

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL PUBLIC RADIO, INC.,

1111 North Capitol St. NE
Washington, DC 20002

**PUBLIC BROADCASTING
OF COLORADO, INC. d/b/a
COLORADO PUBLIC RADIO,**

7409 S. Alton Court
Centennial, CO 80110

Plaintiffs,

v.

Case No. 1:22-cv-670

U.S. CENTRAL COMMAND,

7115 South Boundary Blvd.
MacDill AFB, FL 33621

U.S. DEPARTMENT OF THE AIR FORCE,

1740 Air Force Pentagon
Washington, DC 20330

U.S. DEPARTMENT OF THE ARMY,

104 Army Pentagon
Washington, DC 20310

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs National Public Radio, Inc. and Public Broadcasting of Colorado, Inc. d/b/a Colorado Public Radio (together, "Plaintiffs"), by their undersigned counsel, allege as follows:

INTRODUCTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking records from Defendants U.S. Central Command (“CENTCOM”), U.S. Department of the Air Force (the “Air Force”) and U.S. Department of the Army (the “Army”) (collectively, “Defendants”).
2. Through FOIA, Plaintiffs sought records from CENTCOM, the Air Force, and the Army – by way of its components U.S. Army Central (“ARCENT”) and the Army Public Health Center (“APHC”) – concerning the Karshi-Khanabad Air Base (“K2”) in Uzbekistan, where U.S. service members were deployed from 2001 through 2005.
3. According to the U.S. House of Representatives Committee on Oversight and Reform, service members deployed to K2 “were exposed to multiple toxic hazards,” such as “burn pits.” *See Fact Sheet: Declassified Karshi-Khanabad (K2) Documents*, H. Comm. on Oversight & Reform, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/K2%20Document%20Fact%20Sheet.pdf> (the “K2 Fact Sheet”).
4. In his recent State of the Union address, President Joseph R. Biden expressly stated that his Administration is “committed to finding out everything we can” about the extent to which such burn pits have caused “the diseases of so many of our troops.” *See Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery*, The White House (Mar. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/03/01/remarks-of-president-joe-biden-state-of-the-union-address-as-delivered/>.
5. In their FOIA requests, Plaintiffs have likewise sought to find out everything they can about how deployment to K2 and exposure to burn pits and other hazards have impacted the health of U.S. service members. Because Defendants have failed to respond to these requests,

the Court should order Defendants to comply with FOIA and release the requested records immediately.

PARTIES

6. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization organized under the laws of the District of Columbia with its principal place of business in Washington, D.C. It provides non-commercial news, information and entertainment programming to the American public. NPR's fact-based, independent journalism helps the public monitor breaking news, follow the most critical stories of the day and track complex issues over the long term. NPR reaches approximately 53 million people on broadcast radio, podcasts, NPR apps, NPR.org and YouTube video content per month. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 250 NPR members and numerous other NPR-affiliated entities.

7. Plaintiff Colorado Public Radio is the trade name of Public Broadcasting of Colorado, Inc., a not-for-profit tax-exempt organization organized under the laws of Colorado. Colorado Public Radio is engaged in newsgathering and disseminating of information of public interest via broadcast radio (at 90.1 FM in the Denver metropolitan area) and online at www.cpr.org.

8. Defendant CENTCOM, a unified combatant command as defined under 10 U.S.C. § 161, is an agency within the meaning of 5 U.S.C. § 552(f)(1). CENTCOM has possession and control of records requested by Plaintiffs.

9. Defendant the Air Force is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Air Force has possession and control of records requested by Plaintiffs.

10. Defendant the Army is an agency within the meaning of 5 U.S.C. § 552(f)(1). The Army has possession and control of records requested by Plaintiffs.

JURISDICTION AND VENUE

11. This action arises under FOIA. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B) & (a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

12. Venue is proper in this judicial district under 5 U.S.C. § 552(a)(4)(B).

13. Because Defendants have failed to make and communicate to Plaintiffs timely determinations on Plaintiffs' FOIA requests, as discussed in more detail below, Plaintiffs are deemed to have exhausted their administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i).

FACTUAL ALLEGATIONS

The K2 Air Base

14. K2 “is a Soviet-era air base in southeastern Uzbekistan.” *See* K2 Fact Sheet at 1.

15. “Following the September 11, 2001, attacks, the U.S. military established Camp Stronghold Freedom at K2 and forces from the U.S. Army, Air Force, and Marine Corps used the base for support missions into Afghanistan between 2001 and 2005.” *Id.*

16. U.S. service members deployed to K2 “were exposed to multiple toxic hazards,” including “a variety of hazardous petrochemicals and [volatile organic compounds]”; “particulate matter 10 (PM10) and tetrachloroethylene”; “burn pits”; and radiation. *Id.* at 1-2.

17. On December 19, 2019, McClatchy reported that “[a]t least 61 of the men and women who served at K2 had been diagnosed with cancer or died from the disease, according to a 2015 Army study on the base.” *See* Tara Copp, *Cancers strike veterans who deployed to*

Uzbek base where black goo oozed, ponds glowed, McClatchy (Dec. 19, 2019) (the “McClatchy Report”). A true and correct copy of the McClatchy Report is attached hereto as Exhibit 1.

18. According to the McClatchy Report, “Military doctors [have] rais[ed] concerns about the number of personnel who served at K2 being diagnosed with cancer,” and “[i]n 2015, the Army published an in-depth look at illnesses reported at the base, prompted by a number of U.S. Army Special Operations Command forces at K2 who had developed various types of cancer.” *See* Ex. 1 at 8.

19. On January 19, 2021, President Trump issued Executive Order 13,982, titled “Care of Veterans With Service in Uzbekistan,” which directed the Secretary of Defense to “conduct a rigorous study investigating toxic exposure by members of the Armed Forces deployed to [K2], between October 1, 2001, and December 31, 2005.”

Plaintiffs’ FOIA Requests

20. On December 6, 2021, Plaintiffs sent a total of 10 FOIA requests (the “Requests”) to CENTCOM, the Air Force, ARCENT, and APHC, seeking records relating to the impact of deployment to K2 on the health of U.S. service members.

Plaintiffs’ Requests to CENTCOM

21. On December 6, 2021, Plaintiffs submitted three of the Requests to CENTCOM. True and correct copies of these requests are attached hereto as Exhibits 2-4.

22. In the first request, Plaintiffs sought the following *five* categories of records:

- (1) All responses to the health questionnaire given to all service members who were at K2 between June 6, 2002 and July 20, 2002, with personal identifiable information redacted. By way of background, about 700 service members were questioned/screened for an epidemiological analysis, as referenced in a report declassified Feb. 24, 2020, called, “Final Report - Environmental Assessment, Hardened Aircraft Shelters; Stronghold Freedom, Karshi-Khanabad Airfield, Uzbekistan”. According to section 5(b) of this report, the completed questionnaires were forwarded to the CJTF 180 Surgeon, who “subsequently

requested HQ, USACHPPM conduct epidemiological analysis and archiving of all questionnaires to determine possible trends as a reach-back capability.”

- (2) All analyses conducted using information from the abovementioned questionnaire.
- (3) All agreements that service members signed before or after their deployment to K2 related to their future medical care.
- (4) All waiver(s) given to all military, contractor or civilian DoD members who served at K2 regarding burn pits or another possible health hazards.
- (5) All protocols for physical and mental health screenings after service members returned from deployment to K2 between 2001 and 2004.

See Ex. 2 at 1. CENTCOM acknowledged the request and assigned it handling number 22-0046.

23. In the second request, Plaintiffs sought the following *two* categories of records:

- (1) All records — including but not limited to emails, call notes, memorandums, and reports — from January 1, 2001 to December 31, 2005 related to possible health risks to service members stationed at K2. This request includes but is not limited to emails sent between 2001 and 2005 to and from the following personnel and/or their aides and support staff: Maj. Gen. Franklin Hagenbeck; then COL (now Gen) Thomas R Moore; then COL (now Major General) Jesse T. Simmons Jr.; and then Col. Timothy Vining.
- (2) All communications, in any form, from the service branches to service members about possible health risks of being stationed at or from the environment surrounding K2 from January 1, 2001 to December 31, 2005.

See Ex. 3 at 1. CENTCOM acknowledged the request and assigned it handling number 22-0047.

24. In the third request, Plaintiffs sought the following category of records:

All records from January 1, 2020 to the present — including but not limited to emails, call notes, memorandums, and reports that DoD shared within the agency, with other agencies, or with Congress — related to any health or environmental risks or concerns arising from plans to return to K2 after the US withdrawal from Afghanistan in 2021.

See Ex. 4 at 1. CENTCOM acknowledged the request and assigned it handling number 22-0048.

Plaintiffs’ Requests to the Air Force

25. On December 6, 2021, Plaintiffs submitted the same three FOIA requests described in Paragraphs 22 through 24 above to the Air Force.

26. The Air Force has not responded to these requests.

Plaintiffs’ Requests to ARCENT

27. On December 6, 2021, Plaintiffs submitted the same three FOIA requests described in Paragraphs 22 through 24 above to ARCENT.

28. On December 10, 2021, by email, ARCENT acknowledged receipt of the three FOIA requests and assigned handling numbers FA-22-0036, FA-22-0037, and FA-22-0038. A true and correct copy of ARCENT’s email is attached hereto as Exhibit 5.

29. In the same email, ARCENT also stated, “While processing [the] requests it was determined that the information/records [they] are seeking does not fall under the purview of this command/agency.” Ex. 5 at 1. ARCENT represented that it was “currently researching” which “command/agency [might] have purview for the information/records,” and that “[o]nce that is determine[d] we will notify you of the referral. *Id.*

30. ARCENT has not communicated further with Plaintiffs about these requests since that December 10, 2021 email.

Plaintiffs’ Request to AHRC

31. On December 6, 2021, Plaintiffs submitted the first request described in Paragraph 22 above – *i.e.*, the request seeking five categories of records – to AHRC.

32. AHRC has not responded to this request.

CLAIM FOR RELIEF

COUNT I

**Declaratory and Injunctive Relief:
Constructive Denial in Violation of FOIA, 5 U.S.C. § 552**

33. Plaintiffs reallege and incorporate by reference all previous paragraphs as if fully set forth herein.

34. FOIA requires that within 20 working days of receiving a FOIA request, an agency must notify a requester of, *inter alia*, the scope of the documents that the agency will produce and the scope of the documents that the agency plans to withhold under any FOIA exemptions. *See* 5 U.S.C. § 552(a)(6)(A)(i).

35. Defendants received Plaintiffs' Requests on December 6, 2021.

36. Pursuant to FOIA, Defendants were therefore required to make and communicate to Plaintiffs determinations on the Requests by January 5, 2022. *See* 5 U.S.C. § 552(a)(6)(A)(i).

37. As of the date of this filing, however, not one of the Defendants has made and communicated to Plaintiffs a determination on *any* of the Requests. Plaintiffs are therefore deemed to have exhausted their administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C).

38. There is no basis under FOIA to withhold, in whole or in part, the requested records. Defendants have wrongfully withheld these public records in violation of FOIA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare Defendants' constructive denial of Plaintiffs' Requests unlawful;
- B. Enter an injunction, pursuant to 5 U.S.C. § 552(a)(4)(B), directing Defendants to make the requested records promptly available to Plaintiffs;

C. Award Plaintiffs their costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

D. Grant such other and further relief as the Court may deem just and proper.

Dated: March 10, 2022

Respectfully submitted,

BALLARD SPAHR LLP

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