

Defendants.

December 13, 2017

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rape in the military (collectively, “military sexual trauma” or “MST”), as well as MST’s consequences for veterans after their service is completed.

5. Experiencing military sexual trauma can wreak havoc on a service member’s ability to pursue a meaningful career in the armed forces.

6. Individuals within the chain of command frequently retaliate against the minority of survivors who report an offense. Survivors are at increased risk of post-traumatic stress and substance abuse disorders, which can impair their ability to fulfill assigned duties. Survivors who are discharged from the military with a less-than-honorable discharge status due to retaliation or MST-associated misconduct become ineligible for medical care and other critical federal and state benefits that their service merits, and face a lifetime of shame and discrimination by private employers.

7. To redress these injustices, Plaintiffs have sought a wide range of reforms to the military justice, personnel, and discharge review systems. Nonetheless, Defendants have not taken the steps necessary to end sexual harassment, assault, and rape in the military. Service members are not sufficiently protected from MST while they serve, and survivors are not adequately cared for after they leave.

8. Plaintiffs filed FOIA requests seeking information about the military’s treatment of survivors of sexual harassment, assault, and rape. The government has responded with denials and delay, refusing to disclose records relating to gender disparities within the military justice system or the military record correction boards’ handling of sexual assault and harassment cases.

9. The military’s treatment of survivors of MST cannot be a black box. Defendants’ prompt, complete response to the FOIA requests is necessary to bring this important information to light.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331 and 1361.

11. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1)(c) as Plaintiff Connecticut Veterans Legal Center resides and has its primary place of business in the District of Connecticut, and no real property is involved in this action.

PARTIES

12. Plaintiff POD is the only national nonprofit organization solely dedicated to ending the epidemic of sexual harassment, assault, and rape in the military and to combating a culture of pervasive misogyny and retribution against victims. POD honors, supports, and gives voice to survivors of military sexual assault and sexual harassment, and seeks reforms to ensure that all survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

13. POD also analyzes sexual assault and harassment data, publicizes its research, presses for collection and disclosure of military data on demographics of and disparities affecting both the victim and the accused, educates the public and press on key findings, and collaborates on major research projects. Because members of Congress, stakeholders, survivors, advocates, and the press rely on it for fact-based analysis, it is crucial that POD receive the requested information promptly, as required by statute.

14. Plaintiff CVLC is a nonprofit organization whose mission is to help veterans who have experienced homelessness and mental illness to overcome legal barriers to housing, healthcare, and income. CVLC is the first VA medical-legal partnership in the country, co-locating with VA medical centers in the state to provide legal services to marginalized clients,

many of whom are homeless or have serious mental disabilities. In addition, CVLC spearheads advocacy and education efforts on behalf of veterans within the state and nationally and produces manuals for veterans' legal services nationwide.

15. Defendant Department of Defense ("DoD") is the federal agency responsible for coordinating and supervising government activity related to national security and the United States Armed Forces. The Departments of the Army, Air Force, and Navy are within DoD. The Marine Corps is a component of the Department of the Navy. DoD is an agency within the meaning of 5 U.S.C. § 552(f).

16. Defendant Department of Homeland Security ("DHS") is the federal agency tasked with preserving the security of the United States within its borders. The Coast Guard is in service of DHS, except when operating in the service of the Navy. DHS is an agency within the meaning of 5 U.S.C. § 552(f).

STATEMENT OF FACTS

The United States Armed Forces Has Failed to Integrate Women into Its Ranks

17. The modern history of women in the U.S. military began during World War II. More than 350,000 women volunteered for military service. Seven million women accepted jobs in wartime manufacturing, many of which had been previously closed to them.

18. In 1942, President Roosevelt signed legislation creating an all-volunteer Women's Army Auxiliary Corps.

19. DoD founded the women's naval organization, Women Accepted for Volunteer Emergency Service, in July 1942; the women's coast guard, Semper Paratus Always Ready, in November; and the U.S. Marine Corps Women's Reserve in February 1943.

20. Despite the opportunities that participation in these organizations afforded,

military leadership often treated the women who enlisted in them like second-class service members. The military excluded these women from combat duty, barred them from commanding male service members, and paid them less than their male counterparts.

21. Civilian women also supported the war effort as artillery inspectors, aircraft welders, sheet metal assemblers, gear cutters, lathe operators, chemical analysts, and mechanics. Millions of civilian women raised crops for the Women's Land Army, a federal agriculture program.

22. In 1948 – at a time when the rate of women's military service was growing rapidly – President Harry Truman signed Executive Order 9981, which called for the desegregation of the Armed Forces by providing “equality of treatment and opportunity for all persons in the armed services.” Exec. Order No. 9,981, 13 Fed. Reg. 4313 (July 28, 1948).

23. That same year, President Truman sanctioned discriminatory treatment against female service members when he signed the Women's Armed Service Integration Act of 1948. The legislation enabled women to serve as permanent, regular members of the armed forces and entitled them to veterans' benefits, but it barred women from participation in combat roles.

24. Despite these limitations, and following the establishment of an all-volunteer force in 1973, the number of women serving in active duty roles has risen dramatically. The share of female enlisted service members has increased from 2% to 14%, and the share among commissioned officers has increased from 4% to 16%.

25. In 1976, Congress required the military to admit female students to the military service academies. Senior leadership at West Point resisted their inclusion and issued a public statement that the presence of female students had been “disruptive” and served to “alienate the men.” Kelly Schloesser, *The First Women of West Point* (Oct. 27, 2010), *available at*

http://www.army.mil/article/47238/the_first_women_of_west_point.

26. In 1996, Virginia Military Institute and the Citadel became the last state-funded schools to admit female students after the Supreme Court held that their male-only admissions policies violated the United States Constitution's equal protection guarantee.

27. The military has lifted other restrictions on women's service over the past two decades. In 2013, citing the changes in women's combat service, the Secretary of Defense rescinded his only remaining policy limiting women's service in the military – the direct ground combat exclusion policy – and ordered the service branches to integrate women fully into all facets of military service by January 1, 2016.

28. Notwithstanding this incremental progress, the military's efforts to integrate women have long lagged behind the civilian sector. Today, women make up 47% of the civilian workforce but account for little over 15% of the Department of Defense's active duty force.

MST and Retaliation Threaten Gender Equality in Military and Civilian Life

29. Even as the military lifts *de jure* restrictions on women's equal participation in its ranks, many *de facto* barriers to women's advancement endure.

30. Most important is the persistent and pervasive culture of harassment and discrimination. High rates of rape, sexual assault, and harassment constitute a major obstacle to women's advancement within the armed forces and civilian life.

31. In fiscal year 2016 alone, almost 15,000 service members experienced sexual assault. Female service members reported sexual assault at a rate two and a half times greater than male service members. U.S. Dep't. of Defense, *Annual Report on Sexual Assault in the Military FY2016* 13 (2016).

32. Fifty-five percent of female service members report experiencing sexual

harassment. 2 Nat'l Def. Research Inst., *Sexual Assault and Sexual Harassment in the U.S. Military: Estimates for Department of Defense Service Members from the 2014 RAND Military Workplace Study* 9 (Andrew R. Morral et al. eds., 2014).

33. Lesbian, gay, bisexual, and transgender ("LGBT") service members also experience elevated rates of sexual assault and harassment.

34. Women who identify as LGBT are almost two times more likely than straight and cisgender women to experience sexual assault. The disparities are even higher for LGBT men, who are *over ten times* more likely than straight and cisgender men to be sexually assaulted. U.S. Dep't. of Defense, *Annual Report on Sexual Assault in the Military FY2016*, at 15 (2016).

35. The consequences of MST are disproportionately borne by female service members of color, as the active-duty female force is more racially diverse than the male force.

36. According to the Pew Research Center, "nearly one-third (31%) of active-duty women are black compared with only 16% of men, and a smaller share of active-duty women than men are white (53% vs. 71%)." Eileen Patten & Kim Parker, Pew Social Trends, *Women in the U.S. Military: Growing Share, Distinctive Profile* (2011).

37. The effects of MST are wide ranging. Victims are four times more likely to suffer from PTSD compared with veterans with no sexual-assault histories. Shira Maguen, et al., *Gender Differences in Military Sexual Trauma and Mental Health Diagnoses Among Iraq And Afghanistan Veterans With Posttraumatic Stress Disorder*, 22 *Women's Health Issues* e61, e65 (2012). Victims also experience higher rates of chronic pain, pelvic pain, and chronic fatigue as well as eating disorders, depression, dissociative disorder, and substance abuse.

38. Homelessness among female veterans is particularly acute. Female veterans are two to four times more likely than civilian women to experience homelessness. Gail Gamache, et

al., *Overrepresentation of Women Veterans Among Homeless Women*, 93 Am. J. Public Health 1132, 1134 (2003). One study showed that over half of all homeless female veterans have experienced rape, sexual assault, or harassment. See Donna L. Washington et al., *Risk Factors for Homelessness Among Women Veterans*, 21 J. Health Care for The Poor and Underserved 82, 87 (2010).

Victims of Military Sexual Trauma Are at Increased Risk of Discharge from the Military

39. Service members who have experienced MST are also at increased risk of involvement with the military justice system, as the effects of sexual trauma can manifest in misconduct and subsequent discharge from the armed forces.

40. Service members who report MST experience high rates of retaliation that can end their careers.

41. In FY 2016, 40% percent of active duty service members stated they experienced professional reprisal after they reported sexual assault. U.S. Dep't. of Defense, *Annual Report on Sexual Assault in the Military FY2016*, at 32 (2016).

42. In a majority of cases, the retaliator is within the service member's chain of command.

43. There is significant documentation showing commanders punishing service members who report MST. Reporters are frequently given negative comments in performance evaluations; denied opportunities for training and deployment; and passed over for promotion. Others have been targeted for disciplinary action and separated from the armed forces with a less-than-honorable discharge. See Sara Darehshori, Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged US Military Rape Survivors* (2016).

44. Commanders retain broad discretion over the process of administrative separations as well, and have been found to exercise this discretion in retaliation.

The Consequences of a Less-than-Honorable Discharge Are Lifelong

45. Whether due to misconduct associated with MST or retaliation, there are lifetime consequences of receiving a less-than-honorable discharge; the effects persist, in part, because there are few avenues for service members to correct their records.

46. Service members may seek correction of their discharge status by submitting an application to the Board for Correction of Military/Naval Records (BCMR) or the Discharge Review Board (DRB) for each service branch.

47. These bodies have broad statutory authority to grant discharge upgrades but rarely grant requests. Sundiata Sidibe & Francisco Unger, *Unfinished Business: Correcting Bad Paper for Veterans with PTSD* 3 (VVA & NVCLR: 2015).

48. Even though the Boards have been explicitly ordered to grant “liberal consideration” to the claims of veterans with PTSD and MST, only about half of those veterans have received upgrades. *Id.* at 6.

49. In cases where an individual was retaliated against after they reported MST, the Boards must apply the Military Whistleblower Protection Act (MWPA). Few veterans receive relief under the statute, in part due to inadequate efforts by the Boards to implement its requirements.

50. Like other veterans, MST survivors seek disability compensation from the VA, most commonly for PTSD, in order to support themselves and their families while making up for earnings lost as a result of their injuries. To receive benefits, a veteran must prove that a current disability is related to military service.

51. Although the VA has reduced the disparities in grant rates between claims involving PTSD and MST, veterans who experience in-service sexual trauma continue to face discrimination in seeking disability compensation. *See American Civil Liberties Union & Service Women's Action Network, Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma 1* (2013).

52. Individuals who are discharged with a less-than-honorable discharge forfeit a range of benefits from the VA, which include assistance with education and training, health care coverage, disability compensation, and burial benefits.

53. Employers in the private sector often discriminate against veterans with “bad paper.” Some private employers refuse to consider applications from veterans with less-than-honorable discharges.

**The Military Has Refused to Release Information
About the Effectiveness of Its Response to Gender Discrimination**

54. The public has a strong interest in information that reveals the effectiveness of efforts to address gender disparities in the military. This information includes records regarding gender disparities in the DoD's military justice system and handling of MST claims by the BCMRs and DRBs.

55. Much of the information about the extent and cost of gender discrimination in the military, particularly with respect to MST, is not in the public sphere.

56. The public has a compelling interest in this information, given the potential enormity of the problem, the emotional and financial cost that it imposes on military service members, and the increasing number of women serving in the armed forces.

57. Just as the Defense Department has been slow to respond to the advocacy groups and politicians who have attempted to shed light on the MST crisis, it has refused to comply with its statutory obligation to produce documents under FOIA.

58. For example, in July 2013, at the height of a contentious Senate debate over legislation to create an impartial military justice system, the Pentagon provided misleading and unsupported claims to Congress to block reform.

59. In that case, through a FOIA request, POD was able to demonstrate that the Pentagon exaggerated and distorted the facts in order to undermine fundamental reform of the military justice system. *See* Protect our Defenders, *Debunked: Fact-Checking the Pentagon's Claims Regarding Military Justice* (2016).

60. Plaintiffs must have access to the records they have requested to do the same for survivors of MST.

The Plaintiffs' FOIA Requests

61. To redress the military's gender disparities, Plaintiffs filed FOIA requests seeking information about the military's treatment of survivors of sexual harassment, assault, and rape.

July 6 FOIA Requests – MWPA

62. On July 6, 2017, Plaintiffs POD and CVLC submitted FOIA requests ("July 6 Requests") to the Army, Air Force, Navy, and Coast Guard via overnight mail and email.

63. The July 6 Requests seek records related to the prosecution of claims under the MWPA by the BCMRs. The July 6 requests to each of the branches are substantively identical. The letter to the Army is attached as Exhibit A.

64. To date, the Army has not acknowledged the July 6 request in any way nor disclosed any responsive records.

65. The Air Force provided its final disposition to Plaintiffs' July 6 Requests on August 22, thirteen days after the statutory deadline for response.

66. On October 4, 2017, Plaintiffs timely appealed, because the Air Force did not conduct an adequate search for records. Plaintiffs also appealed the Air Force's decision to withhold the names and votes of the BCMR members under 5 U.S.C. § 552(b)(6) ("Exemption 6"). The appeal is attached as Exhibit B. The statutory deadline for response expired on November 2, but the Air Force has failed to respond to Plaintiffs' appeal.

67. The Navy, whose BCNR adjudicates claims brought by Marines as well as sailors, provided its final disposition to Plaintiffs' July 6 request on September 26, 2017.

68. Plaintiffs timely appealed on November 8 (copy attached as Exhibit C). The Navy failed to answer Plaintiffs' appeal within the time allowed by statute, which expired on December 8. Plaintiffs' unanswered appeal challenges the adequacy of the Navy's search, and the Navy's failure to specify its search methods – which has resulted in Plaintiffs' inability to determine whether the Navy relied upon the legal definition of a protected communication.

69. The Coast Guard acknowledged the July 6 request via email on August 3, but has provided no substantive response to date.

July 14 FOIA Requests - Military Justice System

70. On July 14, 2017, Plaintiffs submitted FOIA requests ("July 14 Requests") to the Army, Air Force, Marine Corps, and Coast Guard via overnight mail and email.

71. The July 14 Requests seek records related to the prosecution of sexual assault offenses under Uniform Code of Military Justice Articles 120 and 125 in military courts-martial and in civilian courts. The July 14 Requests to the Army, Marine Corps, and Coast Guard are substantively identical, as are the first six requests to the Air Force. The letter to the Air Force

also includes an additional seventh request, on the creation and performance of the Air Force's "diversity team" (Exhibit D).

72. After sending an acknowledgement letter on August 10 stating only that Plaintiffs' July 14 Request was in a "complex queue," the Army provided its final disposition of records on October 20, forty-eight days after the statutory deadline.

73. Plaintiffs timely appealed on November 2. The appeal is attached as Exhibit E.

74. In its response, the Army did not sufficiently respond to Plaintiffs' requests in multiple paragraphs, instead claiming that such records are not maintained. The Army provided no information about its search methods that would allow Plaintiffs to determine whether its search was adequate and improperly withheld information under Exemption 6.

75. After months of silence, and only after Plaintiffs' counsel inquired, the Air Force confirmed on October 2 that it has received and is processing the July 14 Request. The Air Force has provided no additional response to date.

76. In response to the July 14 Requests, the Navy provided its final disposition of records on August 30.

77. On October 2, 2017, Plaintiffs timely appealed, challenging the adequacy of the Navy's search. The appeal letter is attached as Exhibit F. The Navy responded to Plaintiffs' appeal in part on November 30, twenty working days after the twenty provided by statute had expired. The Navy admits that it does not maintain any records responsive to Paragraph 5 of Plaintiffs' July 14 request. Plaintiffs do not challenge the Navy's response in this Complaint with regard to Paragraph 5. Plaintiffs do, however, challenge the Navy's failure to respond in a timely matter to the remainder of the issues that Plaintiffs appealed on October 2.

78. The Marine Corps partially granted and partially denied the July 14 Requests on

August 24.

79. Plaintiffs timely appealed on October 2, because the Marine Corps did not provide responsive records for multiple paragraphs, and gave no explanation for this omission. A copy of the appeal is attached as Exhibit G. In response to several items of the July 14 Requests, the Marine Corps did not specify the search methods that led it to conclude that it does not maintain responsive records. The statutory deadline for response expired on October 31.

80. On November 3, the Marine Corps decided Plaintiffs' appeal, attached as Exhibit H. Plaintiffs' appeal of Questions 3, 4, 5, and 6 was granted. The Marine Corps agreed to conduct a more thorough search of its database for the requested information, but it has yet to provide a timeline for response.

81. The Marine Corps continues to refuse to provide staff judge advocate (SJA) biographies in response to Question 1, claiming that these fall under Exemption 6 and that releasing these biographies could subject SJAs to "terrorist threats." Plaintiffs challenge the Marine Corps' denial of their appeal with respect to these questions.

82. At the Coast Guard's request, Plaintiffs agreed to modify several parts of their requests and withdraw Question 6 on August 8.

83. The Coast Guard provided its final disposition of records on August 11.

84. The Coast Guard's response to Questions 2 and 4 of the July 14 Request failed to describe its search methods, and failed to conduct an adequate search. Plaintiffs timely appealed on October 4, attached as Exhibit I. The statutory deadline expired on November 2 – the Coast Guard failed to respond.

August 23 FOIA Requests – BCMRs

85. On August 23, 2017, Plaintiffs submitted FOIA requests ("August 23 Requests")

to the Army, Air Force, Navy, and Marine Corps via overnight mail and email.

86. The August 23 Requests seek records related to the disposition of claims with sexual assault elements before the BCMRs, and records related to gender disparities in the branches' internal appeals processes for performance evaluations, and in military discipline generally.

87. Questions 1 and 3 are substantively identical for all the August 23 Requests. Because the remaining questions differ somewhat, however, all August 23 Requests are attached, as Exhibits J-M.

88. To date, neither the Army nor the Air Force have acknowledged the August 23 requests, despite the expiration of the statutory deadline for response on September 21.

89. Both the Navy and the Marine Corps have bifurcated their responses to the August 23 requests. Records from the BCNR are being processed under FOIA tracking numbers DON-NAVY-2017-009992 and DON-USMC-2017-009979, respectively, and records from other custodians are being processed under FOIA tracking numbers DON-NAVY-2017-009980 and DON-USMC-2017-009985.

90. On October 2, the Marine Corps provided a partial response to Plaintiffs' August 23 request under FOIA tracking number DON-USMC-2017-009985 but has not yet responded to the remainder of Plaintiffs' August 23 request.

91. The Navy provided a partial disposition to Plaintiffs' August 23 request under FOIA tracking number DON-NAVY-2017-009980 on October 12.

92. Plaintiffs timely appealed the Navy's partial disposition on November 2. The appeal letter is attached as Exhibit N.

93. The Navy and Plaintiffs agreed to make good faith modifications to paragraph in the requests pertaining to records from the BCNR – the requests being processed under FOIA tracking numbers DON-NAVY-2017-009992 and DON-USMC-2017-009979.

94. In a phone conversation on October 23, Plaintiffs agreed to modify the requests by accepting data only, and no other types of records, as responsive to their requests. Plaintiffs also agreed to limit the time period from which they seek records to fiscal year 2011 through the present.

95. Notwithstanding these modifications, the Navy has failed to produce responsive records for these requests promptly.

96. Additionally, for other, unmodified paragraphs, the Navy claims the information is “not maintained,” but did not provide Plaintiffs with any information about the search methods that led it to that claim. The statutory deadline for response expired on December 4. The Navy did not respond.

CLAIMS FOR RELIEF

97. Plaintiffs repeat and incorporate every allegation contained in paragraphs 1-96 as if set forth here in full.

98. Defendants’ failure to notify Plaintiffs within 20 days (excepting Saturdays, Sundays, and legal public holidays) whether it will comply with their requests violated their rights to records under 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(3)(A).

99. Defendants’ failure to release responsive, non-exempt records violated Plaintiffs’ right to those records under 5 U.S.C. § 552(a)(3)(A).

100. Defendants’ failure to make a reasonable search for responsive records violated Plaintiffs’ rights under 5 U.S.C. § 552(a)(3)(C).

101. Defendants' withholding of responsive records under 5 U.S.C. § 552(b)(6) violated Plaintiffs' rights under 5 U.S.C. § 552(a)(3)(C).

REQUESTED RELIEF

WHEREFORE, Plaintiffs Protect Our Defenders and Connecticut Veterans Legal Center respectfully request that this Court:

1. Order Defendants to conduct a reasonable search for records responsive to their requests;
2. Order Defendants to disclose and release the requested records in their entireties;
3. Order Defendants to grant a full fee waiver to Plaintiffs;
4. Provide for expeditious proceedings in this action;
5. Award Plaintiffs costs and reasonable attorney's fees in this action as provided by 5 U.S.C. § 552(a)(1)-(2); and
6. Grant any other and further relief the Court deems appropriate.

Dated: December 13, 2017
New Haven, CT

Respectfully submitted,

By: /s/ Michael J. Wishnie
Meghan Brooks, Law Student Intern*
Alyssa Peterson, Law Student Intern*
Giovanni Sanchez, Law Student Intern*
Michael J. Wishnie, Supervising Attorney, ct27221
Jerome N. Frank Legal Services Organization
Veterans Legal Services Clinic
Yale Law School
P.O. Box 209090
New Haven, CT. 06520-9090
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

**Motion for law student appearance forthcoming*

Counsel for Plaintiffs

Exhibit A

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Attention: FOIA Contact, Department of the Army
Freedom of Information Act Office Suite 144
7701 Telegraph Road, Room 150
Alexandria, VA 22315-3905

July 6, 2017

Re: Request Under the Freedom of Information Act for Records Related to Reports of Reprisal under the Military Whistleblower Protection Act

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records¹ in the possession of the United States Army. The Request is submitted on behalf of Protect Our Defenders (POD) and the Connecticut Veterans Legal Center (CVLC), also referred to as the "Requesters."

POD and CVLC request that you provide records related to the Army Board for Correction of Military Records' (ABCMR) handling of reprisal claims under the Military Whistleblower Protection Act (MWPA), 10 U.S.C. § 1034. Specifically, Requesters ask that you provide:

1. Records sufficient to show the number of instances where an applicant expressly invoked or raised the protection of the MWPA in an application to the ABCMR, by year, from the FY2011 to the present.
2. Records sufficient to show the number of instances where a ABCMR decision questioned or discussed the applicability of the MWPA because the MWPA was reasonably raised by the evidence, by year, from the FY2011 to the present.
3. Records sufficient to show the number of instances where the ABCMR determined that the MWPA provisions applied to an application, by year, from the FY2011 to the present.
4. Records sufficient to show the number of instances where the ABCMR conducted an evidentiary hearing pursuant to the MWPA, by year, from the FY2011 to the present.

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

5. Records sufficient to show the number of instances where an applicant claimed personnel action was taken as reprisal² for a protected communication related to matters of sexual assault³ and the outcomes of those claims, by year, from the FY2011 to the present.
6. Records sufficient to show the number of instances where an applicant claimed personnel action was taken as reprisal for a protected communication related to matters of sexual harassment⁴ and the outcomes of those claims, by year, from the FY2011 to the present.
7. Records sufficient to show the number of instances where an applicant claimed personnel action was taken as reprisal for a protected communication related to matters other than sexual assault or sexual harassment and the outcomes of those claims, by year, from the FY2011 to the present.
8. Records sufficient to show the number of instances where the ABCMR recommended the Secretary of the Army take disciplinary action against the individual who committed a prohibited personnel action,⁵ by year, from the FY2011 to the present.
9. Any and all guidance, guidelines, instructions, memoranda, policy statements, procedures, protocols, reports, rules, training manuals, correspondence, emails, documents, or other records relating to the ABCMR's application of the MWPA from 2007 to the present. This includes but is not limited to:
 - a. Internal training manuals provided to ABCMR members or staff regarding application of the MWPA.
 - b. Internal guidance documents provided to ABCMR members or staff regarding application of the MWPA.
 - c. Internal emails regarding or addressing the MWPA.
 - d. Internal correspondence regarding or addressing the MWPA.

² As used herein, the term "reprisal" includes taking (or threatening to take) an unfavorable personnel action, or withholding (or threatening to withhold) a favorable personnel action, for making or preparing to make a protected communication. 10 U.S.C. § 1034(b)(1). "Personnel action" as used herein means [a]ny action taken on a service member that affects, or has the potential to affect, that member's current position or career." *DoDD 7050.06 Glossary Part II*. This includes conducting a retaliatory investigation of a member meaning "an investigation requested, directed, initiated, or conducted for the primary purpose of punishing, harassing, or ostracizing a member of the armed forces for making a protected communication." 10 U.S.C. § 1034(b)(2)(A)(v).

³ As used herein, sexual assault means "intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent" including rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses. *DoD Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports*, DEPARTMENT OF DEFENSE, 27 (April 2016) (quoting DoDD 6495.01).

⁴ As used herein, sexual harassment is "a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the purpose or effect of reasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment. *Id.* at 28 (quoting DoDD 1350.2).

⁵ Pursuant to 10 U.S.C. § 1034(g)(6), 32 C.F.R. § 581.3(c)(2)(ii), and DoD Directive 7050.06 Enclosure 2 § 4(f)(2)(d).

10. Any and all records relating to the Army's implementation of Department of Defense (DoD) Directive 7050.06 regarding Military Whistleblower Protection, by year, from April 2015 to the present.⁶ This includes but is not limited to:
- a. Records sufficient to show the number of instances where the ABCMR requested copies of investigation reports from the Inspector General of the DoD.⁷
 - b. Records sufficient to show the number of instances where the ABCMR requested copies of investigation reports from the investigating Inspector General.⁸
 - c. Records sufficient to show the number of instances where the ABCMR requested the Inspector General of the DoD gather further evidence.⁹
 - d. Records sufficient to show the number of instances where the ABCMR requested the Inspector General of the Army gather further evidence.¹⁰
 - e. Records sufficient to show the number of instances where the ABCMR took a deposition or allowed the applicant for a record correction to take a deposition, or issued and served a subpoena for records or testimony or allowed the applicant to issue and serve a subpoena.¹¹
 - f. Records sufficient to show the number of instances where the ABCMR conducted an evidentiary hearing.¹²
 - g. Records sufficient to show the number of instances where the ABCMR examined or cross-examined a witness or allowed an applicant to do so.¹³
 - h. Records sufficient to show the number of instances where the ABCMR held or received oral argument.¹⁴
 - i. Records sufficient to show the number of instances where the ABCMR ordered action to correct the record of a personnel action prohibited by 10 U.S.C. § 1034.¹⁵

These documents pertain to investigations that Requesters are conducting to determine whether the ABCMR has been appropriately handling reports of reprisal as required under the MWPA.

If the Army believes it would be in the interest of all parties to discuss ways to narrow the scope of this Request in order to provide responsive documents more expeditiously, please contact undersigned counsel.

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if

⁶ *Department of Defense Directive Number 7050.06*, DEPARTMENT OF DEFENSE (April 17, 2015) at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>.

⁷ DoDD 7050.06 Enclosure 2 § 1(j).

⁸ DoDD 7050.06 Enclosure 2 § 3(j).

⁹ DoDD 7050.06 Enclosure 2 § 4(f)(2)(b).

¹⁰ DoDD 7050.06 Enclosure 2 § 4(f)(2)(b).

¹¹ DoDD 7050.06 Enclosure 2 § 4(f)(2)(c).

¹² DoDD 7050.06 Enclosure 2 § 4(f)(2)(c).

¹³ DoDD 7050.06 Enclosure 2 § 4(f)(2)(c).

¹⁴ DoDD 7050.06 Enclosure 2 § 4(f)(2)(c).

¹⁵ DoDD 7050.06 Enclosure 2 § 4(i).

“disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.¹⁶ See 32 C.F.R. § 286.12(l). FOIA’s legislative history makes clear that the “fee waiver provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); see also *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the Army’s application of the MWPA, an Act that prohibits retaliation against members of the armed forces who make protected communications.¹⁷ Requester’s research based on the records requested would shed light on whether the Army has been appropriately applying the MWPA and whether veterans have been subject to retaliation after reporting in violation of the MWPA.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the handling of MWPA claims. Disclosure is particularly meaningful because the public remains unaware of whether the ABCMR is applying the MWPA correctly. The Act was intended to protect service members who make protected communications.¹⁸ If the ABCMR is not applying or is misapplying the MWPA, service members are left unprotected and could be subject to retaliation which is prohibited by the Act. Misapplication may also deter future service members from making communications at all. Therefore, information on the handling of these claims will be meaningfully informative.

Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic

¹⁶ Components of the Department of Defense include the Department of the Army. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense’s regulations related to the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

¹⁷ 10 U.S.C. § 1034.

¹⁸ 10 U.S.C. § 1034.

of rape and sexual assault in the military.”¹⁹ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.²⁰ This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.²¹ POD has the ability and intention to convey information to the public as evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.²² This ability is further evidenced by POD’s experience in aggregating data and creating reports that receive attention from nationwide news sources.²³ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In addition to communicating information with the general public in the state of Connecticut,²⁴ CVLC has the ability to reach nationwide public audiences through national news organizations²⁵ and manuals produced by CVLC that are referenced nationwide.²⁶

In determining whether disclosure of information is primarily in the commercial interest of a requester, DoD and its Components consider “whether the requester has any commercial interest that would be furthered by the requested disclosure,” and, if a commercial interest exists, whether the requester’s primary interest in disclosure is commercial. 32 C.F.R. § 286.12(l)(2)(iii)(A–B). Requester CVLC is a nonprofit organization whose primary goal is to assist veterans. Similarly, Requester POD is a nonprofit organization whose primary goal is to assist veterans with a focus on military sexual trauma. Requesters will make no commercial use of the requested information and have no commercial interest in accessing the requested records. Therefore, the Requester’s primary interest in disclosure is not commercial.

¹⁹ *About Protect Our Defenders: Our Mission and Work*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/>.

²⁰ *2016 Annual Report: Five Years of Impact*, PROTECT OUR DEFENDERS, at http://www.protectourdefenders.com/wp-content/uploads/2014/10/Annual_Reportv10-Online-single.pdf.

²¹ *Id.* at 5.

²² *Id.* at 18.

²³ *Racial Disparities in Military Justice*, PROTECT OUR DEFENDERS (May 5, 2017), at http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (POD report on data of racial disparities in military justice obtained through FOIA requests); see also Tom Vanden Brook, *Black Troops as much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017), at <https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630/> (discussing PODs report on racial disparity).

²⁴ CVLC’s work has been repeatedly covered by Connecticut news organizations. See, e.g., Peggy McCarthy, *Can Legal Services Lead to Better Health Outcomes For Veterans?*, THE HARTFORD COURANT (Jan. 14, 2014) at http://articles.courant.com/2014-01-14/health/hc-vet-services-20140114_1_va-care-margaret-middleton-connecticut-veterans-legal-center; Lucy Nalpathanchil, *Connecticut Law to Help Veterans Connect to Jobs, College Credit*, WNPR (June 11, 2014) at <http://wnpr.org/post/connecticut-law-help-veterans-connect-jobs-college-credit>.

²⁵ See, e.g., Ellen Lawton & Martha Bergmark, *One reason so many veterans are homeless? They can’t afford lawyers*, THE WASHINGTON POST (July 8, 2016) at https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-so-many-veterans-are-homeless-they-cant-afford-lawyers/?utm_term=.9ad5131591f5.

²⁶ See *Denying Credit: The Failure to Transition Troops to Civilian Employment*, CONNECTICUT VETERANS LEGAL CENTER (Sep. 8, 2014), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_DenyingCredit.pdf; *Veteran’s Discharge Upgrade Manual*, CONNECTICUT VETERANS LEGAL CENTER (2011), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

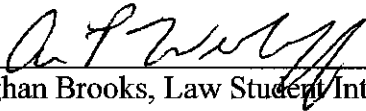
Finally, Requesters expect the determination of this Request within twenty business days pursuant to 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, please justify all redactions by reference to the specific FOIA exemption(s) in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In addition, please release all disclosable portions of otherwise exempt material. We reserve the right to appeal your decision to withhold any information or to deny a fee waiver.

Should you have any questions while processing this Request, we can be contacted by mail at the address below or by telephone at (203) 432-4800.

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,



Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Jenna Rowan, Law Student Intern
Aaron Wenzloff, Supervising Attorney
Michael Wishnie, Supervising Attorney
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Counsel for Requesters Protect Our Defenders and Connecticut Veterans Legal Center

Exhibit B

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

October 4, 2017

Office of the Secretary
Department of the Air Force, Attn: FOIA Appeals
1000 Air Force Pentagon
Washington, D.C. 20330-0100

Re: FOIA Appeal,
Case # 2017-03478-F

Dear Ms. Beasley:

In a letter dated August 22, 2017, the Department of the Air Force ("Air Force") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters") seeking records concerning the Air Force Board for Correction of Military Records ("AFBCMR") handling of reprisal claims under the Military Whistleblower Protection Act ("MWPA"). The original request and the letter containing the Air Force's final disposition are enclosed.

In its response, the Air Force did not sufficiently respond to Requesters' inquiries in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10. With respect to paragraphs 1 through 8, the Air Force did not include a single AFBCMR decision that was not already available to the public through the Boards of Review Reading Room. Because the Air Force did not specify its search methods, Requesters are unable to determine whether the Air Force supplied records sufficient to show:

1. The number of instances where an applicant expressly invoked or raised the protection of the MWPA;
2. The number of instances where an AFBCMR decision questioned or discussed the applicability of the MWPA;
3. The number of instances where the AFBCMR determined that the MWPA provisions applied to an application;
4. The number of instances where AFBCMR conducted an evidentiary hearing pursuant to the MWPA;
5. The number of instances where an applicant claimed a personnel action was taken as reprisal for a protected communication related to matters of sexual assault;
6. The number of instances where an applicant claimed a personnel action was taken as reprisal for a protected communication related to matters of sexual harassment;
7. The number of instances where an applicant claimed a personnel action was taken as reprisal for a protected communication related to matters other than sexual assault or sexual harassment; and
8. The number of instances where the AFBCMR recommended disciplinary actions against an individual who committed a prohibited personnel action.

With respect to paragraph 9, the Air Force did not provide any records that were responsive to requests for internal emails addressing or regarding the MWPA and requests for internal correspondence addressing or regarding the MWPA.

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October 4, 2017

With respect to paragraph 10, the Air Force did not provide sufficient records related to the Air Force's implementation of Department of Defense ("DoD") Directive 7050.06, regarding the MWPA. The Air Force did not provide any AFBCMR adjudications that were not already publicly available and did not provide information about its search methods.

Requesters hereby appeal the Air Force's response to their requests on the ground that the Air Force failed to conduct an adequate search for the records at issue. FOIA requires that in responding to a request, "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). The Air Force has not shown that its search was adequate.

When the adequacy of an agency's search is at issue—as it is in this case—the agency "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *El Badrawi v. Dep't of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Air Force has not demonstrated "beyond material doubt" that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Air Force's search methods. The Air Force has not described its search methods or systems of records in a way that suggests that its limited search was thorough or reasonable. The Air Force provides no explanation at all about what type of searching, if any, it conducted, nor has the Air Force shown a search would be "unreasonably burdensome" and therefore not necessary. *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

Requesters also appeal the Air Force's decision to withhold the names and votes of AFBCMR members under 5 U.S.C. § 552 (b)(6) ("Exemption 6"). FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* In enacting Exemption 6, Congress did not intend to create "a blanket exemption for personnel files," and "[j]udicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy." *Dep't of Air Force v. Rose*, 425 U.S. 352, 371 (1976). The Air Force has not demonstrated that providing the names and votes of the members of the panel would constitute a breach of personal privacy; indeed, the Board for Correction of Naval Records ("BCNR") furnishes the names and votes of panel members upon request. *See, e.g.*, Board for Correction of Naval Records, Department of the Navy, Docket No. 8040-99 (2001) (stating that "[t]he names and votes of the members of the panel will be furnished upon request").

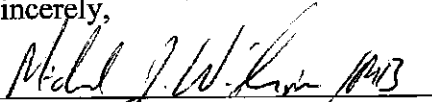
Because the Air Force did not provide any information to Requesters regarding its search methods, Requesters are unable to determine whether the Air Force's efforts to identify records were adequate. Additionally, the Air Force did not demonstrate that providing the names and votes of AFBCMR members would constitute "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Consequently, Requesters hereby appeal the Air Force's response to their request on the ground that the Air Force failed to conduct an adequate search for the records at issue and improperly withheld information under FOIA Exemption 6.

Page 3 of 3
October 4, 2017

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days. Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Wishnie", with a date "10/3" written to the right of the signature.

Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney

Encl.

Exhibit C

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 8, 2017

Office of the Judge Advocate General,
General Litigation Division (Code 14)
1322 Patterson Avenue, SE, STE 3000
Washington Navy Yard, D.C. 20374-5066

Re: FOIA Appeal,
DON-NAVY-2017-008231

Dear Office of the Judge Advocate General:

In a letter dated September 26, 2017, the Department of the Navy ("Navy") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters") seeking records concerning the Board for Correction of Naval Records ("BCNR") handling of reprisal claims under the Military Whistleblower Protection Act ("MWPA"). The original request and the letter containing the Navy's final disposition are enclosed.

In its response, the Navy did not sufficiently respond to Requesters' inquiries in paragraphs 5, 6, 7, 9, and 10. The Navy supplied a 2014 email from Robert O'Neill, the Executive Director of the BCNR, which indicates that the BCNR defines a protected communication as any lawful communication to made Members of Congress or Inspectors General. However, per the MWPA, a protected communication includes reports made to a Member of Congress; an Inspector General; a member of the Department of Defense audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; a court-marital proceeding; or "any other person or organization designated pursuant to regulations or other established administrative procedures for such communications." 10 U.S.C § 1034(b)(1)(B). Because the Navy did not specify its search methods, Requesters are unable to determine whether the Navy relied upon the legal definition of a protected communication when it supplied records sufficient to show:

5. The number of instances where an applicant claimed personnel action was taken as reprisal for a protected communication related to matters of sexual assault and the outcomes of those claims, by year, from the FY2011 to the present.
6. The number of instances where an applicant claimed personnel action was taken as reprisal for a protected communication related to matters of sexual harassment and the outcomes of those claims, by year, from the FY2011 to the present.
7. The number of instances where an applicant claimed personnel action was taken as reprisal for a protected communication related to matters other than sexual assault or sexual harassment and the outcomes of those claims, by year, from the FY2011 to the present.

Page 2 of 2
November 8, 2017

Requesters are also unable to determine what search methods the Navy relied upon when it produced records sufficient to show:

9. Any and all guidance, instructions, memoranda, or other records relating to the BCNR's application of the MWPA from 2007 to the present.

10. Any and all records relating to the Navy's implementation of DoD Directive 7050.06 regarding Military Whistleblower Protection, by year, from April 2015 to the present.

Requesters hereby appeal the Navy's response to their requests on the ground that the Navy failed to conduct an adequate search for the records at issue. FOIA requires that in responding to a request, "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). The Navy has not shown that its search was adequate.

When the adequacy of an agency's search is at issue—as it is in this case—the agency "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *El Badrawi v. Dep't of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Navy has not demonstrated "beyond material doubt" that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Navy's search methods. The Navy has not described its search methods or collections of data in a way that suggests that its limited search was thorough or reasonable. The Navy provides little explanation about what type of searching, if any, it conducted to produce these records, nor has the Navy shown a search would be "unreasonably burdensome" and therefore not necessary. *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

Because the Navy did not provide sufficient information to Requesters regarding its search methods, Requesters are unable to determine whether the Navy's efforts to identify records were adequate. Requesters hereby appeal the Navy's response to their request on the ground that the Navy failed to conduct an adequate search for the records at issue. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Page 3 of 2
November 8, 2017

Sincerely,

/s/ Michael J. Wishnie

Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney

Counsel for Requesters

Encl.

Exhibit D



Attention: FOIA Contact

SAF/AAL (FOIA)

1000 Air Force Pentagon

Washington, DC 20330

July 14, 2017

Re: Request Under the Freedom of Information Act for Records Related to the Military Justice System

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records¹ in the possession of the United States Air Force. The Request is submitted on behalf of Protect Our Defenders ("POD") and the Connecticut Veterans Legal Center ("CVLC"), also referred to as the "Requesters."

POD and CVLC request that you provide records related to the military justice system. Specifically, Requesters ask that you provide:

1. Official Biographies for all general courts-martial convening authorities, including staff judge advocates, who have referred a case to court-martial since January 1, 2014.
2. Records sufficient to show the total number of Air Force members who were prosecuted in the civilian justice system per year since January 1, 2012 for the following offenses:
 - a. A violation of the Uniform Code of Military Justice ("UCMJ") Article 120.
 - b. A violation of UCMJ Article 125.
 - c. An attempt to commit an offense that constitutes a violation of UCMJ Article 120.
 - d. An attempt to commit an offense that constitutes a violation of UCMJ Article 125.
3. Records sufficient to show the average length of time for all special and all general courts-martial from the date the alleged violation was reported to the date of the verdict, per year since January 1, 2012.
4. Records sufficient to show, per year since January 1, 2007:
 - a. The top 10 most frequently tried offenses in Air Force general court-martial.
 - b. The top 10 most frequently tried offenses in Air Force special court-martial.
 - c. The top 10 most frequently tried offenses in Air Force summary court-martial.
 - d. The top 10 most frequently tried offenses adjudicated through the Air Force non-judicial punishment service.

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

5. Records regarding victim preferences for civilian court versus military court as outlined in Pub. L. No. 113-291 § 534(b).² This information includes, but is not limited to:
 - a. Records sufficient to show the number of victims who have requested their cases be handled by civilian court.
 - b. Records sufficient to show whether or not the Air Force honored the victim's request.
 - c. Records sufficient to show the process for informing victims of the right to choose civilian court.
 - d. Records sufficient to show whether or not the Air Force is tracking how many victims have been informed of this right.
 - e. Records sufficient to show the number of victims who have been informed of this right.
6. Records regarding the courts-martial convened in Iraq and Afghanistan from October, 2001 to the present. Such information includes, but is not limited to:
 - a. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were convened (actually tried).
 - b. Records sufficient to disclose the number of courts-martial that included charges for violations of Article 120, Article 125, or attempts to commit such offenses.
 - c. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were guilty pleas.
 - d. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that included a pre-trial agreement.
 - e. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by a judge alone.
 - f. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by court members.
 - g. Records sufficient to disclose the physical location of the general courts-martial convening authorities including whether this location was in Iraq, Afghanistan, or another location.
7. Any and all records regarding the creation and performance of the Air Force's diversity team.³ Such information includes, but is not limited to:
 - a. If and when the diversity team was created.
 - b. The names of the members who are on the diversity team.
 - c. The qualifications of each member of the diversity team.
 - d. Any findings by the diversity team.
 - e. Any recommendations by the diversity team.
 - f. Whether witnesses were called to testify in front of the diversity team.

² The Secretary of Defense is required to "establish a process to ensure consultation with the victim of an alleged sex-related offense that occurs in the United States to solicit the victim's preference regarding whether the offense should be prosecuted by court-martial or in a civilian court." Pub. L. No. 113-291 § 534(b)(1).

³ Air Force Freedom of Information Act response (Enclosure 1). The response stated: "As part of the strategic imperative of diversity the Air Force is conducting a thorough analysis of demographic trends in military justice across the entire Air Force. A cross functional team led by diversity and inclusion experts will collect and analyze the data and recommend policy changes, process modifications or additional study as appropriate."

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.⁴ See 32 C.F.R. § 286.12(l). FOIA’s legislative history makes clear that the “fee waiver provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); see also *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the military justice system with respect to the Air Force.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the military justice system. Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military.”⁵ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.⁶ This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.⁷ POD has the ability and intention to convey information to the public as

⁴ Components of the Department of Defense include the Department of the Air Force. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense’s regulations related to the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

⁵ *About Protect Our Defenders: Our Mission and Work*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/>.

⁶ *2016 Annual Report: Five Years of Impact*, PROTECT OUR DEFENDERS, at http://www.protectourdefenders.com/wp-content/uploads/2014/10/Annual_Reportv10-Online-single.pdf.

⁷ *Id.* at 5.

evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.⁸ This ability is further evidenced by POD's experience in aggregating data and creating reports that receive attention from nationwide news sources.⁹ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In addition to communicating information with the general public in the state of Connecticut,¹⁰ CVLC has the ability to reach nationwide public audiences through national news organizations¹¹ and manuals produced by CVLC that are referenced nationwide.¹²

In determining whether disclosure of information is primarily in the commercial interest of a requester, DoD and its Components consider "whether the requester has any commercial interest that would be furthered by the requested disclosure," and, if a commercial interest exists, whether the requester's primary interest in disclosure is commercial. 32 C.F.R. § 286.12(l)(2)(iii)(A–B). Requester CVLC is a nonprofit organization whose primary goal is to assist veterans. Similarly, Requester POD is a nonprofit organization whose primary goal is to assist veterans with a focus on military sexual trauma. Requesters will make no commercial use of the requested information and have no commercial interest in accessing the requested records. Therefore, the Requester's primary interest in disclosure is not commercial.

Finally, Requesters expect the determination of this Request within twenty business days pursuant to 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, please justify all redactions by reference to the specific FOIA exemption(s) in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In addition, please release all disclosable portions of otherwise exempt material. We reserve the right to appeal your decision to withhold any information or to deny a fee waiver.

⁸ *Id.* at 18.

⁹ *Racial Disparities in Military Justice*, PROTECT OUR DEFENDERS (May 5, 2017), at http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (POD report on data of racial disparities in military justice obtained through FOIA requests); *see also* Tom Vanden Brook, *Black Troops as much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017), at <https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630/> (discussing PODs report on racial disparity).

¹⁰ CVLC's work has been repeatedly covered by Connecticut news organizations. *See, e.g.*, Peggy McCarthy, *Can Legal Services Lead to Better Health Outcomes For Veterans?*, THE HARTFORD COURANT (Jan. 14, 2014) at http://articles.courant.com/2014-01-14/health/hc-vet-services-20140114_1_va-care-margaret-middleton-connecticut-veterans-legal-center; Lucy Nalpathanchil, *Connecticut Law to Help Veterans Connect to Jobs, College Credit*, WNPR (June 11, 2014) at <http://wnpr.org/post/connecticut-law-help-veterans-connect-jobs-college-credit>.

¹¹ *See, e.g.*, Ellen Lawton & Martha Bergmark, *One reason so many veterans are homeless? They can't afford lawyers*, THE WASHINGTON POST (July 8, 2016) at https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-so-many-veterans-are-homeless-they-cant-afford-lawyers/?utm_term=.9ad5131591f5.

¹² *See Denying Credit: The Failure to Transition Troops to Civilian Employment*, CONNECTICUT VETERANS LEGAL CENTER (Sep. 8, 2014), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_DenyingCredit.pdf; *Veteran's Discharge Upgrade Manual*, CONNECTICUT VETERANS LEGAL CENTER (2011), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

Thank you for your prompt attention to this matter.

Very Respectfully,

A handwritten signature in black ink that reads "Don Christensen". The signature is written in a cursive style with a large, sweeping initial "D".

Col. Don Christensen (Ret.)
President, Protect Our Defenders
110 Maryland Ave. NE, Suite 505
Washington, DC 20002
christensen@protectourdefenders.com
(202) 733-5196

Exhibit E

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 2, 2017

Secretary of the Army
ATTN: Office of the General Counsel
Room 3C546
104 Army Pentagon
Washington, D.C. 20310-010

Re: FOIA Appeal,
Case # FP-17-026007

Dear Sir or Madam:

In a letter dated October 20, 2017, the Department of the Army ("the Army") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters"). The original request and the letter containing the Army's final disposition are enclosed.

In its response, the Army did not sufficiently respond to Requesters' inquiries in paragraphs 1, 2, 3, 4, 5, and 6.

1. The Army withheld information regarding Staff Judge Advocates' biographies, asserting that "the release of this information would constitute a clearly unwarranted invasion of personal privacy."
2. The Army did not satisfy requests or conduct an adequate search for records regarding civilian prosecutions, stating that neither "the Office of the Judge Advocate General nor the Office of the Clerk of Court maintains records responsive to item 2."
3. The Army did not conduct an adequate search or provide information regarding the duration of courts-martial proceedings because neither "the Office of the Judge Advocate General nor the Office of the Clerk of Court maintains records responsive to item 3."
4. The Army failed to conduct an adequate search or provide information regarding frequently tried offenses at summary court-martial, and non-judicial punishment services, claiming that neither the "Judge Advocate General nor the Office of the Clerk of Court maintains records responsive to item 4c or 4d."
5. The Army did not provide records in response to requests regarding victim preferences for civilian court versus military court.
6. The Army did not conduct an adequate search or provide records "responsive to the request in items 6a-6d related to summary court-martial," stating that neither "the Office of the Judge Advocate General nor the Office of the Clerk of Court" maintains records responsive to this request."

Page 2 of 3
November 2, 2017

Requesters hereby appeal the Army's response to their request on the grounds that the Army failed to conduct an adequate search for the records at issue and because the Army improperly withheld information under FOIA Exemption 6.

The Army failed to conduct an adequate search. FOIA requires that in responding to a request, "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). When the adequacy of an agency's search is at issue—as it is in this case—the agency "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *El Badrawi v. Dep't of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Army has not demonstrated "beyond material doubt" that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Army's relevant systems of records or the search methods used in response to this request. The Army has not described its search methods or collections of data in a way that demonstrates that its limited search was thorough or reasonable. The Army provides no explanation at all about what type of searching, if any, it conducted, nor has the Army shown additional searches would be "unreasonably burdensome" and therefore not necessary. *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

With respect to paragraph one, the Army improperly withheld information under FOIA Exemption 6. FOIA Exemption 6 exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). In enacting Exemption 6, Congress did not intend to create "a blanket exemption for personnel files," and "[j]udicial interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy." *Dep't of Air Force v. Rose*, 425 U.S. 352, 371 (1976). The Army has not demonstrated that providing the biographies of the Staff Judge Advocates would constitute a breach of personal privacy; indeed, the biographies of the Staff Judge Advocates are frequently disseminated to staff within the Army upon request.

Because the Army did not provide any information to Requesters regarding its search methods, Requesters are unable to determine whether the Army's efforts to identify records were adequate and hereby appeal because the Army failed to conduct an adequate search. Additionally, the Army did not demonstrate that providing biographies of Staff Judge Advocates would constitute "a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Consequently, Requesters also appeal the Army's response on the ground that the Army improperly withheld information under FOIA Exemption 6. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Page 3 of 3
November 2, 2017

Please furnish all applicable records to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,

/s/ Michael J. Wishnie
Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney
Counsel for Requesters

Encl.

Exhibit F

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

September 29, 2017

Office of the Judge Advocate General, Code 14
Department of the Navy, Attn: FOIA Appeals
1322 Patterson Ave. SE, Suite 3000
Washington Navy Yard
Washington, D.C. 20374-5066

Re: Freedom of Information Act Appeal, Case # DON-NAVY-2017-008499.

Dear Office of the Judge Advocate General:

In a letter dated August 30, 2017, the Department of the Navy ("Navy") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters") seeking records concerning biographies for all general courts-martial convening authorities, including staff judge advocates; prosecution of Navy members in the civilian justice system for violations of the Uniform Code of Military Justice; the duration of all special and all general courts-martial proceedings; frequently tried offenses in Navy general, special, and summary court martials as well as non-judicial punishments; victim preferences for civilian court or military courts; and the number of courts-martial convened in Iraq and Afghanistan. The original request and the letter containing the Navy's final disposition are enclosed.

In its response, the Navy agreed that Requesters qualified for a fee waiver, but did not sufficiently respond to Requesters' inquiries in paragraphs 1, 2, 3, 4, 5, and 6.

1. The Navy did not provide information regarding staff judge advocates' biographies, stating that they "are not retrievable by current or historical duty assignments."
2. The Navy did not satisfy requests for records regarding civilian prosecutions, claiming that the Navy does not maintain records of members prosecuted in the civilian justice system.
3. The Navy did not provide sufficient information regarding the duration of courts-martial proceedings on the ground that the Navy does not keep records regarding dates of reports of violations. Where the Navy did provide information regarding dates where Region Legal Services Offices, it did not provide records for all the years requested.
4. The Navy provided information regarding frequently tried offenses at general and special courts-martial but did not provide information for every year requested. The Navy also failed to provide information regarding frequent disciplinary actions in summary courts-martial and non-judicial punishment.

Page 2 of 2
September 29, 2017

5. The Navy did not provide sufficient records in response to requests regarding victim preferences for civilian court versus military court.
6. The Navy did not provide any records in response to requests for data around courts-marital convened in Iraq and Afghanistan.

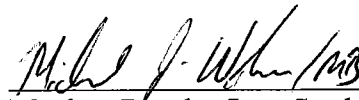
Requesters hereby appeal the Navy's response to their requests on the ground that the Navy failed to conduct an adequate search for the records at issue. Courts have recognized that federal agencies bear the burden of demonstrating that they have conducted an adequate search for records. In fact, when the adequacy of an agency's search is at issue (as it is in this case), the agency "must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *El Badrawi v. Dep't of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Navy has not demonstrated "beyond material doubt" that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Navy's search methods.

As set forth in their original request, Requesters are entitled to records related to the military justice system. Because the Navy did not provide any information to Requesters regarding its search methods, Requesters are unable to determine whether the Navy's efforts to identify records were adequate. As a consequence, Requesters hereby appeal the Navy's response their request on the ground that the Navy failed to conduct an adequate search for the records at issue. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Please furnish all applicable records to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,



Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney

Encl.

Exhibit G

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

October 2, 2017

Judge Advocate General (Code 14)
Department of the Navy, Attn: FOIA Appeals
1322 Patterson Ave. SE, Suite 3000
Washington Navy Yard
Washington, D.C. 20374-5066

Re: FOIA Appeal,
Case # DON-USMC-2017-008500.

Dear Sir or Madam:

In a letter dated August 24, 2017, the Headquarters United States Marine Corps ("the Marine Corps") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters"). The original request and the letter containing the Marine Corps' final disposition are enclosed.

In its response, the Marine Corps agreed that Requesters qualified for a fee waiver, but did not sufficiently respond to Requesters' inquiries in paragraphs 1, 2, 3, 4, 5, and 6.

1. The Marine Corps did not provide information regarding staff judge advocates' biographies, stating that "the Marine Corps tracks general court-martial convening authorities (GCMCAs) by billet, not by individual."
2. The Marine Corps did not satisfy requests for records regarding civilian prosecutions, claiming that the Marine Corps does not maintain such records.
3. The Marine Corps did not provide information regarding the duration of courts-marital proceedings on the ground that the Marine Corps does not keep said records.
4. The Marine Corps failed to provide information regarding frequently tried offenses at general court-martial, special court-martial, summary court-martial, and non-judicial punishment services, again claiming "this information is not tracked."
5. The Marine Corps did not provide records in response to requests regarding victim preferences for civilian court versus military court. The Marine Corps provided a Bulletin (the "Military Justice Requirements and Implementation Guidance"), but said Bulletin is not responsive to the requested information.
6. The Marine Corps did not provide records in response to requests for data around courts-marital convened in Iraq and Afghanistan.

Requesters hereby appeal on the ground that the Marine Corps failed to conduct an adequate search for records. FOIA requires that in responding to a request, "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such

Page 2 of 2
October 2, 2017

efforts would significantly interfere with the operation of the agency's automated information system." 5 U.S.C. § 552(a)(3)(C). The Marine Corps has not shown that its search was adequate.

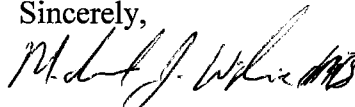
When the adequacy of an agency's search is at issue—as it is in this case—the agency “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *El Badrawi v. Dep’t of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Marine Corps has not demonstrated “beyond material doubt” that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Marine Corps’ relevant systems of records or the search methods used in response to this request. The Marine Corps has not described its search methods or collections of data in a way that demonstrates that its limited search was thorough or reasonable. The Marine Corps provides no explanation at all about what type of searching, if any, it conducted, nor has the Marine Corps shown additional searches would be “unreasonably burdensome” and therefore not necessary. *Ruotolo v. Dep’t of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

Because the Marine Corps did not provide any information to Requesters regarding its search methods, Requesters are unable to determine whether the Marine Corps efforts to identify records were adequate and hereby appeal on the ground that the Marine Corps failed to conduct an adequate search. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Please furnish all applicable records to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,



Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney
Counsel for Requesters

Encl.

Exhibit H



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 14/044

November 3, 2017

Ms. Jenna Rowan (on behalf of COL Don Christensen, USAF, Ret.)
Veterans Legal Services Clinic
127 Wall Street
New Haven, CT 06511
Email: jenna.rowan@ylsclinics.org

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-USMC-
2017-008500; FOIA APPEAL DON-NAVY-2017-000107

This letter responds to your appeal dated October 2, 2017, received in our office on October 3, 2017, challenging Headquarters Marine Corps' (HQMC) August 24, 2017, response to your underlying FOIA request DON-USMC-2017-008500, in which you requested:

1. Official biographies for all general courts-martial convening authorities (GCMCAs), including staff judge advocates, who have referred a case to court-martial since January 1, 2014;
2. Records sufficient to show the total number of Marines who were prosecuted in the civilian justice system per year since January 1, 2012 for the following offenses:
 - a. A violation of the Uniform Code of Military Justice ("UCMJ") Article 120.
 - b. A violation of UCMJ Article 125.
 - c. An attempt to commit an offense that constitutes a violation of UCMJ Article 120.
 - d. An attempt to commit an offense that constitutes a violation of UCMJ Article 125.
3. Records sufficient to show the average length of time for all special and all general courts-martial from the date the alleged violation was reported to the date of the verdict, per year since January 1, 2012.
4. Records sufficient to show, per year since January 1, 2007:
 - a. The top 10 most frequently tried offenses in Marine Corps general courts-martial.
 - b. The top 10 most frequently tried offenses in Marine Corps special courts-martial.
 - c. The top 10 most frequently tried offenses in Marine Corps summary courts-martial.
 - d. The top 10 most frequently tried offenses adjudicated through the Marine Corps non-judicial punishment service.
5. Records regarding victim preferences for civilian court versus military court as outlined

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Ser 14/044

November 3, 2017

in Pub. L. No. 113-291 § 534(b).2 This information includes, but is not limited to:

- a. Records sufficient to show the number of victims who have requested their cases be handled by civilian court.
 - b. Records sufficient to show whether or not the Marine Corps honored the victim's request.
 - c. Records sufficient to show the process for informing victims of the right to choose civilian court.
 - d. Records sufficient to show whether or not the Marine Corps is tracking how many victims have been informed of this right.
 - e. Records sufficient to show the number of victims who have been informed of this right.
6. Records regarding the courts-martial convened in Iraq and Afghanistan from October, 2001 to the present. Such information includes, but is not limited to:
- a. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were convened (actually tried).
 - b. Records sufficient to disclose the number of courts-martial that included charges for violations of Article 120, Article 125, or attempts to commit such offenses.
 - c. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were guilty pleas.
 - d. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that included a pre-trial agreement.
 - e. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by a judge alone.
 - f. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by court members.
 - g. Records sufficient to disclose the physical location of the general courts-martial convening authorities including whether this location was in Iraq, Afghanistan, or another location.

In its letter, HQMC provided the following responses relating to your specific paragraph requests (condensed for brevity):

1. A list of all USMC GCMCAs and advice on how to obtain each GCMCA biography, by convening authority, which are publicly available on the respective GCMCA official USMC website;
2. This information is not tracked;
3. This information is not tracked;
4. This information is not tracked;
5. Copies of Marine Corps Bulletin 5800 ("Military Justice Requirements and Implementation Guidance") and Marine Corps Order 5800.14 ("Victim-Witness Assistance Program"); and

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November 3, 2017

6. Copies of Marine Corps Bulletin 5800 ("Military Justice Requirements and Implementation Guidance") and Marine Corps Order 5800.14 ("Victim-Witness Assistance Program")

Your appeal challenges the adequacy of HQMC's search for records responsive to your request. For the following reasons, your appeal is denied as to all of the requested information in paragraphs 1 and 2, but granted as to your requests in paragraph 3-6 to the extent that I am remanding your request to HQMC for further processing.

Adequacy of the Search - Overview

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). The mere speculation that requested documents exist does not undermine the finding that the agency conducted a reasonable search. *Wilbur v. C.I.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."). Finally, the reasonableness of an agency's search can depend on whether the agency properly determined where responsive records were likely to be found, and searched those locations. *Karantsalis v. DOJ*, 635 F. 3d 497, 500-501 (11th Cir. 2011).

Adequacy of HQMC's search and discussion of FOIA Exemption (b)(6)-Paragraph 1

HQMC provided you a list of designated USMC GCMCA's with information that all of the commanding general biographies are available publicly. For these reasons, I find the adequacy of HQMC's search for GCMCA officer biographies and its response to you was reasonable for purposes of the FOIA.

That said, although HQMC did not respond to that part of your request about judge advocate biographies, I find their "no records response" to this part of your request was in accordance with FOIA for the following reasons.

As an initial matter, the USMC does not have a database containing Marine judge advocate biographies, nor does it have a requirement that Marine judge advocates create biographies. Furthermore, under the FOIA, agencies are not required to create explanatory material or records in response to a FOIA request. *Nat'l Labor Relations Bd. V Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975).

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November 3, 2017

Second, even if some USMC judge advocate biographies exist, they would be exempt from disclosure under 5 U.S.C. 552(b)(6). Exemption (b)(6) authorizes the Government to withhold information about individuals when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy. This requires a balancing of personal privacy interests against the public interest served by disclosure – whether the release of the information will shed light on the agency’s performance of its statutory duties. Within the department, all Navy and Marine Corps SJAs supporting GCMCAs are in the grades of captain (O-6) (colonel in the Marine Corps) or below, with most in grades of commander (O-5) (lieutenant colonel in Marine Corps) or below. Additionally, SJAs serve in staff, advisory positions – they are not in leadership billets or office-director roles. As the Court said in *Amnesty Int’l USA v. CIA*, “names and email addresses of DoD personnel below the office-director level, or officers below the rank of colonel [captain in the Navy], are properly exempt from disclosure under (b)(6).” 728 F. Supp. 2d 479, 523 (S.D.N.Y. 2010). And finally, disclosure of the names of active duty personnel is particularly sensitive given the ongoing war on terrorism. It is known that some terrorist organizations have encouraged its followers to obtain social media information to target military members. Information obtained pursuant to FOIA can be used for the same purpose. For the foregoing reasons, your appeal of that part of your request in paragraph 1 is denied.

Adequacy of HQMC’s search – Paragraph 2

I also find HQMC’s search for the requested information in paragraph 2 was reasonable. The unstructured electronic database that tracks courts-martial within the Navy and Marine Corps (which is the most likely and reasonable place to look for these requested records) does not keep track of the information requested in this paragraph. Furthermore, HQMC, which contains the individual personnel records for all of the nearly 200,000 active duty servicemembers in the Marine Corps, does not keep records of which members were prosecuted in the civilian justice system, let alone by type of offense. Finally, even if the Marine Corps did track which members were prosecuted in the civilian justice system, a request to review nearly 200,000 active duty Marine records (not to mention the hundreds of thousands of Marine records who were in the Marine Corps as of January 1, 2012, but were discharged prior to the date of your request) would be unduly burdensome. See generally *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (refusing to order agency to identify and segregate nonexempt documents from millions of pages of files in light of government’s estimate that doing so would take eight work-years); *Van Strum v. EPA*, Nos. 91-35404, 91-35577, 1992 WL 197660, at *1 (9th Cir. 1992) (accepting agency justification denying or seeking clarification of overly broad requests because agency not required to conduct search which would place inordinate burden on agency resources). For these reasons, your appeal as to the requested information in paragraph 2 is denied.

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Ser 14/044

November 3, 2017

Adequacy of HQMC's search – Paragraphs 3-6

I am granting your appeal as it relates to the adequacy of the search for documents contained in paragraphs 3-6 to the extent that I am remanding your request to HQMC with a request to conduct a more thorough search in accordance with the FOIA; they will reach out to you directly regarding a timeline for conducting the search. Please be advised, however, that HQMC may not find additional records following a more thorough search, or may find records responsive that are exempted from disclosure due to one of the applicable FOIA exemptions. That said, you will retain your right to appeal HQMC's response to our office so long as you do so within 90 calendar days from the date of their letter to you.

Conclusion

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for the denial of your appeal as to paragraphs 1 and 2 of your request. 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 HQMC's FOIA public liaison, Ms. Sally Hughes, at sally.hughes@usmc.mil or (703) 614-3685; or 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 LCDR Adam Yost, JAGC, USN, who may be reached at adam.yost@navy.mil or (202) 685-5398.

Sincerely,

A handwritten signature in dark ink, appearing to read "G. E. Lattin". The signature is fluid and cursive, with a large, stylized initial "G" and "L".

G. E. LATTIN

Director

General Litigation Division

Copy to:
HQMC (ARSF)
DON CIO

Exhibit I

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

October 4, 2017

Commandant (CG-611)
US Coast Guard, Attn: FOIA Appeals
2703 Martin Luther King Ave. Stop 7710
Washington, D.C. 20593-7710

Re: FOIA Appeal,
Case # 2017-CGFO-02744

Dear Sir or Madam:

On August 8, 2017, the above-captioned FOIA request was modified pursuant to a conversation between our client, Protect Our Defenders, and the United States Coast Guard (“the Coast Guard”). In a letter dated August 11, 2017, the Coast Guard responded to the above-captioned Freedom of Information Act Request (“FOIA Request”) submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center (“Requesters”), as modified on August, 8, 2017. The original request, modification, and the letter containing the Coast Guard’s final disposition are enclosed.

In its response, the Coast Guard did not sufficiently respond to Requesters’ inquiries in paragraphs 2 and 4.

2. The Coast Guard did not provide any records to satisfy requests for records regarding civilian prosecutions, claiming the Coast Guard “conducted a comprehensive search of Coast Guard military justice records, but [that] no responsive records were located.”
4. The Coast Guard did not provide records in response to requests for information regarding frequently tried offenses at non-judicial proceedings.

Requesters hereby appeal on the ground that the Coast Guard failed to conduct an adequate search for records. FOIA requires that, “[i]n responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency’s automated information system.” 5 U.S.C. § 552(a)(3)(C). The Coast Guard has not shown that its search was adequate.

When the adequacy of an agency’s search is at issue—as it is in this case—the agency “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *El Badrawi v. Dep’t of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Coast Guard has not demonstrated “beyond material doubt” that it conducted an adequate search, as its letter to Requesters did not include any information regarding the Coast Guard’s relevant systems of records or the search methods used in response to this request. The Coast Guard has not described its search methods or collections of data in a way that demonstrates that its limited search was thorough or reasonable. Rather, the Coast Guard, in a conclusory manner, merely asserts that it conducted a “comprehensive search.” The Coast Guard provides no explanation at all about what type of searching, if any, it conducted, nor has the Coast Guard shown additional

Page 2 of 2
October 4, 2017

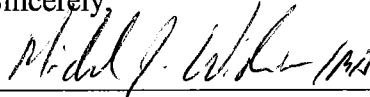
searches would be "unreasonably burdensome" and therefore not necessary. *Ruotolo v. Dep't of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

Because the Coast Guard did not provide any information to Requesters regarding its search methods, Requesters are unable to determine whether the Coast Guard efforts to identify records were adequate and hereby appeal on the ground that the Coast Guard failed to conduct an adequate search. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Please furnish all applicable records to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,

A handwritten signature in black ink, appearing to read "Michael J. Wishnie".

Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney
Counsel for Requesters

Encl.

Exhibit J

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Attention: FOIA Contact, Department of the Army

Freedom of Information Act Office

7701 Telegraph Road, Room 150

Alexandria, VA 22315-3905

usarmy.belvoir.hqda-oaa-ahs.mbx.rmda-foia@mail.mil

August 23, 2017

Re: Request Under the Freedom of Information Act for Records Related to Military Discipline and the Military Justice System

To Whom It May Concern:

This letter constitutes a request (“Request”), pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for records¹ in the possession of the United States Army. The Request is submitted on behalf of Protect Our Defenders (POD) and the Connecticut Veterans Legal Center (CVLC), also referred to as the “Requesters.”

POD and CVLC request that you provide records related to military discipline and the military justice system. Specifically, Requesters ask that you provide:

1. Records related to the Army Board for Correction of Military Records’ (ABCMR) disposition of claims involving military sexual trauma (“MST”).² This includes:
 - a. Records sufficient to show the number of instances where an applicant to the ABCMR indicated he or she was a victim of sexual assault³ and the outcomes of those claims (discharge upgrade granted or denied), by year, from FY2007 to the present.
 - b. Records sufficient to show the number of instances where an applicant to the ABCMR indicated he or she was a victim of sexual harassment⁴ and the outcomes of those claims (discharge upgrade granted or denied), by year, from FY2007 to the present.

¹ The term “records” as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

² The term “military sexual trauma” as used herein includes sexual assault and sexual harassment.

³ As used herein, “sexual assault” means “intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent” including rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses. *DoD Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports*, DEPARTMENT OF DEFENSE, 27 (April 2016) (quoting DoDD 6495.01).

⁴ As used herein, “sexual harassment” means “a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term of condition of a person’s job, pay, or career; (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the purpose or effect of reasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive working environment. *Id.* at 28 (quoting DoDD 1350.2).

2. Records regarding the Army's internal appeals processes for performance evaluations and promotions.⁵ This information includes, by year, from FY2007 to the present:
 - a. Records sufficient to show the total number of applications to the Army Special Review Board (ASRB) and the outcomes of applications to the ASRB including whether the appeal was approved in full, approved in part, or denied.⁶
 - b. Records sufficient to show the total number of applications to the Army Board for Correction of Military Records (ABCMR) seeking to correct an inaccuracy or injustice in an evaluation or promotion.⁷
 - c. Records sufficient to show the number of instances where the ASRB obtained more information from the appellant, ratings officials, persons in the chain of command, or anyone with firsthand knowledge of the case.⁸
3. Records regarding gender disparities in military discipline. This information includes records sufficient to show:
 - a. Rates per thousand⁹ by gender and rank of the subject (defendant) for all Army general courts-martial, by year, from FY2007 to the present.
 - b. Rates per thousand by gender and rank of the subject (defendant) for all Army special courts-martial, by year, from FY2007 to the present.
 - c. Rates per thousand by gender and rank of the subject (defendant) for all Army summary courts-martial, by year, from FY2007 to the present.
 - d. Rates per thousand by gender and rank of the subject (defendant) for all Army Article 15 non-judicial punishments, by year, from FY2007 to the present.

If the Army believes it would be in the interest of all parties to discuss ways to narrow the scope of this Request in order to provide responsive documents more expeditiously, please contact undersigned counsel.

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.¹⁰ See 32 C.F.R. § 286.12(l). FOIA's legislative history makes clear that the "fee waiver

⁵Army Regulation 623-2 § 4-9 (Nov. 2015)

⁶ AR 623-3 § 4-9.

⁷ AR 623-3 § 4-9(f).

⁸ AR 623-3 § 4-12(b).

⁹ The term "rates per thousand" as used herein refers to the number of individuals of a certain gender or rank who are court-martialed or face an NJP out of the total number of service members of that gender or rank currently serving.

¹⁰ Components of the Department of Defense include the Department of the Air Force. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense's regulations related to

provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); *see also Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the military justice system with respect to the Air Force.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the military justice system. Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military.”¹¹ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.¹² This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.¹³ POD has the ability and intention to convey information to the public as evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.¹⁴ This ability is further evidenced by POD’s experience in aggregating data and creating reports that receive attention from nationwide news sources.¹⁵ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In addition to

the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

¹¹ *About Protect Our Defenders: Our Mission and Work*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/>.

¹² *2016 Annual Report: Five Years of Impact*, PROTECT OUR DEFENDERS, at http://www.protectourdefenders.com/wp-content/uploads/2014/10/Annual_Reportv10-Online-single.pdf.

¹³ *Id.* at 5.

¹⁴ *Id.* at 18.

¹⁵ *Racial Disparities in Military Justice*, PROTECT OUR DEFENDERS (May 5, 2017), at http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (POD report on data of racial disparities in military justice obtained through FOIA requests); *see also* Tom Vanden Brook, *Black Troops as much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017), at <https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630/> (discussing PODs report on racial disparity).

communicating information with the general public in the state of Connecticut,¹⁶ CVLC has the ability to reach nationwide public audiences through national news organizations¹⁷ and manuals produced by CVLC that are referenced nationwide.¹⁸

In determining whether disclosure of information is primarily in the commercial interest of a requester, DoD and its Components consider “whether the requester has any commercial interest that would be furthered by the requested disclosure,” and, if a commercial interest exists, whether the requester’s primary interest in disclosure is commercial. 32 C.F.R. § 286.12(l)(2)(iii)(A–B). Requester CVLC is a nonprofit organization whose primary goal is to assist veterans. Similarly, Requester POD is a nonprofit organization whose primary goal is to assist veterans with a focus on military sexual trauma. Requesters will make no commercial use of the requested information and have no commercial interest in accessing the requested records. Therefore, the Requester’s primary interest in disclosure is not commercial.

Finally, Requesters expect the determination of this Request within twenty business days pursuant to 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, please justify all redactions by reference to the specific FOIA exemption(s) in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In addition, please release all disclosable portions of otherwise exempt material. We reserve the right to appeal your decision to withhold any information or to deny a fee waiver.

Should you have any questions while processing this Request, we can be contacted by mail at the address below or by telephone at (203) 432-4800.

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

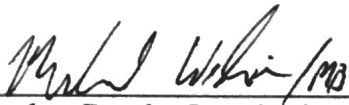
¹⁶ CVLC’s work has been repeatedly covered by Connecticut news organizations. *See, e.g.*, Peggy McCarthy, *Can Legal Services Lead to Better Health Outcomes For Veterans?*, THE HARTFORD COURANT (Jan. 14, 2014) at http://articles.courant.com/2014-01-14/health/hc-vet-services-20140114_1_va-care-margaret-middleton-connecticut-veterans-legal-center; Lucy Nalpathanchil, *Connecticut Law to Help Veterans Connect to Jobs*, College Credit, WNPR (June 11, 2014) at <http://wnpr.org/post/connecticut-law-help-veterans-connect-jobs-college-credit>.

¹⁷ *See, e.g.*, Ellen Lawton & Martha Bergmark, *One reason so many veterans are homeless? They can’t afford lawyers*, THE WASHINGTON POST (July 8, 2016) at https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-so-many-veterans-are-homeless-they-cant-afford-lawyers/?utm_term=.9ad5131591f5.

¹⁸ *See Denying Credit: The Failure to Transition Troops to Civilian Employment*, CONNECTICUT VETERANS LEGAL CENTER (Sep. 8, 2014), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_DenyingCredit.pdf; *Veteran’s Discharge Upgrade Manual*, CONNECTICUT VETERANS LEGAL CENTER (2011), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

Thank you for your prompt attention to this matter.

Sincerely,

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Meghan Brooks, Law Student Intern

Alyssa Peterson, Law Student Intern

Jenna Rowan, Law Student Intern

Aaron Wenzloff, Supervising Attorney

Michael Wishnie, Supervising Attorney

Counsel for Requesters Protect Our Defenders and Connecticut Veterans Legal Center

Exhibit K

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Attention: Headquarters Air Force FOIA

Air Force Headquarters
1000 Air Force Pentagon
Washington DC 20330
usaf.pentagon.saf-aa.mbx.haf-foia-workflow@mail.mil

August 23, 2017

Re: Request Under the Freedom of Information Act for Records Related to Military Discipline and the Military Justice System

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POD and CVLC request that you provide records related to military discipline and the military justice system. Specifically, Requesters ask that you provide:

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 - b. Records sufficient to show the number of instances where an applicant to the AFBCMR indicated he or she was a victim of sexual harassment⁴ and the outcomes of those claims (discharge upgrade granted or denied), by year, from FY2007 to the present.

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² The term “military sexual trauma” as used herein includes sexual assault and sexual harassment.

³ As used herein, “sexual assault” means “intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent” including rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these offenses. *DoD Retaliation Prevention and Response Strategy: Regarding Sexual Assault and Harassment Reports*, DEPARTMENT OF DEFENSE, 27 (April 2016) (quoting DoDD 6495.01).

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2. Records regarding the Air Force's internal appeals processes for performance evaluations and promotions.⁵ This information includes, by year, from FY2007 to the present:
 - a. Records sufficient to show the total number of applications to the Evaluation Reports Appeal Board ("ERAB") and the outcomes of applications to the ERAB, including whether the ERAB directed removal, inclusion, substitution, and/or corrections to evaluations.⁶
 - b. Records sufficient to show the total number of applications to the AFBCMR seeking to correct an error or injustice in an evaluation or promotion.⁷
 - c. Records sufficient to show the average length of time from an appeal submitted to the ERAB to the completion of that appeal.
 - d. Records sufficient to show the average length of time from an appeal submitted to the AFBCMR seeking to correct an error or injustice in an evaluation or promotion to the completion of that appeal.
 - e. Records sufficient to show the total number of resubmitted appeals and the outcomes of those claims.⁸
3. Records regarding non-rated performance periods, as authorized by Air Force Instruction 36-2406 § 3.12 (for officers) and § 4.8 (for enlisted service members). This information includes, by year, from FY2007 to the present:
 - a. Records sufficient to show the total number of non-rated performance periods requested by officers, pursuant to AFI 36-2406 § 3.12.
 - b. Records sufficient to show the total number of non-rated performance periods authorized for officers, pursuant to AFI 36-2406 § 3.12.
 - c. Records sufficient to show the number of non-rated performance periods requested by officers due to sexual assault, pursuant to AFI 36-2406 § 3.12.2.
 - d. Records sufficient to show the number of non-rated performance periods authorized for officers due to sexual assault, pursuant to AFI 36-2406 § 3.12.2.
 - e. Records sufficient to show the total number of non-rated performance periods requested by enlisted service members, pursuant to AFI 36-2406 § 4.8.
 - f. Records sufficient to show the total number of non-rated performance periods authorized for enlisted service members, pursuant to AFI 36-2406 § 4.8.
 - g. Records sufficient to show the number of non-rated performance periods requested by enlisted service members due to sexual assault, pursuant to AFI 36-2406 § 4.8.2.
 - h. Records sufficient to show the number of non-rated performance periods authorized for enlisted service members due to sexual assault, pursuant to AFI 36-2406 § 4.8.2.
4. Records regarding gender disparities in military discipline. This information includes records sufficient to show:

⁵ Air Force Instruction 36-2406 §§ 10.1–10.8 (Nov. 2016).

⁶ *Id.* at § 10.2.3.3.6.

⁷ Air Force Instruction 36-2603.

⁸ *Id.* at § 10.8.

- a. Rates per thousand⁹ by gender and rank of the subject (defendant) for all Air Force general courts-martial, by year, from FY2007 to the present.
- b. Rates per thousand by gender and rank of the subject (defendant) for all Air Force special courts-martial, by year, from FY2007 to the present.
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If the Air Force believes it would be in the interest of all parties to discuss ways to narrow the scope of this Request in order to provide responsive documents more expeditiously, please contact undersigned counsel.

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.¹⁰ See 32 C.F.R. § 286.12(l). FOIA’s legislative history makes clear that the “fee waiver provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); see also *Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the military justice system with respect to the Air Force.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

⁹ The term “rates per thousand” as used herein refers to the number of individuals of a certain gender or rank who are court-martialed or face an NJP out of the total number of service members of that gender or rank currently serving.

¹⁰ Components of the Department of Defense include the Department of the Air Force. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense’s regulations related to the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the military justice system. Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military.”¹¹ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.¹² This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.¹³ POD has the ability and intention to convey information to the public as evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.¹⁴ This ability is further evidenced by POD’s experience in aggregating data and creating reports that receive attention from nationwide news sources.¹⁵ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In addition to communicating information with the general public in the state of Connecticut,¹⁶ CVLC has the ability to reach nationwide public audiences through national news organizations¹⁷ and manuals produced by CVLC that are referenced nationwide.¹⁸

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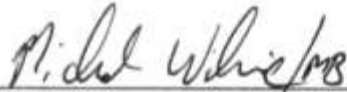
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Michael Wishnie
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Alyssa Peterson, Law Student Intern
Jenna Rowan, Law Student Intern
Aaron Wenzloff, Supervising Attorney
Michael Wishnie, Supervising Attorney
Counsel for Requesters Protect Our Defenders and Connecticut Veterans Legal Center

Exhibit L

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Attention: FOIA Contact, Department of the Navy

Chief of Naval Operations

DNS-36

2000 Navy Pentagon

Washington, DC 20350-2000

donfoia-pa@navy.mil

August 23, 2017

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⁴ As used herein, “sexual harassment” means “a form of sex discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term of condition of a person’s job, pay, or career; (2) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or (3) such conduct has the

2. Records regarding the Navy's internal appeals processes for performance evaluations and promotions.⁵ This information includes, by year, from FY2007 to the present:
 - a. Records sufficient to show the total number of applications to the Board for Correction of Naval Records (BCNR) seeking to correct an error or remove an injustice in a FITREP, CHIEFEVAL, or EVAL.⁶
 - b. Records sufficient to show the outcomes of those applications, including the number of times the BCNR recommended to the Secretary of the Navy that a record be changed due to an error or injustice in an evaluation.⁷
3. Records regarding gender disparities in military discipline. This information includes records sufficient to show:
 - a. Rates per thousand⁸ by gender and rank of the subject (defendant) for all Navy general courts-martial, by year, from FY2007 to the present.
 - b. Rates per thousand by gender and rank of the subject (defendant) for all Navy special courts-martial, by year, from FY2007 to the present.
 - c. Rates per thousand by gender and rank of the subject (defendant) for all Navy summary courts-martial, by year, from FY2007 to the present.
 - d. Rates per thousand by gender and rank of the subject (defendant) for all Navy Article 15 non-judicial punishments, by year, from FY2007 to the present.

If the Navy believes it would be in the interest of all parties to discuss ways to narrow the scope of this Request in order to provide responsive documents more expeditiously, please contact undersigned counsel.

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.⁹ See 32 C.F.R. § 286.12(l). FOIA's legislative history makes clear that the “fee waiver

purpose or effect of reasonably interfering with an individual's work performance or creates an intimidating, hostile, or offensive working environment. *Id.* at 28 (quoting DoDD 1350.2).

⁵ Department of the Navy Instruction 1610.10D § 17-10 (May 1, 2015).

⁶ DON Instruction 1610.10D § 17-10(a).

⁷ DON Instruction 1610.10D § 17-10(a).

⁸ The term “rates per thousand” as used herein refers to the number of individuals of a certain gender or rank who are court-martialed or face an NJP out of the total number of service members of that gender or rank currently serving.

⁹ Components of the Department of Defense include the Department of the Air Force. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense's regulations related to the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); *see also Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the military justice system with respect to the Air Force.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the military justice system. Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military.”¹⁰ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.¹¹ This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.¹² POD has the ability and intention to convey information to the public as evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.¹³ This ability is further evidenced by POD’s experience in aggregating data and creating reports that receive attention from nationwide news sources.¹⁴ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In addition to communicating information with the general public in the state of Connecticut,¹⁵ CVLC has the ability

¹⁰ *About Protect Our Defenders: Our Mission and Work*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/>.

¹¹ *2016 Annual Report: Five Years of Impact*, PROTECT OUR DEFENDERS, at http://www.protectourdefenders.com/wp-content/uploads/2014/10/Annual_Reportv10-Online-single.pdf.

¹² *Id.* at 5.

¹³ *Id.* at 18.

¹⁴ *Racial Disparities in Military Justice*, PROTECT OUR DEFENDERS (May 5, 2017), at http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (POD report on data of racial disparities in military justice obtained through FOIA requests); *see also* Tom Vanden Brook, *Black Troops as much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017), at <https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630/> (discussing PODs report on racial disparity).

¹⁵ CVLC’s work has been repeatedly covered by Connecticut news organizations. *See, e.g.,* Peggy McCarthy, *Can Legal Services Lead to Better Health Outcomes For Veterans?*, THE HARTFORD COURANT (Jan. 14, 2014) at

to reach nationwide public audiences through national news organizations¹⁶ and manuals produced by CVLC that are referenced nationwide.¹⁷

In determining whether disclosure of information is primarily in the commercial interest of a requester, DoD and its Components consider “whether the requester has any commercial interest that would be furthered by the requested disclosure,” and, if a commercial interest exists, whether the requester’s primary interest in disclosure is commercial. 32 C.F.R. § 286.12(l)(2)(iii)(A–B). Requester CVLC is a nonprofit organization whose primary goal is to assist veterans. Similarly, Requester POD is a nonprofit organization whose primary goal is to assist veterans with a focus on military sexual trauma. Requesters will make no commercial use of the requested information and have no commercial interest in accessing the requested records. Therefore, the Requester’s primary interest in disclosure is not commercial.

Finally, Requesters expect the determination of this Request within twenty business days pursuant to 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, please justify all redactions by reference to the specific FOIA exemption(s) in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In addition, please release all disclosable portions of otherwise exempt material. We reserve the right to appeal your decision to withhold any information or to deny a fee waiver.

Should you have any questions while processing this Request, we can be contacted by mail at the address below or by telephone at (203) 432-4800.

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

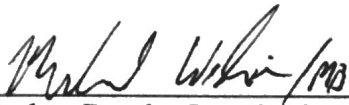
http://articles.courant.com/2014-01-14/health/hc-vet-services-20140114_1_va-care-margaret-middleton-connecticut-veterans-legal-center; Lucy Nalpathanchil, *Connecticut Law to Help Veterans Connect to Jobs, College Credit*, WNPR (June 11, 2014) at <http://wnpr.org/post/connecticut-law-help-veterans-connect-jobs-college-credit>.

¹⁶ See, e.g., Ellen Lawton & Martha Bergmark, *One reason so many veterans are homeless? They can't afford lawyers*, THE WASHINGTON POST (July 8, 2016) at https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-so-many-veterans-are-homeless-they-cant-afford-lawyers/?utm_term=.9ad5131591f5.

¹⁷ See *Denying Credit: The Failure to Transition Troops to Civilian Employment*, CONNECTICUT VETERANS LEGAL CENTER (Sep. 8, 2014), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_DenyingCredit.pdf; *Veteran's Discharge Upgrade Manual*, CONNECTICUT VETERANS LEGAL CENTER (2011), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

Thank you for your prompt attention to this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Michael Wishnie" followed by a stylized flourish or initials.

Meghan Brooks, Law Student Intern

Alyssa Peterson, Law Student Intern

Jenna Rowan, Law Student Intern

Aaron Wenzloff, Supervising Attorney

Michael Wishnie, Supervising Attorney

Counsel for Requesters Protect Our Defenders and Connecticut Veterans Legal Center

Exhibit M



Attention: Headquarters US Marine Corps (ARSF)

FOIA/PA Section (ARSF)

3000 Marine Corps Pentagon

Washington, DC 20350-3000

July 14, 2017

Re: Request Under the Freedom of Information Act for Records Related to the Military Justice System

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records¹ in the possession of the United States Marine Corps. The Request is submitted on behalf of Protect Our Defenders ("POD") and the Connecticut Veterans Legal Center ("CVLC"), also referred to as the "Requesters."

POD and CVLC request that you provide records related to the military justice system. Specifically, Requesters ask that you provide:

1. Official Biographies for all general courts-martial convening authorities, including staff judge advocates, who have referred a case to court-martial since January 1, 2014.
2. Records sufficient to show the total number of Marines who were prosecuted in the civilian justice system per year since January 1, 2012 for the following offenses:
 - a. A violation of the Uniform Code of Military Justice ("UCMJ") Article 120.
 - b. A violation of UCMJ Article 125.
 - c. An attempt to commit an offense that constitutes a violation of UCMJ Article 120.
 - d. An attempt to commit an offense that constitutes a violation of UCMJ Article 125.
3. Records sufficient to show the average length of time for all special and all general courts-martial from the date the alleged violation was reported to the date of the verdict, per year since January 1, 2012.
4. Records sufficient to show, per year since January 1, 2007:
 - a. The top 10 most frequently tried offenses in Marine Corps general court-martial.
 - b. The top 10 most frequently tried offenses in Marine Corps special court-martial.
 - c. The top 10 most frequently tried offenses in Marine Corps summary court-martial.
 - d. The top 10 most frequently tried offenses adjudicated through the Marine Corps non-judicial punishment service.

¹ The term "records" as used herein includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

5. Records regarding victim preferences for civilian court versus military court as outlined in Pub. L. No. 113-291 § 534(b).² This information includes, but is not limited to:
 - a. Records sufficient to show the number of victims who have requested their cases be handled by civilian court.
 - b. Records sufficient to show whether or not the Marine Corps honored the victim's request.
 - c. Records sufficient to show the process for informing victims of the right to choose civilian court.
 - d. Records sufficient to show whether or not the Marine Corps is tracking how many victims have been informed of this right.
 - e. Records sufficient to show the number of victims who have been informed of this right.
6. Records regarding the courts-martial convened in Iraq and Afghanistan from October, 2001 to the present. Such information includes, but is not limited to:
 - a. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were convened (actually tried).
 - b. Records sufficient to disclose the number of courts-martial that included charges for violations of Article 120, Article 125, or attempts to commit such offenses.
 - c. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that were guilty pleas.
 - d. Records sufficient to disclose the number of summary courts-martial, special courts-martial, and general courts-martial that included a pre-trial agreement.
 - e. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by a judge alone.
 - f. Records sufficient to disclose the number of special courts-martial and general courts-martial that were tried by court members.
 - g. Records sufficient to disclose the physical location of the general courts-martial convening authorities including whether this location was in Iraq, Afghanistan, or another location.

Requesters agree to pay search, duplication, and review fees up to \$100. If the fees amount to more than \$100, Requesters request a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.12(l). FOIA requires federal agencies to furnish documents at zero or reduced charges if “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This language also appears in the fee waiver requirement of the Department of Defense (DoD) FOIA regulations, which apply to all DoD Components.³ See 32 C.F.R. § 286.12(l). FOIA's legislative

² The Secretary of Defense is required to “establish a process to ensure consultation with the victim of an alleged sex-related offense that occurs in the United States to solicit the victim's preference regarding whether the offense should be prosecuted by court-martial or in a civilian court.” Pub. L. No. 113-291 § 534(b)(1).

³ Components of the Department of Defense include the Marine Corps. *DoD Manual 5400.07: Freedom of Information Act (FOIA) Program* § 3.2, DEPARTMENT OF DEFENSE (May 2017), http://www.dtic.mil/whs/directives/corres/pdf/540007_dodm_2017.pdf. The Department of Defense's regulations

history makes clear that the “fee waiver provision . . . is to be liberally construed in favor of waivers for noncommercial requesters.” *Fed. Cure v. Lappin*, 602 F. Supp. 2d 197, 201 (D.D.C. 2009) (internal quotation marks omitted); *see also Serv. Women’s Action Network v. DOD*, 888 F. Supp. 282, 288–90 (D. Conn. 2012) (granting a public interest fee waiver to Plaintiffs seeking records relating to sexual assault, equal opportunity, sexual harassment, and domestic violence complaints from all military departments).

Disclosure of the requested information would directly shed light on identifiable operations and activities of the Federal Government. 32 C.F.R. § 286.12(l)(2)(i). The Department of Defense and its Components are part of the Federal Government. The records requested concern the military justice system with respect to the Marine Corps.

The subject of this Request indisputably involves issues that will “contribute significantly to public understanding” of the operations or activities of the Department of Defense. 32 C.F.R. § 286.12(l)(2)(ii). In determining whether a request involves issues that will significantly contribute to public understanding, DoD and its Components consider whether disclosure of the requested records will be meaningfully informative and whether the disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. 32 C.F.R. § 286.12(l)(2)(ii)(A–B).

The information requested will be meaningfully informative because the Department of Defense has failed to provide veterans and the general public with adequate information regarding the military justice system. Further, disclosure contributes to the understanding of a reasonably broad audience of persons interested in the subject. Requester POD is the “only national organization solely dedicated to ending the epidemic of rape and sexual assault in the military.”⁴ POD has expertise in researching and disseminating information to the public regarding military sexual trauma and the military justice system generally.⁵ This expertise is recognized by members of Congress, the press, and advocacy organizations who rely on POD’s reports for policy analysis.⁶ POD has the ability and intention to convey information to the public as evidenced by their large network consisting of over 79,000 newsletter subscribers and over 24,000 social media subscribers.⁷ This ability is further evidenced by POD’s experience in aggregating data and creating reports that receive attention from nationwide news sources.⁸ Likewise, Requester CVLC has expertise in advocacy and education on behalf of veterans, evidencing that CVLC also has the ability and intent to convey information to the public. In

related to the Freedom of Information Act “take[] precedence over all DoD Component publications that supplement and implement the DoD FOIA Program.” *Id.* at 1.

⁴ *About Protect Our Defenders: Our Mission and Work*, PROTECT OUR DEFENDERS, <http://www.protectourdefenders.com/about/>.

⁵ *2016 Annual Report: Five Years of Impact*, PROTECT OUR DEFENDERS, at http://www.protectourdefenders.com/wp-content/uploads/2014/10/Annual_Reportv10-Online-single.pdf.

⁶ *Id.* at 5.

⁷ *Id.* at 18.

⁸ *Racial Disparities in Military Justice*, PROTECT OUR DEFENDERS (May 5, 2017), at http://www.protectourdefenders.com/wp-content/uploads/2017/05/Report_20.pdf (POD report on data of racial disparities in military justice obtained through FOIA requests); *see also* Tom Vanden Brook, *Black Troops as much as Twice as Likely to be Punished by Commanders, Courts*, USA TODAY (June 7, 2017), at <https://www.usatoday.com/story/news/politics/2017/06/07/black-troops-much-twice-likely-punished-commanders-courts/102555630/> (discussing PODs report on racial disparity).

addition to communicating information with the general public in the state of Connecticut,⁹ CVLC has the ability to reach nationwide public audiences through national news organizations¹⁰ and manuals produced by CVLC that are referenced nationwide.¹¹

In determining whether disclosure of information is primarily in the commercial interest of a requester, DoD and its Components consider “whether the requester has any commercial interest that would be furthered by the requested disclosure,” and, if a commercial interest exists, whether the requester’s primary interest in disclosure is commercial. 32 C.F.R. § 286.12(l)(2)(iii)(A–B). Requester CVLC is a nonprofit organization whose primary goal is to assist veterans. Similarly, Requester POD is a nonprofit organization whose primary goal is to assist veterans with a focus on military sexual trauma. Requesters will make no commercial use of the requested information and have no commercial interest in accessing the requested records. Therefore, the Requester’s primary interest in disclosure is not commercial.

Finally, Requesters expect the determination of this Request within twenty business days pursuant to 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, please justify all redactions by reference to the specific FOIA exemption(s) in accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). In addition, please release all disclosable portions of otherwise exempt material. We reserve the right to appeal your decision to withhold any information or to deny a fee waiver.

Thank you for your prompt attention to this matter.

Very Respectfully,



Col. Don Christensen (Ret.)
 President, Protect Our Defenders
 110 Maryland Ave. NE, Suite 505
 Washington, DC 20002
 christensen@protectourdefenders.com
 (202) 733-5196

⁹ CVLC’s work has been repeatedly covered by Connecticut news organizations. *See, e.g.*, Peggy McCarthy, *Can Legal Services Lead to Better Health Outcomes For Veterans?*, THE HARTFORD COURANT (Jan. 14, 2014) at http://articles.courant.com/2014-01-14/health/hc-vet-services-20140114_1_va-care-margaret-middleton-connecticut-veterans-legal-center; Lucy Nalpathanchil, *Connecticut Law to Help Veterans Connect to Jobs, College Credit*, WNPR (June 11, 2014) at <http://wnpr.org/post/connecticut-law-help-veterans-connect-jobs-college-credit>.

¹⁰ *See, e.g.*, Ellen Lawton & Martha Bergmark, *One reason so many veterans are homeless? They can’t afford lawyers*, THE WASHINGTON POST (July 8, 2016) at https://www.washingtonpost.com/posteverything/wp/2016/07/08/one-reason-so-many-veterans-are-homeless-they-cant-afford-lawyers/?utm_term=.9ad5131591f5.

¹¹ *See Denying Credit: The Failure to Transition Troops to Civilian Employment*, CONNECTICUT VETERANS LEGAL CENTER (Sep. 8, 2014), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_DenyingCredit.pdf; *Veteran’s Discharge Upgrade Manual*, CONNECTICUT VETERANS LEGAL CENTER (2011), at https://law.yale.edu/system/files/documents/pdf/Clinics/wirac_CTdischargeUpgradeManual.pdf.

Exhibit N

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

November 2, 2017

Department of the Navy
Office of the Judge Advocate General (Code 14)
1322 Patterson Ave. SE, Suite 3000
Washington Navy Yard
Washington, D.C. 20374-5066

Re: FOIA APPEAL,
Case # DON-NAVY-2017-009980.

Dear Sir or Madam:

In a letter dated October 12, 2017, the Department of the Navy ("the Navy") responded to the above-captioned Freedom of Information Act Request ("FOIA Request") submitted by our clients Protect Our Defenders and the Connecticut Veterans Legal Center ("Requesters"). The original request and the letter containing the Navy's disposition are enclosed.

In its response, the Navy did not sufficiently respond to Requesters' inquiries in paragraphs 1, 2, 3(c), and 3(d):

1. The Navy has not provided information regarding the Marines Board for Correction of Naval Records' (BCNR) disposition of claims involving military sexual trauma ("MST").
2. The Navy has not satisfied requests for records regarding the Navy's internal appeals processes for performance evaluations and promotion.
3. The Navy did not provide any records sufficient to show rates per gender and rank of the subject for all Navy summary courts-martial nor non-judicial punishments, as requested in 3(c) and 3(d). Instead, the Navy claimed that the requested information "is not maintained."

With respect to paragraphs 1 and 2, the Navy requested modifications and noted that responsive records are in the BCNR's possession. Requesters are making good faith efforts to modify their requests. In a phone conversation on October 23, 2017 Requesters agreed to accept data instead of claim files as responsive to these requests. Requesters also agreed to limit the time period from which they seek records to fiscal year 2011 through the present.

Notwithstanding these modifications, the Navy has yet to produce any responsive records for paragraphs 1 and 2. Consequently, Requesters write today appealing the Navy's disposition with respect to those requests, as modified. Requesters also appeal the Navy's disposition with respect to the requests from paragraphs 3(c) and 3(d).

Requesters hereby appeal on the ground that the Navy failed to conduct an adequate search for records. FOIA requires that in responding to a request, "an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would

Page 2 of 2
November 2, 2017

significantly interfere with the operation of the agency's automated information system.” 5 U.S.C. § 552(a)(3)(C). The Navy has not shown that its search was adequate.

When the adequacy of an agency's search is at issue—as it is in this case—the agency “must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents.” *El Badrawi v. Dep’t of Homeland Sec.*, 583 F.Supp.2d 285, 298 (D. Conn. 2008) (quoting *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir.2007)). The Navy has not demonstrated “beyond material doubt” that it conducted an adequate search.

The Navy failed to include information describing its search methods or collections of data in a way that demonstrates that its limited search was thorough or reasonable. Aside from the cursory information provided with respect to requests 3(a) and 3(b)—which are not being herein appealed—the Navy did not include any information regarding the Navy’s relevant systems of records or the search methods used in response to the information. The only information the Navy provided in the letter to Requesters was that no entity within “the Navy tracks th[e] information” requested in 3(c) and 3(d). For paragraphs 1 and 2, the Navy failed to provide any information nor provided any explanation about its search efforts. Therefore, Requesters have no information about what type of searching, if any, it conducted. Additionally, the Navy has not shown additional searches would be “unreasonably burdensome” and therefore not necessary. *Ruotolo v. Dep’t of Justice, Tax Div.*, 53 F.3d 4, 9 (2nd Cir. 1995).

For the foregoing reasons, Requesters are unable to determine whether the Navy efforts to identify records were adequate and hereby appeal on the ground that the Navy failed to conduct an adequate search. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Requesters expect a response to their administrative appeal within twenty days.

Please furnish all applicable records to:

Michael Wishnie
Veterans Legal Services Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Sincerely,

/s/ Michael J. Wishnie
Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney
Counsel for Requesters

Encl.

Page 3 of 3
November 2, 2017

Please furnish all applicable records to:

Michael Wishnie
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Jerome N. Frank Legal Services Organization
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Sincerely,

/s/ Michael J. Wishnie

Meghan Brooks, Law Student Intern
Alyssa Peterson, Law Student Intern
Giovanni Sanchez, Law Student Intern
Michael Wishnie, Supervising Attorney
Counsel for Requesters

Encl.