

**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.

**U.S. DEPARTMENT OF DEFENSE,**  
1400 Defense Boulevard  
Washington, D.C. 20301-1400

**U.S. DEPARTMENT OF THE ARMY,**  
104 Army Pentagon  
Washington, D.C. 20310-010

Defendant.

**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 Defense (“DoD”) and the U.S. Department of the Army (“Army”) to respond to a FOIA request for communications between General Charles A. Flynn and retired Lieutenant General Michael Flynn.

2. This case seeks declaratory relief that DoD and the Army 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 request within 20 business days, as well as injunctive relief ordering DoD and the Army 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. Defendants U.S. Department of Defense and U.S. Department of the Army, a subcomponent of DoD, are agencies within the meaning of 5 U.S.C. §§ 552(f)(1) and 701(b)(1). DoD and the Army 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. An agency's failure to make this determination within 20 business days is subject to judicial review without exhausting administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

9. In "unusual circumstances" an agency may extend the time to respond to a request by no more than 10 working days provided that the agency gives the requester written notice setting forth the unusual circumstances and the date on which the agency expects to make a determination. 5 U.S.C. § 552(a)(6)(B)(i)-(iii). The FOIA defines "unusual circumstances" as including the need to search for and collect responsive records from offices other than the office processing the request; the need to search for, collect, and examine a "voluminous amount of separate and distinct records"; and the need to consult with another agency. 5 U.S.C. § 552(a)(6)(B)(iii)(I)-(III).

### **Factual Background**

10. On November 16, 2021, DoD's Inspector General released a report, "Review of the DOD's Role, Responsibilities, and Actions to Prepare for and Respond to the Protest and Its Aftermath at the U.S. Capitol Campus on January 6, 2021." DODIG-2022-039, *available at* <https://www.dodig.mil/reports.html/Article/2844941/review-of-the-department-of-defenses-role-responsibilities-and-actions-to-prepa/> ("IG Report"). The IG Report purported to represent the

results of a review by DoD's Office of Inspector General ("OIG") of the role, responsibilities, and actions DoD played in preparing for and responding to the January 6 insurrection. *Id.* at 3.

11. In conducting its review, the OIG interviewed 44 witnesses, including then-Lt. Gen. Charles Flynn. *Id.* at 3-4. Based on its review, the OIG concluded that "the actions the DoD took before January 6, 2021, to prepare for the planned protests in Washington, D.C., on January 5 and 6, 2021, were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA [Defense Support of Civil Authorities], and compliant with laws, regulations, and other applicable guidance." *Id.* at 8. The OIG also concluded that DoD's actions in response to the request from the U.S. Capitol Police for assistance "were appropriate, supported by requirements, consistent with the DoD's roles and responsibilities for DSCA, and compliance with laws, regulations, and other applicable guidance." *Id.*

12. On December 1, 2021, Col. Earl G. Matthews, who served as Staff Judge Advocate to the Commanding General of the District of Columbia National Guard on January 6, 2021, released a 36-page memorandum outlining the multiple errors, misstatements, and faulty analysis in the IG Report, "The Harder Right: An Analysis of a Recent DoD Inspector General Investigation and Other Matters," available at <https://www.justsecurity.org/wp-content/uploads/2021/12/january-6-clearinghouse-Colonel-Earl-G.-Matthews-An-Analysis-of-a-Recent-DoD-Inspector-General-Investigation-and-Other-Matters-December-1-2021.pdf> ("Matthews Report").

13. According to the Matthews Report, top military officials Gen. Charles A. Flynn and Lt. Gen. Walter Piatt lied to Congress and/or the DoD OIG about facts relating to DoD's response to repeated requests for the D.C. National Guard to be swiftly deployed to Capitol Hill. *See* Matthews Report at 16, 19, 20, 21-35. Col. Matthews characterized the IG Report as "replete

with factual inaccuracies,” *id.* at 3, raising the possibility that outside factors may have contributed to the delay in the deployment of the D.C. National Guard, possibly including a request by Lt. Gen. Michael Flynn to his brother, Gen. Charles Flynn, to hold off on such deployment.

14. By letter dated January 26, 2022, CREW made a FOIA request to DoD seeking all communications between Gen. Charles A. Flynn and Retired Lt. Gen. Michael Flynn from June 1, 2020, through the date the request is processed. CREW specified that it was seeking all communications sent or received by Gen. Charles Flynn acting in his governmental capacity, including but not limited to those sent or received on non-governmental communications devices or through non-governmental accounts.

15. CREW’s request also specified that the search include, *inter alia*, records of five government custodians involved in DoD’s response to the January 6 attack on the U.S. Capitol: (1) Gen. Charles A. Flynn; (2) Lt. Gen. Walter Piatt; (3) Maj. Gen. Christopher LaNeve; (4) former U.S. Army Secretary Ryan McCarthy; and (5) former Acting Secretary of Defense Chris Miller.

16. CREW further specified that its request excludes records consisting solely of news articles, press clippings, and other publicly available material so long as such records include no accompanying discussion or notations.

17. CREW sought a waiver of fees associated with processing its request. In support of its request for a fee waiver CREW explained that the records it seeks will shed substantial light on a matter of significant public interest, specifically the extent to which the delay in deploying the D.C. National Guard to protect the Capitol while it was being violently attacked by a band of insurrectionists was due, at least in part, to the interference of individuals like Gen.

Michael Flynn. CREW explained that Gen. Michael Flynn has expressed public and repeated support for former President Donald Trump's efforts to overturn the results of the 2020 presidential election. The requested records also will help the public independently evaluate the veracity and thoroughness of the IG Report.

18. CREW further explained that it is a non-profit organization 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 in politics. CREW noted its intent to analyze the information response to its request and share its analysis with the public, and that the release of the information is in not in CREW's financial interest.

19. CREW further requested that it not be charged search or review fees because it qualifies as a member of the news media. CREW explained the ways that it routinely and systematically disseminates information to the public.

20. By email dated January 26, 2022, DoD acknowledged receipt of CREW's request.

21. By letter dated February 3, 2022, DoD advised CREW that its request had been misdirected to DoD's Freedom of Information Division for process, as that office only processes requests for the Office of the Secretary of Defense and the Joint Staff. DoD further advised that the United States Army operates its own FOIA program and "would have cognizance of the information" CREW seeks. DoD advised CREW it had forwarded its request to the Army and was closing the request with DoD. The letter provided no appeal rights to CREW.

22. By email to the Army dated July 6, 2022, CREW requested an update regarding the status of its FOIA request.

23. To date, plaintiff CREW has received no response to its request from the Army, or any other communication from either DoD or the Army.

24. Under 5 U.S.C. § 552(a)(6)(C)(i), CREW has now effectively exhausted all applicable administrative remedies with respect to its request of DoD and the Army.

**PLAINTIFF'S CLAIM FOR RELIEF**

25. Plaintiff repeats and re-alleges paragraphs 1-24.

26. Plaintiff properly asked for records within the custody and control of the U.S. Department of Defense and its subcomponent the U.S. Department of the Army.

27. DoD and the Army have wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for making a determination on plaintiff's request, and by withholding from disclosure records responsive to plaintiff's request.

28. Plaintiff CREW is therefore entitled to injunctive and declaratory relief with respect to the immediate processing and disclosure of the records requested in its January 26, 2022 FOIA request.

**Requested Relief**

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order defendants to immediately and fully process plaintiff's January 26, 2022 FOIA request and to disclose all non-exempt documents immediately to plaintiff;
- (2) Issue a declaration that plaintiff 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 plaintiff 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/ Anne L. Weismann

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