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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CITIZENS FOR RESPONSIBILITY AND :
ETHICS IN WASHINGTON :
1400 Eye Street, N.W., Suite 450, :
Washington, D.C. 20005 :
:
Plaintiff, :
:
v. :
OFFICE OF ADMINISTRATION :
725 17th Street, N.W. :
Washington, D.C. 20503 :
:
Defendant. :
:

Civil Action No.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as amended challenging the failure of the Office of Administration (“OA”) to respond to the expedited request of plaintiff for documents relating to the loss of email records of the Executive Office of the President (“EOP”) from EOP-managed email systems and environments.

2. This case seeks declaratory relief that the OA is in violation of the FOIA, 5 U.S.C. §

552(a)(6)(E)(i), for failing to respond to plaintiff's expedited request for records and injunctive relief ordering defendant OA to process immediately the requested records in their entirety.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the OA pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(A)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1331. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. CREW seeks to empower citizens to have an influential voice in government decisions and in the governmental decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take ethics issues seriously. CREW monitors closely the laws and rules applicable to government agencies.

6. CREW is harmed by the OA's failure to process CREW's FOIA request on an expedited basis, because that failure harms CREW's ability to satisfy the compelling public need for full, accurate and current information about the record-keeping practices of the White House

and the degree to which it knowingly ignored, if not outright violated, federal laws. 5 U.S.C. § 552(a)(6)(C). Absent this critical information, CREW cannot advance its mission of educating the public to ensure that the public continues to have a vital voice in government.

7. Defendant OA is part of the EOP and is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 702. The OA is the federal agency with possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

8. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

9. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

10. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

11. The FOIA also requires agencies to promulgate regulations that provide for expedited processing of FOIA requests where the requester has demonstrated a "compelling need" as well as "other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). The FOIA defines "compelling need" as including requests "made by a person primarily engaged in disseminating information" where there is an "urgency to inform the public concerning actual or

alleged Federal Government activity.” Id. at § 552(a)(6)(E)(v)(III).

12. Agencies are required to make a determination on a request for expedition within 10 calendar days “after the date of the request,” 5 U.S.C. § 552(a)(6)(E)(ii)(I), and to give “expeditious consideration” to administrative appeals of such determinations. Id. at § 552(a)(6)(E)(ii)(II).

13. Agency decisions to deny or affirm denial of a request for expedition are subject to judicial review “based on the record before the agency at the time of the determination.” 5 U.S.C. § 552(a)(6)(E)(iii).

14. A requester is not required to exhaust administrative remedies prior to seeking judicial review of an agency’s denial of a request for expedited processing. See, e.g., Al-Fayed v. CIA, No. 00-2092, 2000 U.S. District LEXIS 21476, at *8 (D.D.C. Sept. 20, 2000).

15. The OA has yet to promulgate regulations that provide for expedited processing of FOIA requests. OA regulations currently require the agency to process all requests for records within 10 working days after receipt of the request, subject to certain enumerated exceptions. 5 C.F.R. § 2502.8(a).

16. This Court has jurisdiction, upon receipt of a complaint, “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

17. The FOIA provides a mechanism for disciplinary action against agency officials who have acted inappropriately in withholding records. Specifically, when requiring the release of improperly withheld records, if the Court makes a written finding that “the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or

capriciously,” a disciplinary investigation is triggered. 5 U.S.C. § 552(a)(4)(F).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS FOR RELIEF

18. Currently the EOP has no effective email records management system in place that offers sufficient protections against the loss or modification of stored messages. Nor is there any way to assess or audit the completeness of the stored messages.

19. In October 2005, the OA discovered a problem with EOP’s email retention process. Thereafter, the OA conducted a detailed analysis of the problem, which revealed that between March 2003 and October 2005, there were hundreds of days in which emails were missing for one or more EOP components.

20. The OA prepared multiple estimates of the volume of missing email, which ranged from a low of roughly five million missing email to much higher numbers.

21. The White House Counsel, then Harriet Miers, was provided a detailed briefing of the missing email problem and a plan of action to recover the missing email. At least as of April 12, 2007, the plan to recover the missing email had not been implemented.

22. An individual or individuals within the OA prepared a document or documents that provide a detailed accounting of both actual email messages retained and those email messages missing from EOP’s records management system, including the dates for which the email are missing.

23. An individual or individuals within the OA also prepared a document or documents that included, among other things, a risk assessment of the effect on the public’s perception of the White House and/or the Bush administration if it became known publicly that the EOP had a problem with its email record-keeping system.

24. In early 2006, the EOP terminated a project to implement a new electronic record-keeping system.

25. On April 17, 2007, plaintiff sent a FOIA request by facsimile and first-class mail to the OA seeking records, regardless of format and including electronic records and information, relating to the potential loss of email records of the EOP associated with any and all EOP-managed email systems and environments. Letter from Anne L. Weismann to Office of Administration FOIA Officer, April 17, 2007 (attached as Exhibit A).

26. On April 18, 2007, plaintiff sent by facsimile and first-class mail a second FOIA request to the OA clarifying and supplementing its April 17, 2007 FOIA request to the OA. Letter from Anne L. Weismann to Office of Administration FOIA Officer, April 18, 2007 (attached as Exhibit B). Specifically, CREW's clarifying FOIA sought the following:

(1) copies of all analyses prepared by the OA and its offices, directorates and branches between January 21, 2001 and April 13, 2007, that identify potential technical, procedural and process problems related to the potential loss of email records of the Executive Office of the President ("EOP") associated with any and all EOP-managed email systems and environments;

(2) copies of all documents, databases, spreadsheets and inventories prepared between January 21, 2001 and April 13, 2007, that provide a detailed accounting (daily, weekly and/or monthly) of actual email messages retained or that identify potential missing email messages within the scope of all EOP-managed email records management environments;

(3) copies of all system requirements specifications, risk assessments, project implementation documents, project concepts and other documents related to all planned, incomplete or completed implementation of any EOP email records management systems since January 21, 2001; and

(4) copies of all statement of work ("SOW"), requests for proposal ("RFP") and requests for quote ("RFQ") issued by the OA or other government offices or agencies on behalf of the OA related to the analysis,

design, implementation and support of EOP email systems implementation and migration and email records management system analysis, implementation, support and services.

Id.

27. CREW's clarifying FOIA also explained that CREW is not seeking "any system security, system configuration, or internal system network configuration information." Id. In addition, CREW is seeking specific documents that it has been advised were in existence at least as of July 2006, and that were either created by individuals within the OA or are in the possession of OA. Id.

28. CREW also sought a waiver of fees associated with processing its request given that the request concerns the operations of the federal government, the disclosures will likely contribute to a better understanding of relevant government procedures, and the request is primarily and fundamentally for non-commercial purposes. See Exhibits A & B. Specifically, the requested records are likely to shed light on the extent to which the White House's practices deviate from the requirements of the Presidential Records Act, 44 U.S.C. §§ 2201 et seq., as well as any White House record-keeping guidance and policies, and the extent to which the White House had prior knowledge that its practices violate federal law. Id.

29. For both of its FOIA requests CREW sought expedition for the express purpose of disseminating any responsive documents to the public based on the widespread and exceptional media interest in the White House emails, the revelations about the use by high-ranking EOP officials of outside email accounts and the fact that the White House has known since the fall of 2005 that at least five million emails have been missing from its records management system. Exhibits A and B. CREW's website contains numerous examples of its efforts in this regard,

including a report it issued concerning missing White House email and the implications under the Presidential Records Act. Id.

30. By letter dated April 27, 2007, the OA acknowledged receipt of CREW's FOIA requests of April 17 and 18, 2007, and granted CREW's request for expedited processing. Letter from Carol Ehrlich to Anne Weismann, April 27, 2007 (attached as Exhibit C). Notwithstanding this determination, the OA further stated that "unusual circumstances described in 5 U.S.C. § 552(a)(6)(A)(B)(iii)(II) exist" and that "[a]s a result of these unusual circumstances, OA cannot meet the time limits prescribed in 5 U.S.C. § 552(a)(6)(A)." Id. The OA based its finding of unusual circumstances on what it characterized as "an extensive list of records that span more than a six-year period" that CREW was seeking as well as "the day-to-day responsibilities" of the employees within the OA tasked with processing the requests. Id. The OA did not inform CREW of an anticipated date for completing its processing of CREW's FOIA requests.

31. On April 30, 2007, CREW sent a letter to the OA by facsimile and first-class mail responding to the inaccuracies in the OA's letter of April 27, 2007. Letter from Anne L. Weismann to Carol Ehrlich, April 30, 2007 (attached as Exhibit D). As CREW explained, it is not seeking an "extensive list of records," but rather "four discrete categories of records that are described with great particularity" and that relate to one discrete issue -- "the White House's loss of over five million email from its email system." Id. And, contrary to the OA's characterization of its FOIA requests, CREW is not seeking records that span a six-year period. Rather, two of CREW's requested categories seek records that were prepared over a one-year period and the remaining two categories span only two years. Id.

32. Notwithstanding defendant OA's purported decision to expedite the processing of

plaintiff's FOIA requests, to date the OA has neither produced a single document to CREW nor withheld or otherwise accounted for any responsive documents. Nor has the OA informed plaintiff of an anticipated date for completing the processing of plaintiff's FOIA requests.

33. Plaintiff has exhausted the applicable administrative remedies.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Produce Records Under the FOIA)

34. Plaintiff realleges and incorporates by reference all preceding paragraphs.

35. Plaintiff properly requested that the OA expedite the processing of plaintiffs' FOIA requests which sought agency records within the custody and control of the OA.

36. The OA wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for the processing of plaintiff's FOIA requests.

37. Plaintiff has exhausted the applicable administrative remedies with respect to defendant OA's wrongful withholding of the requested records.

38. Plaintiff is entitled to injunctive relief with respect to the expedited release and disclosure of the requested documents

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order the OA to process immediately the requested records in their entirety;
- (2) Order defendant OA upon completion of such expedited processing to disclose the requested records in their entirety and make copies available to plaintiff;
- (3) provide for expeditious proceedings in this action;

(4) Award plaintiff reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and

(5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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