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ADMINISTRATION AND MANAGEMENT

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SOCOM 2012-096
12-AC-0056
CENTCOM 12-0203
SEP 30 2013

Mr. Nathan Wessler
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10005

Dear Mr. Wessler:

This responds to American Civil Liberties Union (ACLU) and Center for Constitutional Rights (CCR) July 2, 2012 and June 19, 2012, Freedom of Information Act (FOIA) appeals. ACLU and CCR appealed the United States Central Command (USCENTCOM) and United States Special Operations Command (USSOCOM) decision to deny their request for expedited processing, to be considered representatives of the news media, and fee waiver of the FOIA request dated April 17, 2012. I apologize this response was not provided in a more timely manner.

I reviewed the appeals at the appellate level and determined that the ACLU and CCR request for expedited processing should be denied. ACLU and CCR sought expedited processing on the basis of compelling need. Department of Defense (DoD) Regulation 5400.7-R § C1.5.4.3.2. states that compelling need means that "the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity." DoD uses a standard that urgently needed means that "the information has a particular value that will be lost if not disseminated quickly. Ordinarily, this means a breaking news story of general public interest." Additionally, the federal courts have declared a three-pronged test to determine "compelling need" based on whether or not the information is "urgently needed" (*Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001)). The three prongs of the test are as follows:

1. Whether the request concerns a matter of current exigency to the American public.
2. Whether the consequences of delaying a response would compromise a significant recognized interest.
3. Whether the request concerns actual or alleged federal government activity.

I have determined that the ACLU and CCR initial request meets the third prong of the "urgently needed" test. However, they do not meet the first and second prongs of the test. The FOIA request to USCENTCOM and USSOCOM does not meet the standard of the first prong because information related to the alleged U.S. military strike on a community located in the al-Majalah region of the Abyan province of Yemen on December 17, 2009, has been debated in numerous stories by members of the media. Thus, it is no longer a "breaking news story," nor is it a matter of current exigency to the American people.

Additionally, ACLU and CCR do not meet the standard of the second prong because they have not proven that the consequences of delaying a response to the request would compromise a significant recognized interest. They state that this is a topic of particular current interest and the

information would lose it relevance if the responsive documents were not released on an expedited basis. However, they admit that this topic is of ongoing interest, therefore showing that the requested information will not lose its value. Therefore, I have determined that the information they seek will not lose its value if expedited processing is denied.

In *Al-Fayed v. CIA*, the District Court also states that the legislative history of the FOIA declares that "the specified categories for compelling need are intended to be narrowly applied," because "given the finite resources generally available for fulfilling FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment." The court then concludes that "an unduly generous approach would also disadvantage those requesters who do qualify for expedition, because prioritizing all requests would effectively prioritize none." Because ACLU and CCR have not proven a compelling need for the information, USCENTCOM and USSOCOM will continue to process the request in the standard queue.

I have determined that the ACLU and CCR request to be classified as "representatives of the news media" should be denied. The FOIA sets three standards that must be met for a requester to qualify as a representative of the news media:

1. Requester must be a person or entity that gathers information of potential interest (news) to a segment of the public. The FOIA defines 'news' as information that is about current events or that would be of current interest to the public.
2. Requester must use editorial skills to turn the raw materials into a distinct work.
3. Requester must distribute that work to an audience.

After reviewing the ACLU and CCR appeals, I have determined that they do not meet standards 1 and 3 listed above. The first criterion that must be met to be considered a representative of the news media is that the requester gathers the information in the public interest. Representatives of the news media normally are organized to seek out and gather information generated by public interest, and do not gather information primarily to support the organization's internal interests. This is what qualifies these organizations to be considered as members of the news media. However, ACLU and CCR selectively choose what information to seek out. This selective process disqualifies them as representatives of the news media. Additionally, ACLU and CCR have not proven that they have the ability to disseminate the requested information. They state that they have the concrete intention to publish an analysis and report, however, they do not elaborate on who the audience will be and how they will disseminate this analysis and report. Because ACLU and CCR do not meet the standards set by the FOIA, they do not qualify as "representatives of the news media."

Finally, I have determined that the ACLU and CCR request for a public interest fee waiver should be denied. A requester must satisfy a two-pronged test in order to qualify for a fee waiver. First, the requested information must favor the public interest. Second, the request must not be primarily in the requester's commercial interest. The following six factors further define the two-pronged test. A requester must meet the first four factors in order to qualify under the public interest prong.

1. The subject of the request must concern the alleged "operations and activities of the government."

2. The disclosure of information is "likely to contribute to an understanding of alleged government operations and activities."
3. The disclosure of the requested information will "contribute to public understanding."
4. The disclosure is likely to contribute "significantly" to public understanding of alleged government operations or activities.
5. The requester has a commercial interest that would be furthered by the requested disclosure.
6. Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, thereby rendering the disclosure "primarily in the commercial interest of the requester."

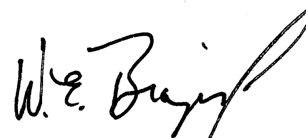
Further analysis shows that ACLU and CCR do not meet two of these six factors. They have not provided evidence that they meet factor 3 regarding how the information will "contribute to public understanding." This factor generally means that the requester can disseminate the information to the general public as opposed to a narrow segment of interested persons. Merely posting information on a website, Twitter, Facebook, and sending out emails is not dissemination to the public as only persons actively searching for the information or subscribers would have access to it. Passively making this information available to anyone who might seek access to it does not meet the burden of demonstrating that the information will be communicated to the general public. ACLU and CCR also does not meet factor 4 because they have not shown how this information will 'significantly' contribute to public understanding of alleged government operations.

Because they do not meet the standards of factors 3 and 4 listed above, ACLU and CCR do not qualify for a fee waiver under the public interest prong. Consequently, I have determined that ACLU/CCR request for a fee waiver should be denied. Because fee waivers are made on a case-by-case basis, any instances where agencies may have provided them with a fee waiver or reduction of fees were not factors into my coming to this decision.

USCENTCOM and USSOCOM have placed ACLU and CCR in the "other" fee category. They are expected to pay for search time after the first two hours and duplication costs after the first 100 pages. Since ACLU and CCR have not agreed to pay any applicable fees assessed with these requests, in order to avoid delays in processing your requests, please provide USCENTCOM and USSOCOM with an amount that you are willing to pay.

ACLU and CCR has the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



William E. Brazis
Deputy Director

cc:
USCENTCOM
USSOCOM