

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

FEB 21 2017

at 4 o'clock and 20 min. PM
SUE BEITIA, CLERK

ORIGINAL

CV 17 00077 LEK (KJM)
CASE NO. CV 00077 LEK (KJM)

Jury Trial: NO

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

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PLAINTIFFS)

- v. -)

DEPARTMENT OF VETERANS' AFFAIRS)
810 Vermont Ave. N.W.)
Washington D.C. 20420)

DEFENDANT)

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF;
SUMMONS**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs SANDRA LEE DEMORUELLE and JOSEPH LOUIS DEMORUELLE,
Pro Se, a married couple, for their complaint against Defendant UNITED STATES

DEPARTMENT OF VETERANS' AFFAIRS ("DVA" or "VA"), allege as follows:

- 1) This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, seeking to have FOIA search fees waived or substantially reduced as mandated by 5 U.S.C. 552(a)(4)(A)(iii) for disclosure and release of agency records by Defendant, Department of Veterans' Affairs. (That provision applies when "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operation or activities of the government and is not primarily in the interest of the requester.")
- 2) Plaintiffs allege that for a third time in the past two years (*see* HID CV15-00246-LEK-KSC and CV16-00562-LEK-KJM), Defendant DVA has admittedly violated FOIA by failing to adhere to FOIA's 20-workday time limit for reaching a determination on their appeals of VAPIHCS' improper denial of their original request for a public-interest fee waiver as "the 20-working-day time limit also applies to the agency's internal appeals process." (*Bensman v National Park Service*, 806 F.Supp.2d 31, 38 (DDC 2011)) "To underscore Congress's belief in the importance of the statutory time limit, the 2007 Amendments declare that '[a]n agency shall not assess

search fees ... it the agency fails to comply with any time limit of FOIA ss 552(a)(4)(A)(viii) (emphasis added).” (Id.)

- 3) The VA PIHCS FOIA Officer Allison Tanaka denied a waiver of the following VAPIHCS FOIA search fees and the dates DVA received the Plaintiffs’ administrative appeals:

January 10, 2017, Initial Agency Decision for Freedom of Information Act Request Search Fees of \$584.86 (OGC #55078 Appeal for Fee Waiver dated 1/18/2017): FOIA #17-03660-F; 17-03853-F; 17-03856-F; 17-03658-F; and 17-03855-F.

January 4, 2017, Initial Agency Decision for Freedom of Information Act Requests Fees of \$256.03 (OGC #54986 Appeal for Fee Waiver received 1/9/2017): FOIA #17-03374-F; 17-03376-F; and 17-03378-F.

December 23, 2016, Initial Agency Decision for Freedom of Information Act Requests with Search Fees of \$1064.17(OGC # 54982 Appeal for Fee Waiver received 12/29/2016): FOIA #17-03361-F; 17-03369-F; 17-03371-F; 17-03372-F; 17-03373-F; 17-03374-F; 17-03376-F; 17-03377-F; 17-03378-F; 17-03415-F; 17-03521-F; 17-03520-F; and 17-03550-F.

December 21, 2016, Initial Agency Decision for Freedom of Information Act Requests with Search Fees estimated at \$261.40 (OGC #54984 Appeal for Fee Waiver received 12/29/2016): FOIA #17-03367-F; 17-3187-F; 17-03189-F; [17-03379-F in IAD and Plaintiffs' appeal letter of 12/23/16, but not in OGC Appeal initial reply).

December 19, 2016, Initial Agency Decision for Freedom of Information Act Request (OGC #54985 Appeal for Fee Waiver received 12/21/2016): FOIA #17-02775-F.

- 4) The DVA Office of General Counsel sent Plaintiffs acknowledgment of receipt of their FOIA Appeals, but has failed to provide a timely determination on their appeal of denial of the fee waivers within the 20-working-day FOIA time limit, so no search fees shall be assessed by VAPIHCS for provision of the requested records (5 USC 552(a)(6)(A)(ii)).
- 5) The dates OGC received the Plaintiffs' appeals were 12/21/2016 OGC #54985 Appeal for Fee Waiver; 12/29/2016 OGC #54984 Appeal for Fee Waiver; 12/29/2016 OGC # 54982 Appeal for Fee Waiver; 1/9/2017 OGC #54986 Appeal for Fee Waiver; 1/18/2017 OGC

#55078 Appeal for Fee Waiver. The final (1/18/2017) 20-working-day FOIA time limit, so no search fees shall be assessed, ended on February 16, 2017, leaving Plaintiffs no recourse but this lawsuit asking this Court to compel DVA to comply with the law.

PARTIES

- 6) PLAINTIFFS JOSEPH LOUIS DEMORUELLE and SANDRA LEE DEMORUELLE, natural-born citizens of the United States of America, are and, at all times relevant, were residents of the County and State of Hawaii.
- 7) DEFENDANT DEPARTMENT OF VETERANS' AFFAIRS is a Federal agency within the meaning of 5 U.S.C. 552 (f)(1). Defendant DVA has its principal place of business in the District of Columbia. Defendant DVA has possession of the agency records to which Plaintiffs seek access.

BASIS FOR JURISDICTION AND VENUE

- 8) This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 USC 552(a)(4)(B)

FOIA. This Court also has jurisdiction over this action pursuant to 28 USC 1331 (a) (Federal question).

- 9) Venue is properly vested in this Court pursuant to 28 USC 1391(c) and 5 USC 552(a)(4)(B).

FACTUAL BACKGROUND

- 10) Plaintiff Joseph Demoruelle, a Veteran who was a combat infantryman awarded a Bronze Star during the War in Vietnam, was rated 100% permanent service-connected combat-disabled in a Board of Veteran Appeals decision in November 1989. Since that date, the Plaintiff has been receiving benefits from the DVA and filing Beneficiary Travel (“BT”) Reimbursement Claims on DVA Form 10-3542 since June 13, 2014.
- 11) From 2014 through to the present day, Plaintiffs have been seeking to review and amend errors in Personally Identifiable Information (“PII”) that DVA has obtained through Plaintiff Joseph Louis Demoruelle’s submissions of Beneficiary Travel Reimbursement claims.
- 12) Because the VA Pacific Islands Health Care System (“PIHCS”) BT Office has admittedly lost the May 26, 2016 physical BT 10-3542 claim along with the accompanying supporting documents, provided improper BTR payments and otherwise mishandled Plaintiffs’ BT reimbursement claims, the

Plaintiffs sought to review the underlying administrative operations and activities of the Beneficiary Travel Office through a well-developed plan (*Citizen Initiative to Reduce Improper Payments*) that required specific information that formed the Plaintiffs' FOIA requests for records (listed in CIRIP Appendix A).

- 13) The difficulty obtaining VAPIHCS records that has resulted in Plaintiffs' two other FOIA suits¹ also has them sending FOIA requests to determine the policies and procedures in place as compared to the actual operations and activities at the VAPIHCS FOIA Office.
- 14) These records requested under the FOIA have not been produced because Allison Tanaka, FOIA Officer for VAPIHCS and Rebecca Dominy, VISN21 FOIA Officer, have denied either a news media classification or a fee waiver of imposed search fees based on "*significant* public interest" and "dissemination" of the requested information, and, when appealed, the DVA Office of the General Counsel remained non-responsive for over 20 work days, exhausting the Plaintiffs administrative remedies and forcing this instant litigation.

¹ HID CV15-00246 LEK-KSC and CV16-00562 LEK-KJM.

FOIA and Fee Waiver

- 15) FOIA mandates fee waiver or reduction when “disclosure of the [requested] information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.” 5 USC 552(a)(4)(A)(iii). (A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations; or otherwise confirms or clarifies data on past or present operations of the government.” 132 Cong. Rec. H9464 (Reps. English and Kindness)).
- 16) The FOIA history shows all fees should be waived whenever a requester is seeking information on how a government agency is carrying out its operations, or how its policies or activities affect the public, including the Plaintiffs.
- 17) However, as in *Bensman*, the Court is not called upon to determine the merits of the evidence in the administrative record that was before the agency at the time of its decisions regarding the Plaintiffs’ right to a “public interest” fee waiver, as the agency has failed to comply with

the appeal 20-workday time limit. (*See Lawyers Comm. For Civil Rights v US Dept. of Treasury*, No. 07-2590, 2009 WL (N.D. Cal. Sept. 8, 2009)(Defendant waived its right to object to plaintiff's request for a fee waiver where it failed to respond within twenty days of the request.)

STATEMENT OF CLAIM

A. DEFENDANT FAILED TO PROVIDE A TIMELY DETERMINATION ON PLAINTIFFS' APPEALS

Count 1.

- 18) Plaintiffs hereby incorporate all the allegations contained in paragraphs 1 through 17 above.
- 19) The suit concerns only the issues of whether Defendant properly handled Plaintiffs' fee waiver requests and respectfully requests that the Court find that DVA exceeded FOIA's 20-working-day time limit with respect to Plaintiffs' internal appeals so that Defendant cannot assess fees for its search and rendering moot the question of whether Plaintiffs adequately justified their significant public-interest contribution under FOIA.

REQUESTED RELIEF

- 20) WHEREFORE, Plaintiffs Sandra and Joseph Demoruelle request that the Court award them the following relief:
- (a) order Defendant to waive all search fees and to disclose all the requested non-exempt records in their entireties and make copies available to Plaintiffs;
 - (b) enjoin Defendant from withholding responsive agency records under Plaintiffs' FOIA/PA requests in the future;
 - (c) enjoin agency from pattern and practice of no agency response or delayed response to Plaintiffs' FOIA/PA requests;
 - (d) provide for expeditious proceeding in this action;
 - (e) award Plaintiffs their costs and reasonable attorney's fees, as incurred in this action;
 - (f) grant such other relief as the Court may deem just and proper.

CERTIFICATION AND CLOSING

- 21) Under Federal Rule of Civil Procedure 11, by signing below, we certify to the best of our knowledge, information, and belief that this complaint: (1) is not being presented for an improper purpose, such as

to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) is supported by existing law or by nonfrivolous argument for extending, modifying, or reversing existing law; (3) the factual contentions have the evidentiary support of Exhibits 1 through 5 which document the OGC acknowledgment of the Plaintiffs' FOIA fee waiver appeals; and (4) the complaint otherwise complies with the requirements of Rule 11.

- 22) We agree to provide the Clerk's Office with any changes to our address where case-related papers may be served. We understand that our failure to keep a current address on file with the Clerk's Office may result in the dismissal of our case.

Dated: February 17, 2017 at Naalehu, Hawaii

Plaintiff:

A handwritten signature in black ink that reads "Sandra Lee Demoruelle". The signature is written in a cursive style with a large initial 'S'.

Sandra Lee Demoruelle, *Pro Se*

Plaintiff:

A handwritten signature in black ink that reads "Joseph Louis Demoruelle". The signature is written in a cursive style with a large initial 'J'.

Joseph Louis Demoruelle, *Pro Se*