

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

TERESA C. CHAMBERS

Plaintiff,

v.

U.S. DEPARTMENT OF THE  
INTERIOR,

Defendant.

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Civil Action No. 05-0380 (JR)

**DEFENDANT’S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Civil Rule 7(h), Defendant respectfully submits this statement of material facts as to which there is no genuine dispute.

**Undisputed Material Facts Regarding  
Plaintiff’s Employment and Subsequent Removal**

1. The United States Department of the Interior (“Interior”) hired plaintiff Teresa Chambers to serve as Chief of U.S. Park Police, National Park Service (“NPS”), on February 10, 2002. Complaint ¶ 5. Interior placed plaintiff on administrative leave on December 5, 2003. Id. ¶ 10. On December 17, 2003, Deputy Director Donald Murphy (“Murphy”), plaintiff’s immediate supervisor, id. ¶ 6, proposed plaintiff’s removal from federal service. Id. ¶ 14.
2. On June 28, 2004, plaintiff filed an appeal with the U.S. Merit Systems Protection Board (“MSPB”). Complaint ¶ 16. On July 9, 2004, the Deputy Assistant Secretary for Fish, Wildlife, and Parks officially issued a decision to remove plaintiff from federal service, a decision subsequently included within the scope of plaintiff’s appeal before the MSPB. Id. ¶ 17.

**Undisputed Material Facts Regarding Plaintiff's Privacy Act Request and Subsequent Filing of the Instant Action**

3. During Murphy's August 11, 2004 deposition taken in the MSPB proceeding ("Murphy MSPB deposition," relevant portions attached as Exhibit A hereto), Murphy testified that he had personally prepared a written performance appraisal for plaintiff in late summer, 2003. Complaint ¶ 19; Murphy MSPB deposition at page 18, line 16, through page 19, line 20 (hereafter cited in the following format: "18/16 – 19/20"). He further testified that he had prepared the document in conjunction with the Human Resources office, *id.* 21/1-8, and specifically with "personnelist" Terrie Fajardo, now retired, *id.* 22/21 – 23/21. He also testified, *inter alia*, that the appraisal had never been communicated to plaintiff because of scheduling problems, Murphy MSPB deposition 19/7-8; 20/8-13.<sup>1</sup>
4. Terrie Fajardo was the Chief of Human Resources Operations for the NPS, Washington Office, during the time period in which plaintiff was employed with the NPS and through Fajardo's retirement in March, 2004. Deposition of Terrie Fajardo ("Fajardo Dep.") 7/7-9; 23/9-12.
5. On October 26, 2004, plaintiff submitted a "FOIA /Privacy Act request," seeking a "draft employee evaluation written by Deputy Director Donald Murphy concerning Chief Teresa Chambers during the time period covering 2002 and / or 2003," and all transmittal documents identifying the officials who had received copies thereof. Complaint ¶ 24. Interior acknowledged the request in November 2004 and January 2005, explaining that

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<sup>1</sup> In an e-mail from Murphy to plaintiff dated September 22, 2003, Murphy stated that he had prepared plaintiff's performance appraisal, and was ready to review it with her, and invited her to schedule a meeting at which he might do so. Complaint ¶ 6.

additional time was needed to confer with various components of the agency in locating the document earlier, see id. ¶¶ 25, 26, and responded on January 18, 2005 that it had searched its files and had been unable identify any responsive documents, id. ¶ 27.

6. On January 26, 2005, plaintiff's counsel wrote to Interior, "advising that the agency should reconsider its determination that no responsive documents existed," id. ¶ 28, and stating that Murphy had identified and described the appraisal in his MSPB deposition testimony, id. Plaintiff also advised Interior to check directly with Murphy "and agency lawyers to determine if [plaintiff's] appraisal was being kept with them." Id. Interior responded on February 4, 2005, that it was treating plaintiff's January 26<sup>th</sup> letter as an administrative appeal under FOIA. Id. ¶ 29.
7. On March 14, 2005, Interior sent plaintiff's counsel a copy of a document referenced as "potentially responsive" and entitled "U.S. Department of Interior, Senior Executive Service Performance Plan," an unsigned document constituting a performance plan enumerating a set of performance elements to be used to measure plaintiff's performance. See Declaration of Donald W. Murphy ("Murphy Declaration"), Exhibit B hereto, ¶¶ 3, 4; March 14, 2005 letter from Alfred J. Poole, III, Acting Associate Director, Administration, Business Practices and Workforce Development to Richard Condit, attached hereto as Exhibit F.
8. Plaintiff filed this Privacy Act action on February 24, 2005, seeking production of the "draft employee evaluation" document referenced in Murphy's MSPB deposition. See Complaint ¶ 24. The Complaint alleges that Interior "maintains a system of records

containing information pertaining to the Plain and has possession and control of the records at issue in this Complaint. ” Id. ¶ 4.

9. In response to the Complaint, Murphy executed a declaration on April 13, 2005 (Murphy Declaration, referenced *supra* as Exhibit B), submitted to this Court on June 3, 2005 in support of Defendant’s Response to the Court’s May 4, 2005 Order. See docket entry 8. In his declaration, Murphy attested, *inter alia*, that the document to which he had referred in his MSPB deposition (referenced in ¶ 3, *supra*) was not, as he had mistakenly stated in that deposition, a performance appraisal of plaintiff, but was instead a performance plan enumerating a set of performance elements to be used to measure her performance.

Murphy Declaration ¶ 4. Murphy additionally attested that

- the performance plan was the only document created in connection with the review of plaintiff’s performance, id. ¶ 4;
- Murphy had reviewed his files to confirm that there were no documents that were labeled as or constituted a performance appraisal or evaluation for plaintiff, id.;
- he had never drafted or completed a performance appraisal or evaluation of plaintiff; id. ¶ 5;
- he *had* drafted a performance plan for plaintiff which had been released to her, id.;
- neither he nor anyone on his staff destroyed documents relating to any performance appraisal of plaintiff, id.

- he had personal knowledge that the document that plaintiff was seeking in this suit never existed; id. and
- he would have been the person who would have prepared such a document and he never did, id.

**Undisputed Material Facts Relating to the Testimony  
of Terrie Fajardo as to the Creation, Transmittal and Maintenance  
of the Alleged Draft Performance Appraisal**

10. In her deposition taken in the instant action on October 7, 2005, and again on November 16, 2005, see excerpts from the Fajardo Deposition, referenced at ¶ 4, *supra*, attached hereto as Exhibit C), Fajardo testified that as Chief of Human Resources for NPS, she had prepared draft performance standards (sometimes referenced in the deposition transcript as a “performance plan”) for plaintiff’s position, see Fajardo Deposition 18/11-15; 116/18 – 120/19; 121/4-9, and then a draft performance appraisal for Plain, see id. 20/18 – 21/19.
11. Fajardo initially testified that she prepared the performance standards “shortly after [plaintiff’s] arrival [at NPS].” Id. 18/11-15. Plaintiff arrived at NPS in February 2002. Complant ¶ 5. Fajardo subsequently testified, in connection with Exhibit 7 to her deposition (attached hereto as Exhibit D), that Fajardo transmitted the performance standards, then newly-prepared, to Murphy 19 months later, on September 17, 2003. See Fajardo Deposition 116/18 – 120/19; 121/4-9.
12. Fajardo initially testified that she prepared the performance appraisal “either in the fall, up to the latter part of December [of 2003] . . . . It could have been, everything could have been late summer, early fall,” id. 20/18 – 21/19, but subsequently testified that she completed the appraisal between November 2003 and January 2004, id. 124/6-15, and

testified thereafter that she produced the appraisal, not between November 2003 and January 2004, but in late September, 2003, id. 162/12-20.

13. Fajardo testified that she prepared the draft appraisal at Murphy's request, id. 21/8-12; 110/6-14; but see 111/4-5 (stating that Murphy gave the appraisal to Fajardo for her approval).
14. Fajardo testified that, to her knowledge, she and Donald Murphy were the only individuals who had been involved in preparing the appraisal document, id. 20/15-17; who knew of the creation of the appraisal document, id. 22/20-22; who had a copy of the appraisal document, id. 25/19 – 26/1; or who had seen the appraisal document, id. 163/2 – 9. Fajardo did not recall talking to anyone about the fact that she was preparing the appraisal document. Id. 163/10-12.
15. Fajardo testified that she knew of no one in her office who knew about the appraisal document, id. 23/1- 5 ("I was the Chief of Human Resources for the Washington office. I did not have to have my work reviewed by anyone, or I should not have been the Chief"), and had no knowledge that her supervisor at the time was aware of her preparation of the document, id. 42/9 – 43/8.
16. Fajardo testified that there would have been no e-mail record of the appraisal document because Fajardo had hand-delivered the appraisal document to Murphy personally. Id. 22/10-14. Fajardo does not recall ever communicating with Murphy or anyone else through e-mail about the appraisal, although Fajardo did use e-mail, id. 34/15-21, and had attempted to e-mail the performance standards document to Murphy on September 17, 2003, but had transmission problems with that e-mail attachment, id. 116/18 – 120/19;

121/4-9. Fajardo did not know of anyone who saw her give the appraisal document to Murphy, id. 51/10-15, and did not recall ever seeing any e-mail from Murphy or anyone else regarding the document, id. 115/20 – 116/2.

17. Fajardo testified that a performance appraisal is not final before the reviewing official signs it, id. 161/7-9, and that a performance appraisal is not filed in an employee's official personnel folder until the completion of certain specific events involving the development of performance standards: the transmittal of the performance standards to the employee; a mid-season appraisal (or "progress review"); the incorporation of notes of the discussion between the supervisor and employee during the progress review; the rating official's initialing of the form indicating the completion of a mid-season appraisal; the yearly review, which occurs after the time period covered by the appraisal has elapsed; and the signatures of the supervisor and employee. Id. 126/22 – 128/15.
18. Specifically, Fajardo testified that a performance appraisal cannot be final unless the performance plan has been issued to the employee, id. 168/5-20, and described the process of preparing performance standards as "determin[ing] the duties and responsibilities of the position and what the criteria will be for the incumbent to make a satisfactory rating . . .," id. 10/2-6; see also 17/14 - 18/1. The appraisal document incorporates the performance standards, which become a part of the appraisal document. Id. 9/19 – 10/11; see also 10/19 – 22; 19/10-11 ("[the appraisal document] is the performance standards with a pass fail and a narrative summation of her performance").

19. Although Fajardo testified that she understood the performance standards she had drafted for plaintiff were “final,” id. 18/2-6, she also testified that she did not know if anyone other than Murphy had reviewed those performance standards, id. 18/18-21, or whether they had ever been presented to Plain, id. 18/22 – 19/3; see also id. 125/21 – 126/6 (Fajardo had no knowledge of whether Murphy ever presented the performance standards to Plain); id. 60/17-19 (Fajardo had no knowledge of whether plaintiff ever signed the Senior Executive Service Performance Plan Guidelines).
20. Fajardo testified that the appraisal document had been in final form as she “understood it,” id. 20/11-14; 28/6-8; 121/14-19; 11/20, but that to her knowledge, Murphy never signed off on the appraisal, id. 33/13-18; see also 28/3-5 (signature blocks were not filled out in the “final form”), and the copy that she had “was not completed with the signature,” id. 34/8-9; 111/20 – 112/1 (she understood the document to be final except that it was never shared with Plain and Murphy had not signed it). Fajardo testified that she did not know whether the appraisal was ever communicated to plaintiff, id. 64/2-4, and that Fajardo never received back from Murphy a signed copy of the appraisal, even though she had asked that he send her back a signed copy so that it could be filed in plaintiff’s employee performance file, an official file maintained by the agency, id. 34/4-9; see also 41/8-18; 112/2-16. When asked whether a certain box had been filled in on the performance appraisal form for Plain, Fajardo testified that she had not “fill[ed] anything in in [sic] that box, so I have no idea whether it was or it wasn’t.” Id. 32/6-14.



21. Any finalized performance appraisal of Plain would have been reviewed and approved by Frances Mainella, Director of the NPS, because, under the reporting structure of the NPS, Director Mainella would have been the reviewing official for any performance appraisal of the Chief of the U.S. Park Police. Declaration of Frances Mainella (“Mainella Declaration”), attached hereto as Exhibit E, ¶¶ 2-5. As such, Director Mainella would have reviewed any draft appraisal provided to her by Murphy and would have made changes as she deemed necessary before she signed, and thus rendering final, any appraisal of plaintiff. Id. ¶ 5.
22. Fajardo testified that she herself was not the reviewing official with respect to plaintiff’s performance appraisal, and that she had no supervisory responsibilities for Plain. Id. 160/13–161/6. Fajardo’s knowledge of plaintiff’s performance was not based on personal knowledge but was based, instead, on “things” that she had heard, id. 190/15-16 (“you know, you hear things”), and on Murphy’s comment to Fajardo that plaintiff’s performance was “fine” :

I asked him how was her performance. He said her performance was fine. So I based my recommendation, my appraisal of her, on his "She was fine." So then I put together a paragraph or so that said that she was doing her job in an excellent manner.

Id. 190/ 2-7. See also 206/14 – 207/3:

Q. You were asked by agency counsel whether you had personal knowledge of Chief Chambers' performance, and you mentioned that you had heard things about the President's detail, the Fourth of July. What things did you have personal knowledge with respect to Chief Chambers' performance in that period of 2003?

A. That there were some things that -- in the White House detail when the officers were going and how hard they worked and all of that, and how well July 4th went. I think I saw her on television, and I think Mr. Bush had said something complimentary about how the Fourth of July went.

See also 21/11-19 ( Fajardo did not have specific information; “what I wrote was not outstandingly glowing because I did not know that it should be outstandingly glowing”); id.

21/20 – 22/5.

23. Director Mainella is not aware of any performance appraisal of plaintiff that had been prepared by Human Resources for Murphy, and does not remember signing any performance appraisal of plaintiff. Mainella Declaration ¶ 6. Mainella has attested that had one been completed, it would have identified areas of significant concern with respect to plaintiff’s performance during portions of 2003. Id. ¶ 7.
24. Fajardo testified that she prepared the appraisal document on a computer in her office. Id. 26/5-8. When asked if a copy of the appraisal document was maintained in Fajardo’s computer file “somewhere,” Fajardo testified that “I did not delete what I prepared, so I am sure it was.” Id. 27/5-9. The document was under “My Documents” with a file name that “would have been Chambers or Chief Chambers.” Id. 27/13-14. But Fajardo also testified that she did not keep performance appraisals “or anything of that nature” in a file on her computer, but instead “divided things by discs . . . because I wanted to have the ability to find things quickly.” Id. 27/15-20.

25. Fajardo does not “recall actually storing [the appraisal document] on the floppy disc” (plaintiff’s counsel’s phrasing of the question), but her normal practice would have been to do that, id. 35/19-22. If the appraisal document had been stored on a disc, the disc could not have been retrieved using plaintiff’s personal identifier because “the whole disc box was full and then there was other discs in other disc boxes” but the disc box in which the disc with the appraisal would have been stored “was not labeled when I had it. I have a private office. All of these things were in my private office.” Id. 38/1-10; see also 40/1- 7 (Fajardo did not know whether part of the appraisal document was on a disc, and did not recall how the disc had been labeled).
26. Fajardo testified that at her retirement, she left a box of discs, as well as discs “not in disc boxes [,] but . . . just stacked up next to my computer.” Id. 55/13-21; 104/15-21.
27. Fajardo maintained a hard-copy version of the document in an unlabeled, locked file cabinet behind her desk, id. 47/3-13; 164/3, where she kept “hot topic cases, cases that [she] was working on of the moment,” id. 164/5-6; see also id. 165/1-3 (“There’s a number of files in there that were of significance to cases that I was handling at the time”); id. 177/19 – 178/2 (“In my office behind my desk in a drawer that was locked was this particular file that contained my copy of Chief Chambers appraisal and standards as well as other cases in that file cabinet in that drawer that I was working on that were of a sensitive nature. That’s why they were locked.”). The “hot topics” file drawer included, *inter alia*, file folders labeled “Union grievances” and the names of certain people with EEO cases. Id. 164/7-21. Fajardo explained that she put draft appraisals in the “hot topics” drawer “because [the draft appraisals were documents for] the director’s office,

and they can be asking about it at any time. And when it's completed I like to know about it." Id. 182/16-20.

28. When asked about the existence of "any policy, regulation, or statute that required the preservation of records like the type that we're talking about here today, the performance plan for Chief Chambers, the performance appraisal that you did, anything like that?," Fajardo responded that only after a performance plan or appraisal was signed off on did they "become part of the official record and they are put into the performance folder." Id. 135/7 – 20. When specifically asked whether, assuming Murphy had not signed the appraisal, there would have been "any reason to preserve, under policy or regulation or law, the file that [Fajardo] had on Chief Chambers with the appraisal in it," id. 135/21 – 136/5, Fajardo responded, "if they wanted to use it for bird cage paper they certainly could . . .," id. 137/10-11.<sup>2</sup>
29. Fajardo's position required her to act in two capacities: As "chief of operations [, in which capacity] it was my responsibility to maintain documents, the legal life of the employee, the personnel folder," id. 136/13–15, and as "personnel officer for the office, that I would handle things that are of a confidential nature. All of that would have been on my computer and my disks," id. 136/17-21. In responding to plaintiff's counsel's question about the agency's obligation to preserve the unsigned performance standards

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<sup>2</sup> While Fajardo stated that she did not believe that the unsigned performance standards or unsigned performance appraisal should have been discarded, id. 137/7-13, her reason related to the institutional significance of those documents arising from the fact that "it was the first time that document like this was created for the chief of the U.S. Park Police," id. 140/3-5. Fajardo was clear, however, that Interior "did not break any law if they [used those documents for bird cage paper]." Id. 137/10-17.

and appraisal, Fajardo distinguished between her role as the custodian of official agency personnel files, on one hand, and the agency personnel officer, "handling things that are of a confidential nature having to do with EEO, grievances, union matters, all of that stuff," id. 135/21 – 137/13, on the other. In that second capacity, she explained, "the documents that I had and the disks and the computer and everything that I had you would want to keep because you don't know what's going to happen in the future. If something came up about a grievance I had or a union matter that I had or something else, you would have to have all that material." Id. 136/22 – 137/6. See generally id. 135/21 – 137/17:

... [0135]

21 Q. Now, if Mr. Murphy didn't sign it, let's say  
22 it just sat on his desk or got lost or whatever, if he

[0136]

1 didn't sign it --

2 A. Right. Uh-huh.

3 Q. -- was there any reason to preserve, under  
4 policy or regulation or law, the file that you had on  
5 Chief Chambers with the appraisal in it?

6 MS. GOLDFLUSS: Objection, only to the  
7 extent that it leads to a legal conclusion.

8 A. As the head of the office -- let me clarify  
9 that. I was the chief of human resource operations.  
10 At one time I was also the chief of policy, but those  
11 positions had been -- I couldn't do everything, so we  
12 had to split them out.

13 As chief of operations it was my  
14 responsibility to maintain documents, the legal life  
15 of the employee, the personnel folder. It was also my  
16 position, because I was head of the Washington human  
17 resource office, personnel officer for the office,  
18 that I would handle things that are of a confidential  
19 nature having to do with EEO, grievances, union  
20 matters, all of that stuff. All of that would have

21 been on my computer and my disks.  
22 Because of the position that I held, the

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1 documents that I had and the disks and the computer  
2 and everything that I had you would want to keep  
3 because you don't know what's going to happen in the  
4 future. If something came up about a grievance I had  
5 or a union matter that I had or something else, you  
6 would have to have all that material.

7 Your question was should -- does that piece  
8 of paper that I did, the draft plan or the plan for  
9 Chief Chambers, even the appraisal before it was  
10 signed -- if they wanted to use it for bird cage paper  
11 they certainly could, but it would not have been -- it  
12 would not have been something that they should have  
13 done.

14 BY MR. CONDIT:

15 Q. Okay.

16 A. But they did not break any law if they did  
17 it.

30. Fajardo did not invoke any formal protocol in transferring the responsibility of maintaining this working file on Teresa Chambers upon her retirement from the agency: there were no specific instructions regarding any institutional requirements for its maintenance, or with respect to any larger file system in which the appraisal document was required to be kept. When asked whether she had given her successor any such directions or instructions, she responded, "Well, I suggested that everything regarding Chief Chambers be kept because by that time there was the action being taken, so I would have said, you know, 'Don't throw it out.'" Id. 44/9-14. As to her successor's response, "[i]t would have been 'okay,' something like that." Id. 44/18-21; see also 46/9-16

(Fajardo gave no specific instructions to her successor as to the maintenance of the files and floppy discs that had been located in her private office).

31. After the filing of the instant action, on August 25, 2005, Stephanie Yu, an attorney in Interior's Office of the Solicitor, invited Fajardo to Interior's NPS Washington office to assist the agency in locating the alleged draft performance appraisal that was the subject of plaintiff's request. See id. 172/7-20; 200/11- 18; 201/4-8; see generally 102/10 - 103; 8/19 - 9/20; 11/6 - 12/21. Fajardo testified that during the August 25<sup>th</sup> visit, she was not denied access to any files that she identified as a potential location of the document. Id. 176/19-21; 173/2 - 20 (first testifying, *inter alia*, that she was not given access to her old office but then stating that she never asked to perform personally a search of her old office because its inhabitant, her successor, said such documents were not there); id. 176/8-21; see also id. 11/6 - 12. Fajardo also testified that during her August 25<sup>th</sup> visit, she and Stephanie Yu went to the offices of the U.S. Park Police to look for the appraisal document but could not locate such a document there, either in the file on plaintiff

maintained there (referenced as the “dummy file, meaning “non-official”), or anywhere else. Id. 112/13 – 114/20 (incorrectly designating Ms. Yu as “Ms. Hee”).

Respectfully submitted,

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