

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

CITIZENS FOR RESPONSIBILITY AND)
ETHICS IN WASHINGTON,)
1331 F Street NW, Suite 900)
Washington, DC 20004,)

Plaintiff,)

v.)

Civil Action No. _____

THE NATIONAL ARCHIVES AND)
RECORDS ADMINISTRATION,)
700 Pennsylvania Avenue NW)
Washington, DC 20408,)

Defendant.)

_____)

COMPLAINT FOR INJUNCTIVE AND DECLARATORY 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, seeking (1) communications between the National Archives and Records Administration (“NARA”) and federal agencies regarding the disposal of records posing a “continuing menace to human health or life or to property” under 44 U.S.C. § 3310 and 36 C.F.R. § 1229.10, and (2) the unauthorized disposition case files for various cases involving the potential unlawful destruction of federal records.

2. CREW seeks declaratory relief that Defendant has violated FOIA by failing to timely respond to CREW’s request, and injunctive relief requiring Defendant to immediately process and release the requested records.

Jurisdiction and Venue

3. This Court has subject-matter jurisdiction and personal jurisdiction under 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.

4. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B).

Parties

5. 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. 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 advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of those efforts, CREW uses government records it obtains under FOIA.

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

Statutory and Regulatory Background

7. 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.

8. 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 of which of the requested records it will release, which it will withhold and why, and the requester's right to appeal the determination to the agency head. 5 U.S.C. § 552(a)(6)(A)(i).

9. An agency's failure to make this determination within 20 days is subject to judicial review without exhausting administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

Factual Background

10. The Federal Records Act ("FRA") requires government agencies to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities."¹ Yet, recent events reveal numerous examples of federal agencies and officials violating their FRA obligations.

11. For instance, during Scott Pruitt's tenure as the Environmental Protection Agency ("EPA") Administrator from February 2017 to July 2018, he created a culture of secrecy and set up systems to ensure that records and paper trails were never created.² Administrator Pruitt instructed political staff to seal out career staff, not to bring cellular devices into meetings, and prohibited staff from taking notes or written records on substantive policy matters, including a water quality rule.³ Pruitt himself, in an attempt to circumvent accountability, kept a secret calendar to shield meetings from public disclosure, used non-EPA phones to conduct EPA-related calls, and avoided the use of official email.⁴

¹ 44 U.S.C. § 3101.

² See Coral Davenport and Eric Lipton, *Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say*, *New York Times*, Aug. 11, 2017, <https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html>.

³ Ethan Sacks, *EPA chief Scott Pruitt's \$43K soundproof phone booth violated federal spending laws, GAO says*, *NBC News*, (Apr. 16, 2018), available at <https://www.nbcnews.com/politics/white-house/epa-chief-scott-pruitt-s-43k-soundproof-phone-booth-violated-n866391>; David Roberts, *Why the head of the EPA built himself a secret phone booth*, *Vox*, Oct. 3, 2017, <https://www.vox.com/energy-and-environment/2017/10/2/16395370/epa-secret-phone-booth>.

⁴ *Id.*; see also Scott Bronstein, Curt Devine, and Drew Griffin, *Whistleblower: EPA's Pruitt kept secret calendar to hide meetings*, *CNN*, July 3, 2018, <https://www.cnn.com/2018/07/02/politics/scott-pruitt-whistleblower-secret-calendar/index.html>.

12. In May 2019, CREW sent a letter to the Archivist of the United States requesting that guidance be issued requiring agencies to make their Federal Records Act policies public in order to encourage FRA compliance.⁵

13. In August 2020, CREW discovered that the EPA illegally destroyed contaminated records regarding water quality without receiving prior approval from NARA.⁶

14. To investigate these issues further, CREW submitted a FOIA request on August 16, 2021 to NARA requesting records that would shed light on communications between NARA and federal agencies regarding the frequency with which federal agencies request and engage in destruction of records. Specifically, CREW's August 16, 2021 FOIA request to NARA sought the following records:

1. All communications from January 1, 2017 to the date this request is processed between NARA and any federal agency regarding any potential or actual disposal of records posing a "continuing menace to human health or life or to property" under 44 U.S.C. § 3310 and 36 C.F.R. § 1229.10, and
2. The complete unauthorized disposition case files for each of the following cases:
 - a. UD-2020-0031 (Department of Commerce)
 - b. UD-2019-0030 (Department of Defense)
 - c. UD-2021-0019 (Department of Defense)
 - d. UD-2021-0020 (Department of Defense)
 - e. UD-2021-0033 (Department of Defense)
 - f. UD-2021-0005 (Department of Defense)
 - g. UD-2020-0042 (Department of Homeland Security)
 - h. UD-2021-0011 (Department of Interior)
 - i. UD-2020-0004 (Department of Justice)

⁵ See CREW Request for Agency Guidance on Public Disclosure of Records Management Policies, May 6, 2019, <https://www.citizensforethics.org/wp-content/uploads/legacy/2019/05/2019.05.06-CREW-Letter-to-NARA.pdf>.

⁶ Hajar Hammado, *EPA destroys water quality records, deceives archivist*, *Citizens for Responsibility and Ethics in Washington*, Aug. 7, 2022, <https://www.citizensforethics.org/reports-investigations/crew-investigations/epa-destroys-water-quality-records-deceives-archivist/>; see also House Committee on Transportation & Infrastructure, *In Letter to National Archives Watchdog, Chairs DeFazio and Napolitano Request Investigation into Destruction of Records by the Trump EPA*, Sept. 09, 2020, <https://transportation.house.gov/news/press-releases/in-letter-to-national-archives-watchdog-chairs-defazio-and-napolitano-request-investigation-into-destruction-of-records-by-the-trump-epa>.

- j. UD-2020-0021 (Department of Justice)
- k. UD-2021-0040 (Environmental Protection Agency)
- l. UD-2021-0021 (U.S. Agency for Global Media)

- 15. CREW's request sought a fee waiver.
- 16. By online correspondence on August 16, 2021, NARA acknowledged receipt of CREW's request and assigned it tracking number NARA-NGC-2021-001268.
- 17. To date, CREW has not received any additional communications from Defendant regarding its August 16, 2021 FOIA request.

PLAINTIFF'S CLAIM FOR RELIEF

**NARA's Wrongful Withholding of Records Responsive to
CREW's FOIA Request**

- 18. CREW repeats and realleges the foregoing paragraphs.
- 19. In its August 16, 2021 FOIA request, CREW properly asked for records within the possession, custody, and control of NARA.
- 20. NARA is wrongfully withholding records responsive to CREW's FOIA request.
- 21. NARA has failed to conduct an adequate search in response to CREW's FOIA request.
- 22. By failing to timely release all requested records in full to CREW, NARA is in violation of FOIA.
- 23. CREW is therefore entitled to injunctive and declaratory relief requiring immediate processing and disclosure of the records requested in its August 16, 2021 FOIA request to NARA.

Requested Relief

WHEREFORE, CREW respectfully requests that this Court:

1. Order Defendant to immediately and fully process CREW's FOIA request and disclose all non-exempt documents 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.

Date: April 21, 2022

Respectfully Submitted,

/s/ Nikhel S. Sus

Nikhel S. Sus

(D.C. Bar No. 1017937)

Laura Iheanachor

(Pending D.C. Bar Admission)

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