



Thomas Curley
Associate General Counsel

May 25, 2021

VIA EMAIL AND FIRST CLASS MAIL

Ms. Joo Chung
Director of Oversight and Compliance
Office of the Secretary of Defense
ODCMO Directorate for Oversight and Compliance
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Re: FOIA Appeal No. J-21-0101

Dear Ms. Chung:

I write on behalf of Tom Vanden Brook, Pentagon correspondent for USA TODAY. Please accept this correspondence as an appeal of the denial of Mr. Vanden Brook's request pursuant to the Freedom of Information Act, 5 U.S.C. § 552 *et seq.* ("FOIA") for expedited processing of his records request for copies of notices of the proposed resolution issued by the Chief Complaints Management Adjudication for the National Guard Bureau to State Equal Employment Opportunity (EEO) Managers from January 1, 2011 to present.

The Department denied Mr. Vanden Brook's request for expedited processing and provided an estimated completion date of February 28, 2023, approximately two years from the date of Mr. Vanden Brook's initial request. A copy of the Department's denial is attached.

While we are mindful of the burden on agencies in responding to FOIA requests, and of delays resulting from the pandemic, a two-year delay is not permitted under FOIA and the request should be processed more quickly. We respectfully request the Department process Mr. Vanden Brook's request promptly and release the records he has requested. Furthermore, if any part of the requested documents can be released while this appeal is pending, we ask that those records be released now, with the remaining records to follow on a rolling basis.

FOIA is meant to guarantee prompt access to government records. To that end, FOIA gives agencies a limited time period to produce records and up to a maximum of 30 days in which to respond to an appeal. 5 U.S.C. § 552(a)(6)(A)(ii). When an agency fails to respond within that statutory timeframe, it has constructively denied the records request or appeal and the requester may proceed immediately to federal court. *See, e.g., Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990); *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013). In addition, FOIA provides for the recovery attorneys' fees where a request has been

constructively denied by delay. *See, e.g., Batton v. IRS*, 718 F.3d 522, 526 (5th Cir. 2013) (“Only after [requester] filed and served this lawsuit did the IRS first begin to produce a fraction of the responsive documents[.] ... Accordingly, we conclude that [requester] is eligible to receive attorneys’ fees.”).

Although we understand the Department has a backlog of FOIA requests, Mr. Vanden Brook’s request is nevertheless entitled to expedited processing. Under FOIA, expedited processing is required “with respect to a request made by a person primarily engaged in disseminating information” where “a compelling need for expedition may be shown by demonstrating an ‘urgency to inform the public concerning actual or alleged Federal Government activity.’” *ACLU v. United States DOJ*, 321 F. Supp. 2d 24, 27-28, 2004 U.S. Dist. LEXIS 9381, *7-8 (D.D.C. May 10, 2004) (citing FOIA § 552(a)(6)(E)(v)(II)).

Here, there can be little doubt that allegations of racial discrimination and sexual assault within the National Guard have been, and continue to be, of widespread public concern, as is the manner in which those claims have been investigated by Guard units. The particular records sought by Mr. Vanden Brook pursuant to FOIA are one of the few gauges of substantiated claims of discrimination and how the individual States address them.

Indeed, the handling of discrimination and harassment complaints by state National Guard officials has attracted intense scrutiny from Congress and the news media, and has even raised related concerns about the possibility of white supremacist views among some Guard members.

- For example, as USA TODAY recently reported, the Maryland National Guard was rebuked by the National Guard Bureau for mishandling the racial discrimination and harassment complaint brought by Sgt. Bruce Weaver. Weaver, a Black Guardsman, had been required to wear a heavy chain during Officer Candidate School training. His complaint of discrimination and harassment was rejected by the Maryland National Guard but substantiated by the National Guard Bureau. *See* <https://www.usatoday.com/in-depth/news/politics/2021/04/14/military-claims-racism-black-national-guardsman-made-wear-chain/4376143001/> (“Weaver’s case represents a wider problem for the National Guard whose units in each of the states, territories and District of Columbia operate with a great deal of autonomy and with little oversight of how various units respond to complaints of inappropriate conduct, such as allegations of racism, sexual harassment and assault.”).
- A Black Guardsman in Tennessee alleged similar racist treatment during his service, as Task & Purpose reported. *See* <https://taskandpurpose.com/news/video-racism-tennessee-national-guard/> (“A former Tennessee National Guardsman described a disturbing culture of racism within the guard and a failure to take action against it, according to a YouTube video he posted over the weekend. In a nearly-15 minute-long video, William Louis Kyle, Jr., a Black man with the YouTube username Wil Kyle, detailed frequent racist interactions he had with white members of the Tennessee National Guard, saying that they led him to attempt suicide.”).
- And an Ohio National Guardsman was recently discharged for expressing views about white supremacy, according to the Washington Post. *See*

https://www.washingtonpost.com/national-security/soldiers-cases-highlight-reach-of-white-extremism-into-us-military/2020/06/25/0203532e-b582-11ea-9b0f-c797548c1154_story.html (“Simpson is one of several service members whose actions have come under scrutiny in recent months as the U.S. military grapples with white extremism in its ranks. The military has wrestled with the problem for decades, but the issue is receiving new attention amid a broader conversation about race and discrimination prompted in part by the death of George Floyd, a black civilian who was killed in police custody last month.”).

- *See also Cap Times Investigation on Sexual Assault in National Guard Sparks Federal Hearing and Initiatives*, THE CAPITAL TIMES (Madison, Wisconsin), May 19, 2021 (“Responding to an investigation by the Cap Times and Milwaukee Journal Sentinel, a key Congressional leader says she will hold hearings this summer to address the chronic problem of sexual assault in the National Guard. ... A Cap Times/Journal Sentinel investigation in March revealed a decades-long pattern of Guard units in states nationwide burying sexual harassment and assault allegations, withholding crucial documents from victims and retaliating against women who have come forward.”).
- *Probe of New Jersey National Guard discrimination launched*, ASSOCIATED PRESS, May 18, 2015 (“Former federal prosecutor and state comptroller Matthew Boxer is looking into complaints made by four senior Guard officers that two generals are discriminating against minorities, stunting the careers of their critics and rewarding loyalists with promotions and other opportunities.”).
- *Rape jokes, vindictive culture in ‘old boys club’ at Horsham’s Air National Guard Station*, THE PHILADELPHIA INQUIRER, July 29, 2020 (“On National Guard bases, changing the male-dominated culture can be particularly difficult because, unlike active-duty bases, guardsmen often climb the ranks and work alongside each other for years or decades, rather than moving from one base to another. ... Sexual misconduct scandals have recently been reported within the National Guard in Florida, Wisconsin, Vermont and Minnesota.”).

Several members of Congress have spoken out recently about the subject as well, including Senator Tammy Duckworth of Illinois, a member of the Senate Armed Services Committee:

“Stories like these are painful reminders of how much work remains to make our military a safe and welcoming place for all service members,” Duckworth said. “As the Chair of the Airland Subcommittee, I am focused on rooting out these kinds of degrading and discriminatory incidents that harm our troop readiness and national security. We need greater diversity in the upper ranks of our military leaders, and we need leaders of all backgrounds, genders and races to send a clear message that they won’t tolerate discrimination of any kind.”

Similarly, Representative Jackie Spier of California, Chair of the House Armed Services Military Personnel Subcommittee, has recently stated that “Congress must get serious about addressing rampant racism in the military, and throughout our country and society, as well as ending the ‘good old boys club’ mentality that continues to result in injustice and abuse.”

The above-cited articles and statements by public officials are only a sample of the widespread public interest and attention devoted to the subject of Mr. Vanden Brook's FOIA request. Accordingly, his FOIA request is entitled to expedited processing and we respectfully request the Department reconsider its denial. *See, e.g., ACLU v. United States DOJ*, 321 F. Supp. 2d 24, 31-32, 2004 U.S. Dist. LEXIS 9381, *19-20 (D.D.C. 2004) ("The articles cited by plaintiffs in their request ... demonstrate that the manner and frequency of the government's use of section are matters of 'widespread and exceptional media interest.' Although plaintiffs presented only a handful of articles, they were published in a variety of publications, and repeatedly reference the ongoing national discussion about the" subject of the FOIA requests.); *ACLU of N. Cal. v. United States DOD*, 2006 U.S. Dist. LEXIS 36888, *18-19, 2006 WL 1469418 (N.D. Cal. 2006) ("At the time of the request, news organizations were competing with each other to get the latest scoop on the TALON program. Such intense scrutiny validated plaintiffs' argument that Bay Guardian felt a legitimate 'urgency to inform' the public about the program. ... Many of these articles appeared in multiple publications, based in such disparate places as New York City, Wisconsin and Santa Cruz."); *Gerstein v. CIA*, 2006 U.S. Dist. LEXIS 89847, *18-19 (N.D. Cal. 2006) (granting expedited processing where requester "seeks documents concerning the government's ongoing efforts to address leaks of classified information, an issue that is not only newsworthy, but was the subject of an ongoing national debate at the time he made his FOIA requests.").

We thank the Department for its consideration of this appeal.

Sincerely,

/s/ Thomas Curley

Thomas Curley

Enclosure

Cc: Tom Vanden Brook (via email) (without enclosure)