

Anne L. Weismann
D.C. Bar No. 298190
Melanie Sloan
D.C. Bar No. 434584
Citizens for Responsibility
and Ethics in Washington
1400 Eye Street, N.W.
Suite 450
Washington, D.C. 20005
202-408-5565

Attorneys for Plaintiff

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

CITIZENS FOR RESPONSIBILITY AND :
ETHICS IN WASHINGTON :
1400 Eye Street, N.W., Suite 450, :
Washington, D.C. 20005 :

Plaintiff, :

v. :

Civil Action No. :

National Archives and Records :
Administration, :
8601 Adelphi Road :
College Park, Maryland 20740 :

Defendant. :

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, as amended and agency FOIA regulations challenging the failure of the National Archives and Records Administration (“NARA”) to fulfill the request of Plaintiff for documents relating to a request NARA made to the United States Secret Service that it cease its destruction of visitor records once the Secret Service has transferred copies of the agency records to the White House.

2. This case seeks declaratory relief that NARA is in violation of the FOIA and NARA regulations, 36 C.F.R. § 1250.36, for failing to fulfill Plaintiff's request for records and injunctive relief that NARA immediately and fully comply with Plaintiff's request under the FOIA.

JURISDICTION AND VENUE

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over NARA pursuant to 5 U.S.C. §552(a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §1331. Venue lies in this district under 5 U.S.C. §552(a)(4)(B).

PARTIES

4. Plaintiff Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit 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. CREW is dedicated to empowering citizens to have an influential voice in government decisions and in the governmental decision-making process. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA.

5. CREW has invested considerable organizational resources in pushing the U.S. government to take ethics issues seriously. CREW monitors closely the laws and rules applicable to government agencies.

6. CREW is harmed by NARA's failure to comply with the FOIA, because that failure

harms CREW's ability to provide full, accurate and current information to the public. 5 U.S.C. §552(a)(6)(C). Absent this critical information, CREW cannot advance its mission of educating the public to ensure that the public continues to have a vital voice in government.

7. Defendant NARA is an agency within the meaning of 5 U.S.C. §552(f) and 5 U.S.C. §702. NARA is the federal agency with possession and control of the requested records and is responsible for fulfilling Plaintiff's FOIA request.

STATUTORY FRAMEWORK

The Freedom of Information Act

8. The FOIA, 5 U.S.C. §552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

9. An agency must respond to a party making a FOIA request within 20 working days, notifying that party of at least the agency's determination whether or not to fulfill the request and of the requester's right to appeal the agency's determination to the agency head. 5 U.S.C. §552(a)(6)(A)(I).

10. An agency must respond to a FOIA appeal within 20 working days, notifying the appealing party of the agency's determination to either release the withheld records or uphold the denial. 5 U.S.C. §552(a)(6)(A)(ii).

11. In "unusual circumstances," an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. §552(a)(6)(B).

12. The FOIA also requires agencies to promulgate regulations that provide for expedited processing of FOIA requests where the requester has demonstrated a "compelling

need” as well as “other cases determined by the agency.” 5 U.S.C. §552(a)(6)(E)(I). The FOIA defines “compelling need” as including requests “made by a person primarily engaged in disseminating information” where there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* at §552(a)(6)(E)(v)(III).

13. Defendant NARA’s regulations mirror these requirements by providing for expedition upon a showing of “an urgent need to inform the public about an actual or alleged Federal government activity (this last criterion applies only to those requests made by a person primarily engaged in disseminating information to the public).” 36 C.F.R. §1250.28.

14 Agencies are required to make a determination on a request for expedition within 10 days “after the date of the request,” 5 U.S.C. §552(a)(6)(E)(ii)(I), and to give “expeditious consideration” to administrative appeals of such determinations. *Id.* at §552(a)(6)(E)(ii)(II). NARA regulations require NARA to expedite appeals of denials of expedition. 36 C.F.R. §1250.32.

15. Agency decisions to deny or affirm denial of a request for expedition are subject to judicial review “based on the record before the agency at the time of the determination.” 5 U.S.C. §552(a)(6)(E)(iii).

FACTS GIVING RISE TO PLAINTIFF’S CLAIMS FOR RELIEF

16. On or before October 2004, NARA requested that the Secret Service retain copies of all Workers and Visitors Entrance System (“WAVES”) records that the Secret Service had transferred to the White House Office of Records Management. On information and belief, NARA made this request based on its determination that the WAVES records were agency records of the Secret Service subject to the record-keeping requirements of the Federal Records

Act.

17. On information and belief, the Secret Service, at the direction of the Office of the Vice President and/or the White House Office of Records Management, has communicated to NARA the view that WAVES records are presidential records and are therefore not subject to the Federal Records Act. The Secret Service has agreed to maintain its copies of the WAVES records until a legal determination is made as to whether those records are agency records or presidential records.

18. Both the Secret Service and the Office of the Vice President, in filings made in The Washington Post v. U.S. Dep't of Homeland Security, C.A. No. 1737 (D.D.C.), have admitted that NARA requested that the Secret Service retain its copies of WAVES records and that the Secret Service agreed to do so pending a legal determination as to whether records created under the White House Access Control System, which includes WAVES records and the Access Control Records System, are presidential records.

19. On September 27, 2006, Plaintiff sent a FOIA request to NARA seeking records, regardless of format and including electronic records and information, relating to the request made by NARA to the U.S. Secret Service "that the Secret Service retain its own copies of the Workers and Visitors Entrance System ("WAVES") records that it transferred to the White House." Letter from Sharon Y. Eubanks to FOIA Officer, National Archives and Records, September 27, 2006 (attached as Exhibit A). CREW also sought communications between NARA and any other governmental entity regarding the practice of the Secret Service to erase copies of WAVES records it had transferred to the White House, documents referring or relating to the practice of the Secret Service to delete records from its computer system and documents

related to three pending district court cases: (I) Judicial Watch v. U.S. Secret Service, C.A. No. 06-310 (D.D.C.), (ii) Democratic Nat'l Comm. v. U.S. Secret Service, C.A. No. 06-842 (D.D.C.) and (iii) CREW v. U.S. Dep't of Homeland Security, C.A. No. 06-883 (D.D.C.). Id.

20. CREW also sought a waiver of fees associated with processing its request given that the request concerns the operations of the federal government, the disclosures will likely contribute to a better understanding of relevant government procedures and the request is primarily and fundamentally for non-commercial purposes. Id. Specifically, the requested records are likely to inform the public about the record-keeping practices of the Secret Service as they relate to White House visitor logs. Id.

21. CREW also sought expedition based on the widespread and exceptional media interest in the visitor logs maintained by the Secret Service and the questions of government integrity raised by the practice of the Secret Service to intentionally destroy WAVES records once it transfers copies to the White House. Id. Declarations submitted in pending litigation revealed that NARA was aware of this practice of agency record destruction. Id.

22. By letter dated October 20, 2006, NARA acknowledged receipt of CREW's FOIA request, granted CREW's request for expedition and relayed NARA's anticipation that it would respond to the request itself on or before October 25, 2006. Letter from Ramona Branch Oliver, NARA FOIA Officer, to Sharon Y. Eubanks, October 20, 2006 (attached as Exhibit B). NARA also granted CREW's request for a fee waiver. Id.

23. Thereafter, by letter dated October 24, 2006, NARA advised CREW that the agency had located 336 pages of documents responsive to CREW's FOIA request. Letter from Ramona Branch Oliver to Sharon Y. Eubanks, October 24, 2006 (attached as Exhibit C). NARA

explained that it had excluded from the request copies of publicly available court filings. Id. Of the 336 pages of responsive documents, NARA disclosed 31 pages in full and 11 pages in part with redactions pursuant to Exemption 5 of the FOIA, 5 U.S.C. §552(b)(5), as inter- and intra-agency communications protected by the deliberative process privilege. Id. In addition, NARA withheld 118 pages in full as within the deliberative process privilege and protected by Exemption 5, and 176 pages in full as deliberative and attorney-work product also protected by Exemption 5. Id.

24. On October 25, 2006, CREW appealed the partial denial of CREW's FOIA request. Letter from Sharon Y. Eubanks to Deputy Archivist, October 25, 2006 (attached as Exhibit D). On the scope and adequacy of NARA's search, CREW explained that NARA's production did not appear to be complete because it did not include any communications with the Secret Service, as CREW had expressly requested, and NARA had refused, in a follow-up telephone conversation with CREW, to identify whether the agency had withheld any records responsive to CREW's request for these communications. Id. NARA also failed to provide any documents that addressed the issue of the Secret Service's document destruction. Id. Moreover, to the extent NARA had excluded publicly available court filings, CREW explained that it was seeking production of those records that contain any marginalia. Id.

25. As to the exemption claims, CREW challenged NARA's failure to explain the basis for its assertion of Exemption 5 and its failure to state whether there are segregable, factual portions of documents that could be disclosed. Id. CREW also explained that Exemption 5 is not available to withhold documents that reflect how NARA has exercised its statutory record-keeping obligations with respect to the Secret Service. Id. As to NARA's reliance on the

attorney-work product to withhold documents under Exemption 5, CREW challenged NARA's failure to identify "some articulable claim likely to lead to litigation." Id.

26. By letter dated November 28, 2006, NARA responded to CREW's appeal. Letter from Lewis J. Bellardo, Deputy Archivist, Chief of Staff to Sharon Y. Eubanks, November 28, 2006 (attached as Exhibit E). NARA defended its search as "adequate and comprehensive." Id. NARA also advised CREW that subsequent to its initial search, the agency had located an additional 336 pages of responsive material in NARA's Office of General Counsel and components of the Office of Records Services and an additional 50 pages of material found by staff in the Office of General Counsel and the Office of Presidential Libraries in an unidentified location. Id. Of those 50 pages, NARA released 28 pages with redactions under Exemption 5, and withheld 22 pages in full also pursuant to Exemption 5. Id. NARA's letter of November 28, 2006, also advised CREW that with respect to the publicly available court filings, they contained no marginalia. Id.

27. With respect to CREW's appeal of NARA's exemption claims, NARA released an additional 11 pages in whole and 57 pages in part and otherwise upheld NARA's initial determination to withhold the remaining portions under Exemption 5. Id. According to NARA, the deliberative discussions reflected in the withheld documents "constitute intra- and inter-agency deliberations with respect to the legal status of WAVES records." Id. NARA claimed that their predecisional character was not altered "by any final decisions that have been made with respect to the record status of WAVES records under the records laws." Id. NARA justified its initial claim of attorney-work product privilege by its claim that the withheld material consists of draft briefs sent to NARA from Department of Justice attorneys prior to their

filing along with emails related to those drafts, five pages of background information on WAVES records prepared by the Secret Service in anticipation of litigation, and documents that “reflect the mental impressions of counsel” or respond to counsel’s inquiries. Id.

28. Plaintiff has now exhausted its administrative remedies with respect to NARA’s processing of CREW’s FOIA request. Oglesby v. U.S. Dep’t of the Army, 920 F.2d 57, 62 (D.C. Cir. 1990).

PLAINTIFF’S CLAIMS FOR RELIEF

CLAIM ONE

(Failure to Produce Records Under the FOIA)

29. Plaintiff realleges and incorporates by reference all preceding paragraphs.

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

31. Plaintiff is entitled by law to access to the records requested under the FOIA, unless NARA makes an explicit and justified statutory exemption claim.

32. Therefore, NARA violated FOIA’s mandate to release agency records to the public by failing to conduct a reasonable search and failing to release all non-exempt records as Plaintiff specifically requested. 5 U.S.C. §§552(a)(3)(A), 552(a)(4)(B).

PRAYER FOR RELIEF

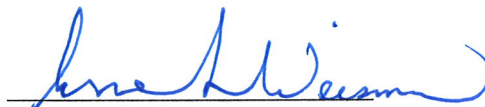
WHEREFORE, Plaintiff respectfully requests that this Court:

- (1) Declare that NARA has violated the Freedom of Information Act by failing to lawfully satisfy Plaintiff’s FOIA request of September 27, 2006;
- (2) Order NARA to respond to Plaintiff’s FOIA request immediately by conducting a reasonable search and producing all responsive documents;

(3) Award Plaintiff reasonable attorney fees and litigation costs in this action, pursuant to 5 U.S.C. §552(a)(4)(E); and

(4) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Anne L. Weismann
(D.C. Bar No. 298190)
Melanie Sloan
(D.C. Bar No. 434584)
Citizens for Responsibility and Ethics
in Washington
1400 Eye Street, N.W., Suite 450
Washington, D.C. 20005
Phone: (20) 408-5565
Fax: (202) 588-5020

Attorneys for Plaintiff

Dated: January 10, 2007