



U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

May 22, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: *CREW v. OMB*, No. 25-cv-1051 (D.D.C.); *Protect Democracy Project v. OMB*,
No. 25-cv-1111 (D.D.C.)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has determined to refrain from defending the constitutionality of certain disclosure requirements imposed on the Office of Management and Budget (OMB) in the Consolidated Appropriations Act, 2022 (2022 Act), Pub. L. No. 117-103, Div. E, Tit. II, § 204, 136 Stat. 257. The 2022 Act mandates that OMB establish a public website to automatically disclose OMB-approved “apportionments” of appropriations. Earlier this year, OMB ceased to operate that website after concluding that the 2022 Act impermissibly infringes on the President’s authority to withhold privileged information from public disclosure. In two pending cases challenging OMB’s decision, *CREW v. OMB*, No. 25-cv-1051 (D.D.C.), and *Protect Democracy Project v. OMB*, No. 25-cv-1111 (D.D.C.), the Department has likewise taken the position that the apportionment disclosure requirements in the 2022 Act are unconstitutional. Copies of the Department’s recent filings are enclosed.

As set forth in more detail in those filings, Congress has vested the President with the authority and responsibility to “apportion” the appropriations that Congress makes available to executive agencies. 31 U.S.C. 1513(b)(1). The President has long delegated that authority to the Director of OMB. See Exec. Order No. 6166, § 16 (June 10, 1933), reprinted in *Codification of Presidential Proclamations and Executive Orders* 680 (1945-1989), as amended by Exec. Order No. 12,608, 3 C.F.R. 245 (1988 comp.). When Congress appropriates funds for a definite period, such as a fiscal year, OMB is responsible for apportioning the appropriation across increments of time within that period, such as months or fiscal quarters, and for apportioning the appropriation among the agency functions, projects, or objects for which the appropriation is available. 31 U.S.C. 1512(a) and (b)(1). OMB’s apportionment authority is an important tool for safeguarding the public fisc and for ensuring that executive agencies obligate funds in an efficient manner that is consistent with law and with the President’s priorities.

In the 2022 Act, Congress purported to require that OMB establish and operate “an automated system to post each document apportioning an appropriation” to a public website “not

later than 2 business days after the date of [OMB] approval of such apportionment.” § 204(b), 136 Stat. 257. The 2022 Act contemplates that OMB may withhold classified information from the public website but does not otherwise include any exceptions for privileged information. § 204(c), 136 Stat. 257. The following year, Congress purported to require that OMB operate the website indefinitely. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. E, Tit. II, § 204, 136 Stat. 4667.

Although OMB established such a website during the prior Administration, OMB concluded earlier this year that continuing to maintain the website would be inconsistent with the constitutional separation of powers, including the President’s authority under Article II to withhold from public disclosure certain internal Executive Branch communications. Among other constitutional defects, which are discussed in the enclosed briefs, the 2022 Act purports to require that publication of apportionments automatically occur within two business days of OMB approval. The two-day period does not afford the Executive Branch sufficient opportunity to determine whether any particular OMB-approved apportionment contains privileged information, such as information that would reveal pre-decisional deliberations regarding agency spending requests and priorities. By comparison, the Freedom of Information Act, 5 U.S.C. 552, provides at least 20 business days, plus an additional ten days in unusual circumstances, for agencies to collect, review, and produce records in response to specific requests. See 5 U.S.C. 552(a)(6)(A). In OMB’s judgment, continuing to maintain an automated system of disclosure of all apportionments within two business days of approval presents an intolerable risk of public disclosure of privileged information. For those and other reasons set forth in the enclosed filings, the Department has taken the position in the two pending cases identified above that the apportionment disclosure requirements in the 2022 Act are unconstitutional and unenforceable.

Please let me know if I can be of further assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "D. John Sauer".

D. John Sauer
Solicitor General