



### **Parties**

2. COVA is a non-profit public interest association with a mailing address of 600 Beulah Road, Pittsburgh, Pennsylvania 15235. COVA is a group of individuals with a united purpose of advocating for veterans and their families.

3. DVA is the department of the United States government responsible for providing federal benefits, including health and medical services, to veterans and their families.

### **Jurisdiction and Venue**

4. This Court has subject-matter jurisdiction over this action pursuant to FOIA, 5 U.S.C. § 552(a)(4)(B), which grants a district court of the United States jurisdiction to enjoin an agency from improperly withholding records and to order the production of any agency records improperly withheld from the complainant, and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.* and 28 U.S.C. § 1331.

5. Venue is proper in the Western District of Pennsylvania because the Plaintiff organization, and most of its members, reside there and because at least some of the records sought are situated there.

### **Facts**

6. In or around 2003, DVA instituted a program it called Capital Asset Realignment for Enhanced Services, or “CARES”. The purpose of this program was to seek ways in which DVA could reduce its costs while still preserving benefits to this country’s many veterans and their families.

7. In February of 2004, as part of the CARES program, a special commission endorsed a plan to close the DVA's Highland Drive facility located at 7180 Highland Drive, Pittsburgh, PA 15206.

8. The Highland Drive facility was the largest of the three Pittsburgh-area VA medical facilities. The other facilities are located in O'Hara Township and in the Oakland section of the City of Pittsburgh.

9. On or about May 7, 2004, the Secretary of DVA officially approved the plan to close the Highland Drive facility.

10. DVA labeled this closure a "consolidation" or "realignment" of services, stating that the services currently performed at the Highland Drive facility would be transferred to the facilities in O'Hara Township and Oakland. The program sought \$200 million in federal funds for the expansion of the O'Hara Township and Oakland facilities.

11. Many veterans groups, individuals and representatives of the media became concerned about the closure of the Highland Drive facility. Concerns were raised about a number of issues, including but not limited to:

(a) Why the DVA would plan to close the Highland Drive facility before Congress actually allocated funds for the expansion of the other two facilities, and whether such funding would actually be awarded.

(b) Whether the two other facilities would have sufficient capacity and staffing to provide quality care to this region's many veterans and their families.

(c) The Highland Drive facility treats many veterans with post-traumatic stress disorder and various psychiatric disorders who require a calm atmosphere, and these

patients would now be required to travel into Oakland, which is admittedly a much busier and more urban area than the Highland Drive facility.

(d) Whether the DVA was sufficiently accounting for the anticipated increase in the need for services as a result of veterans returning from Iraq and Afghanistan.

12. DVA represented that the closure of the Highland Drive facility was necessary because it would improve efficiency over the long haul and eventually save money. DVA also represented that services would not diminish as a result of the planned closure.

13. DVA held one public meeting in the Pittsburgh area regarding the proposed closure, but excluded certain organizations, including COVA, from speaking at that meeting.

14. Further, the only information provided by DVA to support its representations were summaries or overviews of the DVA's conclusions. DVA did not provide to the concerned groups, individuals or representatives of the media the underlying information that DVA considered when determining that closure of the Highland Drive facility was appropriate and would not compromise veterans' access to quality healthcare.

15. On or about June 15, 2004, COVA submitted a request to DVA under the Freedom of Information Act, 5 U.S.C. § 552, for certain information that would enable it to verify DVA's representations and determine whether the closure of the Highland Drive facility would have an adverse impact on veterans and their families. A true and correct copy of this request is attached hereto as Exhibit 1.

16. COVA's request included a request for a waiver of fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), because COVA had no source of funds with which to pay any such fees. COVA asserted that disclosure of the requested information was in the public interest because it was likely to contribute significantly to public understanding of the operations or activities of the

government (namely, how DVA determined that closure of the Highland Drive facility was in the best interests of veterans and their families) and that its request was not in the commercial interest of COVA.

17. Although FOIA requires an agency to respond to a request within ten days (See 5 U.S.C. § 552(a)(6)(A)), DVA did not provide a response until September 24, 2004, over three months later.

18. In its September 24, 2004 response, the DVA denied COVA's request for a fee waiver. A true and correct copy of this response is attached hereto as Exhibit 2.

19. DVA's response cited two reasons for the denial of a fee waiver. First, DVA asserted that COVA was "not in a position to disseminate the requested information to the general public, as opposed to a narrow segment of interested persons." Second, DVA asserted that COVA's request "does not describe how dissemination of the information sought will contribute significantly to the public's understanding of the operations or activities of the government."

20. DVA advised COVA that the fee for the requested documents was \$30,369.75.

21. In response, COVA submitted a revised request on December 8, 2004. COVA's revised request reduced the number of documents requested so as to minimize costs to DVA. COVA's revised request also provided additional information to establish that COVA qualified for a fee waiver. A true and correct copy of the December 8, 2004 request is attached hereto as Exhibit 3.

22. The December 8, 2004 request explained in part as follows:

The disclosure of this information is in the public interest because it is likely to contribute significantly to the public's understanding of the operations or activities of the government. The Department apparently has determined that these service reductions and now closure of a facility were necessary, and

veterans in Western Pennsylvania would like to understand the reasons why this conclusion was reached. Many veterans fear that the Oakland facility will be unable to handle the capacity of all patients that are now distributed between the Oakland and Highland Drive facilities, especially given the lack of funding for the transfer of these services.

23. With respect to DVA's determination that COVA was not in a position to disseminate the information to the public at large, COVA's December 8, 2004 request detailed how COVA had both the ability and intention to disseminate the information to the public. In particular, in addition to COVA's several hundred members, COVA has relationships with many other organizations, including the Veterans' Affairs Committee of the Pittsburgh NAACP, the Disabled Veterans of America, the American Legion and the Veterans of Foreign Wars. Further, COVA intends to provide the information to Senator Arlen Specter to supplement hearings he held in 2004 regarding the closure of the facility, and to the media, which has shown a high level of interest in the proposed closure.

24. On January 4, 2005, DVA again denied COVA's request for a fee waiver. DVA's response summarily concluded:

We cannot see by your identity or by any statement in your request where you are in a position or have the ability or intention to disseminate the requested information to the general public. Your request also does not describe how dissemination of the information sought will contribute significantly to the public's understanding of the operations or activities of the government. Consequently, your fee waiver is denied.

A true and correct copy of this denial is attached hereto as Exhibit 4. Due to the reduction in the number of documents requested, DVA's fee was adjusted to \$17,238.57, an amount that was still far in excess of COVA's ability to pay.

25. On March 9, 2005, COVA appealed the denial of fee waiver to the General Counsel of DVA, pursuant to 38 C.F.R. §§ 1.555 and 1.557. A true and correct copy of that appeal is attached hereto as Exhibit 5.

26. COVA's March 9, 2005 letter included copies of numerous newspaper articles describing the closure of the Highland Drive facility and the concerns such closure has raised among numerous groups. The letter further explained why the requested information would contribute significantly to the public's understanding of the government's decision to close the Highland Drive facility and the analysis underlying that decision. The appeal also detailed how COVA would disseminate the information upon receipt. In particular, the appeal stated that COVA would disseminate the information (1) through the internet; (2) through a newsletter to its members; (3) by providing the information to the many organizations and associations with which it is affiliated; (4) by providing the information to the media; and (5) by providing the information to Senator Arlen Specter to supplement his recent hearings regarding the impact of the proposed closing.

27. On June 21, 2005, General Counsel for DVA affirmed the denial of a fee waiver. This response cited two reasons for affirming the denial, although they were not the same reasons cited by DVA for the first two denials. A true and correct copy of this response is attached hereto as Exhibit 6.

28. The first stated reason for affirming the denial was that: "there is no indication that the materials are appreciably informative about government operations and will significantly increase the public's understanding of the subject matter. It is unclear how the surveys, polls, statistics, agreements, contracts and data you seek will inform the public of VA operations or activities since they do not reflect the observations and analyses of agency officials who are in a

position [to] represent the agency. It also appears unlikely that the disclosure will enhance the public's understanding of VA operations or activities to a considerable extent as compared to the level of understanding before the disclosure.”

29. COVA submits that these statements are, for several reasons, disingenuous. First, COVA is seeking this information so that it can confirm or refute DVA's conclusion and representations that closing the Highland Drive facility will not adversely affect health and mental health services for veterans. Therefore, the requested information relates directly to the “observations and analyses of agency officials” and will help the public understand the basis for those observations and analyses. Second, it is unreasonable to expect COVA to describe how “appreciably informative” the documents requested are before those documents are produced publicly. Because those documents have not yet been produced, neither COVA nor any other entity could describe the contents of those documents. Third, DVA's conclusory statement that disclosure would not enhance public understanding “compared to the level of understanding before the disclosure” is without basis. Currently, the public has no ability to understand and verify the analyses and observations that led to DVA's decision to close the Highland Drive facility, other than DVA's own conclusory statements to the press or the public.

30. DVA's second stated basis for affirming the denial of the fee waiver is that COVA is not sophisticated enough to understand and analyze the documents requested:

Although you have expressed an intent to disseminate the information to the public, there is no indication that, with respect to the particular records requested, you are able to evaluate, analyze and present the voluminous materials in a form intelligible and understandable to the general public.

31. Again, COVA submits that this statement is disingenuous. First, FOIA does not require a person requesting records to meet some minimal educational requirement. Second,

COVA is a non-profit public interest group whose sole purpose is to protect veterans' interests. Therefore, COVA clearly has knowledge generally about veterans' issues and the level of care offered by VA facilities. Third, because COVA has not yet seen these documents, it cannot provide any more specificity as to its ability to review and analyze the materials. Although General Counsel described the documents as "particularly technical," it is believed that General Counsel did not actually review these documents before submitting his response. DVA's first two responses said nothing about the allegedly "technical" nature of the documents requested. Fourth, COVA advised DVA that it would be sharing the information with various other groups interested in these materials, including the Disabled Veterans of America, the American Legion, the Thomas Merton Center, the Pennsylvania Association of Individuals with Disabilities, the Veterans of Foreign Wars, and the American Federation of Government Employees, as well as Senator Arlen Specter. Clearly, COVA has sufficient resources to assist it in evaluating and analyzing the requested information no matter how "particularly technical" it may be.

### **COUNT I**

32. COVA incorporates by reference paragraphs 1 through 31 of the Complaint as though set forth fully herein.

33. FOIA provides that documents shall be produced without charge in certain circumstances. In particular, it provides:

Documents shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it 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).

34. DVA's regulations additionally provide as follows:

The following factors will be considered in sequence in determining whether disclosure of information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government:

- (i) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;
- (ii) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;
- (iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding; and
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

38 C.F.R. § 1.555 (f)(2).

35. FOIA requires each government agency to promulgate regulations establishing procedures and guidelines for determining when such fees should be waived, and is not permitted to deny a waiver request on bases other than those set forth in the promulgated regulations.

36. COVA submits that DVA improperly and unlawfully denied its requests for a fee waiver.

37. DVA's stated reasons for denying COVA's requests for a fee waiver are inaccurate and in any event not a valid basis for denying COVA's requests.

38. COVA's requests satisfy all of the requirements for a fee waiver.

39. COVA's request is not primarily in the commercial interest of the requester.

40. COVA's request is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government.

41. COVA's several requests make clear that COVA has the ability and intention to disseminate the information to a significant segment of the general public.

42. The dissemination of this information is likely to contribute significantly to the public's understanding of DVA's rationale for its decision to close the Highland Drive facility. To date, DVA has provided little if any information that would allow the public to confirm or refute the alleged costs savings from the closure and DVA's representations that patient care would not suffer.

43. Indeed, COVA's concerns regarding the DVA's observations and analyses have been verified at least in part in recent weeks due to the disclosure that DVA significantly underestimated the number of veterans that would be seeking care and that DVA had a budget shortfall of an astonishing \$1 billion. The increase in need for services as a result of veterans returning from Iraq and Afghanistan was one of the concerns raised by COVA and others for the past two years, and it now appears that DVA's consideration of this concern was completely inadequate.

44. COVA has no regular source of income and cannot possibly pay the fee assessed by DVA. As a result, DVA's denial of COVA's request for a fee waiver effectively denies COVA, and other veterans' groups with whom it plans to share the documents, its right to this information.

45. COVA meets all of the requirements of 5 U.S.C. § 552 (a)(4)(iii) and, therefore, is entitled to a fee waiver.

46. COVA is entitled to reasonable attorneys' fees and costs incurred as a result of the denial of its requests for a fee waiver.

WHEREFORE, the Coalition of Veterans Advocates respectfully requests that this Honorable Court:

(a) Enjoin DVA from assessing a fee for the production of documents requested by COVA;

(b) Enter an Order that COVA is entitled to a fee waiver in accordance with 5 U.S.C. § 552 (a)(4)(iii), and requiring DVA to produce the requested documents without charge;

(c) Conduct, pursuant to 5 U.S.C. 552 (a)(4)(B), an in camera review in the event any FOIA exemptions are claimed after this late date;

(d) Award COVA reasonable attorneys' fees and litigation costs, as provided for by 5 U.S.C. § 552 (a)(4)(E);

(e) Award COVA such other relief as the Court deems just and equitable.

Respectfully submitted,

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