

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

WATTS CONSTRUCTORS, LLC
1451 Dolley Madison Boulevard, Suite 200
McLean, Virginia 22101

Plaintiff,

v.

Civil Action No. 1:19-cv-500

DEPARTMENT OF DEFENSE
1000 Defense Pentagon
Washington, DC 20301

And

DEPARTMENT OF THE ARMY
101 Army Pentagon
Washington, District of Columbia 20310

And

**UNITED STATES ARMY SPECIAL
OPERATIONS COMMAND**
2929 Desert Storm Drive
Fort Bragg, North Carolina 28310-9110

As to each Defendant

Serve:

G. Zachary Terwilliger
United States Attorney for the
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

Attorney General of the United
States
U.S. Department of Justice
Main Justice Building
10th & Constitution Ave, NW
Washington, District of Columbia
22314

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

For its Complaint, Watts Constructors, LLC (“Watts”), by undersigned counsel, states as follows:

FREEDOM OF INFORMATION ACT ACTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552, seeking the release of agency records requested by Watts from the United States Army Special Operations Command (“USASOC”), a component command of the Department of the Army (“Army”), which is a military department of the Department of Defense (“DOD”).

2. This action challenges the Army and USASOC’s failure to disclose and release documents and records in response to Watts’ 20 February 2018 FOIA request (the “Request”).

3. Watts has exhausted its administrative remedies. Watts respectfully requests that the Court order the Army and USASOC to immediately disclose and release all records responsive to the Request, and enjoin the DOD, Army and USASOC from withholding from disclosure certain records of USASOC within their possession and control.

PARTIES

4. Watts is a limited liability company organized under the laws of Iowa with its principal place of business at 1451 Dolley Madison Boulevard, Suite 200, McLean, Virginia 22101. Watts is engaged as a general contractor and construction manager for federal government construction projects.

5. The DOD is a federal government agency within the meaning of 5 U.S.C. §552(f)(1). The Army is a military department and component of the DOD, which is headquartered in Washington, D.C. USASOC is an assigned Army service component command that oversees

various special operations forces of the Army and is headquartered at Fort Bragg, North Carolina. The Army and USASOC are also considered agencies within the meaning of 5 U.S.C. §552(f)(1). USASOC is in possession, custody, and control over documents and records to which Watts seeks access.

JURISDICTION

6. The Court has subject matter jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B) and 28 U.S.C. §1331. The Court has personal jurisdiction over Defendants DOD, Army, and USASOC.

7. Venue is proper in this Court pursuant to 5 U.S.C. §552(a)(4)(B) as Watts maintains its principal place of business in McLean, Fairfax County, Virginia.

BACKGROUND

8. On or about 17 July 2014, the United States Army Corps of Engineers, Omaha District (“USACE”) awarded Watts Contract No. W9128F-14-C-0024 (the “Contract”) for the design and construction of the Special Operations Forces Battalion Operations Facility Complex at Fort Carson, Colorado (the “Project”).

9. The end users of the Project are USASOC and 10th Special Forces Group (“10th SFG”). 10th SFG is a component of USASOC.

10. Although USACE was building the Project for USASOC and 10th SFG, various members and personnel of USASOC and 10th SFG were involved in the administration of the Contract and oversight of the construction of the Project.

11. On 30 January 2018, USACE wrongfully terminated Watts’ Contract for default. On 06 February 2018, Watts filed its timely and proper Notice of Appeal from the USACE Contracting Officer’s 30 January 2018 termination decision. Watts’ Appeal is currently pending

before the Armed Services Board of Contract Appeals (“ASBCA”) as consolidated Case No. 61518 (the “Litigation”).

12. On 20 February 2018, undersigned counsel’s firm, on behalf of Watts, filed the Request with USASOC seeking certain USASOC and 10th SFG documents and records related to the Project. (**Exhibit 1**) Watts’ Request was separate from the discovery requests Watts served on USACE in the Litigation, and included 14 reasonable requests for documents and records in USASOC’s possession and control.

13. On 23 February 2018, USASOC’s FOIA Officer, Mr. Christopher Nesbitt, responded that he was referring the Request to USACE. (**Exhibit 2**) That same day, Watts’ counsel objected to the referral and responded that the Request was directed to USASOC and 10th SFG and not USACE, and that Watts fully expected USASOC to review the Request and gather responsive documents and records. (**Exhibit 3**) In reply, USASOC informed Watts’ counsel that USACE would have the same documents communications and documents as USASOC. (*See Id.*)

14. On 26 February 2018, Watts’ counsel again reiterated that Watts’ Request was directed to USASOC and 10th SFG and that USASOC was required to conduct an independent search of its records without the interference of USACE. Watts’ attorneys also requested a fee estimate. Following this exchange, USASOC switched its focus to the level of difficulty of the search and the resulting fees. (*See Exhibit 3*)

15. On 27 February 2018, Watts’ counsel conducted a telephone call with USASOC’s FOIA Officer, Mr. Nesbitt to discuss limiting the scope of the Request to allow USASOC to quickly and efficiently conduct a search of its records. Following this call, on 28 February 2018, under a full reservation of rights, Watts narrowed its Request down from fourteen to five specific

inquiries and also narrowed the time period to 01 December 2016 to 28 February 2018, instead of the original period of 17 July 2014 to 20 February 2018. **(Exhibit 4)**

16. On 05 March 2018, USASOC responded that Watts' narrowed request of 28 February 2018 would cost not less than \$4,224.00. *(See Exhibit 4)*

17. On 06 March 2018, Watts' counsel informed USASOC that the fee estimate was unreasonable considering the narrowed scope but, in the spirit of cooperation, agreed to narrow the Request a second time to the time period of 01 December 2017 to 06 February 2018, just over 2 months. Watts' counsel also provided USASOC with specific search terms to further narrow the inquiry. **(Exhibit 5)**

18. On 07 March 2018, USASOC informed Watts that the \$4,224.00 fee estimate was based on a search of the accounts and records of 30,000+ USASOC personnel and this was the reason for such high fees, but that the fee estimate could be significantly reduced if a specific list of custodians was provided. *(See Exhibit 5)*

19. On 08 March 2018, pursuant to USASOC's request and under a reservation of rights, Watts' counsel narrowed the Request a third time to only four specific USASOC custodians, five specific operators and search terms, and the two-month period of 01 December 2017 to 06 February 2018. **(Exhibit 6)**

20. Despite being provided with a significantly limited scope for the Request, USASOC astonishingly increased its fees estimate from \$4,224.00 to \$7,568.00 and stated, "You may want to pursue this matter other than through FOIA." **(Exhibit 7)**

21. On 12 March 2018, Watts' counsel requested that USASOC reconsider its position and provide Watts with a reasonable fee estimate in accordance with its representations of 07 March 2018. **(Exhibit 8)**

22. On 13 March 2018, USASOC provided Watts with a FOIA control number for its Request, but indicated that it would not reconsider its position. (*See* Exhibit 8)

23. On 16 March 2018, USASOC informed Watts' counsel that it would be administratively closing the Request on 23 March 2018. (**Exhibit 9**) Watts' counsel replied that Watts would not be withdrawing the Request and maintained that the fee estimate was unreasonable and again asked that USASOC reconsider the estimate in light of its representations that the fees would be significantly reduced if specific custodians could be identified. (**Exhibit 10**)

24. On 20 April 2018, Watts' counsel filed a FOIA appeal with the Secretary of the Army, Office of General Counsel challenging USASOC's decision to assess a fee estimate of \$7,568.00. (**Exhibit 11**) The Secretary of the Army, Office of General Counsel is the appellate authority designated for receipt of FOIA appeals on behalf of the Army.

25. On 13 June 2018, the Secretary of the Army, Office of General Counsel remanded Watts' Request back to USASOC with instructions to assess only reasonable review fees, not search fees. (**Exhibit 12**)

26. On 22 June 2018, in response to the Secretary's remand instructions, USASOC provided Watts with a fee estimate of \$1,280.00. (**Exhibit 13**)

27. On 26 June 2018, Watts' counsel, on behalf of Watts, forwarded a check in the amount of \$640.00 to USASOC, representing 1/2 of the estimate fees. (**Exhibit 14**)

28. On 24 July 2018, Watts' counsel and USASOC conducted a conference call in which USASOC indicated that it conducted a search of its records and located 2500 documents; however, only a single email "string" was responsive to Watts' Request. USASOC stated that it would be able to release the emails "in a few days."

29. On 08 August 2018, Watts' counsel requested an update on the status of USASOC's release of the responsive documents. USASOC replied indicating that it was trying to obtain a release decision from USACE, who was now involved in reviewing Watts' Request. (**Exhibit 15**)

30. On 23 August 2018, USASOC issued a letter referring Watts' Request to USACE on the basis that the requested information "falls under the purview of the U.S. Army Corps of Engineers, Omaha District." (**Exhibit 16**)

31. On 29 August 2018, Watts' counsel issued a letter to USASOC objecting to the referral and requesting an explanation from USASOC of the parameters of USASOC's search and the search terms used. (**Exhibit 17**) That same day, USASOC responded "...the information we located originated at the COE and must be approved [by] them for release" and "Your case is close[d] at our office and you must direct any further questions/concerns with the COE." USASOC again avoided responding to Watts Request, did not produce any documents, and improperly allowed USACE to take control of the FOIA process. (**Exhibit 18**)

32. On 14 September 2018, USACE Omaha District Counsel Thomas Tracey, who is directly involved in the Litigation, sent Watts' counsel a letter: (1) producing the single e-mail string identified by USASOC on 24 July 2018; (2) stating that documents responsive to Watts' FOIA Request Nos. 1-10 and 13 would be produced by USACE in the course of discovery in the Litigation; (3) offering to conduct a search of USACE's electronic records to locate documents related to FOIA Request Nos. 11 and 12 in exchange for payment of \$500; and (4) denying FOIA Request No. 14 on the basis that, "The information requested is exempt from release under FOIA Exemption 5." (**Exhibit 19**) USACE further advised, "Since your request has been denied...you are advised of your right to appeal this determination to the Secretary of Army (ATTN: General

Counsel). Your appeal must be postmarked or electronically transmitted within 90 days of the date of this letter.”

33. On 13 December 2018, in accordance with 5 U.S.C. §552(a)(6)(A)(i)(III)(aa), Watts appealed USACE’s 14 September 2018 decision to the Secretary of the Army’s Office of General Counsel in its entirety via certified mail (the “Appeal”). (**Exhibit 20 (exhibits omitted)**) Watts’ Appeal was postmarked within 90 days of USACE’s letter of 14 September 2018. Watts sent the Appeal to the Office of General Counsel directly and also to the Office of General Counsel c/o USACE and to USASOC’s FOIA Office.

34. Watts contests both USASOC’s referral and USACE’s subsequent response. The bases for Watts’ Appeal include, but are not limited to: (1) USASOC did not conduct a comprehensive search of its records; (2) USASOC’s referral of Watts’ Request to USACE was improper; and (3) USACE’s 14 September 2018 letter does not sufficiently respond to Watts’ FOIA Request. With respect to basis No. 3, (a) USACE did not produce USASOC/10th SFG documents and records in discovery in the Litigation responsive to FOIA Request Nos. 1-10 and 13; (b) Watts did not request USACE to conduct a search of USACE’s records for FOIA Request Nos. 11 and 12; these requests were directed to USASOC; and (c) USACE improperly invoked FOIA Exemption No. 5 to deny Request No. 14. (*See Exhibit 20*)

35. Pursuant to 5 U.S.C. §552(a)(6)(A)(ii), the Secretary of the Army, Office of General Counsel was required to make a determination with respect to Watts’ Appeal within twenty days after receipt of the Appeal.

36. United States Postal Service (“USPS”) records indicate that both the Office of General Counsel and USACE, Omaha District received the Appeal on 17 December 2018.

(Exhibit 21) Accordingly, the Secretary of the Army, Office of General Counsel was required to respond to Watts' Appeal no later than Monday 14 January 2019.

37. As of the date of this Complaint, the Army has not responded to or made a determination with respect to Watts' Appeal. Further, the Army has not provided any "unusual circumstances," as defined in 5 U.S.C. §552(a)(6)(B)(iii), which would warrant extension of the prescribed time limit in which the Army was required to make a determination as to Watts' Appeal.

38. Because the Army failed to comply with the time limit set forth in 5 U.S.C. §552(a)(6)(A)(ii), Watts is deemed to have exhausted any and all administrative remedies pursuant to 5 U.S.C. §552(a)(6)(C), the Army's inaction constitutes a deemed denial of Watts' Appeal, and Watts may properly seek relief in this Court.

COUNT I
(Violation of FOIA - Failure to Comply with Statutory Deadlines)

39. Watts incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

40. The Army's failure to respond to Watts' Appeal violated the statutory deadline imposed by the FOIA in 5 U.S.C. §552(a)(6)(A)(ii).

41. Watts has exhausted all applicable administrative remedies with respect to its FOIA Request.

42. Watts is entitled to declaratory and injunctive relief compelling the release and disclosure of the documents and records requested from USASOC.

43. Watts is also entitled to its attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E).

COUNT II
(Violation of FOIA - Unlawful Withholding of Agency Records)

44. Watts incorporates by reference all prior paragraphs of this Complaint as if fully set forth herein.

45. The Army and USASOC are unlawfully withholding records requested by Watts pursuant to 5 U.S.C. §552.

46. Watts has a statutory right to the documents and records it seeks from the Army and USASOC.

47. The Army and USASOC have no legitimate or legal basis to withhold the documents and records Watts seeks in its FOIA Request.

48. Watts has exhausted all applicable administrative remedies with respect to its FOIA Request, and there is no basis for further delay of the disclosure and production of USASOC's responsive documents and records.

49. Watts is entitled to declaratory and injunctive relief compelling the release and disclosure of the documents and records requested from USASOC.

50. Watts is also entitled to its attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E).

PRAYER FOR RELIEF

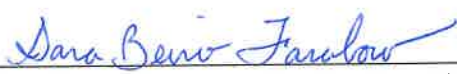
Watts respectfully requests that the Court:

1. Declare the DOD's, Army's, and USASOC's failure to comply with FOIA to be unlawful;
2. Declare USASOC's referral of Watts' 20 February 2018 FOIA Request to USACE to be unlawful;

3. Order USASOC to conduct an independent and comprehensive search of its documents and records in response to Watts' 20 February 2018 FOIA Request without USACE's involvement;
4. Order the Army and USASOC to produce all responsive records without further delay or charge;
5. Enjoin the DOD, Army, and USASOC from continuing to withhold records responsive to Watts' 20 February 2018 FOIA Request;
6. Award Watts its attorney's fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E); and
7. Grant such other relief as the Court deems just and proper.

DATED: April 24, 2019

Respectfully submitted,

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