DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO
5720
Ser 14/493
October 4, 2017

Mr. Robert Hammond
(b) (6) [redacted]
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SUBJECT: APPEAL OF FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY-2017-008847, FOIA APPEAL DON-NAVY-2017-010608

This letter responds to the subject FOIA appeal that was received by our office on September 6, 2017.

In your original FOIA request to the Department of the Navy dated July 25, 2017, you requested (1) the "SOP FOIA Quarterly Reports and Consolidation Proces[,]" (2) all "four quarterly FOIA Reports submissions emails for Fiscal Year 2013 to the DON PA/FOIA Office from any submitter[,]" and (3) a copy of your request. In your appeal, you raise five issues to be addressed. First, you assert that the DON PA/FOIA Office improperly withheld reports from the Walter Reed National Military Medical Center (WRNMMC). Second, you assert that the DON PA/FOIA Office improperly redacted records under FOIA exemption (b)(6). Third, you assert that DON PA/FOIAOffice improperly withheld the first and second quarterly FOIA reports. Fourth, you assert that the DON PA/FOIA Office improperly withheld the SOP FOIA Quarterly Reports and Consolidation Process. And fifth, you assert that the DON PA/FOIA Office improperly withheld a copy of your request.

Your appeal is a request for a final determination under the FOIA. For the reason set forth below, your appeal is granted in part and denied in part. I address the issues you raised in your appeal below.

First, WRNMMC is an echelon 3 command and does not submit emails or FOIA reports directly to the DON PA/FOIA Office. As such, in light of your specific request, the decision not to provide or search for records submitted by WRNMMC was reasonable.

Second, I find that DON PA/FOIA Office's use of FOIA exemption (b)(6) was appropriate because your request does not demonstrate a sufficient public interest in disclosure of personal information. FOIA exemption (b)(6) allows the Government to

withhold information about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. This requires a balancing of personal privacy interests against the public interest served by disclosure – whether the release of the information will shed light on the agency's performance of its statutory duties. An unwarranted invasion of personal privacy is one where disclosure would compromise a substantial privacy interest. *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). A substantial privacy interest is anything more than a de minimus one. *Multi AG Media LLC v. U.S. Dep't of Agric.*, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008). If the Court finds a substantial privacy interest exists, it then analyzes the public interest in that record's release. *Id.* The requested record must relate to FOIA's central purpose by producing information that reveals what "the government is up to," with the requester having the burden of establishing that the disclosure of personal information serves a public interest. *AP v. U.S. Dep't of Justice*, 549 F.3d 62, 66 (2d Cir. 2008). In the Office of the Secretary of Defense memorandum, "Withholding of Information that Personally Identifies DoD Personnel," dated 1 September 2005, the Office of the Secretary of Defense set forth a policy that "in general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above." This policy is a result of the Office of the Secretary of Defense's earlier memorandum, "Withholding of Personally Identifying Information Under the Freedon of Information Act (FOIA)," dated 9 November 2001, which articulated a "heightened interest in the personal privacy of DoD personnel that is concurrent with the inreased security awareness demanded in times of national emergency." Given the fact that terrorist organizations have been mining social media within the past two years for purposes of targeting military personnel, these concerns are just as troubling now as in 2001. Courts have routinely rejected disclosure of names when there is an insufficient showing of public interest in disclosure. *See Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *see also Schoenman v. FBI*, 573 F. Supp. 2d 119, 149 (D.D.C. 2008) (concluding individuals' name was properly withheld where requester's alleged public interest "is simply not the public interest cognizable under FOIA Exemption [6]"). Lastly, the fact that privacy information may have been improperly released in the past does not prohibit protecting that information at this time. The DON FOIA/PA Office conducted its own review of the requested records, and reasonably made redactions based on the information contained in those records. However, by copy of this letter, I am directing DON FOIA/PA Office to reevaluate and remove the redactions that cover individuals who are publically-posted FOIA representatives/coordinators or those who are serving as designated Initial Denial Authorities.

Third, the requested records concerning the first and second quarterly FOIA reports were no longer in the filing system maintained by the DON PA/FOIA Office. Secretary of the Navy Manual 5210.1 only requires such reports to be maintained for two years,

and the General Records Schedule 04-2 only requires such reports to be maintained for three years. All responsive reports for fiscal year 2013 were provided.

Fourth, the DON FOIA/PA Office released a record titled, "FOIA DON 17-A FY 2-13 Quarterly FOIAI [sic] Report SOP and Emails RU." Despite the title of this record, it actually contained a redacted version of your request. By copy of this letter, I am directing the DON FOIA/PA Office to reevaluate the responsive records found in response to your request for the SOP to ensure that such records are produced.

Fifth, as indicated above, the DON FOIA/PA Office did release a redacted copy of your request on August 28, 2013 on FOIA Online under the record titled, "FOIA DON 17-A FY 2-13 Quarterly FOIAI [sic] Report SOP and Emails RU."

By copy of this correspondence, I have directed the DON FOIA/PA Office to take two actions described above. That office will respond directly to you and will give you an opportunity to appeal its FOIA release decisions to this office.

Regarding another FOIA matter, on September 28, 2017, my office received e-mail correspondence from you alleging that your FOIA appeal DON-NAVY-2015-000246 was closed in a manner that you believe calls into question "BUMED, DON JAG, DON FOIA processes and reporting through DOD to the Attorney General of the United States[.]" You further requested that DON leadership address your allegations concerning "the accuracy and integrity of the BUMED/DON FOIA process and reporting of this Request/Appeal and whether or not there is willful false reporting plus an attempt to cover up same."

On November 16, 2015, I issued a final determination on your FOIA appeal DON-NAVY-2015-000246 by my letter 5720, Ser 14/050. My final determination letter partially granted and partially denied your underlying FOIA request. The final determination letter also enclosed 18 pages of documents responsive to your request, and advised you of your right to seek judicial review of my final determination if you so desired. I transmitted the final determination letter to your physical mailing address with a courtesy copy to your e-mail address. My office also uploaded the final disposition correspondence into FOIA Online. The act of mailing you the final determination closed FOIA appeal DON-NAVY-2015-000246 effective November 16, 2015.

In a review of FOIA Online, we discovered that your 2015 FOIA appeal DON-NAVY-2015-000246 was incorrectly closed in the FOIA Online system. Because your appeal was already properly disposed of on November 16, 2015, the corresponding entry in FOIA Online was likewise closed. While your receipt of FOIA Online system-generated notifications regarding an appeal disposed of in 2015 may be frustrating to you, such communication through FOIA Online in no way lends credence to your allegations set

forth above. Rather, the system is keeping you fully informed of our activity in the system. I apologize for any inconvenience or confusion resulting from our efforts to update the FOIA Online system. Should you have any questions or concerns regarding this situation, please feel free to contact my office.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for this final decision. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. government and is therefore unable to assist you in this process.

If you would like to seek dispute resolution services, you have the right to contact the the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at christopher.a.julka@navy.mil or (703) 697-0031.

If you have further questions or concerns for my office, my point of contact is LCDR Adam Inch, JAGC, USN, who may be reached at adam.inch@navy.mil or (202) 685-5452.

Sincerely,

G. E. LATTIN
Director
General Litigation Division

Attachment:
Your FOIA Appeal Letter of September 6, 2017

Copy to:
DNS-36
DON CIO