

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL VETERANS LEGAL)
SERVICES PROGRAM,)
1600 K Street NW, Suite 500)
Washington, DC, 20006,)

Plaintiff,)

v.)

U.S. DEPARTMENT OF VETERANS)
AFFAIRS,)
810 Vermont Ave NW)
Washington, DC, 20421,)

Defendant.)

Civil Case No. 22-1826

COMPLAINT

INTRODUCTION

1. Lesbian, gay, bisexual, transgender, and queer (LGBTQ+) members of the United States military have long endured intolerance and bigotry within the armed forces. For many decades, that intolerance was codified in the law and in the military’s procedures. Before 1982, for example, same-sex relations were criminalized and considered grounds for discharge.

2. In 1994, Congress enacted the policy widely known as Don’t Ask, Don’t Tell. Under that policy, a service member would be separated from the U.S. military if they openly stated they were homosexual or bisexual, were married to a person of the same sex, or had engaged in homosexual behavior in particular circumstances.

3. Don’t Ask, Don’t Tell was repealed in 2011. But for service members who were discharged under the policy, the damage had already been done. In total, approximately 14,000 service members were discharged under Don’t Ask, Don’t Tell.

4. In addition to abruptly ending the career of a service member, a separation made under Don't Ask, Don't Tell would often result in a less than honorable discharge. A less than honorable discharge characterization can prevent a veteran from receiving Department of Veterans Affairs (VA) benefits including health care, disability benefits, home loans, health care, and burial benefits.

5. On September 20, 2021, for the tenth anniversary of the repeal of Don't Ask, Don't Tell, the VA released a blog post stating that there would be new VA guidance issued for employees reviewing claims from veterans who received other than honorable discharges under Don't Ask, Don't Tell and similar policies.

6. VA, however, did not make the text of the guidance public.

7. The National Legal Services Program (NVLSP), a non-profit organization dedicated to ensuring that the government honors its commitment to our nation's veterans and service members, filed a Freedom of Information Act (FOIA) request to receive a copy of this new guidance.

8. NVLSP has not received a substantive response from the VA or a copy of the guidance.

9. NVLSP brings this action against Defendant United States Department of Veterans Affairs (VA) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (FOIA).

JURISDICTION AND VENUE

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

11. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

12. Plaintiff NVLSP is a not-for-profit organization headquartered at 1600 K Street NW, Ste 500, Washington DC 20006. Founded in 1981, NVLSP is an independent veterans service organization recognized by the VA and dedicated to ensuring that the government honors its commitment to our nation's twenty-two million veterans and active-duty personnel. Over the years, the organization has represented thousands of veterans in individual court cases and educated countless people about veterans benefits law. As part of its mission, NVLSP regularly requests records from VA and other federal agencies pursuant to FOIA, analyzes the responses, and disseminates its findings through trainings, webinars, and publications to inform the public, veterans, and their advocates about law and policies affecting veterans and service members.

13. Defendant VA is a department of the executive branch of the U.S. government with headquarters at 810 Vermont Ave NW, Washington DC 20421. It is an agency within the meaning of 5 U.S.C. § 552(f). VA has possession, custody, and control of records to which Plaintiff seeks access.

STATEMENT OF FACTS

14. For much of its history, the U.S. military formally discriminated against the LGBTQ+ community.

15. During World War I, the military began imposing discharges that were neither honorable nor dishonorable, for "undesirable habits and traits of character." Colloquially known as "blue" discharges because of the color of the form, these discharges were often used to remove homosexual service members. Following World War II, over 9,000 service members were discharged under the blue discharges for their sexuality. By 1982, the military formally banned any member of the lesbian, gay, or bisexual person from serving in the military.

16. Then, in 1994, Congress enacted the policy widely known as Don't Ask, Don't Tell, codified at 10 U.S.C. § 654. Under that policy, a service member would be separated from the U.S. military if they openly stating they were homosexual or bisexual, married to a person of the same sex, or had engaged in homosexual behavior in particular circumstances.

17. Don't Ask, Don't Tell was repealed in 2011. Over the approximately seventeen years that the statute was in force, an estimated 14,000 service members were discharged under the policy.

18. A separation made under Don't Ask, Don't Tell often resulted in a less than honorable discharge. A less than honorable discharge characterization can prevent a veteran from receiving certain Department of Veterans Affairs (VA) benefits, including health care, disability benefits, home loans, health care, and burial benefits.

19. Although "Don't Ask, Don't Tell" was repealed over a decade ago, the VA is still in the process of ensuring that its policies provide equal inclusion of all veterans with the distribution of benefits. A VA regulation, for example, still states that if a service member was separated from the military due to "homosexual acts involving aggravating circumstances or affecting the performance of duty," they are barred from most VA benefits, with no corresponding provision for heterosexual acts.

20. On September 20, 2021, the U.S. Department of Veterans Affairs issued a blog post on its website entitled "Tenth anniversary of the repeal of Don't Ask, Don't Tell" by Assistant Secretary of the Office of Public and Intergovernmental Affairs, Kayla Williams. The blog post stated that there would be new guidance in reviewing benefits claims for former servicemembers who received an other than honorable discharge due to gender identity, HIV status, or homosexual conduct. The post also stated that, although the guidance did not change

the underlying law, whenever the VA is considering whether to deny a claim from a less-than-honorably discharged veteran, there would be additional review of the claim.

21. This guidance directly affects thousands of veterans, their families, and their advocates and allies.

22. However, the VA has yet to release the new guidance to permit the public to see what VA is actually doing and how its policies and procedures have been updated by the guidance. VA's new guidance received significant national media coverage, but the guidance itself does not appear to be publicly available. Without the ability to review the details of the guidance, LGBTQ+ veterans, the public, and advocates like NVLSP are unable to truly evaluate the revisions of these guidelines.

23. Pursuant to 5 U.S.C. § 552(a)(2)(B), executive agencies like the VA must "make available for public inspection in an electronic format . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

24. Upon information and belief, the guidance announced in September 2021 is not available for public inspection. NVLSP has been unable to locate the guidance on the VA's website or other location for public inspection.

25. On April 20, 2022, Plaintiff submitted a FOIA request by email to VA seeking the production of:

A) The "newly-issued guidance" and "policy statement" referenced in the blog post from the Assistant Secretary for Public Affairs in VA's Office of Public and Intergovernmental Affairs dated September 20, 2021, "Tenth anniversary of the repeal of Don't Ask, Don't Tell," at <https://blogs.va.gov/VAntage/94920/tenth-anniversary-of-the-repeal-of-dont-ask-dont-tell/>.

26. On April 26, 2022, the VA acknowledged the request and assigned FOIA tracking number 22-05032-F by email. The FOIA request was assigned to the Office of Assistant Secretary for Public & Intergovernmental Affairs (OPIA).

27. The Assistant Secretary for Public & Intergovernmental Affairs handles executive level oversight to OPIA and provides outreach and communication through media, public affairs, and veteran engagement. OPIA is the coordinator of external communications and internal employees to ensure consistent messaging from the VA.

28. Knowledge of this new guidance will allow NVLSP to inform the public, advocates and veterans about how VA handles applications for benefits from veterans who received a less than honorable discharge under Don't Ask, Don't Tell policy.

29. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), VA was required to determine whether to comply with the FOIA request within twenty (20) working days of receipt of the request and to notify Plaintiff immediately of its determination, the reasons therefore, and the right to appeal any adverse determination.

30. The VA determination regarding Plaintiff's FOIA request was due by May 18, 2022, at the latest.

31. As of the date of this complaint, the VA has failed to: (i) determine whether to comply with Plaintiff's FOIA request; (ii) notify Plaintiff of any such determination or the reasons therefor; (iii) advise Plaintiff of the right to appeal any adverse determination; or (iv) produce the requested records or otherwise demonstrate that the requested records are exempt from production.

32. Because VA has failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), NVLSP is deemed to have exhausted any and all administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C) as the allotted time under FOIA has passed.

COUNT 1

(Violation of FOIA, 5 U.S.C. § 552)

33. Plaintiff realleges paragraphs 1 through 20 as if fully stated herein.

34. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552(a)(3).

35. Defendant has violated U.S.C. § 552(a)(2) by failing to publicly post this new guidance online. This guidance is procedural and affects members of the public.

36. Plaintiff has a legal right to obtain such records, and no legal basis exists for the Defendant's failure to disclose them.

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request;

(2) order Defendant to immediately process and release to Plaintiff the guidance and policy statement pursuant to Plaintiff's FOIA request;

(3) enjoin Defendant from charging Plaintiff search, review, or duplication fees for the processing of Plaintiff's FOIA request;

(4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

(5) grant such other relief as the Court deems just and proper.

Dated: 6/27/2022
Washington, DC

Respectfully submitted,

/s/ Barton F. Stichman

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