

EXHIBIT 7



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November 7, 2023

The Judge Advocate General (Code 14)
1322 Patterson Avenue SE, Suite 3000
Washington Navy Yard, DC 20374-5066

SUBJECT: FOIA Appeal DON-NAVY-2023-002479

Sent via electronic mail to: usn.ncr.dns.mbx.don-foia-pa@us.navy.mil

On December 5, 2022, I submitted a request under the Freedom of Information Act and the Privacy Act seeking, on behalf of my client, LT Craig R. Becker, information pertaining to the Navy's decision to recommend against asserting jurisdiction in LT Becker's case involving the death of his wife, as well as the ultimate decision by the Secretary of Defense to assert jurisdiction. The Navy assigned tracking number DON-Navy-2023-002479 to the request.

In a letter dated January 12, 2023 (though not sent to our office via DOD SAFE until February 8, 2023), the Navy provided "428 pages of documents that are responsive to your request. 290 pages of those documents are redacted pursuant to FOIA exemptions (b)(5) and (b)(6). 138 pages of those documents are withheld in their entirety pursuant to FOIA exemption (b)(5)."

Of the 290 pages provided by the Navy in response to the request, over 80 are redacted in their entirety and numerous pages of emails are completely redacted with the exception of the date and the subject line. In fact, the bulk of the non- or slightly-redacted documents provided by the Navy are a copy of the U.S.-Belgium Mutual Legal Assistance Treaty (53 pages in several languages) and copies of correspondence sent by LT Becker's defense attorneys to Senators and Congressmen in an effort to get the U.S. to assert jurisdiction.

On February 20, 2023, I submitted an appeal. Given the redactions by the Navy, it was nearly impossible for my client to determine the responsiveness of its reply. We requested the Navy review its response, review and release the redacted documents and the withheld documents. Having heard no response, we sent a follow up letter to your office on June 23, 2023.

In addition, we had sent a similar request to U.S. European Command on that same date. In response, we received documents from the Northern Law Center in Belgium. The Northern Law Center informed us it had sent to the Navy documents that it found responsive but were within the authority of the Navy to determine releasability. The Northern Law Center also indicated that it had Bates numbered the documents from "NLC NAVY 0001" to "NLC NAVY 0199" and "NLC NAVY 0200" to "NLC NAVY 0382". On May 15, 2023, I sent a letter to the Navy requesting that it release those documents to me. My office exchanged a series of emails with

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the Navy in which they stated the documents were under review and provided ever-changing dates for a decision.

On October 25, 2023, the Navy FOIA/PA Program Office sent a “final response” to our December 5, 2022 request. The letter was accompanied by three sets of documents. One was labeled “RLSO 4.26.23 Responsive Records_Non Duplicative_Redacted”. The second was labeled “OJAG 3.2.23 Code 13 Responsive Records_Redacted”, and the third was labeled “OJJAG 6.14.23 NLC Responsive Docs Redacted”. Group 1 was six pages, completely redacted with the exception of three pages of an email chain in which 5 sentences and signature blocks (without names) were readable. Group 2 was 114 pages. Pages 2-71 were redacted in their entirety, pages 72-106 were highly redacted emails, some of which appear to concern a news story that the San Diego Union-Tribune was planning to write regarding LT Becker’s case. Curiously, there is an August 11, 2017 email from RADM John Hannink to the Secretary of the Navy and the Chief of Naval Operations titled “Media interest-Navy member overseas”. VADM James Crawford is “cc’d” on the email and reply from the Chief of Naval Operations. Yet, during LT Becker’s court-martial, the government represented to the court and the defense that there were no emails in VADM Crawford’s records that referred to LT Becker. The final pages, 107-114 are also redacted in their entirety. The third group consists of the documents sent to the Navy by the Northern Law Center. Of the 382 documents, you only released 82. Of those, pages 1-4 were completely redacted, pages 5-64 are heavily redacted emails that seem to mention interaction with Belgian authorities and the effort to cede jurisdiction, pages 65-81 are redacted in their entirety, and page 82 is the French-language translation of Secretary Mattis’s letter denying the Navy’s request to cede jurisdiction.

As noted in your response letter: “The OJAG Code 13 conducted a search of their local and electronic files and located 723 pages of documents responsive to your request. Upon review of the OJAG’s documents it was determined that 492 pages of those documents are redacted pursuant to FOIA exemptions (b)(5) and (b)(6). 93 pages of those documents were duplicative and have previously been released to you by the Office of the Judge Advocate General (OJAG), National Security Law Division (Code 10). 138 pages of those documents are withheld in their entirety pursuant to FOIA exemption (b)(5)”.

As rationale for withholding 138 pages of documents in their entirety (and apparently for redacting others), you stated “The documents contain instances of deliberative process privileged material, are predecisional in nature, and/or contain working versions of documents, and are thus exempt from disclosure under 5 U.S.C. § 552(b)(5). These records contain frank and open discussion on predecisional matters. Due to the sensitive nature of such discussions, disclosure could discourage such forthright discussion on future reviews, impairing the decision-making process. Therefore, those portions are exempt from disclosure.”

I respectfully request that you review the redactions and the documents withheld in their entirety. It seems unlikely that all of the redactions and withheld documents consist entirely of “deliberative process privileged material, are predecisional, or contain working documents. As the Court of Appeals for the District of Columbia noted in *Mead Data Cent., Inc. v. Dep’t of the Air Force*, “factual material must be disclosed but advisory material containing opinions and recommendations may be withheld.” *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d

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242, 256 (D.C. Cir. 1977). Your response withheld 138 pages of documents and completely redacted over 100. It is unlikely that every word on each of those pages was not factual, but was opinion or recommendation. To imply that the FOIA allows the withholding of entire documents merely because a portion may be exempt from disclosure, overlooks entirely the "segregable portions" clause of the Act. "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b). "[E]ven if the agency establishes an exemption, it must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record[s]." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167, 395 U.S. App. D.C. 340 (D.C. Cir. 2011).

It is well-established law that a plaintiff in a FOIA case is entitled to an index of the documents and/or portions of documents that have been withheld by the defendant agency. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Moreover, the description of the withheld material must be "sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Dir. 1979). Of course, we are not in the litigation context yet, but to help avoid such an eventuality, it would certainly be helpful if the Navy was to provide such an index if it decides to continue withholding of any portions of the requested documents.

Finally, because disclosure would be in the public interest, the Navy should release any materials which happen to be covered by exemption five by utilizing its discretionary release powers, as stated in SECNAV Instruction 5720.42G. In discussing the public interest in overcoming a FOIA exemption and ordering release, the Supreme Court stated: "a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *United States DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 776 (1989.) In this instance there is a public interest in knowing how the government operates to protect the rights of servicemembers deployed overseas.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. 5 U.S.C. § 552(a)(6)(ii) and 32 CFR § 286.11. If you have any questions, please feel free to contact me at 202 546-9575 or at davidsheldon@militarydefense.com. Thank you for your assistance.

Respectfully,

David P. Sheldon

David P. Sheldon
Attorney for LT Craig Becker

Attachments

1. Initial Request
2. Denial letter