

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
CITIZENS FOR RESPONSIBILITY AND)		
ETHICS IN WASHINGTON,)		
)		
Plaintiff,)		
)		
v.)	Civil Action No. 1:22-cv-3350	
)		
DEPARTMENT OF ARMY, et al.,)		
)		
Defendants.)		
)		
<hr/>)		

DECLARATION OF PAUL DEAGOSTINO

I, Paul DeAgostino, do hereby declare as follows:

1. I am the Senior Counsel, Chief Attorney and Legal Services, Office of the Administrative Assistant to the Secretary of the Army (AASA). My responsibilities include the general management, oversight, and supervision of the AASA Freedom of Information Act (FOIA) processing practices. In that capacity, I manage and supervise FOIA Specialists, who report to me regarding the processing of FOIA and Privacy Act requests received by AASA. I am also the appointed Initial Denial Authority for FOIA requests that involve Army Senior Leader equities. In connection with my official duties and responsibilities, I am familiar with AASA procedures for responding to requests for information pursuant to provisions of the FOIA and the Privacy Act. I make the following statements based upon my personal knowledge and information made available to me in my official capacity.

I. SEARCH FOR RESPONSIVE RECORDS

2. I am aware of Plaintiff's Complaint under the Administrative Procedure Act, the Federal Records Act, and the Declaratory Judgment Act. I am familiar with active FOIA litigation involving Plaintiff and other named Defendants. In the FOIA litigation, Plaintiff seeks text messages from HON Ryan McCarthy, GEN James McConville, LTG Walter Piatt, and HON James McPherson. Army performed a diligent search for responsive records pursuant to Plaintiff's text message request.

a. **HON Ryan McCarthy**. According to the Assistant Executive Officer and the Communications Non-commissioned Officer, HON McCarthy's government issued cell phone was reprovisioned when he left office in January 2021. The phone was reprovisioned and issued to a new user. Army contacted the new user to inquire about the status of the phone when it was issued to him. The new user stated the issued phone was like new when he received it and there was no indication of HON McCarthy's communications on the phone.

b. **GEN James McConville**. According to the Information Management Officer, Property Book Officer, and the Communications Non-commissioned Officer, GEN McConville's government issued cell phone was reprovisioned in April 2021 due to cyber security concerns. A communication team immediately secured the phone and reprovisioned it. A new phone was issued to GEN McConville in April 2021. GEN McConville's reprovisioned phone was issued to a new user. Army contacted the new user to inquire about the status of the phone when it was issued to him. The new user stated the issued phone was like new when he received it and there was no indication of GEN McConville's communications on the phone.

c. **LTG Walter Piatt**. According to the Information Management Officer, Property Book Officer, and the Assistant Executive Officer, LTG Piatt's government issued cell phone

was unable to be searched since it was reprovisioned due to cyber security concerns in April 2021 and turned in to the phone carrier. LTG Piatt was issued a new phone in May 2021. The office was in the process of upgrading to new phone models, so LTG Piatt's compromised, reprovisioned phone was not reissued to a new user; it was sent to the phone company for account credit.

d. **HON James McPherson**. When HON McPherson departed the Under Secretary of the Army office on January 20, 2021, he left his government issued cell phone with his Executive Officer. The Executive Officer returned the phone to the Officer of the Army General Counsel office where HON McPherson worked as the Army General Counsel before he served as the Under Secretary of the Army. A Soldier assigned to the Pentagon found a phone with a sticky note on it marked "McPherson" in a box of old phones that needed to be turned in for reprovisioning. She secured the phone in the office. She did not know if the phone had been reprovisioned. The International Mobile Equipment Identity (IMEI) number on the phone box matches the IMEI assigned to HON McPherson's government issued cell phone on an internal phone roster. So, in addition to the sticky note with "McPherson" and the IMEI, it is assumed this phone at some point was assigned to HON McPherson.

The Army obtained a PIN from HON McPherson that HON McPherson thought might be the PIN to his government issued cell phone. An Army Officer entered the PIN; it did not open the phone. The Assistant Executive Officers provided and tried PINs that are typically issued to new government cell phone users; the PINs did not open the phone. The Army Office of the General Counsel Property Book Officer contacted the Joint Service Provider (JSP) to see if the phone's PIN could be reset. The JSP could not assist with resetting the PIN for the phone. An Army Information Management Officer used an online internal system to see if he could reset

the PIN. HON McPherson's government issued cell phone was not located in the internal system.

In summary, the Army has exhausted all reasonable means to retrieve any records on the phone it suspects belongs to HON McPherson.


e. **Mobile Service Providers.** Text messages sent by Department of Defense (DoD) mobile devices for the Army personnel requested in this case are serviced by the third-party mobile service providers, to include AT&T and Verizon, and may be preserved by those third-party mobile service providers for a specified period of time in accordance with that mobile service provider's policy. During the period at issue, AT&T informed DOD that it did not retain text messages beyond forty-eight (48) hours after the message is sent or received and Verizon did not retain text messages beyond seven (7) days after the message is sent or received. Because these text message retention periods had expired when DoD inquiries were made to AT&T and Verizon, the Army was unable to obtain from AT&T and Verizon the content of any text messages from the reprovisioned phones.

II. NATIONAL ARCHIVES AND RECORDS ADMINISTRATION RESPONSE

3. In a letter dated August 5, 2022, the National Archives and Records Administration (NARA) requested the Department of Army to investigate the apparent loss of certain Headquarters, Department of the Army records containing telephonic text messages of former senior officials. The Army responded to NARA's letter on October 25, 2022. Exhibit A is a true and correct copy of the Army's letter.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: March 1, 2023



Name: Mr. Paul DeAgostino

Declarations have the same effect as affidavits. 28 U.S.C. § 1746.



DEPARTMENT OF THE ARMY
OFFICE OF THE ADMINISTRATIVE ASSISTANT TO THE SECRETARY
105 ARMY PENTAGON
WASHINGTON DC 20310-0105

AAES-RM (25-1i)

25 October 2022

MEMORANDUM FOR Chief Records Officer for the United States Government
(Mr. Laurence Brewer); 8601 Adelphi Road, College Park, MD 20740

SUBJECT: Response to 5 August 2022 NARA Information Request

1. References.

a. Washington Headquarters Services, Office of the Secretary of Defense Records Administrator letter to Office of the Chief Records Officer for the U.S. Government (Mr. Laurence Brewer), 24 October 2022

b. Deputy Secretary of Defense memorandum (Records Management Responsibilities for Text Messages), 3 August 2022

c. All Army Activities message 054/2022 (Retention of Text Messages on Government Furnished Equipment), 9 August 2022

d. Title 44, U.S. Code, section 3101, et. seq.

2. This memorandum responds to your 5 August 2022 request for the Department of the Army (DA) to conduct an investigation into the apparent loss of certain Headquarters, Department of the Army (HQDA) records containing telephonic text messages of former senior officials. HQDA utilizes the Defense Information Systems Agency (DISA) and the Joint Service Provider (JSP) as the information technology (IT) vendor for HQDA IT requirements. Our review and the responses that follow rely on the information contained in references cited above.

a. A complete description of the records with the volume and dates if known. When government-furnished mobile devices were returned to the mobile service provider for HQDA, in accordance with DA practice at the time, all data resident on the device was erased before the device was reprovisioned to a new user or retired and returned to the mobile service carrier. Therefore, the HQDA Records Management Directorate (RMD) is unable to discern whether any Federal records were resident on these mobile devices or what the volume or nature of any such records may have been. Any email communications sent and received on those mobile devices using government email applications, while erased from the mobile devices themselves should, and we believe, have been captured and retained in accordance with procedures put in place by DISA, the JSP enterprise email service provider, and Army records managers.

AAES-RM (25-1i)

SUBJECT: Response to 5 August 2022 NARA Information Request

b. Office responsible for maintaining the records. The Army concurs with the statement made in reference 1a that the components, to include the Service components, had the responsibility to appropriately maintain records resident on mobile devices. Pursuant to Department of Defense Instruction 8170.01 (Online Information Management and Electronic Messaging), the user had to ensure potential records resident only on a mobile device were transferred into the Service's appropriate storage and archival locations.

c. Exact circumstances surrounding the removal, defacing, alteration, or destruction of records. Prior to 3 August 2022, when government-furnished mobile devices were returned to the HQDA mobile service provider, all data on those devices were erased by resetting the devices to their factory settings. Therefore, potential records requiring retention that were resident only on these devices were erased.

d. Safeguards established to prevent further loss of documentation. Pursuant to references 1b and 1c, government cell phones that are due to be replaced, for any reason, are no longer being re-provisioned until all records are properly safeguarded. The Army will continue to comply with DoD guidance in this regard.

e. Actions taken to salvage, retrieve, or reconstruct the records. The Army concurs with the statement in reference 1b that any retrieval of the data resident on the phone cannot be reconstructed due to commercial vendor practices.

3. Should you require further information, please contact me at (703) 473-0613 or joyce.luton2.civ@army.mil.

LUTON.JOYCE
1117770326
JOYCE LUTON
Director, Records Management Directorate

Digitally signed by
LUTON.JOYCE.1117770326
Date: 2022.10.25 20:50:34
-04'00'