

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Public Employees for Environmental  
Responsibility,

Plaintiff,

v.

Scott J. Bloch  
Special Counsel,  
U.S. Office of Special Counsel,

Defendant.

Civil Action No. 04-2021 (JR)  
ECF

DECLARATION OF ERIN M. MCDONNELL

I, Erin M. McDonnell, in lieu of an affidavit, as permitted by 28 U.S.C. §1746,  
declare as follows from personal knowledge and on information and belief:

1. I am the Associate Special Counsel for Legal Counsel and Policy. As such, I head the Legal Counsel and Policy Division (LC&PD) in the U.S. Office of Special Counsel (OSC or agency), and serve as General Counsel for the agency. I have served in this position since 1992.
2. The LC&PD provides legal and policy advice and support to agency management and staff. Since 1992, division responsibilities have included the provision of legal advice and support on management and personnel issues; provision of litigation services (e.g., defense of the OSC in adverse action and equal employment opportunity (EEO) cases; responses to third-party requests for discovery in connection with administrative and judicial cases; and

representation of OSC in Federal court litigation against the agency); implementation of Federal agency ethics program responsibilities; development and/or reviews of policies and procedures; development or coordination of required reports on various agency functions or operations to the President, Congress, and other Federal agencies; and management of the statutorily-required OSC annual survey program. During the transition between Special Counsels that occurred between June and December 2003, and the first three months of 2004, LC&PD also assumed responsibilities formerly performed by the former Special Counsel's immediate staff – i.e., service as liaison with the Government Accountability Office in connection with a major, extended review of OSC program operations, as well as other reviews, and performance of budget formulation responsibilities for the agency.

3. Since 1995, in addition to the foregoing responsibilities, the LC&PD has been responsible for implementation of the agency's Freedom of Information Act (FOIA) and Privacy Act (PA) program responsibilities. I serve as the appeal official for FOIA and PA appeals.
4. In early July 2002, a paralegal specialist employed in the LC&PD since November 1999 as both OSC's FOIA and PA Officer, resigned. The paralegal specialist's principal responsibility was to process FOIA and PA requests received by the agency, and to assist me with FOIA/PA appeals.
5. After the paralegal specialist's resignation in July 2002, staffing in the LC&PD consisted of one full-time attorney (myself), responsible for management and supervision, as well as performance, of functions described in paragraphs 1-3,

above; one part-time attorney (24 hours per week – became full-time in April 2003) responsible for litigation matters (other than enforcement proceedings filed by OSC), involving defense of OSC in connection with Federal court, Merit Systems Protection Board (MSPB), and Equal Employment Opportunity Commission proceedings, and provision of legal advice and support to agency officials in connection with internal personnel and EEO matters; a part-time attorney (24-32 hours per week – became full-time in October 2004), responsible for handling the array of other legal and policy functions assigned to the division; and one secretary, who performed basic administrative tasks in connection with FOIA/PA requests, and the annual survey program (this employee has been on extended medical-related leave since September 2003, except for a two-month period in 2004 when the employee returned on a part-time basis).

6. Due to one unsuccessful recruitment in the fall of 2002, budgetary constraints (including the imposition of hiring freezes), and limitations on hiring observed since January 2004 pending a comprehensive review and assessment of all agency operations for and by the new Special Counsel (appointed in December of 2003), the paralegal specialist position responsible for FOIA/PA program duties in LC&PD has remained vacant since July 2002.
7. Between July 2002 and May 2003, FOIA and/or PA requests were logged in, but the division had no personnel available to process requests on an ongoing basis and only approximately 18 requests (many of them simple requests) were processed during that period.

8. FOIA and PA processing duties previously carried out by the paralegal specialist included: logging in incoming FOIA/PA requests in the order they were received; documenting subsequent actions related to requests; sending acknowledgment letters that provided requesters with a file number for their request, its date of receipt in the LC&PD, descriptions of FOIA exemptions that might be invoked to withhold commonly requested types of OSC records or information, information about possible fees, and notice that there would be some delay in processing the request;<sup>1</sup> reviewing requests as they reached the head of the queue of pending requests, determining the status of any underlying cases (i.e., OSC complaint, Hatch Act, disclosure, or other matters about which records had been requested), and the types and locations of potentially responsive case or non-case documents; obtaining and reviewing responsive documents; consulting with other Federal agencies when needed; determining the appropriateness of releasing or withholding requested records or information; copying (or overseeing the secretary's copying of) any records to be disclosed, after making any necessary redactions of information; reviewing the fee status of requests and calculating applicable fees; drafting and mailing initial decisions to requesters, with any responsive documents being released; maintaining appropriate records of requests and fees received and processed, and compiling statistical request data required for annual FOIA reports to Congress or the Justice Department.

---

<sup>1</sup> The acknowledgment letter format in use when plaintiff's requests were received indicated that there would be a delay in responding due to the departure of the FOIA/PA Officer, the lack of support staff, and a backlog of pending requests.

9. Assistance and support previously provided by the paralegal specialist to me as the FOIA/PA appeal official included: logging in incoming appeals, and subsequent actions related to appeals; identifying and/or researching issues raised by the appeals; determining the status at that time of any underlying cases, and the type and location of responsive documents; obtaining and reviewing responsive documents; consulting with other Federal agencies as needed; advising on the appropriateness of releasing or withholding requested records or information; drafting proposed appeal decisions for my review and approval; copying (or overseeing the clerk's copying of) any additional records to be disclosed, after making any necessary redactions of information; calculating any appropriate fees, and sending final responses; maintaining appropriate records of appeals received and processed; and compiling statistical appeal data required for annual FOIA reports.
10. In May 2003, based on my recommendation, two OSC investigators (one each from the agency's Dallas, Texas, and Oakland, California, field offices) were detailed to LC&PD for six months to reduce the FOIA/PA backlog. (During the details, they worked out of their respective field offices.) In preparation for the start of the details (because neither investigator had in-depth experience with FOIA and PA law, policy and procedure), and to upgrade and streamline procedures that might facilitate future FOIA/PA processing, I updated templates for acknowledgment letters, developed new templates for initial decision letters, drafted checklists to facilitate reviews of requests, updated the unit's log of

pending requests, and classified requests as “simple” or “complex,” among other measures.

11. After their details began, I provided the investigators with intensive and ongoing on-the-job training over a period of two to three months. The two attorneys on my staff and I worked with them to orient them on the division’s electronic and paper files and procedures; facilitate exchanges of files between headquarters and their offices in Dallas and Oakland; research and/or resolve questions they raised during the processing of requests; and track their ongoing progress. These efforts required a major commitment of LC&PD attorney time during this period, including my own. The investigators’ effectiveness in processing requests, drafting decisions, and then issuing initial decisions grew over time, so that they were handling full FOIA workloads by approximately August 2003, until their details ended in October 2003.
12. As a result of the details between May-October 2003, the number of initial FOIA/PA decisions issued by OSC rose in fiscal year (FY) 2003 over the prior fiscal year – i.e., a reported 126 decisions in FY 2003 (most issued during the six-month period of the details), from 117 decisions in FY 2002 (approximately 110 of which were issued before the FOIA/PA Officer’s resignation). The FY 2003 decision rate represented an 8% increase over the rate in FY 2002. Similarly, the number of requests pending at the close of FY 2003 – 45 – was a marked improvement over the 65 requests reported as pending at the close of the prior fiscal year.

13. During FY 2003, in detailing two employees into LC&PD to reduce the FOIA/PA backlog, OSC spent more than \$176,000 on its FOIA/PA program, over twice the total of \$87,000 spent on the program in FY 2002.
14. Between October 2003 and August 2004, LC&PD continued to be unable to fill the position responsible for processing FOIA/ PA requests and assisting in the processing of appeals. Since the end of the details in October 2003, I have processed some FOIA/PA requests myself, and have assigned the attorneys on my staff to process other requests, as and when our other duties permit.
15. Since May 2004, a consultant has worked with LC&PD on improvements needed in the agency's automated case tracking and other systems, on both a short-term and long-term basis, to more effectively track, process, and report on FOIA/PA request and appeal activities.
16. As of June 22, 2004, when the first of plaintiff's two FOIA requests at issue was received by OSC, the agency had a backlog of 75 pending FOIA/PA requests. The agency was unable to timely process plaintiff's first request, and the second one received the next day, due to this queue.<sup>2</sup>
17. Beginning in August 2004, an attorney in the new Special Projects Unit established by the Special Counsel was tasked with assisting LC&PD in the processing of backlogged FOIA/PA requests. That employee has processed FOIA/PA requests since then, interrupted only by absences on military leave (including for some extended periods in connection with election- and inauguration-related security needs).

---

<sup>2</sup> The agency's annual FOIA report to the Department of Justice for FY 2004 has not been completed. Numbers cited here for FY 2004, therefore, may vary slightly from the final tally included in the report.

18. Following the comprehensive review and assessment of OSC operations undertaken by and for the Special Counsel, on January 6, 2005, he announced an agency reorganization that will include a transfer of responsibility for the processing of initial FOIA/PA requests to a Document Control Branch. The LC&PD will be responsible for identifying and/or conducting needed training for the Document Control Branch employee(s) who will handle initial responses to FOIA/PA requests, and for providing legal advice and support as needed thereafter. This realignment of FOIA/PA functions is intended to provide the staff needed on an ongoing basis to process initial requests once the current backlog is eliminated. The LC&PD will retain responsibility for processing and issuing appeal decisions in such matters, and I will remain the FOIA/PA appeal official.

19. OSC's general policy and procedure is to process FOIA/PA requests in order of receipt, with the exception of those requests for which expedited processing is requested and granted, and requests placed on the "simple" processing track. Expedited requests are those in which someone asks for his/her FOIA/PA request to be processed ahead of others in the queue, most often on the basis that the information sought is relevant to the issues in a case pending at the MSPB. "Simple" requests are ones that generally require less intensive review and analysis (e.g., because they entail requests only for records that OSC does not have or maintain, or for copies of records that the requester exchanged with OSC, or for a discrete item of information such as the name of the agency credit card holder).



20. In the two FOIA requests at issue in this case (assigned request numbers FO-04-2167 and FO-04-2195 by the LC&PD), plaintiff did not seek expedited processing, and they were not placed on the "simple" track. The requests will entail searches to identify and retrieve all responsive documents; many, if not all, documents requested may not be accessible through OSC's automated case tracking system; and the requests involve records and issues of a kind not previously requested or addressed by OSC.
21. In September 2004, plaintiff filed appeals of both FOIA requests based on the agency's inability to issue initial decisions within the 20-day statutory period.
22. FOIA/PA appeals are entered chronologically, in order of receipt, on the logging system for pending requests and appeals, and OSC's general policy (as with initial requests) is to process them on a first-in, first-out basis. When plaintiff submitted its appeals in the two FOIA requests in this case, on September 17<sup>th</sup> and 20<sup>th</sup>, 2004, 26 appeals were active and pending ahead of these two appeals.
23. The current backlog of appeals has been exacerbated, in part, by the time and effort entailed in maintaining and/or upgrading all FOIA/PA systems and operations until additional resources and support became available; training temporary staff as they have been made available, and that are expected to be available in coming months; the extended absence of a paralegal specialist to research and prepare appeal matters for my decision; and the press of other regularly assigned (and temporary) duties for which LC&PD has been and continues to be responsible. Nevertheless, since September 2004, I have issued

decisions in 5 pending appeals, and one additional appeal is in abeyance pending the outcome of litigation.

24. There are currently 14 appeals ahead of those that plaintiff submitted in FO-04-2167 and FO-04-2195.

25. I anticipate that the two appeals at issue in this case will be reached in the appeal queue by mid-June 2005, and that I will issue decisions on the appeals by July 31, 2005.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct in accordance with 28 U.S.C. §1746.

  
Erin M. McDonnell

Date: 1/24/05