

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL SECURITY COUNSELORS, *

*

Plaintiff, *

*

v. *

Case: 1:11-cv-00443 (BAH)

*

CENTRAL INTELLIGENCE AGENCY, *

*

Defendant. *

*

* * * * *

**PLAINTIFF’S SUPPLEMENTAL NOTICE OF ADDITIONAL AUTHORITY
REGARDING COUNT 3 AND ELECTRONIC RECORDS**

With apologies to the Court, Plaintiff hereby supplements its Notice of Additional Authority (Docket No. 18) with two exhibits.

After reading Defendant’s Notice of Additional Authority (Docket No. 19), Plaintiff offers for the Court’s consideration the example of a similarly situated intelligence agency, the National Security Agency (“NSA”). All of the risks posed to the Central Intelligence Agency can also be claimed by the NSA, and yet the NSA releases electronic records upon request. Attached to this Notice are two NSA release letters for recent requests (the second of which is the subject of Count 10 of the related case *NSC v. CIA, et al.*, No. 11-445), which clearly indicate the fact that the responsive records were provided on CD. Taking into account the virtually identical real-world situations of the two agencies, the only distinction between them in this respect is that the NSA has chosen to comply with the 1996 amendments to FOIA, and the CIA has not.

Date: December 14, 2011

Respectfully submitted,

/s/ Kelly B. McClanahan
Kelly B. McClanahan, Esq.
D.C. Bar #984704
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Counsel for Plaintiff

EXHIBIT H



NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 60281E
24 November 2010

Mr. Kel McClanahan, Esquire
National Security Counselors
1200 South Courthouse Road, Suite 124
Arlington, VA 22204

Dear Mr. McClanahan:

This responds to your Freedom of Information Act (FOIA) request which was submitted via facsimile on 30 November 2009 and received by this office on 1 December 2009, for "all National Security Agency ('NSA') records referencing FOIA and Privacy Act requests submitted by the parties listed below that contain remarks, comments, notes, explanations, etc., made by NSA personnel or contractors about the processing of these requests (and appeals, if appropriate), the invocation of exemptions, or related matters." You then state that, the "parties covered by this request are: Accuracy in Media ('AIM'), Roger Hall, Scott Hodes, James Madison Project ('JMP'), H. Ray Lahr, James Lesar, NSC, Michael Ravnitzky, Reporters Committee for Freedom of the Press ('RCFP'), and Studies Solutions Results, Inc. ('SSRI')." A copy of your request is enclosed. Your request has been processed under the FOIA, and a CD containing the documents you requested is enclosed. Certain information, however, has been deleted from the documents.

Some of the information deleted from the documents was found to be currently and properly classified in accordance with Executive Order 13526. This information meets the criteria for classification as set forth in Subparagraphs (c) and (d) of Section 1.4 and remains classified TOP SECRET, SECRET, and CONFIDENTIAL as provided in Section 1.2 of the Executive Order. The information is classified because its disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Because the information is currently and properly classified, it is exempt from disclosure pursuant to the first exemption of the FOIA (5 U.S.C. Section 552(b)(1)).

In addition, this Agency is authorized by various statutes to protect certain information concerning its activities. We have determined the classified information in these documents is also exempt from disclosure pursuant to the

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third exemption of the FOIA which provides for the withholding of information specifically protected from disclosure by statute. The specific statutes applicable in this case are Title 18 U.S. Code 798; Title 50 U.S. Code 403-1(i); and Section 6, Public Law 86-36 (50 U.S. Code 402 note).

This Agency is authorized by statute to protect certain unclassified information concerning its activities, as well as the names of its employees. Such information is exempt from disclosure pursuant to the third exemption of the FOIA. The specific statute applicable in this case is Section 6, Public Law 86-36 (50 U.S. Code 402 note). We have determined that such information exists in these records, and we have excised it accordingly.

In addition, personal information regarding an individual has been deleted from the enclosures in accordance with 5 U.S.C. 552(b)(6). This exemption protects from disclosure information that would constitute a clearly unwarranted invasion of personal privacy. In balancing the public interest for the information you request against the privacy interests involved, we have determined that the privacy interests sufficiently satisfy the requirements for the application of the (b)(6) exemption.

Finally, Subsection (b)(2) of the FOIA exempts from disclosure matters related solely to the internal personnel rules and practices of an agency. This exemption has been held to apply to matters that are "predominantly internal," the release of which would "significantly risk circumvention of agency regulations or statutes." Crooker v. Bureau of Alcohol, Tobacco, and Firearms, 670 F.2d 1051, 1074 (D.C. Cir. 1981). Information contained within the enclosures meets the criteria for Exemption (b)(2) protection as that statutory provision has been interpreted and applied by the Federal Judiciary. The information being protected under Subsection (b)(2) is limited to e-mail routing and server information that appears before the text of a message and would reveal how NSA's information network is constructed. The release of such information could expose the network to unauthorized access.

One page of a document was found to be Non-Responsive to your request because it is related to the open FOIA case 59953. This page will not be provided to you. You were informed by a member of my staff that we cannot process portions of FOIA requests that still have issues pending. You were advised to resubmit your request for information about case 59953 at a later date.

The Initial Denial Authority for NSA information is the Deputy Associate Director for Policy and Records, Diane M. Janosek. Since these deletions may be construed as a partial denial of your request, you are hereby advised of this

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Agency's appeal procedures. Any person denied access to information may file an appeal to the NSA/CSS Freedom of Information Act Appeal Authority. The appeal must be postmarked no later than 60 calendar days from the date of the initial denial letter. The appeal shall be in writing addressed to the NSA/CSS FOIA Appeal Authority (DJP4), National Security Agency, 9800 Savage Road STE 6248, Fort George G. Meade, MD 20755-6248. The appeal shall reference the initial denial of access and shall contain, in sufficient detail and particularity, the grounds upon which the requester believes release of the information is required. The NSA/CSS Appeal Authority will endeavor to respond to the appeal within 20 working days after receipt, absent any unusual circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read "Pamela N. Phillips". The signature is written in a cursive, flowing style.

PAMELA N. PHILLIPS
Chief
FOIA/PA Office

Encls:
a/s



NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 60859A
22 April 2011

Mr. Kel McClanahan, Esquire
National Security Counselors
1200 South Courthouse Road, Suite 124
Arlington, VA 22204

Dear Mr. McClanahan:

This responds to your Freedom of Information Act (FOIA) request of 6 February 2010 for "copies of all current training handbooks, manuals, guidelines, checklists, worksheets, and similar documents provided to National Security Agency (NSA) FOIA and Privacy Act analysts (both agency employees and contractors). This request is limited to documents in current use as of 6 February 2010." A copy of your request is enclosed. Your request has been processed under the FOIA, and the documents you requested are enclosed in soft-copy, as requested. Certain information, however, has been deleted from the enclosures and one document (2 pages) has been withheld in its entirety.

Some of the information deleted from the documents was found to be currently and properly classified in accordance with Executive Order 13526. This information meets the criteria for classification as set for in subparagraph (c) of Section 1.4 and remains classified SECRET as provided in Section 1.2 of the Executive Order. This information is classified because its disclosure could reasonably be expected to cause serious damage to the national security. Because the information is currently and properly classified, it is exempt from disclosure pursuant to the first exemption of the FOIA (5 U.S.C. Section 552(b)(1)).

In addition, this Agency is authorized by various statutes to protect certain information concerning its activities. We have determined that such information exists in these documents. Accordingly, those portions are exempt from disclosure pursuant to the third exemption of the FOIA, which provides for the withholding of information specifically protected from disclosure by statute. The specific statutes applicable in this case are Title 18 U.S. Code 798; Title 50 U.S. Code 403-1(i); and Section 6, Public Law 86-36 (50 U.S. Code 402 note).

The names of NSA/CSS employees have been deleted from the enclosures. This information is exempt from disclosure pursuant to the third exemption of the FOIA, specifically Section 6, Public Law 86-36 (50 U.S. Code 402 note).

Some of the information has been deleted from the enclosures, and one document has been withheld in its entirety, pursuant to the fifth exemption of the FOIA. This exemption applies to inter-agency or intra-agency memoranda or letters which would not be available by law to a party in litigation with the agency, protecting

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information that is normally privileged in the civil discovery context, such as attorney-client privileged information and attorney-client work product.

In addition, information regarding other individuals has been deleted from the enclosures in accordance with 5 U.S.C. 552 (b)(6). This exemption protects from disclosure information which would constitute a clearly unwarranted invasion of personal privacy. In balancing the public interest for the information you request against the privacy interests involved, we have determined that the privacy interests sufficiently satisfy the requirements for the application of the (b)(6) exemption.

Finally, exemption 7 of the FOIA protects from disclosure records or information compiled for law enforcement purposes. This includes information that, if released, could identify a confidential source. The information withheld under (b)(7)(D) meets the threshold requirements for withholding under exemption 7 of the FOIA.

We also located 110 pages of briefing materials from the American Society of Access Professional (*asap*) National Training Conference. We do not have control of the material, which contains briefings prepared by numerous other government agencies. While it is possible that some of those briefings may be considered releasable by the originating agencies, because the material compiled by *asap* is only available by paying for and attending the training conference, we do not consider it to be under the control of the government, and, therefore, it is not subject to the FOIA.

The Initial Denial Authority for NSA information is the Deputy Associate Director for Policy and Records, Diane M. Janosek. Since one of the documents was withheld in its entirety and information was withheld from the enclosures, you may construe this as a partial denial of your request. You are hereby advised of this Agency's appeal procedures. Any person denied access to information may file an appeal to the NSA/CSS Freedom of Information Act Appeal Authority. The appeal must be postmarked no later than 60 calendar days from the date of the initial denial letter. The appeal shall be in writing addressed to the NSA/CSS FOIA Appeal Authority (DJP4), National Security Agency, 9800 Savage Road STE 6248, Fort George G. Meade, MD 20755-6248. The appeal shall reference the initial denial of access and shall contain, in sufficient detail and particularity, the grounds upon which the requester believes release of the information is required. The NSA/CSS Appeal Authority will endeavor to respond to the appeal within 20 working days after receipt, absent any unusual circumstances.

Please note that the redactions on two pages of Doc Id 3843188 (the 9th and 34th slides, both numbered 57 at the bottom of the page), are for illustrative briefing purposes only and contain redactions as they appear in the briefing. It is not information being withheld from you.

We have withheld certain information in one of the documents on behalf of the FBI pursuant to 5 U.S.C. 552 (b)(6), (b)(7)(C), and on behalf of the Navy, Army, and Air Force pursuant to 5 U.S.C. 552 (b)(6). Those deletions have been marked with the code OGA (Other Government Agency.)

Finally, we removed some information from one of the documents as non-responsive, because it dealt specifically with identifying other-government agencies'

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information in order to determine the handling of that information for referral and consultation. Our follow-up contact with you regarding your request indicated that you were most interested in the training related to the FOIA and the Privacy Act (PA), including how decisions are made regarding the release or denial of information (except for classified information). This information did not relate to making determinations about release – only about identifying information for consultation or referral. (The other agencies would make the decisions about release or denial.) The information would have required coordination with several other government agencies if we had considered it responsive. We felt that it was more efficient to handle the information in this manner and get a response to you.

Please be advised that records responsive to your request include documents originating with the Department of Defense (DoD). Because we are unable to make determinations as to the releasability of DoD's information, the subject documents have been referred to DoD for review and direct response to you. Documents used by NSA personnel that originated with DoD and are available on their website are not provided to you nor referred to DoD since they are already publicly available.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pamela N. Phillips".

PAMELA N. PHILLIPS
Chief
FOIA/PA Office

Encls:
a/s