

The Honorable Richard A. Jones

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

STATE OF WASHINGTON, et al.,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF THE NAVY, et al.,
Defendants.

NO. 2:19-cv-01059-RAJ
DECLARATION OF ZACHARY K.
GRIEFEN

Pursuant to 28 USC § 1746, and under penalty of perjury, I, Zachary K. Griefen, declare that the following is true and correct.

1. I am one of the attorneys for plaintiffs Citizens of Ebey’s Reserve, et al. I make this declaration based on my personal knowledge.

2. On July 26, 2022, I submitted, on behalf of Citizens of Ebey’s Reserve, a FOIA request (FOIA Tracking No. DON-NAVY-2022-010938) to the Navy requesting, *inter alia*, “[a]ll records since December 10, 2021 addressing the feasibility of the Navy returning to pre-ROD levels of Growler activity at the OLF” and “[a]ll records since December 10, 2021 that address reducing,

1 within the next five years, non-Growler aircraft operations at Ault Field” in the possession of Navy
2 Region Northwest.

3 3. The requests quoted in the preceding paragraph were broad enough to encompass
4 agency records analyzing a return to the pre-ROD regime (single-site Growler training at Whidbey
5 Island, but with the allocation of FCLPs flipped back to 80 percent at Ault Field and 20 percent at
6 OLF Coupeville) and other options, including utilization of non-Whidbey Island sites for Growler
7 training.
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9 4. On September 20, 2022, the Navy responded. Attached hereto as Exhibit 1 is a true
10 and correct copy of the Navy’s September 20, 2022 Interim Response to FOIA Request No. DON-
11 NAVY-2022-010938. As to my requests quoted above, the Navy responded:

A thorough search of files in the possession of Commander, Navy
Region Northwest did not locate any records responsive to [these
requests].

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15 Ex. 1 at 3, ¶¶10, 12.

16 5. In these responses, the Navy admits that during the year since the December 10,
17 2021 R&R, it has not even contemplated the possibility that the ROD may be vacated, despite
18 vacatur being the default remedy for the Navy’s arbitrary and capricious action.
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6. Nor has the Navy even considered, post R&R, the opportunities for freeing up space for FCLP training at Ault Field by reducing non-Growler operations at Ault Field.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated this 9th day of December, 2022 at Lynnwood, Washington.

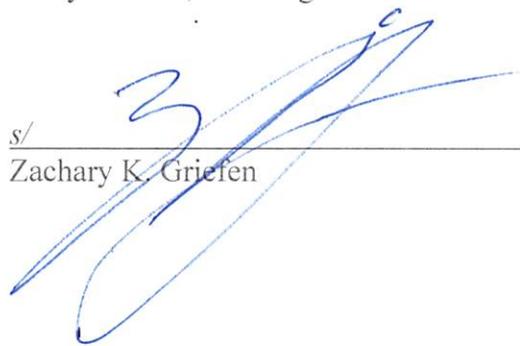
By:  s/ _____
Zachary K. Griefen

EXHIBIT 1



DEPARTMENT OF THE NAVY
NAVY REGION NORTHWEST
1100 HUNLEY ROAD
SILVERDALE, WA 98315-1100

5720
Ser N01J/019
September 20, 2022

Sent via email to: griefen@bnd-law.com

Mr. Zachary Knox Griefen
123 NW 36th Street, Suite 205
Seattle, WA 98107

Dear Mr. Griefen:

SUBJECT: FREEDOM OF INFORMATION (FOIA) REQUEST DON-NAVY-2022-010938

This is an interim response to your client's Freedom of Information Act (FOIA) request dated July 26, 2022. The request was received by this office on July 27, 2022 and has been processed under the FOIA, section 552 of Title 5, U.S Code. For tracking purposes, your client's request was assigned NAVY FOIA ONLINE number DON-NAVY-2022-010938.

On August 9, 2022 we sent you an initial interim response, requesting clarification on your client's fee waiver request and the substance of your client's request. You responded on behalf of your client on August 24, 2022 after normal working hours. Our office received this response on August 25, 2022. In this submission you corrected your client's fee waiver request, confirmed or corrected the Navy's assumptions regarding certain enumerated categories of records in your original request, and clarified the search scope of certain enumerated categories of records in your original request. This submission also stopped the toll on the FOIA processing time period. On August 31, 2022, CDR Jessica Ford contacted you via e-mail to ask for additional clarification on the scope of the search for records responsive to Items 12 and 13. You responded via e-mail on September 8, 2022 and stated as to these items your client is limiting the request to records in Commander, Navy Region Northwest's (CNRNW) possession¹ while also reiterating the Navy's original assumption about the scope of Item 13 was incorrect. CDR Ford responded via e-mail on September 9, 2022, asking whether the limitation to records within CNRNW's possession also applied to Items 10 and 11 and she also reiterated even with these changes to the scope, the Navy still anticipates needing a minimum of sixty business days to respond in full to your client's extensive FOIA request. You responded via e-mail that same day, confirming your client agreed to also limit items 10 and 11 to only records "in NRNW's possession."

After a thorough search of our files and coordination with other Navy commands, Commander, Navy Region Northwest did not locate records responsive to the following items in your client's request:

¹ "Commander, Navy Region Northwest" as used herein refers to the command, not the Commander. There is no distinction herein between "Commander, Navy Region Northwest (CNRNW)" and "Navy Region Northwest (NRNW)".

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6. Records that show how many touch and go operations (not FCLPs) were conducted by the EA-18G Growler carrier squadrons at Ault Field from January 1, 2021 to the present.²

7. Records that show how many touch and go operations (not FCLPs) were conducted by the EA-18G Growler carrier squadrons at the OLF from January 1, 2021 to the present.³

8. Records that show how many touch and go operations (not FCLPs) were conducted by the EA-18G Growler expeditionary squadrons at Ault Field from January 1, 2021 to the present.⁴

9. Records that show how many touch and go operations (not FCLPs) were conducted by the EA-18G Growler expeditionary squadrons at the OLF from January 1, 2021 to the present.⁵

10. In your e-mail response received on September 9, 2022, you clarified as to Item 10 your client is seeking “[a]ll records since December 10, 2021 addressing the feasibility of the Navy returning to pre-ROD levels of Growler activity at the OLF” in the possession of Navy Region Northwest. You previously clarified in your letter dated August 24, 2022 the phrase “Growler activity” in Item 10 is equivalent to “Growler operations” as used in Item 11 of the subject FOIA request, and the word “feasibility” means “possibility.” You also clarified your client “simply seeks all records addressing a sustained reduction of Growler FCLP operations at the OLF from the ROD levels of about 24,000, regardless of how that reduction may be accomplished.” A thorough search of files in the possession of Commander, Navy Region Northwest did not locate any records responsive to Item 10.

12. In your e-mail response received on September 8, 2022, you clarified as to Item 12 your client is seeking “[a]ll records since December 10, 2021 that address reducing, within the next five years, non-Growler aircraft operations at Ault Field” in the possession of Commander, Navy Region Northwest. You previously clarified in your letter dated August 24, 2022 your client is seeking “all records discussing a long-term or permanent reduction in non-Growler aircraft operations at Ault Field.” A thorough search of files in the possession of Commander, Navy Region Northwest did not locate any records responsive to Item 12.

15. In your letter dated August 24, 2022, you clarified as to Item 15 your client is seeking “[a]ll records since October 28, 2020 in the possession of Navy Region Northwest and/or Navy Region Southwest that relate to noise impacts of Navy aircraft on Northern Spotted Owls and/or Marbled Murrelets and that contain the phrase: ‘Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California.’” A thorough search of files in the possession of Commander, Navy Region

² The Navy tracks total touch and go operations at Ault Field and that information is included in the enclosed documents. However, the Navy does not distinguish between EA-18G Growler carrier and expeditionary squadrons when calculating this data, so these records do not exist.

³ OLF Coupeville is not used for touch and go operations, so these records do not exist.

⁴ The Navy tracks total touch and go operations at Ault Field and that information is included in the enclosed documents. However, the Navy does not distinguish between EA-18G Growler carrier and expeditionary squadrons when calculating this data, so these records do not exist.

⁵ OLF Coupeville is not used for touch and go operations, so these records do not exist.

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Northwest and coordination with Commander, Navy Region Southwest did not locate any records responsive to Item 15.

In addition, in your e-mail responses received on September 8-9, 2022, you clarified your client is seeking the following records in the possession of Commander, Navy Region Northwest:

11. All records since December 10, 2021 that address reducing, within the next five years, Growler operations at the OLF.

In your letter dated August 25, 2022 you confirmed the word “reducing” in Item 11 means a reduction in operations that is not temporary or of limited duration, such as a disruption in operations to allow for anticipated maintenance activities. You further clarified the word “reducing” in your response as to Item 12, which is substantially equivalent to Item 11 though distinguished by aircraft (Growler, non-Growler) and airfield (OLF Coupeville, Ault Field), means “a long-term or permanent reduction.”

13. All records since December 10, 2021 that address relocating aircraft from NASWI to another location.

In your letter dated August 24, 2022 you clarified the word “relocating” as used in Item 13 means a “Navy-directed change in home-basing’ aircraft now stationed at NASWI,” and the word “aircraft” “includes any aircraft home-based at NASWI.” You further clarified your client is seeking “all records discussing a long-term or permanent relocation of aircraft from NASWI to another location.”

We have located and reviewed thirty-four (34) pages of documents that are responsive to items 11 and 13, but these materials are being withheld in their entirety because they are exempt from disclosure under FOIA exemption 5 U.S.C. § 552(b)(5) as they are inter-agency or intra-agency memorandums or letters that are deliberative and pre-decisional.

With respect to the remainder of your client’s request, excepting the items discussed herein, a diligent search for responsive documents is ongoing, and certain information has been found. Enclosed are 364 pages of records responsive to your client’s request, which are being released to you in part. Of note, if a responsive record is not titled or the context is unclear, a title has been added in the Bookmarks tab of the PDF file. In addition, Pages 93-106 of the PDF file entitled “2022-010938 - Consolidated Responsive Records – SEP 2022” contain totals of EA-18 Growler operations by month for 2022. Corresponding monthly records for 2021 existed but previously were destroyed in accordance with record retention policies, so these records cannot be produced.

After a review of these responsive documents, it was determined that certain portions of these released documents were exempt from disclosure under the following FOIA exemption:

5 U.S.C. § 552(b)(6): personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. The exemption has been interpreted to include, for example: names and ranks of active duty military personnel,

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social security numbers, home addresses, email addresses, phone numbers, etc., that if disclosed would result in a clearly unwarranted invasion of personal privacy.

We are continuing to search for additional records that are responsive to your client's request. Because this request requires us to search for and collect requested records from other field activities that are separate from the office processing the request, and because the request requires that we search for, collect, and examine a voluminous amount of separate and distinct records, we previously informed you the request cannot be processed within the time limit specified in the FOIA. We also sought to arrange an extension of time to process the request under 32 C.F.R. § 286.8(c) and 5 C.F.R. 552(a)(6)(B)(ii). We expect we will dispatch a final determination to you by November 8, 2022, which is a total processing time of sixty (60) business days.

Your client's fee waiver is granted in part and denied in part. First, your client is not an educational or noncommercial scientific institution whose purpose is scholarly or scientific research or a representative of the news media, so the request for a fee waiver under 5 U.S.C. § 552(a)(4)(A)(ii)(II) is denied. Second, the requested records released herein meet the criteria under 5 U.S.C. § 552(a)(4)(A)(iii), so your client's fee waiver request is granted under the public interest provision *as to the enclosed records*, notwithstanding that certain records are already in the public domain.

With respect to the remainder of your client's request, we reserve the statutory right to assess fees. As we continue our search, given the breadth of potentially responsive documents, it is possible we may determine (1) certain records are already in the public domain; (2) certain records sought are only partially responsive to the request; and/or (3) certain records would require specialized expertise to extract data, merge multiple sources, synthesize, and convey the information to the public in a manner consistent with the request. As a result of these uncertainties, we have not made a fee waiver determination on the remainder of your client's request. We reserve statutory authority to assess fees if we determine the criteria for a fee waiver under the FOIA is not met as to any categories of additional records not yet provided, or to assess reduced fees if appropriate, depending on the total number of responsive records, any overlap with existing publically available information, and any specialized expertise needed to effectively convey information to the public, without which the information is not likely to contribute significantly to public understanding of the operations or activities of the Navy. We will notify you promptly of any determination to assess fees and will provide an estimated total fee.

In view of the above, your client may consider this to be an adverse determination that may be appealed even though this is not a final response to your client's underlying request. Since you have created an account in FOIA ONLINE, you may submit an appeal directly within the web-based system. To do this, you would log in to your account, retrieve your original request, and then click on the "Create Appeal" tab in the left-hand column. The basic information from your request will be duplicated for you, and then you can type in the basis of your appeal. If you prefer to use regular mail, you may submit an appeal to:

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The Department of the Navy
Office of the General Counsel (ATTN: FOIA APPEALS)
1000 Navy Pentagon, Room 5A532
Washington, DC 20350-1000

Your client's appeal, if any, must be postmarked within 90 calendar days from the date of this letter and should include a copy of your client's initial request, a copy of this letter, and a statement indicating why your client believes the appeal should be granted.

For any further assistance and to discuss any aspect of your client's FOIA request, your client has the right to contact the Department of the Navy FOIA Public Liaison, Mr. Christopher Julka, at Christopher.A.Julka@navy.mil or 703-697-0031. Additionally, your client has the right to contact the Office of Government Information Services (OGIS) to inquire about the FOIA mediation services they offer. The contact information for OGIS is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road (OGIS), College Park, Maryland 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5761.

If you have any questions concerning this matter, please contact CDR Jessica Ford, JAGC, USN, at 360-396-1938 or jessica.l.ford29.mil@us.navy.mil.

Sincerely,


D. M. SHULL
Commander, JAGC, U.S. Navy
Region Environmental Counsel

Enclosure: Requested documents (364 total pages contained in three files)