

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

**CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON**

1331 F Street N.W., Suite 900
Washington, D.C. 20004,

Plaintiff,

v.

Civil Action No.

**UNITED STATES CUSTOMS AND
BORDER PROTECTION**

1300 Pennsylvania Avenue, N.W.
Washington, DC 20229,

Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, against Defendant U.S. Customs and Border Protection (“CBP”), seeking records relating to its procurement, implementation, and use of Wickr messaging services for official agency business.

2. CREW seeks a declaratory judgment that CBP is in violation of the FOIA, and injunctive relief requiring CBP to immediately process and release the requested records.

Jurisdiction and Venue

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). The Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 2201(a), and 2202.

4. Venue properly lies with this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

Parties

5. Plaintiff CREW is a non-profit, non-partisan organization 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. 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. To further its mission of promoting government transparency and accountability, CREW frequently files FOIA requests, disseminates the documents it receives through FOIA requests on its website (www.citizensforethics.org) and social media accounts, and uses the documents as the basis for reports, complaints, litigation, blog posts, and other publications widely disseminated to the public.

6. Defendant CBP is a component of the Department of Homeland Security (“DHS”) and is an agency within the meaning of the FOIA, 5 U.S.C. §§ 551, 552(f).

7. CBP has possession of and control over the records requested by CREW.

Factual Background

8. CBP is the largest law enforcement agency in the United States, with the United States Border Patrol (“USBP”), a division of CBP, employing more than 19,700 agents in fiscal year 2020. In recent years, there have been numerous reports of abuse or misconduct by USBP

agents,¹ and publicized text messages between agents have showcased an environment of racism and cruelty within the agency.² Meanwhile, CBP reportedly has shielded agency decisions and misconduct from public scrutiny,³ despite touting integrity as one of its core values.⁴

9. On September 28, 2021, *Vice* reported that public procurement records indicated that CBP had contracted with Wickr to provide the agency with an encrypted messaging app platform which would be implemented across all components of the organization.⁵

10. Wickr allows “users to send end-to-end encrypted messages and voice calls” and provides an auto-burn feature, where messages are deleted from the device and become unrecoverable after a predetermined period of time.⁶

¹ See, e.g., Human Rights Watch, “*They Treat You Like You Are Worthless*” - Internal DHS Reports of Abuses by US Border Officials, (2021), available at https://www.hrw.org/sites/default/files/media_2021/10/us_borderabuses1021_web.pdf.

² See, e.g., Tim Dickinson, ‘Guats,’ ‘Tonks’ and ‘Subhuman Shit’: The Shocking Texts of a Border Patrol Agent, *Rolling Stone* (June 13, 2019), available at <https://www.rollingstone.com/politics/politics-news/matthew-bowen-border-patrol-trial-847878/>; A.C. Thompson, *Inside the Secret Border Patrol Facebook Group Where Agents Joke About Migrant Deaths and Post Sexist Memes*, *ProPublica*, (July 1, 2019), available at <https://www.propublica.org/article/secret-border-patrol-facebook-group-agents-joke-about-migrant-deaths-post-sexist-memes>.

³ See, e.g., Salvador Rivera, *Watchdog group says Border Patrol uses ‘shadow units’ that tamper, destroy and alter crime-scene evidence*, *Border Report*, (Nov. 1, 2021), available at <https://www.borderreport.com/hot-topics/border-crime/watchdog-group-says-border-patrol-uses-shadow-units-that-tamper-destroy-and-alter-crime-scene-evidence/>; Julia Ainsley, *Biden administration limits what Border Patrol can share with media about migrant surge at border*, *CBS NEWS*, (March 17, 2021), available at <https://www.nbcnews.com/politics/immigration/biden-administration-limits-what-border-patrol-can-share-media-about-n1261133>; Kate Morrissey, *Congressional committees call for investigation into alleged Border Patrol cover-up team*, *The San Diego Union Tribune*, (Jan. 24, 2022), available at <https://www.sandiegouniontribune.com/news/immigration/story/2022-01-24/congressional-committees-border-patrol/>; Kate Morrissey, *U.S. officials accused of cover-up in 2010 border killing in international human rights case*, *Los Angeles Times*, (Feb. 4, 2021), available at <https://www.latimes.com/california/story/2021-02-04/border-killing-cover-up-plot>; Amy Isackson, Miguel Macias & Ari Shapiro, *Biden Says Border Agents Will Be Held Accountable For Misconduct. A Critic Has Doubts*, *NPR*, (Sept. 28, 2021), available at <https://www.npr.org/2021/09/28/1040999587/border-patrol-agents-misconduct-abuse-accountability>; see also *Border Accountability, Oversight, and Community Engagement Act*, S. 3160, 117th Congress (2021).

⁴ See About CBP, <https://www.cbp.gov/about> (last visited Jan. 27, 2022) (stating “Integrity is our cornerstone. We are guided by the highest ethical and moral principles. Our actions bring honor to ourselves and our agency.”).

⁵ See Joseph Cox, *Customs and Border Protection to Use Encrypted App Wickr Widely*, *Vice*, (Sept. 28, 2021), available at

<https://www.vice.com/en/article/dyvmjm/customs-and-border-protection-cbp-wickr>.

⁶ See *id.*; see also Wickr, Inc., <https://wickr.com/security/> (last visited Jan. 29, 2022).

11. Any agency use of the auto-burn feature may violate the Federal Records Act, 44 U.S.C. § 3101, *et seq.*

12. As a result, CREW filed a FOIA request on September 28, 2021 for records regarding CBP's procurement, implementation, and use of Wickr for official agency business. (A copy of the September 28, 2021 FOIA Request is appended hereto as **Exhibit A**). Apart from CBP's acknowledgement of the receipt of CREW's FOIA request on September 29, 2021, the agency has not responded to the September 28, 2021 FOIA request.

FOIA Request at Issue

13. On September 28, 2021, CREW sent a FOIA request to CBP by email.

14. CREW's FOIA request sought:

(a) All records reflecting CBP's operative records management requirements, policies, procedures, or technological specifications relating to the creation, maintenance, and preservation of federal records on Wickr, including policies or procedures for ensuring that federal records created by CBP personnel via Wickr are properly preserved in accordance with the Federal Records Act ("FRA") and implementing regulations.

(b) All records reflecting any discussion of Wickr's "auto-burn" feature, through which messages are permanently deleted from a user's device after a certain period of time.

(c) All communications with the National Archives and Records Administration ("NARA") relating to CBP's deployment or use of Wickr.

(d) All records reflecting any determination, analysis, or consideration by CBP, NARA, or any other agency of whether CBP's use of Wickr complies with the FRA and implementing regulations.

(e) Records sufficient to identify which Wickr product(s) CBP will deploy or use for official agency business.

15. The FOIA Request also sought a waiver of fees associated with the processing of the request.

16. In an email dated September 29, 2021, the CBP's FOIA Division acknowledged that CBP received CREW's September 28, 2021 FOIA request. (A copy of CBP's September 29, 2021 email is appended hereto as **Exhibit B**).

17. CBP's email also stated that "[a]lthough CBP's goal is to respond within 20 business days of receipt of [CREW's] request, the FOIA does permit a 10-day extension of this time" and "CBP will invoke a 10-day extension for [CREW's] request pursuant to 6 C.F.R. Part 5 § 5.5(c)."

18. To date, CBP has not made a determination on CREW's September 28, 2021 FOIA request.

Statutory Framework

19. The FOIA requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

20. A presumption of disclosure applies to all decisions related to the FOIA and agencies should only withhold information if the disclosure is prohibited by law or if they reasonably foresee that disclosure would harm an interest protected by an exemption. 5 U.S.C. § 552(a)(8).

21. The FOIA provides for nine exemptions, none of which are applicable to this request. 5 U.S.C. § 552(b).

22. An agency must respond to a party making a FOIA request within twenty working days, notifying the party of the agency's determination whether to fulfill the request, what information it will provide or withhold, reasons for withholding any information, and notification of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

23. In "unusual circumstances," these time limits may be extended for no more than ten working days by written notice to the party making such request. 5 U.S.C. § 552(a)(6)(B).

24. Pursuant to DHS FOIA regulations, the agency may invoke a ten working day extension of the response period if the "statutory time limit[] for processing a request cannot be met because of 'unusual circumstances,' as defined in the FOIA." 6 C.F.R. § 5.5(c).

CREW'S CLAIM FOR RELIEF

COUNT I CBP's Wrongful Withholding of Records Responsive to CREW's FOIA Request

25. CREW re-alleges and incorporates by reference all preceding paragraphs.

26. In its September 28, 2021 FOIA request, CREW properly asked for records within the possession, custody, and control of CBP, and for a waiver of fees associated with the processing of its request.

27. CBP has failed to conduct an adequate search in response to CREW's request.

28. CBP is wrongfully withholding records responsive to CREW's request.

29. By failing to timely release all requested records in full to CREW, CBP is in violation of the FOIA.

30. CREW has constructively exhausted its administrative remedies.

31. CREW is therefore entitled to declaratory and injunctive relief requiring immediate processing and disclosure of the requested records.


Requested Relief

WHEREFORE, CREW respectfully requests that judgment be entered in its favor against CBP, and that this Court:

- (1) Declare that CREW is entitled to prompt processing and disclosure of the requested records;
- (2) Declare that CREW is entitled to a waiver of fees associated with the processing of its request;
- (3) Enjoin CBP from withholding records responsive to CREW's FOIA request;
- (4) Order CBP to fully and promptly process CREW's FOIA request and produce all non-exempt documents immediately to CREW;
- (5) Provide for expeditious proceedings in this action;
- (6) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (7) Award CREW its costs and reasonable attorneys' fees in this action; and
- (8) Grant all such other relief as the Court may deem just and proper.

DATED: February 25, 2022

Respectfully submitted,



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(D.C. Bar No. 1017937)

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nsus@citizensforethics.org

Attorneys for Plaintiff Citizens for Responsibility
and Ethics in Washington



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

EXHIBIT A

September 28, 2021

FOIA Officer
U.S. Customs and Border Protection
FOIA Division
90 K Street NE
Washington, DC 20229

Re: Freedom of Information Act Request

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington ("CREW") submits this request for records to U.S. Customs and Border Protection ("CBP") pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and U.S. Department of Homeland Security ("DHS") regulations.

Specifically, CREW requests all records from January 1, 2021 to the date this request is processed relating to CBP's deployment or use of the encrypted messaging app platform Wickr for official agency business, including without limitation the following records:

1. All records reflecting CBP's operative records management requirements, policies, procedures, or technological specifications relating to the creation, maintenance, and preservation of federal records on Wickr, including policies or procedures for ensuring that federal records created by CBP personnel via Wickr are properly preserved in accordance with the Federal Records Act ("FRA") and implementing regulations.
2. All records reflecting any discussion of Wickr's "auto-burn" feature, through which messages are permanently deleted from a user's device after a certain period of time.
3. All communications with the National Archives and Records Administration ("NARA") relating to CBP's deployment or use of Wickr.
4. All records reflecting any determination, analysis, or consideration by CBP, NARA, or any other agency of whether CBP's use of Wickr complies with the FRA and implementing regulations.
5. Records sufficient to identify which Wickr product(s) CBP will deploy or use for official agency business.

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The above request excludes agency records consisting solely of news articles, press clippings, and other publicly-available material, so long as the records include no accompanying discussion by agency officials.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, and anyone who was cc'ed or bcc'ed on any emails.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. See *Mead Data Central v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

Please be advised that CREW intends to pursue all legal remedies to enforce its right under the FOIA to access these documents. Accordingly, because litigation reasonably is foreseeable, the agency should institute an agency-wide preservation hold on documents potentially responsive to this request.

Fee Waiver Request

In accordance with 5 U.S.C. § 552(a)(4)(A) and agency regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. See 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. See, e.g., *McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

On September 28, 2021, Vice reported that CBP is "deploying encrypted messaging app platform Wickr across 'all components' of the organization, according to public procurement records."¹ Wickr allows "users to send end-to-end encrypted messages and voice calls." "The app also offers an auto-burn feature, where messages are deleted from a user's device after a certain period of time, with the company claiming these messages 'can never be uncovered.'"²

¹Joseph Cox, Customs and Border Protection to Use Encrypted App Wickr Widely, *Vice*, Sept. 28, 2021, <https://www.vice.com/en/article/dyvmjm/customs-and-border-protection-cbp-wickr>.

²Joseph Cox, Customs and Border Protection Paid \$700,000 to Encrypted App Wickr, *Vice*, April 8, 2021, <https://www.vice.com/en/article/m7ammn/customs-border-protection-wickr-dhs>.

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The FRA and its implementing regulations require CBP to adopt “effective controls” to ensure records documenting official agency business are properly maintained and preserved.³ Given Wickr’s capability to auto-delete messages permanently, CBP’s widespread use of the platform to generate federal records raises questions about the agency’s compliance with the FRA. The requested records will shed light on this issue of substantial public interest.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public’s right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, www.citizensforethics.org. The release of information obtained through this request is not in CREW’s financial interest.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat’l Sec. Archive v. U.S. Dep’t of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely and systematically disseminates information to the public in several ways. CREW’s website receives tens of thousands of page views every month. The website includes blogposts that report on and analyze newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts the documents it receives under the FOIA on its website.

Under these circumstances, CREW fully satisfies the criteria for a fee waiver.

Conclusion

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 408-5565 or nsus@citizensforethics.org. Also, if CREW’s request for a fee waiver is denied, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me at either nsus@citizensforethics.org or Nikhel Sus, Citizens for Responsibility and Ethics in Washington, 1101 K St., N.W., Suite 201, Washington, D.C. 20005.

³ See 44 U.S.C. §§ 3101, 3102.

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Sincerely,

A handwritten signature in black ink, appearing to read "Nikhel Sus". The signature is written in a cursive style with a large, sweeping flourish at the end.

Nikhel Sus
Senior Counsel

Fwd: Acknowledgement Letter

Nikhel Sus <nsus@citizensforethics.org>
 To: Eden Tadesse <etadesse@citizensforethics.org>

Wed, Sep 29, 2021 at 12:22 PM

For FOIA file

----- Forwarded message -----
 From: <no-reply@foiaonline.gov>
 Date: Wed, Sep 29, 2021 at 12:15 PM
 Subject: Acknowledgement Letter
 To: <nsus@citizensforethics.org>

Nikhel Sus

1331 F St NW
 Suite 900
 Washington, DC, 20004

09/29/2021

CBP-2021-110485

Dear Nikhel Sus:

This notice acknowledges receipt of your Freedom of Information Act (FOIA) request to U.S. Customs and Border Protection (CBP) received on 09/28/2021. Please use the following unique FOIA tracking number CBP-2021-110485 to track the status of your request. If you have not already done so, you must create a FOIAonline account at <https://foiaonline.gov>. This is the only method available to check the status of your pending FOIA request.

Provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for records in accordance with the DHS FOIA regulations outlined on the DHS website, <https://www.federalregister.gov/documents/2016/11/22/2016-28095/freedom-of-information-act-regulations>. By submitting your request, you have agreed to pay up to \$25.00 in applicable processing fees, if any fees associated with your request exceed this amount, CBP shall contact you; however, the first 100 pages are free.

Due to the increasing number of FOIA requests received by this office, we may encounter some delay in processing your request. Consistent with 6 C.F.R. Part 5 § 5.5(a) of the DHS FOIA regulations, CBP processes FOIA requests according to their order of receipt. Although CBP's goal is to respond within 20 business days of receipt of your request, FOIA does permit a 10-day extension of this time period in certain circumstances pursuant to 6 C.F.R. Part 5 § 5.5(c). [As your request seeks documents that will require a thorough and wide-ranging search, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.] **OR** [As your request seeks a voluminous amount of separate and distinct records, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.] **OR** [As the subject matter of your request is of substantial interest to two or more components of CBP or of substantial interest to another agency, we will need to consult with those entities before we issue a final response. Due to these unusual circumstances, CBP will invoke a 10-day extension for your request pursuant to 6 C.F.R. Part 5 § 5.5(c). If you would like to narrow the scope of your request, please contact our office. We will make every effort to comply with your request in a timely manner.]

CBP's FOIA Division is working hard to reduce the amount of time necessary to respond to FOIA requests. We truly appreciate your continued patience.

For additional information please consult CBP FOIA website please click on FOIA Act Resources or visit <http://www.cbp.gov/site-policy-notices/foia>.

Sincerely,

U.S. Customs and Border Protection

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Nikhe! Sus

Senior Counsel | Citizens for Responsibility and Ethics in Washington (CREW)

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www.citizensforethics.org

 **NT Acknowledgement Letter Letter.pdf**
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