

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LESLIE KEAN
46 Dominican Dr.
San Rafael, California 94901,

Plaintiff,

v.

NATIONAL AERONAUTICS AND SPACE
ADMINISTRATION
300 E Street, S.W.
Washington, D.C. 20546

Defendant.

CASE NUMBER 1:03CV02509
JUDGE: Emmet G. Sullivan
DECK TYPE: FOIA/Privacy Act
DATE STAMP: 12/09/2003

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for injunctive and other appropriate relief seeking the disclosure and release of agency records improperly withheld from plaintiff by defendant National Aeronautics and Space Administration (NASA).

Jurisdiction and Venue

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) and §§ 701 through 706. This Court also has

jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 2201 and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

3. Plaintiff Leslie Kean is an investigative journalist, who resides at 46 Dominican Drive, San Rafael, California 84901. Ms. Kean is investigative director of the Coalition for Freedom of Information, which was set up in 2002 to focus on the government operations relating to the investigation of “unidentified flying objects”, as defined by the federal government; federal record management practices, and federal responsiveness to public requests for freedom of information under the FOIA.

4. NASA is an independent administrative agency within the Executive Branch of the United States government. NASA is an agency within the meaning of 5 U.S.C. § 552(f).

Plaintiff's FOIA Request and Defendant's Failure to Respond

5. By letter dated January 31, 2003, plaintiff submitted a FOIA request for all records pertaining to: (a) a December 9, 1965 incident in or around Kecksburg, Pennsylvania; (b) the NASA fragology files for 1962 to 1967; (c) Richard M. Schulherr; (d) Project Moon Dust; and (e) Cosmos 96.

6. On or about March 11, 2003, defendant informed plaintiff that processing her request would be delayed due to requests relating to the Columbia tragedy.

7. On or about April 7, 2003, defendant informed plaintiff that she would be receiving a “no records” response. Defendant also informed plaintiff that there had been a previous FOIA request for documentation concerning the same subject matter and that documents had been released to the previous requester. Defendant informed plaintiff that release of the prior FOIA material could not be disclosed under the Privacy Act.

8. By e-mail dated April 11, 2003, plaintiff received a "no records" response from defendant. Defendant stated that the "NASA Headquarters History Office conducted a search and from that search no records were found responsive to your request." In its response, defendant did not disclose the records relating to the previous FOIA request.

9. By letter dated May 9, 2003, plaintiff timely filed an administrative appeal of the defendant's April 11, 2003 "no records" response to her FOIA request with NASA's Office of Administrator.

10. As part of her May 9, 2003 administrative appeal, plaintiff attached documentation indicating that NASA did have records relating to the subjects outlined in her January 31, 2003 request. Plaintiff objected to NASA's restriction of its search to its Headquarters History Office. The documentation attached by plaintiff included a copy of "Record Transmittal and Receipt", dated September 25, 1967, indicating that a NASA employee, Richard M. Schulherr, had authorized the transfer to storage of the "NASA Fragology Files." This Record was attached as Exhibit 3 to plaintiff's administrative appeal.

11. Richard M. Schulherr was employed at NASA during the years 1965 to 1971 as an associate administrator with the Office of Manned Space Flight, Missions Operations. Schulherr died on or about October 12, 1987.

12. As part of her May 9, 2003 administrative appeal, plaintiff also requested that NASA provide her "(1) a description of the search conducted regarding her request and any documentation (e.g., e-mails) related thereto; (2) a copy of NASA's draft affidavit on FOIA searches, or, in lieu thereof, a copy of affidavits that have been filed on NASA's behalf in FOIA disputes; (3) copies of the relevant information management manuals, memoranda, etc., that would have governed the

transfer or disposal of documentation during the early 1960s, and including the transfer of files listed in Exhibit 3; (4) copies of the relevant information management manuals, memoranda, etc., that would have governed the retention, transfer or disposal of FOIA requests at the time that any earlier request was processed; (5) all documentation relating to NASA's processing of any earlier request(s), and (6) copies of instructional or procedural memoranda, manuals, etc., relating to the process for conducting investigations, such as 'fragology', that were in force in the 1960s."

13. By letter dated June 18, 2003, defendant NASA, through its Associate Deputy Administrator, granted plaintiff's administrative appeal and remanded her FOIA request back to defendant's FOIA Office for a new search. The June 18, 2003 appeals letter stated, *inter alia*, that "...based on the circumstances of this particular FOIA process, the search may not have been fully adequate, especially because only the NASA History Office was asked to conduct a search on behalf of the Agency. I will, therefore, remand this case to the FOIA Office and direct that the original request be sent to all NASA Centers for further processing in accordance with this appeal." Defendant committed to undertaking responsive searches on an "expedited basis." [Emphasis supplied].

14. Defendant's June 18, 2003 appeal letter attached a March 28, 1996 letter from the Washington National Record Center. The 1996 letter stated that "the National Record Center could not locate the two boxes identified as fragology files, with the accession number 255-68A-2062. However, NASA will initiate a new search to include these NASA files that may be located at the Washington National Records Center or other NASA archives."

15. Defendant's June 18, 2003 appeal letter also directed its FOIA Office to search for the documentation set forth above in Paragraph 11.

16. In or around August 2003, plaintiff provided defendant with a list of Accession numbers for documents, under defendant's control, stored at the Washington National Record Center that had "been identified as probable repositories of data relevant" to her FOIA request. The Accession numbers provided were 255-68A-2062; 225-69A-1954, 225-70A-5187, 255-71A-4778, 255-73A-777, 255-81-631, 255-82-624, and 255-90-663. [Emphasis supplied].

17. By letter dated October 15, 2003, plaintiff informed NASA of her intent to commence litigation. Plaintiff's October 15, 2003 letter was received by defendant on or about October 17, 2003.

18. By letter dated October 21, 2003, defendant provided a response to plaintiff regarding the administrative remand requiring additional searches of its records. Defendant indicated that its October 21, 2003 response was the result of "a search of responsive documents" conducted by "[o]ur History Office."

19. Defendant's October 21, 2003 response attached four documents: (a) another copy of the March 28, 1996 letter from the Washington National Record Center (*see* paragraph 13); (b) a different copy of the September 25, 1967 Record Transmittal and Receipt, which plaintiff had previously provided defendant (*see* paragraph 10); (c) a list of three of the eight Accession numbers, which plaintiff had previously provided defendant (*see* paragraph 15); and a bibliography of articles.

20. In its October 21, 2003 response, defendant, falsely and in bad faith, represented that the documents indexed under the Accession numbers referenced in Paragraph 18(c) above were in the custody and control of the National Archives and Records Administration (NARA).

21. In its October 21, 2003 response, defendant, in bad faith, represented that the existence of documents regarding the work and employment of Richard M. Schulherr (*see* paragraphs 10 and

18) could not be confirmed or denied because the “Privacy Act prevents government agencies from disclosing information to the public without the written consent of the individual, or a court order signed by a judge or magistrate. *Absent a Privacy Act waiver or court order, this command will not confirm or deny the existence of a NASA record.*” (Emphasis supplied). The defendant characterized its statement as an “initial determination” under Exemption (b)(6) of the FOIA, which was subject to administrative appeal to the NASA administrator.

22. By letter dated November 14, 2003, plaintiff filed a protective administrative appeal of defendant’s October 21, 2003 response with the NASA administrator.

23. Since filing the protective appeal, NASA has been in contact with plaintiff’s counsel, with offers to send plaintiff’s request back to its FOIA office that has acted in bad faith twice with regard to fulfilling plaintiff’s FOIA request.

NASA’s Bad Faith Failure To Comply With FOIA

24. Defendant’s application of FOIA Exemption (b)(6) as grounds to refuse to confirm or deny the existence of records related to the work and employment of Robert M. Schulherr at NASA was arbitrary, capricious and contrary to law.

25. Defendant’s practice and policy “not to confirm or deny the existence of a NASA record” under Exemption (b)(6) “without written consent of the individual, or a court order ...” is arbitrary, capricious and contrary to law.

26. Defendant’s application of FOIA Exemption (b)(6) was made in a bad faith attempt to delay processing of plaintiff’s FOIA request as directed by and in conformance with the June 18, 2003 remand of plaintiff’s successful administrative appeal of defendant’s denial of her FOIA request.

27. Exhaustion of defendant's determination under Exemption (b)(6) would be futile.

28. Plaintiff exhausted all applicable administrative remedies with respect to her FOIA request.

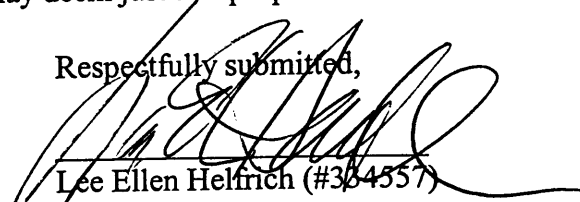
29. Defendant has wrongfully withheld the requested records from plaintiff.

Requested Relief

WHEREFORE, plaintiff respectfully requests that this Court:

- A. Order defendant to disclose requested records in their entireties and make copies available to plaintiff;
- B. Issue an Order finding that defendant's actions were in bad faith, arbitrary, capricious and contrary to law;
- C. Provide for expeditious proceedings in this action;
- D. Award plaintiff her costs and reasonable attorneys fees incurred during the administrative proceedings and in this action; and
- E. Grant such other relief as the Court may deem just and proper.

Respectfully submitted,



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