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NATIONAL PUBLIC RADIO, INC. and ERIC WESTERVELT

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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION

11 NATIONAL PUBLIC RADIO, INC. and ERIC  
WESTERVELT,

12 Plaintiffs,

13 v.

14 U.S. MARINES; U.S. NAVY; U.S.  
15 DEPARTMENT OF DEFENSE,

16 Defendants.

Case No. 3:20-cv-2587

**COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF FOR VIOLATION  
OF THE FREEDOM OF INFORMATION  
ACT, 5 U.S.C. § 552 et seq.**

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1 Plaintiffs National Public Radio, Inc. and Eric Westervelt (collectively, “NPR” or  
2 “Plaintiffs”), by their undersigned attorneys, allege as follows:

3 **INTRODUCTION**

4 1. Operation Vigilant Resolve – also known as the First Battle of Fallujah – involved  
5 a military operation to apprehend or kill the perpetrators who killed four U.S. contractors in  
6 Fallujah in the March of 2004 as well as the perpetrators who killed five American soldiers in  
7 Habbaniyah. On July 15, 2019, as part of an investigation into this operation, NPR Correspondent  
8 Eric Westervelt made a FOIA request to the U.S. Marines for records of administrative  
9 investigations – known as “JAGMAN” investigations – into U.S. Marines killed or injured during  
10 Operation Vigilant Resolve in or around Fallujah, Iraq in the winter or spring of 2004. *See, e.g.*,  
11 [https://www.nytimes.com/2004/04/09/world/the-struggle-for-iraq-combat-marines-battle-](https://www.nytimes.com/2004/04/09/world/the-struggle-for-iraq-combat-marines-battle-guerrillas-in-streets-of-falluja.html)  
12 [guerrillas-in-streets-of-falluja.html](https://www.nytimes.com/2004/04/09/world/the-struggle-for-iraq-combat-marines-battle-guerrillas-in-streets-of-falluja.html); [https://www.theatlantic.com/magazine/archive/2004/07/five-](https://www.theatlantic.com/magazine/archive/2004/07/five-days-in-fallujah/303450/)  
13 [days-in-fallujah/303450/](https://www.theatlantic.com/magazine/archive/2004/07/five-days-in-fallujah/303450/). More than eight months after NPR made its FOIA Request, no  
14 responsive documents have been produced.

15 2. NPR brings this action under the Freedom of Information Act, 5 U.S.C. § 552 *et*  
16 *seq.*, as amended (“FOIA”), to enjoin the U.S. Marines, the U.S. Navy and the U.S. Department of  
17 Defense from continuing to improperly withhold agency records that are responsive to the FOIA  
18 request NPR sent on July 15, 2019 (the “FOIA Request”). This FOIA action is necessary because  
19 Defendants continue to withhold responsive records since NPR made the FOIA Request over eight  
20 months ago, a constructive denial of the FOIA Request.

21 3. The Freedom of Information Act “focuses on the citizens’ right to be informed  
22 about ‘what their government is up to,’” by requiring the release of “[o]fficial information that  
23 sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for*  
24 *Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not  
25 secrecy, is the dominant objective” of FOIA. *Dept’t of Interior v. Klamath Water Users*  
26 *Protective Ass’n*, 532 U.S. 1, 8, (2001) (internal quotation marks and citations omitted). NPR  
27 plays a critical role in providing information to citizens about “what their government is up to.”  
28 Indeed, the First Amendment’s guarantee of freedom of the press is meant to enable journalists to

1 play an “essential role in our democracy,” to “bare the secrets of government and inform the  
2 people.” *New York Times. Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J. concurring).

3 4. Through its FOIA Request, NPR seeks to fulfill its journalistic function and to  
4 shine a public light on information about U.S. Marines killed or injured during Operation Vigilant  
5 Resolve in Iraq.

6 **PARTIES**

7 5. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization and the  
8 leading provider of non-commercial news, information, and entertainment programming to the  
9 American public. NPR’s fact-based, independent journalism helps the public stay on top of  
10 breaking news, follow the most critical stories of the day, and track complex issues over the long  
11 term. NPR reaches approximately 52 million people on broadcast radio, podcasts, NPR apps, and  
12 NPR.org each weekper month. NPR distributes its radio broadcasts through more than 1,000 non-  
13 commercial, independently operated radio stations, licensed to more than 260 NPR members and  
14 numerous other NPR-affiliated entities.

15 6. Plaintiff Eric Westervelt is a resident and citizen of the state of California and a  
16 journalist who works as a Correspondent on NPR’s National Desk from an office in Berkeley,  
17 California.

18 7. Defendant U.S. Marines is a component of Defendant U.S. Navy which is a  
19 component of Defendant U.S. Department of Defense (“DOD”), itself a component of the  
20 Executive Branch of the United States Government. Defendants are each an “agency” within the  
21 meaning of 5 U.S.C. § 552(f). Plaintiffs are informed and believe that the U.S. Marines has  
22 possession and control of the records sought by the FOIA Request.

23 **JURISDICTION**

24 8. This Court has subject-matter jurisdiction over this action and personal jurisdiction  
25 over the parties under 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 701-706, and 28 U.S.C. § 1331.

26 **VENUE**

27 9. Venue in the Northern District of California is proper under 5 U.S.C.  
28 § 552(a)(4)(B) as Mr. Westervelt’s work for NPR and his FOIA Request to the U.S. Marines

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1 occurred in Alameda County. For the same reason, venue also is proper under 28 U.S.C. §  
2 1391(e).

3 10. Assignment to the San Francisco Division is proper under Civil Local Rule 3-2(c)  
4 and (d) because Mr. Westervelt’s work for NPR and his FOIA Request to the U.S. Marines  
5 occurred in Alameda County, within this District.

6 **FACTS**

7 11. Through the FOIA Request to the U.S. Army on July 29, 2019, Mr. Westervelt,  
8 while employed for NPR, requested access to and copies (including electronic records) of:

- 9 a. Records from administrative investigations (commonly referred to as “JAGMAN”  
10 investigations) and other investigation, relating to U.S. Marines killed or injured  
11 during Operation Vigilant Resolve in or around Fallujah, Iraq in the winter or  
12 spring of 2004; and
- 13 b. Records from an investigation ordered by Lieutenant General Greg Olsen into the  
14 death of a Marine and the injury of another Marine from 2<sup>nd</sup> Battalion, 1<sup>st</sup> Marines  
15 that may relate to actions taken by or ordered by Marines with the 1<sup>st</sup> Battalion, 11<sup>th</sup>  
16 Marines, including then Captain Duncan Hunter.

17 12. Mr. Westervelt also asked the U.S. Marines for a “waiver or reduction of fees”  
18 because the information sought was for NPR’s use “for a planned news story”. Attached as  
19 **Exhibit A** is a true and correct copy of the FOIA Request.

20 13. On August 5, 2019, the U.S. Marines acknowledged receipt of the FOIA Request.  
21 Attached as **Exhibit B** is a true and correct of this acknowledgment of receipt.

22 14. On August 28, 2019, on behalf of the U.S. Marines, Ms. Elisa Reyes wrote that  
23 “[t]he time-frame that you are requesting are for records that we no longer have physically here in  
24 Camp Pendleton (if we ever did have them). I have requested that the archive center search based  
25 on the criteria you provided.” Attached as **Exhibit C** is a true and correct copy of this response.

26 15. On September 6, 2019, Mr. Westervelt wrote to Ms. Reyes and requested an update  
27 on the status of the FOIA Request. On September 10, 2019, Ms. Reyes responded that “I am still  
28 awaiting on confirmation of records for your request. I will inform you once I have been

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1 contacted. Again, I appreciate your patience.” Attached as **Exhibit D** is a true and correct copy of  
2 this response.

3 16. On September 17, 2019, Ms. Elias wrote to Mr. Westervelt: “This is 1st Marine  
4 Division’s final response to your request under the Freedom of Information Act (FOIA). Please  
5 be advised that after diligent searches, no responsive records were located.” Ms. Elias also stated  
6 that “[t]his does not constitute a denial of records as no records were found by this command;  
7 however, I am advising you of your right to appeal this determination” and provided information  
8 about making an appeal. Attached as **Exhibit E** is a true and correct copy of this response.

9 17. NPR appealed this determination in an October 17, 2019, letter. In the appeal,  
10 NPR noted: “We have reason to believe, per reliable active duty military sources, that a report and  
11 or documents on this incident exists. We again request a thorough search for any records from  
12 administrative investigations (commonly referred to as "JAGMAN" investigations) and other  
13 investigations, relating to U.S. Marines killed or injured during Operation Vigilant Resolve in or  
14 around Fallujah, Iraq in the winter or spring of 2004; and records from an investigation ordered by  
15 then-Lieutenant General Greg Olsen into the death of a Marine and the injury of another Marine  
16 from 2nd Battalion, 1st Marines that may relate to actions taken by or ordered by Marines with the  
17 1st Battalion, 11th Marines, including then Marine Captain Duncan Hunter.” Attached as **Exhibit**  
18 **F** is a true and correct copy of this correspondence.

19 18. In a letter dated January 16, 2020, NPR’s appeal was denied after the agencies  
20 insisted they “were unable to locate responsive records”. The letter informed that NPR “may seek  
21 judicial review of this decision by filing a complaint in an appropriate U.S. District Court.”  
22 Attached as **Exhibit G** is a true and correct copy of this correspondence. Plaintiffs are deemed to  
23 have exhausted their administrative remedies with respect to the FOIA Request under 5 U.S.C.  
24 § 552(a)(6)(C)(i).

25 19. NPR is informed and believes that Defendants possess at least one responsive  
26 investigative report: a memorandum from the United States Central Command, Office of the  
27 Commander, involving “Investigation of Friendly Fire Incident on 12 April 2004, in the vicinity of  
28 Fallujah, Iraq, Company E, 2<sup>nd</sup> Battalion, 1<sup>st</sup> Marines (E/2/1)”. The memorandum, dated May 12,

1 2004, is 57 pages in length and details, “findings of fact, analysis, conclusions, and opinions as to  
2 the cause of the incident and contributing factors”. The memorandum expressly provides that  
3 “Commander, USMARCENT will ensure the next of kin are injured service members are fully  
4 briefed on the findings of this Investigation and when that has been accomplished, USCENCOM  
5 will authorize the public release of this report.”

6 **FIRST CAUSE OF ACTION**

7 **(Violation of FOIA)**

8 20. Plaintiffs reallege and incorporates the allegations contained in the preceding  
9 paragraphs as if fully set forth herein.

10 21. NPR’s FOIA Request seeks “agency” records and within the Defendants’ custody  
11 and control.

12 22. Defendants failed to produce any responsive records to NPR’s FOIA Request.  
13 Plaintiffs have a legal right under FOIA to obtain the agency records they requested in their FOIA  
14 request, and there exists no “exceptional circumstances” or legal basis for Defendants’ failure to  
15 respond to Plaintiffs’ FOIA Request and to make these records available.

16 23. Defendants’ failure to make promptly available the records sought by NPR’s FOIA  
17 Request violates FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A)(ii), and applicable regulations  
18 promulgated thereunder.

19 24. Plaintiffs are entitled to declaratory relief finding that Defendants have violated  
20 FOIA and are immediately entitled to receive all records responsive to their request.

21 25. Plaintiffs are further entitled to injunctive relief, ordering Defendants to  
22 immediately produce copies of all records responsive to Plaintiffs’ FOIA Request without further  
23 delay.

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request the Court award them the following relief:

- A. Declare that Defendants violated FOIA in their response to NPR’s FOIA Request;
- B. Order Defendants to immediately disclose the requested records to Plaintiffs and enter an injunction prohibiting Defendants from continuing to withhold the requested records;
- C. Order Defendants to immediately disclose any responsive records in their possession or control to Plaintiffs;
- D. Award Plaintiffs their reasonable costs and attorney’s fees;
- E. Grant such further relief as the court may deem just and proper.

Dated: April 15, 2020

Respectfully submitted,

DAVIS WRIGHT TREMAINE LLP

By: /s/ Thomas R. Burke  
THOMAS R. BURKE

Attorneys for Plaintiffs  
NATIONAL PUBLIC RADIO, INC. and ERIC WESTERVELT

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