



a substantive response to his requests in most cases, much less any actual records. Instead, defendants have either ignored his requests, passed the buck to the National Archives & Records Administration (“NARA”) or dragged their feet. None of these “responses” complies with the requirements of FOIA and plaintiff requests that this Court order defendants to comply promptly with their unambiguous obligations under the Act.

## **II. JURISDICTION AND VENUE**

2. This Court has both personal jurisdiction over the parties and subject matter jurisdiction over this action pursuant to 5 U.S.C. § 552 (a) (4) (B) and 28 U.S.C. § 1331 as this action arises under FOIA. This District is the proper venue for this action under 5 U.S.C. § 552 (a) (4) (B).

## **III. THE PARTIES**

3. Plaintiff David Mermelstein is a citizen of the United States and resides in Miami, FL. Plaintiff was born in Hungary in 1929, managed to survive the Holocaust, emigrated to the United States in 1947 and became a naturalized citizen of the United States in 1954. Valuable personal property belonging to him and other Hungarian Jews was forcibly seized by the Nazis, later taken into custody by the United States from the so-called Werfen Train or Hungarian Gold Train (the “Gold Train”), and subsequently misappropriated by the United States. Plaintiff sought to learn, through the FOIA requests that are the subject of this complaint, the laws, rules, regulations and policies of the United States governing property of non-combatants in occupied Austria in the post-World War II era, as well as the policies of the United States governing the restitution of Holocaust assets. Plaintiff is also a named plaintiff in a class action lawsuit pending in the United

States District Court for the Southern District of Florida titled *Rosner v. United States*, No. 01-1859-CIV-SEITZ, which seeks compensation from the United States for his property and the property of other Hungarian Jews that was on the Gold Train. This lawsuit, however, seeks to vindicate plaintiff's separate and independent right under FOIA, just as any other U.S. citizen, to obtain information from the government concerning his property.

4. Defendant Department of Defense ("DOD") is a department of the Executive Branch of the United States government. DOD is an "agency" within the meaning of 5 U.S.C. § 552 (e) and has possession of and control over certain of the records plaintiff seeks.

5. Defendant Department of the Army ("DOA") is a component of DOD. DOA is an "agency" within the meaning of 5 U.S.C. § 552 (e) and has possession of and control over certain of the records plaintiff seeks.

6. Defendant Department of State ("DOS") is a department of the Executive Branch of the United States government. DOS is an "agency" within the meaning of 5 U.S.C. § 552 (e) and has possession of and control over certain of the records plaintiff seeks.

#### **IV. PLAINTIFF'S FOIA REQUESTS TO DOD**

7. By letter to defendant DOD dated December 18, 2002, plaintiff requested copies of certain DOD records (the "December 18 DOD Request"). Specifically, plaintiff requested:

a) all agency records generated or received by the DOD regarding United States military field manuals, regulations, codes or other documents that existed in 1945, which governed the conduct of United States forces overseas dealing with property of non-combatants; and

b) all other presentations, testimonies, meetings, notes, articles, news releases or other documents related to the previous request.

8. DOD did not respond to the December 18 DOD Request.

9. Plaintiff wrote again to DOD on April 30, 2003, again requesting copies of DOD records (the "April 30 DOD Request"). Specifically, plaintiff requested:

a) all laws, regulations, codes or other documents that governed the conduct of United States forces in Austria from 1945 to 1950; and

b) laws, regulations, codes or other documents that comprise or relate to the applicability of U.S. law to occupied Austria from 1945 to 1950.

10. On May 28, 2003, DOD wrote plaintiff's attorney a tardy and non-responsive letter, telling him that the requested records, if they existed, would be at the National Archives & Records Administration ("NARA") and inviting him to contact NARA.

11. Plaintiff has received no further written response from DOD regarding either of his requests, nor has he received any agency records in response to either of his requests to DOD.

## **V. PLAINTIFF'S FOIA REQUESTS TO DOA**

12. By letter to defendant DOA dated December 18, 2002, plaintiff requested copies of certain DOA records (the "December 18 DOA Request"). Specifically, plaintiff requested:

a) all agency records generated or received by DOA regarding United States Army field manuals, regulations, codes or other documents that existed in 1945, which governed the conduct of United States forces overseas dealing with property of non-combatants; and

b) all other presentations, testimonies, meetings, notes, articles, news

releases or other documents related to the previous request.

13. DOA did not respond substantively to the December 18 DOA Request. Rather it sent plaintiff's attorney a letter on January 9, 2003, stating that it had referred the December 18 DOA Request to the National Archives & Records Administration ("NARA") "[a]s a matter under its purview, in the event that records exist...." NARA wrote plaintiff's attorney on January 17, 2003, informing him that it had received the request and had referred it to the "appropriate office." NARA wrote again on January 21, 2003, informing plaintiff's attorney that it had located approximately 7,000 pages concerning the general subject matter of plaintiff's request, but could not "undertake the extensive research necessary to identify the exact documents in which your client is interested." NARA then invited plaintiff to come and conduct his own search.

14. Plaintiff wrote again to DOA on April 30, 2003, requesting copies of certain DOA records (the "April 30 DOA Request"). Specifically, plaintiff requested:

- a) all laws, regulations, codes or other documents that governed the conduct of United States forces in Austria from 1945 to 1950; and
- b) laws, regulations, codes or other documents that comprise or relate to the applicability of U.S. law to occupied Austria from 1945 to 1950.

15. And once again, by letter dated May 8, 2003, DOA passed the buck to NARA. Plaintiff has received no further written response from DOA regarding either of his requests, nor from NARA, nor has he received any agency records in response to either of his requests to DOA.

## **VI. PLAINTIFF'S FOIA REQUESTS TO DOS**

16. By letter to defendant DOS dated December 18, 2002, plaintiff requested

copies of certain DOS records (the "December 18 DOS Request"). Specifically, plaintiff requested:

a) all agency records generated or received by DOS regarding statements made by Mr. Randolph M. Bell, Assistant Secretary of State for European Affairs, United States Department of State, or his predecessors, or any other person senior to Mr. Bell or their predecessors, relating to the United States government's or any other country's policy on restitution of Holocaust assets; and

b) All other presentations, testimonies, meetings, notes, articles, news releases or other documents related to the previous request.

17. DOS wrote plaintiff's attorney a tardy response on January 13, 2003, asserting that the December 18 DOS Request lacked sufficient information to ascertain which records were being requested because it lacked a time frame.

18. Plaintiff wrote DOS once again on April 30, 2003, requesting copies of certain DOS records (the "April 30 DOS Request"). Specifically, plaintiff requested:

a) all written or transcribed statements made by Mr. Randolph Bell, Special Envoy for Holocaust Issues, United States Department of State, and Mr. James Bindenagel, Senior Advisor for Restitution and Holocaust Issues, United States Department of State, or their predecessors, or any other person senior to Mr. Bell or Mr. Bindenagel, or their predecessors, relating to the United States' or any other country's policies on restitution of Holocaust assets; and

b) all laws, regulations, codes or other documents that comprise or relate to the applicability of U.S. laws to or in occupied Austria in 1945-1950.

19. DOS wrote a tardy response to the April 30 DOS Request on July 18, 2003, in which it informed plaintiff's attorney that it would produce the requested records as soon

as they were retrieved and reviewed, but that it anticipated that its response would be “delayed” in view of the number, range and complexity of the requests it was receiving.

20. More than four months later, plaintiff has received no agency records from DOS in response to either of his requests.

## **VII. DEFENDANTS’ VIOLATIONS OF FOIA**

21. Defendants have violated FOIA in at least the following ways: By failing to respond to plaintiff’s requests; by failing to respond timely to plaintiff’s requests; and by failing to provide access to agency records within the time provided by law. More than twenty working days have passed since plaintiff made each of his requests. Plaintiff has a statutory right to disclosure of the records requested in each of his requests, and there is no legal basis for defendants’ failure to respond in a timely manner and to produce the requested records.

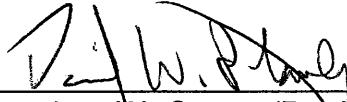
### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays that this Court:

- A. Declare that defendants’ failure to disclose the records requested by plaintiff is unlawful;
  - B. Order defendants to comply with FOIA and to promptly provide plaintiff access to the requested agency records;
  - C. Award plaintiff costs and reasonable attorneys fees incurred in this action;
- and
- D. Grant such other relief as the Court may deem just and proper.

December 18, 2003

Respectfully submitted,



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