

4. Defendant DEA is a department of the Executive Branch of the government of the United States. DEA is an “agency” within the meaning of 5 U.S.C. § 552(f).

Facts

5. In May 2007, a grand jury for the United States District, Southern District of Ohio returned a 22-count indictment charging Paul Volkman (“Volkman”) with the following: conspiring to unlawfully distribute a controlled substance in violation of 21 U.S.C. §841(a), maintaining drug-involved premises in violation of 21 U.S.C. §856(a)(1), the unlawful distribution of a controlled substance leading to death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c)(1) and (2).

6. Plaintiff Eil, whose father went to college and medical school with Volkman, subsequently began working on a story about Volkman and conducted interviews of Volkman, in 2009 and 2010, among more than 100 other interviews for the project.

7. Volkman’s trial began on March 1, 2011. During the course of the eight-week trial, the government presented 70 witnesses and more than 220 exhibits into evidence. A jury found Volkman guilty on all but two counts in May 2011. On or about January 11, 2012, Plaintiff Eil contacted Assistant U.S. Attorney Timothy Oakley, the lead prosecutor of the Volkman trial, to see the evidence which was admitted in Volkman’s trial. That same day, Attorney Oakley responded that Plaintiff Eil should file a FOIA request with the United States Department of Justice (“DOJ”).

8. On February 1, 2012, Plaintiff Eil sent a FOIA request (the “FOIA Request”) to the Executive Office of U.S. Attorneys (“EOUSA”) requesting “all materials listed in the Exhibit List filed by the government on August 18, 2011 (Doc. #375)” submitted in the case of U.S.A. v.

Volkman, and attached a complete list of exhibits to this letter. A copy of this letter is attached hereto as Exhibit A. Plaintiff Eil also sought “the opportunity to inspect physical items, such as prescription bottles, and receive copies of all other materials (papers, photographs, DVDs, etc.) that can be re-produced.”

9. Neither the Exhibit List, nor the PACER docket, show that any of the exhibits were ordered to be filed under seal.

10. On February 28, 2012, the EOUSA acknowledged receipt of Plaintiff Eil’s FOIA request and assigned it tracking number “12-485.”

11. On March 20, 2012, Plaintiff Eil sent a letter to U.S. District Court Judge Sandra Beckwith, the judge who presided over Volkman’s trial, to see if he could obtain access to the trial exhibits.

12. On or about April 3, 2012, Judge Beckwith responded to Plaintiff Eil stating, in part, that the FOIA request was the appropriate vehicle for Plaintiff Eil to obtain access to these records. She also informed Plaintiff Eil that the entire trial record, including exhibits, had been transferred to the United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”).

13. Following the receipt of Judge Beckwith’s letter, Plaintiff Eil sent a letter to the Sixth Circuit Clerk of Court requesting access to the exhibits from Volkman’s trial.

14. On or about April 17, 2012, Janice Yates, Chief Deputy Clerk of the Sixth Circuit, sent Plaintiff Eil a letter stating that a response to his request would be made after the DOJ conducted its review of the materials.

15. On or about November 29, 2012, nine months after acknowledging receipt of Plaintiff Eil’s request, the EOUSA sent Plaintiff Eil a letter stating that his FOIA request had been processed and that the records Plaintiff Eil requested were being sent to the DEA, which would

respond to Plaintiff Eil directly. The EOUSA notified Plaintiff Eil that it had charged him a \$154 review fee.

16. On or about December 19, 2012, the DEA received the transfer of the FOIA Request from the EOUSA.

17. Four and a half months later, on or about May 7, 2013, the DEA sent Plaintiff Eil a First Partial Release in response to the FOIA Request. In this First Partial Release, the DEA stated that the DEA's Freedom of Information/Privacy Act Unit ("SARF") had completed its review of 150 pages of the approximately 15,000 referred pages of his request and that certain materials would be released to Plaintiff Eil, while others were being withheld pursuant to the Freedom of Information Act, 5 U.S.C. §552, and/or the Privacy Act, 5 U.S.C. §552a.

18. The First Partial Release specified that the DEA was withholding documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E), which state that FOIA is inapplicable to "[r]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; [or] ... (E) would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law[.]"

19. Per the DEA, the agency withheld 105 pages and released 45 pages to Plaintiff Eil in the First Partial Release. Of the 45 released pages, 35 of the pages are copies of the front cover, spine and opening pages of various "Dangerous Drug/Controlled Substance" logs used in Volkman's clinic, from which the contents were withheld. Examples of these documents are attached hereto as Exhibit B.

20. Two months later, on or about July 1, 2013, the DEA sent Plaintiff Eil a Second Partial Release in response to the FOIA Request. In this Second Partial Release, the DEA stated that SARF had completed its review of 300 pages of the approximately 15,000 referred pages of his request. The DEA withheld documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E).

21. Per the DEA, it withheld 287 pages and released 13 pages in the Second Partial Release. Again, these released pages consist of the cover, spine and title pages (or blank pages) from a record log. Copies of some of these pages are attached hereto as Exhibit C.

22. On or about July 30, 2013, the DEA sent Plaintiff Eil a Third Partial Release in response to the FOIA Request. In this Third Partial Release, the DEA stated that SARF had completed its review of 1,232 pages of the approximately 15,000 referred pages of his request. The DEA withheld documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E).

23. According to the DEA, it withheld 1,225 pages (99.43 percent of the documents it processed) and released 7 pages in its Third Partial Release. Of the documents it provided, the seven pages contain two blank "Medication Record" pages and a blank cover page. Copies of some of these pages are attached hereto as Exhibit D.

24. Nearly seven months later, on or about February 20, 2014, the DEA sent Plaintiff Eil a Fourth Partial Release in response to the FOIA Request. In this Fourth Partial Release, the DEA stated that SARF had completed its review of 1,853 pages of the approximately 15,000 referred pages of his request. The DEA withheld documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E).

25. The DEA indicated that it withheld 513 pages and released 108 pages in its Fourth Partial Release.

26. On or about May 1, 2014, the DEA sent Plaintiff Eil a Fifth Partial Release in response to the FOIA Request. In this Fifth Partial Release, the DEA stated that SARF had completed its review of 2,158 pages of the approximately 15,000 referred pages of his request. The DEA withheld documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E).

27. It appears that the DEA withheld 181 pages and released 123 pages in its Fifth Partial Release, though, unlike previous partial fulfillment packages, this release did not include an official tally of pages withheld and released in its cover letter.

28. On or about October 29, 2014, Plaintiff Eil called the DEA's FOIA Request Service Center for an estimated date of completion. His requests were denied by two DEA FOIA employees. Plaintiff Eil followed up with an email on November 3, 2014 citing 5 U.S. §552(a)(7), which requires agencies to provide the requester with an estimated date of completion.

29. On or about November 10, 2014, the DEA sent Plaintiff Eil a Sixth Partial Release in response to his February 1, 2012 FOIA request. In this Sixth Partial Release, the DEA stated that SARF had completed its review of a "portion" of the approximately 15,000 referred pages of his request and specifically that it had reviewed and processed 1,290 pages since the Fifth Partial Release. Of these 1,290 pages, the DEA stated that 980 of them contained third-party information that is not releasable without proof of death or an original notarized authorization and that they were exempt from disclosure under FOIA exemptions. Plaintiff Eil does not know, and has no way of determining, the identities of these third parties. Further, the DEA withheld additional documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E).

30. Included in the documents the DEA released in this installment is a 133-page slide show in which the substance from nearly every single slide is redacted. Copies of some of these

slides are attached hereto as Exhibit E. Additionally, the DEA included heavily redacted photographs, copies of which are attached hereto as Exhibit F.

31. In response to Plaintiff's Eil's requests, in its Sixth Partial Release, the DEA stated that its estimated timeline for completion of the FOIA Request would be five months from the date of the Sixth Partial Release.

32. Plaintiff Eil wrote to Senator Sheldon Whitehouse and Congressman David Cicilline on November 22nd and November 25th, respectively, to inform them that the DOJ had taken more than 33 months to process roughly 23 percent of the FOIA request and to seek assistance regarding the same.

33. On or about December 2, 2014, Senator Whitehouse sent a letter to the DEA Acting Section Chief of Congressional Affairs, Erik Akers, requesting that he review and address Plaintiff Eil's concerns, in accordance with all applicable rules and regulations of the agency.

34. On or about December 9, 2014, Plaintiff wrote to Senator Jack Reed to inform him of the DEA's delay in responding to the FOIA request and to seek assistance.

35. On or about December 9, 2014, Plaintiff Eil sent a letter to the FOIA Ombudsman at the National Archives and Records Administration's Office of Government Information Services to inquire about the FOIA request.

36. On or about December 15, 2014, the DEA sent Plaintiff Eil a Seventh Partial Release in response to the FOIA Request. In this Seventh Partial Release, the DEA stated that SARF had completed its review of a "portion" of the approximately 15,000 referred pages of his request and specifically that it had reviewed and processed 2,927 pages since the Sixth Partial Release. Of these 2,927 pages, the DEA stated that 2,623 of them contained third-party information that is not releasable without proof of death or an original notarized authorization and

that they were exempt from disclosure under FOIA exemptions. Plaintiff Eil does not know, and has no way of determining, the identities of these third parties. Further, the DEA withheld additional documents pursuant to 5 U.S.C. §§ 552(b)(7)(C) and (b)(7)(E). Over 100 pages contained in this installment are legal agreements or notices with identifying information (signatures or initials) redacted, effectively leaving Plaintiff Eil with multiple copies of the same form documents (i.e., Narcotic Pain Medication Releases, Notices of Privacy Practices and Drug Screen Agreements). Copies of some of these documents are attached hereto as Exhibit G. Additionally, more than 40 pages are blank physical examination sheets. A copy of such a document is attached hereto as Exhibit H.

37. On or about December 16, 2014, Plaintiff Eil received a letter from Congressman Cicilline stating that he forwarded Plaintiff Eil's concerns to Mr. Akers.

38. On or about December 18, 2014, Plaintiff Eil received an e-mail from Senator Reed stating that he has shared Plaintiff Eil's concerns with the DEA.

39. On or about January 26, 2015, the DEA sent Plaintiff Eil an Eighth Partial Release in response to the FOIA Request. In this Eighth Partial Release, the DEA stated that SARF had completed its review of a "portion" of the approximately 15,000 referred pages of his request and specifically that it had reviewed and processed 4,165 pages since the Seventh Partial Release. Of these 4,165 pages, the DEA stated that 3,837 of them contained third-party information that is not releasable without proof of death or an original notarized authorization and that they were exempt from disclosure under FOIA exemptions. Plaintiff Eil does not know, and has no way of determining, the identities of these third parties. Further, the DEA withheld additional documents pursuant to 5 U.S.C. §§ 552(b)(7)(C). Included in this installment were more than 100 pages of

pain-clinic sign-in sheets and appointment-book pages which were completely redacted except for the dates on each page.

40. On or about February 11, 2015, the DEA sent Plaintiff Eil a Ninth Partial Release in response to the FOIA Request. In this Ninth Partial Release, the DEA stated that SARF had completed its review of a “portion” of the approximately 15,000 referred pages of his request and specifically that it had reviewed and processed 1,735 pages since the Eighth Partial Release. Of these 1,735 pages, the DEA stated that 1,373 of them contained third-party information that is not releasable without proof of death or an original notarized authorization and that they were exempt from disclosure under FOIA exemptions. Plaintiff Eil does not know, and has no way of determining, the identities of these third parties.

41. More than 350 of the 362 pages that the DEA released to Plaintiff Eil in its Ninth Partial Release consisted of pain-clinic sign-in sheets which were redacted of all substantive information. Attached hereto as Exhibit I are examples of these pages.

42. On or about February 19, 2015, Plaintiff Eil received a letter Senator Whitehouse forwarded to him from Mr. Akers, which stated that the DEA had processed about two-thirds of the 15,000 pages and estimated that the review would be completed in advance of the five-month estimate the DEA made in November 2014.

43. To date, upon information and belief, the DEA has reviewed and processed 12,724 pages of Plaintiff Eil’s request. Upon information and belief, this does not account for any of the physical or multimedia evidence, including numerous DVDs, which is also part of the FOIA request.

44. To date, the DEA has withheld 11,124 pages (87.4 percent) of the 12,724 pages it has reviewed of Plaintiff Eil's request; however, Plaintiff is uncertain of the precise number of pages reviewed and released because of the DEA's inconsistencies in its letters to Plaintiff Eil.

45. To date, hundreds of the 1,600 pages produced have been largely redacted, making these documents effectively no more than blank pages.

46. The FOIA request has been pending more than three years.

47. The EOUSA acknowledged receipt of the FOIA request over three years ago.

48. The EOUSA transferred the records to the DEA more than two years ago.

49. The DEA received the transfer more than two years ago.

50. The DOJ has stated that Dr. Volkman, who was dubbed the "pill mill killer" in the press, was the "largest physician dispenser of oxycodone in the U.S. from 2003 - 2005." Further, it has been stated that his improper prescribing led to the deaths of at least 14 people. On February 14, 2012, Dr. Volkman was sentenced to four consecutive life terms in prison, plus additional lesser sentences to be served concurrently. Upon information and belief, this is one of the lengthiest criminal sentences for a United States physician. The Centers for Disease Control and Prevention has classified abuse of prescription drugs as a national epidemic, affecting millions of individuals and leading to thousands of drug-related deaths each year. Plaintiff Eil intends to write a book about these topics but cannot do so without first reviewing the exhibits which were presented to the jury in the Volkman trial.

COUNT I

51. Plaintiff Eil repeats and realleges Paragraphs 1 – 50 as if fully set forth herein.

52. Plaintiff Eil is the requestor of public records which the DEA is withholding or has withheld.

53. Plaintiff Eil has requested this information for use to write a book and prompt release of the information is important because of the immediate public interest in such information.

54. The DEA has possession of the documents Plaintiff Eil seeks and which it has wrongfully withheld and/or redacted.

55. Plaintiff Eil has a right of access to the requested public information under 5 U.S.C. § 552(a)(3), and there is no legal basis for the DEA's denial of such access.

WHEREFORE, Plaintiff requests this Court:

- 1) Issue a declaration that Defendant DEA has wrongfully withheld and redacted documents;
- 2) Order Defendant to provide access to the requested documents;
- 3) Expedite this proceeding as provided for in 28 U.S.C. § 1657;
- 4) Award Plaintiff costs and reasonable attorneys fees in this action, as provided in 5 U.S.C. § 552(a)(4)(E); and
- 5) Grant such other and further relief as it may deem just and proper.

Plaintiff,

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By His Attorneys,

/s/ Neal J. McNamara

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