

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
ODESSA DIVISION

ROBERT KASPER,

Plaintiff,

v.

DEPARTMENT OF  
VETERAN AFFAIRS,

Defendant.

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Civil Action No. 7:16-cv-104

**COMPLAINT**

Plaintiff Robert Kasper, a Vietnam Veteran who suffers from exposure to Agent Orange while he served his country, brings this action against Defendant, the Department of Veteran Affairs (“the VA”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, and the Privacy Act, 5 U.S.C. §552a, for injunctive and declaratory relief. He seeks to obtain records he requested from Defendant that the VA itself requires to file a properly completed claim for service-connected disability benefits. Mr. Kasper requested his veteran claims file from the VA through both a FOIA and Privacy Act request over nine months ago, but Defendant has not yet sent him a single responsive document. As long as the VA refuses to produce the records, it prevents Mr. Kasper from successfully filing a claim, receiving disability benefits, and limits his access to adequate medical assistance for his medical condition.

**PARTIES**

1. Plaintiff, Robert Kasper, is a resident of Ector County, Texas.
2. Defendant, the VA, is a department of the United States Federal Government under the supervision of the Executive Branch. The VA is an “agency” within the meaning of FOIA, 5 U.S.C. §552(f). Defendant can be served by delivering a copy of the summons and complaint by registered or certified mail to both the Department of Veterans Affairs and the United States. FED. R. CIV. P.

4(i)(2), 5. To serve the Department of Veterans Affairs, service may be addressed as follows: U.S. Department of Veterans Affairs, c/o Leigh A. Bradley, Office of General Counsel, 810 Vermont Avenue NW, Washington, D.C. 20420. To serve the United States, more specifically, Plaintiff must either (i) deliver a copy of the summons and complaint to the U.S. attorney for the district where the action is brought or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the U.S. attorney's office. FED. R. CIV. P. 4(i)(1)(A). Service via either of these avenues may be made to the following: Richard L. Durbin, Jr., U.S. Attorney's Office, 400 West Illinois Street, Suite 1200, Midland, TX 79701. Finally, Plaintiff must additionally send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C. FED. R. CIV. P. 4(i)(1)(B). To serve the Attorney General, service may be addressed as follows: Loretta E. Lynch, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, D.C. 20530). *Service is requested.*

### **JURISDICTION**

3. This court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §§552(a)(4)(B), 552(a)(6)(C)(i), 552a(g)(1), and 552a(g)(5). This court also has jurisdiction over this action pursuant to 28 U.S.C. §1331 because it arises under federal law.

4. Because Mr. Kasper resides in Ector County, Texas, within the bounds of the Western District of Texas, venue is proper in this district under 5 U.S.C. §§552(a)(4)(B) and 552a(g)(5).

### **FACTUAL ALLEGATIONS**

5. Robert Kasper served in the United States Navy in Vietnam in the late 1960s and early 1970s. After serving his country, the Navy honorably discharged Mr. Kasper under a favorable record with thanks for his military service.

6. During his service in Vietnam, Mr. Kasper was exposed to Agent Orange, which has caused him serious medical complications. Mr. Kasper wishes to properly present his case to receive certain

benefits from the VA, including medical care to treat the illnesses he sustained while serving his country. However, he cannot do so unless and until he receives his veteran claims file, which is only available from Defendant, the sole custodian of these important records.

7. The VA has previously determined that many of the individuals who served in the military in the Vietnam War between 1962 and 1975 are presumed to have been exposed to Agent Orange, a toxic herbicide used in Vietnam from 1962 to 1970 that often causes severe illnesses for those exposed to it. Recently, the VA came out with a ruling declaring that not only are those service members who were stationed on land or in waters close to the land presumed to have been exposed to Agent Orange, but so, too, are those service members who were stationed in waters further out from the Vietnam coast.

8. Mr. Kasper served in the U.S. Navy and was stationed in Vietnam from 1969 to 1975. According to the VA, therefore, he now has a substantial basis for health care benefits from the VA for Agent Orange exposure, but Defendant has denied them on multiple occasions due to an alleged lack of sufficient evidence. Mr. Kasper very much wants to access any evidence there may be to get a fair hearing, but Defendant is the only entity that has access to this information.

9. About two years ago, Mr. Kasper filed a request for health benefits to Defendant with the assistance of Disabled American Veterans, a veteran service organization. Mr. Kasper was pleased to learn that Defendant reopened his claim for medical benefits because he was able to prove that his condition was clinically diagnosed. However, in order to succeed with that claim, Mr. Kasper learned he must provide further evidence connecting his medical condition to his military service. Mr. Kasper is, of course, unable to provide evidence of such a connection because he lacks access to the medical information contained in his veteran claims file, which is in the sole custody of Defendant.

10. On or around June 24, 2015, Mr. Kasper submitted his intent to file a claim to provide new evidence in support of his claim for health benefits. Mr. Kasper has only a year from June 24, 2015, to complete his claim application with supporting documents.

11. Without the information contained in his veteran claims file, Mr. Kasper has little chance of succeeding in his claim. Defendant has access to all of the records that would show his military history and exposure to risks and injuries.

12. On or about July 1, 2015, Mr. Kasper's attorney of record with the VA submitted a request under FOIA to Defendant requesting his veteran claims file on his behalf pursuant to 5 U.S.C. §552. He requested information on "any documents pertaining to any benefits claims [Mr. Kasper] has filed" and specifically indicated that he sought inclusion of all "the evidence compiled, his medical documents, and any decision rendered." Mr. Kasper reasonably described the records he requested and his request was made in accordance to all published rules and procedures.

13. After almost three months without a response from Defendant, Mr. Kasper's attorney called Defendant about his FOIA request, in which Defendant ensured her that it had received Mr. Kasper's FOIA request. Mr. Kasper also sent a letter requesting assistance with his FOIA and Privacy Act requests. He did not receive any response from Defendant or any information about his right to appeal.

14. Mr. Kasper has already constructively exhausted all of the applicable administrative remedies and is not subject to actual exhaustion requirements with respect to his FOIA request because Defendant did not adhere to the statutory time requirements of FOIA and has not provided Mr. Kasper with any information regarding his right to appeal.

15. Defendant did not respond to either Mr. Kasper's FOIA request or his Privacy Act request within 20 days. In fact, it did not respond to him even within twenty weeks. In the end, Defendant failed to adequately answer Mr. Kasper's FOIA and Privacy Act requests at all. In a letter dated

December 2, 2015, the VA's Record Management Center acknowledged receipt of his FOIA and Privacy Act requests.

16. The December 2, 2015, letter stated, in relevant part, that Defendant:

will begin searching for records responsive to [Mr. Kasper's] request and notify [Mr. Kasper] of the results of the search and our next steps in processing your request. [Defendant] will grant you access to the requested records, if found, providing the records are not exempted from disclosure by law. Any releasable sections of the requested records shall be provided to you after redaction of the parts that are exempt. Your request will be processed in the order of receipt. You may expect to receive a response as soon as possible.

17. Since last year, Defendant has still failed to respond any further to Mr. Kasper's FOIA and Privacy Act requests. Defendant has neither complied with the request and provided Mr. Kasper with his veteran claims file, nor denied the request and informed him of the reasons for the denial and his right to appeal. Nor did Defendant ever attempt to toll the 20-day period for responding to Mr. Kasper's records request or opt to extend the 20-day time limit for responding to Mr. Kasper's records request because of unusual circumstances. Defendant never provided Mr. Kasper an opportunity to modify his request or the time limit within which the VA would respond to his request. Indeed, to date, Defendant has refused to send Mr. Kasper or his attorney any other written communication since its letter dated December 2, 2015, which was a wholly inadequate determination of Mr. Kasper's FOIA and Privacy Act requests.

18. Meanwhile, Mr. Kasper has only one year from the date upon which the VA received his disability compensation claim for service-connected disability—until June 24, 2016—to submit his completed claim. Without the information he has requested from his veteran claims file, Mr. Kasper is unlikely to be successful.

19. Moreover, if Mr. Kasper is unable to submit his completed claim by June 24, 2016, he will lose the opportunity to be compensated for the year. The VA may compensate him only from the date upon which the agency received his completed application, rather than from the date upon

which the agency received his intent to file. As long as Defendant wrongfully withholds Mr. Kasper's veteran claims file, it prevents him from receiving any compensation for treatment.

20. Defendant's failure to provide Mr. Kasper with his veteran claims file also negatively affects his health. He does not have money to pay for proper treatment himself, but would be able to seek better treatment if he is successful in his claim. Mr. Kasper is currently foregoing proper treatment because he cannot afford it. Mr. Kasper's illness is life-threatening and will not improve without medical assistance. By wrongfully withholding Mr. Kasper's veteran claims file, Defendant is preventing Mr. Kasper from receiving adequate medical assistance.

21. Mr. Kasper has a genuine need and reason for urgency to obtain the documents he has requested from his veteran claims file ahead of prior applicants. Defendant has not shown due diligence in processing Mr. Kasper's individual request. Defendant has forced Mr. Kasper to wait over nine months for Defendant to respond to his FOIA and Privacy Act requests, more than fifteen times longer than Defendant, by law, should have responded to his request. Defendant has not only failed to timely comply with the law's deadlines, but it has wrongfully withheld records responsive to Mr. Kasper's request.

## **CAUSES OF ACTION**

### Violation of the Freedom of Information Act

22. Mr. Kasper repeats and re-alleges paragraphs 1 through 21.

23. On or about July 1, 2015, Mr. Kasper's attorney, on his behalf, submitted a FOIA requesting his veteran claims file from Defendant pursuant to 5 U.S.C. §552.

24. The request submitted to Defendant reasonably described the records requested and was made in accordance to published rules and procedures, as required under 5 U.S.C. §552(a)(3)(A).

25. Defendant acknowledged receipt of Mr. Kasper's FOIA and Privacy Act requests. Pursuant to 5 U.S.C. §552(a)(6)(B), Defendant had twenty days in which to respond to Mr. Kasper's FOIA request, yet failed to do so.

26. Defendant has not exercised its statutory option to toll the 20-day period for responding to Mr. Kasper's records request either under 5 U.S.C. §552(a)(6)(A)(i)(I) or 5 U.S.C. §552(a)(6)(A)(i)(II). Nor has Defendant exercised its statutory option to extend the 20-day time limit for responding to Mr. Kasper's records request because of "unusual circumstances" as provided under 5 U.S.C. §552(a)(6)(B)(i). Defendant has not provided Mr. Kasper an opportunity to modify his request or the time limit within which the VA would respond to his request, both of which are required under 5 U.S.C. §552(a)(6)(B)(ii) should an agency choose to take such an extension to the normal 20-day time-limit under 5 U.S.C. §552(a)(6)(B). Indeed, to date, Defendant has not sent Mr. Kasper any other written communication since its letter dated December 2, 2015.

27. As a result, Defendant's December 2, 2015, letter remains the only response from Defendant and is a wholly inadequate determination of Mr. Kasper's FOIA request. *See* 5 U.S.C. §§552(a)(3)(A), (a)(6)(A)(i).

28. Even though it is not required under the law, Mr. Kasper has exhausted all administrative remedies with respect to his FOIA request to Defendant, as provided under 5 U.S.C. §552(a)(6)(C)(i): he has made a proper records request under FOIA and waited 20 days for Defendant to respond. While not required to do so, Mr. Kasper even took the additional proactive measures of both calling Defendant and sending it a letter requesting that it respond to his FOIA and Privacy Act requests. Despite his efforts, Defendant to this day has refused to send him either a response or any further communication beyond Defendant's December 2, 2015 letter.

29. Defendant has all of the documents Mr. Kasper needs to complete his claim for benefits. He has less than two months to submit his completed claim by Defendant's deadline, and the VA puts

him at imminent risk of losing the opportunity to make a claim at all for his injuries this year. Thus, Mr. Kasper falls into both of the “two occasions” that Congress intended to reserve the role of the courts for FOIA requests: (1) when the agency was not showing due diligence in processing a plaintiff’s individual request or was lax overall in meeting its obligations with available resources, and (2) when a plaintiff can show a genuine need and reason for urgency in gaining access to government records ahead of prior applicants for information.

30. While Defendant withholds the information he has requested in his veteran claims file, Mr. Kasper cannot file his completed disability compensation claim by June 24, 2016, and thus demonstrates both a need and urgency for his requested records. As Congress stated, “information is often only useful if it is timely,” and “excessive delay” by agencies made it necessary that they “be required to respond to inquiries and administrative appeals within specific time limits.” *Cazalas*, 660 F.2d at 621 (5th Cir. 1981), quoting H.R. Rep. No. 93-876 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6271).

31. Defendant has wrongfully withheld records requested by Mr. Kasper by failing to abide by the statutory time limit for the processing of a FOIA request, and thereby violated FOIA, 5 U.S.C. §552(a)(6)(A)(ii).

#### Violation of the Privacy Act

32. Mr. Kasper repeats and re-alleges paragraphs 1 through 30.

33. On or about July 1, 2015, Mr. Kasper’s attorney, on his behalf, submitted a letter under FOIA requesting his veteran claims file from Defendant pursuant to 5 U.S.C. §552.

34. The request submitted to Defendant reasonably described the records requested and was made in accordance to published rules and procedures as required under 5 U.S.C. §552(a)(3)(A).



35. On or about September 15, 2015, Mr. Kasper's attorney, on his behalf, submitted a second letter to Defendant requesting his veteran claims file under both FOIA and the Privacy Act, pursuant to 5 U.S.C. §552.

36. By letter dated December 2, 2015, Defendant acknowledged receipt of Mr. Kasper's FOIA and Privacy Act requests. Pursuant to 5 U.S.C. §552a(d)(1), Defendant had an obligation to permit Mr. Kasper to gain access to his requested veteran claims file to review and/or copy it, yet failed to do so.

37. Since its letter dated December 2, 2015, Defendant has not sent Mr. Kasper any other written communication.

38. As a result, Defendant's December 2, 2015, letter remains the only response from Defendant and is a wholly inadequate response to Mr. Kasper's Privacy Act request. *See* 5 U.S.C. §552a(d)(1).

39. Defendant has wrongfully withheld records requested by Mr. Kasper by failing to permit Mr. Kasper to gain access to his requested veteran claims file to review and/or copy it, and thereby violated the Privacy Act. 5 U.S.C. §552a(d)(1).

### **JURY DEMAND**

40. Mr. Kasper respectfully demands a trial by jury.

### **RELIEF REQUESTED**

#### Injunctive Relief

41. Mr. Kasper still wishes to complete the disability compensation claim for which he submitted his intent to file on or about June 24, 2015. Further, he wishes to—and, in fact, must—do so within one year of submitting his intent to file, as required by the VA. However, Defendant has caused him to justifiably fear that it will fail to produce the records he requested in a timely manner,

if it produces them at all, and thus prevent him from using the information in his veteran claims file to submit his completed disability compensation claim by the June 24, 2016 deadline.

42. Plaintiff respectfully asks the Court to grant a permanent injunction that compels Defendant to release immediately—and in no case later than a reasonably sufficient time before June 24, 2016—the information Mr. Kasper requested so that he may use the information in his veteran claims file to submit his completed disability compensation claim on time.

43. Mr. Kasper further requests that the Court grant a permanent injunction compelling Defendant to abide by the 20-day timeline for responding to all records requests under the FOIA, including those made not only by Mr. Kasper, but also by any individual.

44. Defendant and its members have caused Mr. Kasper to suffer, and he will continue to suffer, irreparable injury in the denial of his rights under both the Freedom of Information Act and Privacy Act as a proximate result of Defendant's actions and inactions. Unless injunctive relief is granted, Plaintiff will continue to suffer immediate and irreparable injury for which there is no remedy at law.

45. Mr. Kasper is entitled to injunctive relief concerning the release and disclosure of the requested documentation pursuant to 5 U.S.C. §§552(a)(4)(B) and 552a(g)(3)(A).

#### Declaratory Relief

46. This suit involves an actual controversy within the Court's jurisdiction, and the Court can and should declare Defendant has violated the rights of Plaintiff under FOIA and the Privacy Act.

#### Attorneys' Fees and Costs

47. Mr. Kasper is entitled to recover reasonable attorneys' fees, litigation fees, and court costs, as allowed by the laws above, including 5 U.S.C. §§552(a)(4)(E)(i) and 552a(g)(3)(B).

#### **PRAYER FOR RELIEF**

WHEREFORE, Mr. Kasper prays that this Court:

A. Issue injunctive relief by ordering Defendant to release immediately—and in no case later than a reasonably sufficient time before June 24, 2015—the information Mr. Kasper requested so that

he may use the information in his veteran claims file to submit his completed disability compensation claim and by ordering Defendant to abide by the 20-day timeline for responding to all records requests under the FOIA;

- B. Enter declaratory relief for Mr. Kasper by declaring Defendant in violation of 5 U.S.C. §§552 and 552a;
- C. Award Mr. Kasper reasonable attorneys' fees, expenses, and costs incurred in this action, as permitted under 5 U.S.C. §§552(a)(4)(E)(i) and 552a(g)(3)(B); and
- D. Grant such other relief as the Court may deem just and proper.

DATED: April 27, 2016

Respectfully Submitted,

/s/ Cassandra Champion

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