

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

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON**

1101 K Street, N.W., Suite 201
Washington, D.C. 20005

Plaintiff,

v.

**U.S. DEPARTMENT OF TRANSPORTATION,
OFFICE OF THE INSPECTOR GENERAL**

1200 New Jersey Ave., S.E., 7th Floor
Washington, D.C. 20590,

U.S. DEPARTMENT OF TRANSPORTATION

1200 New Jersey Ave., S.E.
Washington, D.C. 20590, and

**PIPELINE AND HAZARDOUS MATERIALS
SAFETY ADMINISTRATION**

1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Defendants.

Civil Action No. 21-610

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, for injunctive, declaratory, and other appropriate relief against the Office of the Inspector General of the U.S. Department of Transportation (“DOT OIG”), the U.S. Department of Transportation (“DOT”), and its component the Pipeline and Hazardous Materials Safety Administration (“PHMSA”). Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) challenges the failure of the DOT OIG, DOT, and PHMSA to respond to requests for documents related to the May

2020 nomination of a new Inspector General for the Department of Transportation and the replacement of the Acting IG with the then-current head of PHMSA. These appointments occurred while the DOT OIG was reviewing allegations involving then-Secretary of Transportation Elaine Chao, including that she afforded special treatment to constituents of her husband, Senator Mitch McConnell, and helped steer millings of federal dollars to Kentucky.

2. This case seeks declaratory relief that the DOT OIG, DOT, and PHMSA are in violation of the FOIA, specifically, 5 U.S.C. § 552(a)(3)(A), for failing to provide CREW all responsive records, and 5 U.S.C. § 552(a)(6)(A), for failing to provide CREW with a determination on its requests within 20 business days, as well as injunctive relief ordering defendants DOT OIG, DOT, and PHMSA to process and release to CREW 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 parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). The Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201(a), and 2202. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B).

Parties

4. Plaintiff CREW is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. 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. Additionally, CREW seeks to

empower citizens to have an influential voice in government decisions and in the government decision-making process through the dissemination of information about public officials and their actions.

5. Defendant DOT OIG is an agency within the meaning of 5 U.S.C. §§ 552(f)(1) and 701(b)(1). DOT OIG has possession, custody, and control of records responsive to CREW's FOIA request.

6. Defendant DOT is an agency within the meaning of 5 U.S.C. §§ 552(f)(1) and 701(b)(1). DOT has possession, custody, and control of records responsive to CREW's FOIA request. Defendant PHMSA is a component of DOT, and PHMSA has possession, custody, and control of records responsive to CREW's FOIA request.

Factual Background

7. In 2019, the DOT OIG began a review of allegations regarding then-Secretary Chao, including that she afforded Senator McConnell's constituents special treatment and helped steer millions of federal dollars to Kentucky at a time when the Senator was facing low approval ratings and a tough reelection bid. Tucker Doherty and Tanya Snyder, Chao's Team Helped McConnell's State Win its Largest DOT Grant, *Politico*, Dec. 17, 2020, <https://politi.co/2OnEGaJ>.

8. On January 9, 2020, DOT Inspector General Calvin Scovel, III announced his retirement after 13 years leading the office effective January 31, 2020. Per the Federal Vacancies Reform Act ("FVRA") and OIG's order of succession, on February 1, 2020, Mitch Behm, who has been with the DOT OIG since 2003, assumed the authority and duties of Acting Inspector General for DOT OIG.

9. On May 15, 2020, the same day that President Trump announced his intention to fire the State Department Inspector General, President Trump also notified Congress that he would nominate Eric Soskin, a Justice Department trial lawyer “involved in some hot-button immigration and civil rights cases” to serve as DOT IG. Meridith McGraw and Nahal Toosi, Trump Ousts State Department Watchdog, *Politico*, May 15, 2020, <https://politi.co/3bey3Ad>.

10. That same day, Trump removed Acting IG Behm, appointing Howard “Skip” Elliott, a political appointee serving as administrator of the Pipeline and Hazardous Materials Safety Administration, to serve in his place. Philip Rucker, Karen DeYoung, Lisa Rein, and Hannah Knowles, Trump Ramps Up Retaliatory Purge with Firing of State Department Inspector General, *Washington Post*, May 16, 2020, <https://wapo.st/38c6dTp>. A DOT spokesperson said that Elliott would “continue to serve as leader of the pipeline agency under a dual-hat arrangement.” *Id.*

11. Because IGs are meant to be apolitical and independent, they do not typically come from among an administration’s pool of political appointees. Lisa Rein, Robert O’Harrow Jr., and Juliet Eilperin, HUD Appointee Abruptly Moved to Lead Interior Dept.’s Watchdog Unit Amid Zinke Probe, *Washington Post*, Oct. 16, 2018, <https://wapo.st/385d2Gr>.

12. On March 2, 2021, DOT OIG released a letter stating that, following a preliminary review, it found no basis to launch a full investigation of the allegations regarding favoritism towards Kentucky. Mitch Behm, Deputy Inspector General, *Letter to the Hon. Peter DeFazio* (Mar. 2, 2021), <https://bit.ly/3sNZiYl>. The letter accompanied a formal DOT OIG report regarding its investigation into whether then-Secretary Chao had misused her office for the benefit of her family’s shipping company. Office of the Inspector General, Department of Transportation, *Report of Investigation: CHAO-Ethics Violation (Misconduct)*, Investigation No.

I20E002R200, <https://bit.ly/3sNZiYl>. The letter further stated that the DOT OIG had referred potential criminal violations stemming from misuse of office to the DOJ for possible prosecution.

The FOIA Requests at Issue

13. On May 18, 2020 CREW submitted FOIA requests to the DOT OIG, DOT, and PHMSA seeking information regarding the Inspector General's review of alleged favoritism towards Kentucky, the nomination of a new Inspector General, and the replacement of the Acting Inspector General.

14. Each of CREW's requests sought a fee waiver.

FOIA to the Inspector General for the Department of Transportation

15. On May 18, 2020, CREW submitted a FOIA request to the DOT OIG seeking 5 categories of documents. The three categories of documents still at issue are as follows:

1. All communications or records of communications sent to, copied to, or received by acting Inspector General Mitch Behm or Barry J. DeWeese Assistant Inspector General for Surface Transportation Audits to or from Howard "Skip" Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard "Mac" McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from June 1, 2019 to May 16, 2020 regarding outstanding open OIG recommendations for PHMSA.
2. All documents referring or relating to PHMSA's outstanding OIG recommendations from June 1, 2019 to May 16, 2020.
3. All communications or records of communications sent to, copied to, or received by acting Inspector General Mitch Behm or Barry J. DeWeese Assistant Inspector General for Surface Transportation Audits to or from Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan regarding outstanding open OIG recommendations for PHMSA.¹

¹ Parts 4 and 5 of CREW's request are not at issue in this litigation.

16. By email dated May 18, 2020, DOT OIG acknowledged receipt of CREW's request and assigned it control number FI-2020-0090.

17. By email dated June 15, 2020, DOT OIG notified CREW that it was in the final stages of reviewing records responsive to parts 3, 4, and 5 of CREW's FOIA request and asked that CREW agree to separate parts 1 and 2 into a separate FOIA request.

18. CREW agreed to separate the requests and the second request was assigned control number FI-2020-0097.

19. On June 22, 2020 and July 10, 2020, DOT IG issued records responsive to parts 1, 3, 4, and 5 of CREW's FOIA request.²

20. By letter dated July 10, 2020, DOT OIG informed CREW that its response was final as to parts 1, 3, 4, and 5 of CREW's FOIA request. However, it further stated that the response omitted documents that were referred to the Office of the Secretary of Transportation on June 22, 2020 for review and direct response to CREW.

21. By letter dated June 23, 2020, the DOT Office of the Secretary of Transportation acknowledged receipt of parts 1 and 3 of CREW's FOIA request to the DOT OIG and assigned the request File No. 2020-268.

22. By email dated March 2, 2021, the DOT OIG stated that it is continuing to process control number FI-2020-0097, consisting of part 2 of CREW's FOIA request.

23. To date, DOT OIG has not responded to CREW's request for a fee waiver, nor has CREW has received the production of documents assigned control number FI-2020-0097 or those documents referred to the Office of the Secretary of Transportation for review.

² While DOT OIG's June 15, 2020 email indicated that parts 1 and 2 of CREW's FOIA request were to be separated into the second request (control number FI-2020-0097), DOT OIG continued to process part 2 of CREW's FOIA request with the original requests (control number FI-2020-0090).

FOIA to the Department of Transportation

24. On May 18, 2020, CREW submitted a FOIA request to the DOT seeking the following:
1. All communications or records of communications sent to, copied to, or received by Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan from January 1, 2020 to May 16, 2020 regarding the Office of Inspector General review of Secretary Chao's alleged favoritism towards Kentucky and the office of Senator Mitch McConnell.
 2. All communications or records of communications sent to, copied to, or received by Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan from January 1, 2020 to May 16, 2020 regarding the Office of Inspector General vacancy resulting from the retirement of Inspector General Calvin L. Scovel III.
 3. All communications or records of communications sent to, copied to, or received by Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan from January 1, 2020 to May 16, 2020 with the Senate office or leadership office of Senator Mitch McConnell.
 4. All communications or records of communications sent to, copied to, or received by Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan from January 1, 2020 to May 16, 2020 regarding the replacement of Mitch Behm as acting Inspector General.
 5. All communications or records of communications sent to, copied to, or received by Secretary Elaine Chao, Chief of Staff Todd Inman, Deputy Chief of Staff Sean McMaster, or Assistant Secretary for Governmental Affairs Adam Sullivan from January 1, 2020 to May 16, 2020 regarding the possibility of Howard "Skip" Elliott serving as acting Inspector General.
25. By letter dated May 20, 2020, DOT acknowledged receipt of CREW's FOIA request and assigned it File No. 2020-231.
26. To date, DOT has not responded to CREW's request for a fee waiver, nor has CREW received any further communication from DOT regarding File No. 2020-231.

FOIA Request to the Pipeline and Hazardous Materials Safety Administration

27. On May 18, 2020, CREW submitted a FOIA request to the PHMSA seeking the following:

1. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from June 1, 2019 to May 16, 2020 regarding Secretary Chao’s alleged favoritism towards Kentucky and the office of Senator Mitch McConnell.
2. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from January 1, 2020 to May 16, 2020 regarding the Office of Inspector General vacancy resulting from the retirement of Inspector General Calvin L. Scovel III.
3. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from January 1, 2020 to May 16, 2020 with the Senate office or leadership office of Senator Mitch McConnell.
4. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman regarding the replacement of Mitch Behm as acting Inspector General.
5. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from January 1, 2020 to May 16, 2020 regarding the possibility of Howard “Skip” Elliott serving as acting Inspector General.

6. All communications or records of communications sent to, copied to, or received by Howard “Skip” Elliot, Administrator of the Pipeline and Hazardous Materials Safety Administration (PHMSA), Deputy PHMSA Administrator Drue Pearce, Executive Director Howard “Mac” McMillan, or Director of Governmental, International and Public Affairs Ben Kochman from June 1, 2019 to May 16, 2020 regarding any outstanding OIG recommendations to PHMSA.

28. By letter dated May 19, 2020, PHMSA acknowledged CREW’s request, assigned it FOIA Control Number 2020-0177, and granted CREW’s request for a fee waiver for search and review of documents.

29. To date, CREW has received no further communication from PHMSA regarding its FOIA request.

CREW’S CLAIMS FOR RELIEF

COUNT I

**DOT OIG’s Wrongful Withholding of Records Responsive to CREW’s FOIA Request
(DOT OIG FI-2020-0097)
(Office of the Secretary File No. 2020-268)**

30. Plaintiff repeats and re-alleges paragraphs 1-29.

31. In its May 18, 2020 FOIA request, CREW properly asked for records within the custody and control of the DOT OIG.

32. DOT OIG is wrongfully withholding records responsive to CREW’s FOIA request.

33. By failing to timely release all requested records in full to CREW, DOT OIG is in violation of the FOIA.

34. CREW is therefore entitled to injunctive and declaratory relief requiring immediate processing and disclosure of the records requested in its May 18, 2020 FOIA request assigned DOT OIG FI-2020-0097 and Office of the Secretary File No. 2020-268.

Count II
DOT's Wrongful Withholding of Records Responsive To CREW's FOIA Request
(DOT File No. 2020-231)
(PHMSA FOIA Control Number 2020-0177)

35. Plaintiff repeats and re-alleges paragraphs 1-34.

36. In its May 18, 2020 FOIA request, CREW properly asked for records within the custody and control of the DOT and its component PHMSA.

37. DOT and its component PHMSA are wrongfully withholding records responsive to CREW's FOIA requests.

38. By failing to timely release all requested records in full to CREW, DOT and its component PHMSA are in violation of the FOIA.

39. CREW is therefore entitled to injunctive and declaratory relief requiring immediate processing and disclosure of the records requested in its May 18, 2020 FOIA to DOT and its component PHMSA.

Requested Relief

WHEREFORE, CREW respectfully requests that this Court:

(1) Order Defendants to immediately and fully process CREW's May 18, 2020 FOIA requests and to disclose all non-exempt documents immediately to CREW;

(2) Issue a declaration that CREW is entitled to immediate processing and disclosure of the requested records;

(3) Provide for expeditious proceedings in this action;

(4) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;

(5) Award CREW its costs and reasonable attorneys' fees in this action; and

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

Respectfully submitted,

/s/ Laura C. Beckerman

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