

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

CITIZENS FOR RESPONSIBILITY AND
ETHICS IN WASHINGTON,


Plaintiff,

v.

U.S. DEPARTMENT OF THE ARMY,
104 Army Pentagon
Washington, DC 20310-0104, and

SOUTH DAKOTA NATIONAL GUARD,
2823 West Main Street
Rapid City, SD 57702,

Defendants.

Civil Action No. _____

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, against Defendants U.S. Department of the Army (“Army”) and the South Dakota National Guard (“SDNG”) seeking records relating to Governor Kristi Noem’s deployment of National Guard troops to the southern U.S. border using funds provided by a private donor.

2. The SDNG improperly denied and refused to process CREW’s FOIA request, claiming “the SDNG does not meet the definition of an agency under FOIA” in this instance because the requested records relate solely to the agency’s state functions. As a federally recognized National Guard unit, however, the SDNG is an “agency” covered by FOIA at all times, regardless of whether the requested records relate to its federal or state functions. *See In re Sealed Case*, 551 F.3d 1047, 1049-53 (D.C. Cir. 2009).

3. CREW seeks injunctive relief requiring the SDNG to immediately process and release the requested records. CREW also seeks a declaratory judgment that the SDNG is a FOIA-covered agency and that, by failing to process CREW's request and release the requested records, the SDNG is in violation of FOIA.

Jurisdiction and Venue

4. 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.

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

Parties

6. 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.

7. Defendant Army is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Army National Guard is a component of the Army.

8. Defendant SDNG includes the South Dakota Army National Guard ("SDARNG"), a federally recognized unit of the Army National Guard. The SDNG and

SDARNG are agencies within the meaning of 5 U.S.C. § 552(f)(1). *See In re Sealed Case*, 551 F.3d at 1049-53.

Factual Background

9. On June 29, 2021, Governor Kristi Noem announced that “up to fifty South Dakota National Guard troops are being deployed to Texas to help the secure the border between the United States and Mexico.” Press Release, Governor Noem Deploys South Dakota National Guard to Texas for Border Security, *South Dakota State News*, June 29, 2021, <https://news.sd.gov/newsitem.aspx?id=28226>.

10. The release added that the “deployment will be paid for by a private donation.” *Id.*

11. Later reporting shows that the donation was for \$1 million, and was provided by Willis Johnson, a billionaire Republican donor who lives in Tennessee. Brian Slodysko and Stephen Groves, GOP donor pays \$1M to deploy South Dakota national guard, *Associated Press*, June 30, 2021, <https://apnews.com/article/joe-biden-sd-state-wire-south-dakota-immigration-philanthropy>.

12. Governor Noem’s decision to accept a private donation to fund an interstate National Guard deployment “has drawn intense scrutiny,” with experts saying “it sets a troubling precedent in which a wealthy patron is effectively commandeering U.S. military might to address private political motivations.” *Id.*

13. On July 6, 2021, CREW submitted a FOIA request to the SDNG seeking:

all records from May 1, 2021 to the date this request is processed relating to the deployment of the South Dakota National Guard to the southern U.S. border, as announced by Governor Kristi Noem on June 29, 2021 (the “Deployment”), including without limitation the following records:

1. All records relating to the “private donation” to support the Deployment provided by Willis and Reba Johnson’s Foundation and billionaire Willis Johnson, including records sufficient to identify the amount of the private

donation and any communications with Willis Johnson or any representative of his foundation.

2. All records reflecting any complaint, inquiry, analysis, consideration, or determination by the DOD, the National Guard, or any other federal or state entity regarding the propriety of using a private donation to fund the Deployment.
3. All records reflecting any complaint, inquiry, analysis, consideration, or determination by the DOD, the National Guard, or any other federal or state entity regarding any legal restrictions applicable to the Deployment.
4. All communications with Governor Noem's office regarding the Deployment.
5. All records reflecting the parameters of the Deployment, including any instructions or other communications to South Dakota National Guard members about the nature of the Deployment, whether participation is mandatory or voluntary, and the source of funding for the Deployment.

14. CREW's request sought a fee waiver.

15. By letter dated July 16, 2021, the SDNG acknowledged receipt of CREW's FOIA request and assigned it case number FA-21-00005.

16. By letter dated August 26, 2021 (and transmitted to CREW by email dated September 10, 2021), the SDNG denied and refused to process CREW's request, explaining as follows:

The SDNG is a dual mission entity performing both federal and state functions. As a hybrid organization the SDNG can be performing such functions either separately or simultaneously. With regard to your request any involvement the SDNG may or may not have had with the Willis and Reba Johnson Foundation would have been solely as a function of the State of South Dakota. As such, in this instance, the SDNG does not meet the definition of an agency under FOIA, 5 U.S.C. 551. Were the SDNG performing a federal function and, as such, as [sic] an agency for purposes of FOIA, any involvement that the SDNG may or may not have had with the subjects of your request would be exempt from release under FOIA under 5 U.S.C. 552(b)(5) as part of the deliberative process of the agency and/or attorney-client privilege. Your request would be denied were it properly a FOIA request.

17. The SDNG's August 26, 2021 letter also denied CREW's request insofar as it sought any records under South Dakota law.

18. The SDNG's August 26, 2021 letter did not inform CREW of any administrative appeal rights, nor did it state that the agency had gathered and reviewed any documents responsive to CREW's request.

CREW'S CLAIM FOR RELIEF

The SDNG's Wrongful Withholding of Records Responsive to CREW's FOIA Request

19. CREW repeats and re-alleges the preceding paragraphs.

20. In its July 6, 2021 FOIA request, CREW properly asked for records within the possession, custody, and control of the SDNG.

21. The SDNG is an "agency" within the meaning of 5 U.S.C. § 552(f)(1) at all times. *See In re Sealed Case*, 551 F.3d at 1049-53.

22. In its August 26, 2021 letter, the SDNG improperly refused to process CREW's FOIA request based on the legally erroneous position that it is not a FOIA-covered "agency" for purposes of CREW's request.

23. By refusing to process CREW's request and failing to timely release the requested records, the SDNG is in violation of FOIA.

24. The SDNG is wrongfully withholding records responsive to CREW's request.

25. The SDNG's August 26, 2021 letter does not qualify as a "determination" sufficient to trigger FOIA's exhaustion requirements because the letter did not inform CREW of any administrative appeal rights or state that the agency had gathered and reviewed responsive documents. *See CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).

26. Because the SDNG has not issued any determination on CREW's FOIA request, CREW has constructively exhausted its administrative remedies.

Requested Relief

WHEREFORE, CREW respectfully requests that this Court:

1. Declare that the SDNG is an "agency" within the meaning of 5 U.S.C. § 552(f)(1);
2. Enjoin the SDNG from improperly withholding records from CREW on the ground that it is not an "agency" within the meaning of 5 U.S.C. § 552(f)(1);
3. Declare that CREW is entitled to immediate processing and disclosure of the requested records;
4. Order the SDNG to immediately and fully process CREW's FOIA request and disclose all non-exempt records 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 such other relief as the Court may deem just and proper

Date: September 22, 2021

Respectfully Submitted,

/s/ Nikhel S. Sus

Nikhel S. Sus

(D.C. Bar No. 1017937)

Laura Iheanachor

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