

# Exhibit F



February 18, 2019

**Via Electronic Mail**

DHA Freedom of Information Service Center  
7700 Arlington Boulevard, Suite 5101  
Falls Church, Virginia 22042-5101  
Fax: 1-703-275-6386  
Email: dha.ncr.pcl.mbx.foia-requests@mail.mil

**RE: Improper Administrative Closing of FOIA Request 2018-186**

Dear FOIA Office,

We write on behalf of the Innocence Project (“IP”), which we represent with respect to its Freedom of Information Act Request (“Request”) submitted on or about February 26, 2018. The Request, which seeks records from certain archives of the National Museum of Health and Medicine as well as related electronic correspondence, has been assigned tracking number 2018-186 by your office.

On February 13, 2019, we wrote to DHA in order to clarify and supplement IP’s request for a limitation of fees and fee waiver. As we indicated in that letter, the last correspondence that IP or its co-counsel, Julia Baker, had received from DHA was dated June 26, 2018, via email.

In response to our February 13, 2019, letter, DHA emailed a response which stated:

On July 27, 2018, our offices sent you an interim response with partial records in response to your request. Included in that response, we asked that you revise the scope of your request being that, after review, the request was overly broad and voluminous. Further, we requested a reduced scope, particularly as it pertains to archived ABFO records. Subsequently, we did not receive a reply.

Therefore, as of January 30, 2019, our offices have administratively closed this inquiry due to non-responsiveness.

This email was the first time that we, our co-counsel (Julia Baker), or our client (Chris Fabricant and IP) had heard of any July 27, 2018, “interim response” and request to “revise the scope” of the request.

DHA’s administrative closure of the request was improper and unjustified, for all the reasons described below. DHA must reopen the request and process it as usual.

IP never received the July 27, 2018, letter from your office. The letter appears to have been addressed to Mr. Fabricant, but Mr. Fabricant never received it and neither did his two

paralegals at IP ever see the letter. It is unclear to us whether this is because the letter never actually left DHA's offices in July 2018 or because it was lost in transit.

In addition, DHA improperly failed to send the letter to Julia Baker, or even to copy her on the letter, even though she was the attorney representing IP and Mr. Fabricant with respect to this Request at the time. Ms. Baker had been in regular contact via email with DHA's FOIA office for some months, and she had explicitly informed DHA that she was handling the request on IP's behalf. Indeed, she had stated to DHA that she was contemplating filing suit on IP's behalf. Moreover, DHA had indicated *to her* that it would provide an interim response by July 3, 2018. Yet DHA did not provide her with the interim response it claims to have sent on July 27, 2018. Any letter regarding the Request should have been sent to her, or at least cc'ed to her, so that she could have appropriately responded on behalf of her client. As it happens, her client, Mr. Fabricant and IP, never received the letter either.

In addition, to our knowledge, DHA never once followed up on the July 2018 letter to confirm receipt or otherwise inquire after a response. Nor did DHA ever notify IP or its counsel that IP's request would be closed by a certain date if it did not receive a response. Indeed, the July 2018 letter itself provides no time limit or deadline that would result in the closing of the Request, and there is nothing in DoD's FOIA regulations or manuals that imposes a time limit.<sup>1</sup>

For all these reasons, DHA's "administrative closure" of the request was improper. DHA should continue to process IP's request under FOIA as usual. Among other things, DHA must consider IP's letter of February 13, 2019, clarifying and supplementing its request for a limitation of fees and fee waiver. *See* 32 C.F.R. § 286.12(c), (l)(4).

Separately, we take this opportunity to state our position with respect to the effect of the July 27, 2018, letter that we never received. The July 2018 letter is not an appropriate response to IP's FOIA Request, and is in violation of both the FOIA statute and DoD's regulations and guidelines. This is for at least two reasons.

First, the July 2018 letter states that IP's request "will not be considered 'perfected' until the scope issue is resolved." Elsewhere, the letter states that the "request, as currently defined, is overly broad and voluminous." DoD's own FOIA Manual, however, specifically prohibits DoD components from refusing to process a request because it seeks a large number of documents. *See* DoD Manual 5400.07 § 3.6(b) ("The fact that a FOIA request appears broad or burdensome (e.g., contains a large volume of potentially responsive information) does not, by itself, entitle the DoD Component to deny the FOIA request on the grounds that it does not reasonably describe the record sought."). DHA's July 2018 letter seeks to reject IP's FOIA request on precisely this ground, in clear violation of DoD's own Manual.

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<sup>1</sup> The FOIA statute and DoD FOIA regulations never mention the notion of "administrative closure" and DoD's FOIA Manual only provides that requests should be "administratively closed" when a requester has initiated litigation in federal court. *See* DoD Manual 5400.07 §§ 6.3(b)(9)(b); 6.7(b). Accordingly, it does not appear that DHA's unilateral decision to "administratively close" the request can affect IP's legal rights under FOIA.

Put another way, IP's FOIA request "reasonably described" the records sought, and nothing in FOIA or DoD's regulations permitted DHA to reject the request simply because the responsive records were voluminous. *See* 5 U.S.C. § 552(a)(3)(A); 32 C.F.R. § 286.5(a).

Second, the July 2018 letter appears to be an improper and unlawful attempt to delay DHA's obligation to timely respond to IP's request. 32 C.F.R. § 286.8(c). FOIA and DoD's regulations require that a response to a request be sent to the requestor within twenty business days. 5 U.S.C. § 552(a)(6)(A)(i); 32 C.F.R. § 286.8(c). If DoD wishes to extend this twenty-day deadline, it must do so "before the expiration of the 20-day period to respond." 32 C.F.R. § 286.8(c); *see also* 5 U.S.C. § 552(a)(6)(B). Moreover, if DoD wishes to extend the deadline beyond 10 additional business days, it must—within the original 20-day deadline, "provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request." 32 C.F.R. § 286.8(c).

The letter allegedly sent by the DHA on July 27, 2018, is well outside of the twenty-day window and therefore cannot properly delay DoD's statutory and regulatory deadline to respond to the request. IP sent the Request on February 27, 2018; it was received on March 7, 2018, and routed to the DHA FOIA on that date or soon thereafter. On April 20, 2018, DHA confirmed to IP's counsel that DHA had already received the FOIA request and was processing it. The July 27, 2018, letter was thus (purportedly) sent to IP approximately 100 business days after it was referred to DHA and 69 days after DHA confirmed it had already received the request. This is well beyond the 20-business-day window required under FOIA for a timely response—or for a timely request to extend deadlines.

As a result, DHA has failed to comply with the time limit provisions of FOIA. Accordingly, IP is deemed to have exhausted its administrative remedies with respect to this request. 5 U.S.C. § 552(a)(6)(C)(i). IP is thus entitled to file suit in federal district court to enforce its rights under FOIA and, as previously indicated by co-counsel in email correspondence with DHA, IP intends to do so.<sup>2</sup>

Finally, with respect to DHA's request that IP "reduce [the] scope [of the request] particularly as it pertains to archived ABFO records," IP states that it is willing to reasonably narrow the scope of its request if necessary in order to expedite processing and production of responsive records, and to eliminate records that may be of little interest to IP or the public. However, IP is unable to meaningfully or intelligibly limit the scope of the request without more

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<sup>2</sup> IP is not required to file an administrative appeal before filing suit, because DHA has not issued any determinations in this matter that are subject to appeal. FOIA provides that a requester must pursue an administrative appeal before filing suit only if the agency makes a determination on the request and explicitly notifies the requester of their right to appeal. 5 U.S.C. § 552(a)(6)(A)(i)(III); *Sloman v. U.S. Dep't of Justice*, 832 F. Supp. 63, 66 (S.D.N.Y. 1993); *Oglesby v. Dep't of the Army*, 920 F.2d 57, 65 (D.C. Cir. 1990) ("A response is sufficient for purposes of requiring an administrative appeal if it includes: the agency's determination of whether or not to comply with the request; the reasons for its decision; and *notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse.*")

DHA's letter of July 27, 2018, which purports to have provided an "interim response," did not notify IP of any right to appeal and so did not trigger any obligation for IP to file an administrative appeal in order to exhaust administrative remedies before filing suit.

information about what is actually in the various components of the archived ABFO records and without more information about how those records are organized. Accordingly, IP is unable to specify a specific “reduced scope” for the request at this time, but stands ready to discuss ways to potentially narrow the request with DHA or with its counsel in litigation.

Thank you for your prompt attention to this matter.

Sincerely,

/s/Jonathan Manes

Jonathan Manes, *supervising attorney*

John Zakour, *student attorney*

Samantha Winter, *student attorney*

John Kuebler, *student attorney*

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