

IN THE
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

NATIONAL SECURITY NEWS SERVICE,)
 and CHRISTOPHER LAW,)
 Suite 1310)
 1100 Connecticut Avenue NW)
 Washington, D.C. 20036)
 Plaintiffs,)
 v.)
 THE UNITED STATES DEPARTMENT)
 OF THE NAVY,)
 The Pentagon)
 Washington, D.C. 20350;)
 Naval Medical Center)
 The Staff Judge Advocate Office)
 620 John Paul Jones Circle)
 Portsmouth, VA 23708-2197)
 Defendant.)

Case: 1:08-cv-01772
 Assigned To : Collyer, Rosemary M.
 Assign. Date : 10/16/2008
 Description: FOIA/Privacy Act

COMPLAINT UNDER THE FREEDOM OF INFORMATION ACT

Come now the National Security News Service and Christopher Law, and for their complaint against the United States Navy Department for violation of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Plaintiffs state:

1. Pursuant to the FOIA, Plaintiffs have requested releasable Navy records listing assignments of Navy personnel to Portsmouth Naval Hospital in July 1964. Contrary to FOIA law and regulations, as well as routine federal government records release policies, the Navy has denied Plaintiffs' request, asserting that it seeks personnel, medical and personal information protected by FOIA Exemption 6. Based on Plaintiffs' investigation, including information provided by civilian law enforcement personnel, Plaintiffs submit that, not only does the Navy's

denial violate FOIA law, regulation and policy, it appears to be a deliberate refusal to provide clearly releasable information concerning assignments to Portsmouth Naval Hospital in Portsmouth, VA, of Lt. John Sidney McCain III and another injured other person in an automobile collision in which Lt. McCain was involved in July 1964. The Navy has denied the Plaintiffs' right to expedited treatment and, in the circumstances, has constructively denied their appeal of the denial of their request.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter under 5 U.S.C. § 552(a)(4)(B).
3. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. Plaintiff National Security News Service ("NS New Service") is a news service located in Washington, D.C. It is regularly engaged in gathering and publishing information on matters related to national security. Plaintiff Christopher Law is an employee of NS News Service. The Navy has acknowledged that the Plaintiffs are primarily engaged in disseminating information in order to inform the public concerning federal government activity.

5. Defendant United States Department of the Navy (the "Navy") is an executive agency of the Department of Defense and the United States government; and it is an "agency" within the meaning of, and therefore subject to the FOIA.

FACTS

6. On August 28, 2008, Plaintiffs submitted a request for the duty assignment logs for Portsmouth Naval Hospital for July 24 and 25, 1964 (the "Request"). (Exhibit 1B)
7. On September 17, 2008, the Navy acknowledged receipt of the Request as of August 28, 2008. (Exhibit 1C)

8. On September 25, 2008, the Navy advised that it had located the requested information. (Exhibit 1D)

9. On September 26, 2008, the Navy denied the Request, asserting that the information is protected from release by FOIA Exemption 6, 5 U.S.C. § 552(B)(6). (Exhibit 1E)

10. On October 2, 2008, Plaintiffs submitted an administrative appeal to the Navy, showing that they are entitled to expedited treatment of the appeal based on a compelling need for the information (the Appeal"). (Exhibit 1A)

11. On October 2, 2008, the Navy advised that it had received the Appeal, would print the files and start the process of determining the Appeal. (Exhibit 2)

12. On October 8, 2008, the Navy advised that it considered the Appeal to be received as of October 3, 2008 and advised that it had "20 days" to respond to it. (Exhibit 3)

13. Thereafter, on October 8, 2008, Plaintiffs responded immediately to the Navy reminding it that they had requested expedited treatment of the Appeal and noted that the Navy's assertion that it had 20 days to respond did not address Plaintiffs' request for expedited treatment. (Exhibit 4)

14. On October 10, 2008, the Navy denied the Plaintiffs' request for expedited treatment. In its denial, the Navy acknowledged: the standards for demonstrating compelling need for expedited treatment, that the Plaintiffs are primarily engaged in disseminating information in order to inform the public concerning the federal government, and that their request relates to federal government activity. The Navy predicated its denial of expedited treatment on an asserted absence of an urgent need for decision, which it characterized as requiring a showing that the information must be of particular value that will be lost if not disseminated quickly. Relying on the 1964 date of the requested records, the Navy contended that the records could

only have historical value and could not become a breaking news story. (Exhibit 5) In doing so, the Navy avoided Plaintiffs' submission that its refusal to release the requested information constitutes a current continuation of more than four decades of official silence about releasable assignments to Portsmouth Naval Hospital in July 1964.

15. On October 14, 2008, Plaintiffs replied to the Navy's October 10, 2008 decision, stating that by focusing merely on the date of the requested records, it had avoided the demonstration in Plaintiffs' Appeal that its refusal to release the requested information is a continuing violation of the FOIA, which creates a presently compelling need for expedited treatment in light of the relevance of that government conduct toward John McCain, as a candidate for President in a national election in just 21 calendar days. Plaintiffs confirmed their certification of their request for expedited treatment and asked for an immediate response whether the Navy would change its decision. The Navy has not responded to this submission.

16. Plaintiffs, working with *Vanity Fair* magazine, have undertaken an extensive investigation of the life and early military career of John Sidney McCain III, currently the Republican candidate for President of the United States, including an examination of his conduct in Norfolk and Portsmouth in the 1960's. Despite Senator McCain's prior 23 years of service as a Naval officer, the Navy has only released general summaries of his military career. See Exhibit 6.

17. Plaintiffs and *Vanity Fair* have developed from first-hand sources information indicating that Lt. McCain was involved in an automobile accident on Hampton Boulevard outside the main gate of the Naval Base at Norfolk, VA in July 1964. Plaintiffs' investigation has disclosed that responding civilian law enforcement officers recall the accident, that another person was injured, and that a Naval officer dispatched a messenger to take a change of clothing to Lt. McCain at

Portsmouth Naval Hospital. Plaintiffs have also obtained documents showing that law enforcement officers were ordered back to the accident scene to retrieve personal physical effects. The Navy has never publicly acknowledged this information.

18. The fact of assignment to Portsmouth Naval Hospital, as to any Navy hospital, is a public record not protected by FOIA law or regulations. This is confirmed by the Navy policy of providing such documents without requiring a FOIA request to governmental archives offices around the country. Such records are, moreover, readily accessible upon request according to government policy, as illustrated by the government's release of such information regarding a Naval seaman assigned as a "patient" to Portsmouth Naval Hospital during the very same period that is the subject of Plaintiffs' Request. See Exhibits, 1F and 1G.

19. Nor does the location or volume of the requested information support the Navy's refusal promptly to release responsive documents; for, as the Navy has stated, it located the documents on September 25, 2008, and was copying the files on October 2, 2008. The requested information consists of records of only two days of assignments to Portsmouth Naval Hospital.

20. The Navy has persistently refused to provide full public access to the same information about medical assignments in John S. McCain III's military career that it makes routinely available for all other Navy personnel. In addition to such information that it files in public archives, the Navy's rules concerning the types of information that are available on request include Assignments and Geographical Location, including assignments to Navy medical facilities. See Exhibit 1G.

21. The personal history and military career of a Presidential candidate are matters of high importance to the American public. Based on Plaintiffs' investigation, if the documents responsive to their Request are accurate, they reflect the assignment of Lt. McCain and the other

injured person to Portsmouth Naval Hospital. Since the Navy has located, copied and reviewed those documents, they are readily available for immediate *in camera* review by the Court and release to the Plaintiffs.

22. The facts and circumstances leading to the assignment of Lt. McCain to Portsmouth Naval Hospital are the subjects of an article under preparation for timely publication by the Plaintiffs and *Vanity Fair*. If the responsive documents are accurate, the information they record will provide additional information for the Plaintiffs' consideration and publication. Allowing the Navy to extend its time to respond beyond a date when the documentary facts of this matter would be available for public consideration prior to the national election on Tuesday, November 4, 2008 would violate the spirit, as well as the provisions of the FOIA. There is, therefore, a demonstrated compelling need for release of those documents at the earliest possible time. There is no legal basis or excuse for further delay.

PRAYER FOR EXPEDITIOUS CONSIDERATION AND JUDGMENT

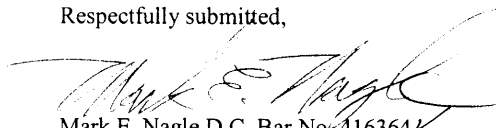
23. WHEREFORE, Plaintiffs pray for:

- a. An order requiring that the Navy must file any opposition to Plaintiffs' requested relief within five (5) calendar days of the service of this Complaint on the Attorney General;
- b. An order requiring the Navy to produce the documents sought in the Request for *in camera* inspection with that response;
- c. Judgment holding that the Navy has violated the Freedom of Information Act;
- d. An order that the Navy must produce to the Plaintiffs the documents sought in the Request forthwith;

- e. Consideration of this Complaint and Plaintiff's Motion for Injunction within eight (8) calendar days from the filing and service on the Attorney General;
- f. Full compensation and reimbursement to the Plaintiffs for the recoverable costs and attorneys fees in succeeding in this action; and
- g. Such other and further relief as is just and proper.

DATED this 14th day of October, 2008.

Respectfully submitted,



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