

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Willkie Farr & Gallagher LLP
1875 K Street, NW
Washington, DC 20006

Plaintiff,

v.

Federal Bureau of Investigation
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: 540-868-4391

Defendant.

Case No.: _____

**COMPLAINT FOR VIOLATION OF THE
FREEDOM OF INFORMATION ACT**

INTRODUCTION

1. Plaintiff Willkie Farr & Gallagher LLP (“Willkie” or “Plaintiff”) represents forty U.S. nationals who were killed or wounded, or whose relatives were killed or wounded by the Islamic Republic of Iran (“Iran”) and/or its agents in Iraq from 2006 to 2009, including American military veterans and Gold Star families. *See Ami Neiberger et al. v. Islamic Republic of Iran*, Case No. 1:16-cv-02193-EGS (D.D.C.). Plaintiff brings this action for relief under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to compel the Federal Bureau of Investigation (the “Agency” or “FBI”) to produce records, as required by law, relating to the wrongful injury and deaths of U.S. soldiers and citizens.

2. On January 9, 2020, Plaintiff properly submitted six targeted requests to the Agency in accordance with FOIA and applicable agency regulations, requesting certain specified records relating to the deaths or injuries in Iraq of six identified service members and civilian contractors.

3. Also on January 9, 2020, Plaintiff properly submitted an additional targeted FOIA request to the Department of Justice (“DOJ”) requesting certain specified records relating to the death of an identified civilian contractor. On January 17, 2020, the DOJ FOIA/PA Mail Referral Unit referred that request to the Agency in accordance with applicable agency regulations.

4. The Agency’s statutory deadline for making a determination concerning each of Plaintiff’s seven requests has long since expired. However, for all of the aforementioned requests, the Agency has neither produced any documents nor made determinations. The Agency’s failure to act on Plaintiff’s requests violates FOIA and Department of Justice FOIA Regulations. 5 U.S.C. §§ 552 (a)(6)(A)(i), (a)(6)(B)(i); 28 CFR § 16.4(a).

5. More than a decade ago, the President directed federal agencies to adopt a “presumption in favor of disclosure” and to respond to FOIA requests “promptly and in a spirit of cooperation,” so that “openness prevails.” FOIA Pres. Mem., 74 Fed. Reg. 4683, 4683 (Jan. 21,

2009). In failing to provide a determination or response on any of Plaintiff's FOIA requests long after the deadline has expired, the Agency has thus far disregarded this directive.

6. The requested records have broader public significance beyond the *Neiberger* litigation. Official government publications, policy analysts, and the national media have all reported on America's efforts to hold Iran accountable for its support of terrorism in Iraq, reflecting the public's interest in allegations that Iran financed terrorism in Iraq.¹

7. Plaintiff has constructively exhausted administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i), and now seeks judicial relief compelling the Agency to promptly search for and produce the requested records, and enjoining any further improper withholding.

JURISDICTION AND VENUE

8. This Court has jurisdiction under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201(a), and 2202.

9. Venue lies in this District pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

PARTIES

10. Plaintiff Willkie Farr & Gallagher LLP is a law firm with an office in Washington, D.C. Plaintiff submitted the seven FOIA requests identified in this Complaint.

¹ See, e.g., *Iran Ordered to pay \$879 Million to Khobar Towers Bombing Survivors: MM ~Law LLC*, CISION PR NEWSWIRE (July 7, 2020), <https://www.prnewswire.com/news-releases/iran-ordered-to-pay-879-million-to-khobar-towers-bombing-survivors-mmlaw-llc-301088893.html>; Natalie Rodriguez, *New Path To Justice May Await Terror Victims After Court Win*, LAW360 (May 31, 2020), <https://www.law360.com/articles/1278222/new-path-to-justice-may-await-terror-victims-after-court-win>; Richard A. Oppel Jr. and Nicholas Bogel-Burroughs, *'I Lost My Legs': Wounded in Iraq, He Sued Iran*, THE NEW YORK TIMES (JAN. 12, 2020), <https://www.nytimes.com/2020/01/12/us/suleimani-iran-attacks.html>; see also Tim Arango, et al, *The Iran Cables: Secret Documents Show How Tehran Wields Power in Iraq*, THE NEW YORK TIMES (Nov. 19, 2019), <https://www.nytimes.com/interactive/2019/11/18/world/middleeast/iran-iraq-spy-cables.html>; Edward Wong and Eric Schmitt, *U.S. Pressures Iraq Over Embrace of Militias Linked to Iran*, THE NEW YORK TIMES (Mar. 19, 2019), <https://www.nytimes.com/2019/03/19/world/middleeast/iraq-us-tensions-iran.html>.

11. Defendant Federal Bureau of Investigation is an “agency” of the federal government within the meaning of 5 U.S.C. § 552(f)(1). The Agency is believed to have possession, custody, and control of records responsive to Plaintiff’s requests.

FACTUAL ALLEGATIONS

I. PLAINTIFF PROPERLY SUBMITTED SEVEN FOIA REQUESTS FOR AGENCY RECORDS

12. **January 9, 2020 Requests.** On January 9, 2020, Plaintiff properly submitted six targeted requests to the Agency in accordance with FOIA and applicable agency regulations, requesting certain specified records, files, reports, and other related documents pertaining to specified attacks in Iraq (identified by incident dates, locations of death or injury, report keys, soldier rank and unit, and other relevant details, where available) that resulted in the deaths or injuries of six identified service members and civilian contractors.

13. All six requests were submitted via fax to the Agency’s fax number, as instructed by the Agency on its FOIA website. *See Requesting FBI Records*, FEDERAL BUREAU OF INVESTIGATION INFORMATION MANAGEMENT (July 31, 2020, 10:53 AM), <https://www.fbi.gov/services/information-management/foipa/requesting-fbi-records>, attached as **Exhibit 1**. Each request “reasonably describes” the records Plaintiff seeks, 5 U.S.C. § 552(a)(3)(A)(i), and, to the extent possible, specifies documents, authors, dates, and corroborating information establishing the existence of the requested records believed to be in the Agency’s possession. The six requests and fax transmission report showing delivery are attached as **Exhibit 2**.

14. On January 10, 2020, Plaintiff contacted the Agency to confirm that it had received the six requests and requested that the Agency advise Plaintiff if any additional information was

needed. *See* **Exhibit 3**. The Agency responded that same day acknowledging that the six requests were received. *Id.*

15. **January 17, 2020 Referred Request.** On January 9, 2020, Plaintiff submitted one targeted request to the DOJ FOIA/PA Mail Referral Unit in accordance with FOIA and applicable agency regulations, requesting specified lists of records, files, reports, and other related documents pertaining to the specified attack in Iraq (identified by incident date, location of death, report keys, soldier rank and unit, and other relevant details, where available) that resulted in the death of an identified civilian contractor. On January 17, 2020, DOJ assigned the request Tracking Number EMRUFOIA010920-2 and referred it to the FBI in compliance with applicable agency regulations. *See* 28 CFR § 16.4(d)(2)(i). The request and DOJ notice of receipt and referral are attached in full as **Exhibit 4**.

16. The Agency has not sent any communications to Plaintiff pertaining to any of the seven FOIA requests other than to acknowledge that the first six requests had been received. The Agency has never asserted that any of the above-mentioned requests failed to reasonably describe the records sought or was improper or deficient in any manner. Nor has the Agency ever requested any additional information from Plaintiff. Instead, the Agency has failed to provide a determination or otherwise respond substantively to any of Plaintiff's requests in violation of FOIA.

II. THE AGENCY FAILED TO MAKE DETERMINATIONS WITHIN FOIA'S TIME LIMITS FOR ALL OF PLAINTIFF'S REQUESTS, AND PLAINTIFF HAS CONSTRUCTIVELY EXHAUSTED ADMINISTRATIVE REMEDIES

A. The Agency Violated FOIA's Time Limits and Search Requirements

17. Pursuant to 5 U.S.C. § 552(a)(3)(A), after receiving each of Plaintiff's requests, the Agency was required to search for responsive records, including making reasonable efforts to search for records in electronic format and to promptly produce the records it located. Further,

pursuant to 5 U.S.C. § 552(a)(6)(A)(i), the Agency was required to make a determination within 20 working days of receiving each FOIA request. Given that the last of Plaintiff's Requests was referred to the Agency on January 17, 2020, the Agency has long since violated the 20-working-day deadline to provide a determination for each of Plaintiff's requests as required by FOIA.

18. To date, six months after its deadline, the Agency has still made *no determination or production* in response to any of Plaintiff's FOIA requests. The Agency's failure to make determinations or productions concerning Plaintiff's requests within the required time period violates 5 U.S.C. §§ 552(a)(6)(A)(i) and (B)(i), as well as the Agency's own FOIA regulations. *See* 28 CFR § 16.5(a).

B. Plaintiff Has Constructively Exhausted Administrative Remedies

19. For each of the foregoing requests (or aspects thereof), the Agency has not stated which documents will be produced or withheld, provided reasons for any withholding, or informed Plaintiff of its appellate rights. The Agency thus has not made a determination as required by FOIA.

20. As stated above, the 20-working-day time limit for a determination has long since expired for each request at issue, and Plaintiff is therefore "deemed to have exhausted administrative remedies" with respect to the foregoing FOIA violations. 5 U.S.C. § 552(a)(6)(C)(i). FOIA thus authorizes Plaintiff to bring suit in this District to compel prompt production and enjoin continued wrongful withholding of records responsive to Plaintiff's requests. 5 U.S.C. § 552(a)(4)(B).

CLAIMS FOR RELIEF

COUNT ONE: Failure to Comply with FOIA

21. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

22. Plaintiff properly requested records within the possession, custody, and control of the Agency.

23. The Federal Bureau of Investigation is an agency subject to FOIA.

24. The Agency was required under 5 U.S.C. § 552(a)(3) to conduct a reasonable search for records responsive to Plaintiff's seven FOIA requests.

25. The time under 5 U.S.C. § 552(a)(6) for the Agency to conduct such a search and to make a determination as to each of Plaintiff's seven FOIA requests, informing Plaintiff which documents the Agency intends to produce and withhold, and the reasons for withholding any documents, has expired.

26. The Agency has wrongfully failed to make and communicate to Plaintiff a determination as to each of Plaintiff's seven FOIA requests.

27. Pursuant to 5 U.S.C. § 552(a)(3)(A), the Agency was required to promptly produce all responsive records that are subject to disclosure under FOIA.

28. The Agency has wrongfully failed to make such a production as to any of Plaintiff's seven FOIA requests.

29. Plaintiff has exhausted administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

30. Plaintiff is entitled to an order compelling the Agency to conduct reasonable searches sufficient to locate responsive records and to expeditiously produce all responsive records, subject to withholdings agreed to by the parties or approved by the Court.

31. To facilitate determination of the validity of any withholdings based on FOIA exemptions the Agency may ultimately assert, Plaintiff seeks an order compelling the Agency to produce indexes justifying redactions to or withholding of responsive records.

COUNT TWO: Declaration Precluding Assessment of Fees

32. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

33. The Agency has failed to comply with time limits under 5 U.S.C. § 552(a)(6).

34. The Agency has not discussed or attempted to discuss with Plaintiff how or whether Plaintiff is required to limit the scope of any of Plaintiff's FOIA requests.

35. No court has determined that exceptional circumstances exist.

36. Accordingly, Plaintiff is entitled to a declaration that the agency may not assess any search fees associated with any of Plaintiff's FOIA requests, pursuant to 5 U.S.C. § 552(a)(4)(A)(viii) and 28 U.S.C. § 2201(a).

PRAYER FOR RELIEF

37. Plaintiff requests that the Court:

- a. Order the Agency to expeditiously conduct a reasonable search for all records responsive to Plaintiff's seven FOIA requests, to the extent such a search has not already been conducted, and to demonstrate that it employed search methods reasonably likely to lead to the discovery of responsive records;
- b. Order the Agency to produce within twenty (20) days or such other time as the Court deems proper all records responsive to Plaintiff's seven FOIA requests that are subject to disclosure under FOIA, as agreed to by the parties or determined by the Court, and indexes justifying any withholdings or redactions;
- c. Declare that the Agency failed to comply with the time limits under 5 U.S.C. § 552(a)(6) and that search fees therefore may not be assessed under 5 U.S.C. § 552(a)(4)(A)(viii) with respect to any of Plaintiff's FOIA requests;
- d. Award Plaintiff's attorney's fees and costs incurred in relation to this case, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant Plaintiff any other relief the Court deems just and proper.

Dated: September 11, 2020

Respectfully submitted,

/s/ Michael J. Gottlieb

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