
Agency Report 1



DEPARTMENT OF THE ARMY
OFFICE OF THE GENERAL COUNSEL
104 ARMY PENTAGON
WASHINGTON DC 20310-0104

USDSC HQ DC '08NOV26
PM3:31

November 21, 2008

Ms. Catherine A. McMullen
Chief, Disclosure Unit
U.S. Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

Re: Whistleblower Investigation—Fort Bragg Office of the
Inspector General (OSC File Nos. DI-06-1645 and DI-06-1904)

Dear Ms. McMullen:

The Department of the Army appreciates the opportunity to provide its recommendations to the Office of Special Counsel (OSC) regarding the release of its report in the above referenced case.

Background –

On December 21, 2007, the Department of the Army submitted to the OSC its report in the captioned case.

We understand that the report has been processed to the stage at which its release outside OSC is required. The report submitted by the Army to OSC contains the names and other identifying information of witnesses. The Army interposes no objection to OSC's disclosure of the report, in its entirety, to the complainant, the President, and to Congress for review provided that none of these entities release the report to the public. We understand, however, that the OSC places copies of reports in an open reading room for review by the general public. Pursuant to the rationale set forth below, the copy of the report made available to the public should be redacted in compliance with the Privacy Act, as reflected in Enclosure 1.

Analysis Pertaining to the Redaction of Department of the Army Information -

The Office of Special Counsel (OSC) is required to make available to the public reports from heads of agencies made under 5 U.S.C. § 1213(g)(1), but only to the extent that these reports do not contain any information, the disclosure of which is prohibited by law. 5 U.S.C. § 1219(a), (b). The Privacy Act (PA) prohibits an agency from disclosing any record which is contained in a system of records, except pursuant to the prior written consent of the individual to whom the record pertains or in those cases in which an exception applies. 5 USC § 552a(b). As discussed below, it appears as though OSC's investigative case files, to include the instant file, are contained in a system of records regulated by the PA. Therefore, under our reading of the statute, records made available to the public under § 1219 may be released only to the extent that disclosure is consistent with the PA.

OSC's system notice indicates that OSC's investigation case files are contained in a PA system of records. *See* OSC/GOVT-1, OSC Complaint, Litigation and Political Activity Files. This suggests that OSC would not render its investigative case files public absent either the consent of the individual to whom the record pertains, or an exception that allows for disclosure without consent.

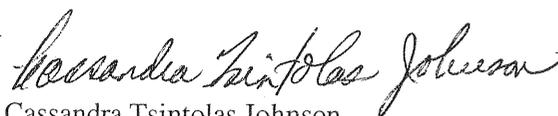
In this case, there is no indication that the consent of the individuals named in the report will be sought. Absent such consent, the only exception we have identified that might permit the disclosure of the OSC record to the general public is that of a routine use. The OSC system notice governing this system of records contains a routine use permitting the disclosure of these files to the public in only the following circumstances: 1) the matter under investigation has become public knowledge; 2) the Special Counsel determines that disclosure is necessary to preserve confidence in the integrity of the OSC investigative process or is necessary to demonstrate accountability of OSC officers, employees, or individuals covered by this system; or 3) the Special Counsel determines that there exists a legitimate public interest, except to the extent that the Special Counsel determines that disclosure would constitute an unwarranted invasion of personal privacy.

At this point, we are not aware that the investigation has become public knowledge nor does it appear to us that disclosure would be necessary to demonstrate the integrity of the OSC. Therefore, under our view of the PA, the OSC may disclose this investigative file if it determines that there is a legitimate public interest in doing so. However, if you choose to do so, we recommend that the record be redacted to ensure that its release would not constitute an unwarranted invasion of personal privacy.

We have redacted these reports in a manner that is designed to protect the privacy of the individuals involved in and associated with this investigation. Because the language of the applicable PA routine use mirrors the language of the Freedom of Information Act's (FOIA) exemption (b)(6), we have relied upon FOIA principles in redacting the report. Additionally, we have relied upon several DoD policy memoranda that have interpreted exemption (b)(6) of the FOIA to permit the redaction of information that personally identifies DoD personnel. (Enclosure 3).

We note that recently, the Department of the Army and the OSC were sued in Federal Court by the individual subject of an OSC investigative case file that was released publicly, in its entirety, by OSC. (Enclosure 4). The plaintiff in this case alleges that this public release violated his rights under the PA. We believe that limiting public release of the redacted report in the instant case complies with the PA, fulfills the mandate of OSC accountability to the public as set forth in your constituting statute, and minimizes litigation risk to both Army and OSC.

We appreciate the opportunity to present the Department of the Army's views on these matters. Should you have any questions, please do not hesitate to contact me at 703-614-3500.



Cassandra Tsintolas Johnson
Associate Deputy General Counsel
(Human Resources)

Enclosures

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ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

SEP 1 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, PROGRAM ANALYSIS AND EVALUATION
DIRECTOR, NET ASSESSMENT
DIRECTOR, FORCE TRANSFORMATION
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Withholding of Information that Personally Identifies DoD Personnel

This guidance was previously issued on February 3, 2005, but its importance mandates that it be published again to reinforce significant security considerations.

Organizations outside the Federal Government often approach DoD personnel to obtain updated contact information for their publications, which are then made available to the general public. The information sought usually includes names, job titles, organizations, phone numbers, and sometimes room numbers.

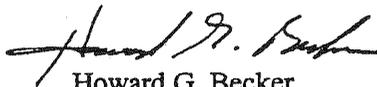
The Director, Administration and Management, issued a policy memorandum on November 9, 2001 (attached) that provided greater protection of DoD personnel in the aftermath of 9/11 by requiring information that personally identifies DoD personnel be more carefully scrutinized and limited. Under this policy, personally identifying information may be inappropriate for inclusion in any medium available to the general public. A December 28, 2001, memorandum from the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (attached) issued a policy limiting publication of personally identifying information on web sites.

The following policy augments the above cited memoranda and is in effect with regard to publication of information that personally identifies DoD personnel in publications accessible by the general public. In general, release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns. No other information, including room numbers, will

OSD 17746-05

normally be released about these officials. Consistent with current policy, as delineated in the referenced memoranda issued in 2001, information on officials below the office director level may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Mr. Will Kammer, Office of Freedom of Information, at 703-696-4495.



Howard G. Becker
Deputy Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE

1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

FEB 03 2005

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
ASSISTANTS TO THE SECRETARY OF DEFENSE
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OSD 02421-05

may continue to be released if their positions or duties require frequent interaction with the public.

Questions regarding this policy should be directed to Will Kammer, Office of Freedom of Information, at 703-697-1171.



Raymond F. DuBois
Director

Attachments:
As Stated

cc: Secretary of Defense
Deputy Secretary of Defense



ADMINISTRATION &
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 203014950



November 9, 2001

Ref: OI-CORR-101

MEMORANDUM FOR DOD FOIA OFFICES

SUBJECT: Withholding of Personally Identifying Information Under the Freedom of Information Act (FOIA)

The President has declared a national emergency by reason of the terrorist attacks on the United States. In the attached memorandum, the Deputy Secretary of Defense emphasizes the responsibilities all DoD personnel have towards operations security and the increased risks to US military and civilian personnel, DoD operational capabilities, facilities and resources. All Department of Defense personnel should have a heightened security awareness concerning their day-to-day duties and recognition that the increased security posture will remain a fact of life for an indefinite period of time.

This change in our security posture has implications for the Defense Department's policies implementing the Freedom of Information Act (FOIA). Presently all DoD components withhold, under 5 USC § 552(b)(3), the personally identifying information (name, rank, duty address, official title, and information regarding the person's pay) of military and civilian personnel who are assigned overseas, on board ship, or to sensitive or routinely deployable units. Names and other information regarding DoD personnel who did not meet these criteria have been routinely released when requested under the FOIA. Now, since DoD personnel are at increased risk regardless of their duties or assignment to such a unit, release of names and other personal information must be more carefully scrutinized and limited.

I have therefore determined this policy requires revision. Effective immediately, personally identifying information (to include lists of e-mail addresses) in the categories listed below must be carefully considered and the interests supporting withholding of the information given more serious weight in the analysis. This information may be found to be exempt under 5 USC § 552(b)(6) because of the heightened interest in the personal privacy of DoD personnel that is concurrent with the increased security awareness demanded in times of national emergency.

- Lists of personally identifying information of DoD personnel: All DoD components shall ordinarily withhold lists of names and other personally identifying information of personnel currently or recently assigned within a particular component, unit, organization or office with the Department of Defense in response to requests under the FOIA. This is to include active duty military personnel, civilian employees, contractors, members of the National Guard and Reserves, military dependents, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy. If a particular request does not raise

security or privacy concerns, names may be released as, for example, a list of attendees at a meeting held more than 25 years ago. Particular care shall be taken prior to any decision to release a list of names in any electronic format.

- Verification of status of named individuals: DoD components may determine that release of personal identifying information about an individual is appropriate only if the release would not raise security or privacy concerns and has been routinely released to the public.
- Names in documents that don't fall into any of the preceding categories: Ordinarily names of DoD personnel, other than lists of names, mentioned in documents that are releasable under the FOIA should not be withheld, but in special circumstances where the release of a particular name would raise substantial security or privacy concerns, such a name may be withheld.

When processing a FOIA request, a DoD component may determine that exemption (b)(6) does not fully protect the component's or an individual's interests. In this case, please contact Mr. Jim Hogan, Directorate of Freedom of Information and Security Review, at (703) 697-4026, or DSN 227-4026.

This policy does not preclude a DoD component's discretionary release of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons.



D. O. Cooke
Director

Attachment:
As stated



COMMAND, CONTROL,
COMMUNICATIONS, AND
INTELLIGENCE

ASSISTANT SECRETARY OF DEFENSE
6000 DEFENSE PENTAGON
WASHINGTON, DC 20301-6000

December 28, 2001



MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Removal of Personally Identifying Information of DoD Personnel from
Unclassified Web Sites

In accordance with DoD 5400.7-R, "DoD Freedom of Information Act Program," unclassified information which may be withheld from the public by one or more Freedom of Information Act (FOIA) exemptions is considered For Official Use Only (FOUO). DoD Web Site Administration policy (www.defenselink.mil/webmasters), issued by Deputy Secretary of Defense memorandum, December 7, 1998, prohibits posting FOUO information to publicly accessible web sites and requires access and transmission controls on sites that do post FOUO materials (see Part V, Table 1).

The attached November 9, 2001, memorandum from the Director, Administration and Management (DA&M), citing increased risks to DoD personnel, states that personally identifying information regarding all DoD personnel may be withheld by the Components under exemption (b)(6) of the FOIA, 5 USC §552. This action makes the information which may be withheld FOUO and inappropriate for posting to most unclassified DoD web sites.

Thus, all personally identifying information regarding DoD personnel now eligible to be withheld under the FOIA must be removed from publicly accessible web pages and web pages with access restricted only by domain or IP address (i.e., .mil restricted). This applies to unclassified DoD web sites regardless of domain (e.g., .com, .edu, .org, .mil, .gov) or sponsoring organization (e.g., Non-Appropriated Fund/Morale, Welfare and



Recreations sites; DoD educational institutions). The information to be removed includes name, rank, e-mail address, and other identifying information regarding DoD personnel, including civilians, active duty military, military family members, contractors, members of the National Guard and Reserves, and Coast Guard personnel when the Coast Guard is operating as a service in the Navy.

Rosters, directories (including telephone directories) and detailed organizational charts showing personnel are considered lists of personally identifying information. Multiple names of individuals from different organizations/locations listed on the same document or web page constitutes a list. Aggregation of names across pages must specifically be considered. In particular, the fact that data can be compiled easily using simple web searches means caution must be applied to decisions to post individual names. If aggregation of lists of names is possible across a single organization's web site/pages, that list should be evaluated on its merits and the individual aggregated elements treated accordingly.

Individual names contained in documents posted on web sites may be removed or left at the discretion of the Component, in accordance with the DA&M guidance. This direction does not preclude the discretionary posting of names and duty information of personnel who, by the nature of their position and duties, frequently interact with the public, such as flag/general officers, public affairs officers, or other personnel designated as official command spokespersons. Posting such information should be coordinated with the cognizant Component FOIA or Public Affairs office.

In keeping with the concerns stated in the referenced memorandum and in the October 18, 2001, DepSecDef memorandum, "Operations Security Throughout the Department of Defense," the posting of biographies and photographs of DoD personnel identified on public and .mil restricted web sites should also be more carefully scrutinized and limited.

Sites needing to post contact information for the public are encouraged to use organizational designation/title and organizational/generic position e-mail addresses (e.g., office@organization.mil; helpdesk@organization.mil; commander@base.mil).

Questions regarding Web Site Administration policy may be directed to Ms. Linda Brown. She can be reached at (703) 695-2289 and e-mail Linda.Brown@osd.mil. Questions regarding Component-specific implementation of the DA&M memorandum should be directed to the Component FOIA office.


John P. Stenbit

Attachment
As stated

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FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

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CLERK U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS, FLORIDA

JAMES V. MUDD,

Plaintiff,

vs.

UNITED STATES ARMY,
UNITED STATES OFFICE OF SPECIAL
COUNSEL, and UNITED STATES
DEPARTMENT OF DEFENSE,

Defendants.

CASE NO. _____

2:05-cv-137-FTM-29DNF

COMPLAINT AND JURY DEMAND

Plaintiff JAMES V. MUDD (hereinafter "MUDD"), by and through his undersigned attorneys, sues Defendants, the UNITED STATES ARMY, the UNITED STATES OFFICE OF SPECIAL COUNSEL, and the UNITED STATES DEPARTMENT OF DEFENSE (hereinafter individually, "ARMY", "SPECIAL COUNSEL", and "DOD", and collectively, "Defendants"), and alleges as follows:

PARTIES

1. MUDD is an individual residing in Collier County, Florida who retired honorably as a Colonel in the United States Army after serving the United States of America with distinction for 26 years.
2. ARMY is a department of the United States Government with its principal location in Alexandria, Virginia.
3. SPECIAL COUNSEL is a department of the United States Government with its principal location in Washington, D.C.

4. DOD is a department of the United States Government with its principal location in Alexandria, Virginia.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the claims in this complaint pursuant to 28 U.S.C. § 1331.

6. This Court has venue over the claims in this complaint pursuant to 28 U.S.C. § 1402.

GENERAL ALLEGATIONS

7. MUDD graduated from the United States Military Academy at West Point and was commissioned as a Second Lieutenant in the ARMY in 1974.

8. MUDD served in the ARMY with distinction rising to the rank of Colonel until his retirement on September 1, 2000, having served his country faithfully for 26 years.

Upper Mississippi River Navigation Study

9. The Upper Mississippi River is a portion of the Mississippi River which extends from Minneapolis, Minnesota, to the confluence of the Ohio River just north at Cairo, Illinois. The Upper Mississippi River is 854 miles long and has 29 locks and dams located on it. The Illinois Waterway which serves as the connecting link between the Great Lakes, the Saint Lawrence Seaway, and the Mississippi River has 8 locks and dams located on it. The system of locks and dams on the Upper Mississippi River and the Illinois Waterway is referred to as the Upper Mississippi River-Illinois Waterway navigation system. The Upper Mississippi River-Illinois Waterway navigation system provides a transportation network linking the upper Midwestern United States to domestic and overseas markets.

10. During the 1980s, the U.S. Army Corps of Engineers (the "Corps") was given Congressional authorization to undertake a formal study of the Upper Mississippi River-Illinois Waterway navigation system.

11. As part of the Corps' Civil Works Project Development Process, separate reconnaissance studies of the Illinois Waterway and the Upper Mississippi River were undertaken from 1989 to 1991. The results of these studies indicated that major capital improvements would be needed on at least five locks in the navigation system.

12. A single Upper Mississippi River - Illinois Waterway Navigation Study (the "Study") was initiated by the Corps beginning in 1993 to describe and evaluate alternative project plans, assess environmental impacts and determine if a solution could be economically beneficial.

13. From the beginning, the Study was not without controversy. Environmental and taxpayer organizations argued that major capital improvements to the system were neither cost effective nor environmentally sound for the Mississippi River ecosystem. The navigation industry, on the other hand, argued that system modernization was vital to protecting the economic well being of the Upper Mississippi River basin.

14. By the year 2000, the estimated cost for the Study was almost \$21 million over the original estimate.

Involvement of Dr. Sweeney in the Study

15. The Economic Work Group (the "EWG") for the Study was responsible for determining the economic benefits of the various project alternatives. To fulfill its mission, the EWG's technical manager, Dr. Donald Sweeney, who was also referred to as the Study's lead economist, devised a new economic modeling technique for the Study.

16. According to the lead economist, his new modeling technique was a distinct improvement over the modeling technique utilized by the Corps for years because it, for the first time, attempted to account for the willingness of the navigation system users to continue using the system as user costs increase.

17. Under the new modeling technique, the elasticity of demand, or the willingness of the users to use the system as costs increase, is a vitally important component which was referred to as the "N" value.

Involvement of MUDD in Study

18. In April 1997, as a result of a Corps wide restructuring, the Mississippi Valley Division of the Corps became the division directly responsible for the Study. Prior to this time, responsibility had been shared between two different divisions within the Corps. The Rock Island District maintained the lead district status for the Study throughout the restructuring.

19. In July 1997, MUDD took over as Commander of the Rock Island District, Mississippi Valley Division of the U.S. Army Corps of Engineers.

20. After assuming command of the Rock Island District and familiarizing himself with the current status of the Study, MUDD became concerned with the apparent repeated failure of the lead economist and his team to meet deadlines.

21. MUDD also became concerned regarding some of the assumptions being made by the lead economist particularly as those assumptions related to the "N" value in the economic model.

22. MUDD asked the lead economist and the EWG for the fundamental basis surrounding the proposed N-value of 1.5 and was informed that the various economists could not determine an absolute N-value. The EWG informed MUDD that some economists had argued

for a value of 2.0 (very elastic) and others had argued for a value of 1.0 (very inelastic), and so ultimately they had compromised by consensus on the value of 1.5.

23. MUDD informed the lead economist and the EWG that as the N-value was a key component to the economic model, the Corps needed an N-value that could be logically defended and empirically supported during the public review process that followed the release of the draft and final reports. MUDD then asked the EWG to come up with a N-value that could be defended and supported.

24. Around this time, MUDD, in consultation with his Division Commander, had the lead economist reassigned off of the Study due to the repeated failures of he and his team to meet deadlines.

25. While the EWG was exploring options for a new N-value for the economic model, MUDD also approached experts in the area regarding the historical elasticity of grain on the Mississippi River and was advised that approximately 70% of the grain transported on the navigation system which originated in Iowa, the only state for which such data existed, was derived from eastern Iowa, 20% was derived from central Iowa, and 10% was derived from western Iowa, and was also informed that the elasticity of demand for use of the navigation system would depend in large measure on where the grain to be shipped was derived. MUDD presented this information, including some proposed elasticities derived from the experts and from the Iowa Grain Flow Survey, to the new lead economist and suggested that perhaps a more defensible position was to take a weighted average of the elasticities of the grain.

26. Shortly thereafter, the new lead economist approached MUDD and suggested an N-value of 1.2, which was the weighted average of the elasticities obtained by MUDD. In June

of 1999, MUDD accepted this recommendation and ordered that an N-value of 1.2 be utilized by the EWG in its efforts to utilize the economic model developed by Dr. Sweeney.

Sweeney Whistleblower Claims

27. After his removal from the Study in February 2000, the former lead economist, and the creator of the economic modeling system that is contingent on an appropriate N-value, filed an affidavit with the U.S. Office of Special Counsel accusing Corps officials of altering Study data in order to justify major capital improvements to the navigation system.

28. Specifically, the former lead economist charged that MUDD and others had intentionally altered the proposed N-value of 1.5 to 1.2 in order to support additional capital improvements on the navigation system.

29. Based solely upon this affidavit, the U.S. Office of Special Counsel found a substantial likelihood that the Corps violated regulations and wasted millions of dollars of taxpayer funds and requested that the Department of Defense investigate the allegations contained in the affidavit.

Investigations

30. In the Spring of 2000, the Department of the Army Inspector General ("DAIG") began an investigation into the alleged misconduct of Corps officials.

31. Also during this time, various environmental groups, who generally opposed any major capital improvements to the navigation system, assisted the lead economist in gaining wide media coverage of his allegations.

32. This large media coverage lead to hearings being called by Congress regarding the Study in the Spring of 2000. The Congressional hearings did not yield any allegations of fraud or criminal intent by any Corps officials, including MUDD. In fact, subsequent

Congressional findings indicate the exact opposite that Corps officials acted appropriately in attempting to fix a fundamentally flawed economic model.

33. In June of 2000, the National Academy of Sciences initiated a review of the Corps' methodology for the conduct of the Study, particularly the methodology being utilized in the economic model proposed by the former lead economist, which was initially scheduled to be released in November of 2000.

34. On September 1, 2000, MUDD retired from the Army and received an honorable discharge.

Release of the Report

35. On September 28, 2000, the Secretary of the Army approved the DAIG Report of Investigation (the "DAIG Report") and forwarded the same to the Secretary of Defense. Clearly printed at the bottom of each page of the DAIG Report was the language "For Official Use Only. Dissemination Is Prohibited Except As Authorized By AR 20-1."

36. The Report indicated among other things that MUDD took or directed actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study failing to meet standards established in law and regulation.

37. On November 13, 2000, the Secretary of Defense forwarded the DAIG Report to the Office of the Special Counsel with an admonition that the Report contained information that may be considered as a basis for adverse actions against individuals and therefore it should only be distributed to those whose duties and official responsibilities required access to it in order to protect the privacy of those individuals and witnesses who requested confidentiality.

38. On November 17, 2000, the Department of the Army responded to an inquiry from the Office of Special Counsel regarding the timeline for the release of the National

Academy of Sciences review and informed the Office of the Special Counsel that the National Academy of Sciences had requested a three month extension within which to release the results of its investigation. Consequently, the National Academy of Sciences was not going to release the results of its investigation until February of 2001 at the earliest.

39. On November 20, 2000, the Office of Special Counsel gave a copy of the DAIG Report to Dr. Sweeney for his review and comments, which he placed in writing on December 1, 2000.

40. MUDD was not given a copy of the DAIG Report prior to its release, nor was he given the opportunity to comment on all of the allegations against him contained in the DAIG Report prior to it being released to the media.

41. On December 6, 2000, the Office of Special Counsel held a press conference whereby it released copies of the complete DAIG Report to all of the members of the press that were present and the Office also posted a complete copy of the DAIG Report on the Internet on its web-site.

42. By correspondence dated December 12, 2000, MUDD received a Memorandum of Admonishment from General John M. Keane, the Vice Chief of Staff for the Army. According to the Memorandum of Admonishment, MUDD was admonished for improperly taking or directing actions which he knew, or reasonably should have known, would contribute to the production of a feasibility study that would fail to meet standards established in law and regulation. General Keane did not officially admonish MUDD because he believed that MUDD's decision to change the N-value in the study was based on methodology that MUDD believed was more appropriate and reasonable.

43. By correspondence dated December 14, 2000, MUDD was informed by the DAIG that the investigation was concluded, that the findings had been approved by the Secretary of the Army and that the Vice Chief of Staff for the Army would be taking action that he deems appropriate.

44. In February of 2001, the National Academy of Sciences released its report finding that the economic model developed by Dr. Sweeney was fundamentally flawed.

MUDD Follow-Up

45. Both before its release by the Office of Special Counsel, and after, MUDD filed four separate requests with ARMY to receive a copy of the completed Report and copies of the transcripts of his own testimony in the investigation. Each of these requests were forwarded also to the Office of Special Counsel. Ultimately, MUDD was informed that the DAIG could not provide him with a copy of the Report, but was directed by a representative of ARMY to download a copy of the Report from the web-site for SPECIAL COUNSEL. Copies of these requests and responses are attached hereto at Tabs D and E of Composite Exhibit "1".

46. By correspondence dated January 28, 2001, MUDD informed ARMY that the Report was posted on the web-site for the Office of Special Counsel. ARMY did nothing to protect MUDD's rights to privacy regarding the improper dissemination of his private information. A copy of this correspondence is attached hereto at Tab G of Composite Exhibit "1".

47. By correspondence dated March 10, 2001, MUDD appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army, in light of the findings of the National Academy of Sciences and provided additional materials that appeared to have been overlooked by the DAIG during its investigation. A copy of this correspondence is

attached hereto at Tab A of Composite Exhibit "1". As the issuing officer of the Memorandum of Admonishment and the individual in the chain of command that oversees the activities of the DAIG, the Vice Chief of Staff of the Army is the appropriate individual to receive MUDD's appeal. MUDD received no response to his appeal.

48. By correspondence dated January 3, 2003, MUDD advised the Vice Chief of Staff of the Army that he had received no response to his earlier appeal and requested a response. MUDD received no response to his appeal. A copy of this correspondence is attached hereto at Tab B of Composite Exhibit "1".

49. By correspondence dated April 16, 2003, MUDD, by and through the undersigned counsel, again appealed his admonishment and the findings of the DAIG Report to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto at Tab H of Composite Exhibit "1".

50. By correspondence dated June 6, 2003, ARMY finally responded to MUDD's appeal with notice that his concerns were being reviewed. A copy of this correspondence is attached hereto at Tab I of Composite Exhibit "1".

51. By correspondence dated July 31, 2003, MUDD provided ARMY with additional support for his appeal in the form of notice that after two years of study and review, the Corps had determined that MUDD's N-value of 1.2 was an appropriate value for the elasticity of grain on the navigation system. A copy of this correspondence is attached hereto at Tab J of Composite Exhibit "1".

52. By correspondence dated October 2, 2003, MUDD provided ARMY with additional support for his appeal which corroborated the information contained in the July 31,

2003 correspondence. A copy of this correspondence is attached hereto at Tab K of Composite Exhibit "1".

53. After receiving no updates from ARMY since June 6, 2003, MUDD again contacted ARMY by correspondence dated December 9, 2003, requesting an update on the status of the appeal. A copy of this correspondence is attached hereto at page 1 of Tab L of Composite Exhibit "1".

54. By correspondence dated December 16, 2003, ARMY finally responded that the DAIG had completed its review of MUDD's appeal on September 26, 2003, but in light of the additional information provided in October, there was a delay in responding as they considered the additional evidence. A copy of this correspondence is attached hereto at page 2 of Tab L of Composite Exhibit "1".

55. Finally, by correspondence dated January 26, 2004, ARMY responded that the information provided by MUDD did not merit a change in the findings of the DAIG Report. A copy of this correspondence is attached hereto at page 3 of Tab L of Composite Exhibit "1".

56. MUDD attempted to informally achieve a resolution of this matter, but his efforts were rebuffed.

57. By correspondence dated August 10, 2004, because he had never received any response from the Vice Chief of Staff of the Army, the only individual who could effect a change in his admonishment and/or the DAIG Report findings, MUDD attempted one last effort to appeal the findings to the Vice Chief of Staff of the Army. A copy of this correspondence is attached hereto as Composite Exhibit "1".

58. By correspondence dated October 1, 2004, ARMY again denied MUDD's attempts to appeal his Memorandum of Admonishment and the DAIG Report findings. A copy of this correspondence is attached hereto as Exhibit "2".

59. As demonstrated by the above correspondence, MUDD has exhausted his administrative remedies.

Additional Studies

60. In August of 2003, the United States Department of Agriculture released a study of the elasticity of grain on the navigation system and found it, contrary to the assumptions of Dr. Sweeney and the EWG prior to the questioning by MUDD, to be highly inelastic.

61. In April of 2004, the Tennessee Valley Authority also released the results of a study that examined the economic model developed by Dr. Sweeney, and particularly his concept of the elasticity of grain on the navigation system, and found that the elasticity assumptions of Dr. Sweeney and the EWG, prior to the questioning by MUDD, were inaccurate.

62. Also in April of 2004, the Corps released its draft Study Report. Interestingly, despite the admonition of the National Academy of Sciences in February of 2001, the Corps continued to utilize the economic model developed by Dr. Sweeney. Moreover, the elasticity values utilized by the Corps in the draft Study Report are exactly the same as the N-value of 1.2 adopted by MUDD, and for which he was admonished.

63. In late 2004, after the appropriate public comment periods, the Corps issued its Final Report which continues to utilize the N-value adopted by MUDD.

Review Process

64. Once a draft feasibility report is issued by the Corps district responsible for the study, there is a two to three month public review and comment period for the draft report.

65. Once the public review and comment period is completed, the Corps then reviews the public comments and make appropriate adjustments, if any are required, to the draft and a final report is issued by the Corps district responsible for the study.

66. Upon issuance of a final report by the district, there is a second public review and comment period for one to two months. During this time, there are additional reviews of the final report by various state and federal agencies.

67. At the conclusion of the two review phases, the Corps Division Commander submits a final report to Corps headquarters, where it undergoes yet another review before the Chief of Engineers for the Corps issues a final report containing recommendations for improvement to the navigation system.

68. This final report is then reviewed by the Department of the Army, the Department of Defense and the Office of Management and Budget prior to any recommendations arising out of the report are submitted to the Congress.

69. Consequently, in 2000, when Dr. Sweeney first raised his claims, the Corps had not even begun to prepare its draft report, nor had any of the work been subjected to any public review or comments.

70. MUDD has retained the law firm of Porter, Wright, Morris & Arthur, LLP to represent him with regard to his claims in this action and is responsible to pay it fees for the services it provides in connection with the representation.

COUNT I – VIOLATIONS OF PRIVACY ACT

71. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

72. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

73. On December 6, 2000, SPECIAL COUNSEL held a press conference where it released the complete DAIG Report to members of the media and posted the complete report on its web-site.

74. The DAIG Report contained personal information of MUDD's that is protected by the Privacy Act.

75. SPECIAL COUNSEL did not request prior permission from MUDD to release the protected information contained in the DAIG Report, nor has MUDD ever given SPECIAL COUNSEL permission to release his personal information to any third-party.

76. SPECIAL COUNSEL improperly released this personal information for the express purpose of injuring MUDD's reputation.

77. Prior to its release, SPECIAL COUNSEL was advised by the Secretary of Defense that disclosure of the DAIG Report should be limited to protect MUDD's personal information.

78. At all times relevant herein, the employees of SPECIAL COUNSEL were acting within the scope of their employment.

79. As a direct result of SPECIAL COUNSEL's improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES OFFICE OF SPECIAL COUNSEL pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT II – VIOLATIONS OF PRIVACY ACT

80. This is an action for violations of the Privacy Act, 5 U.S.C. § 552a, for damages.

81. MUDD realleges the allegations set forth in paragraphs 1 through 70 and 73 through 79 as if fully set forth herein.

82. After SPECIAL COUNSEL released MUDD's personal information in violation of the Privacy Act, DOD and ARMY were advised by MUDD that his personal information was being improperly disseminated by SPECIAL COUNSEL.

83. Shortly thereafter, ARMY notified MUDD that it could not release the DAIG Report to him, nor could it release its investigation materials to him pursuant to the Privacy Act, but that he could obtain the complete DAIG Report containing his personal information on the Internet on the SPECIAL COUNSEL's web-site.

84. Upon receiving notice of this improper release of MUDD's personal information, neither DOD nor ARMY took any actions to halt the unauthorized release of the information.

85. DOD and ARMY refused to halt the improper release of MUDD's personal information with the intent of injuring MUDD's reputation.

86. At all times relevant herein, the employees of DOD and ARMY were acting within the scope of their employment and/or acting in the line of duty.

87. As a direct result of DOD's and ARMY's refusal to stop the improper release of MUDD's personal information, MUDD has suffered damages and continues to suffer damages.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendants UNITED STATES ARMY and the UNITED STATES DEPARTMENT OF DEFENSES pursuant to 5 U.S.C. § 552a for damages, attorneys' fees and costs, and for such other and further relief as this Court deems just and proper.

COUNT III - FAILURE TO FOLLOW ARMY REGULATIONS

88. This is an action for damages for failure to follow Army Regulations.

89. MUDD realleges the allegations set forth in paragraphs 1 through 70 as if fully set forth herein.

90. Pursuant to paragraph 8-6 of Army Regulation 20-1, a suspect or subject is entitled to be told of any unfavorable information uncovered during the Inspector General's investigation and is to be given the opportunity to comment on the unfavorable information.

91. MUDD was never told of the unfavorable information contained in the DAIG Report, nor was he given an opportunity to comment on the unfavorable information prior to its being improperly released to the media.

92. Moreover, pursuant to Army Regulation 20-1, the DAIG report was not to be distributed beyond those individuals whose duties and official responsibilities require access to it to protect the privacy of the individuals and witnesses who requested confidentiality.

93. Contrary to Army Regulation 20-1, ARMY allowed the DAIG report to be released to the general public and did not protect the privacy of MUDD.

94. As a direct result of ARMY's failure to allow MUDD to comment on the unfavorable information prior to it being issued in final form, or to provide additional information to the investigators prior to the DAIG Report being issued in final form, MUDD has suffered and continues to suffer damages to his personal and professional reputation.

95. As a direct result of ARMY's failure to protect MUDD's privacy, he has suffered damages and continues to suffer damages to his personal and professional reputation.

WHEREFORE, Plaintiff JAMES V. MUDD demands judgment against Defendant UNITED STATES ARMY for damages, and for such other and further relief as this Court deems just and proper.

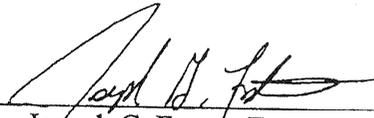
JURY DEMAND

Plaintiff JAMES V. MUDD hereby demands a trial by jury on all issues so triable.

Dated this 1st day of April, 2005.

Porter, Wright, Morris & Arthur LLP

By: _____



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