

This is an action under the Privacy Act, 5 U.S.C. § 552a, et seq., as amended, and the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, et seq., as amended, for the public disclosure of all records pertaining to the investigative file of Case #SSI-0076-2008-CID30123-*P2 (USACIDC COMPUTER CRIMES INVES UNIT FT BELVOIR, VA) which has been withheld from Ms. Gray in its entirety notwithstanding the conclusion that a senior government official had committed a criminal offense punishable by a fine and up to five years in prison. The public’s interest in knowing and understanding the questionable, and at times unlawful, conduct undertaken by several senior ANC officials, to include the Superintendent John C. Metzler, outweighs any privacy interests that these individuals may hold.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the defendants pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552a(g)(1)(D) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. §§ 552(a)(4)(B) and 552a(g)(5) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Jennifer “Gina” Gray (“Gray”) was employed from April to June 2008 as the ANC Public Affairs Officer. Prior to this position she served for 12 years with the U.S. Army in public affairs’ positions; eight years of active duty, and four years as a civilian. This included time in Iraq in 2003 and 2005 and at HQ Department of the Army.

4. Defendant United States Army Criminal Investigation Command (“CID”) is a subentity of the defendant Department of Army and is an agency within the meaning of 5 U.S.C. §§ 552(e) and 552a(a)(1), and is in possession and/or control of the records requested by Ms. Gray which are the subject of this action.

5. Defendant Department of Army (“Army”) is an agency within the meaning of 5 U.S.C. §§ 552(e) and 552a(a)(1), and is in possession and/or control of the records requested by Ms. Gray which are the subject of this action.

FACTUAL BACKGROUND

6. Ms. Gray was employed as the Public Affairs Officer by ANC from April 2008 until she was notified of her termination on June 27, 2008 by Phyllis White (“White”), who had personally conspired with Higginbotham to rid ANC of Ms. Gray.

7. For much of the last two decades ANC has been operated as a fiefdom for its leadership, permeated by egotistical and self-serving attitudes that have grown unchecked over the years due to any significant Army or Congressional oversight of its activities, particularly with respect to the manner in which senior ANC officials treat subordinate employees. The responsibility for the misconduct and/or the lack of proper supervisory actions lies directly at the feet of three senior ANC officials: John C. Metzler, who has served as the ANC Superintendent since 1991, Higginbotham, the Deputy Superintendent since 1990, and White, the Director of Administrative Services since 2003. These three individuals have engaged for years in unlawful or inappropriate and unprofessional activities with little notice until recently.

8. Just days into her new job, Ms. Gray incurred the ire of her supervisors, and particularly Higginbotham, when the *Washington Post* reported on April 24, 2008, that ANC officials were attempting to unduly restrict media access to military funerals. The one positive comment in the article was that Ms. Gray “pushed vigorously to allow the journalists more access to the service yesterday.” The article continued that “she was apparently shot down by other cemetery officials.” Among those “other cemetery officials” was Higginbotham. Mr. Gray was subsequently “demoted” by having her title essentially reduced in rank and her supervisory chain of command modified from the Superintendant to White, who is just a GS-13.

9. It soon became clear that anyone who dared show any semblance of professionalism and independence – which in Ms. Gray’s situation meant following the job description for which she was hired – and demonstrated what was perceived to be a challenge to authority, though it was anything but, fell victim to derogatory, belittling and escalating punishment at the hands of White, Higginbotham and/or Metzler.

10. Ms. Gray met with the Army’s Equal Opportunity Office (“EEO”) on May 29, 2008, and alleged the existence of a hostile work environment and discriminatory conduct based on race and gender. Within days of the EEO investigator interviewing Higginbotham and White, Ms. Gray was suddenly terminated on June 27, 2008. Based on sworn testimony delivered by Higginbotham and White both of them knew at the time of their EEO interviews that Gray was going to be fired yet they intentionally and conspiratorially withheld that information from the investigator.

11. During Ms. Gray’s time of employment and afterwards, one or more ANC officials accessed her e-mail account without her consent. Upon information and belief, it

is believed that this type of unlawful conduct had been ongoing for years by unknown ANC officials to include, but not limited to, the computers of the two prior Public Affairs Officers, both of whom quit in disgust over what they witnessed regarding the failure of leadership at ANC. As a result of its investigation CID agents suspected Higginbotham and/or individuals acting on his behalf of having unlawfully accessed Ms. Gray's computer.

12. An investigation was opened by defendant CID on October 14, 2008, following a formal complaint by Ms. Gray that her ANC e-mail account had been accessed without her consent. The CID investigation, which was finally completed with a cover memorandum dated May 18, 2009, ultimately revealed that on October 8, 2008, "person(s) unknown, committed the offense of Unauthorized Access to a U.S. Government Computer and Wire Fraud when they accessed Ms. GRAY's ANC email account and sent an email reply from the account purporting to be from Ms. GRAY."

13. Additionally, the "[i]nvestigation established Mr. HIGGINBOTHAM committed the offense of False Statements when on 16 Oct 08, he made false and misleading statements to agents from this office regarding access to Ms. GRAY's email account and government computer." In a witness statement White also directly alleged Higginbotham lied. To date, upon information and belief, no punishment has been meted out to Higginbotham as a result of his misconduct, nor has ANC, under the alleged leadership of Metzler, taken any steps to ensure the computers of ANC employees are not illegally accessed in the future.

14. Upon information and belief, Higginbotham was the only witness interviewed by CID who refused to fully answer the investigators' questions, refused to consent to a

search of his computer (which necessitated obtaining a search warrant issued by a United States Magistrate Judge), and retained a private criminal defense attorney, Robert W. Mance, 1050 17th St., N.W., Washington, D.C. 20036.

15. The CID investigation arose parallel to another Army investigation being undertaken by the EEO. As part of the EEO investigation sworn testimony was taken of Metzler, Higginbotham and White. Each individual provided answers that seriously undermined their credibility, at times flatly contradicted each another, and demonstrated evidence of outright lies with respect to Ms. Gray's termination, particularly with respect to the roles they respectively allegedly played or the level of personal knowledge they claimed to possess and when. As far as they were concerned there were no problems at ANC and to the extent any existed, blame lay not at their feet but everywhere and on everyone else. Yet multiple witnesses with firsthand knowledge testified to the hostile work environment that existed due to the leadership, or failure thereof, of these three officials, and that it was, at least in part, based on race and gender. Witness after witness contradicted management's claims that everything was fine or that Ms. Gray was the problem, as well as expressly challenged the notion that they had not been repeatedly made aware of the problematic situation that existed.

16. Higginbotham, in particular, serves as a senior government official with broad responsibilities and supervisory authority over other federal employees. CID's conclusion that he committed the criminal offense of False Statements fits a pattern of practice that weighs heavily in support of the public interest outweighing any privacy interests he may possess. The public record, compiled here for the first time, is replete with multiple derogatory and questionable references concerning Higginbotham that strike at the heart

of his inability to maintain the public's trust. These include his holding himself out as "Dr." Thurman Higginbotham on the website *www.roadsinc.net*, which purports to be an organization of funeral professionals for which he serves as CFO, even though he has never graduated from an accredited academic institution that entitles him to use of the "Dr." designation. The website also directly links Higginbotham to ANC which, upon information and belief, violates one or more Army regulations. More striking is his bankruptcy proceeding that was overseen by the U.S. District Court for the District of Maryland, Case Number 98-23149, which reveals he has a prior criminal conviction from on or after November 15, 1990, for having caused personal injury or death of another by his unlawful operation of a motor vehicle while intoxicated from using alcohol, a drug, or another substance. Yet another unknown criminal conviction from on or after October 22, 1994, is listed as significant enough to be excluded from the discharge of his debts. Other lawsuits reveal a history of family turmoil, including claims against him by his own father and siblings, which no doubt contributed to the negative attitude and retaliatory actions he has emboldened himself to take against subordinates and military Army officers who challenged, or were simply perceived to have challenged, his actions.

17. Upon information and belief, Metzler is aware of the above information yet has failed to take responsible and appropriate actions to ensure trustworthy and competent senior officials serve in high-ranking ANC positions. This, too, fits a pattern of practice over the years that led Metzler to ignore known ongoing and repeated problems within the ANC hierarchy, notwithstanding the fact that he was directly informed of many of these issues by multiple individuals on numerous occasions.

COUNT ONE
(FREEDOM OF INFORMATION/PRIVACY ACT)

18. By e-mail dated May 12, 2009, Ms. Gray requested from CID copies of all records pertaining to her Case #SSI-0076-2008-CID221-30123-8P2.

19. By letter dated May 19, 2009 the CID's FOIA/PA Office acknowledged receipt of Ms. Gray's request, assigned it FOI/PA reference number 09-0666 and indicated the request was being forwarded to the U.S. Army's Crime Records Center, which is part of defendant CID.

20. By letter dated June 1, 2009, CID informed Ms. Gray that her request was received on May 26, 2009, assigned it reference number FA09-2190 and denied her request in its entirety pursuant to "Title 5, USC, Section 522a, Exemption j(2) of the Privacy Act and Title 5, USC Section 522, Exemption (b)(7)(A), (b)(6) and (b)(7)(C) of the Freedom of Information Act."

21. By letter dated June 5, 2009 Ms. Gray timely appealed CID's denial.

22. Additionally, by e-mail and facsimile dated July 1, 2009, Ms. Gray, through counsel, submitted a second FOIA/Privacy Act request to CID which sought "copies of any and all related documents" pertaining to her CID Case # SSI – 0076-2008-CID221-30123-8P2 and indicated that this request "does not replace Ms. Gray's earlier request dated May 13, 2009 or appeal dated June 5, 2009.

23. By letter dated July 7, 2009, CID's FOIA/PA Office acknowledged receipt of the second request, assigned it FOI/PA reference number 09-0824, and indicated the request was being forwarded to the U.S. Army's Crime Records Center, which is part of defendant CID.

24. By letter dated July 24, 2009, CID notified Ms. Gray's counsel that release of the requested records could "affect administrative/disciplinary action" and therefore the records are being withheld until the action has been completed at which time they will be processed. The request was thus denied on the basis of "Exemption (b)(7)(A), (b)(6) and (b)(7)(C) of the Freedom of Information Act." No administrative appeal was submitted.

25. The defendants subsequently notified Ms. Gray as part of the litigation proceedings that her appeal letter dated June 5, 2009 was never received.

26. By facsimile and e-mail dated September 21, 2009, Ms. Gray, through counsel, submitted a third FOIA/Privacy Act request to CID which sought "all records pertaining to: CID Case # SSI -0076-2008-CID221-30123 - 8P2 (USACIDC COMPUTER CRIME INVES UNIT FT BELVOIR, VA). This request does not replace Ms. Gray's earlier request dated May 13, 2009, or appeal dated June 5, 2009, or my earlier request dated July 1, 2009, but is intended to supplement these initial requests and also cover *any and all related documents* pertaining to the investigation, as well as those that have been created or received since these earlier requests were processed."

27. By letter dated September 29, 2009, CID notified Ms. Gray's counsel that the September 21, 2009 request was received on September 22, 2009, and that release of the requested records could "affect administrative/disciplinary action". The request was thus denied on the basis of "Exemption (b)(7)(A), (b)(6) and (b)(7)(C) of the Freedom of Information Act." Additionally, CID reiterated that Ms. Gray's June 5, 2009 appeal had not been received and invited her to resubmit the appeal.

28. By e-mailed letter dated October 4, 2009 (but transmitted October 5, 2009), Ms. Gray, through counsel, timely submitted an appeal of the September 29, 2009 denial as well as resubmitted Ms. Gray's original appeal of June 5, 2009.

29. By e-mail dated October 9, 2009, CID confirmed receipt of the October 4, 2009 appeal. Additionally, CID also acknowledged receipt by an undated letter, which was received on or about October 15, 2009.

30. To the best of Ms. Gray's knowledge, no further responses have been received from the defendants.

31. Ms. Gray has constructively exhausted all required administrative remedies with respect to her requests dated May 12, 2009 and September 21, 2009, and the respective appeals dated June 5, 2009 and October 4, 2009.

32. The defendants unlawfully and intentionally withheld information within the relevant responsive records notwithstanding the fact the CID investigation had already been finalized, that Higginbotham held a high-ranking position with ANC, that there existed strong evidence and degree of wrongdoing, that the defendants are the only available source for the desired information, that the information sought furthers FOIA's main purpose of "opening agency action to the light of public scrutiny," and that the information relates to federal job performance rather than private activity.

33. Ms. Gray has a legal right under the FOIA and the Privacy Act to obtain the information she seeks, and there is no legal basis for the denial by the defendants of said right.

WHEREFORE, plaintiff Gray prays that this Court:

(1) Orders the defendants to disclose the requested records in their entireties and make electronic copies promptly available to her;

(2) Award reasonable costs and attorney's fees as provided in 5 U.S.C. § 552 (a)(4)(E) and/or 28 U.S.C. § 2412 (d);

(3) issue a written finding pursuant to § 552 (a)(4)(F) that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, and refer this matter to the Office of the Special Counsel for a proceeding to determine whether disciplinary action is warranted against the appropriate officer or employee who was primarily responsible for the withholding; and

(4) expedite this action in every way pursuant to 28 U.S.C. § 1657 (a);

(5) grant such other relief as the Court may deem just and proper.

Date: November 9, 2009

Respectfully submitted,

/s/

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