

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**BRETT O'BRIEN** )  
1250 Connecticut Avenue NW, Suite 700 )  
Washington, District of Columbia 20036 )

Plaintiff, )

V. )

**DEPARTMENT OF VETERAN AFFAIRS** )  
810 Vermont Avenue NW )  
Washington, DC 20420 )

Defendant )

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Copies to: )  
Matthew M. Graves )  
U.S. Attorney for the District of Columbia )  
555 4th Street, NW )  
Washington, DC 20530 )

Attorney General of the )  
United States )  
U.S. Department of Justice )  
950 Pennsylvania Avenue )  
Washington, District of Columbia 22314 )

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

For its Complaint, Brett O'Brien ("Mr. O'Brien"), by undersigned counsel, states as follows:

**FREEDOM OF INFORMATION ACT ACTION**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, seeking the release of agency records requested by O’Brien from the Department of Veterans Affairs.

2. This action challenges the Department of Veterans Affairs failure to disclose and release documents and records in response to the Plaintiff’s FOIA request dated January 29, 2024 and faxed to their offices on January 31, 2024 (the “Request”).

3. Pursuant to 5 U.S.C. §552, the Department of Veterans Affairs owed the Plaintiff a response to his FOIA request within 20 business days. The Department of Veterans Affairs failed to provide a response by February 28, 2024, the 20th business day.

4. On February 29, 2024, the undersigned received a letter dated February 15, 2024 from the Department of Veterans Affairs wherein the FOIA exemption 5 U.S.C. 552 § (b)(6) was invoked.

5. On March 5, 2024, the undersigned forwarded an appeal of the FOIA response to the Department of Veterans’ Affairs, Office of General Counsel.

6. The Department of Veterans Affairs failure to respond within the 20 day time limit shall be deemed “to have exhausted his administrative remedies with respect” to the Plaintiff’s FOIA request. Pursuant to 5 U.S.C. §552(a)(6)(C)(i), Mr. O’Brien has exhausted his administrative remedies.

7. Mr. O’Brien respectfully requests that the Court order the Department of Veterans Affairs to immediately disclose and release all records responsive to the Request, and enjoin the Department of Veterans Affairs from withholding from disclosure certain records of the Department of Veterans Affairs within their possession and control.

### PARTIES

8. The Plaintiff is a U.S. citizen who resides in Cleveland, Ohio and who has his office at 1250 Connecticut Avenue NW, Suite 700, Washington, D.C. 20036.

9. The Department of Veterans Affairs is a federal government agency within the meaning of 5 U.S.C. §552(f)(1).

### JURISDICTION

10. The Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §1331.

11. Venue is proper in this Court pursuant to 5 U.S.C. §552(a)(4)(B) as the Defendant, the Department of Veterans Affairs Headquarters are located within the District of Columbia.

### BACKGROUND

12. On or about January 31, 2024, the Plaintiff submitted a FOIA request to the Department of Veterans Affairs requesting the following documentation related to the Plaintiff's denial of veteran benefits: "(1) All email correspondence, notes, annotations, written documents, and any transcribed communication, or record found in the electronic system that manages the Veterans Administration's disability system to include doctor opinions, nurses notes and adjudicator's notes. (2) Any and all notes, supporting documentation or VA opinions from any adjudicators that work on Brett O'Brien's case." A true and accurate copy of the FOIA submission and INSCOM's acknowledgement letter are enclosed herein as **Exhibit A**.

13. On February 15, 2024, the Plaintiff received a letter from the Department of Veterans Affairs acknowledging receipt of the Plaintiff's request. A copy of their acknowledgement letter is enclosed herein as **Exhibit B**.

14. On March 5, 2024, the undersigned forwarded an appeal of the FOIA response to the Department of Veterans' Affairs, Office of General Counsel. **Exhibit C.**

15. On March 5, 2024, the Office of the General Counsel for the Department of Veterans' Affairs provided an acknowledgement of the Plaintiff's appeal and assigned the appeal OGC case #: 169686. **Exhibit D.**

16. To date, Plaintiff has not received a response from the VA OGC regarding his appeal.

### **LEGAL FRAMEWORK FOR THE FOIA AND PRIVACY ACT**

17. The Freedom of Information Act (FOIA) provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, *shall* make the records promptly available to any person." 5 U.S.C. § 552(a)(3) (emphasis added). Thus, FOIA creates a presumption that records held by the federal government must be produced to members of the public upon request.

18. Section 552(d) expressly provides that it "does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Thus, records may only be withheld if they fall within one of Section 552's enumerated exemptions.

19. Records may only be withheld or redacted under the Privacy Act if they fall within one of the enumerated exemptions in subsections (j) or (k), or an exemption under (d)(5).

20. Lastly, upon receipt of an individual's request under FOIA and/or the Privacy Act, under (a)(6)(A)(i), the agency must "determine within 20 days (excepting Saturdays, Sundays, and legal public holidays)... whether to comply with such request and shall immediately notify

the person.” The time limit may be extended by written notice to the person making the request if “unusual circumstances” apply, but such extension would not be authorized to exceed ten working days.

21. The “unusual circumstances” permitted under (a)(6)(B) of the statute would include: (1) the need to search and collect documents from offices separate from the office processing the request; (2) the need to search and collect a large volume of records; or (3) the need to consult with another agency (or a separate subdivision of the same agency) having a substantial subject-matter interest in the request.

**COUNT 1**  
**(Violation of FOIA - Failure to Comply with Statutory Deadlines)**

22. O’Brien incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

23. The Department of Veterans Affairs' failure to respond to O’Brien’s Appeal violated the statutory deadline imposed by the FOIA in 5 U.S.C. §552(a)(6)(A)(ii).

24. O’Brien has exhausted all applicable administrative remedies with respect to its FOIA Request. A true and accurate copy of the initial request, the VA’s response, and the appeal of the VA’s response is enclosed as **Exhibit A, B and C** respectively.

25. O’Brien is entitled to declaratory and injunctive relief compelling the release and disclosure of the documents and records requested from the Department of Veterans Affairs.

26. WHEREFORE, Plaintiff requests this Court award him the following relief: (1) declare that Defendants violated the FOIA Act; (2) order Defendants to immediately disclose the requested records; (3) award Plaintiff reasonable cost and attorney’s fees as provided in 5 U.S.C. §552a(g)(3)(B); and (4) grant such other relief as the Court may deem just and proper.

**COUNT II**

**(Violation of the Privacy Act, 5 U.S.C. §552a )**

27. Plaintiff realleges paragraphs 1 through 26 as if fully stated herein.

28. Plaintiff is an individual seeking access to information about himself.

29. Any documentation in the possession, custody, and control of Defendants is a record maintained in a system of records, as described 5 U.S.C. §552a(a)(4)- (5).

30. Upon information and belief, there are records responsive to Plaintiff's requests that are being withheld in full, and Defendants violated 5 U.S.C. §552a. Defendants are wrongfully withholding records and information requested.

31. Plaintiff has exhausted all required and available administrative remedies.

32. Plaintiff has a legal right under the Privacy Act to obtain the information he seeks, and there is no legal basis for Defendants' denial of said right; Defendants' refusal to provide Plaintiff with the requested records amounts to a deprivation of Plaintiff's federal rights.

33. The Defendants' failure to respond to Plaintiff's FOIA requests violated the statutory deadline imposed by the Privacy Act.

34. WHEREFORE, Plaintiff requests this Court award him the following relief: (1) declare that Defendants violated the Privacy Act; (2) order Defendants to immediately disclose the requested records; (3) award Plaintiff reasonable cost and attorney's fees as provided in 5 U.S.C. §552a(g)(3)(B); and (4) grant such other relief as the Court may deem just and proper.

**COUNT III**

**(Violations of the Administrative Procedures Act,  
38 U.S. Code § 105)**

35. The Plaintiff adopts and incorporates by reference paragraphs 1 through 34 as fully stated.

36. United States Title 38 Section 105 specifically states, “An injury or disease incurred during active military, naval, air, or space service will be deemed to have been incurred in line of duty and not the result of the veteran’s own misconduct when the person on whose account benefits are claimed was, at the time the injury was suffered or disease contracted, in active military, naval, air, or space service, whether on active duty or on authorized leave...”

37. O’Brien provided the VA with a copy of the Army’s Line of Duty Investigation on or about August 20, 2023. The Line of Duty Investigation found that O’Brien’s Hairy Cell Leukemia was “In the Line of Duty.”

38. Based on this information, O’Brien should have been granted a disability rating for the cancer and the subsequent injuries incurred as a result of the cancer (eyesight, neuropathy, etc...).

39. The disability rating should be applied retroactively to approximately January 2022 when the claim was first made.

40. The VA blatantly disregarded the Army’s Line of Duty and denied O’Brien’s VA claim, “Service connection for this condition remains denied as the evidence continues to show this condition was not incurred in or aggravated by military service.” A true and accurate copy of the Line of Duty is enclosed as **Exhibit E**.

41. The VA was arbitrary and capricious in misapplying 38 U.S. Code § 105 and thereby denying O’Brien pay and benefits that he is entitled to.

42. WHEREFORE, Plaintiff is entitled to relief in the form of a declaratory order that Defendants are in violation of their regulation and an injunction compelling Defendant pursuant to the APA to follow all laws, regulations, and applicable policies.

**COUNT IV**  
**(Violations of the Administrative Procedures Act,**  
**38 CFR Chapter 1, Part 3)**

43. The Plaintiff adopts and incorporates by reference paragraphs 1 through 42 as fully stated.

44. The VA in their January 25, 2024 decision cited 38 CFR 3.303, 38 CFR 3.304, and 38 CFR 3.306 as the basis for the denial of O'Brien's VA disability claim; however, none of those statutes invalidate the Army's Line of Duty investigation.

45. 38 CFR Chapter 1, Part 3 specifically states, "***In line of duty*** means an injury or disease incurred or aggravated during a period of active military, naval, air, or space service unless such injury or disease was the result of the veteran's own willful misconduct or, for claims filed after October 31, 1990, was a result of his or her abuse of alcohol or drugs. ***A service department finding that injury, disease or death occurred in line of duty will be binding on the Department of Veterans Affairs unless it is patently inconsistent with the requirements of laws administered by the Department of Veterans Affairs.***" [emphasis added]

46. O'Brien provided the VA with a copy of the Army's Line of Duty Investigation on or about August 20, 2023. The Line of Duty Investigation found that O'Brien's Hairy Cell Leukemia was "In the Line of Duty."

47. The VA was arbitrary and capricious in misapplying their laws and regulations in denying O'Brien benefits he was entitled to based upon the Army's Line of Duty investigation.

48. Based on this information, O'Brien should have been granted a disability rating for the cancer and the subsequent injuries incurred as a result of the cancer (eyesight, neuropathy, etc...).

49. The VA blatantly disregarded the Army's Line of Duty and denied O'Brien's VA



claim by stating, “Service connection for this condition remains denied as the evidence continues to show this condition was not incurred in or aggravated by military service.” A true and accurate copy of the VA denial letter is included as **Exhibit F**.

50. WHEREFORE, Plaintiff is entitled to relief in the form of a declaratory order that Defendants are in violation of their regulation and an injunction compelling Defendant pursuant to the APA to follow all laws, regulations, and applicable policies.

**COUNT IV**  
**(Violations of the Administrative Procedures Act,**  
**38 CFR 3.303, 38 CFR 3.304, and 38 CFR 3.306)**

51. The Plaintiff adopts and incorporates by reference paragraphs 1 through 50 as fully stated.

52. The VA in their January 25, 2024 decision later cited 38 CFR 3.303, 38 CFR 3.304, and 38 CFR 3.306 as the basis for the denial of O’Brien’s VA disability claim; however, none of those statutes invalidate the Army’s Line of Duty investigation. In fact, those regulations support that if the service finds the Servicemember in the Line of Duty that all pay and benefits associated with the injury would follow.

53. O’Brien provided the VA with a copy of the Army’s Line of Duty Investigation on or about August 20, 2023. The Line of Duty Investigation found that O’Brien’s Hairy Cell Leukemia was “In the Line of Duty.”

54. The VA was arbitrary and capricious in misapplying 38 CFR 3.303, 3.304, and 3.06 to deny O’Brien benefits he was entitled to based upon the Army’s Line of Duty investigation.

55. Based on this information, O’Brien should have been granted a disability rating for the cancer and the subsequent injuries incurred as a result of the cancer (eyesight,

neuropathy, etc...).

56. The VA blatantly disregarded the Army's Line of Duty and denied O'Brien's VA claim, "Service connection for this condition remains denied as the evidence continues to show this condition was not incurred in or aggravated by military service."

57. WHEREFORE, Plaintiff is entitled to relief in the form of a declaratory order that Defendants are in violation of their regulation and an injunction compelling Defendant pursuant to the APA to follow all laws, regulations, and applicable policies.

**PRAYER FOR RELIEF**

O'Brien respectfully requests that the Court:

58. Declare the Department of Veterans Affairs failure to comply with FOIA to be unlawful;

59. Declare the Department of Veterans Affairs failure to comply with Privacy Act to be unlawful;

60. Declare that the Department of Veterans Affairs failure to comply with the Administrative Procedures Act to be unlawful;

61. Order the Department of Veterans Affairs to produce all responsive records without further delay or charge;

62. Order the Department of Veterans Affairs to accept the Army's Line of Duty Investigation and to find that O'Brien's Hairy Cell Leukemia was in the Line of Duty thereby making it eligible for compensation;

63. Issue an order invalidating the Department of Veterans Affairs findings, based upon 38 CFR Chapter 1, Part 3, that O'Brien's Hairy Cell Leukemia was not in the Line of Duty;

64. Award O'Brien attorneys fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. 5§52(a)(4)(E); and

65. Grant such other relief as the Court deems just and proper.

Dated: April 9, 2024

Respectfully submitted,

By: /s/ Brett J. O'Brien  
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