

# 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 (admitted in NY, DC)  
EMAIL: [REDACTED] NATIONALSECURITYLAW.ORG

BRADLEY P. MOSS, ESQ., DEPUTY EXECUTIVE DIRECTOR (admitted in IL, DC)  
EMAIL: [REDACTED] NATIONALSECURITYLAW.ORG

25 May 2010

Christopher M. Kurt  
FOIA Officer  
U.S. Office of Special Counsel  
1730 M Street, NW (Suite 218)  
Washington, DC 20036-4505

Re: FOIA Request – FOIA disciplinary action proceedings

Dear Mr. Kurt:

This is a joint request on behalf of National Security Counselors (“NSC”), the James Madison Project (“JMP”), and James Gordon Meek of the New York *Daily News* under the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, for copies of **all Office of Special Counsel (“OSC”) records regarding proceedings initiated since 2005 pursuant to 5 U.S.C. § 552(a)(4)(F)(i), including all records describing findings and recommendations submitted to other agencies and the actions taken by those agencies.**

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.

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 OSC 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 OSC-originated records.

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 classification as a representative of the news media. NSC and JMP are both non-profit organizations, have the ability to disseminate information on a wide scale, and intend 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.

We have 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)). In addition, James Gordon Meek, the third requester, is a well-known Washington correspondent for the New York *Daily News*, and is clearly a representative of the news media in his own right. We intend to use information obtained through this FOIA request in our own published opinion editorials, journal articles, and the like regarding the evolution of agency implementations of FOIA. Therefore, in accordance with the Freedom of Information Act and relevant case law, we should be considered representatives 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. It was not until the most recent FOIA amendments that the OSC was required to report its investigations in these matters to Congress, and records of how OSC has performed its duties are needed to evaluate OSC’s compliance (as well as the relevant

activities of the respective agencies), and will therefore clearly contribute to the public's understanding of government operations or activities.

In addition, with respect to the specific requirement that we 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. Mark Zaid, the second requester, has an even lengthier résumé in the field of FOIA/PA and National Security Law.

The OSC 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, .doc, .jpg, .gif, .tif. Please provide soft-copy records by email or on a CD if email is not feasible. However, we do not agree to pay an additional fee to receive records on a CD, and in the instance that such a fee is required, we will accept a paper copy of responsive records.

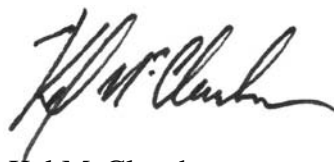
Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact Kel McClanahan at [REDACTED] [NationalSecurityLaw.org](http://NationalSecurityLaw.org) or 301-728-5908 or Bradley Moss at [REDACTED] [JamesMadisonProject.org](http://JamesMadisonProject.org) or 202-907-7945.

Thank you for your prompt attention to this request.

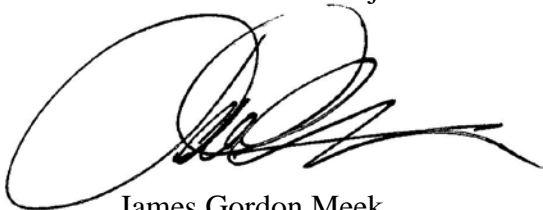
Sincerely,



Mark S. Zaid  
Executive Director  
James Madison Project



Kel McClanahan  
Executive Director  
National Security Counselors



James Gordon Meek  
Washington Correspondent  
New York *Daily News*