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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. :

Civil Action No. :

U.S. DEPARTMENT OF HOMELAND :
SECURITY :
Washington, D.C. 20528 :

ALLEN WEINSTEIN, in his official :
capacity as Archivist of the United States :
8610 Adelphi Road :
College Park, Maryland 20740 :

Defendants. :

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, agency FOIA regulations, and the Administrative Procedure Act (“APA”), challenging the failure of the United States Secret Service (“Secret Service”), a component of the United

States Department of Homeland Security (“DHS”), to fulfill the request of Plaintiff for documents relating to any visits that specified individuals made to the White House or the residence of the vice president between January 1, 2001, and the present. This action is also brought under the Federal Records Act (“FRA”), 44 U.S.C. §§2101 et seq., 2901 et seq., 3010 et seq., and 3301 et seq., which includes the Disposal of Records Act, 44 U.S.C. §§3301-3314, and the Administrative Procedure Act (“APA”), 5 U.S.C. §706, challenging the policy of the Secret Service to erase federal records, including Worker and Visitor Entry System (“WAVES”) records, once it has transferred the information on those records to the White House, and challenging the failure of the Archivist to take enforcement action to prevent the DHS from unlawfully destroying agency records.

2. This case seeks declaratory relief that DHS is in violation of the FOIA for failing to fulfill Plaintiff’s request for records and injunctive relief that DHS immediately and fully comply with Plaintiff’s request under the FOIA. Plaintiff also seeks declaratory relief that DHS’s record-keeping guidelines and directives are arbitrary, capricious, and contrary to the FRA because they fail to ensure preservation of all WAVES and other visitor records. Plaintiff seeks declaratory relief that the Archivist’s failure to seek the initiation of an enforcement action by the Attorney General is arbitrary, capricious, and in violation of his responsibilities under the FRA. In addition, Plaintiff seeks injunctive relief requiring the Archivist to fulfill his mandatory statutory duty to notify Congress and ask the Attorney General to initiate legal action to ensure that DHS complies fully with its obligations under the FRA and to ensure the recovery of copies of WAVES and any other visitor records that the Secret Service transferred to the White House after deleting the agency’s copies.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over DHS pursuant to 5 U.S.C. §552(a)(4)(B) and 5 U.S.C. §702, which gives the Court jurisdiction over agency actions where an aggrieved party has suffered wrong within the meaning of a “relevant statute,” here the FRA, and over the Archivist pursuant to 5 U.S.C. §702. 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) and 5 U.S.C. §703.

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 is dedicated to empowering citizens to have an influential voice in government decisions and in the governmental decision-making process. 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 has sought records of White House visits from the Secret Service in the past, and intends to seek similar records in the future, given their usefulness in identifying and helping to explain the influences to which a given administration may be subject.

7. CREW is harmed by DHS's failure to comply with the FOIA, because that failure harms CREW's ability to provide full, accurate, and current information to the public. 5 U.S.C. §552(a)(6)(C).

8. CREW is also harmed by DHS's failure to adopt and comply with record-keeping guidelines and directives mandated by the FRA, because that failure has denied CREW access to WAVES records that are a critical part of the evidentiary record concerning the influences to which the Bush administration is subject, information that is "in the public interest." 44 U.S.C. §3303(a)(c)(3); *see also American Friends Service Comm. v. Webster*, 720 F.2d 29 (D.C. Cir. 1983).

9. CREW is harmed by the Archivist's failure to fulfill his mandatory statutory duty to seek redress for DHS's unlawful destruction of agency records because that failure has placed years of WAVES records – and possibly other visitor records – beyond CREW's reach under the FOIA and deprived CREW and the public of important historical evidence.

10. CREW is also harmed by the failure of the Archivist to afford CREW notice and the opportunity to comment on any proposal by DHS to destroy visitor records, because it deprived CREW of the opportunity to try to demonstrate for the Archivist that such records should not be destroyed because they have sufficient administrative, legal, research or other value to warrant their continued preservation.

11. Defendant DHS is an agency within the meaning of 5 U.S.C. §552(f) and 5 U.S.C. §702. DHS and its component, the Secret Service, have possession and control of the requested records and are responsible for fulfilling Plaintiff's FOIA request. DHS and its component the Secret Service have adopted a record-keeping policy that has resulted in the destruction of

WAVES records and possibly other federal records and are responsible for the harm done to CREW's ability to obtain and make public those records. *See* 44 U.S.C. §§3301, et seq.; 5 U.S.C. §702.

12. Defendant Allen Weinstein is the Archivist of the United States, and is sued solely in his official capacity. As Archivist, Mr. Weinstein is responsible for the supervision and direction of the National Archives and Records Administration ("NARA"), 44 U.S.C. §2102. The Archivist's duties include authorizing the disposal of records of federal agencies after a specified period of time through the approval of schedules submitted to him by individual agencies, or by promulgating General Records Schedules. In addition, the FRA mandates that upon learning of the unlawful destruction of agency records, the Archivist must notify the head of the agency and assist the agency head in initiating an action through the Attorney General for redress. 44 U.S.C. §2905(a).

STATUTORY FRAMEWORK

The Freedom of Information Act

13. 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.

14. 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).

15. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either release the withheld records or uphold the

denial. 5 U.S.C. §552(a)(6)(A)(ii).

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

17. 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).

18. 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).

19. The FOIA also requires each agency to promulgate regulations specifying a fee schedule for the processing of FOIA requests and establishing procedures and guidelines for the waiver or reduction of fees. 5 U.S.C. §552(a)(4)(A). Defendant DHS’s fee waiver regulations are found at 6 CFR §5.11.

20. The FOIA also provides that documents should be produced at no charge to the requester or at a reduced charge if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. §552(a)(4)(A)(iii).

21. A district court reviews any appeal of a fee waiver determination de novo. The

court's review of the matter is limited to the record before the agency. 5 U.S.C. §552(a)(4)(A)(vii).

The Federal Records Act

22. The FRA is a collection of statutes that governs the creation, management and disposal of federal records. *See generally* 44 U.S.C. §§2101 *et seq.*, 2901 *et seq.*, 3010 *et seq.*, and 3301 *et seq.* Among other things, the FRA ensures “[a]ccurate and complete documentation of the policies and transactions of the Federal Government,” as well as “judicious preservation and disposal of records.” 44 U.S.C. §2902.

23. To fulfill this purpose, the FRA requires the head of each agency to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.” *Id.* at §3101. Under the statute, each agency must also “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency,” *id.* at §3102, and must “establish safeguards against the removal or loss of records” the agency head determines are necessary and required by regulations of the Archivist. *Id.* at §3105.

24. The FRA also prescribes the exclusive mechanism for the disposal of federal records, which it defines to include:

all books, papers, maps, photographs, machine readable materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures operations, or other activities of the Government or because of the informational value of data in them.

44 U.S.C. §3301. No records may be “alienated or destroyed” except pursuant to the disposal provisions of the FRA. Id. at §3314.

25. The Archivist administers the provisions of the FRA and may authorize an agency to dispose of records that the agency no longer needs and that do not have “sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government.” 44 U.S.C. §3303a(a). Only if the Archivist determines that agency records do not have administrative, legal, research, or other value can the Archivist authorize their disposal. Id. at §§3303a(a), (d), and (e).

26. An agency wishing to dispose of records must first submit to the Archivist either lists of records the agency head determines “are not needed by it in the transaction of its current business,” 44 U.S.C. §3303a(2), or “schedules proposing the disposal after the lapse of specified periods of time of records of a specified form or character” that the agency head determines will not have “sufficient administrative, legal, research, or other value to warrant their further preservation by the Government.” Id. at §3303a(3). Upon receipt of such a request, the Archivist must issue a notice requesting public comment on the agency’s proposal and the Archivist’s staff must conduct its own assessment of the value of the records the agency is proposing to destroy. Id. at §3303a(a). The Archivist is free to accept or reject an agency’s proposal. Id.

27. If the Archivist learns of “any actual, impending, or threatened unlawful removal . . . or destruction of records in the custody of [an] agency,” the Archivist is required to notify the head of the agency and assist the agency head “in initiating action through the Attorney General for the recovery of records wrongfully removed and for other redress provided by law.” 44

U.S.C. §2905(a). If the agency head does not initiate such action, the Archivist “shall request the Attorney General to initiate such action, and shall notify the Congress when such a request has been made.” Id.

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS FOR RELIEF

28. On October 4, 2006, Plaintiff sent a FOIA request to DHS seeking records, regardless of format and including electronic records and information, relating to any visit that any of the following individuals made to the White House or the residence of the vice president from January 1, 2001, to the present: James Dobson, Gary L. Bauer, Wendy Wright, Louis P. Sheldon, Andrea Lafferty, Paul Weyrich, Tony Perkins, Donald Wildmon, and Jerry Falwell. Letter from Anne L. Weismann to U.S. Secret Service, Freedom of Information and Privacy Acts Branch, October 4, 2006 (attached as Exhibit A).

29. 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* Exhibit A. Specifically, the requested records are likely to shed light on the influence that conservative Christian leaders have, or attempt to have, on the President in the exercise of his authority. Id.

30. To date, CREW has received no response to this request.

31. Despite repeated phone calls to the Secret Service FOIA office by CREW’s counsel to ascertain the status of CREW’s request, including specifically when it was received by the Secret Service, the Secret Service has refused to disclose any information about the request. Secret Service FOIA personnel have advised CREW’s counsel that they have been instructed

specifically not to tell CREW anything about its request, including any information about the status of the request.

32. The statutory time for the Secret Service to respond to Plaintiff's October 4, 2006 FOIA request has run out and Plaintiff has constructively exhausted its administrative remedies with respect to DHS's processing of CREW's FOIA request. 5 U.S.C. §552(a)(6)(C); Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 65 (D.C. Cir. 1990).

33. On May 16, 2006, the Secret Service filed a motion to dismiss for lack of subject matter jurisdiction in Judicial Watch v. U.S. Secret Service, (D.D.C. Civil No. 06-310 (JGP)), another FOIA lawsuit challenging the failure of the Secret Service to produce records in response to plaintiff Judicial Watch's request for all records that reflect the entries and exits of Jack Abramoff to and from the White House. As part of its motion, the Secret Service submitted the declaration of Kathy J. Lyerly ("Lyerly Decl."), the Special Agent in Charge of the Liaison Division and the Freedom of Information and Privacy Acts Office for the Secret Service (attached as Exhibit B).

34. Ms. Lyerly attested to the "longstanding practice of the Secret Service to transfer WAVES records on CD-ROM to the White House every 30 to 60 days." Lyerly Decl., ¶10. Ms. Lyerly did not explain what she means by "longstanding practice," but it is CREW's understanding that this practice postdates January 21, 2001, when the Bush administration came to power.

35. Ms. Lyerly also stated that "once the Secret Service transferred the WAVES records, the Secret Service ensured that those records were erased from its computer system." Id. According to Ms. Lyerly, beginning in October 2004, "at the request of the National Archives

and Records Administration, the Secret Service began temporarily retaining its own copy of the WAVES records that it transferred to the White House. As such, the Secret Service has in its possession WAVES records dating back only to October 2004.” Id., ¶11.

36. On May 17, 2006, the Secret Service entered into a Memorandum of Understanding (“MOU”) with the White House Office of Records Management that purports to “govern the status and handling of records generated through the White House Access Control System.” MOU, ¶1 (attached as Exhibit C). The MOU confirms that as of October 2004, and at the request of NARA, the Secret Service began once again to retain WAVES records and will maintain this practice “until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.” Id., ¶16a.

37. With the exception of some WAVES records on Secret Service hard drives that, contrary to the stated policy of the Secret Service, were not erased, the Secret Service no longer possesses WAVES records requested by CREW in its FOIA request of October 4, 2006, because the Secret Service destroyed those records once it sent copies to the White House.

PLAINTIFF’S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Produce Records Under the FOIA) (Against Defendant DHS)

38. Plaintiff realleges and incorporates by reference all preceding paragraphs.
39. Plaintiff properly asked for records within the custody and control of DHS.
40. Plaintiff is entitled by law to access to the records requested under the FOIA, unless DHS makes an explicit and justified statutory exemption claim.
41. Therefore, DHS violated FOIA’s mandate to release agency records to the public by

failing to release the records as Plaintiff specifically requested. 5 U.S.C. §§552(a)(3)(A), 552(a)(4)(B).

CLAIM TWO

**(Failure to Respond Under the FOIA)
(Against Defendant DHS)**

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

43. To date, Plaintiff has not received a response from DHS, and DHS has exceeded the 20-working-day statutory time limit for such a response. 5 U.S.C. §552(a)(6)(A)(I).

44. Therefore, DHS has violated the FOIA's mandate to respond to Plaintiff's FOIA request within the statutory time period.

CLAIM THREE

**(Policy to Destroy Records Subject to the FRA)
(Against Defendant DHS)**

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

46. The WAVES and other visitor records that the Secret Service creates and maintains are records within the meaning of the Federal Records Act, 44 U.S.C. §3314. Accordingly, any agency policy that permits or authorizes disposal of these records must conform to the requirements of the FRA.

47. The policy of the Secret Service and the DHS to erase from its computers all WAVES records once the information in those records has been transferred to the White House is arbitrary, capricious, and contrary to law, because it permits the disposal of records that have administrative, legal, research or other value, and because it permits the disposal of records that have not been subject to a disposition schedule that has been subject to notice and public

comment and approved by the Archivist. Id. §§3303(a), (d), and (e).

48. As a result of DHS's unlawful policy in violation of the FRA, Plaintiff was denied a right of access to information in the public interest, including important historical evidence concerning the influences to which the Bush administration has been subject.

49. As a result of DHS's unlawful policy, Plaintiff was denied its right to notice and the opportunity to comment on the proposed destruction of agency records.

CLAIM FOUR

(Refusal to Take Enforcement Action) (Against Defendant Allen Weinstein)

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

51. Under the Federal Records Act, the Archivist has a mandatory duty to assist the head of an agency, after notice to that head, in initiating an action through the Attorney General to prevent the actual, threatened or impending removal or destruction of records in the agency's custody. 44 U.S.C. §2905(a). If the agency head fails to act, the Archivist is required to directly request the Attorney General to initiate an enforcement action and to notify Congress upon such a request. Id.

52. The Archivist has violated his mandatory, non-discretionary duty at least since 2004, when he was on notice that the Secret Service had a stated policy, now memorialized in an MOU executed in May 2006, of destroying WAVES and other visitor records after transferring copies to the White House in violation of the FRA, 44 U.S.C. §2905(a).

53. Plaintiff and the public are harmed by the Archivist's failure to seek the initiation of an enforcement action through the Attorney General, as this failure threatens to keep from public access important historical documents with administrative, legal, research or other value.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) Declare that DHS has violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff's FOIA request of October 4, 2006;

(2) Order DHS to respond to Plaintiff's FOIA request immediately;

(3) Declare that DHS's policy of destroying WAVES and other visitor records is arbitrary, capricious, and contrary to law;

(4) Declare that the Archivist has breached his statutory duty to take enforcement action to prevent DHS from destroying records in contravention of the FRA and to recover records that DHS transferred to the White House;

(5) Order the Archivist to fulfill his mandatory statutory duty to ask the Attorney General to initiate legal action to ensure that DHS complies fully with its obligations under the FRA with corresponding notice to Congress;

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

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

Respectfully submitted,

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November 9, 2006

