

March 16, 2020

BY EMAIL AND UPS SAME-DAY DELIVERY

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500 12th St., S.W.
Washington, DC 20536

Re: Notice of Pending Litigation and Request for Immediate Withdrawal of Disposal Authorization

Dear Messrs. Ferriero, Stern, Albence, and Pham:

We write to notify you of the attached complaint, filed today against the National Archives and Records Administration (“NARA”) and U.S. Immigration and Customs Enforcement (“ICE”) in the U.S. District Court for the District of Columbia (the “Litigation”). Citizens for Responsibility and Ethics in Washington represents the Plaintiffs in the Litigation. Our suit challenges NARA’s December 11, 2019 approval of ICE’s records disposition schedule for Detainee Records, Schedule No. DAA-0567-2015-0013 (the “ICE Schedule”) as arbitrary, capricious, and contrary to law under the Administrative Procedure Act (“APA”) and the Federal Records Act (“FRA”). As you know, the ICE Schedule authorizes ICE to destroy, as early as this year, several categories of records documenting mistreatment of individuals detained in ICE custody, including records of detainee deaths, sexual assault and abuse, civil rights violations, inhumane solitary confinement practices, and violations of ICE detention standards. Our suit seeks a court order vacating NARA’s approval of the ICE Schedule and prohibiting ICE from destroying any records pursuant to that schedule.

With this letter, NARA and ICE are now on actual notice of the Litigation. This has several implications requiring immediate action. First, ICE “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Nunnally v. D.C.*, 243 F. Supp. 3d 55, 73 (D.D.C. 2017) (“A party has a duty to preserve potentially relevant evidence . . . once [that party] anticipates litigation.”). In

this case, the universe of “relevant documents” is readily discernible given the nature of Plaintiffs’ APA claim: it encompasses all records subject to destruction under the ICE Schedule. This means ICE cannot destroy any records pursuant to that schedule pending final resolution of the Litigation. Indeed, destroying federal records subject to a litigation hold qualifies as an “unlawful destruction,” a criminal offense. 36 C.F.R. §§ 1230.03(b), 1230.12 (citing 18 U.S.C. §§ 641 and 2071). And the Director of ICE has a non-discretionary duty to “[p]revent the unlawful . . . destruction of [ICE] records.” *Id.* § 1230.10(a).

NARA, too, should take action to ensure the ICE records are preserved, particularly given the substantial likelihood of confusion on this issue. As noted, the records are reasonably subject to a litigation hold and thus cannot be destroyed. At the same time, the FRA provides that once NARA approves a records disposition schedule, disposal of records pursuant to that schedule “shall be mandatory.” 44 U.S.C. § 3303(3); *see Pub. Citizen v. Carlin*, 184 F.3d 900, 902 (D.C. Cir. 1999) (“[F]or the Archivist to authorize the disposal of a record is to order its disposal.”). Because the ICE records are subject to *both* a litigation hold forbidding destruction *and* a NARA-approved schedule requiring destruction, there is a high risk of confusion as to whether records listed in the ICE Schedule may (or must) be destroyed while the Litigation is pending. To address this concern, we request that NARA immediately exercise its authority to “withdraw,” pending resolution of the Litigation, the “disposal authorization[] in the approved” ICE Schedule in order “to ensure the preservation of Government records.” 36 C.F.R. § 1226.16(a); *see* 44 U.S.C. § 2909. This is a necessary, prudent, and unobtrusive step to ensure preservation of ICE records while the Litigation is ongoing. And the need for such action is urgent since the ICE Schedule mandates destruction of records as early as this year.

We believe these straightforward records-preservation issues can be resolved without judicial intervention. Thus, we propose that the parties execute an agreement under which (1) ICE confirms its issuance of a litigation hold for all records listed in the ICE Schedule; (2) ICE confirms it will not destroy those records pending final resolution of the Litigation; and (3) NARA agrees to withdraw its disposal authorization pending final resolution of the Litigation. In exchange, Plaintiffs will agree not to seek immediate injunctive relief from the Court. We further propose memorializing the agreement in a joint stipulation to be filed with the Court. Such an agreement would conserve judicial and party resources, and avoid motion practice on an accelerated schedule.

If we cannot reach an agreement, Plaintiffs will have no choice but to move the Court for immediate injunctive relief. On that point, we note that every court to consider such a motion in an APA suit challenging records destruction under the FRA has granted the motion. *See Am. Friends Serv. Comm. v. Webster*, 720 F.2d 29, 35 (D.C. Cir. 1983) (district court “issued a preliminary injunction halting destruction of FBI records” pursuant to NARA-approved schedule pending resolution of suit challenging NARA’s approval decision, and government “did not appeal” that ruling); *Armstrong v. Bush*, 807 F. Supp. 816, 820-23 (D.D.C. 1992) (granting temporary restraining order to prevent the “immediate and irreparable harm” of federal records being erased); *Green v. NARA*, 992 F. Supp. 811, 816 (E.D. Va. 1998) (“By Order dated February 11, 1997, NARA was prohibited from transferring or disposing of the films [scheduled for destruction] pending the resolution of this matter.”). In finding irreparable harm, these cases

David S. Ferriero, et al.

March 16, 2020

Page 3

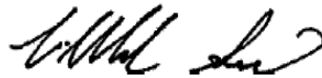
embrace a common-sense proposition: “If the Archivist errs in authorizing disposal, . . . valuable federal records could be lost forever.” *Pub. Citizen*, 184 F.3d at 902.

As detailed in the attached complaint, Plaintiffs have compelling grounds for obtaining immediate injunctive relief. Even setting aside Plaintiffs’ likelihood of success on the merits of their APA claim—which is substantial—it is beyond dispute that the records listed in the ICE Schedule should now be subject to a litigation hold and therefore cannot be destroyed for that independent reason. Nor can there be any dispute that records destruction qualifies as irreparable harm under D.C. Circuit precedent. Defendants, meanwhile, would suffer no harm from merely having to retain the records until the Litigation concludes.

Please advise as to whether NARA and ICE will agree to the above-proposed terms by March 23, 2020. If we do not hear from you by that time, we will construe this as a rejection of our proposal and will proceed to seek relief from the Court.

We are available to discuss at your convenience. You can reach me at nsus@citizensforethics.org or 202-408-5565.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikhel Sus".

Nikhel Sus
Senior Counsel

Attachment:

Complaint, *CREW, et al. v. NARA, et al.*