

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Teresa C. Chambers,

Plaintiff;

v.

Civil Action No. 1: 05CV00380 (JR)

U.S. Department of the Interior,

Defendant.

**PLAINTIFF'S MEMORANDUM OF POINTS & AUTHORITIES
IN OPPOSITION TO DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

INTRODUCTION

Presently before the Court is the Defendant's Motion for Summary Judgment. The Defendant's Motion is not supported by the facts or the law. Plaintiff submits her Memorandum in Opposition, Opposition to Defendant's Statement of Undisputed Material Facts, and her affidavit with exhibits.

I. Factual Background

Plaintiff Teresa Chambers entered the law enforcement profession in 1976 and, after more than 21 years of service, retired at the rank of major from the Prince George's County Police Department, a large police department in the Washington, D.C., area, in order to accept a job as the Chief of Police in Durham, North Carolina, where she served for four years. Affidavit of Teresa C. Chambers ("Chambers' Aff't") included as Attachment A to Plaintiff's Memorandum at ¶ 2.

Ms. Chambers received her bachelor's degree in law enforcement / criminology from the University of Maryland University College and a master's degree in applied behavioral science with a concentration in community development from Johns Hopkins University. She is also a graduate of the FBI National Academy and the FBI's prestigious National Executive Institute. Chambers' Aff't ¶ 3.

Ms. Chambers competed in the Fall of 2001 with candidates from across the United States for the position of Chief of the United States Park Police. Ms. Chambers was offered the position by National Park Service (NPS) Director Frances P. Mainella and began working in that capacity on February 10, 2002. Her day-to-day supervisor was Deputy Director Donald W. Murphy. Chambers' Aff't ¶ 4.

From February 10, 2002, through July 9, 2004, Ms. Chambers was employed as the Chief of the United States Park Police, a subdivision of the National Park Service, Department of the Interior. Chambers' Aff't ¶ 5.

On September 22, 2003, Chief Chambers received an email from her supervisor, National Park Service Deputy Director Donald W. Murphy in which he wrote, in part, "I have completed your performance appraisal." Chambers' Aff't ¶ 6.

On or about September 22, 2003, Deputy Director Murphy saw Chief Chambers in person and told her that he had "completed" her performance appraisal and added, "Don't worry. It's a good one." Chambers' Aff't ¶ 7.

This performance appraisal would have been the only performance appraisal presented to Chief Chambers in nearly two years of active duty service with the National Park Service. Chambers' Aff't ¶ 9.

On December 5, 2003, Deputy Director Donald Murphy placed Chief Chambers on administrative leave and suspended her police authority. Chambers' Aff't ¶ 10.

On December 17, 2003, Deputy Director Murphy proposed Chief Chambers' removal from Federal service. Chambers' Aff't ¶ 11.

On July 9, 2004, Department of the Interior Deputy Assistant Secretary Paul Hoffman notified Chief Chambers that her employment with the National Park Service would be terminated as of the following day. Chambers' Aff't ¶ 12.

Ms. Chambers challenged her removal through the Merit Systems Protection Board (MSPB). Through an administrative hearing, Ms. Chambers was successful in eliminating only two of the six charges against her. Consequently, Ms. Chambers had to appeal the Administrative Judge's ruling and is awaiting a decision from the three members of the MSPB. Chambers' Aff't ¶ 13.

On February 4, 2004, Deputy Director Murphy was called to testify at an internal inquiry being conducted by Assistant Secretary Paul Hoffman. Mr. Hoffman asked Mr. Murphy if he had prepared a performance evaluation for Ms. Chambers. Mr. Murphy responded: "No we have not done one for her yet although one was prepared and was being scheduled for her just as these incidents happened. So there is one that is actually prepared and it was - the only reason it hadn't been done was because of scheduling conflicts." *In the Matter of United States Department of Interior National Park Service, Testimony of Donald Murphy, February 4, 2004, p. 105* (attached as Exhibit 2 to the Affidavit of Teresa Chambers). In this testimony, Mr. Murphy is relating that he prepared Chief Chambers' appraisal/evaluation, but that scheduling conflicts had prevented him from meeting with her to discuss the appraisal.

On August 11, 2004, in a sworn deposition conducted during the discovery phase of the MSPB hearing process, Mr. Murphy again testified that he had prepared a performance appraisal for Chief Chambers. Mr. Murphy testified as follows:

Q. Have you prepared a written performance appraisal for Ms. Chambers in her position as the chief since she took that job?

A. Yes.

Q. And that was a written appraisal?

A. Yes.

Q. And what form did it take? Was it a narrative? Was it --

A. It was a narrative.

Q. Okay. Was it titled a job appraisal? Performance appraisal?

A. It was just titled performance appraisal.

Q. And was it communicated to Ms. Chambers?

A. No.

Q. Okay. And when do you recall preparing that?

Let me rephrase that question while you're thinking.

Did you first -- let me ask you did you prepare it?

Were you the one who prepared it?

A. Yes.

Q. Okay. Then go ahead and think about when you prepared it.

A. It was in the summer, around the summer, late summer of 2003.

Q. Okay. Now Ms. Chambers came on into the position of chief around February of 2002, is that correct?

A. That's correct, somewhere around there.

Q. Okay. So you don't recall preparing a performance appraisal for Ms. Chambers in her first calendar year of work or first 12 months of work?

A. No.

Q. Do you know why this particular appraisal was not communicated to Ms. Chambers?

A. It was simply a matter of scheduling.

We often prepared things, had things that we tried to schedule.

There wasn't any other reason than that.

Q. Okay. Is there a particular document, a final or a draft?

A. It was, it was a final. It was going to be -- we would have sat down and discussed it. I had put it in final form.

Q. Had this document been communicated to any person other than yourself once it was prepared?

A. Yes.

Q. And who had seen it?

A. Our Human Resources office.

Q. Okay. And how did they come to see it?

A. They have the forms. I prepare that in conjunction with the Human Resources office. They review it to make sure it's proper, appropriate, and I followed all of the right protocols.

Q. Okay. So you gave it to them for that purpose?

A. Yes.

Q. And were you given a form or a format to use, or did you prepare that yourself?

A. No. We're given a format. It's a

fairly standard format.

Q. Did someone ask, encourage, or invite you to prepare an appraisal for Ms. Chambers at that time?

A. No.

Q. It was on your own initiative?

A. Yes.

Q. And when did you first begin working on that draft of the appraisal before it became final?

A. I don't remember the exact date. Again, it was some time during the late summer.

Q. Of 2003?

A. 2003, yes.

Q. All right. Was there anything that prompted you to begin that appraisal given that you had not done an appraisal the prior calendar year?

A. No, not in particular.

Q. You were doing it as a matter of routine?

A. That's correct.

Q. Had the personnel office, the Human Resources office, communicated with you in any manner regarding the absence of a performance appraisal for Ms. Chambers for her first 12 months or more?

A. No.

Q. Okay. Who in the Human Resources office saw the document that you prepared as a performance appraisal for the chief?

A. The personnelist is no longer with us. It's, I believe, I'm not sure if I'm absolutely correct about this, but it would have been Terrie Fajardo.

Q. And is that a male or female?

A. It's a female.

Q. Female -- okay. And is Terrie still with the Human Resources?

A. No, she's not.

Q. Is she still with the Department of Interior?

A. No, she's not.

Q. Do you know where she might be employed?

A. She's retired.

Q. Oh, she retired. Okay. Do you know when she left?

A. Probably in April, March or April of 2004.

Q. All right. She's been retired for a few months.

Does she still reside in the District of Columbia area?

A. I don't know.

Q. Was there anyone else in Human Resources who would have seen the performance appraisal you're referring to for the chief?

A. Not that I know of.

Q. Okay. That would include anyone in the Human Resources office?

A. Not that I know of.

Q. No attorneys, for example, would have seen it?

A. No.

Q. All right. The information in this appraisal would have reflected the chief's

performance for what time period exactly?

A. Well, it would have been for, I prepared it for the period that would have ended around the end of the fiscal year, October, so it would have been for the, like the previous September through, through the following September, would have been roughly for that period, so 2003 through 2004, or 2002 through 2003.

Excuse me.

Q. So you intended it to be for the chief's performance for the fiscal year?

A. Yeah, approximately.

Q. Like September to October, something like that?

A. Yes.

Q. Maybe October through September, depending on how you calculate those dates?

A. Yes.

Q. Okay. Now you had it basically in final form by July of 2003 you think?

A. Yes, somewhere around there.

Q. Okay. So the document would not have reflected performance for August, September, or October of 2003?

A. No.

Q. But perhaps the months prior to, say nine to twelve months prior?

A. Yes.

Q. Okay. And you had not yet sat down with the chief to talk about it?

A. No, I had not.

Q. Okay. Had you received any input from the chief in any manner regarding that performance appraisal?

A. No.

Q. Had you formally solicited any input from any other party regarding that performance appraisal?

A. No.

Q. Do you know whether any person other than Terrie from the Human Resources office was aware that you had prepared it?

A. No.

Chambers v. DOI, MSPB Case No. DC-1221-04-0616-W-1, Testimony of Donald Murphy, August 11, 2004, pp. 18 - 26 (attached as Exhibit 3 to the Affidavit of Teresa Chambers).

On or about October 26, 2004, Ms. Chambers assisted Counsel in preparing a FOIA / Privacy Act request asking that the National Park Service provide her with a copy of her performance appraisal. Chambers' Aff't ¶ 18.

On or about November 18, 2004, Ms. Chambers reviewed a letter from the National Park Service FOIA Officer stating that the Agency would provide a final reply to the request "on or before December 23, 2004." Chambers' Aff't ¶ 19.

The Agency failed to provide a reply on or before December 23, 2004. Instead, on or about January 6, 2005, Ms. Chambers reviewed a letter from the National Park Service to Counsel stating that "The National Park Service needs additional time to process your FOIA request due to the need to consult with other components in the Department." Chambers' Aff't ¶ 20.

On or about January 18, 2005, Ms. Chambers reviewed a letter from the National Park Service advising Counsel that "We [the National Park Service] have searched our files and did not find any documents responsive to your request." Chambers' Aff't ¶ 21.

On or about January 26, 2005, Ms. Chambers assisted Counsel in preparing a letter to the National Park Service complaining of the agency's handling of her request and reminding the National Park Service that Deputy

Director Donald Murphy had testified under oath that he had prepared a performance appraisal. Chambers' Aff't ¶ 22.

On or about February 4, 2005, National Park Service FOIA Officer, Diane Cooke, asked, through Counsel, that Ms. Chambers provide a signed authorization for Counsel to obtain records, documentation, and information on her behalf. Chambers' Aff't ¶ 23.

On February 4, 2005, Ms. Chambers emailed and faxed to National Park Service FOIA Officer Cooke her signed authorization. Chambers' Aff't ¶ 24.

On or about March 7, 2005, Ms. Chambers reviewed a letter from the Department of the Interior FOIA officer stating that, "The NPS has advised the Department that . . . it conducted another search of its files and located responsive information." The FOIA officer added, "The National Park Service is currently making a determination on whether to release the information it located." Chambers' Aff't ¶ 25.

On or about March 14, 2005, Ms. Chambers reviewed a letter from the National Park Service contradicting what the Department of the Interior FOIA officer had said in the previous week's letter. This March 14th letter stated, "We have searched our files and found one document that is *potentially* responsive to your request." (Emphasis added.) The FOIA officer added, "We are releasing this *draft* document entitled 'U.S. Department of the Interior Senior Executive Service Performance Plan' dated February 11, 2003 in its entirety (3 pages)." (Emphasis added.) Chambers' Aff't ¶ 26.

The three-page document released by the National Park Service is a document dated February 11, 2003, with Ms. Chambers' name on it; however, it is a document that was never presented to her by anyone at any point during her employment with the National Park Service. Chambers' Aff't ¶ 27. The three-page document eventually released by the National Park Service is not a performance appraisal. Chambers' Aff't ¶ 28.

In the fall of 2003, Terrie Fajardo had been the Chief of Human Resources at the National Park Service for seven years. *Chambers v. DOI*, Civil Action No. 05-0380, Testimony of Terrie Fajardo, p. 23 (attached as Exhibit 13 to the Affidavit of Teresa Chambers) ("Fajardo Depo"). Ms. Fajardo prepared Chief Chambers' performance appraisal at the direction of Mr. Murphy. Fajardo Depo at 20 - 21.

The appraisal was a final version and only required signatures. Fajardo Depo at 20 - 21, 110 - 111, 123 - 124. At the time Ms. Fajardo prepared the appraisal for Mr. Murphy, she understood that Chief Chambers performance was satisfactory and that there were no problems reported. Fajardo Depo at 21 - 22, 56, 91, 207.

Ms. Fajardo delivered a hard copy of the final, completed appraisal of Chief Chambers to Mr. Murphy in a blue envelope. Fajardo Depo at 22. Ms. Fajardo retained a copy of the appraisal on her computer, on a floppy disc, and in a file cabinet in her office. Fajardo Depo at 27, 35 - 36, 47. When Ms. Fajardo retired in March 2004, she left instructions to retain all of the files regarding Chief Chambers. Fajardo Depo at 44.

After the initiation of this litigation, in the summer or fall of 2005, Ms. Fajardo visited her former NPS office to search for Chief Chambers' performance appraisal. During her search, Ms. Fajardo was able to locate the performance appraisal document for Chief Chambers on a floppy disc; but the page with the narrative comments of the appraisal document was missing, and Ms. Fajardo was unable to locate that portion of the documentation on computer file or in hard copy. Fajardo Depo at 9 - 10, 37 - 38, 53, 106. During her search in 2005, Ms. Fajardo was only given access to a portion of the files that had been maintained in her office. Fajardo Depo at 37 - 38, 53.

Mr. Murphy changed his prior testimony in a declaration submitted to this Court. See, Defendant's Motion for Summary Judgment, Exhibit B. Ms. Fajardo disagrees with Mr. Murphy's revised testimony as described in his declaration. Fajardo Depo at 66 - 70. However, she did agree with and confirm Mr. Murphy's original testimony. Fajardo Depo at 62 - 66.

ARGUMENT

II. The *Privacy Act* and the Summary Judgment Standard

A. *Privacy Act*

This Circuit has discussed the purpose and general structure of the *Privacy Act*.

"In order to protect the privacy of individuals identified in information systems maintained by federal agencies," the *Privacy Act* regulates "the collection, maintenance, use, and dissemination of information by such agencies." *Privacy Act*, § 2(a)(5), 88 Stat. 1896. "The Act gives agencies detailed instructions for managing their records and provides for various sorts of civil relief to individuals

aggrieved by failures on the Government's part to comply with the requirements." *Doe v. Chao*, 540 U.S. 614, 157 L. Ed. 2d 1122, 124 S. Ct. 1204, 1207 (2004).

The Privacy Act imposes a series of substantive and procedural obligations on federal agencies that maintain what is known as a "system of records." A system of records is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(5). A "record" is "any item, collection, or grouping of information about an individual that is maintained by an agency ... that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph." *Id.* § 552a(a)(4). "Maintain" means "maintain, collect, use, or disseminate." *Id.* § 552a(a)(3).

Maydak v. United States, 363 F.3d 512, 515 (D.C. Cir. 2004). The *Act* is intended to insure that important information is properly maintained and protected by the government. At issue in the instant case is the question of whether the DOI – NPS properly maintained and protected the performance appraisal that was prepared regarding former Park Police Chief Teresa Chambers.

B. Summary Judgment Standard

Summary judgment may be granted only "where there are no genuine issues of material fact, and all inferences must be viewed in a light most favorable to the non-moving party." *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor." *Anderson*, 477 U.S. at 255; *see also Bayer v. United States Dep't Of Treasury*, 956 F.2d 330, 333-34 (D.C. Cir. 1992).

With the purpose of the Privacy Act and standards for summary judgment in mind, Plaintiff turns to the specific arguments raised by the DOI.

III. Teresa Chambers' Performance Plan and Performance Appraisal Were Maintained as Part of a System of Records Protected by the Privacy Act

The DOI argues that Ms. Chambers' performance appraisal was not part of a *Privacy Act* regulated system of records because it was not "rendered final by the signatures of the appropriate supervisory officials." Def. Mem. at 13 – 15. DOI concludes that if the appraisal was not in a system of records then the United States has not waived sovereign immunity for this action and the government is entitled to summary judgment. This argument is meritless for the reasons explained.

As noted previously, the *Privacy Act* states that "the term 'record' means any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or photograph[.]" 5 U.S.C. § 552a(a)(4). Ms. Chambers' performance appraisal is part of her employment history containing her name and a description of her activities as Chief of the United States Park Police. Thus, her performance appraisal, performance plan, or any related documentation satisfy the definition of a record under the *Privacy Act*.

Having determined that Chief Chambers' performance appraisal and related documents fall within the definition of "record" covered by the *Privacy Act*, the next issue is whether these records fall within a system of records regulated by the *Act*. The facts and law reveal that Chief Chambers' performance appraisal and related records were maintained in a system of records subject to the requirements of the *Privacy Act*.

The DOI describes records subject to the *Privacy Act* broadly to include all records that the Department maintains in a system of records. 43 C.F.R. § 2.47.

“Records” are defined by DOI to include:

any item, collection, or grouping of information about an individual that is maintained by the Department or a bureau thereof, including, but not limited to, education, financial transactions, medical history, and criminal or employment history and that contains the individual's name, or the identifying number, symbol, or other identifying particular

43 C.F.R. § 2.46(e). Further, the DOI’s regulations define “system of records” as

a group of any records under the control of the Department or a bureau thereof from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

43 C.F.R. § 2.46(f). Ms. Chambers’ performance plan, appraisal and related records easily fall within the DOI’s regulations as records regulated under the *Privacy Act*.

The undisputed facts reveal that the official folders for all NPS Senior Managers were kept by Ms. Fajardo, the Chief of Human Resource Operations, in her offices at 1201 I Street, Washington, D.C. Faj. Dep. 114/8-9. Ms. Fajardo prepared the “appraisal document” for Chief Chambers at the behest of Murphy. Fajardo Depo 110/6-8.¹ “It was my [Fajardo’s] role as the chief of the office to prepare for senior level managers performance appraisals for their subordinates. I prepared a whole ream of them for the people who worked with the director’s office. I would not have left out Chief Chambers.” Id. 110/8-14.

Ms. Chambers’ performance plan, appraisal and related records are part of a group of records (*e.g.*, performance records). The documents are under the control of

¹ Transcript designations are page(s)/line(s).

DOI: Ms. Fajardo, NPS Chief of Human Resource Operations, complied with DOI document storage protocol by maintaining the document in a locked file cabinet. The file folder was labeled with Ms. Chambers' name and was even color-coded yellow to conform with the subgroup of the Park Police. Fajardo Depo. 13/7-13. In addition the file was retrieved on multiple occasions. Id. 22/13-19. Fajardo also prepared an electronic record of the document with a file name of "Chambers or Chief Chambers" that was filed under "My Documents" on her assigned office computer. Fajardo Depo 27/13-14. The electronic records were transferred to a 1.44 megabyte disc and labeled in Ms. Fajardo's handwriting "2003 No.1 or 2 or 3, whatever it was for the year for that point of the year," Id. 36/9-11; and kept in a locked office in a commercial disc container with a drawer. Id. 55/1-5. Fajardo retrieved part of one document on her August, 2005 visit. Fajardo Depo 9/13-14.

Moreover, Ms. Chambers' performance appraisal and related documents are considered part of an employee performance record system as defined by the Office of Personnel Management (OPM). Each executive agency is required to establish a separate employee performance record system. 5 C.F.R. §§ 293.401, 293.402. Employee performance files are required to include "[a]ny form or other document which records the performance appraisal." 5 C.F.R. §§ 293.403(b)(1). As previously described, Ms. Fajardo's secure office, locked file cabinet, and disc identification and retention system clearly meet the description of an employee performance record system.

The only case law the DOI cites is *Horowitz v. Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005). *Horowitz* involved a claim of sexual misconduct against a Peace Corps volunteer. The volunteer sought a draft of an Administrative Separation Report (ASR)

that was intended to dismiss him had he not resigned his position. Key to the court's decision not to require release of the ASR under the *Privacy Act* were the following facts: (1) the Director who drafted the ASR had not decided whether to dismiss the volunteer making the document predecisional; (2) Peace Corp regulations specifically provide that an ASR should not be maintained in the agency's records once the volunteer resigns; and (3) that there was no proof offered to show that records kept in a Country Director's safe were regularly retrieved and considered a system of records under the *Privacy Act*.

Horowitz, 428 F.3d at 280 -282. Unlike *Horowitz*, Ms. Chambers' appraisal was final, not predecisional. DOI and OPM regulations specifically cover performance appraisals and performance related records. And, the appraisal and other records maintained by Ms. Fajardo were part of a system of records regularly retrieved using Ms. Chambers' name. These critical distinctions render *Horowitz* inapplicable.

In sum, Ms. Chambers' performance appraisal and related records are records as defined by the *Privacy Act* and DOI regulations. These records are also part of a system of records as defined by DOI and OPM.

IV. Conclusion

For the reasons articulated herein, the Court should deny the Defendant's Motion for Summary Judgment.

Respectfully submitted,



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Dated: June 22, 2006

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CASE NO. 1: 05CV00380 (JR)

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**PLAINTIFF’S OPPOSITION TO DEFENDANT’S
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Civil Rule 7(h), Plaintiff Teresa Chambers respectfully submits this statement of genuine issues necessary to be litigated, including references to the parts of the record relied on to support the statement. Plaintiff will respond to the numbered paragraphs in the Defendant’s Statement of Undisputed Material Facts, which will either be admitted or denied with a supporting statement.

1. Admit.
2. Admit.
3. Admit. Except deny the characterization of footnote 1 that National Park Service (“NPS”) Deputy Director Donald Murphy (“Murphy”) expected Plaintiff to set up the meeting when the Plaintiff’s copy of the September 23, 2003 email from Murphy to

Plaintiff stated: "Janice [Murphy's secretary] will contact you to set up a time for us to go over the appraisal."

4. Admit.

5. Admit.

6. Admit.

7. Admit.

8. Admit.

9. Plaintiff admits that Murphy changed his testimony from what he stated in his MSPB deposition and now attests that the U.S. Department of the Interior Senior Executive Service Performance Plan ("SES Plan") was the only document created in connection with the review of Plaintiff's performance. Murphy Declaration ¶ 4. Murphy now testifies that the SES Plan was the only such document created in the twenty-two months from the time the Plaintiff was hired on February 10, 2002 to December 17, 2003 when Murphy proposed Plaintiff's removal from federal service. The SES performance management systems rule states: "(1) *Appraisal period*. Each agency must establish an official performance appraisal period for which an annual summary rating must be prepared." 5 C.F.R § 430.304(c)(1). Also, "*Appraisal period* means the period of time (generally 1 year) established by an agency for which performance will be reviewed and a rating of record will be prepared." 5 C.F.R. § 430.203 Subpart B--Performance Appraisal for General Schedule, Prevailing Rate, and Certain Other Employees.

Terrie Fajardo ("Fajardo"), former chief of Human Resources Operations for NPS, Washington Office testified she assisted Murphy in the creation of the SES Plan when the plaintiff was first hired. This comports with "General Schedule...and Certain other Employees" procedure: "[p]erformance plans shall be provided to employees at the

beginning of each appraisal period (normally within 30 days).” 5 C.F.R. 430.206(b)(2). Plaintiff was not in fact an SES employee, but considered an “equivalent.” Fajardo further testified that she prepared Chief Chambers’ performance appraisal at the direction of Mr. Murphy. Fajardo Depo at 20 – 21. The appraisal was a final version and only required signatures. Fajardo Depo at 20 – 21, 110 – 111, 123 – 124. At the time Ms. Fajardo prepared the appraisal for Mr. Murphy, she understood that Chief Chambers performance was satisfactory and that there were no problems reported. Fajardo Depo at 21 – 22, 56, 91, 207.

Fajardo gave Murphy a copy of the appraisal in a blue envelope and asked for a signed copy for the Plaintiff’s performance file. During the August, 2005 visit to NPS, Fajardo had also retrieved part of Ms. Chambers’ performance file from the original computer discs she had hand-labeled. See September 22, 2003 email from Murphy to Ms. Chambers stating Murphy ”completed [Plaintiff’s] performance appraisal.” September 22, 2003 Email from Donald Murphy to Plaintiff (9/22/03 Email).

10. Except for the fact that two depositions took place on October 7, 2005 and November 16, 2005, this paragraph is denied; it is Defendant’s characterization of Fajardo’s testimony. Fajardo prepared the SES Plan “shortly after [plaintiff’s] arrival”, Fajardo Depo. 18/14-16; and “based on her position description and the information provided by the United States Park Police as to what the duties of the Chief were, and that was put into a standard format so that the Chief would know what was expected of her in the position.” Id. 17/18-22 – 18/1. “It [SES Plan] was a final document. It had been drafted and reviewed by Mr. Murphy and given back to me. I prepared it in final form.” Id. 18/4-6. The appraisal portion consisted of “the performance standards with a pass fail and a narrative summation of her performance.” Id. 19/10-11; 19/12-15.

11. Denied. It is Defendant's characterization that the SES Plan (*i.e.*, performance plan) was "then newly prepared" in September, 2003. It is a genuine issue whether Fajardo created the SES Plan "shortly after [plaintiff's] arrival. Id. 18/11-15. Fajardo's action would be in accord with "General Schedule...and Certain other Employees" procedure: "[p]erformance plans shall be provided to employees at the beginning of each appraisal period (normally within 30 days)." 5 C.F.R. 430.206(b)(2). Fajardo stated that she would "provide" Murphy with the SES Plan not that she had just prepared it. Fajardo Depo. 120/12-15. Fajardo only says that she will work on drafts for two deputy chiefs. Id. The document Fajardo testified to working on was the appraisal: "Part III, Rating official's recommendation." Id. 120/6-11. However, it would not be inconsistent to have prepared the SES Plan when Plaintiff first was hired and to later make changes to the document.

12. Denied as Defendant's characterization of Fajardo's testimony. Fajardo is asked when after the September 17, 2003 email was the appraisal created and finalized. Id. 124/6-10. Fajardo's response, "between November and January," must have taken into consideration finalization through the chain of command. Fajardo's recollection that preparation of the performance appraisal "could have been late summer early fall" was generally correct. Id. 21/1-2. "Final" for Fajardo meant she was finished with the document on her end. Id. 161/17-20.

13. Denied as defendant's characterization. Murphy had returned the appraisal to Fajardo because Fajardo "had written it." Id. 111/4-5. Murphy gave the appraisal to Fajardo to "review it to make sure it's proper, appropriate and I [Murphy] followed the right protocols." Murphy August 11, 2004 Deposition, 21/6-8. Murphy says he was

mistaken about which document he returned to Fajardo for review; he now would say that document was the SES Plan (performance plan).

14. Admit.

15. Admit

16. Deny for lack of knowledge or information upon which to form a belief as to the truth of the matter asserted. It would have been possible for Murphy to scan the document and forward it to others via email. Fajardo emailed the SES Plan but was unable to send the appraisal. Fajardo Depo 116/18 – 120/19. Discovery has not been completed and there is no way for Plaintiff to know what might be in the e-mail and other electronic records.

17. Denied as Defendant's characterization that the only repository for a performance appraisal is an employee's official personnel folder. "The agency may elect to retain [performance-related] records in a separate file [from the official personnel file]...[a]ny supporting documents that the agency may prescribe as necessary for agency officials in performance of their duties shall be kept in these files." 5 C.F.R. 293.402(b). Fajardo requested that Murphy give her a signed copy of the appraisal so that it could be "put into the performance folder, which is different from the official personnel folder for the employee." Fajardo Depo 135/17-19.

18. Denied. Fajardo uses the word "final" to signify completion of her work. "It was a final document. It had been drafted and reviewed by Mr. Murphy and given back to me. I prepared it in final form." Fajardo Depo. 18/4-6.

19. Admit where Fajardo testified that she did not know whether Murphy had presented performance standards to the Plaintiff. Fajardo is using the word “final” to signify the completion of her work.

20. Admit where Fajardo testified that she did not know whether Murphy had presented performance standards to Ms. Chambers. Fajardo is using the word “final” to signify the completion of her work.

21. Denied. In her Declaration Mainella wrote: “A performance appraisal for the USPP Chief, which is not an SES position, becomes final with the NPS Director’s signature. I may make any changes I deem necessary before I sign and make final a performance appraisal for the USPP Chief Position.” Declaration of Frances P. Mainella ¶ 5 Lines 9 - 11. However, in her sworn deposition of August 10, 2004, Pages 130 and 131, Lines 22 - 5, the following exchange took place: "Q. Have you ever seen a document that, whether called a performance appraisal, would have reflected someone’s assessment of Ms. Chambers’ performance? A. I normally don’t handle those. I don’t remember." See attached excerpt.

Also, in Mainella's Declaration, Page 1, ¶2, she states: “In an August 2001 report, a National Academy of Public Administration (“NAPA”) panel examined the National Park Service law enforcement program and recommended that the United States Park Police (“USPP”) Chief position report to the NPS Director, rather than to the Director of the National Capital Region of the NPS, as had previously been the case. The NPS executed this recommendation, and **in January 2002, the USPP Chief was directed to report to the Director through the Deputy Director, NPS, then Donald Murphy.**” (emphasis added.) However, in “Defendant’s Responses to Plaintiff’s First Request for the Production of Documents and Things,” Tab 1C is a memorandum from “Director”

with stamped “signature” of “Donald W. Murphy” to “Regional Directors Associate Directors, Service Center Directors, and Office Directors” with a subject of “U.S. Park Police Operations.” (Note that the date stamp of the memorandum is only partially visible, showing the year 2002; however, the language of the memorandum makes it clear it was written prior to February 10, 2002.) ¶2 of this memorandum states: “Effective with the appointment of Chief Teresa Chambers, on February 10, the U.S. Park Police will report to the Director” (attached). Nowhere in the memorandum does it “direct” that the USPP Chief “report to the Director through the Deputy Director” as Mainella has declared in her February 2006 “Declaration.”

Further, on Page 3, ¶ 6 of Mainella's declaration, she states: “Regarding former USPP Chief Teresa Chambers, I am not aware of any performance evaluation that had been underway through Donald Murphy’s lead.” However, Mainella was copied on an email from “Don Murphy” to Teresa Chambers, 9-22-03 which states, in part, “Also, I have completed your performance appraisal. Janice will contact you to set up a time for us to go over the appraisal.”

22. Admit.

23. Denied. Mainella was copied on an email from “Don Murphy” to Teresa Chambers, 9-22-03 which states, in part, “Also, I have completed your performance appraisal. Janice will contact you to set up a time for us to go over the appraisal.”

24. Denied. The Defendant’s characterization is that Fajardo is inconsistent in her response. However, the fact that Fajardo put other appraisals and SES Plans on computer discs, which she also did with the Plaintiff’s document, id. 181/6-8, does not preclude that fact that the Plaintiff’s appraisal was still retained under My Documents on Fajardo’s computer.

25. Denied. Defendant's characterization fails to consider the testimony that Fajardo found the disc that she had labeled with her own handwriting when she visited her former office in August, 2003. Fajardo also testified that parts of the appraisal that she prepared were missing. Id. 39/17 - 41/3, id. 106/2-18, id. 116/9-14. The discs in the disc file box were labeled by hand, and the disc with Ms. Chambers' documents were marked "2003 No. 1 or 2 or 3, whatever it was for the year for that point of the year." Id. 36/6-13.

Fajardo's computer disc file box was twelve inches long with a pull-out drawer. Id. 55/1-5. Fajardo also testified that "[t]he [computer] file name would have been Chambers or Chief Chambers." Id. 27/13-14.

26. Denied. The characterization of discs "stacked up next to Fajardo's computer assumes facts not in evidence: that these discs had any informational value. Fajardo's computer disc file box was twelve inches long with a pull-out drawer. Id. 55/1-5. The Plaintiff's appraisal was properly stored on a computer disc that would have been "marked 2003 No. 1 or 2 or 3, whatever it was for the year for that point of the year." Id. 36/9-11.

27. Admit.

28. States a conclusion of law, to which no response is required, but to the extent that paragraph 28 is deemed to contain an allegation of fact, or otherwise require a response, it is denied. Performance ratings or documents supporting them must be retained in conformance with 5 C.F.R. 293.404, where "[s]upporting documents shall be retained for as long as the agency deems appropriate (up to 4 years) 5 C.F.R. 293.404(a)(1)(ii). Performance-related documents required for judicial proceedings may be retained for as long as necessary. 5 C.F.R. 293.404(c). Moreover, DOI regulations establish that Ms. Chambers' performance appraisal and related documents were part of a system of records

regulated by the *Privacy Act*. 43 C.F.R. §§ 2.46, 2.47. Upon retirement, Fajardo reminded her successor not to discard the Plaintiff's files. Fajardo 44/9-14.

29. States a conclusion of law, to which no response is required, but to the extent that paragraph 28 is deemed to contain an allegation of fact, or otherwise require a response, it is denied.

30. Deny for lack of knowledge or information upon which to form a belief as to the truth of the matter asserted. Fajardo's successor may not have required guidance regarding proper procedures and protocols.

31. Denied. Defendant's characterization that no relevant documents were found is false. The performance plan part of the appraisal was found on computer disc. Id. 39/17 - 41/3, id. 106/2-18, id. 116/9-14.

Respectfully submitted,



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Public Employees for
Environmental Responsibility
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Tel. (202) 265-7337

Counsel for Plaintiff Teresa Chambers

Dated: June 22, 2006

**EXCERPT OF FRAN MAINELLA DEPOSITION
AND
EXCERPT OF NAPA DOCUMENT
REFERENCED IN PARAGRAPH 21**

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
Washington Regional Office

TERESA C. CHAMBERS,	x
	:
Appellant,	: Docket Number
vs.	: DC-1221-04-0616-W-1
	:
DEPARTMENT OF INTERIOR,	:
	:
Agency.	x

Washington, D.C.

Tuesday, August 10, 2004

DEPOSITION OF:

FRANCES P. MAINELLA,

a witness, was called for examination by counsel for the appellant, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 9:14 o'clock, a.m., in the offices of the Public Employees for Environmental Responsibility, 2001 S Street, Northwest, Suite 570, Washington, D.C. 20009, before Catherine S. Boyd, a Court Reporter and Notary Public in and for the District of

1 Columbia, when were present on behalf of the
2 respective parties:

3

4 APPEARANCE OF COUNSEL:

5 For the Appellant:

6 KENTUCKY ENVIRONMENTAL FOUNDATION
7 BY: MICK G. HARRISON, ESQUIRE
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10 (859) 986-7565

11 For the Agency:

12 McNAMARA & L'HEUREUX, ESQUIRES
13 BY: ROBERT D. L'HEUREUX, ESQUIRE
14 1522 King Street
15 Alexandria, Virginia 22314
16 (703) 739-1339

17 and

18 U.S. DEPARTMENT OF THE INTERIOR
19 BY: JACQUELINE JACKSON, ESQUIRE
20 Attorney-Advisor
21 Division of General Law
22 Office of the Solicitor
1849 C Street, Northwest
Washington, D.C. 20240
(202) 208-6848

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21

--continued--

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1 APPEARANCE OF COUNSEL: (cont)

2 ALSO PRESENT

3 TERESA CHAMBERS, Appellant
4 RICHARD CONDIT, ESQUIRE
5 JEFFREY P. RUCH
6 STEVE ELDRIDGE
7 GABRIEL BENITEZ, Public Employees for
8 Environmental Responsibility

9 ELIZABETH BOGLE, ESQUIRE (Via telephone)
10 Administrative Law Judge
11 Merit Systems Protection Board

12 - 0 -

13 I-N-D-E-X

14 Witness: Page:

15 Frances P. Mainella

16 Examination by Mr. Harrison 25

17 - 0 -

18 Exhibits: (Included with transcript) Page:

19 Exhibit No. 1 for Identification
20 to the Mainella Deposition 245
21 (Memo dtd 11/28/03 to Mainella
22 fr Chambers)

23 - 0 -

1 questions were, not what you said to Legal, but
2 what your questions were in your mind?

3 What were you wondering?

4 A. I was actually surprised that there
5 wasn't more in there about some of Ms. Chambers'
6 other issues.

7 Q. Historical issues, prior events?

8 A. More, more other, other challenges that
9 we've had.

10 Q. Um-hm.

11 A. I thought that it could have even had
12 more in there.

13 Q. Um-hm.

14 A. That was most of my questions.

15 Q. Anything else that comes to mind that
16 you had a question about when you read it?

17 A. No. I think that was pretty much it.

18 Q. Okay. Now to your knowledge, have you
19 ever seen a performance appraisal for Ms.
20 Chambers written by any party?

21 A. I don't remember.

22 Q. Have you ever seen a document that,

1 whether called a performance appraisal, would
2 have reflected someone's assessment of Ms.
3 Chambers' performance?

4 A. I normally don't handle those. I don't
5 remember.

6 Q. Okay. Have you ever written a
7 communication to Ms. Chambers stating your own
8 perceived dissatisfactions or satisfactions with
9 Ms. Chambers and her performance?

10 A. Not anything in writing.

11 Q. Okay. You've had occasion to give her a
12 compliment from time to time on, if things went
13 well, things she did well, speaking to the press,
14 things like that?

15 A. Yes.

16 Q. Okay. All right. Is there some
17 document you could point me to that you could
18 fairly describe as a document that would have put
19 Ms. Chambers on notice of the, any
20 dissatisfaction with her performance prior to
21 December 2nd that in your mind, should have been
22 included in the proposed removal action against

A54(NCR-RD)

JAF
3/11/02

Memorandum

To: Regional Directors, Associate Directors, Service Center Directors,
and Office Directors

From: Director

Donald W Murphy

Subject: U.S. Park Police Operations

We are currently preparing an implementation plan for the recent National Association of Public Administration (NAPA) report, "The U.S. Park Police: Focusing Priorities, Capabilities, and Resources for the Future". Major policy issues raised by the report will be assessed as a part of our overall examination of the National Park Service law enforcement program. In the meantime, however, we intend to proceed immediately with implementation of several of the NAPA recommendations.

Effective with the appointment of Chief Teresa Chambers, on February 10, the U.S. Park Police will report to the Director. This alignment will recognize the U.S. Park Police's multi-regional responsibilities as well as activities such as personal protection, escorts and demonstrations that are national in scope. Without question, our responsibility for visitor and resource protection is increasingly more complex, particularly in light of the events of September 11. Because the U.S. Park Police mission often transcends individual park and regional interests, it is appropriate that they be subordinated to the Director.

While the NAPA report recommends focusing the U.S. Park Police efforts in Washington D.C., we believe that it would be inadvisable at this time to consider withdrawing U.S. Park Police from New York and California. Rather, we intend to task the Chief with improving communication lines and delivery of services to all park units.

As we progress in implementing this report, we will keep you informed of changes having servicewide implications. If you have questions regarding the NAPA report, please contact Deputy Chief Benjamin J. Holmes at (202) 619-7370.