

# NATIONAL SECURITY COUNSELORS

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7 October 2009

Marianne Stupar  
FOIA Requester Service Center, DJP4  
National Security Agency  
9800 Savage Road, Suite 6248  
Ft. George G. Meade, MD 20755-6248

Re: FOIA Request – FISA Warrants

Dear Ms. Phillips:

This is a request on behalf of National Security Counselors (“NSC”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.*, for copies of

- a) **Any and all requests for Foreign Intelligence Surveillance Act (“FISA”) warrants submitted between 1999-2002 by the National Security Agency (“NSA”) to the Office of the Secretary of Defense (“OSD”) or the Attorney General (“AG”), including all documents and affidavits included as exhibits in such warrant requests and all transcripts of testimony provided by federal agents in furtherance of such warrant requests; and**
- b) **Any and all copies of FISC rulings, decisions, briefs, or orders regarding such warrant requests that are in the NSA’s possession.**

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 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 NSA 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 NSA-originated records.

In conclusion, the NSA 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 NSA still determines that this request does not reasonably describe the records sought, it is instructed to contact NSC pursuant to 32 C.F.R. § 286.4(h)(1) to discuss reformulation of the request before rejecting the request as overbroad, vague, or unduly burdensome.

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 released as a result of this particular request will be used in a law review article evaluating the evolution of the FISA warrant process before and after 9/11. 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.

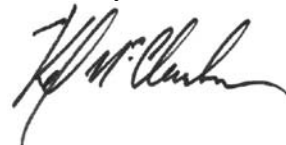
There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Even discounting the NSA's controversial Terrorist Surveillance Program, recent years have seen considerable public debate over the FISA and the role of the FISC. Through the end of 2004, the FISC approved 18,761 warrants, and rejected only five. It approved 2,072 in 2005, and 2,181 in 2006, rejecting none. In 2002, the FISC accused the FBI and DOJ of supplying "erroneous information" in more than 75 affidavits. Disclosure of responsive records pertaining to requests submitted to the OSD and/or DOJ for FISA warrants along with records regarding the ultimate fate of those requests would illuminate the standards by which these requests are evaluated at every level of review.

The NSA is required by law to respond to this request within 20 working days. Failure to timely comply may result in the filing of a civil action against your agency in United States District Court.

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', written in a cursive style.

Kel McClanahan  
Executive Director