

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
ATLANTA DIVISION**

BRANDON KELLEY, et al.,)
)
 Plaintiff,)
)
 v.)
)
 ROBERT WILKIE, SECRETARY OF)
 DEPARTMENT OF VETERANS)
 AFFAIRS)
)
 &)
)
 JAMES BYRNE, GENERAL)
 COUNSEL OF THE DEPARTMENT OF)
 VETERANS AFFAIRS)
)
)
 _____ Defendants.)

CIVIL ACTION FILE NO.

**PLAINTIFF’S ORIGINAL COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

COMES NOW, Brandon Kelley, hereinafter “Plaintiff,” and files the following complaint, directed to the United States Department of Veteran Affairs (hereinafter, “VA”), and the United States Department of Veterans Affairs Office of General Counsel (hereinafter “VA OGC”), hereinafter “Defendants,” and for cause of action, shows the Court as follows:

I.INTRODUCTION

1. This is an action by Plaintiff pursuant to the Freedom of Information Act (hereinafter “FOIA”) 5 U.S.C. § 552, *et seq*, to order the production of agency records maintained by the VA. Plaintiff seeks the documentation set forth below and seeks this Court’s assistance to compel production of documents wrongfully withheld from Plaintiff and to vindicate that statutory right to inspect federal agency documents. Plaintiff asserts that there is a ”significant public interest in disclosure” of the records requested by Plaintiff.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), the Freedom of Information Act, and 28 U.S.C. § 2201, the Federal Declaratory Judgment Act.

3. The government records which Plaintiff requests are the individual claims files (hereinafter, “C-Files”) maintained by the VA in a system of records for Veterans making claims for Veterans Disability Compensation and/or Survivor Benefits claims pursuant to Title 38 of the United States Code. *See Exhibit A (Plaintiff’s FOIA Request)*.

II. JURISDICTION AND VENUE.

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, as this action arises under the laws of the United States, in particular, 5 U.S.C. § 552(a)(4)(B), under which, “the District Court of the United States, in the district in which the complainant resides... has jurisdiction to enjoin the agency from

withholding agency records and to order the production of any agency records improperly withheld from the complainant,” as Plaintiff’s residence is in this district.

III. PARTIES.

6. Plaintiff is an individual, and a resident of the State of Georgia and resides 3702 North Hill Parkway, Chamblee, GA 30341.

7. Defendant Robert Wilkie is the Secretary of the Department of Veterans Affairs, which is believed to maintain facilities throughout this District.

8. Defendant James Byrne is the General Counsel of the Department of Veterans Affairs.

IV. SERVICE

9. Defendant Robert Wilkie, Secretary of the Department of Veterans Affairs, may be served by mailing a copy of this compliant and summons by certified mail to the following address: U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC, 20420

.10. Defendant James Byrne is the General Counsel of the Department of Veterans Affairs, may be served by mailing a copy of this compliant and summons by certified mail to the following address: U.S. Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC, 20420.

11. The United States of America may be served by serving the U.S. Attorney for the district in which this action is brought at Richard B. Russell Federal Building, 75 Ted Turner Dr. SW, Suite 600, Atlanta, GA 30303-3309 and by serving a copy of this complaint and a summons by certified mail to the Attorney General of the United States, U.S. Attorney General, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001.

V. FACTUAL ALLEGATIONS.

12. The FOIA requires U.S. government agencies to promptly make public records available to any person if that person makes a request which (1) reasonably describes the records sought and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

13. The FOIA requires an agency to issue a final determination on any such information request within twenty (20) business days of the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

14. The FOIA allows an agency to extend this determination deadline, however, by ten (10) working days when “unusual circumstances” exist and when the agency so notifies a requester in writing. 5 U.S.C. § 552(a)(6)(B).

15. An agency is entitled to only one (1) ten-business day extension. *Id.* The written notice provided to the requester must specify the specific unusual circumstances

justifying the extension and the date on which a final determination is expected to be dispatched. *Id.*

16. To invoke a longer extension, the FOIA requires an agency to provide written notification to the requester that (1) offers the requester an opportunity to limit the scope of the request so that it may be processed within that time limit, or (2) offers the requester an opportunity to arrange with the agency an alternative time frame for processing the request. 5 U.S.C. § 552(a)(6)(B)(ii).

17. Plaintiff served, and the VA received, a FOIA Request on January 8, 2019 seeking production of Plaintiff's C-File. See Exhibit A.

18. The VA has not fulfilled this request.

19. Plaintiff served a timely FOIA Appeal to the VA OGC pursuant to 5 U.S.C. § 552(a)(6)(A)(ii). The VA Office of the General Counsel responded on April 17, 2019 denying such appeal.

VI. FIRST CAUSE OF ACTION DECLARATORY JUDGMENT

(FOIA Request for Plaintiff's C-File)

20. Plaintiff incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

21. FOIA mandates the disclosure of the documents that Plaintiff seeks in Plaintiff's FOIA request to the VA.

22. The VA has not provided Plaintiff with the records.

23. The VA has not sought extension to the lawful response time under FOIA.

24. No FOIA exemptions apply to this request.

25. No exceptional or unusual circumstances preclude a response to the request within twenty (20) business days of the request.

26. An actual and justiciable controversy exists as to whether the VA has violated the FOIA.

27. Plaintiff seeks declaratory judgment that FOIA entitles Plaintiff to the records it seeks as part of its FOIA request to the VA.

28. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, the VA will continue to violate the rights of Plaintiff and others similarly situated by maintaining its pattern or practice of unlawfully delaying and/or denying and/or ignoring responses to FOIA requests and appeals.

VII. SECOND CAUSE OF ACTION FOR INJUNCTIVE RELIEF

29. Plaintiff incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

30. Plaintiff seeks for an injunction requiring the VA to provide these records in an appropriate time frame.

VIII. THIRD CAUSE OF ACTION FOR ATTORNEY FEES

31. Plaintiff incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

32. Plaintiff seeks the award of reasonable attorney fees for filing this action. The applicable law provides that a "[C]ourt ay assess against the United States

reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.” 5 U.S.C. §552(a)(4)(E).

XI. PRAYER FOR RELIEF.

Wherefore, Plaintiff requests this Court:

1. Order Defendant to provide true copies of all requested documents without further delay or obfuscation;
2. Expedite this proceeding as provided for in 28 U.S.C. § 1657;
3. Award Plaintiff costs and reasonable attorney fees in this action, as provided in 5 U.S.C. §552(a)(4)(E), and/or under any other appropriate federal statute; and,

4. Grant such other and further relief as the Court, in its wisdom, may deem just and proper.

Respectfully submitted this 25th Day of April, 2019.¹

RESPECTFULLY SUBMITTED,

/s _____
WILLIAM L. NABORS JR.
Georgia Bar No. 211644

NABORS LAW GROUP
3355 Lenox Road
Suite 750
Atlanta, Georgia 30326
Telephone No: (678) 510-1730
Fax (678) 710-8957
Email: william@naborstrustlaw.com

¹ Pursuant to Local Rule 7.1, undersigned counsel hereby certifies that this document has been prepared in compliance with Local Rule 5.1(B).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
ATLANTA DIVISION**

BRANDON KELLEY, et al.,)
)
 Plaintiff,)
)
 v.)
)
 ROBERT WILKIE, SECRETARY OF)
 DEPARTMENT OF VETERANS)
 AFFAIRS)
)
 &)
)
 JAMES BYRNE, GENERAL)
 COUNSEL OF THE DEPARTMENT OF)
 VETERANS AFFAIRS)
)
)
 Defendants.)

CIVIL ACTION FILE NO.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I served a true and correct copy of **PLAINTIFF’S ORIGINAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** by depositing it in U.S. Mail with appropriate postage for first class mail. Service was made to the following parties:

James Byrne
General Counsel of the Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC, 20420

Robert Wilkie
Secretary of the Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC, 20420

United States Attorney for the Northern District of Georgia
Richard B. Russell Federal Building
75 Ted Turner Dr. SW
Suite 600
Atlanta, GA 30303-3309

/s _____
WILLIAM L. NABORS JR.

FREEDOM OF INFORMATION ACT REQUEST

VIA FAX & USPS

FOIA/Privacy Act Officer VA
Atlanta Regional Benefits Office
U.S. Department of Veterans Affairs
1700 Clairmont Road
Decatur, GA 30033
Fax: 404-929-5819

RE: FREEDOM OF INFORMATION ACT REQUEST

Veteran: Brandon Jay Kelley
Veteran Social Security # **007-80-0654**
Claim # 007 80 0654

To Whom It May Concern:

This is a request for documents under 38 C.F.R. § 1.577, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 522a, on behalf of Brandon Jay Kelley (Veteran). This request is properly made via facsimile as it contains the signature of the requester.

1. IDENTIFICATION OF DOCUMENTS. Veteran, Brandon Jay Kelley filed a disability claim; I hereby request the original application and all preceding documents that were received and sent by the VA regarding this claim and any other claims that Veteran, Brandon Jay Kelley, submitted or was submitted on his behalf.
2. FORM/FORMAT IN WHICH TO PRODUCE INFORMATION. The FOIA and the VA's own internal policies related to the FOIA requests, require that records be produced in the format sought by the requester, if the record is readily reproducible in that form or format. Please take special care to ensure that both sides of any two-sided documents produced in response to this request are included in the response, and are scanned into a PDF in such way that they do not "bleed-through" form side of the document to another. Please send records on disc.
3. TIME FOR RESPONSE. Please note that this request for documents is being made pursuant to the Privacy Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 522a, as well as 38 C.F.R. § 1.550 and 38 C.F.R. § 1.577. Your agency has a duty to respond to this request within TWENTY (20) BUSINESS DAYS of the date of this request pursuant to 5 U.S.C. § 552 (a)(6)(A)(2)(i). Additionally, although an extension of time to respond may be requested, it may only be granted for "unusual circumstances".

"Predictable agency workload" is not typically considered an unusual circumstance as stated in 5 U.S.C. § 552 (a)(6)(C)(ii). Moreover, even to the extent that unusual circumstances could be demonstrated in this instance, the time limit for the extension is

limited to "10 working days" pursuant to 38 C.F.R. § 1.553(d).

Please also be aware that your agency's failure to respond to this request within twenty business (20) days can result in the filing of an administrative appeal with the office of the Secretary of the Department of Veterans Affairs pursuant to 38 C.F.R. § 1.577 and 5 U.S.C. § 552 (a)(6)(A)(2)(ii), and/or, the filing of the federal lawsuit to compel the Production of the information.

In any such appeal or lawsuit, I intent to seek not only injunctive and/or monetary relief related to this request, but to the extent permitted by law, injunctive and/or monetary relief based on the Department of Veteran's Affairs patterns and/or practices of responding to FOIA requests in a manner violative of the FOIA, as well as attorney fees and litigation expenses, and any other remedy/relief available at law.

4. Point of Contact. As discussed above, please respond to this request within twenty (20) business days. I may be contacted at (678)510-1730.

Thank you in advance for your assistance.

Respectfully,



Brandon Jay Kelley
Nabors Law Group
3355 Lenox Rd.
Suite 750
Atlanta, GA 30326



Office of the General Counsel
Washington DC 20420

In Reply Refer To: IALG/024
OGC Case #:

April 17, 2019

William Nabors, Jr.
Nabors Law Group, LLC
3355 Lenox Road
Suite 750
Atlanta, GA 30326

RE: Douglas Lowery; Melvin Garrett; Brandon Kelly; Dennis Faulkner; Andrew Jones; Ronald Parten; Dwayne Gray; Brenda Vandixon:

Dear Mr. Nabors:

This letter is the final administrative decision issued under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, in response to your appeal from the failure of the Department of Veterans Affairs (VA), Veterans Benefits Administration (VBA) Records Management Center (RMC) in St. Louis, MO to respond to your request.

Your appeal is denied for the reasons outlined below under the FOIA and is remanded to the RMC for an initial agency decision under the Privacy Act.

Procedural History
Initial Request

- Submitted were requests to the VA Evidence Intake Center for a copy of the above-named Veterans VA claims file (C-file).

Initial Agency Decision

- To date, the RMC has not provided you with an Initial Agency Decision to include the requested records.

Appeal

- Between March 4, 2019 and April 15, 2019, you appealed to our office advising that the RMC had not responded to your request for records.

2.

Douglas Lowery; Melvin Garrett; Brandon Kelly; Dennis Faulkner; Andrew Jones; Ronald Parten; Dwayne Gray; Brenda Vandixon:

Responsive Records

- The above-referenced Veteran VA C-file

Relevant Law

We have thoroughly reviewed your submission under the provisions of the FOIA, which provides that federal agencies must disclose records requested unless they may be withheld in accordance with one or more of nine statutory exemptions. 5 U.S.C. § 552(b). We have also reviewed your request under the provisions of the Privacy Act of 1974 Privacy Act of 1974, 5 U.S.C. §552a, and VA's implementing regulations.

Analysis

FOIA

With respect to the reasons for submitting your appeal, we note that the Supreme Court has held that a requester's rights under the FOIA are neither increased nor decreased by reason of the fact that he claims an interest in the requested records greater than that shared by the average member of the public. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975). Accordingly, your request for a copy of the Veteran's VA C-file is denied under FOIA Exemption 6.

FOIA Exemption 6 protects records the release of which would lead to a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989), the Supreme Court provided the following step-by-step analysis to determine when the exemptions apply to a case: (1) determine whether a personal privacy interest is involved; (2) determine whether disclosure would serve the public interest; and (3) balance the personal privacy interest against the public interest. The Veteran has a privacy interest in the information maintained in his VA C-file. VA C-files are part of a Privacy Act system of record identified as 58VA21, 22, 28 – Compensation, Pension, Education, and Rehabilitation, which includes Veteran and beneficiary names, social security numbers, dates of birth, financial information, educational information, and medical records. The disclosure of such sensitive personal identifiable information (PII) and personal health information (PHI) would clearly constitute an unwarranted invasion of the Veteran's personal privacy. See Reporter's Committee at 771 (the requester's identity has no bearing on the merits of the request); Forest Serv. Employees for Evtl. Ethics v. U.S. Forest Serv., 524 F.3d 1021, 1025 (9th Cir. 2008) (release to one is release to all); and, NARA v. Favish, 541 U.S. 157, 174 (once information is disclosed it belongs to the public).

3.

Douglas Lowery; Melvin Garrett; Brandon Kelly; Dennis Faulkner; Andrew Jones; Ronald Parten; Dwayne Gray; Brenda Vandixon:

While the release of this information may be permissible if it would serve an articulable and significant public interest, you have not identified a public interest in the information contained in the Veteran's VA C-file. Under the circumstances, the balance weighs in favor of protecting the Veteran's privacy interest in his VA records. We find that records you seek are protected from disclosure under FOIA Exemption 6. The FOIA requires that we consider whether information that is subject to withhold under FOIA Exemption 6 can be redacted. Unfortunately, because your request relates to a named individual, there is no way to redact the responsive record and protect the Veteran's privacy. Accordingly, your appeal under FOIA is denied.

Privacy Act

The Privacy Act provides that an agency shall "upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence".

VA's regulations implementing the Privacy Act provide that "upon denial [of] a request [for access or amendment] under 38 CFR 1.577 or 1.579, the responsible Department of Veterans Affairs official or designated employee will inform the requester in writing of the denial, cite the reason or reasons and the Department of Veterans Affairs regulations upon which the denial is based, and advise that the denial may be appealed to the General Counsel." 38 C.F.R. §1.580.

You a provided a consent form, signed by the Veteran authorizing VBA to disclose the VA C-file to you for purposes of pursuing claims of entitlement to benefits administered under Title 38 of the United States Code by the Secretary of Veterans Affairs. As noted above and in your appeal, RMC has not responded to your request.

We find that your appeal is premature inasmuch as you have not received a written denial of your request. 38 C.F.R. §1.580. Accordingly, we are remanding your request back to RMC. That office should acknowledge receipt of your request if they have not already done so, and communicate to you a date upon which it is estimated that your request will be processed under the Privacy Act. Ultimately, if RMC denies your request, you should be advised of such in writing as soon as practicable and provided notice of your right to appeal any negative determinations to this office.

4.

Douglas Lowery; Melvin Garrett; Brandon Kelly; Dennis Faulkner; Andrew Jones; Ronald Parten; Dwayne Gray; Brenda Vandixon:

Conclusion

For the reasons discussed above, your request for a copy of the above-named Veteran VA C-file is denied under the FOIA.

However, your request is being remanded back to the RMC for a decision under the access provision of the Privacy Act and VA's implementing regulations. The RMC will provide you with a copy of the C-File under the Privacy Act.

Mediation/Appeal Rights

This final agency decision concludes the administrative processing of your requests referred to above. As part of the 2007 FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services. Similarly, as part of the FOIA Improvement Act of 2016, VA established a FOIA Public Liaison to offer mediation services. Both OGIS and the VA Public Liaison will assist in resolving disputes between FOIA requesters and VA as a non-exclusive alternative to litigation. Using OGIS or the VA FOIA Public Liaison does not affect your right to pursue litigation. You may contact OGIS or the VA Public Liaison in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001

E-mail: ogis@nara.gov
Telephone: 202-741-5770
Facsimile: 202-741-5769
Toll-free: 1-877-684-6448

VA FOIA Public Liaison
John Buck
Acting Director, VA FOIA Service
810 Vermont Avenue, NW (005R1C)
Washington, DC 20420

E-mail: vacofoiaservice@va.gov
Telephone: 1-877-750-3642
Facsimile: 202-632-7581

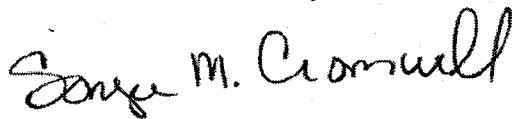
With respect to any information denied to you by this final agency decision, the FOIA requires us to advise you that if you believe the Department erred in this

5.

Douglas Lowery; Melvin Garrett; Brandon Kelly; Dennis Faulkner; Andrew Jones; Ronald Parten; Dwayne Gray; Brenda Vandixon:

decision, you have the right to file a complaint in an appropriate United States District Court.

Sincerely,

A handwritten signature in cursive script that reads "Sonya M. Cromwell".

Sonya M. Cromwell

Chief Counsel, Information & Administrative Law Group

cc: Richard Ivy, FOIA/PA Officer – VA Records Management Center