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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITIZENS OF THE EBEBY’S RESERVE
FOR A HEALTHY, SAFE AND
PEACEFUL ENVIRONMENT;
ROBERT WILBUR; and MARYON
ATTWOOD,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE NAVY, a military department of the
United States, an agency of the United
States,

Defendant.

NO.

COMPLAINT

INTRODUCTION

1. This is an action against the U.S. Department of the Navy (“Navy”) for violations of the Freedom of Information Act (“FOIA” or “Act”), 5 U.S.C. § 552, *as amended*. Under the judicial review provisions of both the FOIA and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, plaintiffs Citizens of the Ebey’s Reserve for a Healthy, Safe, and Peaceful Environment and two of its individual members, Robert Wilbur and Maryon Attwood (collectively

1 herein, “Citizens of Ebey’s Reserve” or “COER”) seek relief regarding FOIA requests they
2 submitted to the Navy on February 15, 2019, May 1, 2019, and May 14, 2019 (“FOIA Requests”)
3 and regarding an administrative FOIA appeal COER submitted to the Navy on April 2, 2019
4 (“FOIA Appeal”).

5
6 2. The purpose of FOIA is “to establish a general philosophy of full agency disclosure
7 unless information is exempted under clearly delineated statutory language.” S. Rep. No. 89-813,
8 1st Sess., at 3 (1965). FOIA requires federal agencies to disclose records in a timely manner to any
9 person upon request unless the information falls within one of nine narrow disclosure exemptions
10 in the Act. *See* 5 U.S.C. § 552(a)(3)(A), (b).

11 3. Federal agencies generally must determine within twenty business days whether
12 requested records are exempt from withholding and, if they are not, the agency must promptly
13 disclose the records to the requester. 5 U.S.C. § 552(a)(6)(A)(i); *id.* at § 552(a)(3)(A), (a)(6)(C)(i).
14 If an agency makes an adverse determination on a FOIA request, the requester may appeal that
15 determination to the agency, which must then make a determination on the administrative appeal
16 within twenty days of receiving it. *Id.* at § 552 (a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii). “If the agency
17 does not make a “determination” within the relevant statutory time period, the requester may file
18 suit without exhausting administrative appeal remedies.” *Citizens for Responsibility & Ethics in*
19 *Washington v. Fed. Election Comm’n*, 711 F.3d 180, 185 (D.C. Cir. 2013).
20

21
22 4. Citizens of Ebey’s Reserve is filing this lawsuit because the Navy has failed to make
23 and communicate its determination on COER’s FOIA Requests; failed to make and communicate
24 the disclosure determinations required by FOIA for the responsive records in its possession; failed
25 to act within applicable deadlines; and failed to comply with its estimated date by which it would
26 complete its response to COER’s FOIA Appeal.

1 5. The Navy is unlawfully withholding its final appeal determination, as well as the
2 documents sought by COER, documents to which COER is entitled and for which no valid dis-
3 closure exemptions apply. COER seeks a declaration that the Navy has violated FOIA and an order
4 from the Court compelling the Navy to make the required determinations and disclosures by a date
5 certain.
6

7 JURISDICTION AND VENUE

8 6. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28
9 U.S.C. §§ 1331 (federal question), 1346 (United States as defendant), 2201 (declaratory judgment),
10 and 2202 (further relief).

11 7. This Court is the proper venue for this case because, pursuant to 5 U.S.C. §
12 552(a)(4)(B), the records responsive to COER's FOIA Requests and Appeal are located in this
13 district and because, under 28 U.S.C. § 1391(e), a substantial part of the events or omissions giving
14 rise to plaintiffs' claims occurred in this district.
15

16 PARTIES

17 8. Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment is a
18 non-profit public interest organization incorporated in 2012 and dedicated to protecting the health
19 and welfare of the inhabitants of Whidbey Island and surrounding areas, including marine,
20 migratory, and endangered species and preserving the historic northwest communities being
21 threatened by military jet training flights. Its registered office is located in Coupeville, Washington.
22 COER brings this action on its own behalf and on behalf of its adversely affected members.
23

24 9. The information COER seeks through its FOIA requests will assist COER in its
25 mission as a non-profit environmental advocacy organization and in its efforts to catalog and assess
26 the human health and environmental impacts from the Navy's expanded operations at Naval Air

1 Station Whidbey Island. COER disseminates the information that it gathers to the public through
2 press releases and online resources including a regularly updated website, blog, and social
3 networking sites.

4 10. The above-described interests of Citizens of Ebey’s Reserve and its members have
5 been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely
6 affected by the Navy’s disregard of its statutory duties under FOIA and by the unlawful harm that
7 results. The Navy’s failure to fully implement FOIA injures the interests of COER and its members
8 and the relief requested in this lawsuit can redress these injuries. These harms are traceable to the
9 Navy’s conduct and would be remedied by the relief sought in this action.

11 11. Plaintiff Robert Wilbur is the current president and a director of Citizens of Ebey’s
12 Reserve. Mr. Wilbur submitted the FOIA requests at issue in this lawsuit on both his own behalf
13 and on behalf of Citizens of Ebey’s Reserve.

14 12. Plaintiff Maryon Attwood is the past president and a current director of Citizens of
15 Ebey’s Reserve. Ms. Attwood submitted the FOIA requests at issue in this lawsuit on both her own
16 behalf and on behalf of Citizens of Ebey’s Reserve.

17 13. Defendant United States Department of the Navy (“Navy”) is a military department
18 within the United States Department of Defense subject to the authority, direction, and control of
19 the Secretary of Defense. It is an agency of the executive branch of the United States government
20 subject to the FOIA, pursuant to 5 U.S.C. § 552(f), and subject to the judicial review provisions of
21 the APA, 5 U.S.C. §§ 701–702. The Navy is in possession or control of public records requested
22 and sought by plaintiffs.
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STATUTORY BACKGROUND

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2 14. The purpose of FOIA is “to open agency action to the light of public scrutiny.” U.S.
3 *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 (1989) (quoting *Dep’t of*
4 *the Air Force v. Rose*, 425 U.S. 352, 372 (1976)). “Congress believed that this philosophy, put into
5 practice, would help ‘ensure an informed citizenry, vital to the functioning of a democratic
6 society.’” U.S. *DOJ v. Tax Analysts*, 492 U.S. 136, 142 (1989) (quoting *NLRB v. Robbins Tire &*
7 *Rubber Co.*, 437 U.S. 214, 242 (1978)).

9 15. FOIA requires federal agencies to make records in their possession or control
10 available to the public upon request unless one of FOIA’s nine specific exemptions applies. 5
11 U.S.C. § 552(a), (b)(1)–(9). Federal agencies bear the burden of demonstrating to a court that any
12 withholding of responsive records is consistent with FOIA. 5 U.S.C. § 552(a)(4)(B). Even if an
13 agency meets its burden to prove that a responsive record contains information that is exempt from
14 disclosure, the agency must nevertheless disclose any non-exempt information if it can be
15 segregated from the exempt materials. 5 U.S.C. § 552(b).

17 16. To ensure a requester receives all requested documents, FOIA requires agencies to
18 conduct a search that is reasonably calculated to uncover all records responsive to the request. 5
19 U.S.C. § 552(a)(3)(C)–(D).

21 17. FOIA imposes strict and rigorous deadlines on federal agencies. FOIA requires a
22 federal agency that receives a FOIA request to determine whether the requested records are exempt
23 from disclosure under 5 U.S.C. § 552(b) and to communicate that determination to the requester
24 within twenty business days. *Id.* § 552(a)(6)(A)(i). If the agency determines the requested records
25 are exempt from public disclosure, the agency must also communicate to the requester that they
26 have a right to appeal that determination. *Id.* If the agency determines the records are not exempt

1 from public disclosure, the agency is required to make the requested records “promptly available”
2 to the requester. *Id.* § 552(a)(3)(A), (a)(6)(C)(i).

3 18. FOIA requires that, within the relevant time period, an agency must determine
4 whether a requester will receive all the documents the requester seeks. “It is not enough that, within
5 the relevant time period, the agency simply decide to later decide.” *Citizens for Responsibility &*
6 *Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 186 (D.C. Cir. 2013). Within the
7 relevant time period, the agency must at least inform the requester of the scope of the documents
8 that the agency will produce, as well as the scope of the documents that the agency plans to withhold
9 under any FOIA exemptions. *Id.*, *See also id.* at 186–89 (“If the agency does not adhere to FOIA’s
10 explicit timelines, the ‘penalty’ is that the agency cannot rely on the administrative exhaustion
11 requirement to keep cases from getting into court.”).

12 19. If an agency makes an adverse determination on a FOIA request, the requester may
13 appeal that determination to the agency, which must then make a determination on the
14 administrative appeal within twenty days of receiving it, absent unusual circumstances. *Id.*
15 § 552(a)(6)(A)(i)(III)(aa), (a)(6)(A)(ii).

16 20. In addition to imposing response deadlines, FOIA also requires federal agencies to
17 communicate with requesters about the status of the agencies’ efforts to respond to a FOIA request.
18 Specifically, FOIA requires agencies to assign tracking numbers to each request that will take
19 longer than ten days to process; to provide that tracking number to each person making such a
20 request; and to establish a telephone line or internet service that provides information about the
21 status of a request to the requester, including an estimated date by which the agency will complete
22 its work. *Id.* § 552(a)(7). Courts have construed these provisions to include a requirement that
23 agencies, upon request, provide estimated completion dates to requesters. *See, e.g., Sierra Club v.*
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1 U.S. EPA, 75 F. Supp. 3d 1125, 1146 (N.D. Cal. 2014) (“[T]he Court finds that the EPA acted
2 unreasonably when it failed to inform Plaintiffs of an estimated completion date”).

3 21. A District Court has jurisdiction “to enjoin the agency from withholding agency
4 records and to order the production of any agency records improperly withheld from the
5 complainant.” 5 U.S.C.A. § 552(a)(4)(B).
6

7 22. Agency action under the FOIA is also subject to judicial review under the APA. *Or.*
8 *Natural Desert Ass’n v. Gutierrez*, 409 F. Supp. 2d 1237, 1248 (D. Or. 2006) (violation of the
9 FOIA’s decision deadline constitutes agency action that is not in accordance with the law). Under
10 the judicial review provisions of the APA, district courts are authorized to compel agency action
11 unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1). District courts should also set
12 aside any agency action found to be arbitrary, capricious, an abuse of discretion, not in accordance
13 with law, or made without observation of required procedures. *Id.* § 706(2).
14

15 STATEMENT OF FACTS

16 FOIA Requests

17 23. On February 15, 2019, Maryon Attwood submitted a FOIA request to the Navy via
18 email seeking records regarding sampling for chemical components of aqueous film-forming foam
19 (AFFF) at and adjacent to Naval Air Station Whidbey Island and OLF Coupeville. The February
20 10, 2019 FOIA request sought six categories of records:
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- 22 a. Results of all soil and surface ground water (upper meter) samples,
23 including location and date, chemical components that were analyzed, and
24 the detection limits.
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b. Results of any water and soil samples taken in Crockett Lake or its adjacent marsh, including location and date, chemical components that were analyzed, and the detection limits.

c. Results of any marine waters, any and fluvial waters including location and date, chemical components that were analyzed, and the detection limits.

d. Results of all wildlife (vertebrate and invertebrate) tested for the presence of AFFF chemicals, including species or lowest identified taxon, sample location and date, chemical components that were analyzed, and the detection limits.

e. A list of the chemical components in the new AFFF that replaces the old stockpile, and any descriptions from the manufacturer related to the toxicity or non-toxicity of the new AFFF chemical components to humans and wildlife, precautions for use, and rate of chemical breakdown.

f. All records, policies, and correspondence related to when, where, and under what circumstances the new AFFF will be used.

24. On February 20, 2019, Maryon Attwood received a response via email from Richard Mach, from the email address richard.mach@navy.mil, stating in full:

“Thank you for forwarding this to us. I have sent this to our FOIA office to ensure prompt and properly coordinated response.

VR,
Richard”

1 25. Maryon Attwood has not, as of the date of this complaint, received any further
2 response from the Navy to her February 15, 2019 FOIA request.

3 26. As of the date of this complaint, the Navy has not assigned a FOIA tracking number
4 to Maryon Attwood's February 15, 2019 FOIA request.

5 27. As of the date of this complaint, the Navy has not made the initial determination
6 required by 5 U.S.C. § 552(a)(6)(A)(i) with regard to Maryon Attwood's February 15, 2019 FOIA
7 request.

8 28. As of the date of this complaint, the Navy has not made a final determination with
9 regard to Maryon Attwood's February 15, 2019 FOIA request.

10 29. As of the date of this complaint, the Navy has not provided an estimated date by
11 which it would respond to Maryon Attwood's February 15, 2019 FOIA request.

12 30. On May 1, 2019, Robert Wilbur submitted a FOIA request to the Navy via email
13 with a hard copy following by mail, seeking nine categories of records:

14 a. All documents, including permitting records, pertaining to the siting and
15 operational use of the Radome and the FSQ-T22 Electronic Combat Trainer or of
16 any upgraded version of that equipment (hereafter "ECT") at Outlying Field
17 Coupeville (OLFC).

18 b. All records of hours and number of days that the ECT at OLFC was used
19 from 2012 through 2018 in simulating radar signals for in-flight aircrew training
20 and for troubleshooting of an EA-18 G Growler Tactical Jamming System.

21 c. All records related to any new equipment installed, replaced or upgraded in
22 the Radome since 2008, including, Is any new equipment being added to interface
23 with the Growler's on-board equipment.

1 d. All records on how many hours and what times of day the OLFC stationary
2 transmitter transmitted for the years 2016 to the most recent use in 2019, including
3 documentation of

- 4 i. frequencies transmitted,
5 ii. modulation modes are used, and
6 iii. power levels (i.e., peak, instantaneous, pulsed, and average
7 power level).
8

9 e. All documents related to the Radome/stationary emitter's receipt of
10 electronic signals from Growlers, including ECT interruptions of electronic
11 equipment functioning on the ground under the OLFC flight paths.
12

13 f. All documents pertaining to ECT evaluations of aircraft electronic warfare
14 performance to aircraft jamming responses to threat emitters, as well as, operator
15 data documenting Measure of Effectiveness.

16 g. Records documenting the most current projection of hours of ECT use at
17 OLFC in 2019, 2020, 2021, including frequencies to be transmitted, modulation
18 modes, as well as peak, instantaneous, pulsed, and average power levels that will be
19 used post-ROD.
20

21 h. All records, correspondence, meeting minutes, military and other studies and
22 documents related to or examining how the use of the ECT at OLFC and mobile
23 transmitters in the Olympic MOA could affect health and safety of individuals
24 exposed in the Coupeville and Olympic National Forest areas. Both brief and long-
25 term exposure are of particular interest.
26

1 i. All records, emails, and websites that provide information in which the Navy
2 has informed the public about the risks of exposure related to the ECT facility and
3 ways to avoid deleterious exposure.

4 31. Robert Wilbur has, as of the date of this complaint, received no response whatsoever
5 from the Navy to his May 1, 2019 FOIA request.

6 32. As of the date of this complaint, the Navy has not assigned a FOIA Tracking
7 Number to Robert Wilbur's May 1, 2019 FOIA request.

8 33. As of the date of this complaint, the Navy has not made the initial determination
9 required by 5 U.S.C. § 552(a)(6)(A)(i) with regard to Robert Wilbur's May 1, 2019 FOIA request.

10 34. As of the date of this complaint, the Navy has not made a final determination with
11 regard to Robert Wilbur's May 1, 2019 FOIA request.

12 35. As of the date of this complaint, the Navy has not provided an estimated date by
13 which it would respond to Robert Wilbur's May 1, 2019 FOIA request.

14 36. On May 13, 2019, Robert Wilbur submitted a FOIA request to the Navy seeking
15 "all records pertaining to the number of EA-18G Growlers to be received at NASWI that will be
16 equipped with the F414 Enhanced engine or, if already stationed at NASWI, to be retrofitted with
17 the enhanced engine."
18

19 37. On May 14, 2019, Robert Wilbur received a response via email from George
20 Amerson, from the email address george.amerson@navy.mil, which included a FOIA tracking
21 number for Robert Wilbur's May 13, 2019 FOIA request: DON-NAVY-2019-006841. The email
22 from George Amerson stated: "I am writing in reference to the Subject FOIA request, wherein you
23 seek documentation of all records pertaining to the number of EA-18G Growlers to be received at
24 NASWI equipped with F414 Enhanced engines or the number of Growlers that will be retrofitted
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1 with the enhanced engine. We are currently conducting a search for the responsive records that you
2 seek. I will update you within two days on the progress of our search.”

3 38. Robert Wilbur has, as of the date of this complaint, received no further response
4 from the Navy to his May 13, 2019 FOIA request regarding “all records pertaining to the number
5 of EA-18G Growlers to be received at NASWI that will be equipped with the F414 Enhanced
6 engine or, if already stationed at NASWI, to be retrofitted with the enhanced engine.”
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8 39. As of the date of this complaint, the Navy has not made the initial determination
9 required by 5 U.S.C. § 552(a)(6)(A)(i) with regard to Robert Wilbur’s May 13, 2019 FOIA request.

10 40. As of the date of this complaint, the Navy has not made a final determination with
11 regard to Robert Wilbur’s May 13, 2019 FOIA request.

12 41. As of the date of this complaint, the Navy has not provided an estimated date by
13 which it would respond to Robert Wilbur’s May 13, 2019 FOIA request.
14

15 FOIA Appeal

16 42. On May 15, 2018, Maryon Attwood submitted a FOIA request to the Navy seeking
17 three categories of records regarding the EA-18G “Growler” aircraft destined for naval Air Station
18 Whidbey Island, including records relating to noise tests of new engines that the Navy proposes to
19 install in the “Growler” aircraft.
20

21 43. On June 20, 2018, the Navy’s Barbara Nimmerrichter responded to Maryon
22 Attwood via email, assigning FOIA tracking number DON-NAVY-2018-008291 to Maryon
23 Attwood’s May 15, 2018 FOIA request, asking a question about the request, and stated: “We have
24 a significant FOIA backlog and that we are currently processing on a first in, first out basis. We
25 will provide monthly status updates to all requestors. We apologize ahead of time for delayed
26 responses but appreciate your patience as we work through our backlog.”

1 44. Maryon Attwood and Barbara Nimmerrichter exchanged emails on June 26 and July
2 18, 2018, regarding the scope of Maryon Attwood’s FOIA request.

3 45. On September 17, 2018, Maryon Attwood sent Barbara Nimmerrichter an email
4 stating, in part: “Since 4 months have elapsed, we hope our overdue FOIA request is given
5 appropriate priority.”
6

7 46. On September 21, 2018, Maryon Attwood and Barbara Nimmerrichter spoke on the
8 phone and Ms. Nimmerrichter sent Ms. Attwood an email summarizing Ms. Attwood’s FOIA
9 request as seeking three categories of records, only the third of which is relevant to this lawsuit:
10 “3. Records and test results of loudness (i.e., decibels on A scale and if available, C-scale) of the
11 F414 enhanced engine and the F414-400 series engine.”
12

13 47. On January 7, 2019, the Navy responded to the request for information described in
14 the preceding paragraph by producing (under a cover letter) a single document, a PDF version of a
15 slideshow. The PDF version of a slideshow was redacted under FOIA exemption 6. The Navy’s
16 cover letter stated “You may consider this to be an adverse determination that may appealed” and
17 provided instructions for appealing the adverse determination.

18 48. The Navy assigned FOIA tracking number DON-NAVY-2018-008291 to Maryon
19 Attwood’s May 15, 2018 FOIA request, as amended on September 21, 2018.
20

21 49. On April 2, 2019, Bricklin & Newman, LLP filed an appeal of the Navy’s adverse
22 determination on behalf of Maryon Attwood. The following day, April 3, 2019, Bricklin &
23 Newman, LLP filed an amended appeal.

24 50. The April 3, 2019 amended appeal concerned “the failure of the Navy to provide
25 any other documents beside the single redacted document[.]”
26

1 51. The April 3, 2019 amended appeal noted: “This is not a case where the Navy has
2 identified other documents and advised our client that they were being withheld under an
3 exemption. Rather, the Navy has not made reference to any other documents at all in its possession
4 which would be responsive to the above-quoted request. It strains credulity to believe that the Navy
5 has no other documents. For instance, there must be documents that form the basis for the slide
6 show document that was produced (with redactions).”

7
8 52. On April 30, 2019, the Navy’s Richard Zeigler responded to the April 3, 2019
9 amended FOIA appeal by letter and assigned the FOIA Appeal tracking number DON-NAVY-
10 2019-005768.

11 53. The Navy’s April 30, 2019 response letter stated that Mr. Zeigler had coordinated
12 with the Navy’s “Initial Denial Authority (IDA)” and that after his discussion with IDA’s FOIA
13 staff and legal office, “the IDA agreed to reconsider the action taken in this matter and conduct an
14 additional search.”

15
16 54. The Navy’s April 30, 2019 response letter went on to state: “Accordingly, I hereby
17 close your appeal to permit the IDA to reconsider the action (and, by copy of this letter, I remand
18 it to the IDA for appropriate action). [...] If, upon receipt of the IDA’s final action, you wish to
19 appeal, you may do so to this office.”

20
21 55. In April 2019, the Navy’s Barbara Nimmerrichter communicated with David
22 Bricklin and told him that the Navy would resume its search for responsive records, as later
23 confirmed by the Navy’s April 30, 2019 response letter.

24 56. The Navy’s April 30, 2019 response letter was received by Bricklin & Newman,
25 LPP on May 7, 2019. On that day, after receiving the letter, David Bricklin wrote to the Navy’s
26 Barbara Nimmerrichter via email, stating:

1 Several weeks ago, you told me you were resuming the search for documents
2 responsive to our request. Consistent with that, today I received the
3 attached letter from the FOIA appeal office, stating the appeal was being
4 dismissed based on the Navy's promise to resume searching for responsive
5 documents. But I still have no documents from you. Please advise of the
6 status of your efforts and a date by which I can expect the documents you
7 locate.

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57. On May 8, 2019, Barbara Nimmerrichter replied to David Bricklin via email,
stating:

We are in the process of conducting a thorough search for responsive
documents. To date, we have not been able to locate any other documents.
We will continue to search and keep you posted.
Thank you for your patience.

58. On May 8, 2019, David Bricklin replied to Barbara Nimmerrichter via email,
stating:

It is hard to understand how it could take this long to find the documents.
Who created the slide shows you sent? That person had access to the
underlying documents which were used to create the slide shows. Contact
that person and get the documents that were used to create the slideshow.
And ask him/her, who provided those and then contact that person for any
other documents they have responsive to our request. This should take two
days not six months.

What is your estimate for a response? At some point soon, I will be forced
to construe the delay as a willful failure to respond. I'd obviously like to
avoid getting to that point. Please help me. Thank you.

59. On May 9, 2019, Barbara Nimmerrichter replied to David Bricklin via email,
stating:

We consulted with the creator of the briefs we provided to you and below is
his response:

"I have not found any other documents than these NNT reports, as the event
was so long ago. There are no other reports showing the "Results" i.e. the
sound levels that I am aware of. I was responsible for compiling and
writing these reports.

1
2 The results were developed on a very tight timetable to answer the question
3 as to whether the Chevrons noise reduction solution worked or not. This kept
4 it from being developed in a more Official format. Once it was discovered
5 that Chevrons did not work as expected, it was thought that further work
6 would be done to fix the Chevron prototypes and retest. That has not
7 happened yet as of this date due to funding limitations."

8 We have made contact with other individuals who may have additional
9 information. I understand your frustration, but hopefully this provides some
10 reassurance that we are doing our best to track down the records.
11 Unfortunately, it was not as simple as going to the creator of the
12 PowerPoint and having him send underlying data.

13 Thank you for your patience and understanding as we continue our search.

14 60. On May 9, 2019, David Bricklin relied to Barbara Nimmerrichter stating:

15 Thank you for that explanation. That's very helpful. Please keep me posted
16 on your efforts.

17 61. On June 2, 2019, Barbara Nimmerrichter replied to David Bricklin stating:

18 We have located some documents that we believe could be responsive to your
19 FOIA request. These documents are currently being reviewed by another
20 office at this time. Unfortunately, I will be out of the office next week
21 but hope to have an answer on these documents once I return. I will keep
22 you posted.

23 Thank you for your patience and understanding.

24 62. As of the date of this complaint, there has been no further response from the Navy
25 to FOIA Appeal No. DON-NAVY-2019-005768 or to the FOIA request underlying that appeal,
26 No. DON-NAVY-2018-008291.

63. As of the date of this complaint, the Navy has not made an initial determination that
complies with 5 U.S.C. § 552(a)(6)(A)(i) regarding FOIA Request No. DON-NAVY-2018-008291
(on remand) that resulted in FOIA Appeal No. DON-NAVY-2019-005768.

1 Navy unlawfully delayed its response to plaintiffs' FOIA Requests beyond the deadlines imposed
2 by the FOIA.

3 69. The Navy violated and is violating the FOIA by failing to respond to plaintiffs'
4 FOIA Requests with a "determination" within the deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i).
5

6 70. Plaintiffs have a statutory right to have the Navy process their FOIA Appeal in a
7 manner that complies with the FOIA. The Navy violated plaintiffs' rights in this regard when the
8 Navy unlawfully delayed its response to their FOIA Appeal beyond the deadlines imposed by the
9 FOIA.

10 71. The Navy's violations of the FOIA with respect to its response to plaintiffs' FOIA
11 Requests and FOIA Appeal entitle plaintiffs to an award of reasonable attorneys' fees and other
12 litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).
13

14 CLAIM 2
15 VIOLATION OF THE FREEDOM OF INFORMATION ACT:
16 UNLAWFUL CONSTRUCTIVE DENIAL/UNLAWFUL WITHHOLDING

17 72. Plaintiffs hereby incorporate by reference the allegations in the preceding
18 paragraphs.

19 73. Plaintiffs have a statutory right to the records, or portions of records, they seek.
20 There is no legal basis for the Navy to withhold the records responsive to plaintiffs' FOIA Requests
21 and FOIA Appeal.

22 74. The Navy has violated and is violating plaintiffs' rights by unlawfully withholding
23 non-exempt documents responsive to their FOIA Requests and FOIA Appeal. The Navy's actions,
24 or lack of action, in response to plaintiffs' FOIA Requests and FOIA Appeal constitute constructive
25 and/or unlawful denials of their FOIA Requests and FOIA Appeal.
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75. The Navy's violations of the FOIA with respect to its response to plaintiffs' FOIA Requests and FOIA Appeal entitle plaintiffs to an award of reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Adjudge and declare that the Navy has violated the FOIA for the reasons set forth above;
- B. Order the Navy to comply immediately with the FOIA by providing plaintiffs with the required determinations, estimated completion dates, and non-exempt public records subject to plaintiffs' FOIA Requests and FOIA Appeal;
- C. Declare that plaintiffs are the prevailing parties and/or substantially prevailing parties in this matter under FOIA, 5 U.S.C. § 552(a)(4)(E).
- D. Declare that plaintiffs are the prevailing parties, that the position of the government in this action was not substantially justified, and that there are no special circumstances that make an award of costs and reasonable attorneys' fees to plaintiffs unjust under the Equal Access to Justice Act, 28 U.S.C. § 2412;
- E. Award plaintiffs their reasonable attorneys' fees and litigation costs under FOIA, 5 U.S.C. § 552(a)(4)(E); and/or award plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation, under the Equal Access to Justice Act, 28 U.S.C. § 2412;
- F. Grant plaintiffs such additional relief as the Court may deem just or proper.

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Dated this 5th day of July, 2019.

Respectfully submitted,

CITIZENS OF THE EBEL'S RESERVE FOR A
HEALTHY, SAFE AND PEACEFUL
ENVIRONMENT; ROBERT WILBUR; and
MARYON ATTWOOD,

By and through their attorneys,

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