

**IN UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION**

FREEDOM WATCH, INC.

Plaintiff,

v.

**DEPARTMENT OF THE NAVY, ET.
AL.**

Defendants.

Civil Action No. 5:13-cv-420-OC-10PRC

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AGAINST DEFENDANTS**

INTRODUCTION

On September 4, 2013, Plaintiff Freedom Watch filed suit against Defendant Department of the Navy, Defendant Department of the Army, Defendant Department of the Air Force and Defendant Department of Defense because each and every Defendant failed to comply with the Freedom of Information Act ("FOIA") 5 U.S.C. § 552. The surviving family members of the 30 U.S. military servicemen aboard Extortion 17 who were murdered in Afghanistan on or about August 6, 2011 by Muslim jihadists and Taliban and family members have sought answers to their questions regarding the circumstances of their sons' deaths and they, along with the American people, are entitled to them. The families of our fallen heroes have requested their counsel, Plaintiff Freedom Watch, to retrieve this information through FOIA requests. Disseminating to the public the answers to these questions is a matter of great public interest and importance, as it involves how and why their sons died. Fifteen (15) U.S. servicemen on Extortion 17 were members of the elite SEAL Team VI and participated in the successful raid and capture of master terrorist Osama Bin Laden. Plaintiff Freedom Watch's FOIA provided

each and every Defendant questions with the required specificity and are entitled to the answers as a matter of law.

BACKGROUND

Plaintiff filed a FOIA request pursuant to 5 U.S.C. § 552 *et. seq* in order to obtain all documents that referred or related to 30 U.S. military servicemen who were killed in a helicopter crash in Afghanistan on or about August 6, 2011 during a mission named Extortion 17.

Specifically, Plaintiff's FOIA request sought that the Defendants:

" ...produce all correspondence, memoranda, documents, reports, records, statements, audits, lists of names, applications, diskettes, letters, expense logs and receipts, calendar or diary logs, facsimile logs, telephone records call sheets, tape recordings, video/movie recordings, notes, examinations, opinions, folders, files, books, manuals, pamphlets, forms, drawings, charts, photographs, electronic mail, and other documents and things that refer or relate in any way to the deaths of the following U.S. military servicemen who were killed in a helicopter crash in Afghanistan on or about August 6, 2011 concerning a mission named Extortion 17:

A.

- 1) Lt. Cmdr. (SEAL) Jonas B. Kelsall
- 2) Special Warfare Operator Master Chief Petty Officer (SEAL) Louis J. Langlais
- 3) Special Warfare Operator Senior Chief Petty Officer (SEAL) Thomas A. Ratzlaff
- 4) Explosive Ordnance Disposal Technician Senior Chief Petty Officer (Expeditionary Warfare Specialist/Freefall Parachutist) Kraig M. Vickers
- 5) Special Warfare Operator Chief Petty Officer (SEAL) Brian R. Bill
- 6) Special Warfare Operator Chief Petty Officer (SEAL) John W. Faas
- 7) Special Warfare Operator Chief Petty Officer (SEAL) Kevin A. Houston
- 8) Special Warfare Operator Chief Petty Officer (SEAL) Matthew D. Mason
- 9) Special Warfare Operator Chief Petty Officer (SEAL) Stephen M. Mills
- 10) Explosive Ordnance Disposal Technician Chief Petty Officer (Expeditionary Warfare Specialist/Freefall Parachutist/Diver) Nicholas H. Null
- 11) Special Warfare Operator Chief Petty Officer (SEAL) Robert J. Reeves
- 12) Special Warfare Operator Chief Petty Officer (SEAL) Heath M. Robinson
- 13) Special Warfare Operator Chief Petty Officer 1st Class (SEAL) Darrik C. Benson
- 14) Special Warfare Operator Chief Petty Officer 1st Class (SEAL/Parachutist) Christopher G. Campbell
- 15) Information Systems Technician Petty Officer 1st Class (Expeditionary Warfare Specialist/Freefall Parachutist) Jared W. Day

- 16) Master-at-Arms Petty Officer 1st Class (Expeditionary Warfare Specialist) John Douangdara
- 17) Cryptologist Technician (Collection) Petty Officer 1st Class (Expeditionary Warfare Specialist) Michael J. Strange
- 18) Special Warfare Operator Petty Officer 1st Class (SEAL/Enlisted Surface Warfare Specialist) Jon T. Tumilson
- 19) Special Warfare Operator Petty Officer 1st Class (SEAL) Aaron C. Vaughn
- 20) Special Warfare Operator Petty Officer 1st Class (SEAL) Jason R. Workman
- 21) Special Warfare Operator Petty Officer 1st Class (SEAL) Jesse D. Pittman
- 22) Special Warfare Operator Petty Officer 2nd Class (SEAL) Nicholas P. Spehar
- 23) Chief Warrant Officer David R. Carter, assigned to the 2nd Battalion, 135th Aviation Regiment (General Support Aviation Battalion)
- 24) Chief Warrant Officer Bryan J. Nichols, assigned to the 7th Battalion, 158th Aviation Regiment (General Support Aviation Battalion)
- 25) Staff Sgt. Patrick D. Hamburger, assigned to the 2nd Battalion, 135th Aviation Regiment (General Support Aviation Battalion)
- 26) Sgt. Alexander J. Bennett, assigned to the 7th Battalion, 158th Aviation Regiment (General Support Aviation Battalion)
- 27) Spc. Spencer C. Duncan, assigned to the 7th Battalion, 158th Aviation Regiment (General Support Aviation Battalion)
- 28) Tech. Sgt. John W. Brown, 33, of Tallahassee, FL.
- 29) Staff Sgt. Andrew W. Harvell, 26, of Long Beach, CA.
- 30) Tech. Sgt. Daniel L. Zerbe, 28, of York, PA.

In addition, Freedom Watch requests all autopsy reports, any and all photographs, X-rays, magnetic resonance images, and all electronic or other recordations of the remains of the above U.S. military servicemen.

B.

Furthermore, Freedom Watch requests any and all information pertaining to the following:

1. Any and all documents that refer or relate in any way to the decision to invite a Muslim cleric to pray at the ramp ceremony in Afghanistan for the above U.S. servicemen.
2. Any and all information that refers or relates to the missing "black box" which may show the reasons for the crash of the subject CH-47D helicopter mission, Extortion 17.
3. Any and all documents that refer or relate to the seven Afghani military servicemen who were originally scheduled to depart with Extortion 17 and whose names are on the official manifest.
4. Any and all documents that refer or relate to the seven Afghani military servicemen who were switched in and substituted immediately prior to departure of Extortion 17 whose names are not on the official manifest.
5. Any and all documents that refer or relate to the decision that seven Afghani military servicemen were substituted out on the flight of Extortion 17.

6. All autopsy reports, any and all photographs, X-rays, magnetic resonance images, remains, and all electronic or other recordings of the remains of the seven Afghani military servicemen who died on the flight of Extortion 17.
7. Any and all documents that refer or relate to the decision to bring the bodies of the dead Afghani military servicemen on Extortion 17 back to the U.S.'s Dover Air Force Base.
8. Any and all documents and things that refer or relate to a flash flood that allegedly washed away Extortion 17's "black box."
9. Any and all documents that refer or relate to the crash report given to the families by the U.S. military that states on May 11, 2011, over 100 Taliban planned to travel to the Tangi Valley with the express intent of shooting down a coalition force aircraft. This is from an interview of TF (redacted) HARC CHIEF opened at 2105 Zulu, 16 August 2011; Declassified on 7 September 2036. See relevant pages attached for identification purposes.
10. Any and all documents and things that refer or relate to the weather in the area of the crash of Extortion 17 on August 6, 2011 and ten (10) days thereafter.
11. Any and all documents that refer or relate to the final decision of the U.S. military to work with the Operational Coordination Group (OCG) made up of the Afghan National Army, the National Director for Security, and the National Police Force.
12. Any and all documents that refer or relate to any final decision to cremate any of the dead servicemen of Extortion 17 as well as the seven Afghan military servicemen who died on Extortion 17, including but not limited to the names and identities of the servicemen who were cremated and the reasons for their cremation.
13. Any and all documents and final decisions that refer or relate to why Admiral Eric Olson abandoned or left Afghanistan on August 8, 2011, two (2) days after the crash of Extortion 17.
14. Any and all documents and final decisions that refer or relate to why General Petraeus abandoned or left Afghanistan on August 16, 2011, ten (10) days after the crash of Extortion 17.
15. Any and all documents and final decisions that refer or relate to why Lieutenant General Joseph L Votel III abandoned or left Afghanistan immediately after the crash of Extortion 17.
16. Any and all documents and final decisions that refer or relate to employing a CH-47D Chinook helicopter, made in the 1960's and last retrofitted in the 1980's, into an active battle zone carrying 30 U.S. military servicemen.
17. Any and all documents and things that refer or relate to the public disclosure by Vice President Biden, Defense Secretary Leon Panetta and others, that SEAL Team VI was responsible for killing Osama Bin Laden.
18. Any and all documents and things that refer or relate to the cause of the attack and shoot-down of Extortion 17.
19. Any and all documents and things that refer or relate to the attack and shoot-down of Extortion 17. "

Complaint, Exhibit 1.

The same FOIA request was sent to Defendants Department of the Navy, Defendant Department of the Army, Defendant Department of the Air Force, and Defendant Department of Defense with the exception of the names of the U.S. military officers that were sent to the corresponding military branch. On an envelope postmarked November 22, 2013, the United States Central Command mailed a compact disc containing what it alleged were the responsive documents to Plaintiff Freedom Watch's FOIA request, along with a letter explaining what was included on the compact disc – the purported unclassified portion of the Report of Investigation. See Exhibit 1. Based on the letter, the agency did not perform a search for the responsive documents but merely released already unclassified and public documents. The documents from the United States Central Command were sent as a result of Plaintiff's FOIA request having been forwarded to their agency by the Department of the Army. *Id.* None of the other agencies have properly responded to Plaintiff's FOIA request.

Plaintiff Freedom Watch is entitled to summary judgment against each and every Defendant at this time, particularly as Defendants failed to produce documents responsive to Plaintiff's FOIA request in a timely manner. Defendants only provided a single compact disc two months after the filing of the Complaint. Indeed, the information contained on the compact disc is already unclassified and public knowledge. In addition, Defendants not only failed to properly claim any exemptions to Plaintiff's FOIA request but also failed to produce a "Vaughn Index" containing sufficient identifying information as to any documents Defendants claim to be exempt from production. Summary judgment should be granted and Defendants should be ordered to produce all documents to Plaintiff.

The records Plaintiff Freedom Watch seek are in the extreme public interest, are of urgent importance, and the immediate production of these documents is necessary for Plaintiff to

prepare for a congressional inquiry on behalf of its clients, which is taking place in January. The purpose of this inquiry is to disseminate information to the public about how our heroes died and why. Plaintiff Freedom Watch intends to disseminate this critical information on its website at www.freedomwatchusa.org. Since this matter is of extreme public importance, this Court should respectfully order each and every Defendant to produce all documents within ten (10) days. Moreover, this Court should also grant Plaintiff attorney fees and litigation costs because Plaintiff will substantially prevail against each and every Defendant in this action, and these Defendants have acted in bad faith.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under Rule 56 of Federal Rules of Civil Procedure:

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56.

Summary judgment is to be freely granted pursuant to Federal Rule of Civil Procedure 56 where there are no material facts genuinely at issue. *See Burka v. DHHS*, 87 F.3d 508, 514 (D.C. Cir. 1996). To prevail on a motion for summary judgment, the moving party bears the burden of establishing that there are no genuine issues of material fact and that the nonmoving party has failed to offer sufficient evidence to support a valid legal claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

SUMMARY JUDGMENT IS PROPER

The central purpose of FOIA is to "open[] up the workings of government to public scrutiny" through the disclosure of government records. *Stern v. FBI*, 737 F.2d 84 (D.C. Cir.

1984) *citing McGehee v. CIA*, 225 U.S. App. D.C. 205, 697 F.2d 1095, 1108 (D.C. Cir. 1983). Congress passed this legislation in the belief that "an informed electorate is vital to the proper operation of a democracy." *Id.*

FOIA specifically allows for this action to be brought if an agency fails to respond in a timely matter. Under 5 U.S.C. § 552 (a)(6)(C)(i):

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph.

5 U.S.C. § 552 (a)(6)(C)(i). If an agency does not respond, it is deemed "to have exhausted [Plaintiff's] administrative remedies."

A. Plaintiff's FOIA Request Sufficiently Described Documents Sought.

A FOIA document request must (i) reasonably describe such records and (ii) be made in accordance with published rules. 5 U.S.C. § 552(a)(3)(A)(i-ii). A document request that reasonably describes the records sought must "describe the records sought with 'reasonably sufficient detail' in light of both statutory guidance and case law." *Dale*, 238 F. Supp. 2d at 104. The central issue "is whether 'the agency is able to determine precisely what records are being requested.'" *Id.* (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997)).

What is simply needed under FOIA is a "description of a requested document would be sufficient [to] enable[] a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." *Truitt v. Dep't of State*, 897 F.2d 540, 545 n.36 (D.C. Cir. 1990) (quotation marks and citation omitted); *see Judicial Watch, Inc. v. Exp.-Imp. Bank*, 108 F. Supp. 2d 19, 27 (D.D.C. 2000); *Jarvik v. CIA*, 741 F. Supp. 2d 106, 115 (D.D.C. 2010).

Plaintiff's requests were unequivocally more than specific enough to meet this standard. Plaintiff sought the records of the Navy SEAL members and others of the U.S. Military who had tragically perished as a result of their helicopter being shot down by Muslim jihadists and the Taliban in August of 2011.

B. The Defendants Failed to Identify Proper Exemptions.

The government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. § 552(a)(4)(B); *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987).

Defendants have not properly claimed any exemptions to any of the documents sought by Plaintiff in the FOIA request. In fact, the Central Command letter only generally claimed exemptions, but did not state which documents the exemptions applied, or provide any possible reason for the exemptions. Further, the families of the fallen heroes, and the public, have an absolute right to all of the records, particularly as no alleged privacy rights are implicated. The information sought regarding the Afghans must be provided as well since they are not U.S. citizens and thus do not have legal rights in this regard. *See Nat'l Archives and Records Admin. v. Farish*, 541 U.S. 157 (2004).

C. Defendants Failed to Produce a Vaughn Index.

Plaintiffs legitimately and legally requested that all allegedly exempt material be identified in a Vaughn Index. The term "Vaughn Index" originated from *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), wherein the court rejected an agency's conclusory affidavit stating that requested FOIA documents were subject to exemption. *Id.* at 828. "A Vaughn Index must: (1) identify each document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure would damage the interests protected by the

claimed exemption." *Citizens Comm'n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). This detailed affidavit " 'permit[s] the court system effectively and efficiently to evaluate the factual nature of disputed information.' " *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 149 n.2 (1989) (quoting *Vaughn*, 484 F.2d at 826).

In the meager and already public released information on the one CD that was produced, the majority of documents contained one or more portions that were redacted and claimed exempt, but there was no Vaughn Index provided. Given the importance of the requested documents and records for the families and the public, since the filing of this lawsuit Defendants have produced nothing more than a single highly redacted compact disc of documents that had been previously released. It appears that no new search of responsive documents had ever been performed. Klayman Affidavit ¶ 5. Defendants are thus in clear violation of FOIA. 5 U.S.C. § 552 *et. seq.*

D. Attorney's Fees Are Proper.

Moreover, attorney's fees and other litigation costs should also be granted. Under 5 U.S.C. § 552(a)(4)(E)(i), "[t]he court may 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." "[T]he goal of encouraging litigation of meritorious FOIA claims is doubtlessly furthered by reimbursing the legal fees of all complainants who substantially prevail and who meet the traditional criteria -- even those complainants, such as corporations or states, who could finance their own lawsuit." *Texas v. ICC*, 935 F.2d 728, 731 (5th Cir. 1991). "By its terms, FOIA's fees provision applies to all "complainants" who have 'substantially prevailed.'" *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312, 324 (D.C. Cir. 2006). Here, Plaintiff substantially prevails because Defendants have no legal basis to

counter Plaintiff's claims, and even more egregiously have obviously acted in bad faith. The Defendants simply refused to perform a search for responsive documents as required under FOIA law. Thus, due to Defendants' clear failure to follow the law, all litigation costs, including but not limited to attorney's fees, filing fees, postage, and so forth should now be awarded to Plaintiffs. Plaintiff is a public interest organization with limited resources and their family clients could not afford legal representation were it not for Freedom Watch's public interest services. The amount of money required to regrettably now have to litigate a FOIA lawsuit to redress Defendants' stonewalling and obstruction strains the resources of Plaintiff Freedom Watch should respectfully be reimbursed for the amount that it has spent compelling the Defendants into complying with the law.

CONCLUSION

Plaintiff consulted with Defendants and each and every Defendant opposed the motion for summary judgment. For the foregoing reasons, Plaintiff respectfully requests that this Court grant summary judgment against each and every Defendant and order Defendants to produce all documents and records within ten (10) business days with a full fee waiver. In addition, attorney's fees and litigation costs should be awarded as Plaintiff will substantially prevail with its suit and Defendants, even more egregiously, have acted in bad faith with regard to honoring its legal commitments to the families of these fallen national heroes. The public also has a right to this information, as the inadequately and in fact unexplained deaths of these Navy Seals, special ops and other servicemen is a tragedy for all Americans.

Dated: December 31, 2013

Respectfully Submitted,

/s/ Larry Klayman
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