

EXHIBIT 13

LAW OFFICES
OF
BRUZZESE & CALABRIA LLC

SINCLAIR BUILDING, 10TH FL.
P.O. BOX 1506
STEUBENVILLE, OHIO 43952

FRANK J. BRUZZESE
MICHAEL J. CALABRIA
EMANUELA AGRESTA
JANE M. HANLIN
JEFFREY J. BRUZZESE

TELEPHONE: 282-5323
TELEPHONE: 283-3711
FAX: 282-5328
AREA CODE: (740)

October 11, 2016

Director-Office of Information Policy (OIP)
United States Department of Justice-Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

RE: FREEDOM OF INFORMATION ACT APPEAL-FOIA REQUEST 2012-4837

TO: THE DIRECTOR

Please consider the Appeal of Jon R. Rogers, who hereby appeals the denial of FOIA Request No. 2012-4837 (self-specific records).

THE APPEAL

On behalf of Jon R. Rogers (the "Requester"), I am hereby filing this appeal from the September 26, 2016 denial of FOIA Request No. 2012-4837. [A copy of the U.S. Department of Justice-EOUSA denial letter, dated September 26, 2016, is enclosed.]

As is demonstrated by the April 29, 2013 letter from Susan B. Gerson to Jon R. Rogers, the U.S. Department of Justice *agreed* to process Jon's Request No. 12-4837, and charged him \$548.00 as an advance payment for search (at \$28 per hour) and duplication (at \$0.10 per page) for the 2,500 responsive pages. [A copy of the U.S. Department of Justice-EOUSA denial letter, dated April 29, 2013, is enclosed.]

With my letter to EOUSA, dated May 2, 2013, I sent Jon's \$548.00 check and the Instruction Form (signed by Jon), as instructed. [A copy of my May 2, 2013 letter and copy of the check and copy of the Instruction Form are enclosed.]

Thereafter, I sent the Reminder Letters of June 6, 2013 and July 22, 2013 and September 18, 2013 and March 18, 2014. [Copies of those Reminder Letters are enclosed.]

It is my client's position that the U.S. Department of Justice (EOUSA) entered into an agreement to produce the responsive records and that Jon paid \$548.00 as consideration for the promise to

search for and copy the records. Therefore, that agreement is enforceable, and it supersedes and supplants the August 1, 2012 Stipulation and Settlement Agreement upon which the U.S. Department of Justice-EOUSA relies in its denial letter, dated September 26, 2016.

REQUEST FOR MEDIATION SERVICES

By copy of this letter to the Office of Government Information Services-National Archives and Records Administration (OGIS), 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001 (via e-mail at ogis@nara.gov and via ordinary U.S. Mail and via Fax) I am requesting mediation of this appeal.

GROUND FOR APPEAL

A: THE FOIA: THE GOAL IS BROAD DISCLOSURE

The Freedom of Information Act protects the fundamental right of a citizen in a free society to learn what the government is doing and why, subject only to specified exceptions. The FOIA was enacted to "pierce the veil of administrative secrecy and to open agency actions to the light of public scrutiny. *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014). The *dominant objective* of the Act is the general philosophy of full agency disclosure (not secrecy), unless the information falls under a clearly delineated exemption. *Rugiero v. United States Department of Justice* (2001) 257 F. 3d 538; *Dep't of the Air Force v. Rose*, 425 U.S. 352, 360-61, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976)

B: THE WRONGFUL NATURE OF THE DENIAL

The denial of this FOIA Request:

- (a) frustrates the "dominant objective of the Act," and raise a steel door "veil of administrative secrecy," which is the exact opposite of the letter and spirit of FOIA; and,
- (b) breaches the agreement made by the government, when it agreed to process the FOIA Request and accepted Jon's payment of \$548.00 as payment in full of the consideration demanded by the government for the search and duplication of responsive records.

C. THE U.S. DEPARTMENT OF JUSTICE (EOUSA) WAIVED THE AUGUST 1, 2012 STIPULATION AND SETTLEMENT AGREEMENT BY ITS SUBSEQUENT CONDUCT

As the Sixth Circuit has explained in *MoonScoop Sas v. Am. Greetings Corp.*, 489 F. App'x 95, 100 at 106 (6th Cir. 2012), "[u]nder Ohio law, a party *may waive* contractual terms by intentionally *acting in a manner inconsistent* with the claimed right and thereby be estopped from insisting upon it." A party waives even "the right to literal compliance with the terms of the contract by engaging in actions or a course of conduct inconsistent with literal compliance." *Id.* at 106. In the instant case, the EOUSA waived its right to raise "release," because, since the beginning of its review of Petitioner's FOIA request, the EOUSA acted in a manner inconsistent

with literal compliance with the former Stipulation and Settlement Agreement, upon which it belatedly relies.

The EOUSA accepted the Petitioner's FOIA request, processed it, responded to it, and **accepted payment in full** for the search and duplication of responsive records. Then, after waiting more than 3 years.....all the while, failing to assert a belief that Petitioner's FOIA claim should be barred ...the EOUSA now breaches its agreement, after accepting payment in full.

The EOUSA should be held accountable for its waiver of the former Stipulation and Settlement Agreement by its subsequent words and conduct.

[¶29] "[W]aiver of a contract provision may be express or implied." [Citation omitted] " "[W]aiver by estoppel" exists *when the acts and conduct of a party are inconsistent with an intent to claim a right*, and have been such as to *mislead the other party* to his prejudice and thereby estop the party having the right from insisting upon it." [Citation omitted.] "Waiver by estoppel allows a party's inconsistent conduct, rather than a party's intent, to establish a waiver of rights." [Citation omitted.]

[¶30] Whether a party's inconsistent conduct constitutes waiver involves a factual determination, [Citation Omitted] and such a factual determination is properly made by the trier of fact.

Lewis & Michael Moving and Storage, Inc. v. Stofcheck Ambulance Serv., Inc., 2006 Ohio 3810 (10th Dist.), quoting *Natl. City Bank v. Rini*, 162 Ohio App. 3d 662, 2005 Ohio 4041, ¶24, 834 N.E.2d 836 (11th Dist.). See also *Tritonservices, Inc. v. Univ. of Cincinnati*, 2011-Ohio-7010 at ¶ 27 (Ct. Claims).

Jon should receive the records for which he has already paid in full.

For over 3 years the EOUSA's words and conduct misled Jon into believing that the EOUSA is diligently searching for responsive records that it will produce in accordance with its FOIA obligations. It demanded payment.....and Jon paid in full.

As explained, in *Ragen v. Hancor, Inc.*, 920 F. Supp. 2d 810 at 818-819 (N.D. Ohio 2013), when one party "induces the other party to rely on his waiver and continued performance under the contract" and when "the acts and conduct of a party inconsistent with an intention to claim the right have been such as to mislead the other party to his prejudice," that conduct amounts to a waiver. See, also *Motz v. Root*, 53 Ohio App. 375, 18 Ohio Law Abs. 377, 4 N.E.2d 990, 991 (Ohio Ct. App. 1934):

In this case, the EOUSA "induced the other party to rely on a waiver and continued performance under the contract," within the meaning of *Ragen, supra*, and within the meaning of *Motz, supra*. Therefore, EOUSA's rights --- if any --- to a release under the terms of the former August 1, 2012 Stipulation and Settlement Agreement are waived.

The fact is that the EOUSA and Jon, both, consistently and constantly evidenced the contemplation and intent of the parties ever since November 29, 2012 (the date of the FOIA request). They both contemplated and intended that Jon **does** have the right to make a FOIA

claim. The EOUSA's belated interpretation of the August 1, 2012 Stipulation and Settlement Agreement erroneously and retroactively creates the fiction of an intent which never existed in reality.

D. THE EOUSA SUPPLANTED THE AUGUST 1, 2012 STIPULATION AND SETTLEMENT AGREEMENT BY ENTERING INTO A SUBSEQUENT AGREEMENT

In this case, the August 1, 2012 Stipulation and Settlement Agreement (upon which the EOUSA relies) was supplanted, by a *subsequent* agreement which supplanted and superseded the August 1, 2012 Stipulation and Settlement Agreement:

It is a fundamental precept of contract law that parties may agree to discharge or terminate a contract in favor of creating a *second agreement to replace the former*, and, when that occurs, the initial agreement is *superceded and is no longer enforceable* as to any party thereto. See 3A Corbin on Contracts § 574 (1960); Restatement (Second) of Contracts § 279 (1979); 17A Am.Jur.2d Contracts § 539 (2004). Thus, as noted in the Restatement, parties may substitute one contract for another, thereby *discharging the pre-existing duty* of the one party and extinguishing the other's right to enforce the original duty. Restatement (Second) of Contracts § 279. [Emphasis added.] [*Glazer v. Lehman Bros.*, (Sixth Cir.) 394 F.3d 444 at 460.]

As *W. India Indus., Inc. v. Tradex, Tradex Petroleum Services*, 664 F.2d 946, 949 n.4 (5th Cir. 1981) put it: "Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties."

The EOUSA entered into a subsequent agreement, by entering into the agreement which is contained in the enclosed letters, in which EOUSA agreed to search for, and duplicate, the responsive records in exchange for \$548.00 which Jon paid in full.

That subsequent express agreement superseded, waived, supplanted and discharged the former August 1, 2012 Stipulation and Settlement Agreement upon which the EOUSA's entire denial is wrongfully based.

It is well established that a "[n]ovation is the substitution of a new obligation for an existing one. . . ." *Wells Fargo Bank v. Bank of America*, 32 Cal. App. 4th 424, 431, 38 Cal. Rptr. 2d 521 (2d Dist. 1995) "The effect of a novation is to **make the original agreement a nullity (that is, void and of no effect)**, and the rights of the new parties are governed solely by the new agreement. . . ." [Emphasis added] *Eckart v. Brown*, 34 Cal. App. 2d 182, 187, 93 P.2d 212 (2d Dist. 1939); see also *Wells Fargo*, 32 Cal. App. 4th at 431 ("[a] novation thus amounts to a new contract which **supplants** the original agreement and **'completely extinguishes** the original obligation . . .") (Emphasis in original) [Emphasis added] *JPMorgan Chase Bank, N.A. v. Safeco Ins. Co. of Am. (In re Commercial Money Ctr., Inc., Equip. Lease Litig.)*, 2011 U.S. Dist. LEXIS 91179, *176-177 (N.D. Ohio Aug. 16, 2011)

The result of the subsequent agreement is the superseding, waiving, supplanting and discharging of the former August 1, 2012 Stipulation and Settlement Agreement.

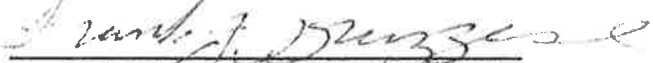
Even if the former August 1, 2012 Stipulation and Settlement Agreement actually did purport to release Jon's FOIA rights, the subsequent agreement supplanted and superseded the former.

CONCLUSION

The Director of the Office of Information Policy (OIP) should reverse the denial, and the EOUSA should be ordered to duplicate the 2,500 pages of responsive records, for which it has been paid.

Respectfully submitted,

BRUZZESE & CALABRIA LLC



By: FRANK J. BRUZZESE (#0000375)

P.O. Box 1506

Sinclair Building-10th Floor

Steubenville, OH 43952

Telephone: (740) 282-5323

Fax: (740) 282-5328

frank@bruzzeselaw.com

Attorney for Appellant-Jon R. Rogers

cc:

OFFICE OF GOVERNMENT INFORMATION SERVICES (OIGS)

National Archives and Records Administration

8601 Adelphi Road-OGIS

College Park, Maryland 20740-6001

via: e-mail at ogis@nara.gov

via: Ordinary U.S. Mail

via: Fax at 202-741-5769