

perseverance2013@aol.com

From: perseverance2013@aol.com
Sent: Monday, November 30, 2020 1:19 AM
To: 'OIP.ComplianceInquiry@usdoj.gov'; 'Bobak.Talebian@usdoj.gov'; 'OGIS@nara.gov'; 'lina.semo@nara.gov'
Cc: (perseverance2013@aol.com)
Subject: FW: Compliance Inquiry. Initial Determination Letters Not Containing Right to OGIS Dispute Resolution [October 26, 2018 2:54 PM]
Attachments: Righth to Dispute Resolution; Hammond 010040.pdf; Panama City Appeal Finan Determination. Hammond 2018-012026 final response.pdf
Importance: High

OIP.ComplianceInquiry@usdoj.gov; Bobak.Talebian@usdoj.gov; OGIS@nara.gov; lina.semo@nara.gov

What is the status of my compliance inquiry and request for OGIS assistance regarding these unlawful actions by Department of Navy regarding Department of Navy's statement that FOIA initial determination letters do not have to contain a statement regarding the right to seek dispute resolution from OGIS.

As part of its oversight and guidance responsibilities, OIP reviews inquiries made by the public raising issues regarding agencies' compliance with the FOIA statute and the Attorney General's FOIA Guidelines. Compliance inquiries may be submitted in writing to OIP by mail or e-mail.

FOIA Improvement Act of 2016

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such a request of —

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services;

Please respond soonest to my Friday, October 26, 2018 2:54 PM email below.

With my respect,

Robert Hammond
Whistleblower

From: Bob Hammond <perseverance2013@aol.com>
Sent: Friday, October 26, 2018 3:42 PM

To: joo.y.chung2.civ@mail.mil

Subject: FW: Compliance Inquiry. Initial Determination Letters Not Containing Right to OGIS Dispute Resolution

Dear Ms. Chung,

Please advise Mr. Tillotson of this latest DOJ inquiry.

What is DOD's position? Please provide your reply by email.

Thank you.

With my deep respect,

Robert Hammond

From: Bob Hammond <perseverance2013@aol.com>

Sent: Friday, October 26, 2018 2:54 PM

To: Melanie.A.Pustay@usdoj.gov; alina.semo@nara.gov

Cc: OGIS@nara.gov; nikki.gramian@nara.gov; alina.semo@nara.gov; adam.yost@navy.mil; wendy.winston@navy.mil; grant.lattin@navy.mil; emilee.k.baldini@navy.mil; kirk.foster@navy.mil; soto.alaric@mail.mil; paul.richelmi@navy.mil; eva.lose@navy.mil; james.mckeen@navy.mil; Meredith.werner@navy.mil; matthew.roush@navy.mil; griffin.farris@navy.mil; robin.patterson@navy.mil; donfoia-pa@navy.mil; mary.p.shaw@navy.mil; richard.r.strong@navy.mil; joshua.portner.ctr@navy.mil; montant.johnson.ctr@navy.mil; Raymond.Hartwick.ctr@navy.mil; montana.johnson.ctr@navy.mil; robert.miller3.ctr@navy.mil; james.p.hogan4.civ@mail.mil

Subject: Compliance Inquiry. Initial Determination Letters Not Containing Right to OGIS Dispute Resolution

Dear Ms. Pustay,

Please open a new DOJ compliance inquiry regarding Department of Navy's statement that FOIA initial determination letters do not have to contain a statement regarding the right to seek dispute resolution from OGIS. The statute is clear in that regard. My express purpose in pursuing this is for Navy to change this practice and afford ALL requests that statutory right. Please provide me a separate letter with your findings and include this compliance inquiry in your reporting. I look forward to a prompt reply to this straight forward matter.

Ms. Semo,

Please also address this matter.

Thank you.

With my respect,

Robert Hammond

Right to Dispute Resolution; Hammond 010040



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO
5720
Ser 14/009 October
24, 2018

Mr. Robert Hammond
REDACTED
Oakton, VA 22124
perseverance2013@aol.com

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY- NME 18-44; FOIA APPEAL DON-NAVY-2018-012040

This letter responds to your September 14, 2018 FOIA appeal. You challenge Navy Medicine East's (NME) September 10, 2018 response to your FOIA request on four bases: (i) NME's failure to respond to your request within 20 working days; (ii) NME's failure to advise you of the right to seek dispute resolution services from the Office of Government Information Service (OGIS); (iii) NME's failure to release records in the requested format; and (iv) the adequacy of NME's search of their email records. Your underlying request sought emails from NME for the period of 1 Oct 12 through 30 Sep 14 from DON FOINPA Office or Navy BUMED including the words both "Quarterly" and "Privacy" in the subject.

Your appeal is a request for a final determination under the FOIA. For the reasons set forth below, your appeal is denied.

The first basis of your appeal is NME's failure to respond to your request within 20 working days. You submitted your FOIA request to NME on July 28, 2018. NME responded on September 10, 2018. NME exceeded the 20 working days time limit under the FOIA, but you already possess NME's response so no live dispute remains. For that reason, the first basis of your appeal is denied as moot as there is no relief that I can provide to remedy this situation.

The second basis of your appeal is NME's failure to advise you of your right to mediation by OGIS. You assert that such notification is required by statute. Your assertion is incorrect. The FOIA requires this agency to notify requesters of "the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services." 5 U.S.C. § 552(a)(6)(A)(i)(III)(bb) (emphasis added). NME's September 10, 2018 response notified you of your "right to seek dispute resolution services from the DOD Navy Component

FOIA Public Liaison, Mr. Chris Julka...." NME properly notified you of your right to seek dispute resolution services from the FOIA Public Liaison for this agency. The FOIA statute does not require this agency to also notify you of your right to seek such services from OGIS in addition to notifying you of your right to seek such services from the agency FOIA Public Liaison. ~~Alternatively, your multiple FOIA requests to this agency have included many responses that inform you of your right to seek such services from OGIS, so you have not been harmed by the failure of NME to inform you of that right.~~ For these reasons, the second basis of your appeal is denied.

The third basis of your appeal is NME's failure to release responsive records to you in the requested format. The FOIA requires agencies to release a record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format." 5 U.S.C. § 552 (a)(3)(B). In your July 28, 2018 FOIA request, you requested that "documents [be] provided as a single PDF file by return email.. ." Instead of emailing you the responsive records in PDF format, NME mailed you hardcopy records and provided no justification for deviating from the requested format. However, in your appeal to this office you include a single PDF of the responsive records. Because you already possess the responsive records in your requested format, there remains no live dispute. For that reason, the third basis of your appeal is denied as moot.

The fourth basis of your appeal is the adequacy of NME's search of email records. In your underlying request you sought "all e-mails during the period of 1 October 2012 through 30 September 2014 from DNS-36 or BUMED" containing Privacy and Quarterly in the subject. NME responded to you that according to records retention regulations all emails from that time were destroyed, that NME no longer maintains emails on a local server and that they referred the search to the Defense Information Systems Agency (DISA), that DISA conducted an electronic search and no responsive records were found and that NME also conducted a physical search for the records you requested with no responsive records found.

After receiving your appeal my office contacted DISA and they informed me that three years ago NME migrated to @mail.mil email addresses. DISA maintains all current emails from NME. They do not maintain any non-@mail.mil email address archives. As stated above NME does maintain a local email server and did not find any records responsive to your original request on that server.

The adequacy of an agency's search for information requested under the FOIA is determined by a "reasonableness" test. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1350-51 (D.C. Cir. 1983). As a general rule, an agency must undertake a search that is reasonably calculated to locate the requested information. *Kowalczyk v. Department of Justice*, 73 F.3d 386,

388 (D.C. Cir. 1996). Courts have found agencies satisfy the "reasonableness" test when they properly determine where responsive records are likely to be found and search those locations. *Lechlitter v. Rumsfeld*, 182 F. App'x 113, 115 (3rd Cir. 2006) (concluding that agency fulfilled duty to conduct a reasonable search when it searched two offices that it determined to be the only ones likely to possess responsive documents (citing *Oglesby v.*

U.S. Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990)); *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 849 F. Supp. 2d 47, 55-56 (D.D.C. 2012) (concluding that agency's search was reasonable because agency determined that all responsive records were located in a particular location created for express purpose of collecting records related to subject of request and searched that location).

Moreover, courts have found that an agency's inability to locate a responsive record does not undermine an otherwise reasonable search. *Moore v. FBI*, 366 F. App'x 659, 661 (7th Cir. 2010) (noting that although agency had years earlier destroyed some potentially responsive records, that fact does not invalidate the search). Additionally, the mere speculation that requested documents exist does not undermine the finding that the agency conducted a reasonable search. *Wilbur v. C.J.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004) ("Likewise, the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records.").

In this case, NME first attempted to locate emails on a local email server for the time frame requested, but due to records retention policies and the migration of their email services to DISA, NME found no responsive records. NME also conducted a physical search. Likewise, DISA conducted an electronic search but, again, no responsive records were located. Based on the foregoing, I find NME's search was reasonable for purposes of the FOIA. As the Seventh Circuit stated in *Moore*, an agency's inability to locate responsive records does not undermine an otherwise reasonable search - even in a situation, exactly like this one, where the agency may have earlier destroyed some potentially responsive records. 366 F. App'x 659 at 661.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for this decision. 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.

If you would like to seek dispute resolution services, you have the right to contact the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at (703) 697-0031, or christopher.a.julka@navy.mil.

If you have further questions or concerns for my office, my point of contact is Major James Mckeeon, USMC at james.mckeeon @navy.mil, or (202) 685-4596.

Sincerely,

G. E. LATTIN
Director
General Litigation Division

Copy to:
NME DNS-
36
DONCIO



**DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374**

IN REPLY REFER TO:
5720
Ser 14/011 October
29, 2018

Mr. Robert Hammond
REDACTED
Oakton, VA 22124
Email to: perseverance2013@aol.com

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY- 2018-011608; FOIA APPEAL DON-NAVY-2018-012026

This letter responds to your FOIA appeal received in my office on October 1, 2018. In your appeal, you challenge the Department of the Navy (DON) Naval Surface Warfare Center Panama City Division (NSWC Panama City) FOIA response to you. Your stated bases for appeal are: NSWC Panama City's dated letter does not match the date of the email response; NSWC Panama City failed to respond to your request within the statutory twenty working-day time standard and failed to provide the statutory notification; and NSWC Panama City failed to advise you of your right to seek dispute resolution services.

In the underlying FOIA Request DON-NAVY-2018-011608, you asked NSWC Panama City for records in the "command's custody of all emails and attachments thereto (i.e. SOP) during the period of 1 October 2012 through 30 September 2014 from DON FOIA/PA Office (OPNAV DNS 36) or Navy BUMED including the words both 'FOIA' and 'Quarterly' in the subject[, to] include any Navy BUMED forwarding of DON FOINPA Office emails to your command or forwarding of DON FOIA/PA emails or Navy BUMED emails to your command by any other entity."

Your appeal is a request for a final agency determination under the FOIA. For the reasons set forth below, I deny your appeal.

The first basis of your appeal is NSWC Panama City's dated letter response to your FOIA request did not match the date of the email sent to you with the letter response as an attachment. You allege that the agency may be incorrectly computing the response time. NSWC Panama City's letter is dated September 20, 2018, and this letter was delivered via an email dated September 25, 2018. Following receipt of your appeal, my staff contacted the NSWC Panama City staff, who confirmed that the response letter emailed to you was sent on September 25, 2018. The FOIA establishes a statutory scheme for the public to use in making requests for existing agency records and imposes

requirements on agencies to make such records promptly available. My authority is limited to adjudication of your FOIA appeal, and I can only provide such relief that is available under the FOIA; therefore, to the extent that your appeal is a dispute of the veracity of the date in the correspondence provided to you, such a dispute is not the proper subject of a FOIA appeal and is, therefore, denied. In short, this office does not correct information; it only releases or withholds information under the FOIA.

The second basis of your appeal is NSWC Panama City's failure to respond within the statutory 20 working-day time standard. Additionally, you state NSWC Panama City failed to provide the statutory notification required when agencies extend the time limit by more than 10 additional working days of written notice to the requester regarding the right to seek dispute resolution services from the Office of Government Information Services. You submitted FOIA request DON-NAVY-2018-011608 on July 30, 2018, and NSWC Panama City responded on September 25, 2018. NSWC Panama City exceeded the 20 working days time limit under the FOIA, but you already possess NSWC Panama City's response so no live dispute remains for which I can provide relief. Regarding dispute resolution services, based on your multiple previous FOIA requests and the fact that you made it a basis of your current appeal, you are aware of this right and have suffered no harm. For that reason, the second basis of your appeal is denied as moot.

The third basis of your appeal is NSWC Panama City's failure to advise you of your right to seek dispute resolution services from the FOIA Public Liaison of the agency of the Office of Government Information Services, and therefore the initial determination is contrary to law and your appeal must be sustained. As I previously stated, you are clearly aware of your right to dispute resolution services and have suffered no harm. The third basis of your appeal is denied as moot.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the partial denial of this 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.

If you would like to seek dispute resolution services, you have the right to contact the Department of the Navy's FOIA public liaison, Mr. Chris Julka, at christopher.a.julka@navy.mil or (703) 697-0031.

If you have further questions or concerns for my office, my point of contact is Major James McKean, who may be reached at james.mckean @navy.mil or (202) 685-4595.

Sincerely,

G. E. LATTIN Director
General Litigation Division

Copy to:
NSWC Panama City DNS-36
DONCIO