

NATIONAL SECURITY COUNSELORS

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8 October 2009

John F. Hackett
Director, Information Management Office
Office of the Director of National Intelligence
Washington, DC 20511

Re: FOIA Request – Congressional National Security Oversight Committees

Dear Mr. Hackett:

This is a request on behalf of National Security Counselors (“NSC”) under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, for copies of **all Office of the Director of National Intelligence (“ODNI”) records, including cross-references, pertaining to:**

- a) **Testimony by ODNI officials delivered verbally or submitted in writing to Congressional Committees or Subcommittees with oversight over national security activities (hereinafter "national security oversight committees"), including *but not limited to* the House Permanent Select Committee on Intelligence (“HPSCI”) and the Senate Select Committee on Intelligence (“SSCI”);**
- b) **Transcripts of hearings and meetings of any national security oversight committees, including but not limited to the HPSCI or SSCI, currently in the ODNI’s possession; and**
- c) **Correspondence and emails between ODNI and the HPSCI or SSCI. For purposes of this subparagraph you may limit your searches to the Offices of the Director, Deputy Director, Congressional Affairs, General Counsel, Inspector General, and their predecessors.**

This request is only for records not publicly available on the ODNI website. To assist you in processing this request, you may consider this request functionally identical to Request #DF-2008-00054 as amended by correspondence between the James Madison Project (“JMP”) and the ODNI, with the exception that this request also covers records created between that request and now.

When processing this request, please note that the D.C. Circuit has previously held that agencies have a duty to construe the subject material of FOIA requests *liberally* to ensure

responsive records are not overlooked. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, you are hereby instructed that the term “record” includes, *but is not limited to*: 1) all email communications to or from any individual within your agency; 2) memoranda; 3) inter-agency communications; 4) sound recordings; 5) tape recordings; 6) video or film recordings; 7) photographs; 8) notes; 9) notebooks; 10) indices; 11) jottings; 12) message slips; 13) letters or correspondence; 14) telexes; 15) telegrams; 16) facsimile transmissions; 17) statements; 18) policies; 19) manuals or binders; 20) books; 21) handbooks; 22) business records; 23) personnel records; 24) ledgers; 25) notices; 26) warnings; 27) affidavits; 28) declarations under penalty of perjury; 29) unsworn statements; 30) reports; 31) diaries; or 32) calendars, regardless of whether they are handwritten, printed, typed, mechanically or electronically recorded or reproduced on any medium capable of conveying an image, such as paper, CDs, DVDs, or diskettes.

Furthermore, in line with the guidance issued by the Department of Justice (“DOJ”) on 9 September 2008 to all federal agencies with records subject to FOIA, agency records that are currently in the possession of a U.S. Government contractor for purposes of records management remain subject to FOIA. Please ensure that your search complies with this clarification on the effect of Section 9 of the OPEN Government Act of 2007 of the definition of a “record” for purposes of FOIA. In addition, the ODNI should not interpret this request to exclude correspondence sent to outside third parties. Please also consider this letter an affirmative rejection of any limitation of your search to ODNI-originated records or to records created prior to the date of this request. To the contrary, we stipulate that this search should be restricted to records created prior to the date of the first substantive review of this request by ODNI FOIA personnel (as opposed to the date that receipt of the request was acknowledged by the ODNI).

Lastly, the ODNI is specifically prohibited from adopting an overbroad interpretation of the above use of the phrase “pertaining to” with respect to the scope of this request; an interpretation that “a request for all documents ‘pertaining to’ a subject is overbroad because all documents ‘pertain’ to others in some remote fashion” is specifically rejected. Therefore, in conclusion, the ODNI is hereby instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought. If, even given these restrictions, the ODNI still determines that this request does not reasonably describe the records sought, it is instructed to contact NSC to discuss reformulation of the request before rejecting the request as overbroad, vague, or unduly burdensome. Given the compartmentalized nature of the ODNI’s records systems, NSC is willing to work with the FOIA analysts to determine a search strategy that will address both parties’ needs.

If you deny all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please “black out” rather than “white out” or “cut out.” In addition, we draw your attention to President Obama’s 21 January 2009 *Memorandum for the Heads of Executive Departments and Agencies*, directing federal agencies to adopt a presumption in favor of disclosure and stating that government information should not be kept confidential “merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.”

We are hereby requesting a waiver of all fees in accordance with our status as a representative of the news media. NSC is a non-profit organization under Virginia law, has the ability to disseminate information on a wide scale, and intends to use information obtained through FOIA in original works. According to 5 U.S.C. § 552(a)(4)(A)(ii), codifying the ruling of *Nat'l Security Archive v. Dep't of Defense*, 880 F.2d 1381 (D.C. Cir. 1989),

the term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

NSC has clear intent to "publish[] or otherwise disseminate[] information to the public." *Id.* at 1386 (quoting the following legislative history: 1) "It is critical that the phrase 'representative of the news media' be broadly interpreted if the act is to work as expected. . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a 'representative of the news media.'*" 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); 2) "A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, *or other entity that is in the business of publishing or otherwise disseminating information to the public* qualifies under this provision." 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). Our website, where much of the information received through our FOIA requests will be posted for all to review, can be accessed at <http://www.nationalsecuritylaw.org>. In addition, we also intend to use information obtained through FOIA in our own published opinion editorials, journal articles, and the like. The records sought in this particular request will be used in a law review article discussing the evolution of Congressional intelligence oversight. I personally have already published information received through FOIA in this manner (Kel McClanahan, *A Perception Based Model for Comparing Intelligence Communities*, 25(2) AMER. INTELLIGENCE J. 46 (Winter 2007/2008) (includes material obtained through a CIA FOIA request)). Therefore, in accordance with the Freedom of Information Act and relevant case law, NSC should be considered a representative of the news media. Similarly, our request for a public interest fee waiver should be granted, for the reasons elucidated below.

We are also asking for expedited processing. NSC is primarily engaged in disseminating information on a wide scale and clearly falls within the scope of the statute. We request expedited processing based on the fact that, according to ODNI representative Jennifer Hudson, responsive records to DF-2008-00054 had already been identified, retrieved, and compiled in March 2009 and were expected to be released by April 2009, but no records have yet been released to JMP. Therefore, this request will require minimal additional processing. I certify this statement to be true and correct to the best of my knowledge and belief.

There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. The question of proper Congressional oversight of the Intelligence Community is an ongoing debate in the public realm. *See, e.g.,* Loch Johnson, *A Season of Inquiry: The Senate Intelligence Investigation (1985)*; *Alleged Assassination Plots Involving Foreign Leaders: An Interim Report*

of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Together with Additional, Supplemental, and Separate Views (1976).

Recent years have seen the public disclosure of several controversial intelligence programs, ranging from the Terrorist Surveillance Program to “extraordinary rendition” of foreign nationals to unidentified overseas prisons. Such programs have raised public concern regarding whether the U.S. Intelligence Community (“USIC”) is operating outside of the law. Indeed, for the first time in six years, the Government Accountability Office (“GAO”) was asked last year by a congressional intelligence committee to perform an intelligence oversight-related function. On 11 March 2008, Rep. Silvestre Reyes (D-TX), the HPSCI chairman, and Rep. Anna Eshoo (D-CA), a subcommittee chairwoman, called upon the GAO to review security clearance processes in the intelligence community and to examine the Director of National Intelligence’s (“DNI”) pilot project on security clearance reform. *See* <http://www.fas.org/irp/news/2008/03/eshoo.html>. The potential role of the GAO in intelligence oversight was also addressed in a 29 February 2008 hearing of the Senate Homeland Security and Governmental Affairs Committee chaired by Senator Daniel Akaka. *See* http://www.fas.org/irp/congress/2008_hr/index.html#gao.

Disclosure of responsive records pertaining to ODNI’s interaction with Congressional national security oversight committees will demonstrate both the exact relationship between the USIC and its legislative watchdogs and the extent to which the USIC has been complying with Congressionally-mandated oversight of its activities, and thereby would contribute to the public’s understanding of government operations and activities.

In addition, with respect to the specific requirement that NSC must demonstrate an expertise in the subject area in order to satisfy the fee waiver criterion that disclosure of the requested information must contribute to the understanding of the public at large, one of NSC’s core missions is to educate the public on legal issues relating to intelligence and national security. With a Board of Directors and a Board of Advisors comprised of some of the most respected names in national security law, NSC’s collective expertise in this field is more than sufficient to satisfy this requirement. I personally have worked for a national security law firm for two years, am nearing completion of an LLM in National Security Law, and am currently the Associate Editor of the *American Intelligence Journal*.

The ODNI is required by law to respond to this request within 20 working days. However, the ODNI is required to issue a determination on the request for expedited processing “within 10 days after the date of the request.” 5 U.S.C. § 552(a)(6)(E)(ii)(I). Therefore, the ODNI’s response is due on or before 19 October 2009. Failure to timely comply may result in the filing of a civil action against your agency in United States District Court. Please note that the denial of expedited processing should not interfere with the normal processing of these requests.

We request that any documents or records produced in response to this request be provided in electronic (soft-copy) form wherever possible. Acceptable formats are .pdf, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible.

However, NSC does not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, NSC will accept a paper copy of responsive records.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Kel McClanahan". The signature is fluid and cursive, with a long horizontal stroke at the end.

Kel McClanahan
Executive Director