

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

**CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON,**
1101 K Street, N.W., Suite 201
Washington, D.C. 20005

Plaintiff,

v.

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

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

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

Defendants.

Civil Action No. 19-cv-00398 (TSC)

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 Office of Legal Counsel (“OLC”), a component of defendant U.S. Department of Justice (“DOJ”) to disclose to CREW opinions OLC has written that discuss the power of the president to invoke emergency powers to declare a national emergency including, *inter alia*, the president’s power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico. CREW also challenges the

failure of the U.S. Department of Homeland Security (“DHS”) and the U.S. Department of Defense (“DoD”) to respond to CREW’s requests under the Freedom of Information Act (“FOIA”) for all opinions written or received by those agencies that discuss the power of the president to invoke emergency powers to declare a national emergency including, *inter alia*, the president’s power to invoke those powers to build a wall or other type of barrier along the U.S. border with Mexico.

2. This case seeks declaratory relief that DOJ, DHS, and DoD are in violation of the FOIA, 5 U.S.C. § 552(a)(6)(E)(i), for failing to provide CREW all responsive requested records, and injunctive relief ordering defendants DOJ, DHS, and DoD 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 701. OLC is a component within DOJ. Defendant has possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

6. Defendant DHS is an agency within the meaning of 5 U.S.C. §§ 552(f) and 701. Defendant DHS has possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

7. Defendant DoD is an agency within the meaning of 5 U.S.C. §§ 552(f) and 701. Defendant DoD has possession and control of the requested records and is responsible for fulfilling plaintiff's FOIA request.

Statutory and Regulatory Background

8. 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.

9. 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).

10. An agency's failure to make this determination within 20 days is subject to judicial review without exhausting administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

Factual Background

11. During the most recent government shutdown, President Donald Trump and his White House suggested he might invoke emergency powers and declare a national emergency to

bypass Congress' refusal to fund his wall along the Mexican border and to direct federal officials to proceed with wall construction.

12. Vice President Mike Pence stated publicly that the White House Counsel's Office was examining the president's ability to declare a national emergency to fund the border wall.

13. President Trump's threatened declaration of a national emergency for these purposes raised serious questions among the public and Congress that the president was considering actions of doubtful legality based on misstated facts and outright falsehoods to make an end-run around Congress' constitutional authority to make laws and appropriate funds.

DOJ FOIA Request

14. To shed light on the legal authority for the president's contemplated action, CREW sent a FOIA request by email to OLC on January 10, 2019. CREW requested all opinions written by OLC that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke these powers to build a wall or other type of barrier along the U.S. border with Mexico.

15. CREW also requested expedition of its request because its subject matter is of widespread and exceptional media interest and the requested information involves possible questions about the government's integrity that affect public confidence. CREW explained that the public needs to have confidence that if the president takes the extraordinary step of invoking his emergency powers he is acting in the best interests of the nation and not for political gain.

16. By letter dated February 12, 2019, OLC acknowledged receiving CREW's request on January 10, 2019. OLC also advised that based on the determination of DOJ's Office of Public Affairs ("OPA") CREW's request for expedition was denied because in OPA's judgment the regulatory criteria for expedition, set forth at 28 C.F.R. § 16.5(e)(1)(iv), were not satisfied.

17. OLC further advised that it was unable to comply with the 20-day statutory deadline for responding to CREW's request but did not provide an alternative date for response or cite "unusual circumstances" that required a 10-day time extension.

18. To date, CREW has received no other communications from OLC.

19. CREW has now exhausted all applicable administrative remedies with respect to its request of OLC.

DHS FOIA Request

20. On January 10, 2019, CREW submitted a FOIA request by email to DHS seeking all opinions written or received by DHS that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke these powers to build a wall or other type of barrier along the U.S. border with Mexico.

21. By a separate letter also dated January 10, 2019, and submitted by email to DHS's Privacy Office, CREW requested expedition of its request because its subject matter is of widespread and exceptional media interest and the requested information involves possible questions about the government's integrity that affect public confidence. CREW explained that the public needs to have confidence that if the president takes the extraordinary step of invoking his emergency powers he is acting in the best interests of the nation and not for political gain.

22. To date, CREW has received no response from DHS to its request for expedition.

23. By letter dated January 16, 2019, DHS acknowledged receipt of CREW's FOIA request and advised CREW DHS considered its request to be too broad in scope or failing to specifically identify the requested records. DHS requested that CREW resubmit its request with a

reasonable description of the records CREW seeks and advised CREW upon receiving a perfected request DHS would advise CRES of the status of that request.

24. By letter dated January 18, 2019 and submitted by email CREW responded to DHS's letter of January 16, 2019. CREW explained how DHS's determination of overbreadth or failing to specifically identify the requested records was both factually and legally flawed. By the plain language of its request CREW has requested a specific subset of records: written opinions DHS either generated or received concerning the president's power to declare a national emergency, including in the current situation pertaining to the requested wall. Further, CREW's request explains the context in which it was making the request. CREW stated that DHS's January 16, 2019 letter seems designed to postpone processing a FOIA request on a politically sensitive topic, a clear abuse of the FOIA.

25. CREW's response of January 18, 2019 offered a clarification in the interest of advancing its request. Specifically, CREW clarified that it seeks legal opinions that DHS either generated or received discussing the legality of the president declaration a national emergency.

26. To date, CREW has received no other communications from DHS.

27. CREW has now exhausted all applicable administrative remedies with respect to its request of DHS.

DoD FOIA Request

28. On January 10, 2019, CREW submitted a FOIA request by facsimile to DoD seeking all opinions written or received by DHS that discuss in any way the power of the president to invoke emergency powers to declare a national emergency including, but not limited to, the president's power to invoke these powers to build a wall or other type of barrier along the U.S. border with Mexico.

29. CREW also requested expedition of its request because its subject matter is of widespread and exceptional media interest and the requested information involves possible questions about the government's integrity that affect public confidence. CREW explained that the public needs to have confidence that if the president takes the extraordinary step of invoking his emergency powers he is acting in the best interests of the nation and not for political gain.

30. By letter dated January 16, 2019, DoD provided CREW with an interim response that advised CREW DoD already had begun processing its request, but because of unusual circumstances would not be able to respond within the FOIA's 20-day statutory time period. DoD explained that because it does not hold the records of the offices for which it handles FOIA requests and is not geographically located with those offices, it was unable to estimate either the potential volume of records or the number of consultations required to make a release determination.

31. DoD's interim response of January 16, 2019 also advised CREW its request for expedition was denied based on DoD's finding that CREW had not demonstrated clearly how the information will lose its value if not processed on an expedited basis.

32. To date, CREW has received no other communications from DoD.

33. CREW has now exhausted all applicable administrative remedies with respect to its request of DoD.

PLAINTIFF'S CLAIM FOR RELIEF

CLAIM ONE (DOJ's Wrongful Withholding of Agency Records)

34. Plaintiff repeats and re-alleges paragraphs 1-33.

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

36. Defendant DOJ 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.

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

CLAIM TWO
(DHS's Wrongful Withholding of Agency Records)

38. Plaintiff repeats and re-alleges paragraphs 1-33.

39. Plaintiff properly asked for records within the custody and control of DHS.

40. Defendant DHS 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.

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

CLAIM THREE
(DoD's Wrongful Withholding of Agency Records)

42. Plaintiff repeats and re-alleges paragraphs 1-33.

43. Plaintiff properly asked for records within the custody and control of DoD.

44. Defendant DoD 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.

45. 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 defendants Department of Justice, Department of Homeland Security, and Department of Defense to immediately and fully process plaintiff's January 10, 2019 FOIA requests 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: February 26, 2019

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