

**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.

**U.S. DEPARTMENT OF HOMELAND
SECURITY,**
245 Murray Lane, S.W.
Washington, D.C. 20528

Defendants.

Civil Action No.

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. Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”) challenges the failure of the U.S. Department of Homeland Security (“DHS”) and its subcomponent the U.S. Secret Service to respond to an expedited request for documents concerning a three-month system migration at the direction of the Secret Service Office of Technical Development and Mission Support (“TEC”), which included a reset begun in January 2021 of the Secret Service’s mobile phones, and which the Secret Service blamed for the erasure of many Secret Service text messages from January 5 and 6, 2021. CREW also sought communications and directives concerning the recordkeeping responsibilities of Secret Service employees.

2. This case seeks declaratory relief that DHS is in violation of the FOIA, specifically, 5 U.S.C. §§ 552(a)(3)(A) and 5 U.S.C. § 552(a)(6)(E)(i), and DHS's implementing regulations for failing to grant CREW's expedited requests for records, for failing to grant CREW a fee waiver, and for failing to provide CREW all responsive records and for injunctive relief ordering defendants DHS to immediately process and release to CREW all responsive, non-exempt records at no cost to CREW.

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. Defendants DHS and DHS component the U.S. Secret Service are agencies within the meaning of 5 U.S.C. §§ 552(f)(1) and 701(b)(1). They have possession and control of the requested records and are responsible for fulfilling plaintiff's FOIA request.

Statutory and Regulatory Background

6. 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.

7. 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).

8. The FOIA also requires agencies to promulgate regulations that provide for expedited processing of FOIA requests where the requester demonstrates a "compelling need" as well as in "other cases determined by the agency." 5 U.S.C. § 552(a)(6)(E)(i). The FOIA defines "compelling need" to include 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)(II).

9. DHS regulations at 6 C.F.R. § 5.5(e)(2) require requesters seeking expedition for "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence" to direct their request to DHS's Senior Director of FOIA Operations.

10. 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). DOJ and DHS regulations mirror this requirement. 28 C.F.R. § 16.5(e)(4); 6 C.F.R. § 5.5(e)(4).

11. Once expedition is granted agencies must process the request “as soon as practicable.” 5 U.S.C. § 552(a)(6)(E)(ii).

12. An agency’s failure to respond within 10 calendar days to a request for expedition is subject to judicial review without exhausting administrative remedies. 5 U.S.C. § 552(a)(6)(E)(iii).

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. The FOIA provides that fees should be waived or reduced “if 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).

Factual Background

15. On July 13, 2022, DHS Inspector General Joseph V. Cuffari sent a letter to the leaders of the House and Senate Homeland Security Committees advising that “many U.S. Secret Service (USSS) text messages, from January 5 and 6, 2021 were erased,” which the Secret Service claimed was “part of a device-replacement program.” Letter from Inspector General Joseph V. Cuffari to Sens. Gary C. Peters and Rob Portman and Reps. Bennie g. Thompson and John Katko, July 13, 2022 (“Cuffari Letter”), <https://twitter.com/NicoleSganga/status/1547699110915895299/photo/1>; Maria Sacchetti and Carol D. Leonnig, Secret Service erased texts from Jan. 5 and 6, 2021, official says, *Washington Post*, July 14, 2022, <https://www.washingtonpost.com/national-security/2022/07/14/secret-service-texts-erased/>. *See also* Ken Klippenstein, Secret Service Deleted Jan. 6 Text Messages After Oversight Officials Requested Them, *The Intercept*,

July 14, 2022, <https://theintercept.com/2022/07/14/jan-6-texts-deleted-secret-service/>; Luke Broadwater, Secret Service Text Messages Around Jan. 6 Were Erased, Inspector General Says, *New York Times*, July 14, 2022, <https://www.nytimes.com/2022/07/14/us/politics/secret-service-text-messages-jan-6.html>.

16. Those erasures, however, occurred *after* OIG requested copies of the texts, Cuffari Letter, and had requested that the Secret Service preserve its data. Broadwater, *New York Times*, July 14, 2022.

17. The Inspector General further stated that efforts by his office to investigate the January 6 attack on the Capitol were being hindered by the Secret Service. Cuffari Letter; Sacchetti & Leonnig, *Washington Post*, July 14, 2022. According to the Inspector General's letter, this is part of a larger pattern by DHS to resist inquiries from his office, that includes repeated refusals to provide documents until review by an attorney. *Id.*

18. After news reports emerged about Inspector General Cuffari's letter the Secret Service released a statement claiming that "the insinuation that the Secret Service maliciously deleted text messages following a request is false." Statement of Anthony Guglielmi, Chief of Communications for the United States Secret Service on Accusations of Deleted Text Messages From DHS Inspector General, July 14, 2022, <https://www.secretservice.gov/newsroom/releases/2022/07/statement-anthony-guglielmi-chief-communications-united-states-secret>. The statement further maintained that the Secret Service has been "fully cooperating" with the DHS OIG "in every respect—whether it be interviews, documents, emails, or texts." *Id.*

19. Inspector General Cuffari's letter calls the claims made in the statement from the Secret Service into question, and his office has now initiated a criminal probe into the missing text messages. *See, e.g.*, Maria Sacchetti and Carol D. Leonnig, Watchdog launches criminal

probe over missing Secret Service messages, *Washington Post*, July 21, 2022, <https://www.washingtonpost.com/national-security/2022/07/21/oig-secret-service-texts/>; Zolan Kanno-Youngs and Maggie Haberman, *Watchdog Informs Secret Service of Criminal Inquiry Into Missing Texts*, *New York Times*, July 21, 2022, <https://www.nytimes.com/2022/07/21/us/politics/secret-service-criminal-inquiry-missing-texts.html>.

20. Reportedly around the time that Inspector General Cuffari launched his criminal probe, senior leadership at the Secret Service confiscated the cell phones of 24 agents involved in the agency's response to the January 6, 2021 insurrection at the U.S. Capitol and turned them over to the Office of the Inspector General. Julia Ainsley, *Secret Service took the cellphones of 24 agents involved in Jan. 6 response and gave them to investigators*, *NBC News*, Sept. 27, 2022, <https://www.nbcnews.com/politics/national-security/secret-service-took-cellphones-24-agents-involved-agencys-jan-6-riot-r-rcna49476>.

21. The missing text messages at issue cover a period of time in which supporters of former President Donald Trump engaged in a violent attack on the U.S. Capitol at the urging of the former President and engaged in other efforts to overturn the results of the 2020 presidential election.

22. Testimony provided the Select Committee to Investigate the January 6th Attack on the United States Capitol revealed that the Secret Service played a critical role during the January 6th insurrection. For example, former White House aide Cassidy Hutchinson testified she was told that President Trump "'lunged' at his lead Secret Service agent" after being told "it was too dangerous for him to go" to the Capitol where he had directed the assembled and armed mob to go after his speech on the ellipse. Broadwater, *New York Times*, July 14, 2022.

23. The Committee also has received evidence that then-Vice President Mike Pence refused to get in a car to leave the Capitol with the Secret Service after rioters breached the building, reportedly fearing they would take him “to a secure location where he would be unable to certify the presidential election results[.]” Klippenstein, *The Intercept*, July 14, 2022.

24. Despite the importance in the Committee’s investigation of evidence corroborating these events, according to the Inspector General’s letter to Congress, “key evidence in the form of the Secret Service’s electronic communications may never see the light of day.” Klippenstein, *The Intercept*, July 14, 2022.

25. Rep. Liz Cheney recently revealed that the Committee received approximately 800,000 pages of communications from the Secret Service but that “most text messages from around that date . . . were not recovered.” Merdie Nzanga, Rep. Liz Cheney: Jan. 6 committee got around 800,000 pages from Secret Service, *USA Today*, Sept. 25, 2022, <https://www.usatoday.com/story/news/politics/2022/09/25/cheney-january-6-committee-secret-service/8113878001/>. Rep. Cheney stated that “[t]he texts themselves, in many cases, are gone or other forms of communication, like Teams messages and emails, and other forms of communication[.]” *Id.*

FOIA Request At Issue

26. On August 16, 2022, CREW submitted via email a FOIA request to the Secret Service seeking two categories of documents. Specifically, CREW requested:

- (1) All communications and directives from the Secret Service Office of Technical Development and Mission Support (“TEC”) concerning the three-month system migration, which included a reset begun in January 2021 of the Secret Service’s mobile phones, referenced in the July 14, 2022 Statement of Anthony Guglielmi, Chief of Communications for the United States Secret Service on Accusations of Deleted Text Messages From DHS Inspector General (“Guglielmi Statement”). This request includes, but is not limited to, directions on whether and how to preserve text messages and emails; and

- (2) All communications and directives concerning the recordkeeping responsibilities of departing Secret Service employees, including but not limited to whether and how to preserve text messages and emails.

27. CREW also requested that the Secret Service expedite the processing of its request because there is “an urgency to inform the public about an actual or alleged federal government activity” and CREW is “primarily engaged in disseminating information” within the meaning of agency regulations, specifically 6 C.F.R. §5.5(e)(1)(ii). CREW explained that there is a particularly urgent need to inform the public about the extent to which key evidence in ongoing congressional and criminal investigations was destroyed illegally and contrary to agency directives and policy. This urgency is heightened by the public dispute between the Secret Service and the DHS Inspector General concerning the missing text messages.

28. Further, as CREW explained, the existence of numerous articles discussing the deletion of the Secret Service records, some of which it cited in its request, also illustrates the urgency to inform the public. *See* 6 C.F.R. § 5.5(e)(3).

29. CREW also explained that it is “primarily engaged in disseminating information” to the public, as agency regulations require. CREW’s primary purpose is to inform and educate the public about the activities of government officials and those who influence public officials. To that end, CREW uses statutes like the FOIA to gather information the public needs to hold public officials accountable and disseminates this information through social media and its website, www.citizensforethics.org, which receives tens of thousands of views every month.

30. CREW also sought a waiver of fees associated with processing its request pursuant to 5 U.S.C. §552(a)(4)(A) and agency regulations. CREW explained it was seeking a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii) because the subject of its 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. Moreover, the request primarily and fundamentally is for non-commercial purposes.

31. In justification of its fee waiver request CREW explained that, as recently reported, on July 13, 2022, DHS Inspector General Joseph V. Cuffari sent a letter to the leaders of the House and Senate Homeland Security committees advising that “many U.S. Secret Service (USSS) text messages, from January 5 and 6, 2021 were erased,” which the Secret Service claimed was “part of a device-replacement program.” Those erasures, however, occurred *after* OIG requested copies of the texts, and had requested that the Secret Service preserve its data. The Inspector General further stated that efforts by his office to investigate the January 6 attack on the Capitol were being hindered by the Secret Service. According to the letter, this is part of a larger pattern by DHS to resist inquiries from his office, that includes repeated refusals to provide documents until review by an attorney.

32. Further, after news reports emerged about the letter, the Secret Service released a statement claiming that “the insinuation that the Secret Service maliciously deleted text messages following a request is false.” The statement further maintained that the Secret Service has been “fully cooperating” with the DHS OIG “in every respect – whether it be interviews, documents, emails, or texts.” Inspector General Cuffari’s letter, however, calls those claims into question, and his office has now initiated a criminal probe into the missing text messages.

33. CREW further explained that the missing emails concern a period of time in which supporters of former President Donald Trump engaged in a violent attack on the U.S. Capitol following violent rhetoric from the former President and engaged in other efforts to overturn the results of the 2020 presidential election. Testimony provided the Select Committee

to Investigate the January 6th Attack on the United States Capitol revealed that the Secret Service played a critical role during the January 6th insurrection. For example, former White House aide Cassidy Hutchinson testified she was told that President Trump “‘lunged’ at his lead Secret Service agent” after being told “it was too dangerous for him to go” to the Capitol where he had directed the assembled and armed mob to go after his speech on the ellipse. The Committee also has received evidence that then-Vice President Mike Pence refused to get in a car with the Secret Service after rioters entered the Capitol, reportedly fearing they would take him “to a secure location where he would be unable to certify the presidential election results[.]”

34. Despite the importance in the Committee’s investigation of evidence corroborating these events, according to the Inspector General’s letter to Congress, “key evidence in the form of the Secret Service’s electronic communications may never see the light of day.”

35. Accordingly, as CREW explained, the requested records will shed light on whether the deletion of the text messages violated agency policy and directives concerning the planned migration and recordkeeping responsibilities of departing employees, information that will help the public evaluate the actions of the Secret Service in deleting critical evidence and the claims of the agency’s chief watchdog concerning the legality of those actions.

36. CREW further explained that it 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 the activities of government officials, to ensuring the integrity of those officials. CREW uses a combination of research, litigation, and advocacy to advance its mission. 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.

37. CREW also requested that it not be charged search or review fees pursuant to U.S.C. §552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. Specifically, 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 reports and analyze on newsworthy developments regarding government ethics, corruption, and money in politics as well as numerous reports to educate the public about these issues. In addition, CREW posts documents it receives under the FOIA on its website.

38. On August 16, 2020, CREW sent a separate letter to DHS's Senior Director of FOIA Operations, Privacy Office, also requesting that DHS expedite its FOIA request of that same date pursuant to 6 C.F.R. § 5.5(e)(1)(ii). CREW explained that the request concerns a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity affecting public confidence. DHS's Inspector General has launched a criminal investigation into text messages that were deleted from Secret Service phones as part of the referenced migration and concerned a period of time during which supporters of then-President Trump violently attacked the U.S. Capitol and engaged in other illegal efforts to overturn the results of the 2020 presidential election.

39. Further, as CREW explained, the missing Secret Service text messages have been the subject of intense scrutiny and media interest, as evidenced by the extensive new reporting on the subject. Unquestionably the requested records raise "possible questions about the government's integrity" affecting public confidence.

40. As Secret Service regulations require, CREW certified that its statements in support of its expedition request are true and correct.

41. By letter dated September 14, 2022, DHS acknowledged receiving CREW's request on August 16, 2022, which it identified as File Number 20220640.

42. That letter also advised CREW that DHS was going to charge CREW for the records as a "media" requester. The letter did not address CREW's request for a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii). Nor did the letter provide CREW any appeal rights.

43. The letter further noted the agency was invoking a 10-day extension for the request pursuant to 6 C.F.R. Part 5 § 5.5(c), stating as justification that CREW's request "will require a thorough and wide-ranging search."

44. Although the agency said it needed an additional ten days, it also stated in its letter that the Secret Service FOIA Office had conducted a search of all offices likely to contain potentially responsive records, and that such records were being processed.

45. On September 14, 2022, DHS sent another letter also acknowledging receipt of the same request from CREW but assigning it File Number 20220639.

46. This second letter also advised CREW it was being treated as a media requester for fee purposes, that the Secret Service was invoking a 10-day extension, and that the Secret Service FOIA Office had conducted a search of all offices likely to contain potentially responsive records, and that such records were being processed. The letter did not address CREW's request for a fee waiver pursuant to 5 U.S.C. §552(a)(4)(A)(iii).

47. This letter also failed to advise CREW of any appeal rights.

48. Neither letter addressed CREW's request for expedition.

49. To date, CREW has received no further communication from DHS, nor has DHS acted on CREW's request for expedition.

PLAINTIFF'S CLAIMS FOR RELIEF

**CLAIM ONE
(Failure to Grant Expedition)**

50. Plaintiff repeats and re-alleges paragraphs 1-49.

51. Plaintiff properly asked that DHS expedite the processing of Plaintiff's FOIA request, which seeks agency records within the custody and control of DHS, based on its showing of widespread and exceptional media interest in the requested information, which involves possible questions of the government's integrity that affect public confidence.

52. Plaintiff also properly sought expedition from DHS because of the urgency to inform the public about an actual or alleged federal government activity and because CREW is primarily engaged in disseminating information.

53. Defendants DHS failed to comply with the statutory time limit for making a determination on Plaintiff's requests for expedition and improperly failed to process Plaintiff's requests on an expedited basis.

54. Plaintiff has exhausted all applicable administrative remedies with respect to Defendant DHS's failure to make a determination on Plaintiff's requests for expedition.

55. Plaintiff therefore is entitled to injunctive and declaratory relief with respect to the immediate and expedited processing and disclosure of the requested records.

**CLAIM TWO
(Failure to Grant a Fee Waiver)**

56. Plaintiff repeats and re-alleges paragraphs 1-55.

57. Plaintiff properly asked that DOJ waive all fees because the information CREW seeks 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 pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).

58. Despite the factual showing Plaintiff made to support its fee waiver request Defendant DHS failed to act on that request and instead characterized Plaintiff as a media requester entitled only to a reduction in fees.

59. Plaintiff therefore is entitled to injunctive and declaratory relief with respect to its entitlement to a waiver of fees because the information it seeks is in the public interest as 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.

CLAIM THREE
(Wrongful Withholding of Non-Exempt Records)

60. Plaintiff repeats and re-alleges paragraphs 1-59.

61. Plaintiff properly asked for records within the custody and control of the U.S. Department of Homeland Security.

62. Defendant DHS wrongfully withheld agency records requested by Plaintiff by failing to comply with the statutory time limit for making a determination on both expedited and non-expedited FOIA requests, and by withholding from disclosure records responsive to Plaintiff's request of the Secret Service.

63. Plaintiff CREW is therefore entitled to injunctive and declaratory relief with respect to the immediate processing and disclosure of the records requested in its August 16, 2022 FOIA request.

Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order Defendant DHS to immediately and fully process Plaintiff's August 16, 2022 expedited FOIA request to the Secret Service and to disclose all non-exempt documents immediately and at no cost to Plaintiff;
- (2) Issue a declaration that Plaintiff is entitled to immediate and expedited processing and disclosure of the requested records;
- (3) Issue a declaration that Plaintiff is entitled to a waiver of fees associated for processing its request;
- (4) Provide for expeditious proceedings in this action;
- (5) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;
- (6) Award plaintiff its costs and reasonable attorneys' fees in this action; and
- (7) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Anne L. Weismann

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