

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THOMAS F. SPELLISSY
Plaintiff,

vs.

CASE NO: _____

UNITED STATES SPECIAL OPERATIONS COMMAND
Defendant.

_____ /

**COMPLAINT TO COMPEL THE UNITED STATES SPECIAL
OPERATIONS COMMAND TO RELEASE ALL DOCUMENTS
RELATED TO THE INVESTIGATION OF PLAINTIFF AND TO
PROTECT THE PLAINTIFF IN ACCORDANCE WITH THE
WHISTLEBLOWER PROTECTION ACT**

INTRODUCTION

1. This is an action under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, challenging the United States Special Operations Command's (USSOCOM), MacDill Air Force Base, Florida failure to respond to a request for public records by the Plaintiff. The records requested by Plaintiff involve USSOCOM's Inspector General Report on the investigation of Colonel (Ret) Thomas F. Spellissy and his company Strategic Defense International, Inc. to include:

- The interviews of Steven Featherman, Brad Mohr, LTC Wil Riggins, Captain Rowland Huss, Dr. Dale Uhler, LTC Donald Heilig and other interviewees not known.
- A copy of the Inspector General Report on the investigation of LTC Donald Heilig, United States Army.

- A copy of the Inspector General Report on the investigation of Captain Rowland Huss, United States Navy.
- Plaintiff's FOIA request seeks a copy of all internal agency documents related to the investigation of Plaintiff.

Plaintiff is conducting an investigation into War Profiteering by general officers assigned and formally assigned to the United States Special Operations Command. A war profiteer is any person or organization that improperly profits from warfare or by selling weapons and other goods to parties at war. General profiteering may also occur in peace time. The public can be deprived of its proper use of tax dollars when government officials knowingly profiteer with private contractors. Plaintiff also needs to be protected by the Whistleblower Protection Act to prevent any further adverse actions to be taken by the Defendant. The Whistleblower Protection Act (WPA) provides statutory protections for federal employees who engage in "whistleblowing," that is, making a disclosure evidencing illegal or improper government activities.

JURISDICTION

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552 (a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question jurisdiction). This court also has jurisdiction for actions over 10 U.S.C. § 1034 and 31 U.S.C. § 3730(h).

3. Venue is properly before this District Court pursuant to 5 U.S.C. § 552 (a)(4)(B), 28 U.S.C. § 1391(e), 10 U.S.C. § 1034 and 31 U.S.C. § 3730(h).

PARTIES

4. Plaintiff was nominated by Congressman C.W Bill Young (R), Florida and entered the United States Military Academy in July 1975, graduating with a Bachelor of Science degree in June 1979 under the President Jimmy Carter Administration. After successful completion of the United States Army Ranger School, Fort Benning, GA Plaintiff was assigned to Fort Sill, Oklahoma. Following completion of the Field Artillery Officer Basic Course at Fort Sill in February 1980, he reported to the 6th Battalion, 33d Field Artillery, III Armored Corps Artillery, Fort Sill. He served as a firing Platoon Leader and Battery Executive officer for Battery A. In December 1981, he was assigned as the battalion adjutant. He then returned to Battery A and commanded the unit from November 1982 to February 1984. Plaintiff was selected to Battery Command when he was a 1st Lieutenant. Battery Commanders are normally assigned to Captains. As a successful commander, Plaintiff was selected by the Field Artillery to attend the Infantry Officer Advanced Course. Plaintiff graduated from the Infantry Officer Advanced Course, Fort Benning, Georgia in December 1984. After graduation, he reported to the 1st Battalion, 94th Field Artillery (Composite 8-inch/MLRS), 1st Armored Division, Germany in March 1985. He was then hand-selected by the Division Artillery Commander to take a rare second battery command. He took command of Battery C (Multiple Launch Rocket System), at Erlangen, Germany – the Division's only Rocket Battery. Under his command, Battery C became the first separate MLRS battery under division artillery control.

His battery was re-designated as Battery A, 94th Field Artillery (MLRS). Under his leadership this battery won and/or achieved almost every unit award that a company sized unit could attain in 1st Armored Division. One of these achievements includes having the highest operational readiness rate for Multiple Launch Rocket Launchers of any operational unit in the Army under President Ronald Reagan's administration. Plaintiff received a master's degree in Operations Research from the Colorado School of Mines, Golden, Colorado in June 1990. He then graduated from the Command and General Staff College, Fort Leavenworth, Kansas in June 1991. After Command and General Staff College Plaintiff was hand-picked as a junior Major to serve in as the lead Ground Military Analyst, Combat Analysis Group at the United States Central Command, MacDill Air Force Base, Florida from June 1991 to August 1993 under then President George H. Bush. His analysis was used for the Army's Bottom-Up Review and he modeled and designed the Kuwaiti and Saudi Army Force Structure. Plaintiff's tour ended early at CENTCOM and was given 30 days to report from the CENTCOM area of operations to the 1st Battalion, 8th Field Artillery (155mm-T), 25th Infantry Division (Light) at Schofield Barracks, Hawaii in September 1993. The unit had been placed in a non-deployable status due to readiness. In less than 120 days the unit was rated as deployable due to Plaintiff's reorganization of the Battalion Operations Center and his revamped battalion training plan. He was assigned then assigned as the battalion executive officer. At the end of Plaintiff's tour his unit went from the worst unit in

the Division to one of the Division's top four units. In May 1995, Plaintiff's unit returned from deployment and he was notified to move in less than 45 days. Plaintiff was again hand picked to lead a joint service, selectively manned staff at the United States Strategic Command at Offutt Air Force Base, Nebraska under President Bill Clinton's Administration. Plaintiff's Studies and Analysis Branch directly supported our Nation's Arms Control Team, he produced our Nation's Nuclear Stockpile Memorandum and had it signed by President Clinton in 1996, and he also provided all the analysis (120 options) to the Secretary of Defense, Secretary Perry for the START III Treaty. In 1997 time Plaintiff was selected for Battalion Command and took charge of his battalion, 2nd Battalion, 4th Field Artillery (MLRS), at Fort Sill, Oklahoma, from June 1997 to June 1999. His unit dominated all areas of measured excellence and competitions in a five battalion brigade and was rated number 1 of 12 for Combat Readiness. After Battalion Command, he was by name requested and reassigned to the United States Special Operations Command, MacDill Air Force Base, Florida, to serve as the Chief, Developmental Test and Evaluation/Foreign Comparative Test, Acquisition and Logistics Center. Plaintiff quickly took charge of the Foreign Comparative Test Program and within a year he was formally commended twice by the Director, Strategic and Tactical Systems, Office of the Secretary of Defense, he was also commended by two Senior Leaders of the Senate Armed Services Committee for his outstanding work. USSOCOM's Foreign Comparative Test Program quadrupled in funding, \$2,000,000.00 to \$8,000,000.00 (\$2M to \$8M).

His program was recognized as the best Foreign Comparative Test Program in the Department of Defense. Plaintiff was also awarded a Defense Acquisition Executive Certificate for Acquisition Excellence. During this time Plaintiff graduated from Senior Leaders in Government Course, Kennedy School of Government, Harvard University. As a result of his performance he became the Program Executive Officer, Special Programs (PEO SP) for USSOCOM under the President George W. Bush administration. As the PEO SP he commanded the most powerful and demanding acquisition unit in the Department of Defense (DoD). He was directly responsible for over \$3,500,000,000.00 (\$3.5 billion) of our Nation's classified research, development, test and evaluation, and procurement of equipment to support our covert soldiers, airmen, and SEAL units at war. This responsibility included leading and managing all of the unclassified ground warfare programs, all USSOCOM collateral classified programs for the Joint Special Operations Command, and all of the USSOCOM acquisition classified Special Access Programs. Plaintiff was also trusted with practically all of the nations classified acquisition programs, which included those of the Central Intelligence Agency, the National Security Agency, the National Laboratories and the Department of Homeland Defense. He also had access to, and negotiated with, his foreign counter-parts in order to use selected National Level Classified Programs from others countries, such as the United Kingdom and the State of Israel, to benefit our Special Operations Forces. Plaintiff led the most demanding Program Executive Office in this command. His contributions to

our Soldiers, Airmen and SEALs during Operation's Enduring and Iraqi Freedom are significant. His office has arguably fielded more new and improved types of equipment than any other Program Executive Office in the Department of Defense. Our National Forces (classified) continues to be the most premier force in the world because of the acquisition work performed by Plaintiff. There are several documented accounts where equipment fielded under his direct authority has saved the lives of members of our force during this Global War on Terrorism. He has been inducted as an Honorary Member of the 75th Ranger Regiment – a recognition achieved by only a few people. Under his leadership, his office has also won the David Packard Award for Acquisition Excellence – this is the highest award for Acquisition in the DoD. As a result of the USSOCOM's refusal to provide public records pertaining to the investigations related to Plaintiff, he is deprived of important information essential to notifying the public through the website www.fight4spellissy.com of war profiteering and abuses of power by general officers. The Public is also deprived of the fraudulent use of tax payers dollars in a scheme to defraud the government by war profiteering.

5. Defendant USSOCOM is an agency of the United States of America within the DoD.

STATUTORY BACKGROUND

6. The Freedom of Information Act requires federal agencies to provide requested documents to the public unless one of the statute's exemptions

applies. 5 U.S.C. § 552. Plaintiff's request does not violate DoD's exemptions. See 32 U.S.C. § 286.12 Exemptions.

7. Upon receiving a FOIA request, an agency has twenty working days to determine and announce what documents the agency will release, what documents the agency plans to withhold, the reasons justifying any such withholding, and the appeal rights available to the requester. 5 U.S.C. § 552(a)(6) (A).

8. Although an agency may grant itself an extension of ten additional days in "unusual circumstances," FOIA does not permit an agency to delay a response indefinitely. 5 U.S.C. § 552(a)(6)(B). According to 32 U.S.C. § 284.4 (a) DoD personnel are expected to comply with the FOIA. This strict adherence is necessary to provide uniformity in the implementation of the DoD FOIA Program and to create conditions that will promote public trust. (b) Openness with the public. The Department of Defense shall conduct its activities in an open manner consistent with the need for security and adherence to other requirements of law and regulation. Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public in accordance with rules promulgated by competent authority, whether or not the Act is invoked. (c) Avoidance of procedural obstacles. DoD Components shall ensure that procedural matters do not unnecessarily impede a requester from obtaining DoD records promptly. Components shall provide assistance to requesters to help them understand and comply with procedures established by this part and any

supplemental regulations published by the DoD Components [USSOCOM]. (d) Prompt action on requests. (1) Generally, when a member of the public complies with the procedures established in this part and DoD Component [USSOCOM] regulations or instructions for obtaining DoD records, and after the request is received by the official designated to respond, DoD Components [USSOCOM] shall endeavor to provide a final response determination within the statutory 20 working days. If a significant number of requests or the complexity of the requests prevent a final response determination within the statutory time period, DoD Components [USSOCOM] shall advise the requester of this fact, and explain how the request will be responded to (see Sec. 286.4(d)(2)). A final response determination is notification to the requester that the records are released, or will be released on a certain date, or the records are denied under the appropriate FOIA exemption, or the records cannot be provided for one or more of the other reasons in Sec. 286.23(b). Interim responses acknowledging receipt of the request, negotiations with the requester concerning the scope of the request, the response timeframe, and fee agreements are encouraged; however, such actions do not constitute a final response determination pursuant to the FOIA. If a request fails to meet minimum requirements as set forth in Sec. 286.3, definition ``FOIA request'', Components [USSOCOM] shall inform the requester how to perfect or correct the request. The statutory 20 working day time limit applies upon receipt of a perfected or correct FOIA request which complies with the requirements outlined in Sec. 286.3, definition ``FOIA request''.

9. FOIA provides for fee waivers or reductions in fees if disclosure of the requested information is in the public interest and if disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

10. FOIA provides that a requester “shall be deemed to have exhausted his administrative remedies... if the agency fails to comply with the applicable time limit provisions.” 5 U.S.C. § 552(a)(6)(A). According to 32 U.S.C. § 286.25 9 (a) (2) A requester may seek an order from a U.S. District Court to compel release of a record after administrative remedies have been exhausted; i.e., when refused a record by the head of a Component [USSOCOM].” (b) Jurisdiction. The requester may bring suit in the U.S. District Court in the district in which the requester resides or is the requester’s place of business, in the district in which the record is located, or in the District of Columbia. (c) Burden of proof. The burden of proof is on the DoD Component to justify its refusal to provide a record. The court shall evaluate the case de novo (anew) and may elect to examine any requester record in camera (in private) to determine whether the denial was justified.

11. FOIA provides this Court with jurisdiction to enjoin USSOCOM “from withholding agency records and to order the production of any such records improperly withheld from” requesters. 5 U.S.C. § 552(a)(4)(B).

12. 10 U.S.C. § 1034 Protected communications; prohibition of retaliatory personnel actions states “(a) Restricting Communications With Members of Congress and Inspector General Prohibited. (1) No person may restrict a

member of the armed forces in communicating with a Member of Congress or an Inspector General. (2) Paragraph (1) does not apply to a communication that is unlawful. (b) Prohibition of Retaliatory Personnel Actions. (1) No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing (A) a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted.”

13. 31 U.S.C. Sec. 3730(h) states, “Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.”

14. 10 U.S.C. § 1370 states, “Commissioned officers: general rule; exceptions (a) Rule for Retirement in Highest Grade Held Satisfactorily. (1) Unless entitled to a higher retired grade under some other provision of law, a commissioned officer (other than a commissioned warrant officer) of the Army, Navy, Air Force, or Marine Corps who retires under any provision of law other than chapter 61 or chapter 1223 of this title shall, except as provided in paragraph (2), be retired in the highest grade in which he served on active duty

satisfactorily, as determined by the Secretary of the military department concerned, for not less than six months.“

FACTUAL BACKGROUND

15. Plaintiff became the PEO SP, USSOCOM on 30 June, 2001 under General Charles Holland, Commander. As the PEO SP Plaintiff briefed Congress annually on the status of his appropriated programs and justified the requirement for continued funding and starting new programs. These briefings are written and recorded.

16. On or about February 2002 Plaintiff was asked by senior leadership at USSOCOM to hide \$20M in classified aviation accounts from the Office of the Secretary of Defense. Plaintiff “flatly refused.” See Exhibit A. The hiding of \$20M is also known to the public as “MacDill Gate.” The senior leadership at USSOCOM coordinated with Program Managers of the programs who were hiding the money to give false briefings to Congress. See Exhibit O. This \$20 million was hid in unclassified programs in the Office’s of Program Executive Office, Maritime and Rotary Wing and the Program Executive Office, Fixed Wing. Three companies who benefited from the hidden funds were Sikorsky, Lockheed Martin and Boeing. Our investigation now reveals that money originates from these same three defense companies who donate funding to Congressman C.W. Bill Young’s campaign finances.

17. On or about May 2002 Congressman Bill Young’s professional staffer, Doug Gregory inquired concerning the production of a foreign shoulder fired

weapon and asked if the production could be brought to Alliant Techsystems Inc. (ATK) in the United States. Spellissy did, however, look into doing this and it was cost prohibited because it increased the unit price by over 300%. ATK does not have an ammunition production facility in Florida's 10th Congressional District.

18. In July 2002 General Bryan "Doug" Brown is assigned to USSOCOM as the Deputy Commander.

19. On October 24, 2002 Plaintiff was responsible for assisting Senator Patrick Leahy (D), Vermont, in establishing the National Center for Counter-Terrorism and Cyber-Crime at Norwich University, Vermont. \$5,000,000.00 (\$5M) was earmarked to a PEO SP procurement account. Subsequent funding followed in 2003, 2004 and 2005. This center benefits our soldiers, airmen and SEALs in the war on terrorism. See Exhibit N.

20. In July 2003, General Holland launched an official investigation of "MacDill Gate." See Exhibit B.

21. In September, 2003, General Bryan "Doug" Brown was appointed by President George W. Bush (supported by Secretary Donald Rumsfeld) and was assigned as the Commander of the United States Special Operations Command.

22. In March 2004 General Brown questioned validity of the Special Operations Combat Assault Rifle (SCAR) program to Plaintiff and the Component Commanders. General Brown also started to question the requirement for hand weapons (pistols). Spellissy and Brown disagreed on the requirements for the programs. Brown wanted to kill the programs and Spellissy at the request of the

soldiers and SEALs on the ground at war wanted to keep the programs. Brown and Spellissy also disagreed with the amount of funding that classified Tier I and Tier II units were receiving. Brown wanted to reallocate funding from these units.

23. In May 2004, Plaintiff Spellissy was against awarding a classified sole source contract to eTreppid Technologies LLC. At USSCOM the contract was known as the "Etreppid Contract." According to Plaintiff there was at least \$12 million wasted on the contact because no product worked to satisfy user requirements. This contract was directed by General Brown. Colonel Spellissy told his Deputy, Stan Highsmith that he didn't think it was legal for General Brown to direct a sole source contract without a market survey and getting a recommendation from the classified users at the Joint Special Operations Command.

24. USSOCOM accepted Congressional \$3.4 million of Procurement plus-up funding specifically for the Magnum Universal Night Sight from Congressman John Murtha, 12th Congressional District, Pennsylvania, and when Plaintiff retired, USSOCOM spent the funding in Florida's 24th Congressional District. This is not consistent with prior protocols when requesting and accepting additional Congressional funding. This is evidence of misappropriation of Congressional funds.

25. In October, 2004 Plaintiff was a government contractor for USSOCOM. USSOCOM directed him to attend critical meetings in Europe, in late November of 2004, as a paid contractor acting on behalf of the USSOCOM

Ammunition Program Office. Plaintiff attended only the authorized meetings for which the Government hired him and he billed the Government for the work that he did on the government's behalf. Plaintiff saved the government \$2 million on this trip to Europe on a classified program and was paid approximately \$9,000.00 for the whole trip. See Exhibit C. On or about the time of conclusion for this trip; Major General (Retired) Lou Hennies, a friend to General Bryan "Doug" Brown, who is also a defense consultant and a competitor to Plaintiff and his company, filed a complaint against the Plaintiff to General Brown. See Exhibit D. The complaint was unsubstantiated. Hennies is also a Board Trustee Member for the National Defense Industrial Association. The members of this association are active in providing funding to political leaders.

26. On April 13, 2005 Plaintiff was interviewed by Federal Agents for approximately 6 hours. Plaintiff cooperated with Agents without his attorney present. Plaintiff was never asked about the \$20M unaccounted funding, the \$100M wasted in classified aviation programs, lack of money for sensors, armored vehicles, blue force tracking and individual soldier equipment, the Etreppid Contract, or any other inappropriate actions by General Brown and his friends. See Exhibit E.

27. In April/May 2005, there is a Joint Special Operations Command (JSOC) Inspector General, DCIS and FBI investigation on a classified program, unclassified code name "Rover", at Fort Bragg, NC. General Brown takes control of the investigation away from the Commander at JSOC. The vendor involved in

supplying the product for “Rover” is Sierra Nevada Corporation. Plaintiff was never interviewed on this investigation and Plaintiff was the approving authority for research, development, testing and acquisitions for Rover. Sierra Nevada Corporation has former retired general officers assisting them.

28. Plaintiff sent a whistleblower letter to the Department of Defense Inspector General on October 19, 2005 to advise about fraud, waste and abuse at USSOCOM. See Exhibit F. Plaintiff was listed as a witness in this whistleblower letter, however, he was never interviewed.

29. Several weeks later, on November 8, 2005 Plaintiff was indicted by the United States Attorney for the Middle District of Florida. See Exhibit G.

30. Plaintiff learned before his indictment that a secret meeting on Plaintiff’s criminal investigation took place on or about October 13, 2005 between Congressman C.W. Bill Young (R), Florida and the U.S. Attorney’s Office for the Middle District of Florida and/or USSOCOM concerning Plaintiff’s criminal investigation. See Exhibit H.

31. On October 14, 2005 Congressman Young intentionally and deliberately leaked the information from his secret meeting to St Petersburg Times Investigative Reporter, Paul De La Garza. See Exhibit H.

32. Paul De La Garza personally told Defendant Spellissy that he [De La Garza] was surprised that Congressman Young had seen or had a copy of Burke’s plea deal before it was made public.

33. On November 10, 2005, Colonel Samuel Talyor, USSOCOM Public Affairs Officer acknowledged that Plaintiff was one of two people who could have written the whistleblower letter. See Exhibit I.

34. In September 2006, Paul De La Garza was working on a story regarding Congressman Young's and Senator Ted Steven's (R), Alaska involvement in the hiding of \$20 million at the United States Special Operations Command. De La Garza was specifically investigating why Doug Gregory, Congressman Young's Professional Staffer, Lesley Kalen, Senator Steven's Professional Staffer and Elaine Kingston, General Brown's Comptroller refused to cooperate with the Defense Criminal Investigative Service in the investigation. See Exhibit B. In October, 2006 Plaintiff was assisting De La Garza with his story and on the weekend before he was going to publish the story, he died. The story was never printed. Plaintiff was listed as a witness in "MacDill Gate," however; he was never interviewed by investigators.

35. Congress authorizes and appropriates funding to USSOCOM. USSOCOM hid \$20 million in their Fiscal Year 2003 Budget in unclassified Aviation Program accounts. Congress wanted to know where the \$20 million went. See Exhibit J. However, Congress refused to cooperate in the investigation. See Exhibit B.

36. On November 3, 2006 Plaintiff was informed by the Department of the Army that Plaintiff was going to be retired at the grade of O-5 (Lieutenant Colonel) instead of grade O-6 (Colonel). See Exhibit K. The reason given to

Plaintiff for the reduction is that he was found of conspiracy to commit mail fraud and bribery on July 6, 2006 in the Middle District of Florida while he was on active duty. See exhibit J. However, Plaintiff was not charged with conspiracy to commit mail fraud and the trial judge, Honorable James Whittemore stated, "It is undisputed that Defendant Spellissy had retired from active duty when he committed the offenses of conviction." See Exhibit L.

37. On February 21, 2007 undersigned counsel met with Senator Carl Levin, Chairman of the Permanent, Subcommittee on Investigations and discussed the circumstances of the criminal case against Plaintiff. Subsequent discussion with the Senator's staff revealed that it is highly unethical for members of Congress to get involved with criminal investigations, unless they are a party.

38. On November 10, 2008 Plaintiff through undersigned counsel filed a FOIA request to USSOCOM. At 4:56 pm, November 10, 2008. USSOCOM accepted the request and sent counsel a receipt of filing. See Exhibit M.

39. On November 12, 2008 USSOCOM FOIA officer, Kathryn Meeks requested a signed letter by Plaintiff. See Exhibit M.

40. On November 13, 2008 counsel faxed the letter and informed Ms. Meeks that Plaintiff had sent Admiral Eric Olson, Commander, USSOCOM, a letter with a similar request. See Exhibit M.

41. On November 14, 2008 Ms. Meeks acknowledged receiving the faxed letter and informed counsel that it would take approximately (20) twenty more days to satisfy the request. See Exhibit M.

42. On December 4, 2008 undersigned counsel sent an email to USSOCOM to check on status of request. USSOCOM responded that they were checking with legal and their Inspector General and would have an answer soon. See exhibit 6. See Exhibit M.

43. As of today, we have not heard from USSOCOM as to the disposition of the FOIA request. Plaintiff informed the Commander, USSOCOM concerning this request and has not heard from his office. All administrative remedies have been met since the Commander is responsible for all actions under his command.

CLAIM FOR RELIEF

Count 1

(Violation of the Freedom of Information Act)

44. The allegations contained in paragraphs 1-35 are incorporated herein by reference.

45. FOIA requires that a federal agency make available records “promptly” upon request, 5 U.S.C. § 552(a)(3)(A), that a federal agency determine “within 20 days” whether to comply with a request, that the agency make a determination upon an appeal within 20 working days, 5 U.S.C. § 552(a)(6)(A)(ii), and grant a waiver or reduction of fees if disclosure of the requested information is in the public interest and if disclosure is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

46. Defendants have failed to make available the records requested on November 10, 2008 have failed to make a determination as to whether USSOCOM would provide or withhold requested records, and have failed to make a determination concerning Spellissy's request for a fee waiver.

47. Defendants' failure to comply with its above-described duties violates FOIA, 5 U.S.C. §552(a)(6), and Department of Defense regulations, 32 U.S.C. § 286.

CLAIM FOR PROTECTION UNDER THE WHISTLEBLOWERS ACT

Count 2

48. The allegations contained in paragraphs 1-47 are incorporated herein by reference.

49. Defendant took adverse administrative action against Plaintiff by getting the United States Army to falsely reduce his retirement rank by claiming that Plaintiff had misconduct while on active duty when in fact he did not and because he is a whistleblower.

PRAYER FOR RELIEF

50. Plaintiff respectfully requests that this Court:

(1) Declare that Defendants' failure to provide Plaintiff with all of the information requested in its November 10, 2008 FOIA request violated FOIA as set forth above;

(2) Order Defendants to immediately provide Plaintiff with copies of all of the requested documents without charge;

(3) Grant Plaintiff such other injunctive and declaratory relief as this Court deems just and proper;

(4) Retain jurisdiction over this case to ensure compliance with this Court's decree; and,

(5) Award Plaintiff its reasonable attorney fees, costs and expenses incurred in pursuing this action.

(6) Reinstate Plaintiff to the retirement grade of O-6, Colonel.

December 13, 2008

Respectfully submitted,

/s/ John F. McGuire

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