issued a final determination in response to Plaintiff’s Request and has yet to produce a single document.

7. Plaintiff brings this action to compel Defendant to immediately process and release to Plaintiff all responsive records that it has unlawfully withheld.

PARTIES

8. Plaintiff the International Refugee Assistance Project is a non-profit organization. IRAP utilizes media and systemic policy advocacy, direct legal aid, and impact litigation to serve the world’s most persecuted individuals and empower the next generation of human rights leaders. IRAP publishes reports, know-your-rights documents, and other educational materials that are widely disseminated to the public, including through its website. These materials are made available to everyone—including tax-exempt organizations, non-profit groups, lawyers, law students, refugees, and other displaced people—free of charge. IRAP also maintains a blog; publishes an electronic newsletter distributed to subscribers via email; and releases information via social media platforms such as Twitter and Facebook. Material obtained through FOIA is an integral part of this educational

work, and IRAP routinely publishes materials that it obtains through FOIA requests. IRAP advocates for legal pathways to safety for Afghan allies who served with U.S. forces. IRAP is a 501(c)(3) corporation headquartered at One Battery Park Plaza in New York, New York.

9. Defendant Department of Defense is an “agency” within the meaning of 5 U.S.C. § 552(f)(1). DOD has possession and control over the documents and information requested by Plaintiff.

JURISDICTION AND VENUE

10. 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. §§ 701-706, and 28 U.S.C. § 1331.

11. Venue in the Southern District of New York is proper under 5 U.S.C. § 552(a)(4)(B) because IRAP has its place of business in New York City and because IRAP’s FOIA Request to DOD occurred within the City and County of New York, within this District.

STATUTORY BACKGROUND

12. The Freedom of Information Act provides that any member of the public may request records from a United States agency. Upon receipt of a FOIA request, an agency must determine within 20 business days—or, in “unusual circumstances,” by 30 business days—whether it will comply with a request and notify the requestor of its determination and reasoning in writing. 5 U.S.C. §§ 552(a)(6)(A)(i) - B(i). This determination must also timely indicate the scope of the documents the agency intends to produce and the exemptions, if any, that it will apply to withhold documents.

13. In response to a FOIA request, an agency, after engaging in a reasonable search for responsive records, including of any field offices that may possess relevant materials, must

disclose in a timely manner all records that do not fall within nine narrowly construed statutory exemptions. 5 U.S.C. §§ 552(a)(3)(A), (C), (b)(1)-(9).

14. Typically, a requester under FOIA must appeal agency action administratively before commencing litigation. However, if the agency has failed to abide by its obligations and issue a determination on the request or a determination on an administrative appeal within the statutory timeframe, the administrative appeal process is considered exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

15. Upon complaint, a district court can enjoin an agency from withholding records and order production of records improperly withheld. 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

16. The Department of Defense is the United States' largest government agency. It coordinates the United States Armed Forces and led the military invasion and war in Afghanistan which started in October 2001. After nearly twenty years of occupation, the U.S. military withdrew from Afghanistan in August 2021—a withdrawal that was marked with chaos and uncertainty.⁴ During its two decades in Afghanistan, the United States relied on local Afghans to undertake critical roles in support of its mission. However, these Afghan allies—and their families—were often targets of lethal, retributive violence by the Taliban, with over 300 targeted killings since 2014.⁵

17. In recognition of the danger posed to Afghan allies, Congress established a Special Immigrant Visa program to provide some measure of protection. However, the SIV program has

⁴ Libby Cathey, *After 20 years, US ground troops leave Afghanistan, but Americans left behind*, ABC News (Aug. 30, 2021), <https://abcnews.go.com/Politics/us-ground-troops-leave-afghanistan-20-years-americans/story?id=79728572>.

⁵ Anne Gearan, *Thousands of Afghans and Iraqis are under threat for helping Americans. Now they hope Biden will help them resettle in the United States*, WASHINGTON POST (Dec. 30, 2020), https://www.washingtonpost.com/politics/biden-refugees-visas/2020/12/30/572c00fc-3e4f-11eb-9453-fc36ba051781_story.html; Zolan Kanno-Youngs, *Refugees Who Assisted the U.S. Military Find the Door to America Slammed Shut*, N.Y. TIMES (Oct. 18, 2020), <https://www.nytimes.com/2020/10/18/us/politics/trump-refugees-iraq-afghanistan.html>.

been plagued by backlogs for more than a decade.⁶ The government's most recent report for the Afghan SIV program claims a U.S. government processing time of 734 days, over twice as long as the nine-month timeframe prescribed by Congress.⁷

18. As the U.S. withdrawal date from Afghanistan approached in the summer of 2021 and the Taliban assumed control of more and more territory in Afghanistan, DOD partnered with DOS to help expedite the SIV process for Afghan nationals employed by DOD contractors. This effort was known as Project Rabbit. Project Rabbit aimed to simplify "one of the most burdensome portions of the [SIV application] process," by replacing the need for companies to write employment verification letters and letters of recommendation for each Afghan employee.⁸

19. According to DOS, Project Rabbit is designed to match SIV applicants with human resource and employment data provided by DOD contractors. If matched, Project Rabbit shares this information directly with DOS to facilitate employment verification for Afghan allies and allow the Chief of Mission to determine whether the SIV applicant offered "faithful and valuable service" to the U.S. Government. With this information, SIV applicants can obtain Chief of Mission approval, which is the first step of the SIV application process.

20. In 2021, DOD created a channel for SIV applicants to request assistance and for representatives of companies operating in Afghanistan to submit human resources data to Project Rabbit. In September 2021, DOS updated their website's Afghan SIV program page to include a DOD email address for applicants who needed assistance obtaining documentation confirming their employment with the DOD or a DOD contractor or subcontractor. In September 2021, the

⁶ Press Release, International Rescue Committee, *IRC: U.S. announcement of Afghan SIV withdrawal leaves more questions than answers; populations remain at risk* (June 29, 2021), <https://www.rescue.org/press-release/irc-us-announcement-afghan-siv-withdrawal-leaves-more-questions-answers-populations>.

⁷ U.S. Dep't of State, U.S. Visas, *supra* note 2.

⁸ Letter from Undersecretary of Defense Colin H. Kahl to Senator Tammy Duckworth, *supra* note 3.

auto-reply for this email hyperlinked to a spreadsheet and webform for company representatives to use to submit human resources data to the DOD. But without notification or explanation, DOD has retired that online form.⁹ Moreover, by December 2021, once again without explanation, DOD removed contact information for company representatives to reach Project Rabbit staff from its auto-reply and indicated that it was no longer responding to individual emails.

21. Despite the vital importance of this program's mission, there is almost no public information on how the program works, whether it actually worked, or its current status of operation. This lack of clarity has caused confusion and speculation among impacted communities, including Afghan allies, military veterans, and other advocates.¹⁰

22. The U.S. has admitted that that it left the majority of SIV-eligible Afghan allies behind when it evacuated Afghanistan.¹¹ According to one nonprofit report, approximately 78,000 Afghan allies have been left behind.¹² A survey conducted by that nonprofit revealed that nearly 30% of Afghan allies have been temporarily imprisoned; 52% have been stopped and questioned; 88% have lost jobs; 95% reported economic hardship; 70% stated that they have gone without food at least once in the past month.¹³

23. Given this fraught history and the very real danger to human life, the documents sought in the Request are of the gravest public importance. They will allow IRAP to better assist and educate Afghan allies, who face serious, ongoing risk from the Taliban due to their service with U.S. forces, and advise them as to what tools are available to facilitate the processing of their

⁹ *Id.*

¹⁰ *Project Rabbit and Afghan SIVs*, AFGHAN WAR NEWS, <https://afghanwarnews.info/taliban-victory-2021/project-rabbit.htm> (last accessed July 19, 2022).

¹¹ Alexander Ward, 'Majority' of Afghan SIVs left behind, *State Dept. officials estimate*, POLITICO (Sept. 1, 2021), <https://www.politico.com/news/2021/09/01/afghanistan-sivs-left-behind-state-dept-508327>.

¹² Dan de Luce, *U.S. 'left behind' 78,000 Afghan allies in chaotic withdrawal: NGO report*, NBC NEWS (Mar. 1, 2022), <https://www.nbcnews.com/investigations/us-left-78000-afghan-allies-ngo-report-rcna18119>

¹³ *Id.*

applications. Moreover, disclosure of this information will contribute significantly to public understanding of the operations or activities of the federal government, specifically DOD's "moral obligation to help those Afghans that have helped us over the past 20 years of our presence and work in Afghanistan."¹⁴

PLAINTIFF'S FOIA REQUEST

24. Plaintiff submitted the FOIA Request to Defendant DOD on March 31, 2022. *See* Ex. A.

25. The Request seeks disclosure of current policies, procedures, directives, training, guidance, and similar documents related to Project Rabbit. *Id.*

26. The Request further seeks aggregate data and statistics related to Project Rabbit. *Id.*

27. Plaintiffs sought expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E). *Id.* First, IRAP is a "representative of the news media", and there exists an "urgency to inform the public concerning the actual or alleged Federal Government activity." Second, a failure to obtain the records on an expedited basis could reasonably be expected to "pose an imminent threat to the life or physical safety of an individual," namely Afghan allies who face ongoing risk from the Taliban. *Id.*

28. Plaintiff also sought a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure of the requested records was in the public interest since it was "likely to contribute significantly to public understanding of the operations or activities of the government and was

¹⁴ C. Todd Lopez, *DOD Official Discusses 'Moral Obligation' to Help Those in Afghanistan Who Helped U.S.*, DOD NEWS (May 20, 2021), <https://www.defense.gov/News/News-Stories/Article/Article/2626344/dod-official-discusses-moral-obligation-to-help-those-in-afghanistan-who-helped/#:~:text=%22We%20have%20a%20moral%20obligation,the%20Senate%20Armed%20Services%20Committee.>

not primarily in the commercial interest of the requestor.” *Id.* IRAP further stated that it qualified for a fee waiver because of its role as a representative of the news media. *Id.*

**DEFENDANT’S RESPONSE AND PLAINTIFF’S EXHAUSTION OF
ADMINISTRATIVE REMEDIES**

29. On April 1, 2022, Defendant DOD sent an interim response to the Request. *See* Ex. B. DOD acknowledged the Request and assigned it case number 22-F-0773. *Id.* DOD denied Plaintiff’s request for expedited processing. *Id.* Defendant did not set a time to respond to the Request nor did it explicitly invoke an extension of time to respond. *Id.*

30. Defendant’s response was due within 30 business days, on or before May 12, 2022.

31. As of the filing of this Complaint, Plaintiff has not received a final determination from Defendant DOD; nor has it received any responsive records or any other substantive reply to its Request. In fact, Plaintiff has received no further correspondence from DOD since the April 1, 2022 acknowledgement.

32. Despite its clear obligation under FOIA, Defendant has not provided any substantive determination in response to the Request nor has it released any responsive records within the statutory timeframe.

33. Because Defendant has not complied with the statutory time limits set forth in the FOIA statute, Plaintiff’s administrative remedies are considered exhausted under 5 U.S.C. § 552(a)(6)(C)(i).

CAUSE OF ACTION

**(Violation of Freedom of Information Act)
5 U.S.C. § 552(a)**

34. Plaintiff incorporates the above paragraphs as if set forth fully herein.

35. Defendant DOD has a legal duty under FOIA to determine whether to comply with a request within 20 days of receipt or within 30 days after invoking an extension. Defendant DOD also has a legal duty to timely notify the requestor of the agency's determination and the reasons therefore.

36. IRAP has a legal right under FOIA to obtain the agency records it seeks in the Request. No legal basis protects Defendant's failure to timely respond to Plaintiff's Request and provide all records responsive to the Request.

37. Defendant has violated 5 U.S.C. § 552(a)(6)(A)-(B) and applicable regulations promulgated thereunder by failing to determine whether to comply with Plaintiff's Request and communicate such determination to Plaintiff within 30 days.

38. Defendant DOD's failure to timely release agency records in response to Plaintiff's Request has violated 5 U.S.C. § 552(a)(3)(A).

39. Defendant DOD has violated 5 U.S.C. § 552(a)(3)(C)-(D) by failing to make reasonable efforts to search for records responsive to Plaintiff's Request.

40. 5 U.S.C. § 552(a)(4)(B) authorizes the grant of injunctive relief to Plaintiff IRAP because Defendant DOD continues to flout FOIA and improperly withhold agency records. Because Defendant's refusal to respond to Plaintiff's Request prevents Plaintiff from educating the public about the operations of DOD, Plaintiff will continue to suffer irreparable injury from Defendant's withholding of government documents subject to Plaintiff's Request in defiance of FOIA mandates.

41. 28 U.S.C. § 2201 authorizes declaratory relief because an actual and justiciable controversy exists regarding Defendant's improper withholding of agency records in violation of FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the International Refugee Assistance Project respectfully requests that the Court award it the following relief:

A. Enter judgment that Defendant's failure to determine within the statutorily appointed 30 days whether to comply with the Request and timely notify Plaintiff of such determination and its reason violates FOIA;

B. Enter judgment that Defendant's unlawful withholding of the records requested violates FOIA;

C. Enter an order requiring Defendant to immediately release any and all responsive and not otherwise properly withheld records to Plaintiff;

D. Award Plaintiff its reasonable costs and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

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

Dated: New York, New York
August 1, 2022

Respectfully submitted,

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