

# NATIONAL SECURITY COUNSELORS

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8 October 2009

Melanie Ann Pustay  
Director  
Office of Information Policy  
U.S. Department of Justice  
Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

Re: FOIA Request – State Secrets Privilege Regulations, Policies, and Guidelines

Dear Ms. Pustay:

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 Department of Justice (“DOJ”) documents, including cross-references, pertaining to regulations, policies, and guidelines governing the assertion of the State Secrets Privilege by the Attorney General (or his designee) in ongoing federal cases, including but not limited to:**

- A. Regulations, policies, or guidelines addressing the question of when and when not to assert this privilege;**
- B. Regulations, policies, or guidelines addressing what information to include in declarations or affidavits submitted to the court in support of the assertion of this privilege; and**
- C. Correspondence, emails, meeting minutes, and records of any discussions regarding these regulations, policies, or guidelines.**

The 23 September 2009 Attorney General’s Memorandum *Policies and Procedures Governing Invocation of the State Secrets Privilege* is not to be considered responsive to this request, but any regulations, policies, or guidelines that either 1) implement the 23 September 2009 Memorandum with greater specificity or 2) predate the 23 September 2009 Memorandum will be responsive, as will any records discussed in (C) above pertaining to the drafting or implementation of the 23 September 2009 Memorandum. Similarly, this request is only for records pertaining to *general* guidelines, and records that only pertain to guidelines for specifically named cases should be excluded.

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

Lastly, the DOJ 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 DOJ 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 DOJ still determines that this request does not reasonably describe the records sought, it is instructed to contact NSC pursuant to 28 C.F.R. § 16.3 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 sought in this particular request will be used in a law review article discussing efforts to reform the privilege. 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. The invocation of the state secrets privilege is of significant interest to the public. Congress has held numerous hearings on the issue, and four bills have been authored in the last two sessions to legislatively reform it. Most recently, Attorney General Holder issued the aforementioned Memorandum regarding its invocation. Never before have any of the declarations or affidavits submitted by an agency head been released to the public. Because of the enormous power of this privilege, the policies and regulations used by the DOJ to determine when to assert the privilege and what information to cite in the supporting declarations or affidavits would significantly 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 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 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