

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

DEMOCRACY FORWARD FOUNDATION,
1333 H St. NW
Washington, DC 20005,

Plaintiff,

v.

U.S. DEPARTMENT OF STATE,
2201 C St. NW
Washington, DC 20520,

Defendant.

Case No.

COMPLAINT

1. Plaintiff Democracy Forward Foundation brings this action against Defendant the U.S. Department of State (the “State Department”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”). Defendant has failed to sufficiently respond to Plaintiff’s request for communications and records related to, among other things: concerns by Secretary of State Rex Tillerson and other senior Trump Administration officials about President Trump’s fitness to carry out his Constitutional duties as Commander in Chief. Specifically, the FOIA requested unclassified records, including those pertaining to a national security meeting in which President Trump reportedly requested a nearly tenfold increase in the U.S. nuclear arsenal, a statement that, along with the President’s lack of fluency in other national security issues, was reported to cause concern among military and diplomatic officials in attendance.

2. The records Plaintiff has requested are of significant public importance. The Commander in Chief function provided for in Article II of the U.S. Constitution is, unarguably, one of the most important roles filled by the President, marrying awesome power with profound

responsibility. *See* U.S. Const. art. II. While President Donald J. Trump may desire to wield his Constitutional power to implement a more aggressive posture with respect to the use of nuclear weapons,¹ serious questions have been raised about his fitness to do so responsibly and in the sober manner required of the Office. These questions are raised, in part, because of reports that the Secretary of State privately expressed doubts about President Trump's ability to competently conduct foreign policy.²

3. Plaintiff submitted a FOIA request to the State Department to examine, and educate the public about, these important questions.

4. The State Department has failed to sufficiently respond to Plaintiff's request. Plaintiff therefore respectfully requests that the Court compel Defendant to comply with the FOIA.

JURISDICTION AND VENUE

5. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

6. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

¹ *See* Jeff Daniels, *Trump's Nuclear Posture Review Shows Greater Willingness to Use Nukes First, Say Critics*, CNBC (Feb. 2, 2018), <https://www.cnbc.com/2018/02/02/trump-nuclear-posture-document-encourages-use-of-nukes-say-critics.html>; *see also* Ishaan Tharoor, *Trump's Nuclear Policy Is Taking Us Back to the Cold War*, Wash. Post (Feb. 6, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/02/06/trumps-nuclear-policy-is-taking-us-back-to-the-cold-war/?utm_term=.a3bc111c2046.

² *See* Carol E. Lee et al., *Tillerson's Fury at Trump Required an Intervention from Pence*, NBC News (Oct. 4, 2017), <https://www.nbcnews.com/politics/white-house/tillerson-s-fury-trump-required-intervention-pence-n806451>; *see also* Kaitlan Collins et al., *Tensions Escalate After Tillerson Calls Trump 'Moron'*, CNN (Oct. 5, 2017), <https://www.cnn.com/2017/10/04/politics/tillerson-trump-moron/index.html>.

PARTIES

7. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part by educating the public on government actions and policies.

8. Defendant the State Department is a federal agency within the meaning of the FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Washington, D.C. Defendant has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

9. On October 4, 2017, Secretary of State Rex Tillerson gave an unscheduled press conference (the “Press Conference”) to address press reports that he had openly disparaged President Trump as a “moron” after a meeting held on July 20, 2017 at the Pentagon³ in which President Trump had reportedly surprised military advisors by calling for a substantial increase in the size of the United States’ nuclear stockpile.⁴ These same press accounts reported that Secretary Tillerson had been on the verge of resigning this past summer amid clashes with the White House.⁵

10. The Press Conference was held despite an already scheduled press briefing led by State Department spokesperson Heather Nauert.⁶

³ *See, e.g.,* David Reid, *Tillerson Reportedly Described Trump as ‘a Moron’ and Was Set to Resign in July*, CNBC (Oct. 4, 2017), <https://www.cnbc.com/2017/10/04/tillerson-called-trump-a-moron-says-report.html>.

⁴ Courtney Kube et al., *Trump Wanted Tenfold Increase in Nuclear Arsenal, Surprising Military*, NBC News (Oct. 11, 2017), <https://www.nbcnews.com/news/all/trump-wanted-dramatic-increase-nuclear-arsenal-meeting-military-leaders-n809701>.

⁵ *See, e.g.,* Reid, *supra* note 3.

⁶ *See* U.S. Dep’t of State, *Department Press Briefing - July 20, 2017* (July 20, 2017), available at <https://www.state.gov/r/pa/prs/dpb/2017/07/272746.htm> (transcript of State Department’s regularly scheduled press briefing for July 20, 2017).

11. During the Press Conference, Secretary Tillerson stated he did not speak with the President ahead of his unscheduled appearance and refused to answer questions regarding the report that he had disparaged the President after the July 20 Pentagon meeting.⁷

Plaintiff's FOIA Request

12. In order to understand, and explain to the public, the decision-making process that led to the Press Conference, Plaintiff submitted the following requests for records to the State Department on October 4, 2017:

1. Any and all records that refer or relate to the development of the statement issued by Secretary of State Rex Tillerson on October 4, 2017. This includes, but is not limited to, all drafts of the statement and communications regarding its content.
2. Any and all records that: (i) refer or relate to Secretary Tillerson, and (ii) were sent from or to any White House employee, including but not limited to: John Kelly, Kirstjen Nielsen, Hope Hicks, Mercedes Schlapp, Sarah Huckabee Sanders, Jared Kushner, Ivanka Trump, Avraham Berkowitz, Stephen Miller, Donald McGahn, Kellyanne Conway, or Madeleine Westerhout.
3. Any and all records, including correspondence, regarding the article published by NBC News on October 4, 2017, titled "Tillerson's Fury at Trump Required an Intervention From Pence". This includes internal correspondence by State Department employees and correspondence between State Department Employees and NBC reporters prior to the publication of the article. For State Department employees, any search should include, but not be limited to, the inboxes of RC Hammond and Heather Nauert.
4. Any and all records that: (i) refer or relate to Secretary Tillerson, and (ii) contain any of the following words: "moron", "statement", "press conference", "NBC", "resign", "resignation", "Pence", "Kelly", "Mattis", or "Haley".
5. Any and all nonclassified records that refer or relate to Secretary Tillerson's participation in a July 20, 2017 meeting at the Pentagon

⁷ See Politico Staff, *Full Text: Rex Tillerson's Press Conference Transcript*, Politico (Oct. 4, 2017), <https://www.politico.com/story/2017/10/04/full-text-rex-tillersons-press-conference-transcript-243450>.

with White House and Cabinet officials, including but not limited to: calendar invitations for the meeting, meeting minutes, meeting notes, and emails sent or received after the meeting.

Ex. A at 1-2 (footnotes omitted).

13. Records request nos. 1 - 4 were limited to records created in the period from October 1, 2017 to the date the State Department conducted a search for responsive records. *Id.* at 2.

14. Records request no. 5 was limited to records created in the period from July 10, 2017 to the date the State Department conducted a search for responsive records. *Id.* at 2-3.

15. Plaintiff specifically requested that, for all five requests, the State Department search for responsive records within the Office of the Secretary, the Office of the Deputy Secretary, the Office of Legislative Affairs, the Office of the Under Secretary for Public Diplomacy and Public Affairs, and the Office of Policy Planning.

16. Plaintiff sought a waiver of search and duplicating fees under 5 U.S.C. § 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

Plaintiff's Correspondence with State Department FOIA Offices

17. The State Department acknowledged receipt of the request on October 25, 2017 and assigned the request tracking number F-2017-15913.

18. After hearing nothing further, Plaintiff sent a letter to the State Department on December 12, 2017. Ex. B. The letter notified the State Department of Plaintiff's view that Defendant's failure to “provide any responsive documents and/or provide a substantive response to the request” constituted “a clear violation of the FOIA.” *Id.* at 1.

19. Plaintiff “ask[ed] that the [State] Department comply with its obligations under the FOIA to provide responsive documents immediately and, in any event, no later than Friday, December 15, 2017.” *Id.* at 2.

20. As of the date of this Complaint, Defendant the State Department has failed to notify Plaintiff whether the State Department will comply with Plaintiff’s FOIA request, *see* 5 U.S.C. § 552(a)(6)(A)(i), or produce all requested records or demonstrate that they are lawfully exempt from production, *see id.* § 552(a)(6)(C). Nor has the State Department notified Plaintiff of the scope of any responsive records the State Department intends to produce or withhold and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific, adverse determination.

21. Because the State Department has “fail[ed] to comply with the applicable time limit provisions” of the FOIA, even with the benefit of any extensions of time that the State Department might have claimed, Plaintiff is “deemed to have exhausted [its] administrative remedies.” *Id.* § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

Count One (Violation of the FOIA, 5 U.S.C. § 552)

22. Plaintiff repeats and incorporates by reference each of the foregoing allegations as if fully set forth herein.

23. By failing to respond to Plaintiff’s request within the statutorily prescribed time limit, Defendant has violated its duties under the FOIA, including but not limited to its duties to conduct a reasonable search for responsive records, and to produce all responsive, reasonably segregable, non-exempt information.

24. Plaintiff is being irreparably harmed by Defendant's violation of the FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
2. order Defendant to produce, by a date certain, any and all nonexempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
4. order Defendant to grant Plaintiff's request for a fee waiver;
5. grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. grant Plaintiff any other relief as the Court deems just and proper.

Dated: March 27, 2018

Respectfully submitted,

/s/ Javier M. Guzman

Javier M. Guzman (D.C. Bar No. 462679)
Karianne M. Jones (D.C. Bar No. 187783)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 448-9090
jguzman@democracyforward.org
kjones@democracyforward.org

Counsel for Plaintiff