

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

CITIZENS FOR RESPONSIBILITY AND  
ETHICS IN WASHINGTON, *et al.*,

Plaintiffs,

v.

MICHAEL R. POMPEO, *et al.*,

Defendants.

Civil Action No. 19-3324 (JEB)

**FIRST AMENDED COMPLAINT**

1. This is an action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701, *et seq.*, and the Federal Records Act, 44 U.S.C. §§ 2101, *et seq.* and §§ 3301, *et seq.* (“FRA”), challenging as contrary to law the policy and practice of the U.S. Department of State (“State Department”) and Secretary of State Michael R. Pompeo of failing to document State Department policies, decisions, and essential transactions as the FRA requires. These actions include a policy and practice of avoiding the creation of records of interactions and meetings with foreign leaders, including by conducting shadow diplomacy with at least three different countries, and the widespread and knowing use of communications methods that fail to create and preserve federal records.

2. Congress enacted and amended the FRA to assure “[a]ccurate and complete documentation of the policies and transactions of the Federal Government,” and “[j]udicious preservation and disposal of records.” 44 U.S.C. § 2902(1), (5). To achieve this result, the FRA requires that “[t]he head of each Federal agency shall make and preserve records containing

adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.” 44 U.S.C. § 3101. To meet this obligation, agencies must create and maintain records that “[d]ocument the persons, places, things, or matters dealt with by the agency,” among other types of records. 36 C.F.R. § 1222.22(a).

3. The public or other interested parties may request the disclosure of agency records subject to the FRA through the Freedom of Information Act (“FOIA”). *See* 5 U.S.C. § 552(a), (f). FOIA’s purpose is completely undermined, however, when records that should be accessible through this mechanism are never created and preserved in the first place.

4. The mandates of the FRA have particular force in the complex international arena, where the need for accurate and complete records of U.S. foreign policy is paramount. State Department officials charged with carrying out our foreign policy should not be left in the dark about shadow diplomacy carried out through secret, alternative channels. Creating records of U.S. foreign policy is also essential to ensure that the critical checks and balances built into our system function as the founders intended, and that the public, private researchers, and historians have access to the full documentary history of each administration.

5. The conduct of Secretary Pompeo and the State Department, however, conflicts directly with their obligations under the FRA. For example, Secretary Pompeo and other high-level State Department officials, including former Ambassador to the European Union Gordon Sondland and former Special Envoy for Ukraine Kurt Volker, conducted foreign policy in Ukraine using a secret and irregular channel that bypassed State Department recordkeeping systems and requirements. The State Department and Secretary Pompeo have used similar, off-the-books channels to conduct diplomacy with Russia and Saudi Arabia in a manner that ensured no State Department records of these interactions were created. Further, at the direction of the

White House, Secretary Pompeo has failed to create records of telephone calls and meetings between foreign leaders and the President and other White House officials in which he participated. As a result the only records and notes of those calls are maintained on a classified system that the White House controls. High level State Department officials and others acting at their direction also use an encrypted messenger app to conduct official business without ensuring that copies of those messages are saved and preserved in a State Department recordkeeping system, as the FRA requires. Absent the requested relief, Defendants will not be held accountable for their actions and Plaintiffs and the public will be denied full access to a record of Defendants' actions.

#### **JURISDICTION AND VENUE**

6. This Court has personal and subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (action arising under the laws of the United States); 44 U.S.C. §§ 2101, *et seq.* and 3301, *et seq.*; and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act).

7. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e).

#### **PARTIES**

8. Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") is a nonprofit, non-partisan corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the right of citizens to be informed about the activities of government officials and to ensuring the integrity of government officials. To advance its mission, CREW uses a combination of research, litigation, advocacy, and public education to disseminate information to the public about public officials and their actions. CREW researches and reviews information made available to the public under the FRA and PRA, including records of former presidents, and uses FOIA to obtain information about the government that is critical

to its mission and purpose. CREW has filed hundreds of FOIA requests since the start of the Trump administration, including with the State Department.

9. CREW also has a longstanding interest in government compliance with recordkeeping laws, including the FRA and the PRA. CREW has brought numerous lawsuits to compel compliance with these laws. For example, to advance CREW's interest in the creation and preservation of agency records, CREW and the Public Employees for Environmental Responsibility brought a lawsuit challenging the failure of the Environmental Protection Agency and its then-Administrator Scott Pruitt to adequately document EPA policies, decisions, and essential transactions as the FRA requires. *CREW, et al. v. Scott Pruitt, et al.*, Civil No. 18-cv-0406 (JEB) (D.D.C.). Plaintiffs here also brought a lawsuit, *CREW, et al. v. Trump, et al.*, Civil No. 19-cv-1333 ABJ (D.D.C.), challenging the failure of the President and the Executive Office of the President to comply with the mandatory, non-discretionary duties the PRA imposes on them. This lawsuit is pending in the U.S. Court of Appeals for the D.C. Circuit, *CREW, et al. v. Trump, et al.*, No. 20-5037. CREW has FOIA requests pending with the Department of State, Department of Defense, and the Office of Management and Budget pertaining to efforts by President Trump to withhold aid from Ukraine unless and until Ukrainian President Volodymyr Zelenskyy agreed to publicly call for an investigation into Hunter Biden and his efforts on behalf of Burisma, a Ukrainian gas company, as well as President Trump's claim that Ukraine interfered in the 2016 presidential election to aid then-presidential candidate Hillary Clinton.

10. CREW will continue its practice of submitting FOIA requests for documents from executive branch agencies on matters that relate to CREW's ongoing research, litigation, advocacy, and public education efforts, including the President's ongoing actions, with the help

of government officials like Secretary Pompeo, to elevate his own personal and political interests over those of the United States.

11. Plaintiff National Security Archive (“the Archive”), founded in 1985 by journalists and scholars to check rising government secrecy, combines a unique range of functions: investigative journalism, a research institute on international affairs, and a library and archive of declassified U.S. documents that is often considered the world’s largest nongovernmental collection of such materials. The Archive is located at the George Washington University, and is one of the leading non-profit users of FOIA. In these roles, the Archive has established an extraordinary track record of highly credible, award-winning investigative journalism and scholarship, as reflected in its receipt of the George Polk Award in 2000 for “piercing self-serving veils of government secrecy, guiding journalists in search for the truth, and informing us all.” Together with its founding director Scott Armstrong, the Archive brought the series of lawsuits against the Executive Office of the President that resulted in the recognition that White House email record-keeping practices and guidelines are subject to judicial review.

12. The Archive currently has 6,458 FOIA and declassification requests pending with the State Department, most of which are for historical documents. These pending requests include a dozen filed in late 2019 for documents referenced in or related to the Whistleblower Complaint and statements to Congress by Ambassadors Volker, Sondland, William Taylor and Marie Yovanovitch concerning efforts by President Trump to withhold aid from Ukraine. Over the last 30 plus years, in which it has been filing requests, the Archive has filed more than 70,000 FOIA requests; 13,741 of these requests were submitted to the State Department. The Archive’s publications, especially the award-winning Digital National Security Archive database published

by ProQuest (an “Outstanding Academic Title 2018” according to *Choice* magazine), include tens of thousands of historically valuable State Department documents.

13. In addition, since its founding, the Archive has filed over 1,300 FOIA and declassification review requests with the Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan, George H.W. Bush, Clinton, and George W. Bush Presidential Libraries. The documents released in response to these requests have illuminated United States foreign policy and national security history since the Second World War. Among other things, the documents the Archive acquired from these presidential libraries have shed light on the Cuban Missile Crisis, the origins of the Vietnam War, President Nixon’s opening to China, communications between the Soviet Union and the United States throughout the Cold War and as the Cold War ended, and the U.S. role during the human rights atrocities in the former Yugoslavia and Rwanda. Continued access to a full historical record of each modern presidency and administration is critical to the Archive’s work. The Archive intends to file requests with the Trump Presidential Library as soon as is legally permitted, likely on a range of topics covering the Trump presidency’s foreign policy.

14. An Archive staffer, Senior Analyst William Burr, has published books and other writings drawing on declassified records of presidential meetings with foreign leaders. One book, *The Kissinger Transcripts: The Top Secret Talks with Beijing and Moscow* (New Press 1998), published for the first time the White House record of President Richard Nixon’s meeting with Mao Zedong in February 1972. Another book, *Nixon’s Nuclear Specter: The Secret Alert of 1969, Madman Diplomacy, and the Vietnam War* (University Press Kansas 2015), drew upon records kept by National Security Adviser Henry Kissinger of his meetings and telephone conversations with President Nixon. Other publications, such as edited collections of documents

posted on the Archive's website, have included declassified records prepared by State Department and White House officials of presidential meetings with foreign leaders.

15. Plaintiff Society for Historians of American Foreign Relations ("SHAFR") is a professional society dedicated to the study of U.S. foreign relations. On behalf of its nearly 1,000 members, it advances its mission "to promote the study, advancement and dissemination of knowledge about U.S. foreign policy" by awarding research grants and prizes, holding conferences, publishing an academic journal, *Diplomatic History*, and furthering archival access to government documents.

16. SHAFR's members depend on preservation of and access to records of a president and his administration in order to present a full and accurate accounting of the past in their teaching, public speaking, exhibitions, and publications. SHAFR members have disseminated research findings to the public on the basis of archival research conducted in every presidential library. SHAFR members have filed many thousands of FOIA and mandatory declassification review requests and have long advocated for the preservation, declassification, and public availability of government records, notably including presidential records, because of the fundamental importance of these records for their investigation of the country's past. Without the proper creation and preservation of government records, SHAFR members will not be able to fulfill their professional responsibility to provide evidence-based assessments of the conduct of U.S. foreign policy during the Trump administration.

17. SHAFR's journal *Diplomatic History* routinely publishes articles based on new research in presidential libraries, such as a 2017 article by Frédéric Bozo based on FOIA requests relating to Iraq from the Clinton Presidential Library. Recent books published by SHAFR members that are based on records in presidential libraries include Kelly J. Shannon's *U.S.*

*Foreign Policy and Muslim Women's Human Rights*, which used Clinton Library records to trace that administration's global women's rights policies. Books by SHAFR members that rely heavily on accounts of conversations and meetings between U.S. presidents and foreign leaders include Jeffrey Engel's *When the World Seemed New: George H.W. Bush and the End of the Cold War*.

18. For all Plaintiffs, access to State Department records of diplomatic efforts is essential to fulfill their core missions. The failure of Secretary Pompeo and State Department officials to create and preserve records of their conversations and meetings with certain foreign leaders and of their diplomatic efforts conducted through a secret, irregular channel outside of the agency's recordkeeping system has deprived and will continue to deprive Plaintiffs of access to the documentary history of this administration. In the process, Plaintiffs and other members of the American public will lose vital information and insight into State Department policies and decision-making, which are critical to interpret and prevent illegal or unwise government action.

19. Defendant Michael R. Pompeo is the Secretary of State and is being sued only in his official capacity. As Secretary of State, he has an obligation under the FRA to adequately document agency decisions and commitments reached orally and all necessary agency actions the State Department takes. As Secretary of State, Mr. Pompeo also has an obligation under the FRA to maintain a program that adequately documents agency decisions and activities.

20. Defendant State Department is an agency within the meaning of 5 U.S.C. § 701. The State Department is responsible for implementing Secretary Pompeo's directives and policies, including those drafted pursuant to the obligations the FRA imposes on Secretary Pompeo and the State Department.

## STATUTORY AND REGULATORY FRAMEWORK

### *The FRA and Implementing Regulations*

21. Agency records are subject to records creation, maintenance, and destruction rules codified in the FRA, 44 U.S.C. §§ 3101, *et seq.* For the purposes of the FRA, the term records

includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

44 U.S.C. § 3301 (cross-referenced in and applied to chapter 31 of title 44 by 44 U.S.C.

§ 2901(1)).

22. The FRA requires that the “head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency’s activities.” 44 U.S.C. § 3101.

23. Under the FRA, the head of each agency also must “establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.” 44 U.S.C. § 3102.

24. Both the Archivist of the United States and the heads of the various executive departments and agencies share responsibility to ensure that an accurate and complete record of each agency’s policies and transactions are compiled. *See* 44 U.S.C. §§ 2901, *et seq.*, §§ 3101, *et seq.*

25. Regulations promulgated by the Archivist describe in greater detail each of the FRA's demands:

To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records that:

- (a) Document the persons, places, things, or matters dealt with by the agency.
- (b) Facilitate action by agency officials and their successors in office.
- (c) Make possible a proper scrutiny by the Congress or other duly authorized agencies of the Government.
- (d) Protect the financial, legal, and other rights of the Government and of persons directly affected by the Government's actions.
- (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.
- (f) Document important board, committee, or staff meetings.

36 C.F.R. § 1222.22. In addition, regulations require that agency recordkeeping requirements “identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel in the course of their official duties.” 36 C.F.R. § 1222.24(a).

26. The State Department's implementing guidance, 5 FAM [Foreign Affairs Manual] 422, echoes these requirements and charges “the Department's Records Officer, representing the head of the agency” with ensuring that “[e]ffective controls over the creation and over the maintenance and use of records in the conduct of current business’ are provided.” 5 FAM 422(2). Under the agency's regulations, those controls must ensure, *inter alia*, that “[i]mportant policies, decisions, and operations are adequately recorded.” 5 FAM 422.1(a)(1). Further, the regulations define adequate documentation as including those that are “complete to the extent necessary to . . . [f]acilitate the making of decisions and policies and the taking of action by the incumbents

and their successors in office” and “[p]rovide appropriate documentary materials for research and other historical purposes.” 5 FAM 422.2(1).

27. Although State Department regulations require that each Department bureau appoint a “bureau records coordinator to be responsible for coordinating a bureau’s records activities with the Office of Information Programs and Services,” 5 FAM 414.4(b), and that each post designate a “post records coordinator” to, among other things, “review[] the post’s record systems and record management practices,” each individual State Department employee is ultimately responsible for his or her compliance with the FRA vis-à-vis their own records. For example, State Department regulations provide that each individual employee has the duty “[w]ithin his or her area of responsibility” to “create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department,” 5 FAM 422.3, and to “preserve documentary materials meeting the definition of a record under the [FRA],” 5 FAM 414.8(1).

28. With respect to electronic records, State Department regulations impose on all agency personnel the “legal responsibility and a business obligation to ensure documentation of official duties is captured, preserved, managed, and protected in official government systems.” 5 FAM 443.2(a). Agency employees are “discouraged from using a personal email account . . . to conduct official business,” 5 FAM 443.4(a), but if they do they must copy their “official Government email account . . . during the original creation or transmission.” *Id.* at 443.4(d)(2). Any employee who fails to do so at the time of the message’s original creation or transmission must

forward a complete copy of work-related email (including any attachments) to his or her official Government email account no later than 20 days after the original creation or transmission.

*Id.* at 443.4(d)(3).

29. Congress views the preservation and maintenance of documents to be of such importance that anyone found guilty of “willfully and unlawfully” concealing, removing, mutilating, obliterating, destroying, or attempting to do any such action against a federal record, can be fined and imprisoned for up to three years. 18 U.S.C. § 2071.

*The Freedom of Information Act*

30. FOIA, enacted in 1966, established a statutory right of public access upon request to information held by Executive Branch agencies. Congress enacted FOIA to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). FOIA carries a “strong presumption in favor of disclosure,” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991), and its “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976).

31. Under FOIA, records of a federal agency must be made publicly available, unless they are specifically exempted pursuant to one or more of the FOIA’s nine exemptions. 5 U.S.C. § 552(b). Those government entities that fall outside the Administrative Procedure Act’s definition of “agency,” including the Office of the President, are not subject to FOIA initially. *See, e.g., Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980).

*The Administrative Procedure Act*

32. The APA provides that a “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Such relief is available unless other “statutes

preclude judicial review” or the action challenged is “committed to agency discretion by law.” 5 U.S.C. § 701.

33. The term “agency action” under the APA “includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*.” 5 U.S.C. § 551 (emphasis added). *See also* 5 U.S.C. § 701 (cross-referencing the definitions at § 551).

34. A court reviewing a claim brought under 5 U.S.C. § 702 “shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706. The reviewing court shall “compel agency action unlawfully withheld or unreasonably delayed” and “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.*

35. The APA authorizes judicial review of properly pleaded claims that an agency has violated its non-discretionary obligations under the FRA, including the failure to “make . . . records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency.” *Armstrong v. Bush*, 924 F.2d 282, 285 (D.C. Cir. (1991)) (“*Armstrong I*”).

### **FACTUAL BACKGROUND**

36. On August 12, 2019, a whistleblower who works within the intelligence community filed a complaint with the Office of the Inspector General of the Intelligence Community (“ICIG”) reporting an “urgent concern” that “the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election.” The Whistleblower Complaint triggered a congressional investigation that culminated

in impeachment proceedings against President Donald Trump. Whistleblower Complaint, <https://bit.ly/2XI2F70>. *See also* Press Release, House Intelligence Committee Releases Whistleblower Complaint, House Permanent Select Committee on Intelligence (Sept. 26, 2019), <https://bit.ly/2WAcj8Z>.

37. In the complaint, the whistleblower asserted that he or she had “received information from multiple U.S. Government officials that the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election. This interference includes, among other things, pressuring a foreign country to investigate one of the President’s main domestic political rivals.” Whistleblower Complaint at 1.

38. The whistleblower described a telephone call between President Trump and President Zelenskyy on July 25, 2019, in which “after an initial exchange of pleasantries, the President used the remainder of the call to advance his personal interests. Namely, he sought to pressure the Ukrainian leader to take actions to help the President’s 2020 reelection bid.” Those actions included pressuring the Ukrainian president: (1) to “initiate or continue an investigation into the activities of former Vice President Joseph Biden and his son, Hunter Biden”; (2) to “assist in purportedly uncovering that allegations of Russian interference in the 2016 U.S. presidential election originated in Ukraine”; and (3) to “meet or speak with two people the President named explicitly as his personal envoys on these matters, Mr. Giuliani and Attorney General Barr.” Whistleblower Complaint at 2.

39. The Whistleblower Complaint further alleged that White House officials may have abused recordkeeping systems to conceal the President’s actions. Officials were reportedly “deeply disturbed by what had transpired” on the July 25 phone call and there was “a ‘discussion ongoing’ with White House lawyers about how to treat the call because of the likelihood . . . that

they had witnessed the President abuse his office for personal gain.” Whistleblower Complaint at

3. According to the complaint, although numerous White House officials and at least one senior State Department official listened in on the call and multiple State Department and Intelligence Community officials were “briefed on the contents of the call,” *id.* at 3, “senior White House officials . . . intervened to ‘lock down’ all records of the phone call,” including State Department records required to be created under the FRA, “especially the official word-for-word transcript of the call that was produced—as is customary—by the White House Situation Room.” *Id.*

40. The classified appendix to the Whistleblower Complaint provides further detail about these recordkeeping practices:

According to multiple White House officials I spoke with, the transcript of the President’s call with President Zelenskyy was placed into a computer system managed directly by the National Security Council (NSC) Directorate for Intelligence Programs. This is a standalone computer system reserved for codeword-level intelligence information, such as covert action. According to information I received from White House officials, some officials voiced concerns internally that this would be an abuse of the system and was not consistent with the responsibilities of the Directorate for Intelligence Programs. *According to White House officials I spoke with, this was “not the first time” under this Administration that a Presidential transcript was placed into this codeword-level system solely for the purpose of protecting politically sensitive—rather than national security sensitive—information.*

*Id.*, Classified Appendix at 1 (emphasis added).

41. On September 24, 2019, House Speaker Nancy Pelosi announced that the House was initiating a formal impeachment inquiry against President Trump based on his efforts to enlist the Ukrainian government to tarnish his political rival Joe Biden.

42. As part of the impeachment inquiry, the House Permanent Select Committee on Intelligence (the “Committee”) conducted interviews with a number of people with knowledge of the events the Whistleblower Complaint describes, including current and former State Department officials. Among those initially interviewed by the Committee were then-

Ambassador Gordon Sondland, former Ambassador to Ukraine Marie Yovanovitch, and former Ambassador William Taylor, the U.S. top envoy to Ukraine. During the impeachment hearings these individuals and a number of other current and former State Department officials testified, including Deputy Assistant Secretary of State George Kent; former U.S. special envoy to Ukraine Ambassador Kurt Volker; David Holmes, a political counselor at the U.S. Embassy in Ukraine; Ambassador P. Michael McKinley, who served as a senior advisor to Secretary Pompeo; Acting Assistant Secretary of State Philip Reeker; Catherine M. Croft, a special State Department advisory for Ukraine; former State Department Special Advisor for Ukraine Christopher Anderson; Deputy Secretary of State John Sullivan; and David Hale, Under Secretary of State for Political Affairs.

43. The testimony from these individuals provided startling details that corroborate and expand on the actions of the President and others acting at his direction that the Whistleblower Complaint outlines and the role of the State Department in the President's scheme. Broadly speaking, they described efforts by President Trump and top administration officials to pressure foreign leaders to act in a way that advances the President's personal interests to the detriment of the interest and security of the United States.

44. Beyond corroborating and expanding on the events described in the Whistleblower Complaint, Ambassador Taylor described diplomatic efforts in Ukraine that involved an "irregular" or shadow diplomatic channel that was pursuing in secret a different goal than the "regular" diplomatic channel Ambassador Taylor and other State Department officials were using. As an example, in his congressional testimony Ambassador Taylor described a telephone call with President Zelenskyy on June 28 that included, in addition to Ambassador Taylor, Ambassadors Sondland and Volker and Energy Secretary Rick Perry. He noted how odd

it was that Ambassador Sondland was not including “most of the regular interagency participants” in the call and further that “Ambassador Sondland said that he wanted to make sure no one was transcribing or monitoring as they added President Zelenskyy to the call.” Taylor Opening Statement at 5.

45. Ambassador Taylor described a process in which Ambassador Sondland engaged President Zelenskyy as part of an “irregular, informal channel of U.S. policy-making” that also included then-Special Envoy Volker, Secretary of Energy Perry, and President Trump’s personal lawyer, Mr. Giuliani. *Id.* at 4. Ambassador Taylor described the existence of this irregular diplomatic channel as “confusing and ultimately alarming.” *Id.* at 3. Although “well-connected in Washington,” the irregular channel “operated mostly outside of official State Department channels,” and “began when Ambassador Volker, Ambassador Sondland, Secretary Perry, and Senator Ron Johnson briefed President Trump on May 23 upon their return from President Zelenskyy’s inauguration.” *Id.* at 4.

46. According to Ambassador Taylor, by August 2019, the regular and the irregular channels “had diverged in their objectives,” causing him to become “increasingly concerned.” *Id.* at 4-5. While the two channels started off sharing the goal of a meeting between Presidents Trump and Zelenskyy, Ambassador Taylor soon learned that President Trump would not agree to such a meeting until President Zelenskyy agreed to “cooperation on investigations to ‘get to the bottom of things.’” *Id.* at 5. By mid-July Ambassador Taylor finally learned precisely what this meant, specifically “that the meeting President Zelenskyy wanted [with the White House] was conditioned on the investigations of Burisma and alleged Ukrainian interference in the 2016 U.S. elections.” *Id.* at 6. It also was clear to him by that time “that this condition was driven by the irregular policy channel I had come to understand was guided by Mr. Giuliani.” *Id.*

47. As part of this separate or shadow diplomacy, State Department officials like Ambassador Volker met separately with Mr. Giuliani to discuss Ukraine. When Ambassador Taylor followed up with Ambassador Volker about that meeting and when he received no response he realized “that the two decision making channels—the regular and irregular—were separate and at odds.” *Id.* at 7. Moreover, participants in the regular diplomatic channel were kept in the dark about the President’s objectives in Ukraine.

48. Secretary Pompeo played an active and knowing role in this shadow diplomacy. He at first denied any familiarity with the details of the Whistleblower Complaint, but finally admitted he was among the officials who listened in on the July 25 phone call. Deirdre Shesgreen, [‘I was on the phone call’: Pompeo acknowledges he was listening to Trump’s phone call with Ukraine president](#), *USA Today* (Oct. 2, 2019), <https://bit.ly/2Vf5HOg>.

49. Secretary Pompeo also was “in the loop” on the efforts of Mr. Giuliani and others to use the shadow diplomatic channel to advance the President’s “scheme regarding Ukraine.” U.S. House of Representatives, *The Trump-Ukraine Impeachment Inquiry Report*, Dec. 2019 (“House Impeachment Report”), 64, 119, 120, <https://bit.ly/2z9na2p>. For his part, Mr. Giuliani has claimed that he did not talk to a Ukrainian official “until the State Department called me and asked me to do it,” after which he “reported every conversation back to them.” Justin Garagona, [Rudy Giuliani: State Department ‘Asked Me’ to Look Into Ukraine](#), *Daily Beast* (Sept. 25, 2019), <https://bit.ly/36xHE0Q>.

50. Ambassador Sondland’s congressional testimony also described Secretary Pompeo’s role in and knowledge of the shadow diplomacy with Ukraine. For example, following a phone conversation Ambassador Sondland had with President Zelenskyy, during which he stressed the need for the Ukrainian president to make a public statement about corruption before

a planned call with President Trump could move forward, Ambassador Sondland wrote to Secretary Pompeo and others about the call. House Impeachment Report at 91. Ambassador Sondland pointed to this email as evidence that “[e]veryone was in the loop.” *Id.* (quoting Ambassador Sondland).

51. Ambassador Sondland’s testimony placed Secretary Pompeo squarely in the middle of the shadow diplomacy being conducted with Ukraine. He enlisted Secretary Pompeo’s help to “‘break the logjam’ on the security assistance and the White House meeting by coordinating a meeting between the two presidents [Trump and Zelenskyy].” House Impeachment Report at 127.

52. Similarly, Ambassador Taylor testified that, at the advice of then-National Security Adviser John Bolton, he sent a first-person cable to Secretary Pompeo conveying his “serious concern about the withholding of military assistance to Ukraine while the Ukrainians were defending their country from Russian aggression.” *Id.* at 128.

53. The participants in this shadow diplomacy with Ukraine understood their communications were to be off-the-record. For example, after Ambassador Taylor asked Ambassador Sondland in a WhatsApp message whether a visit by the Ukrainian president to the White House and military assistance were conditioned on the Ukrainians opening investigations, Ambassador Sondland responded, “Call me,” indicating a desire to keep those details from being memorialized in any written record. Letter to Members of the Intelligence, Oversight and Reform, and Foreign Affairs Committees (“Oct. 3 House Letter”), <https://bit.ly/2r2d2E1>.

54. Similarly, after Ambassador Taylor expressed his concerns to Ambassador Sondland about tying security assistance to Ukraine with Ukraine’s willingness to announce it was opening an investigation into the Bidens, Ambassador Sondland suggested that the two “stop

the back and forth by text[.] If you still have concerns I recommend you give [Pompeo] a call to discuss them directly.” *Id.* at 9.

55. Secretary Pompeo has also engaged in shadow, off-the-books, diplomacy with other countries. For example, on February 14, 2020, Secretary Pompeo met with Russian Foreign Minister Sergey Lavrov during the Munich Security Conference. David M. Herszenhorn, State Department keeps quiet as Pompeo meets Lavrov in Munich, *Politico* (Feb. 15, 2020), <https://politi.co/2VAu2xb>. The State Department made no announcement of the meeting, did not list the meeting in its official schedule of the Secretary’s travel, and no mention of it was included in a brief by a senior administration official discussing U.S. efforts at the security conference. *Id.*, Christina Cabrera, Pompeo Had Undisclosed Meeting With Russian Diplomat At Munich Conference, *TPM* (Feb. 15, 2020), <https://bit.ly/2VGzJcO>. But while U.S. journalists were not briefed on the meeting, Russian journalists were informed, attended, and were permitted to write about it afterward. Herszenhorn, *Politico* (Feb. 15, 2020). According to the Russian News agency *Tass*, the range of topics the two discussed were “related to strategic dialogue and arms control.” Vitaly Belousov, Lavrov says he discussed arms control issues with Pompeo in Munich, *Tass*, Feb. 17, 2020, <https://bit.ly/2zaac4l>. One “journalist traveling with Lavrov said the U.S. side had requested that there be no press conference or joint statements.” Herszenhorn, *Politico*, Feb. 15, 2020. Without the reporting by Russian journalists, the public would not have known the meeting had even taken place, and Secretary Pompeo’s exclusion of American journalists ensured no records accessible by the American public would be created.

56. Secretary Pompeo has also participated in off-the-books calls President Trump had with both Russian President Vladimir Putin and members of the Saudi Royal Family. For example, following the murder of *Washington Post* journalist Jamal Khashoggi, President Trump

spoke by phone to both Saudi King Salman bin Abdulaziz Al-Saud and Crown Prince Mohammed bin Salman. Secretary Pompeo was reportedly present for these calls. No transcripts of these conversations were made. Pamela Brown, Jim Sciutto, & Kevin Liptak, White House restricted access to Trump's calls with Putin and Saudi crown prince, *CNN* (Sept. 28, 2019), <https://cnn.it/2RKCitq>.

57. Regardless of the actions of the White House—including its desire to lock-down records—Secretary Pompeo has an independent duty under the FRA to create records of essential transactions including conversations with foreign leaders. On information and belief, Secretary Pompeo failed to act on that duty on multiple occasions. Secretary Pompeo also has an independent duty under the FRA to ensure that other senior State Department officials create records of essential transactions, and on information and belief, Secretary Pompeo failed to act on this duty on multiple occasions.

58. Secretary Pompeo's participation in shadow diplomacy with Saudi Arabia echoes that practiced by Senior White House Advisor Jared Kushner, who earlier last year met in Saudi Arabia with Saudi Crown Prince Mohammed bin Salman and King Salman. According to a White House statement, the three discussed “the peace efforts, as well as American-Saudi cooperation and plans to improve conditions in the region through investment.” Ben Hubbard, Kushner Met With Saudi Crown Prince to Push Mideast Peace Plan, *New York Times* (Feb. 27, 2019), <https://nyti.ms/2N8dgT2>. Reportedly, U.S. embassy staff in Riyadh “were not read in on the details of Jared Kushner's trip . . . or the meetings he held with members of the country's Royal Court.” Erin Banco, Embassy Staffers Say Jared Kushner Shut Them Out of Saudi Meetings, *Daily Beast* (Mar. 7, 2019), <https://bit.ly/2NuPzmZ>. The only State Department official who was allowed to attend the meeting is someone who focuses on Iran. *Id.* As a result,

the U.S. embassy “was largely left in the dark on the details of Kushner’s schedule and his conversations with Saudi officials.” *Id.*

59. On information and belief, Secretary Pompeo and State Department officials at his direction have engaged in shadow, off-the-books diplomacy, thereby ensuring that no records of these diplomatic efforts exist. Because this is information exclusively in the hands of Defendants, Plaintiffs must rely exclusively on public reporting, which is also hampered when journalists are denied access to information about these shadow diplomacy efforts.

60. State Department officials, like much of the international diplomatic corps, extensively use WhatsApp, a messenger app that has end-to-end encryption. *See, e.g.*, Julian Borger, Jennifer Ranking & Kate Lyons, The rise and rise of international diplomacy by WhatsApp, *The Guardian* (Nov. 4, 2016), <https://bit.ly/3adLGvR>. For example, Ambassadors Volker and Sondland communicated using the encrypted messenger app. On October 3, 2019, the Chairs of the House Committee on Foreign Affairs, the House Permanent Select Committee on Intelligence, and the House Committee on Oversight and Reform sent a letter to the members of the three Committees that included as an attachment text messages from Ambassador Volker to Ambassadors Taylor and Sondland, Andrey Yermak (an aide to President Zelenskyy), and Mr. Giuliani. Oct. 3 House Letter. While Ambassador Volker’s exchanges with Mr. Giuliani appear to have been done using iMessage (an electronic messaging application developed by Apple Inc.), the exchanges between the Ambassadors and Mr. Yermak were done using WhatsApp. Those text messages further evidence the irregular or shadow diplomacy channel that was used to, among other things, place pressure on Ukraine “to deliver on the President’s demand for Ukraine to launch politically motivated investigations.” *Id.* at 2.

61. The circumstances under which the State Department eventually acquired copies of these messages make clear they were not placed into a State Department recordkeeping system upon or even shortly after their creation. It was only after Ambassadors Volker, Sondland, and others received congressional subpoenas to produce the records as part of the House impeachment inquiry that they provided at least some officials at the State Department with copies of records taken directly from their personal phones. If the only way the State Department achieves compliance with the FRA when it comes to the use of personal phones and electronic messaging applications is through congressional subpoenas, the system in place is clearly deficient and requires judicial intervention.

62. Reportedly, the use of personal phones and electronic messaging applications is widespread at the State Department both during the conduct of U.S. policy on Ukraine and for the conduct of other State Department business. *See* John Hudson and Karoun Demirjian, Clinton-email critics pull a role reversal as Trump administration draws fire for private phone use, *Washington Post* (Oct. 9, 2019), <https://wapo.st/2Wyp3Nz>. For example, in a letter to the Assistant Secretary of the Bureau of Diplomatic Security at the State Department, Sen. Robert Menendez, ranking member on the Senate Foreign Relations Committee, expressed “grave concerns about the use of unsecure personal telecommunications devices by senior officials of the Department to conduct sensitive national security business” including numerous reports of “widespread use of personal cell phones as a regular means to communicate on highly sensitive matters among and between numerous senior State Department political appointees of the current administration, as well as between those officials and other officials elsewhere in the U.S. government, including President Trump himself.” Letter from Sen. Robert Menendez, ranking member, Sen. Foreign Rel. Comm., to Michael T. Evanoff, Assistant Secretary, Bureau of

Diplomatic Security, U.S. Department of State (Nov. 19, 2019), *available at* <https://bit.ly/2V8D8SG>.

63. While State Department recordkeeping guidance requires employees who send work-related emails or other electronic communications on a private platform to copy and archive the messages within 20 days of their creation or transmission, “[f]ew, few people do that.” John Hudson and Karoun Demirjian, Clinton-email critics pull a role reversal as Trump administration draws fire for private phone use, *Washington Post* (Oct. 9, 2019), <https://wapo.st/3acWVoo>. On information and belief, the widespread use of personal phones and non-governmental electronic messaging applications, and the failure to archive records, is well known, yet the State Department has not taken adequate steps to ensure that messages sent or received on WhatsApp and similar electronic platforms are preserved. In failing to do so, the State Department has effectively endorsed the practice of using personal cell phones and the routine use of non-government applications and platforms to create federal records without adequately preserving those records in compliance with the FRA.

64. In addition, State Department recordkeeping guidelines provide inadequate and ambiguous guidance to employees regarding their use of non-governmental electronic messaging applications, as evidenced by the widespread and routine use of such applications by State Department employees. For example, State Department guidelines provide that individual employees may choose to use non-governmental electronic messaging applications if “[e]ngagement is greatly enhanced by using such means of communication.” A Message from the Under Secretary of Management on Electronic Messaging Applications and other Records Management Responsibilities, All Diplomatic and Consular Posts Collective (July 9, 2019), 19 STATE 72880, 72880(5)(b).

65. This conduct appears to mirror that of other government officials who used encrypted communications in a way that stymied the investigation of Special Counsel Robert Mueller. In his *Report on the Investigation Into Russian Interference In the 2016 Presidential Election*, Mr. Mueller noted in his executive summary, “the Office learned that some of the individuals we interviewed or whose conduct we investigated—including some associated with the Trump Campaign—deleted relevant communications or communicated during the relevant period using applications that feature encryption or that do not provide for long-term retention of data or communications records.” *Id.*, Executive Summary to Volume I at 10.

66. State Department policies also fail to adequately address the use of personal cell phones and the creation of records documenting “the formulation and execution of basic policies and decisions and the taking of necessary actions, including *all substantive decisions and commitments reached orally.*” 36 C.F.R. § 1222.22(e) (emphasis added).

67. Accurate records of the United States’ interactions with foreign leaders and their representatives are a matter of extreme importance for the nation’s foreign policy and for the historical record. As Ambassador Taylor demonstrated in his congressional testimony, timely access to information about ongoing diplomatic efforts is critical in advancing and protecting the interests of the United States, including its national security interests. Ambassador Taylor described the “strategic importance of Ukraine in our effort to create a whole, free Europe,” which in the past the United States has advanced “with assistance funding, both civilian and military, and political support.” Taylor Opening Statement at 15. The “side channels” along with “quid pro quos, corruption, and interference in elections,” *id.* at 14, hinder those efforts.

68. Those interests are heightened in an administration that has been marked by departures from the normal procedures of international diplomacy, including the use of a

shadow, irregular, and “off-the-books” channel to conduct foreign diplomacy in an effort to conceal the efforts by the President and other top aids to enlist the aid of foreign leaders to advance the President’s personal and political interests.

## PLAINTIFFS’ CLAIMS FOR RELIEF

### CLAIM ONE

**(For a Declaratory Judgment that the Policy and Practice of Defendants Pompeo and the State Department of Affirmatively Electing Not to Create and Preserve Records Adequately Documenting the Organization, Functions, Policies, Decisions, Procedures, and Essential Transactions of the State Department Are Arbitrary, Capricious and Contrary to the FRA and for an Order Compelling Defendants Pompeo and the State Department to Create and Preserve Records Adequately Documenting the Organization, Functions, Policies, Decisions, Procedures, and Essential Transactions of the State Department)**

69. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

70. The FRA requires the head of each federal agency to both make and preserve as federal records all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency. 36 C.F.R. § 1222.22. They also must document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitment reached orally (person-to-person, by telecommunications, or in conference) or electronically. *Id.* They must also identify and prescribe specific categories of records that must be systematically created or received and maintained by agency personnel. 36 C.F.R. § 1222.24(a).

71. Despite these unambiguous requirements, Secretary Pompeo and other State Department officials established and enforce a policy and practice of affirmatively electing not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures, and essential transactions of the State Department. In certain instances this is being done to keep the shadow diplomacy being conducted in furtherance of the President’s personal and political interests a secret, rather than for any legitimate foreign policy goal.

72. Secretary Pompeo and other top State Department officials also have directed other State Department employees not to create and preserve records adequately documenting the organization, functions, policies, decisions, procedures, and essential transactions of the State Department, including to keep hidden the shadow diplomacy being conducted in furtherance of the President's personal and political interests.

73. Further, Secretary Pompeo and other top State Department officials have failed to identify and prescribe specific categories of records to be systematically created or received and maintained by agency personnel, creating circumstances in which State Department employees have participated in a shadow, off-the-books diplomacy.

74. As a result, Plaintiffs have been denied present and future access to important agency documents that would shed light on the conduct of State Department officials and the reasons for their actions and decisions.

75. Plaintiffs therefore are entitled to a declaration that Defendants are in violation of their statutory duties under 44 U.S.C. §§ 3101, 3301 and implementing NARA regulations, 36 C.F.R. § 1222.22, and an order compelling them to make and preserve as federal records all records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the State Department.

## **CLAIM TWO**

**(For a Declaratory Judgment that Defendants Pompeo and the State Department Have Failed to Establish and Maintain an Adequate Program to Preserve Federal Records in Compliance with the FRA and for an Order Compelling Defendants Pompeo and the State Department to Establish and Maintain an FRA-Compliant Program)**

76. Plaintiffs re-allege and incorporate by reference all preceding paragraphs.

77. The FRA requires the head of each federal agency to establish and maintain a records management program that provides for effective controls over the agency's records and

to cooperate with the Archivist in applying standards and procedures for the maintenance and security of the records deemed appropriate for preservation. 44 U.S.C. § 3102. The head of each federal agency also must establish safeguards against the removal or loss of records the agency head determines to be necessary and required by regulations the Archivist promulgates. 44 U.S.C. § 3105.

78. Notwithstanding the evidence of widespread non-compliance at the State Department with recordkeeping requirements, the State Department has failed to enact adequate guidelines concerning the use of private phones and email accounts and non-governmental electronic messaging applications. In doing so, the State Department has effectively delegated to each agency employee the apparently unchecked discretion to “create and preserve records that properly and adequately document the organization, functions, policies, decisions, procedures, and essential transactions of the Department.” 5 FAM 422.3.

79. The lack of effective controls over the State Department’s records program has resulted in the absence of records explaining or documenting key functions, policies, decisions, procedures, and essential transactions of the State Department, thereby depriving Plaintiffs of present and future access to important agency documents that would shed light on the conduct of State Department officials and the bases for their actions and decisions.

80. The absence of guidance and the ambiguity in the State Department’s rules and policies on the use of personal devices, non-governmental electronic messaging applications, and the retention of federal records created using such applications contributes to the widespread noncompliance by State Department employees with the FRA.

81. Plaintiffs therefore are entitled to a declaratory order that the failure of Secretary Pompeo and the State Department to maintain a program to adequately document agency

decisions and activities is in violation of 5 U.S.C. §§ 702, 706, and an injunction compelling Secretary Pompeo and the State Department to maintain a records management program to adequately document agency decisions and activities.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that Defendants' policy and practice of failing to create and preserve records adequately and properly documenting the organization, functions, policies, decisions, procedures, and essential transactions of the State Department violates the FRA.

2. Issue injunctive relief compelling Secretary Pompeo and the State Department to maintain an adequate and proper record of the State Department's organization, functions, policies, decisions, procedures, and essential transactions.

3. Declare that Defendants have failed to maintain a program to adequately document the State Department's organization, functions, policies, decisions, procedures, and essential transactions.

4. Issue injunctive relief compelling Secretary Pompeo and the State Department to maintain a program to adequately document the State Department's organization, functions, policies, decisions, procedures, and essential transactions.

5. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

*/s/ Anne L. Weismann*

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