

cited reasons for the indefinite administrative leave. On April 16, 2021, after General Nakasone declined a request for a personal meeting, Mr. Ellis resigned from the General Counsel position rather than continue to stay on indefinite administrative leave without a realistic hope of resolving the issue.

4. A subsequent investigation by the Office of the Inspector General, U.S. Department of Defense (the “DoD OIG”) determined that, contrary to General Nakasone’s supposed reason for refusing to appoint Mr. Ellis, there was no improper political influence in his selection for the General Counsel position. DoD OIG also concluded that General Nakasone had improperly relied on the pendency of the political-influence investigation as grounds for placing Mr. Ellis on indefinite administrative leave.

5. The other stated reason for General Nakasone’s placing Mr. Ellis on indefinite administrative leave was the need to conduct a security inquiry into two alleged incidents involving the handling and storage of classified materials. After these alleged incidents, NSA continued to provide Mr. Ellis daily access the Agency’s most sensitive information through his remaining tenure at the National Security Council; re-indoctrinated him into Top Secret / Sensitive Compartmented Information (TS/SCI) on January 19, 2021, as part of his on-boarding for the role of General Counsel of NSA; and, to this day, appears to have made no attempt to investigate the alleged incidents. But General Nakasone nevertheless determined that they justified preventing Mr. Ellis from serving in his new role.

6. Mr. Ellis has submitted several information requests to the Defendant Agencies related to these events under FOIA and the Privacy Act. The Defendant Agencies have either failed to respond to his requests or have provided paltry, incomplete responses. Mr. Ellis brings this

action to compel compliance with the Defendant Agencies' disclosure obligations under federal law.

PARTIES

7. Plaintiff Michael J. Ellis is a citizen of the United States and Virginia residing in Alexandria, Virginia. He was previously selected and appointed to serve as General Counsel of the National Security Agency.

8. Defendant National Security Agency is a federal agency located at 9800 Savage Road, Fort Meade, MD 20755. Upon information and belief, NSA has possession, custody, and/or control of documents and other information responsive to Plaintiff's requests.

9. Defendant U.S. Department of Defense is a federal agency located at 1155 Defense Pentagon, Washington, DC 20301. Upon information and belief, DoD has possession, custody, and/or control of documents and other information responsive to Plaintiff's requests.

10. Defendant Office of the Inspector General, U.S. Department of Defense is a federal agency located at 4800 Mark Center Drive, Alexandria, VA 22350. Upon information and belief, DoD OIG has possession, custody, and/or control of documents and other information responsive to Plaintiff's requests.

JURISDICTION AND VENUE

11. Plaintiff's claims arise under federal law. *See* 5 U.S.C. § 552(a)(4)(B) (FOIA); 5 U.S.C. § 552a(g)(1) (Privacy Act).

12. This Court has jurisdiction under 28 U.S.C. § 1331.

13. Plaintiff resides in this district.

14. Venue is proper under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552a(g)(1), and 28 U.S.C. § 1391(e)(1).

RELEVANT FACTS

15. As recounted above, Mr. Ellis was selected and appointed to serve as General Counsel of the NSA but was effectively never permitted to serve. He eventually resigned the position voluntarily rather than remain on indefinite administrative leave.

16. Mr. Ellis has submitted several requests for documents and information to the Defendant Agencies under FOIA and the Privacy Act.

17. On August, 4, 2022, Mr. Ellis submitted a request to DoD OIG under FOIA and the Privacy Act seeking records related to DoD OIG's report and records provided to the DoD Consolidated Adjudications Facility. *See Ex. A.*

18. DoD OIG responded to that request on August 17, 2022, designating the request with case number DODOIG-2022-001186. *See Ex. B.* DoD OIG's response acknowledged receipt of Mr. Ellis's request but did not include a substantive response. Instead, it advised Mr. Ellis that DoD OIG "has adopted a first in/first out practice of processing all incoming requests" and stated that his request "has been placed in chronological order based on the date of receipt." It represented that the request would "be handled as quickly as possible when it is assigned for processing."

19. DoD OIG has never provided a substantive response to Mr. Ellis's August 4, 2022, request.

20. On November 7, 2022, Mr. Ellis submitted a request for information to DoD and the NSA under FOIA and the Privacy Act. *See Ex. C.* That request included ten sub-requests:

(a) "All documents generated between January 1, 2020, and November 5, 2020, related in whole or in part to the selection of the General Counsel of the National Security Agency."

(b) "All emails to, from, or including the following individuals between January 1, 2020, and November 5, 2020, related in whole or in part to the selection of Michael Ellis as General Counsel of the National Security Agency:

- Mr. Paul Ney, General Counsel of the Department of Defense

- Mr. Joseph Kernan, Under Secretary of Defense for Intelligence and Security
- General Mark Milley, Chairman of the Joint Chiefs of Staff
- General Paul Nakasone, Director, National Security Agency
- Mr. George Barnes, Deputy Director, National Security Agency
- Ms. Ariane Cerlenko, Acting Principal Deputy General Counsel, National Security Agency
- Mr. Ralph Cacci, Deputy Under Secretary of Defense for Intelligence and Security
- Mr. Paul Koffsky, Office of General Counsel, Department of Defense.”

(c) “All documents generated between November 5, 2020, and January 20, 2021, related in whole or in part to the appointment of Michael Ellis as General Counsel of the National Security Agency.”

(d) “All notes from meetings between November 5, 2020, and January 20, 2021, that included General Paul Nakasone, Director, National Security Agency, and Mr. Ezra Cohen-Watnick, Acting Under Secretary of Defense for Intelligence and Security, and pertained in whole or in part to the appointment of Michael Ellis as General Counsel of the National Security Agency.”

(e) “All emails to, from, or including the following individuals between November 5, 2020, and January 20, 2021, related in whole or in part to the appointment of Michael Ellis as General Counsel of the National Security Agency:

- Mr. Paul Ney, General Counsel of the Department of Defense
- Mr. Joseph Kernan, Under Secretary of Defense for Intelligence and Security
- Mr. Ezra Cohen-Watnick, Acting Under Secretary of Defense for Intelligence and Security
- General Mark Milley, Chairman of the Joint Chiefs of Staff
- General Paul Nakasone, Director, National Security Agency
- Mr. George Barnes, Deputy Director, National Security Agency
- Ms. Ariane Cerlenko, Acting Principal Deputy General Counsel, National Security Agency
- Mr. Earnest Green, Chief of Staff, National Security Agency
- Ms. Wendy Noble, Executive Director, National Security Agency

- Mr. Ralph Cacci, Deputy Under Secretary of Defense for Intelligence and Security
- Mr. Paul Koffsky, Office of General Counsel, Department of Defense
- Mr. Brent Harvey, Office of General Counsel, Department of Defense.”

(f) “All emails to, from, or including the following individuals between January 1, 2021 and April 30, 2021, related in whole or in part to the personnel status of Michael Ellis, General Counsel of the National Security Agency, including the decision to place him on administrative leave:

- General Mark Milley, Chairman of the Joint Chiefs of Staff
- General Paul Nakasone, Director, National Security Agency
- Mr. George Barnes, Deputy Director, National Security Agency
- Ms. Ariane Cerlenko, Acting Principal Deputy General Counsel, National Security Agency
- Mr. Earnest Green, Chief of Staff, National Security Agency
- Ms. Wendy Noble, Executive Director, National Security Agency
- Ms. Marlisa Smith, Chief of Security and Counterintelligence, National Security Agency
- Ms. Elizabeth George, Acting General Counsel, Department of Defense.”

(g) “All emails to, from, or including an address ending in ‘who.eop.gov’ and ‘nsc.eop.gov’ between January 20, 2021, and April 30, 2021, containing ‘Michael Ellis’ or pertaining in whole or in part to the appointment of the General Counsel of the National Security Agency.”

(h) “All documents related to communications with members of Congress and their staffs between November 5, 2020, and April 30, 2021 related to the appointment of Michael Ellis as General Counsel of the National Security Agency; the personnel status of Mr. Ellis, including the decision to place him on administrative leave; or the NSA security inquiry of Mr. Ellis.”

(i) “All documents related in whole or in part to the NSA security inquiry of Michael Ellis regarding the handling of classified information.”

(j) “All emails to, from, or including the following individuals between January 1, 2021 and April 30, 2021, related in whole or in part to the NSA security inquiry of Michael Ellis regarding the handling of classified information

- General Mark Milley, Chairman of the Joint Chiefs of Staff

- General Paul Nakasone, Director, National Security Agency
 - Mr. George Barnes, Deputy Director, National Security Agency
 - Ms. Ariane Cerlenko, Acting Principal Deputy General Counsel, National Security Agency
 - Mr. Earnest Green, Chief of Staff, National Security Agency
 - Ms. Wendy Noble, Executive Director, National Security Agency
 - Ms. Marlisa Smith, Chief of Security and Counterintelligence, National Security Agency
 - Ms. Elizabeth George, Acting General Counsel, Department of Defense
 - Ms. Jenny Malone, Interagency Engagement Office, National Security Agency
 - Mr. Peter Hall, Interagency Engagement Office, National Security Agency
21. Neither DoD nor NSA has responded to Mr. Ellis's November 7, 2022, request.

CLAIMS FOR RELIEF

Count I

Failure to Comply with Statutory Deadlines Under the Freedom of Information Act (5 U.S.C. § 552(a)(6))

22. FOIA requires agencies to respond to requests within 20 days, excluding weekends and legal holidays. *See* 5 U.S.C. § 552(a)(6)(A)(i).

23. DoD and NSA were required to decide whether to comply with Mr. Ellis's November 7, 2022, request and to notify him of that decision by Wednesday, December 7, 2022. DoD and NSA failed to respond by December 7. Neither has responded as of the filing of this Complaint.

24. DoD OIG was required to respond to Mr. Ellis's August 4, 2022, request by Thursday, September 1, 2022. Its response on August 17, 2022, acknowledged receipt of the request but did not include any substantive response. DoD OIG has not responded substantively as of the filing of this Complaint.

25. FOIA allows an agency to extend its response deadline under “unusual circumstances” for no more than 10 additional working days with notice to the requester. *See* 5 U.S.C. § 552(a)(6)(B)(i). If an agency cannot comply with even the extended deadline, FOIA requires the agency to notify the requester of that fact and to “provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request.” 5 U.S.C. § 552(a)(6)(B)(ii). None of the Defendant Agencies has notified Mr. Ellis of unusual circumstances, provided him with an alternative time frame, or provided him with an opportunity to limit the scope of his request.

26. FOIA provides a cause of action to redress an agency’s failure to comply with statutory deadlines. *See* 5 U.S.C. § 552(a)(4)(B).

27. The Court may “enjoin the agency from withholding agency records,” “order the production of any agency records improperly withheld from the complainant,” 5 U.S.C. § 552(a)(4)(B); and “assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed,” 5 U.S.C. § 552(a)(4)(E)(i).

Count II
Failure to Produce Responsive Agency Records
Under the Freedom of Information Act
(5 U.S.C. § 552(a)(3))

28. FOIA requires agencies, upon receipt of a request, to identify responsive, non-exempt records and to “make the records promptly available” to the requester. 5 U.S.C. § 552(a)(3)(A).

29. Upon information and believe, DoD, DoD OIG, and NSA possess non-exempt agency records that are responsive to Mr. Ellis’s November 7, 2022, request.

30. Neither DoD nor NSA has produced any records to Mr. Ellis in response to his November 7, 2022, request. DoD OIG has not produced any records to Mr. Ellis in response to his August 4, 2022, request.

31. FOIA provides a cause of action to redress an agency's failure to produce responsive, non-exempt records. *See* 5 U.S.C. § 552(a)(4)(B).

32. The Court may “enjoin the agency from withholding agency records,” “order the production of any agency records improperly withheld from the complainant,” 5 U.S.C. § 552(a)(4)(B); and “assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed,” 5 U.S.C. § 552(a)(4)(E)(i).

Count III
Wrongful Denial of Access to Information
Under the Privacy Act
(5 U.S.C. § 522a(g)(1)(B))

33. The Privacy Act requires DoD, DoD OIG, and NSA to give Mr. Ellis access to his records and to information pertaining to him. *See* 5 U.S.C. § 522a(d)(1).

34. Neither DoD nor NSA has provided any records or information to Mr. Ellis in response to his November 7, 2022, request. DoD OIG has not produced any records to Mr. Ellis in response to his August 4, 2022, request.

35. The Privacy Act provides that, “[w]henver any agency . . . refuses to comply with an individual request under subsection (d)(1) of this section . . . the individual may bring a civil action against the agency.” 5 U.S.C. § 522a(g)(1)(B).

36. The Court “may enjoin the agency from withholding the records,” “order the production to the complainant of any agency records improperly withheld from him,” 5 U.S.C. § 522a(g)(3)(A); and “assess against the United States reasonable attorney fees and other litigation

costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed,” 5 U.S.C. § 522a(g)(3)(B).

PRAYER FOR RELIEF

Wherefore, Plaintiff prays that this Court:

- a. Order the Defendant Agencies immediately to conduct reasonable searches for all responsive records;
- b. Order the Defendant Agencies promptly to disclose all responsive, non-exempt records to Plaintiff;
- c. Award Plaintiff costs and attorney’s fees incurred in this action; and
- d. Grant such other relief as the Court may deem just and proper.

Dated: December 14, 2022

Respectfully submitted,
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By Counsel

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