

November 22, 2019

**BY EMAIL:** [usoge@oge.gov](mailto:usoge@oge.gov)

Ms. Shelley K. Finlayson  
Program Counsel  
U.S. Office of Government Ethics  
1201 New York Avenue, NW, Suite 500  
Washington, DC 20005-3917

Re: **FOIA Appeal** (OGE FOIA FY 19/065)

Dear Ms. Finlayson:

Pursuant to 5 U.S.C. § 552 and 5 C.F.R. part 2604, Citizens for Responsibility and Ethics in Washington (“CREW”) files this appeal to challenge the October 24, 2019, adverse determination of the Office of Government Ethics (“OGE”) regarding the above-referenced Freedom of Information Act (“FOIA”) request (OGE FOIA 19/065). CREW files this appeal to challenge OGE’s withholding of information establishing that it was “reasonably necessary” for Mr. Herndon to divest his CSRA, Inc., stock.

On May 16, 2019, CREW filed a FOIA request seeking: “Copies of all records related to the issuance of a Certificate of Divestiture (“CD”) to Deputy Assistant to the President and Director of White House Information Technology Charles Herndon for CSRA stock, including the request package submitted by the White House to OGE, related communications, and other records.”<sup>1</sup> OGE responded on October 24, 2019, by issuing an adverse determination letter explaining that it was releasing five pages of records with redactions and withholding five pages of responsive records.<sup>2</sup> In connection with both its redactions and the pages it withheld, OGE cited FOIA Exemptions 3, 4, 5 and 6. Given the nature of the documents CREW requested it is likely that both the redacted and withheld pages contain information regarding the view that divestiture was “reasonably necessary.”

CREW appeals the redaction and withholding of information regarding the view that divestiture was “reasonably necessary.” CREW also challenges the adequacy of the search OGE conducted.

## **I. Inadequate Search**

OGE was required to perform an adequate search reasonably calculated to uncover all relevant documents.<sup>3</sup> But, according to OGE’s adverse determination letter, its search returned only the five pages of redacted records and five additional pages that OGE characterized as

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<sup>1</sup> Enclosure 1.

<sup>2</sup> Enclosure 2.

<sup>3</sup> *Valencia-Lucena v. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999).

“reviewer notes.” OGE has insisted that these “reviewer notes” are not “an expression of the agency’s official position,” which means they are not the official file notes recording the basis for OGE’s decision to issue Mr. Herndon a CD. The Federal Records Act required OGE to “make and preserve” an adequate record of its decision to award the CD, and the retention schedule for general ethics records required OGE to retain that record for six years.<sup>4</sup> Therefore, unless OGE failed to comply with either the Federal Records Act or the retention schedule, it seems likely that OGE has a set of official file notes in its possession for which it has failed to account in responding to CREW’s FOIA request.<sup>5</sup>

Also absent from the materials OGE released, is the White House’s request for a CD. We note that OGE previously released a CD request that the White House submitted for another employee.<sup>6</sup> In the case of the CD for Mr. Herndon, OGE’s regulations required the White House to initiate the process by submitting a request for a CD.<sup>7</sup> But OGE’s adverse determination letter fails entirely to address this record, which is also subject to the six-year retention schedule.<sup>8</sup>

Based on these facts OGE clearly did not conduct an adequate search. Therefore, we request that OGE conduct a further search that is reasonably calculated to uncover all responsive documents. If the official file for Mr. Herndon’s CD does not contain the CD request and a set of file notes, OGE should conduct a more comprehensive search to locate these records elsewhere.

## **II. Improper Redaction and Withholding of Information**

OGE should not have redacted or withheld information regarding the view that it was “reasonably necessary” for Mr. Herndon to divest his financial interests in CSRA, Inc. For the reasons discussed below, OGE should release any documents containing this information that it withheld. OGE has not identified the FOIA exemption or exemptions on which it relied for the decision to withhold information about the necessity of divestiture. Therefore, we address each exemption cited in OGE’s adverse determination letter.

### *A. Exemption 3*

It is unclear why OGE cited Exemption 3 in its adverse determination letter. OGE claims that it withheld pages that constitute “material specifically exempted from disclosure by another statute,” but OGE failed to cite any statute that exempts the requested material from release. CREW is seeking information regarding the view that divestiture was reasonably necessary,

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<sup>4</sup> 44 U.S.C. § 3101; Nat’l Archives and Records Admin., *General Records Schedule 2.8: Employee Ethics Records*, Sept. 2016, <https://bit.ly/2pkTzyf> (“GRS 2.8”).

<sup>5</sup> It is also possible—perhaps even likely—that what OGE has characterized in its adverse determination letter as “reviewer notes” are actually the official file notes that the Federal Records Act required OGE to “make and preserve.” 44 U.S.C. § 3101. In that case, the problem is not the search for official file notes but OGE’s decision to withhold them. In any case, whether they are official file notes or reviewer notes, they are releasable for the reasons we discuss in the next section.

<sup>6</sup> White House, Certificate of Divestiture Request for Jared C. Kushner, Jan. 25, 2017, <https://bit.ly/34fM1LW>.

<sup>7</sup> 5 C.F.R. § 2634.1005(b).

<sup>8</sup> GRS 2.8.

which would have been based on the official duties that the White House expected Mr. Herndon to perform.<sup>9</sup> No statute exempts this information from release.

#### *B. Exemption 4*

FOIA Exemption 4 exempts “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”<sup>10</sup> OGE erred if it relied on Exemption 4 in redacting or withholding information regarding the necessity of Mr. Herndon divesting CSRA, Inc. stock. When considering the request for a CD, OGE was required to analyze the risk that his duties would conflict with his ownership of CSRA, Inc. stock.<sup>11</sup> An assertion by the White House that Mr. Herndon needed to work on matters affecting CSRA, Inc. would not itself implicate Exemption 4. In fact, that very assertion is contained in an Ethics Pledge waiver that the White House has posted on its website.<sup>12</sup> In the highly unlikely event that the White House’s request for a CD went into such a high degree of detail that it somehow implicated trade secrets or similar information, OGE had a responsibility to segregate that information and release all information not covered by Exemption 4.<sup>13</sup>

#### *C. Exemption 5*

OGE’s apparent reliance on Exemption 5 with regard to information about the necessity of divestiture was erroneous for two reasons, which we address below. We note, too, that a White House request for a CD for another employee is posted on OGE’s official website, raising a question as to why OGE refused to release the request for Mr. Herndon’s CD.<sup>14</sup>

##### *1. Information about the government’s view that divestiture was reasonably necessary lost its predecisional status upon issuance of the CD, which adopted that view.*

First, OGE erred in apparently redacting or withholding the requested information under Exemption 5 because the requested documents are not predecisional. The D.C. Circuit has explained that, for purposes of Exemption 5, “[i]nformation is exempt only if it is both ‘predecisional’ and ‘deliberative.’”<sup>15</sup> Moreover, even if a “document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealings with the public.”<sup>16</sup> “To adopt a deliberative document . . . the agency must make an ‘express[ ]’ choice to use [the] document as a source of

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<sup>9</sup> 18 U.S.C. § 208(a); 5 C.F.R. § 2634.1004.

<sup>10</sup> 5 U.S.C. § 552(b)(4).

<sup>11</sup> 5 C.F.R. § 2634.1004.

<sup>12</sup> Memorandum for White House Information Technology Director Charles C. Herndon from Counsel to the President, White House, <https://bit.ly/2VJ6B7H>.

<sup>13</sup> *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011) (quoting *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 57 (D.C. Cir. 2003) “even if [the] agency establishes an exemption, it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s).”

<sup>14</sup> White House, Certificate of Divestiture Request for Jared C. Kushner, Jan. 25, 2017, <https://bit.ly/34fM1LW>.

<sup>15</sup> *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 39 (D.C. Cir. 2002) (quoting *Petroleum Info. Corp. v. U.S. Dep’t of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992)).

<sup>16</sup> *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

agency guidance.”<sup>17</sup> In the case of Mr. Herndon, records reflecting the view that divestiture was reasonably necessary to avoid a conflict of interest lost their predecisional status upon issuance of the CD, which expressly adopted the views contained in the White House’s request and possibly other records, such as emails.

Lacking direct knowledge of the duties of an employee seeking a CD, OGE relies on the employing agency to establish that divestiture is reasonably necessary to avoid a conflict of interest. Specifically, OGE’s regulations require the employing agency to submit an “opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order.”<sup>18</sup> The regulations then permit OGE to issue a CD only if it adopts the employing agency’s view that divestiture is reasonably necessary.<sup>19</sup> Finally, the applicable statute requires OGE to include in the CD a written declaration that divestiture is reasonably necessary.<sup>20</sup>

In the case of Mr. Herndon, OGE adopted the White House’s view that divestiture was reasonably necessary when it included the following declaration in the CD it issued him: “I hereby determine that the divestiture of the described property is reasonably necessary to comply with 18 U.S.C. § 208, or other applicable Federal conflict of interest statutes, regulations, rules, or executive orders.”<sup>21</sup> Because OGE adopted as its official position the White House’s view that divestiture was reasonably necessary, records containing information articulating or supporting that view lost their predecisional status upon OGE’s issuance of the CD. Therefore, OGE must release this requested information, whether contained in the five pages OGE released or in the records that OGE withheld in their entirety.

2. *OGE cannot meet its burden of showing that release of the requested information would cause injury to the decisionmaking process.*

Second, OGE erred in redacting or withholding the requested information under Exemption 5 because the requested documents are not deliberative. To qualify as “deliberative” for Exemption 5 purposes, a document must reflect the “give-and-take of the consultative process.”<sup>22</sup> Moreover, to assert the deliberative process exemption, “the agency must make the additional showing that disclosure would cause injury to the decisionmaking process.”<sup>23</sup> The agency “must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA.”<sup>24</sup> OGE cannot meet this burden.

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<sup>17</sup> *Judicial Watch, Inc. v. United States Dep’t of Defense*, 847 F.3d 735, 739 (2017).

<sup>18</sup> 5 C.F.R. § 2634.1005(b)(2), (4). Note that this opinion would have been contained in the White House’s request for a CD, which OGE’s adverse determination letter failed to address.

<sup>19</sup> 5 C.F.R. § 2634.1004(a)(1).

<sup>20</sup> 26 U.S.C. § 1043.

<sup>21</sup> Office of Gov’t Ethics, Certificate No. OGE-2017-061, May 11, 2017 (Herndon CD), <https://bit.ly/2pjMy0w>.

<sup>22</sup> *Coastal States*, 617 F.2d at 866.

<sup>23</sup> *Nat’l Sec. Archive v. CIA*, 859 F.Supp.2d 65, 70 (D.D.C. 2012) (citing *Army Times Publ’g Co. v. Dep’t of the Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993)), *aff’d*, 752 F.3d 460 (D.C. Cir. 2014).

<sup>24</sup> *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 258 (D.C. Cir. 1977) (citing *Brockway v. Dep’t of the Air Force*, 518 F.2d 1184, 1194 (8th Cir. 1975)).

The “key question” is “whether disclosure of the information would discourage candid discussion within the agency.”<sup>25</sup> In this case, the information sought would reflect only the prevailing view that Mr. Herndon’s divestiture of CSRA, Inc. stock was reasonably necessary. OGE expressly declared this view in the CD, which it released to CREW and which CREW has posted online for public viewing.<sup>26</sup> Therefore, releasing information that supports this prevailing view would not deter candid deliberation among OGE employees because this view is already publicly known. Such release also would not expose the “give-and-take of the consultative process” because OGE could redact information containing any competing view that divestiture was not reasonably necessary.<sup>27</sup>

Far from protecting the decisionmaking process for OGE’s CD program, OGE’s withholding of the requested information would harm that process by depriving the public of any means to monitor the government’s compliance with applicable law. At issue is the question of whether Mr. Herndon needed to participate in particular matters directly and predictably affecting the financial interests of CSRA, Inc.<sup>28</sup> The law authorizes OGE to issue a CD only when divestiture is reasonably necessary to avoid a conflict of interest, yet OGE has chosen to conceal information the public needs to ascertain whether divestiture was reasonably necessary.<sup>29</sup>

Without transparency and the accountability it affords, there is a danger that the CD program could be used to confer tax benefits on officials who are ineligible for them. It is precisely for preventing this sort of harm that FOIA exists. “The basic purpose of FOIA is 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.”<sup>30</sup> OGE has thwarted that purpose by withholding all of the information that would show whether Mr. Herndon was eligible for a CD.

#### *D. Exemption 6*

OGE also erred if it redacted or withheld the requested information under Exemption 6. Exemption 6 exempts information about a person contained in “personnel and medical files and similar files, . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>31</sup> OGE’s finding regarding the necessity of divestiture would have been based on an evaluation of the duties the White House expected Mr. Herndon to perform in his “official capacity.”<sup>32</sup> Therefore, Exemption 6 is inapplicable because information regarding his official

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<sup>25</sup> *Elec. Frontier Found. v. U.S. Dep’t of Justice*, 826 F. Supp. 2d 157, 166 (D.D.C. 2011) (internal quotations marks omitted) (quoting *Access Reports v. Dep’t of Justice*, 926 F.2d 1192, 1195 (D.C.Cir.1991) and *Dudman Commc’ns Corp. v. Dep’t of Air Force*, 815 F.2d 1565, 1567–68 (D.C.Cir.1987)).

<sup>26</sup> Office of Gov’t Ethics, Certificate No. OGE-2017-061, May 11, 2017 (Herndon CD), <https://bit.ly/2pjMy0w>.

<sup>27</sup> *Coastal States*, 617 F.2d at 866.

<sup>28</sup> 18 U.S.C. § 208(a).

<sup>29</sup> 26 U.S.C. § 1043.

<sup>30</sup> *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>31</sup> 5 U.S.C. § 552(b)(6).

<sup>32</sup> 18 U.S.C. § 208(a).

duties would not reveal any personal information about him.<sup>33</sup>

Even if there were a privacy interest here, OGE failed to properly balance that interest against the public's interest in disclosure.<sup>34</sup> OGE's CD program confers tax benefits on government officials by allowing them to defer capital gains on the sale of assets.<sup>35</sup> OGE's own regulations make clear that the public has an interest in knowing whether OGE is responsibly issuing CDs only to offset the burden of complying with conflict of interest laws and not to unfairly enrich government officials.<sup>36</sup> This public interest would certainly outweigh any purported privacy interests in keeping the official duties of a presidential appointee secret. Furthermore, mere speculation about such harm would fall short of the legal requirement to show that the threat of harm is real.<sup>37</sup>

In Mr. Herndon's case, there is another especially compelling public interest in release of information about his official duties. Though he received a CD and reported his divestiture of CSRA, Inc. stock, it later became clear that he retained a significant amount of CSRA, Inc. restricted stock, despite a regulatory requirement to divest all "similar or related" property.<sup>38</sup> As a result, the public has a strong interest in knowing whether he participated in particular matters affecting the financial interests of CSRA, Inc., while continuing to hold the company's restricted stock—which could implicate concerns under the conflict of interest law.<sup>39</sup> Release of records indicating why it was "reasonably necessary" for Mr. Herndon to divest CSRA, Inc. stock would provide the public with needed information about whether the White House expected that he would perform duties affecting CSRA, Inc.

### III. Conclusion

For the forgoing reasons, CREW respectfully requests that you reverse the October 24, 2019, adverse determination by OGE and release all records containing information regarding the view that it was reasonably necessary for Mr. Herndon to divest his interests in CSRA, Inc. to

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<sup>33</sup> See *New Orleans Workers' Ctr. for Racial Justice v. United States Immigration & Customs Enf't*, 373 F. Supp. 3d 16, 58 (D.D.C. 2019) ("The balancing analysis for FOIA Exemption 6 requires that [the Court] first determine whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest,' because '[i]f no significant privacy interest is implicated ... FOIA demands disclosure.'"); *Providence Journal Co. v. Dep't of Army*, 981 F.2d 552, 568 (1st Cir.1992) ("[A] federal government employee investigated for criminal misfeasance relating to the performance of official duties generally possesses a diminished privacy interest.").

<sup>34</sup> *Ripskis v. Dep't of Housing and Urban Development*, 746 F.2d 1, 3 (D.C. Cir. 1984) (balancing test); *New England Apple Council v. Donovan*, 725 F.2d 139, 144 (1st Cir.1984) ("The public has a significant, enduring interest in remaining informed about actions taken by public officials in the course of their official duties.")

<sup>35</sup> 26 U.S.C. § 1043

<sup>36</sup> 5 C.F.R. §§ 2634.1001(b), 2634.1007.

<sup>37</sup> *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100, 116 (D.D.C. 2005) ("To justify their Exemption 6 withholdings, the defendants must show that the threat to employees' privacy is real rather than speculative.").

<sup>38</sup> Charles Herndon, 2018 Public Financial Disclosure Report, May 14, 2018 (Part 7, Line 1) (disclosing May 30, 2018 sale of \$50,001 - \$100,000 sale of "CSRA Common Stock"); Charles Herndon, Periodic Transaction Report, June 28, 2018 (Line 1) (disclosing April 1, 2018 sale of \$50,001 - \$100,000 of "CSRA Restricted Stock"); 5 C.F.R. § 2634.1007(c).

<sup>39</sup> 5 U.S.C. § 208(a).

OGE Program Counsel

November 22, 2019

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avoid a conflict of interest. If you have any questions about this appeal, please contact me at [aweismann@citizensforethics.org](mailto:aweismann@citizensforethics.org).

Sincerely,

A handwritten signature in black ink, appearing to read "A. Weismann". The signature is fluid and cursive, with a large initial "A" and a long, sweeping tail.

Anne L. Weismann  
Chief FOIA Counsel]

Enclosures (2):

- 1 - CREW FOIA request (5/16/19)
- 2 - OGE adverse determination letter,  
without attachments (10/24/19)

May 16, 2019

**BY EMAIL:** [usoge@oge.gov](mailto:usoge@oge.gov)

OGE FOIA Officer  
Office of Government Ethics  
Suite 500  
1201 New York Avenue, NW  
Washington, D.C. 20005-3917

Re: Freedom of Information Act Request

Dear FOIA Officer,

Citizens for Responsibility and Ethics in Washington (“CREW”) makes this request pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and Office of Government Ethics (“OGE”) regulations.

Specifically, CREW requests copies of all records related to the issuance of a Certificate of Divestiture to Deputy Assistant to the President and Director of White House Information Technology Charles Herndon for CSRA stock,<sup>1</sup> including the request package submitted by the White House to OGE, related communications, and other records.

Please search for responsive records regardless of format, medium, or physical characteristics. We seek records of any kind, including paper records, electronic records, audiotapes, videotapes, photographs, data, and graphical material. Our request includes without limitation all correspondence, letters, emails, text messages, facsimiles, telephone messages, voice mail messages, and transcripts, notes, or minutes of any meetings, telephone conversations, or discussions. Our request also includes any attachments to emails and other records, as well as those who were cc’ed or bcc’ed on any emails.

If it is your position any portion of the requested records is exempt from disclosure, CREW requests that you provide it with an index of those documents as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). If some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records. *See* 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document. *See Mead Data Central v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

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<sup>1</sup> Charles Herndon, Certificate of Divestiture No. OGE-2017-061, May 11, 2017, *available at* <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/16145357/Herndon-Charles-C.-CD-061.pdf>.



### **Fee Waiver Request**

In accordance with 5 U.S.C. § 552(a)(4)(A) and OGE regulations, CREW requests a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures likely will contribute to a better understanding of relevant government procedures by CREW and the general public in a significant way. *See* 5 U.S.C. § 552(a)(4)(A)(iii). Moreover, the request primarily and fundamentally is for non-commercial purposes. *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The requested records are likely to contribute to greater public understanding of the potential conflicts of interest that CSRA posed to Mr. Herndon and the decision to grant him relief from capital gains taxes for the sale of his CSRA stock. OGE's regulations provide that the designated agency ethics official of the employing agency must submit "[a]n opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order."<sup>2</sup> The justification that the White House supplied to establish that divestiture was "reasonably necessary" will contribute to the public's understanding of Mr. Herndon's potential conflicts of interest with respect to CSRA. In addition, OGE's regulations establish other requirements, including requirements to divest all "similar or related property," to submit a "statement that the eligible person holding the property has agreed to divest the property," and to indicate the "date that the requirement to divest first applied."<sup>3</sup> Communications between the White House and OGE regarding these requirements and other aspects of OGE's processing of the request for a Certificate of Divestiture will also enhance the public's understanding of the rationale for OGE's determination. The timing of the Certificate of Divestiture and the requirement to divest, are also of interest partly because the White House publicly released a waiver of Mr. Herndon's ethics pledge requirements on May 31, 2017, in the same month that OGE issued its May 11, 2017, Certificate of Divestiture.<sup>4</sup> As a result, there is significant public interest in the requested records.

CREW is a non-profit corporation, organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW intends to analyze the information responsive to this request and to share its analysis with the public through reports, press releases, or other means. In addition, CREW will disseminate any documents it acquires from this request to the public through its website, [www.citizensforethics.org](http://www.citizensforethics.org). The release of information obtained through this request is not in CREW's financial interest.

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<sup>2</sup> 5 C.F.R. § 2634.1005(b)(2); 26 U.S.C. § 1043 (Sale of property to comply with conflict-of-interest requirements). The White House appears to have submitted its request for a CD for Mr. Herndon on April 28, 2017. Email between Robert Saltaformaggio and Elaine Newton, Apr. 27, 2017, records available in response to FOIA No. FY17-426, at 95, Dec. 31, 2018, *available at* <https://bit.ly/3056hi0>.

<sup>3</sup> 5 C.F.R. § 2634.1007(c).

<sup>4</sup> White House, *Disclosures*, "List of Ethics Waivers Issued as of May 31, 2017," *available at* <https://bit.ly/2WTL2hv> (last viewed May 16, 2019); Charles Herndon, Certificate of Divestiture No. OGE-2017-061, May 11, 2017, *available at* <https://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2019/05/16145357/Herndon-Charles-C.-CD-061.pdf>.

CREW further requests that it not be charged search or review fees for this request pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) because CREW qualifies as a member of the news media. *See Nat'l Sec. Archive v. U.S. Dep't of Defense*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (holding non-profit a “representative of the news media” and broadly interpreting the term to include “any person or organization which regularly publishes or disseminates information to the public”).

CREW routinely and systematically disseminates information to the public in several ways. CREW’s website receives tens of thousands of page views every month. The website includes blogposts that report on and analyze newsworthy developments regarding government ethics, corruption, and money in politics, as well as numerous reports CREW has published to educate the public about these issues. In addition, CREW posts documents it receives under the FOIA on its website, and those documents have been visited hundreds of thousands of times.

Under these circumstances, CREW satisfies fully the criteria for a fee waiver.

### **Conclusion**

If you have any questions about this request or foresee any problems in fully releasing the requested records, please contact me at (202) 897-1845 or [mlerner@citizensforethics.org](mailto:mlerner@citizensforethics.org). Also, if CREW’s request for a fee waiver is not granted in full, please contact our office immediately upon making such a determination.

Where possible, please produce records in electronic format. Please send the requested records to me either at [mlerner@citizensforethics.org](mailto:mlerner@citizensforethics.org) or at Meredith Lerner, Citizens for Responsibility and Ethics in Washington, 1101 K Street, N.W., Suite 201, Washington, D.C. 20005. Thank you for your assistance in this matter.

Sincerely,



Meredith Lerner  
Research Associate



October 24, 2019

**VIA ELECTRONIC MAIL ONLY**

Meredith Lerner

[mlerner@citizensforethics.org](mailto:mlerner@citizensforethics.org)

Tracking No: OGE FOIA FY 19/065

Dear Ms. Lerner:

The U.S. Office of Government Ethics (OGE) is granting in part and denying in part your Freedom of Information Act (FOIA) request, which was received by the OGE FOIA Office on May 16, 2019. In your request, you asked for “copies of all records related to the issuance of a Certificate of Divestiture to Deputy Assistant to the President and Director of White House Information Technology Charles Herndon for CSRA stock, including the request package submitted by the White House to OGE, related communications, and other records.”

In response, we are enclosing 5 pages of responsive documents subject to deletions made in accordance with FOIA Exemption 3, 5 U.S.C. § 552(b)(3) as material specifically exempted from disclosure by another statute; FOIA Exemption 4, 5 U.S.C. § 552(b)(4), as commercial or financial information obtained from a person and privileged or confidential; FOIA Exemption 5, 5 U.S.C. § 552(b)(5), as inter- and intra-agency pre-decisional deliberative process material; and FOIA Exemption 6, 5 U.S.C. § 552(b)(6), as information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The deletions are each marked with a reference “(b)(3),” “(b)(4),” “(b)(5),” or “(b)(6)” in the enclosed copies.

In addition to the withholdings identified in the 5-page enclosure, we are also withholding 5 pages in their entirety under FOIA Exemption 3, 5 U.S.C. § 552(b)(3) as material specifically exempted from disclosure by another statute, FOIA Exemption 4, 5 U.S.C. § 552(b)(4) as trade secrets and commercial or financial information obtained from a person and privileged or confidential, FOIA Exemption 5, 5 U.S.C. § 552(b)(5) as inter- & intra-agency pre-decisional deliberative process material, and FOIA Exemption 6, 5 U.S.C. § 552(b)(6) as information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. These pages are OGE’s reviewer notes pertaining to the certificate of divestiture request. Reviewer notes are pre-decisional and deliberative, and are an expression of the individual reviewer’s views and not an expression of the agency’s official



position. As such, the release of these documents could lead to unnecessary confusion, mislead the public about the employee, and otherwise harm the deliberative process.

Please note there are special access provisions for the following types of records:

- Public financial disclosure reports are not available under the FOIA, pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3) as material specifically exempted from disclosure by another statute. Instead, the Ethics in Government Act (5 U.S.C. app. § 105) and OGE regulations provide for a special access provision for public financial disclosure reports [here](#).
- OGE regulations provide for a special access provision for Certificates of Divestiture (CDs). OGE has created an automated tool to request copies of the CDs, available on OGE's website [here](#).

If you have any questions or wish to discuss any aspect of your request, you may contact me by telephone at 202-482-9267. As OGE's FOIA Public Liaison, I am available for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

The OGE official responsible for this FOIA determination is the undersigned. In accordance with the FOIA, as codified at 5 U.S.C. § 552(a)(6)(A), and OGE's updated FOIA regulations, at 5 C.F.R. § 2604.304, you may administratively appeal this determination to the Program Counsel, U.S. Office of Government Ethics, 1201 New York Avenue, N.W., Suite 500, Washington, DC 20005-3917. Any such appeal must be in writing and must be sent within 90 days of the date you receive this response letter. If you do appeal, you should include copies of your request and this response, together with a statement of why you believe this initial determination is in error. Also, if you appeal, you should clearly indicate on the envelope and in the letter that it is a "Freedom of Information Act Appeal."

Sincerely,

Rachel K. McRae  
OGE FOIA Officer

Enclosure