

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ILLINOIS ASSOCIATION OF COUNTY
VETERANS ASSISTANCE
COMMISSIONS,
501 North Riverside Drive, Suite 106
Gurnee, Illinois 60031-5918

Plaintiff,

v.

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

Defendant.

Civil Case No. 22-3445

COMPLAINT

INTRODUCTION

For decades, Vietnam War Veterans have had to fight to get the recognition and benefits to which they are entitled, including service-connected disability benefits from the U.S. Department of Veterans Affairs (VA) for diseases caused by exposure to herbicides like Agent Orange. Finally, in 2019, Congress passed a law to help Veterans who served in the offshore waters of the Republic of Vietnam (Blue Water Veterans) to more easily obtain VA benefits. The VA, however, has hidden its procedures from the public, refusing to disclose how it is implementing the law and the basis on which it is denying certain Veterans' claims.

Under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), Illinois Association of County Veterans Assistance Commissions (IACVAC) requested that VA provide a copy of a standard operating procedure it uses to adjudicate claims from Blue Water Veterans. VA

unlawfully denied the request. Plaintiff IACVAC thus brings this action against VA to compel compliance with the law.

As grounds therefor, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff IACVAC is an Illinois-based association of county veteran's assistance commissions, which are units of local government and primarily represent Veterans under the National Association of County Veterans Service Officers. IACVAC's membership consists of Department of Veterans Affairs-accredited Veteran Service Officers who are dedicated to serve Illinois Veterans and their families.
4. 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

I. Blue Water Navy Veterans and VA's Standard Operating Procedure

5. During the Vietnam War, the United States military widely used chemical herbicides and defoliants, including Agent Orange and others, for tactical use. These herbicides are known to be toxic, and exposure can cause a wide array of debilitating conditions, such as cancers and certain heart conditions.
6. Veterans who served were exposed to chemical herbicides and who now have conditions

caused by that herbicide exposure are entitled to VA service-connected disability benefits. VA grants presumptive service connection—that is, VA does not require the veteran to prove their exposure to Agent Orange or that it specifically caused their current condition—to Veterans who can demonstrate they served in Vietnam and other locations where the military used chemical herbicides. For many years, VA has granted presumptive service connection to Veterans with herbicide-related conditions who served on land in Vietnam or in the inland waterways (also called brown water) of Vietnam. In 2019, Congress extended the presumption of herbicide exposure to Veterans who served in the offshore waters of the Republic of Vietnam between January 9, 1962, and May 7, 1975. *See* Blue Water Navy Vietnam Veterans Act of 2019 (Pub. L. 116-23). Eligible Veterans served up to 12 nautical miles from the shore of Vietnam and are commonly called Blue Water Navy Veterans or Blue Water Veterans.

7. To implement the Blue Water Navy Vietnam Veterans Act, VA had to create a process to determine which Veterans served on ships that came within 12 nautical miles from the shore of Vietnam. On October 30, 2019, Mr. Willie Clark, Deputy Under Secretary for Field Operations, Veterans Benefits Administration testified to Congress that the VA would develop a tool that incorporates US Navy deck logs to pinpoint the location of US Naval vessels traveling within 12 nautical miles of the shore of Vietnam. For claims that are not easily determined using this new tool, VA has set in place operating procedures that devote particular groups of claims processors to further develop the Veteran's claim, as part of VA's statutory duty to assist Veterans with their claims.

8. VA stated at the hearing that the tool will not be used to deny Veterans' claims. If the tool does not place the veteran within 12 nautical miles of the shore of the Republic of Vietnam, additional development is supposed to occur, including contacting the Veteran for more evidence. *See* <https://www.youtube.com/watch?v=Oar-kjEatXA> (at 35:53-36:28 and 41:37-

43:04).

9. However, Veterans who are represented by membership of the IACVAC have had their claims denied with the tool with no further development and the refusal of VA staff to consider whether a ship came within 12 nautical miles of the shore of Vietnam between the positions VA's tool evaluates from a Naval vessel's deck log. On information and belief, other Blue Water Veterans across the country are similarly denied with no further development.

10. VA's Adjudication Procedures Manual, known as the M21-1 Manual, is an internal guidance document that claims adjudicators are required to follow to determine whether to grant a claim. The manual is also publicly available to Veterans and advocates so they can understand VA's processes and present their claims effectively.

11. For Blue Water Veterans' claims, however, the M21-1 Manual does not provide specific details. Instead, the manual simply refers to a "Blue Water Navy Standard Operating Procedure" that claims adjudicators apparently use. This document is unavailable to advocates and Veterans to review. Blue Water Veterans, therefore, do not know the process or the basis on which VA decides whether they are presumed to have been exposed to herbicides, such as Agent Orange.

II. Procedural History

12. On March 8, 2022, the Illinois Association of County Veterans Assistance Commissions (IACVAC) filed a Freedom of Information Act request under 5 U.S.C. § 552 seeking production of the "Blue Water Navy Standard Operating Procedure" referenced in the Department of Veterans Affairs Adjudication Manual M21-1 at section VIII.i.1.B.4.a.

13. The St. Petersburg VA Regional Office FOIA Service acknowledged receipt of the FOIA request on March 14, 2022, and issued reference number FOIA 22-03981-F.

14. By email dated April 12, 2022, the VA Central Office issued its Initial Agency Decision

denying IACVAC's request. In its denial of IACVAC's FOIA request, VA stated that though the requested document did exist, all 49 pages are exempt under 5 U.S.C. § 552 (b)(5), arguing that the Blue Water Standard Operating Procedure is an "inter-agency or intra-agency memorandum [] or letter [] which would not be available by law to a party other than an agency in litigation with the agency."

15. The Blue Water Standard Operating Procedure, however, is not exempt from disclosure under FOIA, and VA has made no effort to explain why it believes it is. The document is a final policy and procedure of VA—it is not deliberative nor pre-decisional, nor a legal opinion, nor subject to any other type of privilege that would shield the document from disclosure in litigation.

16. On May 27, 2022, IACVAC formally filed a timely administrative appeal of VA's denial to its FOIA request.

17. By letter dated the same date and addressed to IACVAC's president Andrew Tangen, VA acknowledged receipt of the appeal.

18. VA, however, has never issued a decision on the administrative FOIA appeal.

19. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), VA was required to make a determination on IACVAC's administrative appeal within twenty (20) working days of receipt of the request and to notify IACVAC immediately of its determination, the reasons therefor, and the right to judicial appeal.

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

COUNT 1

(Violation of FOIA, 5 U.S.C. § 552)

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

1. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.
2. 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 immediately process and release to Plaintiff the records responsive to Plaintiff's FOIA request;
- (2) enjoin Defendant from charging Plaintiff search, review, or duplication fees for the processing of Plaintiff's FOIA request;
- (3) 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
- (4) grant such other relief as the Court deems just and proper.

Dated: November 10, 2022
Washington, DC

Respectfully submitted,

/s/ Barton F. Stichman
Barton F. Stichman (D.D.C. Bar No. 218834)
Renée A. Burbank (*motion for admission
forthcoming*)
LeTiequa Wallace (*motion for admission
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