

NATIONAL SECURITY COUNSELORS

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BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)
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18 August 2010

Carmen Mallon
Chief of Staff
Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Re: FOIA Request – *Chambers v. Dep't of the Interior*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the DC Circuit’s decision in *Chambers v. Dep’t of the Interior*, 568 F.3d 998 (D.C. Cir. 2009), to the administrative processing of FOIA requests.**

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 DOJ should not limit the search to DOJ-originated records or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.”

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.” To

permit us to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims. This description should include a list of the withheld documents, pursuant to *Shermco Indus. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) (“A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”).

We are hereby requesting classification 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 is 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. 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.

We are also requesting a public interest fee waiver. 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. Due to *Chambers’* status as one of the decisions that shape the current FOIA legal landscape, it is of great interest to the FOIA requester community to learn of the way in which agencies have interpreted this decision. This request is being submitted to several agencies as part of an effort to create a model representing interpretations across the government.

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, I personally have worked for a national security law firm and served as Director of FOIA Operations for the James Madison Project for two years, have litigated several FOIA/PA cases, teach National Security Law at the University of the District of Columbia, and recently received an LLM in National Security Law from Georgetown University Law Center.

We also specifically state for the record our unwillingness to pay any fees for this request. Please do not delay the processing of this request by needlessly requesting further confirmation of our unwillingness to pay fees or terminate the processing of this request for failure to provide you with such confirmation. This statement is a full and unequivocal refusal to pay *any* fees for this request.

Please ensure that, in accordance with the DC Circuit's ruling in *Chambers*, all records potentially responsive to this FOIA request are immediately preserved from destruction until the final resolution of this FOIA action. Destruction of potentially responsive records after the receipt of a FOIA request is considered "contumacious conduct" by the DC Circuit. *See id.* at 1004.

The DOJ 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 a United States District Court.

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Re: FOIA Request – *Feinman v. FBI*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the DC District Court’s decision in *Feinman v. FBI*, 680 F. Supp. 2d 169 (D.D.C. 2010), to the administrative processing of FOIA requests.**

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 DOJ should not limit the search to DOJ-originated records or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.”

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We are also requesting a public interest fee waiver. 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. Due to *Feinman*’s status as one of the decisions that shape the current FOIA legal landscape, it is of great interest to the FOIA requester community to learn of the way in which agencies have interpreted this decision. This request is being submitted to several agencies as part of an effort to create a model representing interpretations across the government.

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Re: FOIA Request – *James Madison Project v. CIA*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the Eastern District of Virginia’s decision in *James Madison Project v. CIA*, No. 08-1323, 2009 U.S. Dist. LEXIS 78671 (E.D. Va. Aug. 31, 2009), to the administrative processing of FOIA requests.**

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 DOJ should not limit the search to DOJ-originated records or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.”

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We are also requesting a public interest fee waiver. 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. Due to *James Madison Project’s* status as one of the decisions that shape the current FOIA legal landscape, it is of great interest to the FOIA requester community to learn of the way in which agencies have interpreted this decision. This request is being submitted to several agencies as part of an effort to create a model representing interpretations across the government.

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Re: FOIA Request – *Massachusetts v. HHS*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the District of Massachusetts’ decision in *Massachusetts v. HHS*, 727 F. Supp. 35 (D. Mass. 1989), to the administrative processing of FOIA requests.**

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Re: FOIA Request – *Payne Enters. v. United States*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the DC Circuit’s decision in *Payne Enters. v. United States*, 837 F.2d 486 (D.C. Cir. 1988), to FOIA cases.**

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 DOJ should not limit the search to DOJ-originated records or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.”

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.” To

permit us to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims. This description should include a list of the withheld documents, pursuant to *Shermco Indus. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) (“A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”).

We are hereby requesting classification 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 is 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. 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.

We are also requesting a public interest fee waiver. 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. Due to this case’s status as one of the decisions that shape the current FOIA legal landscape, it is of great interest to the FOIA requester community to learn of the way in which agencies have interpreted this decision. This request is being submitted to several agencies as part of an effort to create a model representing interpretations across the government.

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, I personally have worked for a national security law firm and served as Director of FOIA Operations for the James Madison Project for two years, have litigated several FOIA/PA cases, teach National Security Law at the University of the District of Columbia, and recently received an LLM in National Security Law from Georgetown University Law Center.

We also specifically state for the record our unwillingness to pay any fees for this request. Please do not delay the processing of this request by needlessly requesting further confirmation of our unwillingness to pay fees or terminate the processing of this request for failure to provide you with such confirmation. This statement is a full and unequivocal refusal to pay *any* fees for this request.

Please ensure that, in accordance with the DC Circuit's ruling in *Chambers v. Dep't of the Interior*, 568 F.3d 998 (D.C. Cir. 2009), all records potentially responsive to this FOIA request are immediately preserved from destruction until the final resolution of this FOIA action. Destruction of potentially responsive records after the receipt of a FOIA request is considered "contumacious conduct" by the DC Circuit. *See id.* at 1004.

The DOJ 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 a 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, .doc, .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 the first name "Kel" being particularly prominent.

Kel McClanahan
Executive Director

NATIONAL SECURITY COUNSELORS

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18 August 2010

Carmen Mallon
Chief of Staff
Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Re: FOIA Request – *Shermco Indust. v. Sec’y of the U.S. Air Force*

Dear Ms. Mallon:

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 **all records generated, received, or maintained by the Department of Justice (“DOJ”) regarding the application of the Northern District of Texas’ decision in *Shermco Indust. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306 (N.D. Tx. 1978), to the administrative processing of FOIA requests.**

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 DOJ should not limit the search to DOJ-originated records or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.”

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Kel McClanahan
Executive Director