The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
1155 Defense Pentagon
Washington, DC 20301-1155
Fax: (703) 696-4506

July 02, 2012

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records[1] in the possession of the Department of Defense ("DoD"). The Request is submitted on behalf of the Service Women's Action Network ("SWAN"), the American Civil Liberties Union Women's Rights Project ("ACLU WRP"), and the ACLU of Connecticut ("ACLU-CT"), referred to collectively as the "Requesters."

The records sought herein are the subject of FOIA requests already submitted by Requesters, by letters dated October 15, 2010, and June 24, 2011, and are the subject of pending litigation in *Serv. Women's Action Network v. Dep't of Defense*, No. 3:10-cv-1953-MRK (D. Conn.) (hereinafter *SWAN I*) and *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11-cv-1534-MRK (D. Conn.) (hereinafter *SWAN II*). Defendants in *SWAN I* have taken the position, however, that the FOIA requests at issue in the litigation do not seek the records listed expressly herein, and the court in *SWAN II* ruled that Requesters' second FOIA request on this matter was unduly burdensome on the agencies. A motion for reconsideration is pending in *SWAN II*.

Requesters do not concede that the requests at issue in *SWAN I* fail to cover the records listed herein and adhere to the position that the prior requests do cover these records. In addition, Requesters do not concede that the narrowed request contained in this FOIA Request is unduly burdensome and adhere to the position that DoD may reasonably search for the requested records. Requesters nevertheless submit this new request to moot out the potential objection of counsel for Defendants in *SWAN I* and to formally request the records sought in this FOIA Request should the court in *SWAN II* deny its motion for reconsideration and should the Second Circuit affirm such a ruling.

All requested records that are responsive may be provided with personally identifying details redacted. FOIA exempts information from disclosure if that disclosure would lead to an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Determination of this exemption requires "a balancing of the public's interest in obtaining the information against any possible invasions of privacy which would result from disclosure." *Burkins v. United States*, 865 F. Supp. 1480, 1502 (D. Colo. 1994). The Supreme Court has held that this balancing act does not preclude the disclosure of military records when names and other

[1] The term "records" as used herein, includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

private details are redacted. *See, e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

I. Requested Records

Requesters seek the release of the following:

1) For the following incidents:

   a. Each and any reported a) sexual harassment-related equal opportunity ("EO") complaint, b) sex discrimination-related EO complaint, and c) EO complaints on other grounds filed together with either sexual harassment-related EO complaints or sex discrimination-related EO complaints, in each service branch,[2] whether substantiated or unsubstantiated, since October 1, 2007;
   b. Each sexual-assault-related nonjudicial punishment in each service branch since October 1, 2007; and
   c. Each sexual-assault-related court-martial initiated by each service branch since October 1, 2007;

   Requesters ask that DoD provide records containing the following information or, alternatively, a spreadsheet containing the following information, separated by incident, that conveys the same information contained in the spreadsheet the DoD has released detailing thousands of incidents reported to the Family Advocacy Program ("FAP"). *See* Child and Spouse Abuse Database, *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/10_F_1583_Child_andSpouseAbuseDatabaseUpdated.xls.

   a. *Offender Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
      iv. Relationship of Alleged Offender to Victim
   b. *Victim Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
   c. *Incident Details*
      i. Place of Offense/Location/Installation
      ii. Alcohol Involvement (if noted)
      iii. Drug Involvement (if noted)
      iv. Type of maltreatment initially reported
   d. *Investigation Details*
      i. Recommendation of investigating officer

[2] For purposes of this request, the Marines shall be considered to be separate from the Navy.

ii. Commander concurs/does not concur with investigating officer
iii. Incident substantiated/unsubstantiated

e. *Resolution of Proceedings*
i. Whether sexual harassment found to have occurred
ii. Plea entered
iii. Actions taken to resolve complaint (administrative, nonjudicial, judicial)
iv. Nature of administrative or non-judicial sanction, if applicable
v. Punishment imposed
vi. Whether appeal sought
vii. Disposition of appeal
viii. Maximum allowable punishment

2) A sample of spouse/intimate partner abuse complaints reported to FAP for the period from October 1, 2007, to September 30, 2012, whether substantiated or unsubstantiated, and randomly selected by DoD. Requesters request the following sample sizes:

a. 850 complaints of emotional abuse in the Army,
b. 850 complaints of physical abuse in the Army,
c. 700 complaints of sexual abuse in the Army,
d. 800 complaints of emotional abuse in the Navy,
e. 850 complaints of physical abuse in the Navy,
f. 650 complaints of sexual abuse in the Navy,
g. 650 complaints of emotional abuse in the Marines,
h. 850 complaints of physical abuse in the Marines,
i. 250 complaints of sexual abuse in the Marines,
j. 850 complaints of emotional abuse in the Air Force,
k. 850 complaints of physical abuse in the Air Force, and
l. 500 complaints of sexual abuse in the Air Force.

For each of these complaints, Requesters ask that DoD provide the situation identifier and races of the victims and offenders.

II. Application for Waiver or Limitation of Fees

Requesters agree to pay search, duplication, and review fees up to $100.00. If the fees will amount to more than $100.00, Requesters seek a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 32 C.F.R. §§ 286.28(d), 1900.13(b)(2). As the Court determined in *SWAN II*, Requesters are entitled to a public interest fee waiver. *See SWAN II*, No. 3:11-cv-1534-MRK, at *11 (D. Conn. May 15, 2012).

Requesters seek a waiver of search and review fees on the grounds that each Requester qualifies as a "representative of the news media." 28 C.F.R. §§ 16.11 (c)(1)-(2), (d)(1). *See SWAN II* at *6. Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

SWAN, the ACLU WRP, and the ACLU-CT meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"); *Elec. Privacy Info Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

SWAN's mission is to "educat[e] and inform policy makers, the media and the public" about issues relating to service women in the armed services. Service Women's Action Network: Mission, http://www.servicewomen.org/SwanPage.asp?PLink=1019&Hding=About. In furtherance of this mission, SWAN publishes an array of fact sheets, newsletters, and other documents for public consumption, on topics ranging from military sexual trauma to homelessness among female veterans. *See Publications*, Service Women's Action Network, http://www.servicewomen.org/media/publications; *see also, e.g.*, Brittany Stalsburg, Service Women's Action Network, Military Sexual Trauma: The Facts, http://www.servicewomen.org/userfiles/file/MST%20fact%20sheet.pdf; Homeless Women Veterans: The Facts, http://www.servicewomen.org/userfiles/File/HomelessWomenVeterans.pdf. Recently, in May 2012, SWAN held a prominent summit on Military Sexual Violence in Washington, D.C., which was attended by Congress members, policy experts, military law experts, survivors of military sexual violence and their families, advocates, and the general public. *See* Truth and Justice: The 2012 Summit on Military Sexual Violence, http://truthandjusticesummit.org (last visited July 2, 2012).

Representatives from SWAN frequently appear in major media outlets in order to disseminate information to the public about issues relating to military women and veterans, including *The New York Times*, *The Washington Post*, *USA Today*, *Newsweek*, *Time*, ABC News, CBS News, CNN, MSNBC, and FOX News. *See, e.g.*, Elisabeth Bumiller, *Pentagon Allows Women Closer to Combat, but Not Close Enough for Some*, N. Y. TIMES, Feb. 10, 2012, at A17; Craig Whitlock, *Pentagon to Ease Restrictions on Women in Some Combat Roles*, WASH. POST (Feb. 9, 2012), http://www.washingtonpost.com/world/national-security/pentagon-to-ease-restrictions-on-women-in-some-combat-roles/2012/02/09/gIQAwnL41Q_story.html; Joe Gould, *Cadet Slang on T-Shirt Denounced as Offensive*, USA TODAY (Nov. 11, 2011), http://www.usatoday.com/USCP/PNI/NEWS/2011-11-29-bcGANMILCADETTSHIRT-1128_ST_U.htm; Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK (Apr. 3, 2011), http://www.thedailybeast.com/newsweek/2011/04/03/the-military-s-secret-shame.html#comments; Laura Fitzpatrick, TIME (June 30, 2010), http://www.time.com/time/magazine/article/0,9171,2001011-

3,00.html; Arlette Saenz, ABC NEWS (Feb. 15, 2011), http://abcnews.go.com/Politics/17-veterans-sue-pentagon-mishandled-rape-cases/story?id=12926111#.T-x9MytYtH0; *Pentagon Won't Ask, Won't Tell*, CBS NEWS (Oct. 9, 2009), http://www.cbsnews.com/stories/2009/10/09/national/main5374161.shtml?tag=mncol;lst;1; Dugald McConnell, *Air Force Base Reports More Sexual Misconduct Charges*, CNN (June 27, 2012), http://www.cnn.com/2012/06/27/justice/texas-air-base-charges/index.html; *Up w/ Chris Hayes* (MSNBC television broadcast June 2, 2012); FOXNews.com, *Sexual Abuse in the Military?*, (Feb. 21, 2011), http://video.foxnews.com/v/4548638/sexual-abuse-in-the-military.

The ACLU WRP and ACLU-CT regularly gather information on issues of public significance (including information gathered through FOIA requests), and use their editorial skills to turn that information into distinct publications such as reports, newsletters, right-to-know pamphlets, fact sheets, and other educational materials. *See, e.g., Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns*, ACLU-CT, http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf. The ACLU distributes these materials to the general public through various channels, including its heavily subscribed Web site (www.aclu.org). In addition, ACLU publishes a newsletter sent to more than 400,000 members.

According to DoD's regulations, "Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of 'news') who make their products available for purchase or subscription by the general public." 32 C.F.R. § 286.28(e)(7)(i). ACLU qualifies as a "publisher" of "periodicals" by distributing its newsletters. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 12 (holding that "DoD's own regulation establishes that EPIC is a representative of the news media for another reason—it publishes a periodical, the EPIC alert, which is a biweekly electronic newsletter."). They further circulate an electronic newsletter, which is distributed to subscribers by e-mail. Because of these activities, fees associated with responding to FOIA requests are regularly waived for the ACLU.[3]

Furthermore, Requesters' narrower request does not materially alter any of Judge Kravitz's four-pronged analysis as to whether Requesters are entitled to a fee waiver. *See SWAN II* at *6 (citing U.S. Dep't of Justice, "New Fee Waiver Policy Guidance" (Apr. 2, 1987), *reprinted in* FOIA Update, Vol. VIII, No. 1 (Winter/Spring 1987), http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). The random-sampling components of the Request were derived from Requesters' consultations with statisticians, meant to ensure that statistically significant data is still

[3] For example, the Department of Housing and Urban Development granted a fee waiver to the ACLU for a FOIA request filed in April 2008. The ACLU subsequently posted the response to this FOIA request on its website at http://www.aclu.org/files/pdfs/womensrights/aclufoiarequestandhudresponseregardingimplementationofvawa.pdf. The Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in 2006. The DoD did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. In addition, ACLU of Washington, an ACLU state affiliate like ACLU of CT, was granted a fee reduction as a representative of the news media. *See ACLU of Wash. v. U.S. Dep't of Justice,* C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011), *reconsidered on other grounds,* No. C09-0642RSL, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

received while nonetheless narrowing the request in order to ease the burden of response on DoD. Otherwise the Request only clarifies the specific types of records Requesters seek. Response to the Request would thus still be such that "[1] the subject of the requested records concerns the operations or activities of the government... [2] the disclosure is likely contribute to an understanding of the government's operations or activities... [3] disclosure of the requested information will contribute to the public understanding... and [4] the disclosure is likely to contribute significantly to the public understanding of government operations or activities." *Id.*

The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

Judge Kravitz furthermore determined that disclosure would likely contribute significantly to the public understanding of government operations or activities, the fourth prong of the analysis. *Id.* at 11. He reached this conclusion because "Plaintiffs raise troubling allegations, supported by reports and their own extensive experience on the subject, about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military. This is not a case where the requests are 'nothing more than bare allegations of malfeasance,'... rather, these requests are an attempt to get to the heart of an issue and contribute significantly to the public understanding." *Id.* at *10-11 (quoting *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009)). Unfortunately with this Request it is necessary for Requestors to raise the same concerns as before regarding the prevalence of and response to sexual assault in the U.S. military. Furthermore, this narrowed request is no less an attempt by Requestors to get at the heart of the issue and contribute significantly to the public understanding, but only a further attempt to avoid DoD's effort to prevent them from doing so.

Finally, pursuant to the applicable regulations and statute, Requesters expect the determination of this request for documents within 20 days. *See* 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,

Michael Wishnie, Supervising Attorney
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Jerome N. Frank Legal Services Organization
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(212) 519-7871

cc: Jonathan G. Cooper, Counsel for Defendants (by email)

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3,00.html; Arlette Saenz, ABC NEWS (Feb. 15, 2011), http://abcnews.go.com/Politics/17-veterans-sue-pentagon-mishandled-rape-cases/story?id=12926111#.T-x9MytYtH0; *Pentagon Won't Ask, Won't Tell*, CBS NEWS (Oct. 9, 2009), http://www.cbsnews.com/stories/2009/10/09/national/main5374161.shtml?tag=mncol;lst;1; Dugald McConnell, *Air Force Base Reports More Sexual Misconduct Charges*, CNN (June 27, 2012), http://www.cnn.com/2012/06/27/justice/texas-air-base-charges/index.html; *Up w/ Chris Hayes* (MSNBC television broadcast June 2, 2012); FOXNews.com, *Sexual Abuse in the Military?*, (Feb. 21, 2011), http://video.foxnews.com/v/4548638/sexual-abuse-in-the-military.

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Furthermore, Requesters' narrower request does not materially alter any of Judge Kravitz's four-pronged analysis as to whether Requesters are entitled to a fee waiver. *See SWAN II* at *6 (citing U.S. Dep't of Justice, "New Fee Waiver Policy Guidance" (Apr. 2, 1987), *reprinted in* FOIA Update, Vol. VIII, No. 1 (Winter/Spring 1987), http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). The random-sampling components of the Request were derived from Requesters' consultations with statisticians, meant to ensure that statistically significant data is still

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received while nonetheless narrowing the request in order to ease the burden of response on DoD. Otherwise the Request only clarifies the specific types of records Requesters seek. Response to the Request would thus still be such that "[1] the subject of the requested records concerns the operations or activities of the government... [2] the disclosure is likely contribute to an understanding of the government's operations or activities... [3] disclosure of the requested information will contribute to the public understanding... and [4] the disclosure is likely to contribute significantly to the public understanding of government operations or activities." *Id.*

The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

Judge Kravitz furthermore determined that disclosure would likely contribute significantly to the public understanding of government operations or activities, the fourth prong of the analysis. *Id.* at 11. He reached this conclusion because "Plaintiffs raise troubling allegations, supported by reports and their own extensive experience on the subject, about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military. This is not a case where the requests are 'nothing more than bare allegations of malfeasance,'... rather, these requests are an attempt to get to the heart of an issue and contribute significantly to the public understanding." *Id.* at *10-11 (quoting *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009)). Unfortunately with this Request it is necessary for Requestors to raise the same concerns as before regarding the prevalence of and response to sexual assault in the U.S. military. Furthermore, this narrowed request is no less an attempt by Requestors to get at the heart of the issue and contribute significantly to the public understanding, but only a further attempt to avoid DoD's effort to prevent them from doing so.

Finally, pursuant to the applicable regulations and statute, Requesters expect the determination of this request for documents within 20 days. *See* 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,

Michael Wishnie, Supervising Attorney
Michael Samsel, Law Student Intern
Randal Wilhite, Law Student Intern
Jerome N. Frank Legal Services Organization
Yale Law School
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Sandra S. Park, Staff Attorney
Lenora M. Lapidus, Director
ACLU Women's Rights Project
125 Broad St., 18th Fl.
New York, NY 10004
(212) 519-7871

cc: Jonathan G. Cooper, Counsel for Defendants (by email)

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Department of the Navy
Chief of Naval Operations (DNS-36)
2000 Navy Pentagon
Washington, DC 20350
Fax: (202) 685-6580

July 02, 2012

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records[1] in the possession of the Department of Defense ("DoD"). The Request is submitted on behalf of the Service Women's Action Network ("SWAN"), the American Civil Liberties Union Women's Rights Project ("ACLU WRP"), and the ACLU of Connecticut ("ACLU-CT"), referred to collectively as the "Requesters."

The records sought herein are the subject of FOIA requests already submitted by Requesters, by letters dated October 15, 2010, and June 24, 2011, and are the subject of pending litigation in *Serv. Women's Action Network v. Dep't of Defense*, No. 3:10-cv-1953-MRK (D. Conn.) (hereinafter *SWAN I*) and *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11-cv-1534-MRK (D. Conn.) (hereinafter *SWAN II*). Defendants in *SWAN I* have taken the position, however, that the FOIA requests at issue in the litigation do not seek the records listed expressly herein, and the court in *SWAN II* ruled that Requesters' second FOIA request on this matter was unduly burdensome on the agencies. A motion for reconsideration is pending in *SWAN II*.

Requesters do not concede that the requests at issue in *SWAN I* fail to cover the records listed herein and adhere to the position that the prior requests do cover these records. In addition, Requesters do not concede that the narrowed request contained in this FOIA Request is unduly burdensome and adhere to the position that DoD may reasonably search for the requested records. Requesters nevertheless submit this new request to moot out the potential objection of counsel for Defendants in *SWAN I* and to formally request the records sought in this FOIA Request should the court in *SWAN II* deny its motion for reconsideration and should the Second Circuit affirm such a ruling.

All requested records that are responsive may be provided with personally identifying details redacted. FOIA exempts information from disclosure if that disclosure would lead to an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Determination of this exemption requires "a balancing of the public's interest in obtaining the information against any possible invasions of privacy which would result from disclosure." *Burkins v. United States*, 865 F. Supp. 1480, 1502 (D. Colo. 1994). The Supreme Court has held that this balancing act does not preclude the disclosure of military records when names and other

[1] The term "records" as used herein, includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

private details are redacted. *See, e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

I. Requested Records

Requesters seek the release of the following:

1) For the following incidents:

   a. Each and any reported a) sexual harassment-related equal opportunity ("EO") complaint, b) sex discrimination-related EO complaint, and c) EO complaints on other grounds filed together with either sexual harassment-related EO complaints or sex discrimination-related EO complaints, in each service branch,[2] whether substantiated or unsubstantiated, since October 1, 2007;
   b. Each sexual-assault-related nonjudicial punishment in each service branch since October 1, 2007; and
   c. Each sexual-assault-related court-martial initiated by each service branch since October 1, 2007;

   Requesters ask that DoD provide records containing the following information or, alternatively, a spreadsheet containing the following information, separated by incident, that conveys the same information contained in the spreadsheet the DoD has released detailing thousands of incidents reported to the Family Advocacy Program ("FAP"). *See* Child and Spouse Abuse Database, *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/10_F_1583_Child_andSpouseAbuseDatabaseUpdated.xls.

   a. *Offender Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
      iv. Relationship of Alleged Offender to Victim
   b. *Victim Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
   c. *Incident Details*
      i. Place of Offense/Location/Installation
      ii. Alcohol Involvement (if noted)
      iii. Drug Involvement (if noted)
      iv. Type of maltreatment initially reported
   d. *Investigation Details*
      i. Recommendation of investigating officer

[2] For purposes of this request, the Marines shall be considered to be separate from the Navy.

ii. Commander concurs/does not concur with investigating officer
iii. Incident substantiated/unsubstantiated

e. *Resolution of Proceedings*
   i. Whether sexual harassment found to have occurred
   ii. Plea entered
   iii. Actions taken to resolve complaint (administrative, nonjudicial, judicial)
   iv. Nature of administrative or non-judicial sanction, if applicable
   v. Punishment imposed
   vi. Whether appeal sought
   vii. Disposition of appeal
   viii. Maximum allowable punishment

2) A sample of spouse/intimate partner abuse complaints reported to FAP for the period from October 1, 2007, to September 30, 2012, whether substantiated or unsubstantiated, and randomly selected by DoD. Requesters request the following sample sizes:

   a. 850 complaints of emotional abuse in the Army,
   b. 850 complaints of physical abuse in the Army,
   c. 700 complaints of sexual abuse in the Army,
   d. 800 complaints of emotional abuse in the Navy,
   e. 850 complaints of physical abuse in the Navy,
   f. 650 complaints of sexual abuse in the Navy,
   g. 650 complaints of emotional abuse in the Marines,
   h. 850 complaints of physical abuse in the Marines,
   i. 250 complaints of sexual abuse in the Marines,
   j. 850 complaints of emotional abuse in the Air Force,
   k. 850 complaints of physical abuse in the Air Force, and
   l. 500 complaints of sexual abuse in the Air Force.

   For each of these complaints, Requesters ask that DoD provide the situation identifier and races of the victims and offenders.

II. Application for Waiver or Limitation of Fees

Requesters agree to pay search, duplication, and review fees up to $100.00. If the fees will amount to more than $100.00, Requesters seek a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 32 C.F.R. §§ 286.28(d), 1900.13(b)(2). As the Court determined in *SWAN II*, Requesters are entitled to a public interest fee waiver. *See SWAN II*, No. 3:11-cv-1534-MRK, at *11 (D. Conn. May 15, 2012).

Requesters seek a waiver of search and review fees on the grounds that each Requester qualifies as a "representative of the news media." 28 C.F.R. §§ 16.11 (c)(1)-(2), (d)(1). *See SWAN II* at *6. Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

SWAN, the ACLU WRP, and the ACLU-CT meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"); *Elec. Privacy Info Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

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received while nonetheless narrowing the request in order to ease the burden of response on DoD. Otherwise the Request only clarifies the specific types of records Requesters seek. Response to the Request would thus still be such that "[1] the subject of the requested records concerns the operations or activities of the government... [2] the disclosure is likely contribute to an understanding of the government's operations or activities... [3] disclosure of the requested information will contribute to the public understanding... and [4] the disclosure is likely to contribute significantly to the public understanding of government operations or activities." *Id.*

The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

Judge Kravitz furthermore determined that disclosure would likely contribute significantly to the public understanding of government operations or activities, the fourth prong of the analysis. *Id.* at 11. He reached this conclusion because "Plaintiffs raise troubling allegations, supported by reports and their own extensive experience on the subject, about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military. This is not a case where the requests are 'nothing more than bare allegations of malfeasance,'... rather, these requests are an attempt to get to the heart of an issue and contribute significantly to the public understanding." *Id.* at *10-11 (quoting *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009)). Unfortunately with this Request it is necessary for Requestors to raise the same concerns as before regarding the prevalence of and response to sexual assault in the U.S. military. Furthermore, this narrowed request is no less an attempt by Requestors to get at the heart of the issue and contribute significantly to the public understanding, but only a further attempt to avoid DoD's effort to prevent them from doing so.

Finally, pursuant to the applicable regulations and statute, Requesters expect the determination of this request for documents within 20 days. *See* 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
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Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,

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cc: Jonathan G. Cooper, Counsel for Defendants (by email)

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

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July 02, 2012

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records[1] in the possession of the Department of Defense ("DoD"). The Request is submitted on behalf of the Service Women's Action Network ("SWAN"), the American Civil Liberties Union Women's Rights Project ("ACLU WRP"), and the ACLU of Connecticut ("ACLU-CT"), referred to collectively as the "Requesters."

The records sought herein are the subject of FOIA requests already submitted by Requesters, by letters dated October 15, 2010, and June 24, 2011, and are the subject of pending litigation in *Serv. Women's Action Network v. Dep't of Defense*, No. 3:10-cv-1953-MRK (D. Conn.) (hereinafter *SWAN I*) and *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11-cv-1534-MRK (D. Conn.) (hereinafter *SWAN II*). Defendants in *SWAN I* have taken the position, however, that the FOIA requests at issue in the litigation do not seek the records listed expressly herein, and the court in *SWAN II* ruled that Requesters' second FOIA request on this matter was unduly burdensome on the agencies. A motion for reconsideration is pending in *SWAN II*.

Requesters do not concede that the requests at issue in *SWAN I* fail to cover the records listed herein and adhere to the position that the prior requests do cover these records. In addition, Requesters do not concede that the narrowed request contained in this FOIA Request is unduly burdensome and adhere to the position that DoD may reasonably search for the requested records. Requesters nevertheless submit this new request to moot out the potential objection of counsel for Defendants in *SWAN I* and to formally request the records sought in this FOIA Request should the court in *SWAN II* deny its motion for reconsideration and should the Second Circuit affirm such a ruling.

All requested records that are responsive may be provided with personally identifying details redacted. FOIA exempts information from disclosure if that disclosure would lead to an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Determination of this exemption requires "a balancing of the public's interest in obtaining the information against any possible invasions of privacy which would result from disclosure." *Burkins v. United States*, 865 F. Supp. 1480, 1502 (D. Colo. 1994). The Supreme Court has held that this balancing act does not preclude the disclosure of military records when names and other

[1] The term "records" as used herein, includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

private details are redacted. *See, e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

I. Requested Records

Requesters seek the release of the following:

1) For the following incidents:

   a. Each and any reported a) sexual harassment-related equal opportunity ("EO") complaint, b) sex discrimination-related EO complaint, and c) EO complaints on other grounds filed together with either sexual harassment-related EO complaints or sex discrimination-related EO complaints, in each service branch,[2] whether substantiated or unsubstantiated, since October 1, 2007;
   b. Each sexual-assault-related nonjudicial punishment in each service branch since October 1, 2007; and
   c. Each sexual-assault-related court-martial initiated by each service branch since October 1, 2007;

   Requesters ask that DoD provide records containing the following information or, alternatively, a spreadsheet containing the following information, separated by incident, that conveys the same information contained in the spreadsheet the DoD has released detailing thousands of incidents reported to the Family Advocacy Program ("FAP"). *See* Child and Spouse Abuse Database, *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/10_F_1583_Child_andSpouseAbuseDatabaseUpdated.xls.

   a. *Offender Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
      iv. Relationship of Alleged Offender to Victim
   b. *Victim Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
   c. *Incident Details*
      i. Place of Offense/Location/Installation
      ii. Alcohol Involvement (if noted)
      iii. Drug Involvement (if noted)
      iv. Type of maltreatment initially reported
   d. *Investigation Details*
      i. Recommendation of investigating officer

[2] For purposes of this request, the Marines shall be considered to be separate from the Navy.

ii. Commander concurs/does not concur with investigating officer
iii. Incident substantiated/unsubstantiated

e. *Resolution of Proceedings*
   i. Whether sexual harassment found to have occurred
   ii. Plea entered
   iii. Actions taken to resolve complaint (administrative, nonjudicial, judicial)
   iv. Nature of administrative or non-judicial sanction, if applicable
   v. Punishment imposed
   vi. Whether appeal sought
   vii. Disposition of appeal
   viii. Maximum allowable punishment

2) A sample of spouse/intimate partner abuse complaints reported to FAP for the period from October 1, 2007, to September 30, 2012, whether substantiated or unsubstantiated, and randomly selected by DoD. Requesters request the following sample sizes:

   a. 850 complaints of emotional abuse in the Army,
   b. 850 complaints of physical abuse in the Army,
   c. 700 complaints of sexual abuse in the Army,
   d. 800 complaints of emotional abuse in the Navy,
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   f. 650 complaints of sexual abuse in the Navy,
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   j. 850 complaints of emotional abuse in the Air Force,
   k. 850 complaints of physical abuse in the Air Force, and
   l. 500 complaints of sexual abuse in the Air Force.

   For each of these complaints, Requesters ask that DoD provide the situation identifier and races of the victims and offenders.

II. Application for Waiver or Limitation of Fees

Requesters agree to pay search, duplication, and review fees up to $100.00. If the fees will amount to more than $100.00, Requesters seek a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 32 C.F.R. §§ 286.28(d), 1900.13(b)(2). As the Court determined in *SWAN II*, Requesters are entitled to a public interest fee waiver. *See SWAN II*, No. 3:11-cv-1534-MRK, at *11 (D. Conn. May 15, 2012).

Requesters seek a waiver of search and review fees on the grounds that each Requester qualifies as a "representative of the news media." 28 C.F.R. §§ 16.11 (c)(1)-(2), (d)(1). *See SWAN II* at *6. Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

SWAN, the ACLU WRP, and the ACLU-CT meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"); *Elec. Privacy Info Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

SWAN's mission is to "educat[e] and inform policy makers, the media and the public" about issues relating to service women in the armed services. Service Women's Action Network: Mission, http://www.servicewomen.org/SwanPage.asp?PLink=1019&Hding=About. In furtherance of this mission, SWAN publishes an array of fact sheets, newsletters, and other documents for public consumption, on topics ranging from military sexual trauma to homelessness among female veterans. *See Publications*, Service Women's Action Network, http://www.servicewomen.org/media/publications; *see also, e.g.*, Brittany Stalsburg, Service Women's Action Network, Military Sexual Trauma: The Facts, http://www.servicewomen.org/userfiles/file/MST%20fact%20sheet.pdf; Homeless Women Veterans: The Facts, http://www.servicewomen.org/userfiles/File/HomelessWomenVeterans.pdf. Recently, in May 2012, SWAN held a prominent summit on Military Sexual Violence in Washington, D.C., which was attended by Congress members, policy experts, military law experts, survivors of military sexual violence and their families, advocates, and the general public. *See* Truth and Justice: The 2012 Summit on Military Sexual Violence, http://truthandjusticesummit.org (last visited July 2, 2012).

Representatives from SWAN frequently appear in major media outlets in order to disseminate information to the public about issues relating to military women and veterans, including *The New York Times*, *The Washington Post*, *USA Today*, *Newsweek*, *Time*, ABC News, CBS News, CNN, MSNBC, and FOX News. *See, e.g.*, Elisabeth Bumiller, *Pentagon Allows Women Closer to Combat, but Not Close Enough for Some*, N. Y. TIMES, Feb. 10, 2012, at A17; Craig Whitlock, *Pentagon to Ease Restrictions on Women in Some Combat Roles*, WASH. POST (Feb. 9, 2012), http://www.washingtonpost.com/world/national-security/pentagon-to-ease-restrictions-on-women-in-some-combat-roles/2012/02/09/gIQAwnL41Q_story.html; Joe Gould, *Cadet Slang on T-Shirt Denounced as Offensive*, USA TODAY (Nov. 11, 2011), http://www.usatoday.com/USCP/PNI/NEWS/2011-11-29-bcGANMILCADETTSHIRT-1128_ST_U.htm; Jesse Ellison, *The Military's Secret Shame*, NEWSWEEK (Apr. 3, 2011), http://www.thedailybeast.com/newsweek/2011/04/03/the-military-s-secret-shame.html#comments; Laura Fitzpatrick, TIME (June 30, 2010), http://www.time.com/time/magazine/article/0,9171,2001011-

3,00.html; Arlette Saenz, ABC NEWS (Feb. 15, 2011), http://abcnews.go.com/Politics/17-veterans-sue-pentagon-mishandled-rape-cases/story?id=12926111#.T-x9MytYtH0; *Pentagon Won't Ask, Won't Tell*, CBS NEWS (Oct. 9, 2009), http://www.cbsnews.com/stories/2009/10/09/national/main5374161.shtml?tag=mncol;lst;1; Dugald McConnell, *Air Force Base Reports More Sexual Misconduct Charges*, CNN (June 27, 2012), http://www.cnn.com/2012/06/27/justice/texas-air-base-charges/index.html; *Up w/ Chris Hayes* (MSNBC television broadcast June 2, 2012); FOXNews.com, *Sexual Abuse in the Military?*, (Feb. 21, 2011), http://video.foxnews.com/v/4548638/sexual-abuse-in-the-military.

The ACLU WRP and ACLU-CT regularly gather information on issues of public significance (including information gathered through FOIA requests), and use their editorial skills to turn that information into distinct publications such as reports, newsletters, right-to-know pamphlets, fact sheets, and other educational materials. *See, e.g., Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns*, ACLU-CT, http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf. The ACLU distributes these materials to the general public through various channels, including its heavily subscribed Web site (www.aclu.org). In addition, ACLU publishes a newsletter sent to more than 400,000 members.

According to DoD's regulations, "Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of 'news') who make their products available for purchase or subscription by the general public." 32 C.F.R. § 286.28(e)(7)(i). ACLU qualifies as a "publisher" of "periodicals" by distributing its newsletters. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 12 (holding that "DoD's own regulation establishes that EPIC is a representative of the news media for another reason—it publishes a periodical, the EPIC alert, which is a biweekly electronic newsletter."). They further circulate an electronic newsletter, which is distributed to subscribers by e-mail. Because of these activities, fees associated with responding to FOIA requests are regularly waived for the ACLU.[3]

Furthermore, Requesters' narrower request does not materially alter any of Judge Kravitz's four-pronged analysis as to whether Requesters are entitled to a fee waiver. *See SWAN II* at *6 (citing U.S. Dep't of Justice, "New Fee Waiver Policy Guidance" (Apr. 2, 1987), *reprinted in* FOIA Update, Vol. VIII, No. 1 (Winter/Spring 1987), http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). The random-sampling components of the Request were derived from Requesters' consultations with statisticians, meant to ensure that statistically significant data is still

[3] For example, the Department of Housing and Urban Development granted a fee waiver to the ACLU for a FOIA request filed in April 2008. The ACLU subsequently posted the response to this FOIA request on its website at http://www.aclu.org/files/pdfs/womensrights/aclufoiarequestandhudresponseregardingimplementationofvawa.pdf. The Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in 2006. The DoD did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. In addition, ACLU of Washington, an ACLU state affiliate like ACLU of CT, was granted a fee reduction as a representative of the news media. *See ACLU of Wash. v. U.S. Dep't of Justice,* C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011), *reconsidered on other grounds,* No. C09-0642RSL, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

received while nonetheless narrowing the request in order to ease the burden of response on DoD. Otherwise the Request only clarifies the specific types of records Requesters seek. Response to the Request would thus still be such that "[1] the subject of the requested records concerns the operations or activities of the government... [2] the disclosure is likely contribute to an understanding of the government's operations or activities... [3] disclosure of the requested information will contribute to the public understanding... and [4] the disclosure is likely to contribute significantly to the public understanding of government operations or activities." *Id.*

The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

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The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Department of the Army
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July 02, 2012

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

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Requesters agree to pay search, duplication, and review fees up to $100.00. If the fees will amount to more than $100.00, Requesters seek a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 32 C.F.R. §§ 286.28(d), 1900.13(b)(2). As the Court determined in *SWAN II*, Requesters are entitled to a public interest fee waiver. *See SWAN II*, No. 3:11-cv-1534-MRK, at *11 (D. Conn. May 15, 2012).

Requesters seek a waiver of search and review fees on the grounds that each Requester qualifies as a "representative of the news media." 28 C.F.R. §§ 16.11 (c)(1)-(2), (d)(1). *See SWAN II* at *6. Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

SWAN, the ACLU WRP, and the ACLU-CT meet the statutory and regulatory definitions of a "representative of the news media" because each is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III); *see also Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *cf. ACLU v. Dep't of Justice*, 321 F. Supp. 2d at 30 n.5 (finding non-profit public interest group to be "primarily engaged in disseminating information"); *Elec. Privacy Info Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003) (finding non-profit public interest group that disseminated an electronic newsletter and published books was a "representative of the media" for purposes of FOIA).

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Laura Fitzpatrick, TIME (June 30, 2010), http://www.time.com/time/magazine/article/0,9171,2001011-3,00.html; Arlette Saenz, ABC NEWS (Feb. 15, 2011), http://abcnews.go.com/Politics/17-veterans-sue-pentagon-mishandled-rape-cases/story?id=12926111#.T-x9MytYtH0; *Pentagon Won't Ask, Won't Tell*, CBS NEWS (Oct. 9, 2009), http://www.cbsnews.com/stories/2009/10/09/national/main5374161.shtml?tag=mncol;lst;1; Dugald McConnell, *Air Force Base Reports More Sexual Misconduct Charges*, CNN (June 27, 2012), http://www.cnn.com/2012/06/27/justice/texas-air-base-charges/index.html; *Up w/ Chris Hayes* (MSNBC television broadcast June 2, 2012); FOXNews.com, *Sexual Abuse in the Military?*, (Feb. 21, 2011), http://video.foxnews.com/v/4548638/sexual-abuse-in-the-military.

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Furthermore, Requesters' narrower request does not materially alter any of Judge Kravitz's four-pronged analysis as to whether Requesters are entitled to a fee waiver. *See SWAN II* at *6 (citing U.S. Dep't of Justice, "New Fee Waiver Policy Guidance" (Apr. 2, 1987), *reprinted in* FOIA Update, Vol. VIII, No. 1 (Winter/Spring 1987), http://www.justice.gov/oip/foia_updates/Vol_VIII_1/viii1page2.htm). The random-sampling components of the Request were derived from

[3] For example, the Department of Housing and Urban Development granted a fee waiver to the ACLU for a FOIA request filed in April 2008. The ACLU subsequently posted the response to this FOIA request on its website at http://www.aclu.org/files/pdfs/womensrights/aclufoiarequestandhudresponseregardingimplementationofvawa.pdf. The Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in 2006. The DoD did not charge the ACLU fees associated with FOIA requests submitted by the ACLU in April 2007, June 2006, February 2006, and October 2003. In addition, ACLU of Washington, an ACLU state affiliate like ACLU of CT, was granted a fee reduction as a representative of the news media. *See ACLU of Wash. v. U.S. Dep't of Justice,* C09-0642RSL, 2011 WL 887731, at *10 (W.D. Wash. Mar. 10, 2011), *reconsidered on other grounds,* No. C09-0642RSL, 2011 WL 1900140 (W.D. Wash. May 19, 2011).

Requesters' consultations with statisticians, meant to ensure that statistically significant data is still received while nonetheless narrowing the request in order to ease the burden of response on DoD. Otherwise the Request only clarifies the specific types of records Requesters seek. Response to the Request would thus still be such that "[1] the subject of the requested records concerns the operations or activities of the government... [2] the disclosure is likely contribute to an understanding of the government's operations or activities... [3] disclosure of the requested information will contribute to the public understanding... and [4] the disclosure is likely to contribute significantly to the public understanding of government operations or activities." *Id.*

The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

Judge Kravitz furthermore determined that disclosure would likely contribute significantly to the public understanding of government operations or activities, the fourth prong of the analysis. *Id.* at 11. He reached this conclusion because "Plaintiffs raise troubling allegations, supported by reports and their own extensive experience on the subject, about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military. This is not a case where the requests are 'nothing more than bare allegations of malfeasance,'... rather, these requests are an attempt to get to the heart of an issue and contribute significantly to the public understanding." *Id.* at *10-11 (quoting *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009)). Unfortunately with this Request it is necessary for Requestors to raise the same concerns as before regarding the prevalence of and response to sexual assault in the U.S. military. Furthermore, this narrowed request is no less an attempt by Requestors to get at the heart of the issue and contribute

significantly to the public understanding, but only a further attempt to avoid DoD's effort to prevent them from doing so.

Finally, pursuant to the applicable regulations and statute, Requesters expect the determination of this request for documents within 20 days. *See* 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,

Michael Wishnie, Supervising Attorney
Michael Samsel, Law Student Intern
Randal Wilhite, Law Student Intern
Jerome N. Frank Legal Services Organization
Yale Law School
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(860) 523-9146, Ext. 8471

Sandra S. Park, Staff Attorney
Lenora M. Lapidus, Director
ACLU Women's Rights Project
125 Broad St., 18th Fl.
New York, NY 10004
(212) 519-7871

cc: Jonathan G. Cooper, Counsel for Defendants (by email)

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

Department of the Air Force
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Washington, DC 20330-1000
Fax: (703) 696-7273

July 02, 2012

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

This letter constitutes a request ("Request"), pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, for records[1] in the possession of the Department of Defense ("DoD"). The Request is submitted on behalf of the Service Women's Action Network ("SWAN"), the American Civil Liberties Union Women's Rights Project ("ACLU WRP"), and the ACLU of Connecticut ("ACLU-CT"), referred to collectively as the "Requesters."

The records sought herein are the subject of FOIA requests already submitted by Requesters, by letters dated October 15, 2010, and June 24, 2011, and are the subject of pending litigation in *Serv. Women's Action Network v. Dep't of Defense*, No. 3:10-cv-1953-MRK (D. Conn.) (hereinafter *SWAN I*) and *Serv. Women's Action Network v. Dep't of Def.*, No. 3:11-cv-1534-MRK (D. Conn.) (hereinafter *SWAN II*). Defendants in *SWAN I* have taken the position, however, that the FOIA requests at issue in the litigation do not seek the records listed expressly herein, and the court in *SWAN II* ruled that Requesters' second FOIA request on this matter was unduly burdensome on the agencies. A motion for reconsideration is pending in *SWAN II*.

Requesters do not concede that the requests at issue in *SWAN I* fail to cover the records listed herein and adhere to the position that the prior requests do cover these records. In addition, Requesters do not concede that the narrowed request contained in this FOIA Request is unduly burdensome and adhere to the position that DoD may reasonably search for the requested records. Requesters nevertheless submit this new request to moot out the potential objection of counsel for Defendants in *SWAN I* and to formally request the records sought in this FOIA Request should the court in *SWAN II* deny its motion for reconsideration and should the Second Circuit affirm such a ruling.

All requested records that are responsive may be provided with personally identifying details redacted. FOIA exempts information from disclosure if that disclosure would lead to an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Determination of this exemption requires "a balancing of the public's interest in obtaining the information against any possible invasions of privacy which would result from disclosure." *Burkins v. United States*, 865 F. Supp. 1480, 1502 (D. Colo. 1994). The Supreme Court has held that this balancing act does not preclude the disclosure of military records when names and other

[1] The term "records" as used herein, includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, audio tapes, emails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes, orders, policies, procedures, protocols, reports, rules, technical manuals, technical specifications, training manuals, or studies.

private details are redacted. *See, e.g.*, *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

I. Requested Records

Requesters seek the release of the following:

1) For the following incidents:

   a. Each and any reported a) sexual harassment-related equal opportunity ("EO") complaint, b) sex discrimination-related EO complaint, and c) EO complaints on other grounds filed together with either sexual harassment-related EO complaints or sex discrimination-related EO complaints, in each service branch,[2] whether substantiated or unsubstantiated, since October 1, 2007;
   b. Each sexual-assault-related nonjudicial punishment in each service branch since October 1, 2007; and
   c. Each sexual-assault-related court-martial initiated by each service branch since October 1, 2007;

   Requesters ask that DoD provide records containing the following information or, alternatively, a spreadsheet containing the following information, separated by incident, that conveys the same information contained in the spreadsheet the DoD has released detailing thousands of incidents reported to the Family Advocacy Program ("FAP"). *See* Child and Spouse Abuse Database, *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/10_F_1583_Child_andSpouseAbuseDatabaseUpdated.xls.

   a. *Offender Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
      iv. Relationship of Alleged Offender to Victim
   b. *Victim Information*
      i. Rank/Rate/Grade
      ii. Race/Ethnic Group
      iii. Gender
   c. *Incident Details*
      i. Place of Offense/Location/Installation
      ii. Alcohol Involvement (if noted)
      iii. Drug Involvement (if noted)
      iv. Type of maltreatment initially reported
   d. *Investigation Details*
      i. Recommendation of investigating officer

[2] For purposes of this request, the Marines shall be considered to be separate from the Navy.

ii. Commander concurs/does not concur with investigating officer
iii. Incident substantiated/unsubstantiated

e. *Resolution of Proceedings*
   i. Whether sexual harassment found to have occurred
   ii. Plea entered
   iii. Actions taken to resolve complaint (administrative, nonjudicial, judicial)
   iv. Nature of administrative or non-judicial sanction, if applicable
   v. Punishment imposed
   vi. Whether appeal sought
   vii. Disposition of appeal
   viii. Maximum allowable punishment

2) A sample of spouse/intimate partner abuse complaints reported to FAP for the period from October 1, 2007, to September 30, 2012, whether substantiated or unsubstantiated, and randomly selected by DoD. Requesters request the following sample sizes:

   a. 850 complaints of emotional abuse in the Army,
   b. 850 complaints of physical abuse in the Army,
   c. 700 complaints of sexual abuse in the Army,
   d. 800 complaints of emotional abuse in the Navy,
   e. 850 complaints of physical abuse in the Navy,
   f. 650 complaints of sexual abuse in the Navy,
   g. 650 complaints of emotional abuse in the Marines,
   h. 850 complaints of physical abuse in the Marines,
   i. 250 complaints of sexual abuse in the Marines,
   j. 850 complaints of emotional abuse in the Air Force,
   k. 850 complaints of physical abuse in the Air Force, and
   l. 500 complaints of sexual abuse in the Air Force.

   For each of these complaints, Requesters ask that DoD provide the situation identifier and races of the victims and offenders.

II. Application for Waiver or Limitation of Fees

Requesters agree to pay search, duplication, and review fees up to $100.00. If the fees will amount to more than $100.00, Requesters seek a fee waiver on the grounds that disclosure of the requested records is in the public interest. The disclosure of the records is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 22 C.F.R. § 171.17(a); 32 C.F.R. §§ 286.28(d), 1900.13(b)(2). As the Court determined in *SWAN II*, Requesters are entitled to a public interest fee waiver. *See SWAN II*, No. 3:11-cv-1534-MRK, at *11 (D. Conn. May 15, 2012).

Requesters seek a waiver of search and review fees on the grounds that each Requester qualifies as a "representative of the news media." 28 C.F.R. §§ 16.11 (c)(1)-(2), (d)(1). *See SWAN II* at *6. Accordingly, fees associated with the processing of the Request should be "limited to reasonable standard charges for document duplication." 5 U.S.C. § 552(a)(4)(A)(ii)(III); 32 C.F.R. § 286.28(e)(7); *see also* 28 C.F.R. §§ 16.11(c)(3), (d) (search and review fees shall not be charged to "representatives of the news media").

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The disclosure will inform Requesters and the public of the prevalence of SA, EO, and SH complaints in the military, as well as of DoD's policies concerning these issues. It is in the public's interest to know how DoD is responding to harassment and discrimination complaints related to sex and gender, whether the DoD responds differently to different types of complaints, and how effective these response efforts have been. Citing this exact language from Requestors' request dated June 24, 2011, Judge Kravitz concluded that "the service-member requests for records, court-martial records, and domestic violence records are all relevant in [1] evaluating how the government responds to different complaints and how effective those responses have been" and that "[it] is not evident that the publicly-available aggregations have been designed to answer Plaintiffs' questions. Accordingly, the Court finds that Plaintiffs have met the second requirement." *SWAN II* at *8, *10.

Additionally, disclosure of the information requested is not in Requesters' commercial interest. Any information disclosed by Requesters as a result of this FOIA request will be available to the public at no cost. Thus, a fee waiver would fulfill Congress's legislative intent in amending FOIA. *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'"); OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, § 2 (Dec. 31, 2007) (finding that "disclosure, not secrecy, is the dominant objective of the Act," but that "in practice, the Freedom of Information Act has not always lived up to the ideals of that Act . . . .").

"The Court can assume the third factor—whether disclosure of the requested information will contribute to the public understanding—is satisfied, as it has already found that the Plaintiffs are news representatives." *SWAN II* at *10 (citing 28 C.F.R. § 16.11(k)(2)(iii)).

Judge Kravitz furthermore determined that disclosure would likely contribute significantly to the public understanding of government operations or activities, the fourth prong of the analysis. *Id.* at 11. He reached this conclusion because "Plaintiffs raise troubling allegations, supported by reports and their own extensive experience on the subject, about the prevalence of and response to sexual assault and its associated psychological fallout in the U.S. military. This is not a case where the requests are 'nothing more than bare allegations of malfeasance,'... rather, these requests are an attempt to get to the heart of an issue and contribute significantly to the public understanding." *Id.* at *10-11 (quoting *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 128 (D.D.C. 2009)). Unfortunately with this Request it is necessary for Requestors to raise the same concerns as before regarding the prevalence of and response to sexual assault in the U.S. military. Furthermore, this narrowed request is no less an attempt by Requestors to get at the heart of the issue and contribute significantly to the public understanding, but only a further attempt to avoid DoD's effort to prevent them from doing so.

Finally, pursuant to the applicable regulations and statute, Requesters expect the determination of this request for documents within 20 days. *See* 5 U.S.C. §552(a)(6)(A)(i). If this Request is denied in whole or in part, Requesters ask that you justify all deletions by reference to specific exemptions to FOIA. Requesters expect the release of all segregable portions of otherwise exempt material. Requesters reserve the right to appeal a decision to respond without any information or to deny a waiver of fees.

Please furnish all applicable records to:

Michael Wishnie
Jerome N. Frank Legal Services Organization
Yale Law School
127 Wall Street
New Haven, CT 06511

Thank you for your prompt attention to this matter.

Sincerely,

Michael Wishnie, Supervising Attorney
Michael Samsel, Law Student Intern
Randal Wilhite, Law Student Intern
Jerome N. Frank Legal Services Organization
Yale Law School
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cc: Jonathan G. Cooper, Counsel for Defendants (by email)

DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

The Jerome N. Frank Legal Services Organization
ATTN: Michael Wishnie
P.O. Box 209090
New Haven, CT 06520

VIA Email Only to michael.wishnie@yale.edu

Aug 07, 2012

Dear Mr. Wishnie,

I am in receipt of the identical letters you sent to DoD (12-F-1091), Air Force (2012-04846-F), Navy (2012F071375), and Marine Corps (201200656). I assume you have sent a copy of the letter to the Department of the Army, but I have been informed that they have not yet received it. The letters are dated July 2, 2012, but it appears that they were not mailed until Friday July 6, 2012. They were received by various offices between July 9 and 11, 2012. I write to respond to those letters and, more generally, to document the history of DoD's diligent efforts to satisfy the series of requests submitted by you and your clients.

As should be clear from the Department of Defense's responses to your repeated requests for records, dedicated public servants have continuously searched and re-searched databases and, in some cases, individual files to respond to your requests. The hundreds of hours expended by those individuals have resulted in the release of thousands of pages of records and have directed you to thousands of additional pages located at the DoD Sexual Assault Prevention and Response Office (SAPRO) website: http://www.sapr.mil/index.php/annual-reports.

As you also know, the Department continues to address the important issues you raise, which relate to a challenging problem throughout our society and which is not exclusive to the military. Specifically, the Secretary of Defense has recently announced a number of initiatives to combat sexual assault in the military, including the elevation of initial disposition authority for the most serious sexual assault offenses to those commanders who have Special Court-Martial Convening Authority and the rank of at least colonel or Navy captain; the establishment of a "special victim capability" within each Military Service; a requirement that sexual assault policies be explained to all service members within 14 days of entrance onto active duty; allowing Reserve and National Guard personnel who have been sexually assaulted while on active duty to remain in active duty status to obtain appropriate treatment and support; a requirement that commanders conduct annual organizational climate assessments; enhanced record-keeping requirements for sexual assault cases; wider public dissemination of available sexual assault resources, including information about the crisis hotline, DoD "Safe Helpline"; and enhanced training programs for sexual assault prevention, including training for new military commanders and senior enlisted leaders in handling sexual assault matters. Those most recent

initiatives supplement others announced in the preceding months, and reflect continuing efforts to address this challenging issue.

Procedural History

Your original FOIA request, dated October 15, 2010, contained twelve numbered paragraphs seeking procedural and statistical information about military sexual trauma complaints, equal opportunity complaints, sexual harassment complaints, and domestic violence complaints. It also sought statistical information on sexual assault related Courts-martial during fiscal years 2006–2010, records regarding the nonjudicial resolution of sexual assault related complaints during the same span, and racial and gender breakdowns for any information responsive to paragraphs 1–11. You filed suit two months after making this initial request: *Service Women's Action Network v. U.S. Department of Defense*, No. 3:10-cv-01953-MRK (D. Conn.) ("*SWAN I*").

While conducting our search and preparing to provide you the records responsive to your request, in February 2011 you asserted that the request was not only for the statistical information about sexual misconduct complaints, courts-martial, and benefits claims, but also the hundreds of thousands of underlying individual records from which the numerical content may be derived. We believed this to be an expansion of your request, and processed the original request as written. In response, we produced to you over 1,000 pages and directed you to the SAPRO website, which contains thousands of additional pages responsive to your original request.

On June 24, 2011, you sent identical FOIA requests to six DoD components seeking all records of any complaint, investigation, courts-martial, or request for records regarding sexual assault, sexual harassment, domestic violence, or equal opportunity complaints. The DoD components explained the burden involved in searching for and processing the millions of pages of records encompassed by your request and advised that you would be responsible for paying for the costs of the search. On October 6, 2011, you filed suit for this request as well in *Service Women's Action Network v. U.S. Department of Defense*, No. 3:11-cv-1534-MRK (D. Conn.) ("*SWAN II*").

On December 29, 2011, you sent what you termed "a confidential settlement communication," which was "inadmissible in any proceeding pursuant to Fed. R. Evid. 408," and purportedly limited the scope of your request. While the offer would have limited the amount of processing required, it would have done little, if anything, to limit the unduly burdensome search required to locate five years of all records regarding sexual assault, sexual harassment, domestic violence, and equal opportunity complaints within DoD. Unable to reach an agreement, DoD moved for summary judgment in *SWAN II* on January 23, 2012.

In your response to our motion for summary judgment in *SWAN II*, you informed the Court of your "confidential" settlement offer to DoD and insisted that it was the operative request, instead of the public request that was the subject of the lawsuit. Ultimately, the Court agreed with DoD's contention that only your original request was ripe for review. The Court

held that the request was unduly burdensome and that we need not conduct a search. You have sought reconsideration and have indicated a desire to appeal that ruling.

In *SWAN I*, the Court granted summary judgment on some matters but found DoD's searches to be insufficient in some respects. The Court also found that DoD had read too narrowly Item 11 of your request. The Court noted that this request is so "expansive" that it "may also be unduly burdensome," but the Court decided it needed additional "evidence on this point" before it could conclude that the request is unduly burdensome. DoD conducted additional searches in response to the Court's concerns and provided you with the results of those searches. In an email on April 13, 2012, you clarified that Item 11 of your FOIA request was meant to encompass only those records "described in Section II ('Nonjudicial Punishment') of Plaintiffs' settlement proposal of December 29, 2011." We conducted all reasonable searches for the forms you requested and produced 681 pages to you on July 5, 2012. I understand you are reviewing those records to determine whether you believe DoD has satisfied that portion of your request. Oral argument regarding any outstanding matters in *SWAN I* is scheduled to occur in September 2012.

Questions Regarding Latest Request

There are several fundamental issues regarding your latest request that must be clarified. First, you state that "[t]he records sought herein are the subject of FOIA requests already submitted by Requesters, by letters dated October 15,2010, and June 24,2011, and are the subject of pending litigation in [*SWAN I and SWAN II*]." Taken at face value, that assertion means your request is duplicative and DoD need not respond.

Second, you state "[r]equesters nevertheless submit this new request to moot out the potential objection of counsel for Defendants in *SWAN I* and to formally request the records sought in this FOIA Request should the court in *SWAN II* deny its motion for reconsideration and should the Second Circuit affirm such a ruling." We are confused by your request, which appears to be contingent upon future actions by Federal Courts. Are you asking that a search for these records be completed only upon final resolution, including any appeals, of *SWAN I* and *SWAN II*? If DoD were to produce everything listed in your current request, would you still insist that you are entitled to the broader request dated June 24, 2011, or the request listed in your settlement proposal of December 29, 2011? If so, then I see no reason to conduct an extensive search for only a portion of your larger search request, which the court has already determined to be unduly burdensome, until after the current litigation is resolved. On the other hand, if you believe that your latest request would provide you sufficient information to complete your mission, it would appear that continuing the litigation over your previous requests is unnecessary.

Third, it is unclear what you consider the time scope of your current request. You "adhere to the position that the prior requests do cover these records." Your previous requests were for records from fiscal years 2006 through 2010. This request appears to shift your request to fiscal year 2008 to the present[1]. If you are attempting to resolve the requests that are in

[1] You request records for the period from October 1, 2007, to September 30, 2012. As the FOIA does not permit a request for future records, DoD interprets your date range to end at the "present date."

litigation, then it is improper to expand your request outside of the original scope. *See Amnesty International USA v. CIA*, 728 F. Supp. 2d 479, 499–500 (S.D.N.Y. 2010); *Laughlin v. Commissioner*, 117 F. Supp. 2d 997, 1002 n.10 (S.D. Cal. 2000). If you consider this a new request, then the portions of the request for records prior to fiscal year 2011 are duplicative of the requests that are in litigation, and do not require a response. These issues must be clarified before any search could be conducted.

Substance of the Request

You request either every individual record or a spreadsheet containing offender and victim information, incident details, investigative details, and the resolution of the proceedings of every sexual assault-related court-martial, non-judicial punishment, and sexual harassment complaint. The request for every individual record remains a request for millions of pages of records, which the Court held to be unduly burdensome in *SWAN II.*

As to your alternative request for spreadsheets, your request does not mention any of the thousands of pages we have previously provided, nor does it mention the thousands of additional pages contained in the SAPRO reports to which you have been directed. Many of our previous releases are directly responsive to your request. For instance, you were previously provided a spreadsheet from the Department of the Navy which detailed the information you have requested for the Navy and Marine Corps. I have attached page 1 of the 23-page document for your reference. (Exhibit 1). You were provided the same type of information from Army, which detailed the disposition of 3,483 sexual assault related courts-martial specifications between fiscal years 2006 and 2010 in a spreadsheet which, if printed, would total 264 pages. The Air Force has similarly provided you with records responsive to your request.

Further, as mentioned above, DoD sent you all of the individual files we could reasonably locate reflecting non-judicial punishment disposition of sexual assault allegations. I understand that these records likely crossed in the mail with your new request. I hope that the recent DoD response, along with the information contained in the SAPRO reports, will satisfy your request.

Ultimately, the information you purport to seek, and claim that DoD is refusing to release to the public, is contained in the annual SAPRO report, which is available to the public online. I have attached a single random page from the 622-page 2010 report, to demonstrate that the report contains information regarding the disposition of every sexual assault allegation within DoD each year. (Exhibit 2). You should note that the spreadsheet contains information about the offense, the general location, the rank and gender of the victim and the accused, the case disposition, and a general description of the alleged offense.

The second section of your current request is for a "sample of spouse/intimate partner abuse complaints reported to FAP for the period from October 1, 2007, to September 30, 2012." The sample you request is 16,300 complaint files. You do not detail what you would discern from the "sample" that is not already contained in the comprehensive database that is available on-line and referenced in your letter. In fact, you reference that database as the format for how information should be presented in response to your requests.

I have contacted the Service Branches regarding the files located in the FAP offices around the world, and I have received a sample file from the Marine Corps. In that sample, there are both an "offender file," which is 243 pages, and a "victim file," which totals 356 pages. Assuming this is a particularly large file and that the average file contains only 200 pages, then your request would seek an estimated 3,260,000 pages that would contain a large amount of personal information, which would need to be carefully reviewed to protect against the release of such information. This request is unduly burdensome.

Conclusion

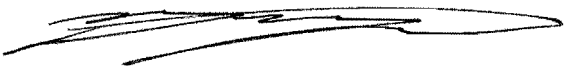
Over the last nearly two years, DoD has performed all reasonable searches for the records responsive to your multiple requests. We have attempted to respond to your assertions of search inadequacies and have diligently tried to satisfy your inquiry. It often seems that your desire is not for records, but rather for the ability to claim that DoD has denied you access to records.

Ultimately, the SAPRO report, to which you were originally directed, is the most complete and comprehensive resource for the information you seek. At your request, we have gone beyond these reports and provided you with thousands of additional pages of records.

I consider your request for media status and a public interest fee waiver moot, as we have not charged you for the search or duplication costs for the thousands of pages we have already provided, and would not charge you for additional reasonable searches or productions. As Judge Kravitz recognized, many of your requests impose an unreasonable burden on DoD.

If you can describe, in a finite and reasonable fashion, information that you believe DoD could locate and provide but that is not contained in the SAPRO reports and the previous releases, I would be happy to have a search for such information conducted. Such an approach would be far more productive than making unsupported accusations against DoD that are belied by the history of this case and ignore DoD's substantial efforts to address your clients' requests.

Sincerely,



Mark H. Herrington, Esq.
Associate Deputy General Counsel
Office of Litigation Counsel

EXHIBIT 1

Results of FOIA Datapull for Jerome N. Frank Legal Services Organization

Submitted by OJAG Code 20, Criminal Law Division

Alternate Disposition = offense adjudicated in alternate forum or manner.

Date Court-Martial Ended	Initials of Accused	Article 120: Specification	Disposition (– = No data in database)	Gender/ Branch of accused		Acquittal	Dismissed	Alternate Disposition (1=yes)	ADJUDGED PUNISHMENT			Forfeitures per month		Fines	Confinement			Hard Labor		Restriction		
									Reduction to Rate						Years	Months	Days	Months	Days	Months		Days
									Punitive Discharge	Confinement for life	Total Forfeitures	# of months										
10/4/2005	J P	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	NULL	NULL	NULL	0	0	0	0	3	0	0		0	0	0
10/4/2005	J P	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	NULL	NULL	NULL	0	0	0	0	3	0	0		0	0	0
10/14/2005	G F	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	E1	NULL	NULL	0	827	3	0	3	0	0		0	0	0
10/16/2005	R Y	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	E5	Bad Conduct	NULL	0	0	0	0	6	0	0		0	0	60 Days
10/19/2005	B R	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	0	0	0	0	6	0	60		0	0	0
10/21/2005	A H	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USMC	0	0	0	E1	Bad Conduct	NULL	0	1235	6	0	0	6	0		0	0	0
10/25/2005	W R	Pre- October 1, 2007: Rape	Guilty	M	USMC	0	0	0	E1	Dishonorable	NULL	1	0	0	0	30	6	0		0	0	0
11/17/2005	F E	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	1	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
11/17/2005	R B	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
11/23/2005	J T	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USMC	0	0	0	E1	Dishonorable	NULL	1	0	30	0	0	30	0		0	0	0
12/1/2005	P C	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
12/15/2005	H L	Pre- October 1, 2007: Rape	Dismissed	M	USMC	0	0	0	E3	NULL	NULL	0	0	0	0	0	0	30		0	0	0
12/15/2005	M S	Pre- October 1, 2007: Rape	Withdrawn	M	USMC	0	0	0	E2	Bad Conduct	NULL	0	923	3	0	0	3	0	3	0	0	0
12/16/2005	D P	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
12/29/2005	S W	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Withdrawn	M	USN	0	0	0	E1	NULL	NULL	0	0	0	0	0	6	0		0	0	0
1/24/2006	K J	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	E1	Bad Conduct	NULL	1	0	0	0	0	0	0		0	0	0
1/24/2006	K J	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	1	0	0	0	5	0	0		0	0	0
1/24/2006	K J	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Withdrawn	M	USN	0	0	0	E1	Bad Conduct	NULL	1	0	0	0	5	0	0		0	0	0
1/27/2006	M B	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	0	0	0	5000	0	6	0		0	0	0
1/31/2006	M B	Pre- October 1, 2007: Rape	Withdrawn	M	USMC	0	0	0	E1	Dishonorable	NULL	1	0	0	0	0	40	0		0	0	0
2/7/2006	R P	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	E3	NULL	NULL	1	0	0	0	0	0	179		0	0	0
2/14/2006	K M	Pre- October 1, 2007: Rape	Withdrawn	M	USMC	0	0	0	E1	NULL	NULL	0	0	0	0	0	9	0		0	0	0
2/17/2006	F B	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USMC	0	0	0	E1	Dishonorable	NULL	1	0	0	0	0	30	0		0	0	0
2/17/2006	M R	Pre- October 1, 2007: Rape	Guilty	M	USN	0	0	0	E1	Dishonorable	NULL	1	0	0	0	10	0	0		0	0	0
2/21/2006	R T	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
2/22/2006	S E	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Dishonorable	NULL	0	0	0	10000	15	0	0		0	0	0
2/22/2006	S E	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Withdrawn	M	USN	0	0	0	E1	Dishonorable	NULL	0	0	0	10000	15	6	0		0	0	0
2/27/2006	J S	Pre- October 1, 2007: Rape	Dismissed	M	USMC	0	0	0	E1	NULL	NULL	0	0	0	0	0	0	103		0	0	0
3/1/2006	N U	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Withdrawn	M	USN	0	0	0	E1	Bad Conduct	NULL	1	0	0	0	0	18	0		0	0	0
3/6/2006	A S	Pre- October 1, 2007: Rape	Withdrawn	M	USMC	0	0	0	E1	Dishonorable	NULL	1	0	0	0	30	0	0		0	0	0
3/7/2006	B F	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
3/8/2006	J K	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Dishonorable	NULL	1	0	0	0	25	0	0		0	0	0
3/13/2006	B L	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
3/21/2006	L H	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	1	0	0	0	0	15	0		0	0	0
4/4/2006	C C	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	E6	NULL	NULL	0	0	0	0	0	0	0		0	0	45 days
4/6/2006	W P	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
4/11/2006	A B	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
4/14/2006	D H	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	E1	Bad Conduct	NULL	0	0	0	0	3	0	0		0	0	0
4/18/2006	J C	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USMC	0	0	0	NULL	Bad Conduct	NULL	0	848	4	0	0	0	120		0	0	0
4/18/2006	T F	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
4/20/2006	C C	Pre- October 1, 2007: Rape	Guilty	M	USN	0	0	0	NULL	Dishonorable	NULL	0	0	0	0	15	0	0		0	0	0
4/25/2006	J N	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
4/26/2006	R O	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	0	0	0	E2	NULL	NULL	0	0	0	0	0	0	30		0	0	0
4/27/2006	R M	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	1	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
4/28/2006	B V	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	0	800	11	0	0	11	0		0	0	0
5/2/2006	B M	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	0	0	0	E2	NULL	NULL	0	0	0	0	0	0	0		0	0	45 days
5/5/2006	A H	Pre- October 1, 2007: Rape	Lesser Included Offense (LIO)	M	USN	0	0	0	E1	Dishonorable	NULL	1	0	0	0	7	0	0		0	0	0
5/8/2006	C B	Pre- October 1, 2007: Rape	Guilty	M	USN	0	0	0	E3	Dishonorable	NULL	1	0	0	0	20	0	0		0	0	0
5/8/2006	C B	Pre- October 1, 2007: Rape	Lesser Included Offense (LIO)	M	USN	0	0	0	E1	Dishonorable	NULL	1	0	0	0	20	0	0		0	0	0
5/10/2006	W J	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
5/11/2006	D R	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	NULL	NULL	0	700	6	0	0	3	0		0	0	2 months
5/24/2006	K G	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0	NULL	0	0	NULL
5/25/2006	W M	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	0	0	0	0	0	6	0		0	0	0
6/2/2006	J P	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	NULL	Bad Conduct	NULL	0	600	2	0	0	0	60		0	0	0
6/2/2006	R S	Pre- October 1, 2007: Rape	Lesser Included Offense (LIO)	M	USMC	0	0	0	E3	NULL	NULL	0	0	0	0	0	0	60		0	0	0
6/3/2006	B L	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	0	0	0	NULL	NULL	NULL	0	1000	2	0	0	0	0		0	0	0
6/6/2006	M F	Pre- October 1, 2007: Rape	–	M	USMC	0	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0	NULL	0	0	NULL
6/12/2006	R V	Pre- October 1, 2007: Rape	Withdrawn	M	USNR	0	0	0	E1	Dishonorable	NULL	0	0	0	0	0	0	0		0	0	0
6/16/2006	B K	Pre- October 1, 2007: Rape	Guilty	M	USN	0	0	0	NULL	Bad Conduct	NULL	0	0	0	0	0	0	30		0	0	0
6/16/2006	M Y	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
6/16/2006	M Y	Pre- October 1, 2007: Rape	Withdrawn	M	USMC	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
7/18/2006	B C	Pre- October 1, 2007: Rape	Withdrawn	M	USN	0	0	0	E1	Bad Conduct	NULL	0	800	6	0	0	6	0	0	0	0	0
7/21/2006	L O	Pre- October 1, 2007: Rape	Not Guilty	M	USN	1	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
7/23/2006	C S	Pre- October 1, 2007: Carnal knowledge: Child 12 to 16 years old	Guilty	M	USN	0	0	0	E1	Bad Conduct	NULL	0	0	0	0	0	0	60		0	0	0
8/24/2006	D B	Pre- October 1, 2007: Rape	Not Guilty	M	USN	0	0	0	NULL	NULL	NULL	0	0	0	0	0	0	0		0	0	0
8/24/2006	S M	Pre- October 1, 2007: Rape	Not Guilty	M	USMC	0	0	0	E4	NULL	NULL	0	0	0	0	0	2	0		0	0	0
8/25/2006	B W	Pre- October 1, 2007: Rape	Lesser Included Offense (LIO)	M	USMC	0	0	0	E2	NULL	NULL	0	900	5	0	0	0	100		0	0	0

EXHIBIT 2

No.	Offense Investigated	Location	Subject Grade	Subject Gender	Victim Grade	Victim Gender	Quarter Disposition Completed	Disposition Offense	Case Disposition	Case Synopsis
291	Rape (Article 120, UCMJ)	OCONUS	E4	M	CIV	Female	Q2	Rape (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged that subject, her husband, had a friend come in to hold down victim while he forcibly sodomized and raped her. Trial docketed for Oct 10.
292	Rape (Article 120, UCMJ)	CONUS	E3	M	CIV	Female	Q3	Rape (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleges subject raped her when she was blacked out. GCM referred but after victims refused to testify, Chapter 10 discharge in lieu of court-martial approved.
293	Forcible Sodomy (Article 125, UCMJ)	CONUS	E7	M	E3	Female	Q2	Forcible Sodomy (Article 125, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim IET student alleged that subject drill sergeant touched her clothed vagina without consent and then engaged in oral sodomy. Subject was convicted at GCM and sentenced to 2 months confinement, reduction in rank, and forfeitures.
294	Aggravated Sexual Assault (Article 120, UCMJ)	OCONUS	E1	M	E3	Female	Q2	Aggravated Sexual Assault (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident in which the victim, 18, awoke with no memory but signs that she had sex while passed out night before in barracks after inviting subject to her room. Subject convicted at GCM and sentenced to 26 months confinement, BCD, and forfeitures.
295	Rape (Article 120, UCMJ)	OCONUS	O2	M	E3	Female	Q2	Rape (Article 120, UCMJ)	Court-Martial Charges Preferred	Off-post incident. Victim alleged that subject sexually assaulted her during a date. Expert testimony refuted victim's intoxication. Subject pled guilty to fraternization and conduct unbecoming and was sentenced to dismissal.
296	Forcible Sodomy (Article 125, UCMJ)	CONUS	E4	M	CIV	Female	Q4	Forcible Sodomy (Article 125, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged that she was forcibly sodomized two years prior by subject husband. After charges were preferred, victim refused to testify at Art. 32. Sex assault charge dismissed, but subject convicted of false official statement.
297	Aggravated Sexual Assault (Article 120, UCMJ)	CONUS	E4	M	E3	Female	Q3	Aggravated Sexual Assault (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Subject sexually assaulted victim while she was substantially incapacitated; victim woke up to find subject penetrating her. Subject pled guilty in GCM and sentenced to a BCD and 3 years confinement.
298	Aggravated Sexual Assault (Article 120, UCMJ)	CONUS	E4	M	E6	Female	Q3	Aggravated Sexual Assault (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged that subject offered her a ride home when she was too intoxicated to drive and sexually assaulted her in car. Subject convicted at GCM and sentenced to 5 years confinement, DD, E-1, and total forfeitures.
299	Rape (Article 120, UCMJ)	OCONUS	E5	M	E5	Female	Q2	Rape (Article 120, UCMJ)	Court-Martial Charges Preferred	Off-post incident. Victim alleged that subject sexually assaulted her after she was drinking. There was insufficient evidence of assault and subject was convicted at SCM of adultery.
300	Rape (Article 120, UCMJ)	CONUS	E3	M	E2	Multiple Victims	Q2	Rape (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged she was sexually assaulted and forced to perform oral sex while intoxicated. Charges dismissed after victim refused to testify.
301	Wrongful Sexual Contact (Article 120, UCMJ)	Afghanistan	E5	M	E4	Female	Q1	Wrongful Sexual Contact (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. One victim alleged that subject grabbed her breast outside her clothes and placed her hand on his genitals outside his clothes. Another victim alleged subject spilled juice on her thigh as a pretext to rub it off. Convicted at GCM and sentenced to 179 days confinement and reduction to E-3.
302	Aggravated Sexual Assault (Article 120, UCMJ)	CONUS	E1	M	E2	Female	Q2	Aggravated Sexual Assault (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged that subject sexually assaulted her when she was too intoxicated to consent. Subject convicted at GCM and sentenced to 90 days confinement, BCD, reduction to E-1, and total forfeitures.
303	Wrongful Sexual Contact (Article 120, UCMJ)	OCONUS	E7	M	E4	Female	Q1	Wrongful Sexual Contact (Article 120, UCMJ)	Court-Martial Charges Preferred	On-post incident. Victim alleged that subject came into her room while she was napping and took off his clothes and rubbed his penis on her over her clothing. Subject convicted of housebreaking and maltreatment and sentenced to reduction in rank.

The Jerome N. Frank Legal Services Organization

YALE LAW SCHOOL

September 10, 2012

Mark Herrington
Associate Deputy General Counsel
Office of General Counsel
U.S. Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: SWAN III

Dear Mr. Herrington,

Your August 7, 2012 letter purports both to respond to our clients' Freedom of Information Act Request dated July 2, 2012 ("Third FOIA Request")[1] and to document the history of the efforts by the U.S. Department of Defense (DoD) to respond to our clients' prior requests for records. Your letter unfortunately did not adequately respond to the Third FOIA request. In addition, the gratuitous history set forth in your letter is a distortion of our client's good faith efforts to obtain DoD records relating to sexual assault in the military.

Your letter is inadequate as a response to the Third FOIA Request because it did not disclose all responsive, non-exempt records. Nor did it offer to produce responsive records at a future date. As you know, the statutory period for disclosure has now passed. We hope you will promptly provide the records sought and obviate the need for further litigation.

We are not going to rebut each of your letter's mischaracterizations of our clients' efforts to address the underlying problem of pervasive rape and sexual assault in the U.S. military. Correcting one of the more blatant mischaracterizations in your letter should suffice as an example. Your insistence that DoD has been diligent in its responses to requests while also complaining of "unsupported accusations against DoD" and what you perceive as the requesters' "desire . . . not for records, but rather for the ability to claim that DoD has denied [them] access to records," rings hollow in a case in which the Court has already described DoD's conduct as seeming to reflect "almost willful blindness." *SWAN I*, ___ F.Supp.2d ___, 2002 WL 1067670 (D.Conn. Mar. 30, 2012), at *18. As advocates for those who have suffered military rape and sexual assault, we are well-acquainted with the military's long tradition of blaming the victim.

The requesters appreciate that the Department has discharged in part its statutory obligations by undertaking searches and releasing some responsive, non-exempt records in response to prior requests by our clients and orders by the Court. The requesters also credit Secretary Panetta's recent steps to address sexual assault in the military, even as they reiterate their previous calls for DoD to implement more substantial reforms, such as those mandated in H.R 930 and H.R. 1517.

In a good faith effort to facilitate your adequate response to the Third FOIA Request, we are providing the following responses to your "questions regarding latest request":

[1] We did mail a copy to the Army, but note your statement that the Army has not received it .

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1. You quote a portion of the Third FOIA Request, in which the requesters recite their view that the records sought "are the subject of FOIA requests already submitted" in *SWAN I* and *SWAN II*. You then state, "Taken at face value, that assertion means your request is duplicative and DoD need not respond." As you well know, and as set forth in the balance of the paragraph from which you quote and in the succeeding paragraph, it is only because DoD has taken the position that the FOIA request in *SWAN I* does not seek individual records, and further that the department need only consider the original, unnarrowed FOIA request in *SWAN II*, that the requesters have submitted the Third FOIA Request. In the view of requesters, the Third FOIA Request is duplicative, but based on DoD's prior representations to the Court, in the opinion of DoD it is not. The Third FOIA Request is simply a formal narrowing of the second request, consistent with the Court decision in *SWAN II*. DoD is obliged to respond to the Third FOIA Request.

2. "Are you asking that a search for these records [sought in the Third FOIA Request] be completed only upon final resolution, including any appeals, of *SWAN I* and *SWAN II*?" No.

3. "If DoD were to produce everything listed in your current request, would you still insist that you are entitled to the broader request dated June 24, 2011, or the request listed in your settlement proposal of December 29, 2011?" No, we would not. If DoD were to produce everything listed in the Third FOIA Request, we would not seek further records in *SWAN I* or *SWAN II*. The Third FOIA Request is nearly identical to the Plaintiffs' settlement proposal dated May 22, 2012, in which they offered to release their claims against DoD in exchange for disclosure of the records described therein.

4. You ask for clarification of the "time scope" of the Third FOIA Request. The date ranges of the Third FOIA Request speak for themselves, and explicitly seek EO, NJP, courts-martial, and FAP records since October 1, 2007. You are correct that these date ranges differ slightly from those set forth in the FOIA requests that are at issue in *SWAN I* and *SWAN II*. The Third FOIA Request does not seek to "resolve the requests that are in litigation," it is an independent request for records under FOIA. Nevertheless, as indicated in paragraph 3 above, if DoD were to produce everything listed in the Third FOIA Request, or the nearly-identical set of records outlined in Plaintiffs' settlement proposal dated May 22, 2012, we would agree not to seek further records in *SWAN I* or *SWAN II*.

In the same paragraph in which you inquire about the "time scope" of the Third FOIA Request, you go on to state that "[i]f you consider this a new request, then the portions of the request for records prior to fiscal year 2011 are duplicative of the requests that are in litigation, and do not require a response." This is incorrect. DoD interpreted the requests in *SWAN I* not to seek individual records, and it refused to respond to the requests in *SWAN II* as narrowed by Plaintiffs. The Third FOIA Request explicitly seeks individual records (and thus differs from the requests in *SWAN I*, as interpreted by DoD and affirmed by Judge Kravitz), only specified information about EO, NJP, and courts martial proceedings, and a random sample of FAP complaints (and thus differs from the original requests in *SWAN II*).

Your letter next addresses the substance of the Third FOIA Request.

1. First, you conclude that it would be unduly burdensome to produce every individual record containing offender and victim information, incident details, investigative details, and the resolution of the proceedings of every sexual-assault related court-martial, non-judicial punishment (NJP), and sexual harassment complaint (EO). As to NJP records, your letter further notes that you sent a separate disclosure, related to "Item 11." We responded to the NJP production by letter dated August 31, 2012, and as to the NJP records, refer you to that letter.

In the Third FOIA Request, we sought in the alternative a spreadsheet containing this same information. Your letter does not state that the production of a spreadsheet would be unduly burdensome. Rather, you emphasize that the records already released in these cases or via the SAPRO reports contain some of the records sought herein.

DoD's Item 11 disclosures, the SAPRO reports, and other previous disclosures do provide responses to some of the items listed in the Third FOIA Request, but not to others. For instance, none of these provide much if any information regarding the race/ethnicity of the offender or victim (other than some aggregated statistics), the relationship between the offender and victim, the type of maltreatment initially reported, the recommendation of the investigating officer, or the maximum allowable punishment for the given offense. Contrary to your letter, this information is not "available to the public online" or previously disclosed in these cases.

2. Second, as for FAP complaints, you provide details about the hundreds of pages contained in a sample Marine Corps FAP file. The Third FOIA Request, however, like the May 22, 2012 settlement proposal, does not seek the *entire* FAP file, but only the FAP "complaint" for the sample sizes listed, plus the situation identifiers and races of the victim and alleged offender. We expect that in most cases the complaint will be 1-2 pages. This request thus seeks approximately 25,000 pages, about 0.08% of the 3.26 million pages estimated in your letter.

For nearly two years, requesters have sought the records still at issue in these cases, which contain a level of detail not revealed in the SAPRO reports. For nearly as long, we have proposed that DoD provide random samples –as small as possible - of the various categories of records, with personally identifying information redacted. Judge Kravitz has urged DoD to work with the requesters to implement a sampling approach. Requesters remain willing to resolve this

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case based on random sampling, and continue to believe that such a compromise offers the best path forward.

Sincerely,

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