

The Washington Post

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22 June 2020

Office of the Judge Advocate General
Code 14
Department of the Navy
1322 Patterson Avenue SE
Suite 3000
Washington Navy Yard, DC 20374-5066

Re: Freedom Of Information Act Appeals:

DON-NAVY-2019-000104 – Board of Inquiry 1st request (updated records)
DON-NAVY-2019-005803 – Board of Inquiry 2nd request (updated records)
DON-NAVY-2020-000481 – Board of Inquiry 3rd request
DON-NAVY-2020-007209 – Board of Inquiry 4th request
DON-NAVY-2020-003840 – NCIS GDMA closed case files prior to Jan. 1, 2006
DON-NAVY-2020-003844 – Disposition and accountability actions for Ulysis Guno
DON-NAVY-2019-000525 – David Morales record of trial

Dear Sir or Madam,

Pursuant to 5 U.S.C. § 552(a)(6)(a), I submit this administrative appeal of the blanket denial by the Naval Criminal Investigative Service (NCIS) of seven Freedom of Information Act requests from reporter Craig Whitlock.

Four of the requests fall into the same category: records related to Boards of Inquiry (BOI), administrative separations and retirement-grade determinations conducted for U.S. Navy officers involved in the Glenn Defense Marine Asia (GDMA) case. The types of records sought by these four requests are identical but cover different time periods. The requests were submitted to NCIS on Oct. 3, 2018; April 10, 2019; Oct. 11, 2019 and April 27, 2020; copies of three of the four requests in this category (“the Boards of Inquiry Requests”) are attached as Exhibit A. (The request that was submitted to NCIS on April 10, 2019 was accepted telephonically by NCIS Assistant Counsel Karen Richman as a renewal of the Oct. 3, 2018 request).

The fifth request was submitted to NCIS on Jan. 22, 2020. It seeks closed Reports of Investigation (ROI) conducted by NCIS into GDMA prior to 2006, as well as any ROIs closed since 2006 that haven't already been publicly released. A copy of the request is attached as Exhibit B ("the ROI Request"). In an email dated Jan. 23, 2020, the NCIS FOIA office confirmed receipt of this request and granted my request for expedited processing.

The sixth request was submitted to NCIS on Jan. 22, 2020 and seeks records from the Navy's Consolidated Disposition Authority (CDA) for GDMA regarding LSC Ulysses Guno. A copy of the request is attached as Exhibit C ("the Guno Request"). In an email dated Jan. 23, 2020, the NCIS FOIA office confirmed receipt of the request and granted my request for expedited processing.

The seventh request was submitted to NCIS on Oct. 16, 2018. It seeks the entire and complete Record of Trial, including exhibits, depositions and other accompanying documents, from the court-martial proceedings for Navy CDR David A. Morales ("the Morales Request").

After waiting for 576 days for the NCIS FOIA office to make a determination with respect to the Morales Request, I submitted an administration appeal ("the Morales Appeal") to the Office of the Judge Advocate General on May 5, 2020 based on NCIS's failure to respond. The appeal was assigned case number DON-NAVY-2020-007628. A copy of the Morales Request and the Morales Appeal are attached as Exhibit D.

In a letter dated June 3, 2020, Grant Lattin, the director of the General Litigation Division for the Office of the Judge Advocate General, denied the Morales Appeal – along with seven other FOIA appeals seeking records related to GDMA – pursuant to FOIA Exemptions (b)(7)(A) and (b)(7)(B). Lattin made no distinction between any of the requests or appeals and withheld all records in their entirety.

At first blush, Lattin's denial appeared to be the Navy's final word regarding the Morales Request. But in a letter dated June 16, 2020, NCIS Assistant Counsel Karen Richman dealt revisited the long-suffering request for the Morales Record of Trial, denying the request based on Exemptions (b)(7)(A) and (b)(7)(B). In her letter, Richman stated that I could appeal her decision regarding the Morales Request. So please consider this my appeal.

In her June 16 letter, Richman also summarily denied the four Board of Inquiry Requests, the Guno Request and the ROI request – for a total of seven denials at one go. This represented a sudden, 180-degree change to the representations that Richman and NCIS had previously made; on numerous occasions over the past 18 months, the NCIS office had informed me that it was diligently working on all seven requests, had located the requested records, and was preparing them for release.

In her June 16 letter, however, Richman indicated that she had changed her position after receiving instructions from Lattin and the Office of the Judge Advocate General. As a

result, she denied the Board of Inquiry Requests, the Guno Request, the ROI request and the Morales Request all pursuant to Exemptions (b)(7)(A) and (b)(7)(B). A copy of the Richman letter (“the Denial”) is attached as Exhibit E.

ARGUMENT

In the Denial, NCIS offers only vague, generalized justifications for its decision to withhold all of the requested records, rather than the specific, detailed evidence the law requires.

Further, NCIS and the Navy’s Office of the Judge Advocate General have taken utterly inconsistent and contradictory positions on the releasability of the types of records being sought.

In response to previous FOIA requests for records related to the GDMA investigation, NCIS has released thousands of pages of Board of Inquiry records, court-martial Records of Trial, closed ROIs and records from the Consolidated Disposition Authority. Yet now NCIS has suddenly reversed itself and declared that each of those categories of records is exempt from release. Even if there were a logically coherent or legally justifiable reason for this backflip, NCIS has failed to offer any explanation whatsoever for its change in position.

NCIS Has Not Justified Withholding Records under Exemption 7(B)

Exemption 7(B) pertains to records compiled for law-enforcement purposes whose release “would deprive a person of a right to a fair trial or an impartial adjudication.” The standard for finding records exempt under Exemption 7(B) is high. As the Court of Appeals for the D.C. Circuit has stated, “Congress made the threshold of (7)(B) higher than for most of the other exemptions for law enforcement material...requir[ing] that release ‘would’ deprive a person of fair adjudication.” *Washington Post Co. v. U.S. Dep’t of Justice*, 863 F.2d 96, 102 (D.C. Cir. 1988).

The D.C. Circuit recognized that Exemption 7(B) applies only in “a narrow range of situations” and articulated a two-part standard for determining whether Exemption 7(B) is applicable: “(1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Id.*

The Denial, however, failed to identify a trial or a proceeding that is pending or truly imminent. In fact, the Denial did not cite any specific proceedings at all, making only an overbroad statement that “the GDMA criminal investigation is active and ongoing and will remain so until the completion of all enforcement proceedings.”

It is true that nine current and former U.S. Navy officials involved in the GDMA case face corruption-related charges in U.S. District Court for the Southern District of

California. But all nine defendants were indicted in March 2018 – more than two years ago – and there is no evidence that a trial is “truly imminent.”

In fact, of the 34 individuals who have been charged in federal court in the GDMA case since 2013, none has actually gone to trial. All the others pleaded guilty long before they were scheduled to face trial.

Given the long history of the GDMA case, it is baffling that NCIS would invoke Exemption 7(B) for the first time now. As Lattin archly noted in his June 3 letter, NCIS has processed more than three-dozen FOIA requests for records in the GDMA case over the past four years and has released thousands of pages of documents – posting them online in its FOIA reading room for all the world to see (<https://www.ncis.navy.mil/Media/Reading-Room/>). NCIS did not consider Exemption 7(B) to be a legitimate reason to withhold any of those documents – even though *hundreds* of cases were pending at the time in the U.S. District Court and the military justice system. Yet today, as the GDMA investigation finally nears an end after seven long years, NCIS all of a sudden seems to have discovered the existence of Exemption 7(B) and is reaching for it as a fig leaf.

Even if the Denial were to have met the first prong of the D.C. Circuit’s two-part test (which it has not), NCIS did not even attempt to address the second requirement: to make a specific finding that it is “more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.”

NCIS simply repeated the language in the statute without giving any further justification or explanation as to how release of the records could “seriously interfere” with a specific proceeding. By making only the barest conclusory statement, NCIS has failed to meet its burden to show how release of the particular material would have the adverse consequence that the FOIA seeks to guard against. *See Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982).

The GDMA case has been covered extensively in the news media for seven years. Thousands of news reports have appeared on television, in newspapers and on news websites, including more than 50 news stories that The Washington Post alone has published (based largely on records obtained from NCIS under FOIA). It would stretch all credulity to argue that release of the additional records being sought could inflame or distort the opinions of prospective jurors to the degree that it would seriously interfere with any possible proceedings.

Further, NCIS has made no specific finding that the records being sought by the Requests are *even relevant* to any pending judicial proceeding. None of the records being sought pertains to the nine defendants who still face charges in U.S. District Court. Rather, they pertain to other subjects of the investigation whose cases have already been adjudicated and closed.

In addition, even if there were some kind of relevancy, NCIS has made no specific finding that release of the records being sought could somehow confer an unfair advantage to any party involved in a pending judicial proceeding. To the contrary, Department of Justice officials have repeatedly represented to the court in the Southern District of California that *all* unclassified investigative material in the GDMA case has already been made available to all of the remaining defendants. As a result, there is simply no credible scenario under which disclosure of the records being sought could seriously interfere with the proceedings.

NCIS Has Not Justified Withholding Records Under Exemption 7(A)

Exemption 7(A) allows for the withholding of records compiled for law-enforcement purposes, “but only to the extent that the production of such law enforcement proceedings or information could reasonably be expected to interfere with enforcement proceedings.”

Determining the applicability of Exemption 7(A), however, requires a two-step analysis focusing on (1) whether a law-enforcement proceeding is pending or prospective; and (2) whether release of information about it could reasonably be expected to cause some articulable harm. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that government must show how records “would interfere with a pending enforcement proceeding.”).

In doing so, an agency must make a greater showing of interference than a conclusory statement that the withheld information was clearly related to an ongoing investigation. See *Campbell v. Dept. of Health and Human Services*, 682 F. 2d. 256, 259 (D.C. Cir. 1982).

The FOIA Improvement Act of 2016 amended the FOIA to codify the “foreseeable harm” standard and require agencies to go beyond mere formulaic justifications for redacting records. Congress made clear that it is no longer enough that an agency make a case for the technical application of an exemption; it must instead articulate *precise* reasons why *specific* records, or portions of records, could be reasonably foreseen to harm a cognizable interest. The unambiguous language of the “foreseeable harm” standard manifests Congress’s intent to require something more of an agency when it defends its withholding.

In this case, NCIS has made no attempt whatsoever to articulate specific reasons for how disclosure could impair an ongoing investigation. Indeed, there is no evidence that NCIS conducted any analysis of the sort at all.

The D.C. Circuit has held that an agency’s burden to withhold records under Exemption 7(A) is far greater when the subject of a law-enforcement proceeding already has access to it. In such situations, courts “must conduct a more focused and particularized review of the documentation on which the government bases its claim that” release of the record “would interfere with the investigation.” See *Campbell*, 682 F.2d at 265.

As stated previously, however, all remaining defendants in the GDMA case already have access to information in the records withheld by NCIS pursuant to Exemption 7(A). Therefore, no harm or interference to law-enforcement proceedings could possibly result from disclosure of this same information under FOIA.

Under the FOIA Improvement Act of 2016, agencies are also required to “take reasonable steps necessary to segregate and release non-exempt information” and must “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.” Yet NCIS failed to take any steps in this regard, either.

Many Of The Records Being Sought Are Already In The Public Domain

It is absurd on its face that NCIS would withhold records that were compiled for the specific purpose of chronicling judicial or administrative proceedings that were open to the public. It is doubly absurd that NCIS would withhold those same records by arguing that they could, in theory, “seriously interfere” with other, unspecified judicial or administrative proceedings at some point in the future.

In accordance with Navy regulations, court-martial proceedings and Board of Inquiry proceedings are clearly open to the public. In his June 3, 2020 letter, Lattin confirmed this, stating: “Lastly, I feel it is my duty to inform you that boards of inquiry and courts-martial are open to the public.”

Established FOIA law holds that, under the public domain doctrine, “when information has been ‘officially acknowledged,’ its disclosure may be compelled even over an agency’s otherwise valid exemption claim.” *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007) (quoting *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)). See also *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (“To the extent that any data requested under FOIA are in the public domain, the submitter is unable to make any claim to confidentiality.”)

In other words, records that otherwise may be exempt from disclosure under FOIA “lose their protective cloak once disclosed and preserved in a permanent public record.” *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999).

NCIS has already acknowledged that records of the Morales court-martial proceedings and of numerous Board of Inquiry proceedings do, in fact, exist and have been preserved in a permanent public record.

In a letter dated Dec. 14, 2018, NCIS Assistant Counsel Karen Richman stated that a Record of Trial for the Morales proceedings had been authenticated by the Navy; she later informed me that the NCIS FOIA office had located a copy of the Morales Record of Trial and was reviewing the documents for release.

In an email dated April 28, 2020, Erin Roberge, a FOIA officer for NCIS, informed me that her office had located records from *ten separate BOIs* that were responsive to the Boards of Inquiry Requests. Roberge said NCIS was reviewing the records for expected release.

Releasing these records should be straightforward. As NCIS well knows, it has previously released voluminous records of court-martial proceedings and Board of Inquiry proceedings involving Navy personnel investigated as part of the GDMA scandal. Those records have been posted publicly in the NCIS FOIA reading room online. So why are the Morales Record of Trial and the records of the 10 additional BOIs any different? There is simply no legitimate explanation.

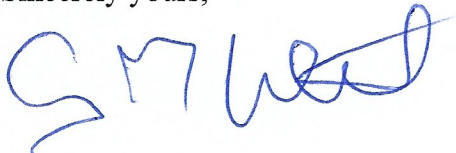
CONCLUSION

For all the reasons detailed above, this appeal should be granted and NCIS should immediately release the requested records in their entirety.

Thank you for your attention and consideration. If I can answer any questions or be of further assistance, please do not hesitate to contact me at 202-689-9134 or by email at craig.whitlock@washpost.com.

I look forward to your determination with respect to this appeal within 20 business days as the law requires.

Sincerely yours,



Craig Whitlock
Staff writer



**DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
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IN REPLY REFER TO:
5720
Ser 14/208
August 13, 2020

Mr. Craig Whitlock
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Subj: YOUR NINE FREEDOM OF INFORMATION ACT (FOIA) FOIA APPEALS;
CONSOLODATED APPEAL TRACKING NUMBER DON-NAVY-2020-
009018.

This letter responds to two sets of multiple appeals submitted to my office. On June 12, 2020, you submitted appeals for FOIA requests DON-NAVY-2020-000481 and DON-NAVY-2020-007209. These appeals were received by my office on June 15, 2020. On June 22, 2020, you submitted a second appeal letter involving these same two FOIA cases again, and an additional five FOIA cases (DON-NAVY-2019-000104, DON-NAVY-2019-005803, DON-NAVY-2020-003840, DON-NAVY-2020-003844, and DON-NAVY-2019-000525). This letter responds to your June 22, 2020, appeals, and by its duplicative inclusion of your earlier, June 12, 2020, appeals, that letter as well. Your appeal tracking number for these consolidated cases is DON-NAVY-2020-009018.

Each of your initial FOIA requests was submitted to the Naval Criminal Investigative Service (NCIS), the initial denial authority (IDA), and sought records of investigation, disposition, and accountability of Department of the Navy personnel in cases related to Glenn Defense Marine Asia (GDMA). NCIS responded to your requests, informing you that, due to pending law-enforcement proceedings, criminal trials, and administrative actions, all records responsive to your request were withheld under FOIA exemptions (b)(7)(A) and (b)(7)(B). However, NCIS informed you that all GDMA records would be reviewed and posted to a public reading room upon final adjudication of all criminal and administrative proceedings related to GDMA cases.

Your appeal contends that (1) NCIS may not withhold responsive records regarding GDMA until the completion of criminal adjudication in the U.S. District Court for the Southern District of California and related administrative actions; (2) the IDA has not sufficiently explained its denial; (3) my office cannot independently invoke FOIA exemption (b)(7)(B) regarding responsive records; and (4) the public domain doctrine requires production of the requested records.

Your appeals are requests for a final determination under the FOIA. The basis for the denials is detailed in full below.

As an initial matter, I note that, by letter dated June 3, 2020, you were previously informed by my office, in response to your earlier appeals of your denied requests for GDMA records, that all GDMA-related records are currently being reviewed by the IDA and will be posted to a public reading room upon completion of all criminal and administrative proceedings. Likewise, my office informed you that such records would continue to be withheld until FOIA exemptions (b)(7)(A) and (b)(7)(B) no longer apply.

Regarding your current FOIA appeals of additional denied requests for additional GDMA records, in which you again contend that withholding under (b)(7)(A) and (b)(7)(B) is improper, I reaffirm my initial position regarding GDMA records and their withholding under these exemptions. Specifically, under FOIA exemption (b)(7)(A), release of GDMA investigative files would hinder law enforcement's ability to control or shape the GDMA investigation by revealing investigatory strategies and what evidence has been identified and yet to be identified, which could interfere with the ability to continue with further investigation (as needed) and enforcement proceedings. This would enable targets and potential targets of the investigation to take steps to suppress evidence or otherwise interfere with the Government's interest in full and fair investigations and enforcement actions (whether civil, criminal, or administrative). I also find that the Government has an interest in protecting the adjudicative process and participants under (b)(7)(A), mirroring the interest of defendants protected by exemption (b)(7)(B), which I have detailed below. Several federal criminal trials are currently pending in the Southern District of California. Moreover, additional administrative actions and court-martial trials are anticipated to begin following conclusions of these federal trials.

Additionally, regarding FOIA exemption (b)(7)(B), I find it is more probable than not that disclosure of these records would unfairly prejudice the rights of criminal, civil, or administrative defendants in later anticipated criminal and adverse administrative proceedings. Release of GDMA records to the public could reasonably be anticipated to complicate the jury selection process and compromise the objectivity of potential jurors, court-martial members, and members of boards of inquiry or administrative separation boards. Such publicity is also likely to improperly influence adjudicators, witnesses, and other parties in these cases. Such improper influence would compromise the ability of defendants or respondents to secure a fair trial or administrative hearing, develop and present a case in defense, seek witnesses in their defense, and more.

I. FOIA Exemption (b)(7)(A)

As you are likely aware from our prior correspondence, under exemption (b)(7)(A),

information compiled for law enforcement purposes is exempted from disclosure to the extent that production of the information “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). This exemption applies where (1) law enforcement proceedings are pending or prospective; and (2) release of the information could reasonably be expected to cause some articulable harm. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978); *FBI v. Abramson*, 456 U.S. 615, 621 (1982).

Although temporal in nature, exemption (b)(7)(A) remains viable throughout the duration of long-term investigations. *Antonelli v. U.S. Parole Comm’n*, No. 93-0109, slip op. at 3-4 (D.D.C. Feb. 23, 1996) (reiterating that courts repeatedly find lengthy, delayed, or even dormant investigations covered by (b)(7)(A)). Additionally, courts have broadly interpreted the types of “law enforcement proceedings” to which (b)(7)(A) applies—such proceedings have been held to include not only criminal actions, but also civil actions and regulatory proceedings. *See generally Bender v. Inspector Gen. NASA*, No. 90-2059, slip op. at 1-2, 8 (N.D. Ohio May 24, 1990); *Johnson v. DEA*, No. 97-2231, 1998 U.S. Dist. LEXIS 9802, at *9 (D.D.C. June 25, 1998).

Even after enforcement proceedings have closed in a particular case against an individual (either in a criminal or administrative proceeding), courts have ruled that continued use of exemption (b)(7)(A) may still be proper in “related” proceedings—i.e., when charges or administrative actions are pending against additional individuals arising out of a similar broad scheme or conspiracy. *See generally DeMartino v. FBI*, 577 F. Supp. 2d 178, 182 (D.D.C. 2008) (explaining that case remains open and pending because co-defendant is scheduled to be retried and other unindicted co-conspirators remain at large); *Hidalgo v. FBI*, 541 F. Supp. 2d 250, 256 (D.D.C. 2008) (finding that “although Hidalgo and other co-conspirators were convicted long ago . . . ongoing search for – and possible future trials of – indicted and unindicted fugitives satisfies the standard [under (b)(7)(A)]”).

Finally, courts have accepted that Congress intended exemption (b)(7)(A) to apply whenever the Government’s case would be harmed by the premature release of evidence or information, or when disclosure would impede any necessary investigation prior to an enforcement proceeding. Thus, courts have held that exemption (b)(7)(A) is properly invoked when release would hinder an agency’s ability to control or shape an investigation, would enable targets of investigations to elude detection or suppress or fabricate evidence, or would prematurely reveal evidence or strategy in the Government’s case. *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (determining that disclosure could result in “revelation of the scope and nature of the Government’s investigation”); *Mapother v. DOJ*, 3 F.3d 1533, 1540 (D.C. Cir. 1993) (holding that release of prosecutor’s index of all documents he deems relevant would

afford a “virtual roadmap through the [Government’s] evidence . . . which would provide critical insights into its legal thinking and strategy”); *Suzhou Yuanda Enter. Co. v. Customs and Border Prot.*, 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (agreeing that disclosure could “inform the public of the evidence sought and scrutinized in this type of investigation”).

Your letter acknowledges that several criminal cases remain active. As noted above, courts have regularly held that law enforcement proceedings are not considered to be complete for purposes of exemption (b)(7)(A) until all appeals and post-trial actions are complete. *See, e.g., James v. U.S. Secret Serv.*, 2007 U.S. Dist. LEXIS 52554, at *12; *DeMartino*, 577 F. Supp. 2d at 182; *Kidder v. FBI*, 517 F. Supp. 2d 17, 27 (D.D.C. 2007); *Kansi v. DOJ*, 11 F. Supp. 2d 42, 44 (D.D.C. 1998). Thus, the GDMA criminal cases are not complete for purposes of the FOIA. Further, after receipt of your appeal, my office contacted the IDA regarding the status of any additional pending cases (whether criminal or adjudicative). The IDA informed my office that many adverse administrative actions and court-martial referrals are pending. Some of these cases are awaiting the results and determinations of the currently scheduled federal court cases.

I also find that release of these records can be reasonably expected to cause an articulable harm. As noted above, release of GDMA investigative files would hinder law enforcement’s ability to control or shape the GDMA investigation by revealing investigatory strategies and what evidence has been identified and yet to be identified, which could interfere with the ability to continue with further investigation (as needed) and enforcement proceedings. This would enable targets and potential targets of the investigation to take steps to suppress evidence or otherwise interfere with the Government’s interest in full and fair investigations and enforcement actions (whether civil, criminal, or administrative). I also find that the Government has an interest in protecting the adjudicative process and participants under (b)(7)(A), mirroring the interest of defendants protected by exemption (b)(7)(B), which I have detailed below. Several federal criminal trials are currently pending in the Southern District of California. Moreover, additional administrative actions and court-martial trials are anticipated to begin following conclusions of these federal trials.

II. FOIA Exemption (b)(7)(B)

Additionally, I find FOIA exemption (b)(7)(B) to apply to the records you seek. FOIA exemption (b)(7)(B) allows for the withholding of records to prevent prejudicial pretrial publicity that could impair a proceeding, specifically protecting “records or information compiled for law enforcement purposes the disclosure of which would deprive a person of a right to a fair trial or an impartial adjudication.” Records can be withheld from release pursuant to exemption (b)(7)(B) when “(1) a trial or adjudication is pending or

imminent; and (2) it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings.” *Alexander & Alexander Servs. v. SEC*, No. 92-1112, 1993 WL 439799, at *10-11 (D.D.C. Oct. 19, 1993).

As discussed above, the records you seek have been compiled for law enforcement purposes, and trials and administrative adjudications are pending or imminent. I find it is more probable than not that disclosure of these records would unfairly prejudice the rights of criminal, civil, or administrative defendants in later anticipated criminal and adverse administrative proceedings. Release of GDMA records to the public could reasonably be anticipated to complicate the jury selection process and compromise the objectivity of potential jurors, court-martial members, and members of boards of inquiry or administrative separation boards. Such publicity is also likely to improperly influence adjudicators, witnesses, and other parties in these cases. Such improper influence would compromise the ability of defendants or respondents to secure a fair trial or administrative hearing, develop and present a case in defense, seek witnesses in their defense, and more. This is particularly so within the tightly knit Navy community. Therefore, your appeal is also denied pursuant to FOIA exemption (b)(7)(B).

III. Records in the Public Domain

For information to be a part of the public domain, the information that is publicly available “(1) must be as specific as the information previously released; (2) the information requested must match the information previously disclosed; and (3) the information requested must already have been made public through an official and documented disclosure.” *Moore v. CIA*, 666 F.3d 1330, 1333, 399 U.S. App. D.C. 63 (D.C. Cir. 2011).

The burden of proving that information exists in the public domain is upon the requester. Your request, however, fails to identify specific documents or information you seek that are already publically available. Your letter notes that NCIS has “acknowledged” that court-martial records and other investigatory documents regarding the GDMA case(s) exist. While such acknowledgement may suffice to prevent a “GLOMAR” response for each respective case, or to require release of documents regarding those respective cases, it merely concedes that such records exist, but does not specify which of the requested records are already publicly available. My office reached out to the IDA regarding its decision to withhold the requested records, and the IDA noted that, after consultation with respective authorities and in view of the pending criminal trials, further public releases are anticipated (as detailed above) to cause foreseeable harm for both the Government and defendants. Accordingly, no further records have been released, nor have any of the records you seek been otherwise posted, acknowledged, or provided to the public.

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Accordingly, I find that you have failed to meet your burden to show that the requested records must be released pursuant to the public domain doctrine, because you have not “demonstrate[d] with specificity the information that is in the public domain.” *Prison Legal News v. Exec. Office for United States Attys.*, 628 F.3d 1243, 1253. I also find that the prior disclosure of some, limited records is insufficient to satisfy your burden, and does not require the release of new and additional records, particularly in light of the foreseeable harm to pending federal criminal trials and subsequent adverse administrative actions.

Due to the pending GDMA criminal and administrative proceedings, the nature of the requested investigative records, and the foreseeable harms, detailed above, of releasing information contained in such records, I also find that no information is segregable at this time. However, as noted in our prior letter, boards of inquiry and courts-martial are open to the public. To the extent you wish to see the public components of ongoing actions, you may request such access from the respective pass and authorization authorities. The consolidated disposition authority has convened all GDMA courts-martial aboard the Washington Navy Yard. The Navy-Marine Corps Trial Judiciary posts the court-martial docket online at the following address: https://www.jag.navy.mil/trial_judiciary.htm.

You may also contact the Naval District Washington and Fleet Forces Command Public Affairs Officer for information regarding GDMA-related boards of inquiry. While the FOIA generally prevents evidence or records from such proceedings from being publicly released, your presence at a court-martial or board of inquiry will allow you to report on what occurs in each case. Therefore, during the pendency of the prosecution of the GDMA cases in the Southern District of California, you may, if you choose, witness and report on the public-facing component of all courts-martial and boards of inquiry related to this investigation. Personal attendance in these cases will allow you to witness all evidence without redaction, and to report in real time without waiting for the IDA to compile and review responsive records, while respecting the rights accorded both the Government and defendants in each respective case or proceeding.

Finally, regarding your contention that my office cannot independently assert a FOIA exemption on behalf of the IDA, please note that, as the agency’s adjudicator of FOIA appeals, my office is authorized to direct final administrative action in such cases. Although my office’s primary FOIA appeal role is to review the action of the IDA below, determine its compliance with the FOIA, and direct corrective action as needed, it cannot close its eyes to additional applicable exemptions just because an errant IDA failed to assert them. To do so would potentially jeopardize the privacy or due process interests of varied individuals, and the proper functioning and needs of the agency.

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CONCLUSION

For the reasons detailed above, your requests have been denied. However, these denials are temporal in nature. Once enforcement proceedings are complete, including any criminal and/or related administrative proceedings that may be taken as a result of the information contained in the investigation, you may submit a new request for this information. Please note that other FOIA exemptions that restrict the disclosure of information contained within the investigation may apply to such released records.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the denial of your appeal. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. Government and is, therefore, unable to assist you in this process.

You have the right to seek dispute resolution services by contacting the Department of the Navy's FOIA public liaison, Mr. Christopher Julka, at christopher.a.julka@navy.mil or at (703) 697-0031. You may also seek dispute resolution services from the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, at (202) 741-5770 or ogis@nara.gov.

If you have further questions or concerns for my office, my point of contact is Lieutenant Alyssa Williams, USN, who may be reached at alyssa.e.williams1@navy.mil or (202) 685-5398.

Sincerely,



S. D. SCHROCK

Director
General Litigation Division

Copy to:
NCIS
DNS-36
DON CIO

The Washington Post

1301 K STREET N. W.
WASHINGTON, D.C. 20071-7403
(202) 334-6000

Oct. 16, 2018

Naval Criminal Investigative Service
Department of the Navy
Attn: FOIA Coordinator
27130 Telegraph Road
Quantico, VA 22134-2253

Transmitted via email at ncis_foia@ncis.navy.mil

Dear FOIA Officer,

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, for copies of the records from the court-martial proceedings involving Navy Cmdr. David A. Morales and the Glenn Defense Marine Asia investigation.

The records I am seeking include, but are not limited to, the following:

- The entire and complete **Record of Trial**, including accompanying papers, for CDR Morales, who was tried before a military judge in Norfolk, Va., in August and September 2018. **Please include transcripts of the trial, all motions hearings, Article 32 hearings, conference calls and any other pre-trial hearings conducted as part of the case.**
- The transcript and audio and video recordings from **the deposition of Leonard Glenn Francis**, held at Naval Base San Diego, during July 9, 2018, before Capt. Charles Purnell, the deposing officer. **Please include all exhibits submitted by trial counsel and defense counsel as part of the Francis deposition proceedings** (there were a bunch of them).
- All other **motions, exhibits, submissions, memoranda or stipulations** submitted by trial counsel or defense counsel during **any of the proceedings involving CDR Morales** (for example, please include the Defense Motion to Preadmit Evidence, with accompanying exhibits, that was filed on Aug. 22, 2018).
- Orders, rulings, findings or other statements made by the judge, hearing officer or deposition officer in the Morales case.

- Reports of Investigation concerning CDR Morales by either the Naval Criminal Investigative Service (NCIS) or the Defense Criminal Investigative Service (DCIS). Please include any statements made by CDR Morales or notes of any interviews conducted with him.
- Memos, emails or other correspondence submitted by CDR Morales or his counsel or advocates to the Convening Authority in the case, believed to be the Commander, U.S. Fleet Forces Command; or to the Secretary of the Navy (SECNAV) or his staff.

All of the records from CDR Morales' court-martial proceedings (including any pre-trial hearings, motions or proceedings) have already been made part of the public record. Unless specifically sealed by the trial judge or hearing officer, none of the records should be exempt from disclosure under the FOIA.

If you deny this request in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the Act, and that you provide all non-exempt portions that are reasonably segregable. As you know, in his March 2009 Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, Attorney General Eric Holder directed federal officials to make discretionary releases when appropriate and partial disclosures of records when full disclosures are not possible.¹ In addition, under the FOIA Improvement Act of 2016, agencies are required to “take reasonable steps necessary to segregate and release nonexempt information” and must “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible.”²

I further request that you disclose the listed documents, as they become available to you, without waiting until all the documents have been assembled.

There is a clear, compelling and strong public interest in disclosure of these records that greatly outweighs any potential privacy concerns. The courts have consistently and forthrightly held that the public interest favors disclosure in cases that shed light on misconduct by government officials. In *Columbia Packing Co. v. U.S. Department of Agriculture* (1977), the First Circuit upheld an order to disclose under FOIA the personnel records of two former federal meat inspectors who had been convicted of taking bribes from meat-packing firms, noting that “the public has an interest in whether public servants carry out their duties in an efficient and law-abiding manner.”³ In *Cochran v. United States* (1985), the 11th Circuit held that “the balance struck under FOIA exemption six overwhelming[ly] favors the disclosure of information relating to a violation of the public trust by a government official, which certainly includes the

¹ <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>

² <https://www.congress.gov/114/plaws/publ185/PLAW-114publ185.pdf>

³ *Columbia Packing Co. v. U.S. Department of Agriculture*, 563 F.2d 495 (1st Cir. 1977)

situation of a misuse of public funds or facilities.”⁴ Although the official misconduct in *Cochran* concerned a relatively small amount of money misappropriated by a general officer in the U.S. Army, the 11th Circuit stated that “information relating to a misappropriation of government funds, in whatever amount, by a high level government official qualifies as a textbook example of information the FOIA would require to be disclosed to the press.”

I am also seeking expedited processing of this request for records. As a journalist for The Washington Post, I am primarily engaged in disseminating information to our worldwide readership. Further, the records I am seeking are urgently needed in order to inform the public concerning government activity, specifically regarding military officials who have committed misconduct as part of their official duties.

Developments in the Glenn Defense Marine Asia investigation have led to a steady stream of breaking news articles in The Washington Post since 2013. Over the past four years, this reporter personally has written more than 50 articles about the case, including numerous front-page stories. A delay in releasing records from the Consolidated Disposition Authority would undermine public confidence in the Navy’s ability and willingness to fairly and thoroughly investigate allegations of misconduct.

I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

For purposes of FOIA fee assessments, I request that you waive all fees in the public interest. The furnishing of the information sought by this request is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester. If, however, you decline to waive all fees, I am prepared to pay your normal fees for news media requesters. Please notify me if you expect the processing fees to exceed \$100.

If I can answer any questions or be of further assistance, please do not hesitate to contact me at 202-334-9587 (office) or by email at craig.whitlock@washpost.com.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'C Whitlock', written in a cursive style.

Craig Whitlock
Staff writer

⁴ *Cochran v. United States*, 770F.2d 949 (11 Cir. 1985)



DEPARTMENT OF THE NAVY
HEADQUARTERS
NAVAL CRIMINAL INVESTIGATIVE SERVICE
27130 TELEGRAPH ROAD
QUANTICO VA 22134-2253

5720 2019-000525
SER00LJF/18U2013
December 14, 2018

craig.whitlock@washpost.com

Mr. Craig Whitlock
The Washington Post
1150 15th Street NW
Washington, DC 20071

Dear Mr. Whitlock:

This further responds to your October 16, 2018 Freedom of Information Act (FOIA) request seeking records from the court-martial proceedings involving Navy Commander David Morales and the Glenn Defense Marine Asia investigation to include, but not limited to, the complete record of trial and the Leonard Francis deposition.

On December 10, 2018 our office was advised that the record of trial US v. CDR David A. Morales, USN (along with a transcript of the Leonard Francis deposition) has been authenticated, but the convening authority has not taken final action. In light of this, your request will remain open and we will further correspond with you once our office receives the final record of trial from the Office of the Judge Advocate General, Criminal Law Division.

We were further advised that the recording of Leonard Francis' deposition is maintained with the original record of trial and will be available to our office for review upon the convening authority's final action. Once the documents and audio/visual file are provided to our office we will conduct a segregability analysis and provide you with the results. We are unable to provide you with an estimated completion date at this time.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Richman", is positioned above the typed name.

KAREN RICHMAN
Assistant Counsel
Head, Government Information and Sharing Unit

Subject: RE: GDMA FOIA appeals



Richman, Karen - GOV <karen.richman@ncis.navy.mil>
to Whitlock, Craig

Mon, Sep 23, 2019, 9:47 AM

Hi Craig,

Thanks for your email. I hope all is well with you too. OJAG sent over your appeal of 2018-005865 last week.

FYI – I plan to release DON-2019-003445/00580 on Oct 2.

NCIS has been trying to locate the missing documents from the Steinberger and Starmer Records of Trial for quite some time. I am happy to report that I finally tracked them down and received a copy this morning. I also received the Morales Record of Trial this morning. We will start working on them immediately.

Once again, thanks for your patience. I hope you have a great day!

V/r,
Karen

Karen Richman
Assistant Counsel
Head, Government Information Sharing Unit
Naval Criminal Investigative Service - Code 00L
27130 Telegraph Rd
Quantico, VA 22134
COMM: 571-305-9099
DSN: 312-240-9099

Subject: RE: re: FOIA status



Richman, Karen - GOV <karen.richman@ncis.navy.mil>
to Whitlock, Craig

Thu, Jan 30, 4:11 PM

You are viewing an attached message. Loevy & Loevy Mail can't verify the authenticity of attached messages.

Hi Craig,

Below is an update on your pending GDMA FOIA requests:

- 1) **The Record of Trial from the court martial of CDR David Morales:** The redactions are complete. The CDA completed its review and concurred with our release. I am waiting to hear back from DOJ. I will continue to follow up with our POCs there.
- 2) DON-2020-00481 – requests for records from Boards of Inquiry since 10/11/2019. There are four BOI records. Erin completed the redactions and I am in the process of reviewing her work. I plan to send it to CDA and DOJ for review next week.
- 3) DON-2019-005803. Boards of Inquiry prior to 4/10/2019. NCIS released documents pertaining to this request on Oct. 2, 2019, but we've had a running discussion about your efforts to obtain additional records from individual commands (as opposed to just Naval Personnel Command). We were able to obtain additional responsive records. The redactions are complete and I intend to review them along with #2) above. Also, we've had a running discussion about whether the identities of individuals who go before a Board of Inquiry should be public (as you'll recall, I've argued and have presented evidence showing that, under Navy regs, Boards of Inquiry are open to the public and therefore the names should be made public as well). Could you please let me know where things stand on those two open questions and how we might be able to come to a final resolution? SECNAVINST 1920.6D Administrative Separation of Officers states "the proceedings of the Board should normally be open to the public at the discretion of the convening authority." The BOIs in question were not opened to the public by the convening authority, therefore, the names of the officers were not put into the public domain.
- 4) FOIA request filed on 11/4/2019 for records pertaining to two flag officers, RADM Timothy Giardina and RDML Adrian Jansen. I expect to release these records to you on FEB 18.
- 5) DON-2019-008473 – CDA records pertaining to GDMA between 2/1/2019 and 6/25/2019. NCIS released a batch of documents responsive to this request on 12/4/2019, but a number of pages were temporarily (?) withheld because they "required additional consultation." Do you know if these documents are still forthcoming? Or was a final determination made to withhold them based on a specific exemption? No final determination yet but I emailed the DOJ POC for an update.

I'm out of the office tomorrow but available to chat on Monday if you'd like to discuss further.

Thanks again for your continued patience Craig.

Best regards,
Karen

Karen Richman
Assistant Counsel
Head, Government Information Sharing Unit
Naval Criminal Investigative Service - Code 00L
27130 Telegraph Rd
Quantico, VA 22134

COMM: 571-305-9099

DSN: 312-240-9099

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Subject: RE: NEW NCIS FOIA GDMA REQUESTS



Roberge, Erin S - GOV <erin.roberge@ncis.navy.mil>
to Whitlock, Craig, Richman, Karen - GOV

Tue, Apr 28, 9:40 AM

You are viewing an attached message. Loevy & Loevy Mail can't verify the authenticity of attached messages.

Good Morning Mr. Whitlock,

Unfortunately, every single one of your requests is pending at DOJ until further notice. We can't move forward with the release of information until the consultation has concluded. We have located 2 NCIS investigations from 2004 and have also asked for a review of previously denied investigations. In regards to the BOIs, we have received additional records for 1 individual from your 1st request, 4 individuals from your second request, however, one file is identical and won't be provided, and 5 individuals from your 3rd request, including JANSEN.

Hope you are doing well!

Erin

The Washington Post

1301 K STREET N. W.
WASHINGTON, D.C. 20071-7403

(202) 334-6000

5 May 2020

Office of the Judge Advocate General
Code 14
Department of the Navy
1322 Patterson Avenue SE
Suite 3000
Washington Navy Yard, DC 20374-5066

Re: Freedom Of Information Act Appeal, **DON-FOIA-2019-000525**

Dear Sir or Madam,

Pursuant to 5 U.S.C. § 552(a)(6)(a), this letter constitutes an administrative appeal regarding the failure of the Naval Criminal Investigative Service (NCIS) to respond to a Freedom of Information Act request (the “Request”) by reporter Craig Whitlock that he submitted 20 months ago.

The Request was submitted to NCIS on Oct. 16, 2018. It seeks the entire and complete Record of Trial, including exhibits, depositions and other accompanying documents, from the court-martial proceedings for Navy Cmdr. David A. Morales. A copy of the Request is attached as Exhibit A.

Cmdr. Morales was tried before a military judge in Norfolk, Va., in August and September 2018 as part of the Glenn Defense Marine Asia (GDMA) investigation. The Secretary of the Navy designated NCIS as the proper authority to process FOIA requests relating to the GDMA investigation.

In a letter dated Dec. 14, 2018, NCIS Assistant Counsel Karen Richman acknowledged receipt of the Request. Richman stated that although the Morales Record of Trial had been authenticated, the convening authority in the case had not yet taken final action and that NCIS was still awaiting the final record of trial from the Office of the Judge Advocate General, Criminal Law Division. Richman further stated that NCIS would conduct “a segregability analysis” and provide the results once her office received the

Exhibit 16

Record of Trial, but that she was unable to provide an estimated completion date. A copy of Richman's Dec. 14, 2018 letter is attached as Exhibit B.

Almost an entire calendar year passed with no action after the Request was submitted. On Sept. 23, 2019, in response to a request for a status update, Richman stated in an email that the Office of the Judge Advocate General had finally shared a copy of the Morales Record of Trial and that NCIS would begin reviewing the documents.

Four months later, in response to another request for a status update, Richman stated in a Jan. 30, 2020 email that her office had completed its proposed redactions to the Morales Record of Trial. She also stated that another Navy agency – the Consolidated Disposition Authority (CDA) – had “completed its review and concurred with” NCIS's proposed redactions. Richman added, however, that she was still “waiting to hear back” from another agency, the Department of Justice, to review the proposed redactions. She did not provide an estimated completion date.

Three months later, in response to yet another request for a status update, NCIS reported that no progress had been made. In an April 28, 2020 email, NCIS FOIA Officer Erin Roberge stated that the Request was still “pending at DOJ until further notice. We can't move forward with the release of the information until the consultation has concluded.” She did not provide an estimated completion date.

As of the date of this appeal, 576 days have elapsed since the Request was submitted. No determination has been made with respect to the Request, no responsive records have been produced and no estimated completion date has been provided.

ARGUMENT

Under the FOIA, an agency is required to make a “determination” with regard to a request within 20 business days of its receipt. 5 U.S.C. § 552(a)(6)(A)(i). FOIA allows an agency to extend the date by which it may make a determination by no more than 10 working days in “unusual circumstances,” including “the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request,” 5 U.S.C. § 552(a)(6)(B).

In this case, NCIS has failed to make a “determination” concerning the Request within 20 business days, or even 30 business days, assuming that the Request involves “unusual circumstances” that legitimately require consultation with another agency. NCIS received the Request 576 days ago and has clearly violated FOIA's statutory deadline. 5 U.S.C. § 552(a)(6)(A)(i).

To date, NCIS has not produced *any* records in response to the Request. Nor has it communicated the scope of the documents it intends to produce and withhold, or provided an estimated date of completion for the Request, despite its legal obligations to do so. 5 U.S.C. § 552(a)(7)(B).

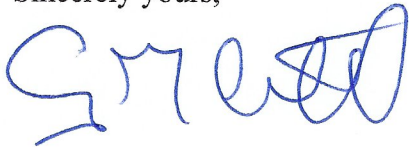
CONCLUSION

For all the reasons detailed above, this appeal should be granted and NCIS should immediately release the requested records in their entirety.

Thank you for your attention and consideration. If I can answer any questions or be of further assistance, please do not hesitate to contact me at 202-689-9134 or by email at craig.whitlock@washpost.com.

I look forward to your determination with respect to this appeal within 20 business days as the law requires. 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely yours,



Craig Whitlock
Staff writer

Subject: RE: re: FOIA appeal - DON-NAVY-2019-000525



Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
to Whitlock, Craig, Mckeon, James G Maj USMC (USA)

Wed, May 6, 4:59 PM

Good Evening,

The new FOIA appeal number is DON-NAVY-2020-007628.

v/r

Wendy A. Winston

From: Whitlock, Craig <Craig.Whitlock@washpost.com>
Sent: Wednesday, May 6, 2020 4:08 PM
To: Mckeon, James G Maj USMC (USA) <james.mckeon@navy.mil>; Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
Subject: [Non-DoD Source] RE: re: FOIA appeal - DON-NAVY-2019-000525

Thanks very much. I'd appreciate it if you could please let me know what case number you assign the appeal. Again, it is a FOIA appeal of NCIS's failure to provide a response to my FOIA request – which was filed over 500 days ago. NCIS acknowledged receipt of the request, but it still has not issued a response of any kind, no denial, no records, nothing.

Craig Whitlock
Staff writer
The Washington Post
+1-202-334-9587 (w)
+1-202-689-9134 (cell)

From: Mckeon, James G Maj USMC (USA) <james.mckeon@navy.mil>
Sent: Wednesday, May 6, 2020 4:02 PM
To: Whitlock, Craig <Craig.Whitlock@washpost.com>; Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
Subject: RE: re: FOIA appeal - DON-NAVY-2019-000525

Mr Whitlock,
Thank you for the email. Ms Winston and I will adjudicate this appeal. We may reach back for clarification in the coming days though.
V/r,
Maj McKeon

From: Whitlock, Craig <Craig.Whitlock@washpost.com>
Sent: Wednesday, May 6, 2020 3:57 PM
To: Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
Cc: Mckeon, James G Maj USMC (USA) <james.mckeon@navy.mil>
Subject: [Non-DoD Source] RE: re: FOIA appeal - DON-NAVY-2019-000525

Thanks for checking, but it is not too late.

That NCIS letter was just a confirmation of receipt of the original request – all the way back in 2018.

As my appeal makes clear, NCIS still has not provided a response to this request. No denial, no release – no nothing. I'm appealing the failure to respond within the statutory deadline.

Craig Whitlock
Staff writer
The Washington Post
+1-202-334-9587 (w)
+1-202-689-9134 (cell)

From: Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
Sent: Wednesday, May 6, 2020 3:49 PM
To: Whitlock, Craig <Craig.Whitlock@washpost.com>
Cc: Mckeon, James G Maj USMC (USA) <james.mckeon@navy.mil>
Subject: RE: re: FOIA appeal - DON-NAVY-2019-000525

It might be too late to file an appeal for this one. It is beyond the 90 days according to the letter dated by NCIS Dec 2019. Dec through April is past the time to appeal.

From: Whitlock, Craig <Craig.Whitlock@washpost.com>
Sent: Tuesday, May 5, 2020 5:10 PM
To: Winston, Wendy A CIV USN (USA) <wendy.winston@navy.mil>
Cc: Whitlock, Craig <Craig.Whitlock@washpost.com>
Subject: [Non-DoD Source] re: FOIA appeal - DON-NAVY-2019-000525

Dear Ms. Winston,

Hope all is well.

Could you please once again do me the favor of accepting this FOIA appeal -- of DON-NAVY-2019-000525 -- via email instead of snail mail, due to the coronavirus difficulties?

FOIAOnline.gov won't allow me to post the appeal online because I originally submitted the request to NCIS via email in 2018.

I'd be happy to CC Maj McKeon in the future if you wouldn't mind sharing his/her email address.

Thanks again and all the best,

Craig Whitlock
Staff writer
The Washington Post
+1-202-334-9587 (w)
+1-202-689-9134 (cell)



DEPARTMENT OF THE NAVY
HEADQUARTERS
NAVAL CRIMINAL INVESTIGATIVE SERVICE
27130 TELEGRAPH ROAD
QUANTICO VA 22134-2253

5720 2019-005803
SER00LJF/19U0719
May 8, 2019

craig.whitlock@washpost.com

Mr. Craig Whitlock
The Washington Post
1150 15th Street NW
Washington, DC 20071

Dear Mr. Whitlock:

This responds to your April 10, 2019 Freedom of Information Act (FOIA) request seeking copies of records related to boards of inquiry, administrative separations and retirement grade determinations for U.S. Navy officers involved in the Glenn Defense Marine Asia case. We received your request via telephone communication on April 10, 2019. We consider your request a renewal of your October 3, 2018 FOIA request.

Please be advised that we are coordinating with other entities within the Department of the Navy and the federal government. We will further correspond with you in the near future.

If you wish, you may appeal this delay by writing to the Office of the Judge Advocate General (Code 14), 1322 Patterson Avenue, S.E., Suite 3000, Washington Navy Yard, D.C. 20374-5066. Your letter should state the reasons for your appeal and, along with a copy of this letter and a copy of your original request, must be postmarked (vice received) in the above office within the 90-day appeal limit. The letter of appeal and the envelope must both bear the notation: "FOIA Appeal."

Your appeal rights will not be prejudiced by waiting until a substantive determination has been made regarding your request.

Your request also seeks expedited processing. Based on your claim, I have determined that, in accordance with the Secretary of the Navy Instruction 5720.42F (SECNAVINST 5720.42F), your request does meet certain criteria established under the FOIA; specifically, an urgent need by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity. Your request for expedited processing has been approved.

If you have any questions regarding this matter, please contact our office at (571) 305-9092 or via email at ncis_foia@ncis.navy.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Richman", is positioned above the typed name.

KAREN RICHMAN
Assistant Counsel
Head, Government Information Sharing Unit



DEPARTMENT OF THE NAVY
HEADQUARTERS
NAVAL CRIMINAL INVESTIGATIVE SERVICE
27130 TELEGRAPH ROAD
QUANTICO VA 22134-2253

5720 2019-005803
SER00LJF/19U0722
October 2, 2019

craig.whitlock@washpost.com

Mr. Craig Whitlock
The Washington Post
1150 15th Street NW
Washington, DC 20071

Dear Mr. Whitlock:

This further responds to your April 10, 2019 Freedom of Information Act (FOIA) request seeking copies of records related to boards of inquiry, administrative separations and retirement grade determinations for U.S. Navy officers involved in the Glenn Defense Marine Asia case. We received your request via telephone communication on April 10, 2019. We consider your request a renewal of your October 3, 2018 FOIA request.

In coordination with the Navy Personnel Command and other offices within the Department of the Navy a search for responsive records was conducted. After additional coordination with other entities within the federal government, a release of information has been processed and is provided to you at enclosure (1).

Our review of these documents reveals that they contain personal identifiers (such as names and social security numbers) of third parties, the release of which would constitute an unwarranted invasion of personal privacy. Accordingly, we must partially deny your request and withhold this information pursuant to the FOIA provisions 5 U.S.C. § 552 (b)(6), (b)(7)(A), and (b)(7)(C). We have also provided an enclosure explaining the various exemptions of the FOIA.

If you would like to appeal any adverse determination, I am advising you of your right to appeal. Your appeal must be postmarked within 90 calendar days from the date of this letter and should be addressed to the Secretary of the Navy's designee: Office of the Judge Advocate General, (Code 14), 1322 Patterson Avenue, S.E., Suite 300, Washington Navy Yard, D.C. 20374-5066. The envelope and letter should bear the annotation "FOIA Appeal." Please include a copy of your original request with your appeal letter.

If you choose not to appeal, you have the right to seek dispute resolution services. You may contact the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at christopher.a.julka@navy.mil or (703) 697-0031 or the Office of Government Information Services (<https://ogis.archives.gov/>).

5720 2019-005803
SER00LJF/19U0722

Additionally, some of the information contained within our records is under the release authority of the Department of Defense, Office of Inspector General, 4800 Mark Center Drive, Alexandria, VA 22350-1500. We are forwarding those documents to them for a release determination and direct response to you.

If you have any questions regarding this matter, please contact our office at (571) 305-9092 or via email at ncis_foia@ncis.navy.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "Karen Richman". The signature is written in a cursive, flowing style.

KAREN RICHMAN
Assistant Counsel
Head, Government Information Sharing Unit

Encl:

- (1) Documents
- (2) Exemption sheet

27130 Telegraph Rd
Quantico, VA 22134
COMM: 571-305-9099
DSN: 312-240-9099

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----- Forwarded message -----
From: "Richman, Karen - GOV" <karen.richman@ncis.navy.mil>
To: "'Whitlock, Craig'" <Craig.Whitlock@washpost.com>
Cc:
Bcc:
Date: Thu, 30 Jan 2020 22:11:50 +0000
Subject: RE: re: FOIA status

Hi Craig,

Below is an update on your pending GDMA FOIA requests:

- 1) The Record of Trial from the court martial of CDR David Morales: The redactions are complete. The CDA completed its review and concurred with our release. I am waiting to hear back from DOJ. I will continue to follow up with our POCs there.
- 2) DON-2020-00481 – requests for records from Boards of Inquiry since 10/11/2019. There are four BOI records. Erin completed the redactions and I am in the process of reviewing her work. I plan to send it to CDA and DOJ for review next week.
- 3) **DON-2019-005803**. Boards of Inquiry prior to 4/10/2019. NCIS released documents pertaining to this request on Oct. 2, 2019, but we've had a running discussion about your efforts to obtain additional records from individual commands (as opposed to just Naval Personnel Command). We were able to obtain additional responsive records. The redactions are complete and I intend to review them along with #2) above. Also, we've had a running discussion about whether the identities of individuals who go before a Board of Inquiry should be public (as you'll recall, I've argued and have presented evidence showing that, under Navy regs, Boards of Inquiry are open to the public and therefore the names should be made public as well). Could you please let me know where things stand on those two open questions and how we might be able to come to a final resolution? SECNAVINST 1920.6D Administrative Separation of Officers states "the proceedings of the Board should normally be open to the public at the discretion of the convening authority." The BOIs in question were not opened to the public by the convening authority, therefore, the names of the officers were not put into the public domain.
- 4) FOIA request filed on 11/4/2019 for records pertaining to two flag officers, RADM Timothy Giardina and RDML Adrian Jansen. I expect to release these records to you on FEB 18.
- 5) DON-2019-008473 – CDA records pertaining to GDMA between 2/1/2019 and 6/25/2019. NCIS released a batch of documents responsive to this request on 12/4/2019, but a number of pages were temporarily (?) withheld because they "required additional consultation." Do you know if these documents are still forthcoming? Or was a final determination made to withhold them based on a specific exemption? No final determination yet but I emailed the DOJ POC for an update.

I'm out of the office tomorrow but available to chat on Monday if you'd like to discuss further.

Thanks again for your continued patience Craig.

Best regards,

Karen

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