

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

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**)
455 Massachusetts Ave., N.W.)
Washington, D.C. 20001)

Plaintiff,)

v.)

Civil Action No. 18-cv-0007 (TSC)

U.S. DEPARTMENT OF JUSTICE)
950 Pennsylvania Ave., N.W.)
Washington, D.C. 20530)

Defendant.)

FIRST AMENDED 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 Justice (“DOJ”) to disclose to CREW communications concerning DOJ’s decision to invite reporters to DOJ on December 12, 2017, to share with them private text messages from two former FBI investigators on Special Counsel Robert Mueller’s team that are part of an ongoing investigation by DOJ’s Office of the Inspector General.

2. This case seeks declaratory relief that DOJ is in violation of the FOIA, 5 U.S.C. § 552(a)(6)(E)(i), for failing to provide CREW on an expedited basis all responsive records, and injunctive relief ordering defendant DOJ 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 lies in this district 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. 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 its research, CREW uses government records made available to it under the FOIA.

5. Defendant DOJ is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 701. Defendant has possession and control of the requested records and is 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 "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. 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); 28 C.F.R. § 16.5(e)(4). DOJ regulations provide that requests for expedition based on a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence must be submitted to the Director of Public Affairs at DOJ's Office of Public Affairs. 28 C.F.R. § 16.5(e)(2).

10. 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).

11. 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).

Factual Background

12. On December 12, 2017, in advance of Deputy Attorney General Rod J. Rosenstein's testimony the following morning before the House Judiciary Committee, DOJ took

the unprecedented step of inviting a group of reporters to its offices to view private text messages that were critical of President Donald Trump and sent during the 2016 presidential campaign by two former FBI investigators who, until shortly before then, had served on Special Counsel Robert Mueller's team. According to a source for one of the news reports on this matter, the texts were given to reporters in case they did not leak in time for Deputy Attorney General Rosenstein's public hearing the following morning.

13. Deputy Attorney General Rosenstein acknowledged during his congressional testimony on December 13 that there had been a decision that the texts "were fit for public consumption," and that the inspector general had been consulted "to determine that he had no objection to releasing the material."

14. Following this testimony, on December 13, 2017, CREW sent a FOIA request by facsimile to DOJ's Office of Information Policy ("OIP") requesting all communications concerning the decision to invite reporters to DOJ on December 12, 2017, for the purpose of sharing with them private text messages sent during the 2016 presidential campaign by two former FBI investigators on Special Counsel Robert Mueller's team. CREW's request specified that it included, but was not limited to: (1) communications with reporters regarding this meeting; (2) communications within DOJ about whether, when, and how to share the text messages with reporters including, *inter alia*, the Office of the Inspector General, the Attorney General, the Office of Legislative Affairs, the Deputy Attorney General, the Associate Attorney General, the Office of Public Affairs, and any individual within the senior leadership offices of DOJ; and (3) communications with any member of Congress and/or their staff regarding this matter ("OIP FOIA request"). CREW further requested documents reflecting who made the decision to release this material to reporters on the evening of December 12, 2017.

15. The coversheet accompanying CREW's OIP FOIA Request indicates the request was successfully transmitted by facsimile.

16. CREW sought expedition of its OIP FOIA Request because the subject matter is of widespread and exceptional media interest and the requested information involves possible questions of the government's integrity that affect public confidence. Pursuant to DOJ regulations, CREW submitted its expedition request by facsimile on December 13, 2017, to Sarah Isgur Flores, Director of DOJ's Office of Public Affairs.

17. In its request for expedition, CREW explained that given the highly unusual, if not unprecedented, action to secretly leak the contents of documents currently under review by DOJ's inspector general, the public has a clear and pressing interest in learning whether the leak was properly authorized and the extent to which the interests of the texts' authors were appropriately considered and protected. Only through the full disclosure of the facts and circumstances surrounding this decision can the public have confidence in the actions and integrity of the Justice Department. CREW also explained that the subject matter of its request is of widespread and exceptional media interest, pointing to the extensive news coverage about the texts of the two former FBI officials. Finally, CREW explained its primary purpose is to inform the public about the activities of government officials and those who influence public officials. As DOJ regulations require, CREW certified its statements in support of its request for expedition are true and correct.

18. The coversheet accompanying CREW's request for expedition sent to DOJ's Office of Public Affairs indicates the request was successfully transmitted by facsimile.

19. In four separate emails sent on December 18, 2017, OIP acknowledged receipt of CREW's OIP FOIA Request and assigned it four separate tracking numbers. OIP's emails erroneously identified the request as having been submitted to DOJ's FOIAonline application.

20. On December 13, 2017, CREW submitted by email another FOIA request to DOJ's Office of the Inspector General ("OIG"), seeking the same documents requested in CREW's OIP FOIA Request ("OIG FOIA Request"). CREW also sought expedition using the December 13, 2017 letter to DOJ's Office of Public Affairs to justify expediting both the OIP and OIG FOIA requests.

21. By letter dated December 15, 2017, and sent by email, the OIG provided a partial response to CREW's request, consisting of a three-page letter sent that day from DOJ's Inspector General Michael E. Horowitz to House Judiciary Committee Ranking Member Jarrold Nadler, Vice Ranking Member Jamie Raskin, and Rep. Hakeem Jeffries responding to two questions. Those responses included the statement that DOJ "did not consult with the OIG in order to determine whether releasing the text messages met applicable ethical and legal standards before providing them to Congress." The inspector general also wrote that "[t]he Department did not consult with the OIG before sharing the text messages with the press."

22. The OIG also indicated to CREW it would continue to review records responsive to CREW's request and process the request as expeditiously as possible.

23. By letter dated December 22, 2017, OIP responded to CREW's OIP FOIA Request on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Public Affairs, and Legislative Affairs. OIP acknowledged receiving the request on December 13, 2017. OIP further advised CREW that it had directed CREW's request for expedition to the Director of Public Affairs, where the expedition request "is still pending."

24. On January 3, 2018, receiving no determination from DOJ's Office of Public Affairs on CREW's request for expedition, CREW filed the complaint in this action challenging DOJ's failure to make a determination on CREW's expedition request.

25. On that same date and after CREW's complaint was filed, OIP, on behalf of the Offices of the Attorney General, Deputy Attorney General, Associate Attorney General, Public Affairs, and Legislative Affairs, informed CREW its request for expedited processing had been granted.

26. Notwithstanding DOJ's claim that it is processing CREW's OIP FOIA Request on an expedited basis and the passage of 20 business days since receiving the request, to date DOJ has not made a determination on the request.

27. Notwithstanding the passage of 20 business days since receiving CREW's OIG FOIA Request, the OIG has yet to make a determination on the request with the exception of the partial response it provided CREW on December 15, 2017.

28. CREW has now exhausted all applicable administrative remedies with respect to its OIP and OIG FOIA Requests.

PLAINTIFF'S CLAIMS FOR RELIEF

CLAIM ONE (Wrongful Withholding of Non-Exempt Records)

29. Plaintiff repeats and re-alleges paragraphs 1-28.

30. Plaintiff properly asked for records within the custody and control of DOJ.

31. Defendant DOJ wrongfully withheld agency records requested by plaintiff by failing to comply with the statutory time limit for making a determination on expedited FOIA requests, and by withholding from disclosure records responsive to plaintiff's OIP and OIG FOIA Requests.

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

Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- (1) Order defendant Department of Justice to immediately and fully process plaintiff's December 13, 2017 FOIA requests to OIP and OIG and 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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Dated: January 16, 2018

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