

NATIONAL SECURITY COUNSELORS

1200 SOUTH COURTHOUSE ROAD
SUITE 124
ARLINGTON, VA 22204

TELEPHONE: (301) 728-5908
FACSIMILE: (240) 681-2189

KEL MCCLANAHAN, ESQ., EXECUTIVE DIRECTOR
EMAIL: [REDACTED]@NATIONALSECURITYLAW.ORG

8 October 2009

Ramona Oliver
FOIA Officer
National Archives and Records Administration
Office of the General Counsel
Room 3110
8601 Adelphi Road
College Park, MD 20740-6001

Re: FOIA Request – Privacy Act Records Control Schedules for OPM/GOVT-5

Dear Ms. Oliver:

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 **specific current Records Control Schedules for the government-wide OPM/GOVT-5 Privacy Act system of records (Recruiting, Examining, and Placement Records) published in the Office of Personnel Management Systems of Records Notice (“SORN”) at 71 Fed. Reg. 35,351 (June 19, 2006), available at http://www.defenselink.mil/privacy/govwide/opm_govt-5.shtml**. This request is limited to records pertaining to the following federal agencies: Central Intelligence Agency, Defense Intelligence Agency, National Security Agency, National Geospatial-Intelligence Agency, Department of Homeland Security, Department of State, and Office of the Director of National Intelligence.

This request is for the specific Records Control Schedules for specific categories of agency records in this system. Because the National Archives and Records Administration (“NARA”) must approve each Records Control Schedule, it is expected to have copies of the NARA-approved schedules or pending schedules awaiting NARA approval.

The SORN states

Records in this system are retained for varying lengths of time, ranging from a few months to 5 years, e.g., applicant records that are part of medical determination case files or medical suitability appeal files are retained for 3 years from completion of action on the case. Most records are retained for a period of 1 to 2 years. Some records, such as individual applications, become part of the person's permanent official records when hired, while some records (e.g., non-competitive action case files), are retained for 5 years.

This request is for the specific Records Control Schedules for the individual categories of records maintained in this system. For example, if Agency X retains Category A records for six months, Category B records for two years, and Category C records for five years, then NARA should produce

three specific Records Control Schedules for Agency X's records, each of which specifies the retention policy for one specific category of records.

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, NARA 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 NARA-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 NARA FOIA personnel (as opposed to the date that receipt of the request was acknowledged by NARA).

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. 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. Withholding such information defeats the legislative purpose behind the SORN, because knowledge of what types of records are being maintained is incomplete without knowledge of how *long* they are being maintained.

NARA 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