

March 14, 2011

Defense Freedom of Information Policy Office
Attn: Mr. James Hogan
Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155

Re: Freedom of Information Act Appeal: 10-F-1242; 10-A-1242-A1

Dear Mr. Hogan:

On June 30, 2010, the Center for Constitution Rights (CCR) (“CCR” or “Requester”) filed a request for information under the Freedom of Information Act (FOIA) *inter alia* “seeking all records, regardless of format, medium, or physical characteristics, and including electronic records and information, audiotapes, videotapes and photographs, that reflect, relate or refer to... the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S.-registered ‘*Challenger I*’ and the Comoros-registered ‘*Mavi Marmara*,’ which was forcefully intercepted by the Israeli Defense Forces, resulting in the death of 9 passengers on board the *Mavi Marmara* including one U.S. citizen and the injury of many more.” (“Request”) See Exhibit A.

In a letter from Paul J. Jacobsmeyer dated July 19, 2010 and postmarked July 21, 2010, the DOD issued an interim response, denying our requests for a fee waiver, a limitation of fees, and expedited processing. See Exhibit B.

CCR filed a timely appeal to that interim response, appealing the denial of our requests for a fee waiver, a limitation of fees, and expedited processing on September 17, 2010. See Exhibit C. In that appeal, CCR demonstrated that “because of the mandates, structure, mission and focus of the OSD [Office of Secretary of Defense] and the JS [Joint Staff], including in regard to the Middle East generally, and policies related to Israel and Gaza, specifically,” the Department of Defense would be expected to have responsive records to the Request “and the public understanding of U.S. policies, activities and operations in relation to the issues raised in the FOIA Request will be served by receiving records from the OSD and JS.”

James P. Hogan sent a letter on November 5, 2010 assigning our appeal case number 10-A-1242-A1. See Exhibit D. In that letter, Mr. Hogan indicated that due to the “extremely heavy FOIA workload,” our appeal could not be processed within the statutory time requirement. Mr. Hogan indicated that CCR would be notified of the outcome of our appeal by the Deputy

Director of Administration and Management, Office of the Secretary of Defense. To date, CCR has received no communication or decision from the Deputy Director of Administration and Management.

In a letter dated December 23, 2010 and related to 10-F-1242, Paul J. Jacobsmeyer indicated that a “final response” had been made in relation to the Request. *See* Exhibit E. The letter states that the search was conducted only by the Joint Staff, was limited to two hours and yielded four documents. One document was withheld from release pursuant to 5 U.S.C. § 552(b)(1), (b)(2) and (b)(5). Three of the four documents have been referred to three agencies for review: the Defense Intelligence Agency, the Department of State, and the National Geospatial-Intelligence Agency. CCR has not received any communications from these three agencies in relation to the three documents; telephone inquiries have confirmed that the documents were referred to at least two of the agencies, but no decision has been taken, and these documents have not been released to CCR.

CCR understood the December 23, 2010 letter to be a partial response to its Request, and not a final response for three reasons: CCR has an open appeal pending before the DOD (appeal 10-A-1242-A1); the search was conducted only by the Joint Staff and CCR has yet to receive a response from the DOD regarding what search, if any, has been undertaken by the OSD; and the three referred documents have yet to be decided upon by the referring agencies. Accordingly, and in an effort not to file duplicate or multiple appeals, CCR did not file an appeal to the December 23, 2010, challenging both the adequacy of the search conducted by the Joint Staff or the withholding of one document, consisting of four pages, pursuant to 5 U.S.C. § 552(b)(1), (b)(2) and (b)(5). After seeking clarification from Alisa Turner about the scope of 10-A-1242-A1, and discussing the case with her on March 9, 2010, and in a voice-mail communication from Stephanie Carr on the same date, considers that it is prudent to file an appeal to the “final response” contained in the December 23, 2010, and asks that the 60-day time limit for appeal be expanded in this case to cover this appeal, taking into account the reasons set forth in this paragraph for the delayed appeal.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby confirms its appeal of the DOD’s “final response” as set for the in the December 23, 2010 letter, and appeals the adequacy of the search undertaken by the DOD and the withholding of one document pursuant to 5 U.S.C. § 552(b)(1), (b)(2) and (b)(5), and reiterates its appeal contained in its September 17, 2010 appeal of the denials of our requests for a fee waiver, a limitation of fees, and expedited processing.

The Department of Defense Has Failed to Demonstrate the Adequacy of its Search.

Contrary to its assertions otherwise, the DOD cannot be reasonably deemed to have performed an adequate search in the two-hour search it conducted that yielded four documents and has not demonstrated that “all files likely to contain responsive materials . . . were searched,” *Oglesby v. Dep’t of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). As an initial matter, the DOD has stated that only that the Joint Staff conducted a search; there is no information about the OSD having committed any search or whether its databases were part of the two-hour search.

As set forth in our September 17, 2010 letter, the OSD, as the principal staff element of the Secretary of Defense and also including the entire staff of the Secretary of Defense, the immediate offices of the Secretary and Deputy Secretary of Defense, the five Under Secretaries in the fields of Acquisition, Technology & Logistics; Comptroller/Chief Financial Officer; Intelligence; Personnel & Readiness; and Policy, would be able to access the information requested. There is no information in the December 23, 2010 Response about a search of any of these components. It is recalled that Israel is the “largest cumulative recipient of U.S. foreign assistance since World War II,”¹ and that “[a]lmost all U.S. bilateral aid to Israel is in the form of military assistance,”² and as such, the DOD and the offices enumerated in the OSD would have significant interests in U.S. policies towards Israel, including its blockade of Gaza. Additionally, the DOD views Israel and Egypt as both non-NATO allies, meaning that Israel and Egypt are exceptionally close allies who have a close working relationship with the Defense Department and receive military and financial advantages not available to other non-NATO countries. A two-hour search yielding only four documents does not appear to be a sufficient response had a “adequate search” been conducted.

Furthermore, there is an MOU between Israel and the United States that recognizes “the threat to Israel of hostile and terrorist activity from Gaza, including weapons smuggling and the build-up of terrorist capabilities, weapons and infrastructure,” and agrees that both countries would participate in “enhanced intelligence fusion with key international and coalition naval forces and other appropriate entities to address weapons supply to Gaza.”³ Israel has publicly said that it went aboard the Flotilla because of concerns of weapons smuggling. The MOU also calls for “enhanced sharing of information and intelligence that would assist in identifying the origin and routing of weapons being supplied to terrorist organizations in Gaza.” The MOU necessarily encompasses the OSD whose responsibilities include, but are not limited to: “initiate programs, actions, and taskings to ensure adherence to DoD policies and national security objectives, and to ensure that programs are designed to accommodate operational requirements.”⁴ Therefore, it is likely that there would have been responsive records related to this incident and what steps the United States took, and continues to take, in securing the rights and protections of its citizens and their property; what steps the United States took and continues to take to ensure that civilians of all nationalities who are engaged in humanitarian missions are protected from attack; and the U.S. policy in relation to the blockade of Gaza in relation to the list of prohibited goods and the delivery of humanitarian assistance to the civilian population of Gaza.

Indeed, the Secretary of Defense, Robert Gates, has confirmed the close relationship between Israel and the United States and personally discussed “important defense issues, both in our bilateral defense relationship and around the region” with the Israeli Defense Minister about

¹ “U.S. Foreign Aid to Israel,” Congressional Research Service, (Jeremy M. Sharp, Specialist in Middle Eastern Affairs), Dec. 4, 2009, Summary, available at: <http://www.fas.org/sgp/crs/mideast/RL33222.pdf>.

² *Id.*

³ Memorandum of Understanding, reprinted in *Haaretz*, January 16, 2009, available at: <http://www.haaretz.com/news/text-of-u-s-israel-agreement-to-end-gaza-arms-smuggling-1.268308>. See also *United States, Israel Working to End Arms Smuggling into Gaza*, Jan. 16, 2009, available at: <http://www.america.gov/st/peacesec-english/2009/January/20090116141010dmslahrellek0.0438959.html>.

⁴ OSD website: <http://odam.defense.gov/omp/pubs/GuideBook/osd.htm>.

one month before the attack on the flotilla.⁵ After the attack, Secretary Gates presented his views on the utility and purposes of the blockade of Gaza.⁶ He further spoke about the Middle East peace process and the central role that the current situation in Gaza plays in that regard.⁷ Secretary Gates also spoke with concern about the deterioration of relationship between Turkey and Israel following the attack on the flotilla.⁸ It is apparent from these statements that he and his office closely follow developments in and around Israel, and would be expected to have records related to US knowledge of, and reaction to, the attack on the flotilla, as set forth in the FOIA Request. The December 23, 2010, by its terms, demonstrates that the search did not extend to these records.

The DOD December 23, 2010 Response provides no explanation of why it conducted such a narrow and limited search by only the Joint Staff; the Request provided no basis for drawing such narrow parameters for the search. The Freedom of Information Act requires that each agency search for all relevant records described in our Request, which may be found within the agency as a whole. Accordingly, the search did not fulfill the most basic requirements for an adequate search as this search was not one that could be “reasonably calculated to uncover all relevant documents.” *Weisberg v. Dep’t of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

Additionally, the DOD has the duty to demonstrate that it exercised all reasonable efforts to ensure that the agency included what was requested in the search conducted. *See Amnesty Int’l USA v. CIA*, No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882 at *37 (S.D.N.Y. June 19, 2008) (citing authorities). CCR “reasonably described” the information we sought in the Request. The DOD did not specify what search terms it used or what databases it searched. The lack of meaningful detail about the search does not allow CCR to discern whether an adequate search has been conducted nor enough information to enable CCR to challenge the procedures that were used. *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890, 892 (D.C. Cir. 1995) (holding that the agency had not provided sufficient information “to allow [] review of the adequacy of [its] search); *Weisberg v. Dep’t of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980) (requiring a reflection of a systematic approach to document location, and providing specific enough information to enable the requester to challenge the procedures used.) The DOD provided no information about the search process itself. For example, it provided no information about whether the search was conducted electronically or by hand and no indication regarding how the agency would find responsive records not in the most likely case files. Mr. Jacobsmeyer letter also does not indicate if there was any systematic approach to locating the documents requested. *Weisberg v. Dep’t of Justice*, 627 F.2d 365, 371 (D.C. Cir. 1980)

⁵ *Press Conference with Secretary Gates and Israeli Defense Minister Barak*, Council on Foreign Relations, April 27, 2010, available at: http://www.cfr.org/publication/22004/press_conference_with_secretary_gates_and_israeli_defense_minister_barak_april_2010.html.

⁶ *Israel eases Gaza embargo, allows snack food in*, Reuters, June 9, 2010, available at: <http://www.alertnet.org/thenews/newsdesk/LDE6581JK.htm>.

⁷ Robert Gates interview: US secretary of defence talks about Iran's nuclear programme and economic sanctions with David Frost, Al Jazeera, June 10, 2010, available at: <http://english.aljazeera.net/programmes/frostovertheworld/2010/06/201061091243602584.html>.

⁸ Adam Entous, *U.S. concerned at Turkey shift: Gates*, Reuters, June 9, 2010, available at: <http://www.reuters.com/article/idUSTRE6581I220100609>.

While an agency's search for records must be reasonable, we recognize that it does not have to be perfect. *Amnesty Int'l USA v. C.I.A.*, No. 07 Civ. 5435, 2008 U.S. Dist. LEXIS 47882, at *27 (quoting *Garcia v. Dep't of Justice*, 181 F. Supp. 2d 356, 368 (S.D.N.Y. 2002)). What is important is whether "the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant" *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999). Reasonableness is looked at within the context of each particular request. See *Davis v. U.S. Dep't of Justice*, 460 F.3d 92, 103 (D.C. Cir. 2006); *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The agency must set forth in an affidavit why a search of other some record systems, but not others, would lead to the discovery of responsive documents. See *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). *Amnesty International et al. v. CIA et al.*, 2010 U.S. Dist. LEXIS 78659 at 11, August 2, 2010. From the DOD's response, it is unclear whether the Department of Defense made any determination about whether there are sections beyond the Joint Staff that should have been searched, and whether that search was adequate. Our review of the Department's structure clearly suggests that there are additional sections that should have been searched and that a yield of only four documents is not reflective of an adequate search.

The Document Withheld under (b)(1), (b)(2) and (b)(5) Has Not Been Shown to Be Entitled to Exemption under FOIA

FOIA requires an agency to release all relevant documents unless an exemption applies. The December 23, 2010 Response indicates that Mr. Mark Patrick, an Initial Denial Authority for the Joint Staff, determined that one document, consisting of four pages, is exempt from release in its entirety pursuant to 5 U.S.C. § 552 (b)(1), (b)(2) and (b)(5).⁹ In relation to the 5 U.S.C. § 552 (b)(1) exemption, the Response further states that the material was withheld in accordance with sections 1.4 (b), (c) and (d) of Executive Order 13526. The Response provides no detail about the nature of the document or the justification for invoking these exemptions. DOD failed to justify the withholding of this document in its entirety, and failed to provide any detailed review and reason for withholding individual paragraphs and sentences. Furthermore, the DOD did not provide any segregable part of the document that can be disclosed.

As the Supreme Court recently affirmed in *Milner v. Dep't of the Navy*, 562 U.S. ___ (2011) No. 09-1163 (U.S. March 7, 2011), the policy behind the FOIA, as reflected in the carefully constructed text, is one of "broad disclosure." Slip Op. at 8 ("We have often noted 'the Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass.'" *Department of Justice v. Tax Analysts*, 492 U. S. 136, 151 (1989); see *Department of Interior v. Klamath Water Users Protective Assn.*, 532 U. S. 1, 7-8 (2001)).

In relation to Exemption 1 and Executive Order 13526, the Response failed to demonstrate that the information is in fact, properly classified pursuant to the procedural and

⁹ 5 U.S.C. § 552 (b)(1), (b)(2) and (b)(5) provides:

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

[...]

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

substantive criteria set forth in the Order. CCR recalls that Section 1.7 of the Order sets forth classifications prohibitions and limitations, and Section 3.5 of the Order provides for a mandatory declassification review process. The Response provides no information about the duration of classification of this document. Furthermore, in relation to Sections 1.4 (b) and (d) of Executive Order 13526, the Request relates to all records that reflect the *DOD's* plans, reports, documents, discussions, meetings and others communications, and not those of a foreign state. Section 6.1(s) of the Executive Order defines "Foreign government information" as (1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence." It is not apparent from the Request that such information could not be redacted, if and as necessary from the document, permitting the release of segregable portions of the document. *See* 5 U.S.C. § 552(b). Sections 1.4(b) and (d) cannot be read so broadly as to withhold from release any and all records that refer to communications with or about a foreign state. These sections are narrowly tailored to protect, for example, "confidential sources" and are not intended to shield from release all information that implicates US relations with a foreign state.

The Supreme Court recently affirmed that "Congress drafted Exemption 2 'to have a narrower reach.'" *Milner*, at Slip Op. 2, citing *Department of Air Force v. Rose*, 425 U. S. 352, 362–363 (1976). The DOD Response incorrectly paraphrases Exemption 2 as pertaining "to information about internal practices and personnel rules, which if released would risk circumvention of agency regulations," which suggests a far broader reach into matters related to agency's internal practices than that contained in the plain language of the exemption. *See* Ex. E, p. 1; the actual text of exemption 2 reflects the "narrow reach" that the Court discussed in *Milner* -- one that is limited to personnel matters: materials "related solely to the internal personnel rules and practices of an agency." ("The key word in that dozen—the one that most clearly marks the provision's boundaries—is 'personnel.')" *Milner*, Slip. Op. at 6. The Court explained that "[a]n agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources." *Milner*, Slip. Op. at 7. It is not apparent from the scope of the Request, and indeed, taking into account the other FOIA exemptions invoked, that Exemption 2 was properly invoked to withhold release of this document in its entirety.

Information can only fall within the scope of Exemption 5 and be withheld under the deliberative process privilege if it is both predecisional and deliberative. *See Wolfe v. HHS*, 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). The DOD failed to demonstrate in the December Response that the document it withheld in its entirety was such a document. The Request does not seek to expose proposed policies, but rather seeks to make known the post-decisional documents. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 141-53 (1975) As the Request seeks, for example, any and all records from January 1, 2010 related to the flotilla, and any and all records since at least June 1, 2007 related to the U.S. actions, policies, procedures or guidelines in relation to the interception, inspection, safe-passage or any other action or responses to vessels in the Mediterranean Sea that have as their destination Gaza, *see* Ex. A, pp. 1-4, it is highly unlikely that there are no post decisional documents related to the blockade of Gaza, the tracking or interception of boats headed to Gaza, or other documents which discuss U.S. policy and coordination vis-à-vis the entry of goods to Gaza.

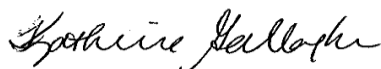
Conclusion

In closing, CCR requests that you refer the Request back to the Department of Defense to conduct an adequate search in compliance with the terms and jurisprudence sent out above. Additionally, CCR requests that you reverse your denial of our request for a fee waiver and expedited processing.

Requesters note that many government officials involved in classification determinations have been increasingly concerned over the past few years about the over-classification of information that results in less public accountability for government conduct.¹⁰ Accordingly, Requesters demand that your office engage in an adequate and diligent effort to properly designate information, to disclose all responsive documents not properly subject to a FOIA exemption, and to comply with your obligations to provide segregable information when necessary.

We request a response to this appeal with twenty (20) working days.

Sincerely,



Katherine Gallagher
Senior Staff Attorney
Center for Constitutional Rights
666 Broadway, 6th Floor
New York, NY 10012
Phone: (212)614-6455

¹⁰ The over-classification of documents was an issue cited by the 9/11 Commission in its final report as one factor impairing the efficient and effective sharing of information with the American public. *See* The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States, 417 (“Current security requirements nurture overclassification and excessive compartmentation of information among agencies”); *see also* Memorandum from Lawrence J. Halloran to Members of the Subcommittee on National Security, Emerging Threats, and International Relations, *Briefing Memorandum for the hearing, Emerging Threats: Overclassification and Pseudo-classification, scheduled for Wednesday, March 2, 1:00 p.m., 2154 Rayburn House Office Building*, Feb. 24, 2005 (noting that the Information and Security Oversight Office’s 2003 Report to the President found that “many senior officials will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own”).

EXHIBIT A

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June 30, 2010

Office of Freedom of Information
Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155
Tel. (703) 696-4689

Re: Freedom of Information Act Request

Dear FOIA Officer:

The Center for Constitution Rights (CCR) ("Requester") makes this request for information regarding the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S.-registered "*Challenger I*" and the Comoros-registered "*Mavi Marmara*," which was forcefully intercepted by the Israel Defense Forces, resulting in the death of 9 passengers on board the *Mavi Marmara*, including one U.S. citizen, and the injury of many more,¹ pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. Sec. 552 *et seq.*, and U.S. Department of Defense FOIA Regulations, 32 C.F.R. Part 286.

Specifically, CCR seeks all records, regardless of format, medium, or physical characteristics, and including electronic records and information, audiotapes, videotapes and photographs, that reflect, relate or refer to:

- (1) Any and all records since January 1, 2010 that relate to and reflect any and all plans, reports, documents, discussions, meetings, or other communications, whether in person, by phone, mail, instant message, email, or any other method, that mention, refer or relate to any vessels or a flotilla of boats destined for Gaza in May 2010, including the U.S.-flagged *Challenger I*. This request includes, but is not limited to records reflecting communications with inter-governmental organizations, such as the North Atlantic Treaty Organization (NATO), foreign governments, including but not

¹ For more information on the attack on the May 31, 2010 attack on the flotilla, see, e.g., "Deaths as Israeli forces storm Gaza aid ship," BBC News, May 31, 2010, available at: http://news.bbc.co.uk/2/hi/middle_east/10195838.stm; J. Zacharia, "Israel troops raid aid flotilla headed for Gaza, killing nine" Washington Post, June 1, 2010, available at: "Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation," Security Council, SC/9940, May 31, 2010, available at: <http://www.un.org/News/Press/docs/2010/sc9940.doc.htm>.

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limited to the Government of Israel, and any communications with other agencies, departments or divisions of the United States, including but not limited to any communications which relate to possible, planned, or executed actions by the U.S. government in the Mediterranean Sea in response to Israel's military operations at sea;

This request also includes but is not limited to:

- (2) Any and all records reflecting communications, in any format, with any member-state of NATO, including but not limited to Turkey, prior to, on, or after May 31, 2010 in relation to the U.S.-registered *Challenger I* or any other vessel which formed part of the flotilla of ships headed towards Gaza in May 2010, including communications regarding any requests, notices or indications from the Israeli government, including by and through the IDF, of its intentions to block, board or otherwise redirect the U.S.-registered vessel to a destination other than its intended destination of Gaza, and any responses to such requests, notices or indications of actions by the Israeli government, and subsequent responses, notices or exchanges between NATO members and/or NATO headquarters in relation to Israel's actions towards the flotilla;
- (3) Any and all records reflecting communications, in any format, with the Israel Defense Forces, or any other division, department or representative of the Government of Israel, prior to, on, or after May 31, 2010 in relation to the U.S.-registered *Challenger I*, including any requests, notices or indications from the Israeli government, including by and through the IDF, of its intentions to block, board or otherwise redirect the U.S.-registered vessel to a destination other than its intended destination of Gaza, and any responses to such requests, notices or indications of actions by the Israeli government. This request includes, but is not limited to, communications by the Chairman of the Joint Chiefs of Staff;²
- (4) Any and all records reflecting communications, in any format, with the Israel Defense Forces, or any other division, department or representative of the Government of Israel, prior to, on, or after May 31, 2010 in relation to vessels included in the flotilla of boats destined to Gaza in May 2010, other than the U.S.-registered *Challenger I*, including any requests, notices or indications from the Israeli government, including

² A. Pfeffer, "Mullen to make unplanned stop in Israel after Afghanistan visit," Haaretz, June 26, 2010, Available at: <http://www.haaretz.com/news/diplomacy-defense/mullen-to-make-unplanned-stop-in-israel-after-afghanistan-visit-1.298460> ("Over the last year, the cooperation between the Israeli and American militaries has grown tremendously in a string of joint exercises and the constant exchange of intel. [Israel Defense Forces Chief of Staff Gabi] Ashkenazi and Mullen speak on a secure line connecting their respective offices every week, and meet somewhere in the world every several months.")

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by and through the IDF, of its intentions to block, board or otherwise redirect any vessel to a destination other than its intended destination of Gaza, and any responses to such requests, notices or indications of actions by the Israeli government;

- (5) Any and all records reflecting communications in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010, in relation to the actions that occurred on board each of the six boats of the flotilla, including the U.S.-registered "*Challenger I*" and the "*Mavi Marmara*," including but not limited to information regarding the status of U.S. and non-U.S. passengers, including the injured and the dead, while on board the vessels or in Israel, including in detention or medical facilities or other facilities, following the interception of the flotilla by Israel;
- (6) Any and all records reflecting communications in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to whereabouts, condition and status of the *Challenger I*, including the property on board that vessel and/or belonging to the passengers on board that vessel, and its return;
- (7) Any and all records reflecting communications in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to whereabouts, condition and status of vessels included in the flotilla of boats destined to Gaza in May 2010, other than the U.S.-registered *Challenger I*, including the property on board each vessel and/or belonging to the passengers on board that vessel, and its return;
- (8) Any and all records reflecting communications, including but not limited to the transmission or exchange of instructions, guidelines, policy statements or standard operation procedures, in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to the preservation and safeguarding of any and all possible evidence or materials seized by or in the possession of Israel from, related to or relevant to the incident, including but not limited to computers, cameras, cell phones, SIM cards, personal devices, computer disks or memory chips, hard drives or other such devices, so as to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in any and all subsequent investigatory proceedings, including but not limited to criminal, civil or administrative proceedings; and
- (9) Any and all records, including but not limited to plans, reports, communications, instructions and documents since at least June 1, 2007 that relate to U.S. actions, policies, procedures or guidelines in relation to interception, inspection, safe-passage or any other action or response to vessels in the Mediterranean Sea that have as their

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destination Gaza, including but not limited to vessels undertaking humanitarian missions in response to the Israeli blockade of Gaza.

Please search for responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, audiotapes, videotapes, photographs, including satellite imagery where available, and back-up tapes. Our request includes any telephone messages, voice mail messages, daily agenda and calendars, information about scheduled meetings and/or discussions, whether in-person or over the telephone or via video-conference, agendas for those meetings and/or discussions, participants included in those meetings and/or discussions, minutes of any such meetings and/or discussions, the topics discussed at those meetings and/or discussions, email regarding meetings and/or discussions, email, facsimiles, cables or other communications sent as a result of those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions to the extent they relate to the aforementioned requested information.

The Requester

The Center for Constitutional Rights ("CCR") is a not-for-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR's diverse dockets include litigation and advocacy related to human rights in times of armed conflict or occupation, as well as the protection of human rights defenders. CCR is a member of human rights networks nationally and internationally, and provides legal support to human rights defenders and movements. One of CCR's primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current international law issues, and other similar materials for public dissemination. These and other materials are available through CCR's Development, Communications, and Education & Outreach Departments. CCR operates a website, www.ccrjustice.org, which addresses the issues on which the Center works. The website includes material on topical civil and human rights issues and material concerning CCR's work. All of this material is freely available to the public. In addition, CCR regularly issues press releases and operates a listserv of over 50,000 members and issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR staff members often serve as sources for journalist and media outlets, including on international human rights.

Fee Waiver

CCR qualifies as a "representative[] of the news media" and the requested records are not sought for commercial use. Accordingly, we request a waiver of fees on the grounds that disclosure of the requested records is in the public interest and because disclosure "is likely to contribute significantly to the public understanding of the activities or operations of the

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government and is not primarily in the commercial interest of the requester[s].” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 32 C.F.R. 286.28(d) records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of institution). *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The Requesters have a proven track-record of compiling and disseminating information to the public about government functions and activities, including the government's record and position on international human rights and policy matters, and plans to disseminate any information disclosed as a result of this FOIA request through the channels described above. The Requesters have undertaken this work in the public interest and not for any private commercial interest. Similarly, the primary purpose of this FOIA request is to obtain information to further the public's understanding of the U.S. government's role in, and response, to an international incident which involved U.S. citizens, U.S. property, including a vessel registered in accordance with international regulations and entitled to certain protections under domestic and international law, and has involved the United States in formulating an international response to both the May 31, 2010 attack on the flotilla and the blockade of Gaza. As such, the subject of this request concerns the operations of the federal government and expenditures, and the disclosures will likely contribute to a better understanding of relevant government procedures by CCR and the general public in a significant way.

The public has an interest in knowing about the manner in which the federal government prepared for, and responded to, information regarding a possible attack on the flotilla destined for Gaza in May 2010. The public further has an interest in knowing what steps the United States took, and continues to take, in securing the rights and protections of U.S. citizens, and their property vis-à-vis a foreign military, and what steps the United States took to ensure that civilians of all nationalities engaged in stated humanitarian missions are protected from attack, in accordance with domestic policies and laws, and international humanitarian law.

The public further has an interest in knowing what the United States policy was, and is, in relation to the blockade of Gaza, including in relation to the list of prohibited goods including but not limited to spices, toys and candy that do not have a military purpose, and the delivery of humanitarian assistance to the civilian population of Gaza.

As stated above, the Requesters have no commercial interest in this matter. The Requesters will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress' legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers of noncommercial requesters.’”).

Alternatively, we request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) (“[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a

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representative of the news media.”). CCR is an “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.” *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Publishing and disseminating information are some of our primary activities. As a “representative of the news media,” we fit within this statutory and regulatory mandate. Therefore, fees associated with the processing of this Request should be limited accordingly.

Expedited Processing

Expedited processing of this request is required because there is a “compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(i)(I). A “compelling need” is established when there exists an “urgency to inform the public concerning actual or alleged Federal Government activity,” when the requester is a “person primarily engaged in disseminating information,” 32 C.F.R. § 286.4(d)(3). A requester can also demonstrate compelling need by a showing that the information sought is “urgently needed” and involves “an imminent loss of substantial due process rights and humanitarian need.” 32 C.F.R. § 286.4(d)(3)(iv) (“Humanitarian need means that disclosing the information will promote the welfare and interest of mankind.”).

There is an urgent need to inform the public of the policies, procedures, guidelines, action, responses or instructions given by the federal government to agencies, departments or divisions, about preparation, participation or reaction to attacks on U.S.- registered boats in international waters, to vessels with U.S. citizens onboard, or to vessels with civilians, including but not limited to civilians transporting humanitarian supplies. This request is urgent in that U.S. citizens or U.S.-registered vessels must know the support, protection, reactions and any actions or inactions they can expect from the United States government in the event that they are subject to attack, detention or deportation.

Further, in light of pending international investigations, whether criminal, civil or disciplinary in nature, and in light of the U.S. position, involvement or assistance in relation to such an investigation,³ there is an urgent need to inform the public of the policies, procedures, requests, demands or any other responses, actions or inactions, the United States has made to the government of Israel to safeguard evidence gathered in relation to the May 31, 2010 attack on the flotilla, including but not limited to the preservation of property in its original form seized by the government of Israel including but not limited to computers, cameras, cell phones, personal devices that have memory chips, hard drives or other such devices, and to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in

³ Statement by the President of the Security Council, S/PRST/2010/9, June 1, 2009, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/382/79/PDF/N1038279.pdf?OpenElement> (calling for “a prompt, impartial, credible and transparent investigation conforming to international standards”).

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subsequent investigatory proceedings. In light of the announced Israeli investigation and the commencement of work by that investigation commission,⁴ this matter is urgent.

The Requester certifies that the above information is true and correct to the best of the Requesters' knowledge. See 32 C.F.R. § 286.4(d)(3)(iii).

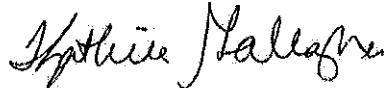
Conclusion

If this Request is denied in whole or in part, CCR ask that the Department of Defense justify all deletions by reference to specific exemptions of FOIA. The Requester expects DoD to release all segregable portions of otherwise exempt material, and reserves the right to appeal a decision to withhold any records or to deny the within application for expedited processing and waiver of fees.

If you have any questions regarding the processing of this request, please contact me at (212) 614-6455. Also, if CCR's request for a fee waiver is not granted in full, please contact me immediately upon making such determination. Please furnish all applicable Records to: Katherine Gallagher, Staff Attorney, Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, N.Y. 10012.

Thank you for your prompt attention to this matter.

Sincerely,



Katherine Gallagher
Staff Attorney
Center for Constitutional Rights
666 Broadway, 6th Floor
New York, NY 10012
Phone: (212)614-6455

⁴ See, "Statement by the Press Secretary on Israel's investigation into the flotilla incident," The White House, Office of the Press Secretary, June 13, 2010 available at: <http://www.whitehouse.gov/the-press-office/2010/06/13/statement-press-secretary-israels-investigation-flotilla-incident>; I. Lemberg, "Israel opens official probe into deadly flotilla raid," CNN, June 28, 2010 available at: <http://www.cnn.com/2010/WORLD/meast/06/28/israel.raid.commission/index.html>

EXHIBIT B



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

JUL 19 2010

Ref: 10-F-1042

Ms. Katherine Gallagher
Staff Attorney
Center for Constitutional Rights
666 Broadway, 6th Floor
New York, NY 10012

Dear Ms. Gallagher:

This is an interim response to your Freedom of Information Act (FOIA) request dated June 30, 2010, submitted by the Center for Constitutional Rights ("CCR") ("Requester"). You have requested "information regarding the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S. - registered "*Challenger I*" and the Comoros-registered "*Mavi Marmara*" which was forcefully intercepted by the Israeli Defense Forces, resulting in the death of 9 passengers on board the *Mavi Marmara*, including one U.S. citizen, and the injury of many more". You have requested a waiver of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. § 286.28(d); a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 32 C.F.R. § 286.28(e)(7); and expedited processing pursuant to 32 C.F.R. § 286.4(d)(3)(ii) and 28 C.F.R. § 16.5(d)(iii). I also understand that you have directly submitted this request to the U.S. European Command, the U.S. Central Command and the Department of the Navy. As this office is the FOIA office for the Office of the Secretary of Defense (OSD) and the Joint Staff (JS), we will only conduct a search for responsive records held by those organizations. We received your request on July 9, 2010, and assigned it case number 10-F-1242.

You have also requested records concerning the preservation and safeguarding of evidence or materials seized by or in the possession of Israel; records since June 1, 2007, relating to U.S. actions, policies, procedures or guidelines in relation to interception, inspection, safe-passage or any other action or response to vessels in the Mediterranean Sea that have as their destination Gaza, including but not limited to vessels undertaking humanitarian missions in response to the Israeli blockade of Gaza; records concerning advance knowledge of any vessels or a flotilla of boats destined for Gaza; records concerning communications with inter-governmental organizations relating to possible, planned, or executed actions by the U.S. government in the Mediterranean Sea in response to Israel's military operations at sea; communications concerning the U.S. - registered *Challenger I* or any other vessel which formed a part of the flotilla of ships; communications by the Chairman of the Joint Chiefs of Staff; records concerning the

actions that occurred on board each of the six boats of the flotilla including the Challenger I; and records concerning whereabouts, condition and status of Challenger I, including the property on board each vessel. I note that you have used a date range "prior to, on, or after May 31, 2010" in parts of your request and it is unclear what you mean by that description. Please clarify, or we will interpret this date range as meaning seven days prior to and seven days following May 31, 2010.

You state that CCR is a not-for-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights." That "CCR's diverse dockets include litigation and advocacy related to human rights in times of armed conflict or occupation as well as the protection of human rights defenders" and "CCR is a member of human rights networks nationally and internationally, and provides legal support to human rights defenders and movements." You additionally explain that one of your primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current international law issues and other similar materials for public dissemination and that CCR regularly issues press releases, issues action alerts that notify supporters and the general public and that CCR staff members often serve as sources for journalist and media outlets.

An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives of the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public. As you have stated, CCR is involved in litigation, advocacy related to human rights, support to human rights defenders and movements and dissemination of information to the public and the press. Although you have demonstrated the ability to disseminate information, the primary activity of CCR is not publishing or disseminating information. Therefore, I do not find that CCR qualifies as a "representative of the news media". Moreover, CCR also does not qualify for a limitation of processing fees on this basis. Accordingly, I have determined that you should be placed in the "other" category for fee purposes.

Regarding your request for a waiver of fees, which I have interpreted as a request for a waiver of all costs, a fee waiver is appropriate when "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester," 5 U.S.C. § 552(a)(4)(A)(iii). A fee waiver is appropriate when "disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the

requester" 5 U.S.C. § 552(a)(4)(iii). You base your request on furthering the public's understanding of the government's role in, and response, to an international incident which involved U.S. citizens and U.S. property; their interest in knowing what steps the United States took, and continues to take, in securing the rights and protections of U.S. citizens and their property and what steps the U.S. took to ensure civilians of all nationalities engaged in humanitarian missions are protected from attack; and the U.S. policy in relation to the blockade of Gaza in relation to the list of prohibited goods and the delivery of humanitarian assistance to the civilian population of Gaza. Although the subject of the requested records may concern the operations or activities of the Federal government, these records would not primarily be expected to be held by OSD or the Joint Staff and would not therefore inform the public of operations of the Federal government. Therefore, a waiver of fees is denied.

As an "other" fee category requester, you are afforded two hours of search time and 100 pages of duplication free of charge. Subsequent processing will be assessed at the established Department of Defense (DoD) fee rates of: clerical search time--\$20 per hour; professional search time--\$44 per hour; executive search time--\$75 per hour; and document reproduction at \$0.15 per page. I note that you have not agreed to pay fees to support this request. If you wish the search to extend beyond two hours, I ask that you make a fee commitment, otherwise, the search will be limited to two hours.

You have requested expedited processing "because there is a "compelling need" for the information" described in your request and an "urgency to inform the public concerning actual or alleged Federal government activity" by a requester who is primarily engaged in disseminating information. 32 C.F.R. § 286.4(d)(3). You have also requested expedited processing on the basis of an "an imminent loss of substantial due process rights and humanitarian need". 32 C.F.R. § 286.4(d)(3)(iv).

In support of your request for expedited processing you state that there is an urgent need because "U.S. citizens or U.S.-registered vessels must know the support, protection, reactions and any action or inactions they can expect from the United States government in the event that they are subject to attack, detention or deportation." Additionally, that "in light of pending international investigations" and "in light of the U.S. position, involvement or assistance in relation to such an investigation" "there is an urgent need to inform the public of the policies, procedures, requests, demands or any other responses, actions or inaction, the United States has made to the government of Israel to safeguard evidence gathered in relation to the May 31, 2010, attack on the flotilla, including but not limited to the preservation of property in its original form seized by the government of Israel...to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in subsequent investigatory proceedings." In light of the announced Israeli investigation and the commencement of work by that investigation commission, this matter is urgent."

I do not find that you have met the criteria for expedited processing on the basis of humanitarian need; imminent loss of substantial due process rights; or compelling need where there exists an urgency to inform the public concerning actual or alleged Federal government activity when the requester is a person primarily engaged in disseminating information. Although CCR does disseminate information, it is not a primary function of CCR. In addition, I do not find that you have demonstrated what due process right is in imminent threat of substantial loss or how records you seek will promote the welfare and interest of mankind. The records you seek to support these concerns would not primarily fall under the authority of the OSD or Joint Staff and are more appropriate to other Federal government agencies. For these reasons, your request for expedited processing is denied.

This Office processes requests on a first-in, first-out basis. At this time, we are unable to make a release determination on your request within the 20-day statutory time period as there are unusual circumstances which impact our ability to quickly process your request. These unusual circumstances are: (a) the need to search for and collect records from offices geographically separated from this Office; (b) the need to consult with one or more agencies or DoD components having a substantial interest in either the determination or the subject matter of the records and (c) the complexity of your request. For these reasons, your request has been placed in our complex processing queue and it will be worked in the order the request was received. As a matter of information, our current administrative workload is approximately 1,730 open requests.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20101-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 10-F-1242, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



for Paul J. Jacobsmeyer
Chief

EXHIBIT C

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September 17, 2010

Freedom of Information Policy Office
ATTN: James Hogan, Chief
Department of Defense
1155 Defense Pentagon
Washington, DC 20101-1155

Re: FREEDOM OF INFORMATION ACT APPEAL - Case No. 10-F-1242

Dear Mr. Hogan,

On June 30, 2010, the Center for Constitutional Rights ("CCR") filed a request for information under the Freedom of Information Act ("FOIA") *inter alia* "seeking all records, regardless of format, medium, or physical characteristics, and including electronic records and information, audiotapes, videotapes and photographs, that reflect, relate or refer to... the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S.-registered 'Challenger I' and the Comoros-registered 'Mavi Marmara,' which was forcefully intercepted by the Israeli Defense Forces, resulting in the death of 9 passengers on board the *Mavi Marmara* including one U.S. citizen and the injury of many more." See Exhibit A.

In a letter from Paul J. Jacobsmeyer dated July 19, 2010 and postmarked July 21, 2010, the DOD issued an interim response, denying our requests for a fee waiver, a limitation of fees, and expedited processing. See Exhibit B.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby appeals the DOD's denials of our requests for a fee waiver, a limitation of fees, and expedited processing.

Fee Waiver

CCR qualifies for a fee waiver on the grounds that the information it seeks "is in the public interest because it is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester[s]," 5 U.S.C. § 552(a)(4)(A)(iii) as well as because

¹ While this appeal letter is submitted within the time-frame set out under the regulations (i.e., 60-days from the date of the letter), CCR believes that the date should begin to run not from the date of the letter, but rather, from the date with the FOIA response letter was mailed (July 21, 2010).

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CCR is a representative of the news media, as it engaged in the dissemination of information to the public as one of its primary activities. See 5 U.S.C. § 552(a)(4)(A)(ii)(II). As demonstrated herein, the DOD erred in concluding that CCR does not qualify for a fee waiver under either of these provisions.

1. CCR qualifies for a fee waiver on the grounds that disclosure will contribute to the public understanding of government activities.

Contrary to the DOD's findings in its response, CCR qualifies for a fee waiver on the grounds that disclosure of the requested records is in the public interest and because disclosure "is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester[s]." 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" (citation omitted)).

The public has an interest in knowing about *inter alia* the manner in which the federal government prepared for, and responded to, information regarding a possible attack on the flotilla destined for Gaza in May 2010. The DOD Response appears to concede this point, at p. 3, but submits that the DOD itself would not have receptive records. ("Although the subject of the requested records may concern the operations or activities of the Federal government, these records would not *primarily* be expected to be held by OSD [Office of the Secretary of Defense] or the Joint Staff [JS] and would therefore inform the public of operations of the Federal government.") (emphasis added). As demonstrated below, because of the mandates, structure, mission and focus of both the OSD and the JS, including in regard to the Middle East generally, and policies related to Israel and Gaza, specifically, this statement is incorrect, and the public understanding of U.S. policies, activities and operations in relation to the issues raised in the FOIA Request will be served by receiving records from the OSD and JS.

The OSD, as the principal staff element of the Secretary of Defense and also including the entire staff of the Secretary of Defense, the immediate offices of the Secretary and Deputy Secretary of Defense, the five Under Secretaries in the fields of Acquisition, Technology & Logistics; Comptroller/Chief Financial Officer; Intelligence; Personnel & Readiness; and Policy, would be able to access the information requested. It is recalled that Israel is the "largest cumulative recipient of U.S. foreign assistance since World War II,"² and that "[a]lmost all U.S. bilateral aid to Israel is in the form of military assistance,"³ and as such, the DOD and the offices enumerated in the OSD would have

² "U.S. Foreign Aid to Israel," Congressional Research Service, (Jeremy M. Sharp, Specialist in Middle Eastern Affairs), Dec. 4, 2009, Summary, available at: <http://www.fas.org/sgp/crs/mideast/RL33222.pdf>.

³ *Id.*

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significant interests in U.S. policies towards Israel, including its blockade of Gaza. Additionally, the DOD views Israel and Egypt as both non-NATO allies, meaning that Israel and Egypt are exceptionally close allies who have a close working relationship with the Defense Department and receive military and financial advantages not available to other non-NATO countries.

Furthermore, there is an MOU between Israel and the United States that recognizes "the threat to Israel of hostile and terrorist activity from Gaza, including weapons smuggling and the build-up of terrorist capabilities, weapons and infrastructure," and agrees that both countries would participate in "enhanced intelligence fusion with key international and coalition naval forces and other appropriate entities to address weapons supply to Gaza."⁴ Israel has publicly said that it went aboard the Flotilla because of concerns of weapons smuggling. The MOU also calls for "enhanced sharing of information and intelligence that would assist in identifying the origin and routing of weapons being supplied to terrorist organizations in Gaza." The MOU necessarily encompasses the OSD whose responsibilities include, but are not limited to: "initiat[ing] programs, actions, and taskings to ensure adherence to DoD policies and national security objectives, and [] ensur[ing] that programs are designed to accommodate operational requirements."⁵ Therefore, it is likely that your office would know about this incident and what steps the United States took, and continues to take, in securing the rights and protections of its citizens and their property; what steps the United States took and continues to take to ensure that civilians of all nationalities who are engaged in humanitarian missions are protected from attack; and the U.S. policy in relation to the blockade of Gaza in relation to the list of prohibited goods and the delivery of humanitarian assistance to the civilian population of Gaza.

Indeed, the Secretary of Defense, Robert Gates, has confirmed the close relationship between Israel and the United States and personally discussed "important defense issues, both in our bilateral defense relationship and around the region" with the Israeli Defense Minister about one month before the attack on the flotilla.⁶ After the attack, Secretary Gates presented his views on the utility and purposes of the blockade of Gaza.⁷ He further spoke about the Middle East peace process and the central role that the

⁴ Memorandum of Understanding, reprinted in *Haaretz*, January 16, 2009, available at: <http://www.haaretz.com/news/text-of-u-s-israel-agreement-to-end-gaza-arms-smuggling-1.268308>. See also *United States, Israel Working to End Arms Smuggling into Gaza*, Jan. 16, 2009, available at: <http://www.america.gov/st/peacesec-english/2009/January/20090116141010dmslahrellek0.0438959.html>.

⁵ OSD website: <http://odam.defense.gov/omp/pubs/GuideBook/osd.htm>.

⁶ *Press Conference with Secretary Gates and Israeli Defense Minister Barak*, Council on Foreign Relations, April 27, 2010, available at: http://www.cfr.org/publication/22004/press_conference_with_secretary_gates_and_israeli_defense_minister_barak_april_2010.html.

⁷ *Israel eases Gaza embargo, allows snack food in*, Reuters, June 9, 2010, available at: <http://www.alertnet.org/thenews/newsdesk/LDE6581JK.htm>.

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current situation in Gaza plays in that regard.⁸ Secretary Gates also spoke with concern about the deterioration of relationship between Turkey and Israel following the attack on the flotilla.⁹ It is apparent from these statements that he and his office closely follow developments in and around Israel, and would be expected to have records related to U.S. knowledge of, and reaction to, the attack on the flotilla, as set forth in the FOIA Request.

The Joint Staffs also is reasonably expected to have responsive records based on the mission of the Joint Staffs.¹⁰ The Joint Chiefs of Staff has demonstrated his knowledge of, and involvement in, formulating a U.S. response to the blockade and the attack through discussions and joint projects between his office and Israeli counterparts;¹¹ new stories of a meeting held between the Joint Chiefs of Staff with Israeli officials about Israeli naval operations report that they "discussed ways to communicate a strategic message to the world, that Israel is not making this stuff up, that aid flotillas can end up becoming weapons flotillas."¹²

2. CCR is entitled to a fee waiver as an organization engaged in the dissemination of information to the public.

CCR is also entitled to a fee waiver as an organization engaged in the dissemination of information to the public as it is a "representative of the news media." 5 U.S.C. §552(a)(4)(A)(ii)(II). A "representative of the news media" either 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," 5 U.S.C. §552(a)(4)(A)(ii) or "refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." 32 CFR 286.28 (e)(7)(i). 5 U.S.C. §552(a)(4)(A)(ii) explicitly recognizes "electronic dissemination" as a method of delivery of news. In defining and describing a representative of the news media, there is no explicit statutory or regulatory requirement that an organization must demonstrate that [its] primary activity involves publishing or otherwise disseminating information to the public to qualify as a representative of the news media. *C.f.*, DOD Response.

⁸ Robert Gates interview: US secretary of defence talks about Iran's nuclear programme and economic sanctions with David Frost, Al Jazeera, June 10, 2010, available at:

<http://english.aljazeera.net/programmes/frostovertheworld/2010/06/201061091243602584.html>.

⁹ Adam Entous, *U.S. concerned at Turkey shift: Gates*, Reuters, June 9, 2010, available at:

<http://www.reuters.com/article/idUSTRE6581I220100609>.

¹⁰ See, e.g., Director Responsibility Statement, available at <http://www.jcs.mil/page.aspx?id=13>.

¹¹ Admiral Michael G. Mullen to Arrive in Israel for Work Visit, 27 Jun 2010, available at:

<http://idfspokesperson.com/2010/06/27/admiral-michael-g-mullen-to-arrive-in-israel-for-work-visit-27-jun-2010/>

¹² Joseph Nasr, *Israeli inquiry into Gaza flotilla raid opens*, Reuters, June 28, 2010, available at:

<http://www.reuters.com/article/idUSLDE65R0K420100628>.

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A public interest organization engaged in litigation and advocacy can qualify as a "representative of the news media." In *Electronic Privacy Info. Center v. DOD*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003), the court determined that the Electronic Privacy Information Center (EPIC), a public interest research organization, was a representative of the news media for the purposes of a fee waiver. In making this determination, the critical question is whether the entity in question "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." *EPIC*, 241 F. Supp. 2d at 11.

CCR regularly gathers information of potential interest to a segment of the public and publishes in-depth reports on critical issues that affect litigation and has authored reports on subjects such as Guantánamo, extraordinary rendition, and resettlement issues and concerns of ex-detainees, among others.¹³ In addition to publishing detailed reports, we inform the news media, issue press releases, publicize our concerns in leaflets, pamphlets, posters, advertisements, newsletters, know-your-rights handbooks and websites including through a "Facebook" page and a Twitter account, raise awareness by mounting public action campaigns, and host and participate in events to inform the public of civil and international human rights issues. CCR also disseminates information through its heavily subscribed website, www.ccrjustice.org, and operates a listserv of over 50,000 members that issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. The website addresses civil and human rights issues in depth, and serves as an invaluable resource to disseminate information to the public. In relation to the subject-matter of this request, CCR has issued various press releases and open letters on its web-site,¹⁴ its President published an op-ed,¹⁵ and CCR immediately set up a web-page on the Gaza Flotilla Freedom of Information Act requests, including the Request at issue.¹⁶ CCR is preparing an in-depth case page dedicated to the Gaza flotilla, including a legal report, and will include all responses and follow-up letters between the agencies and CCR, assembling the information gathered in such a manner as to render it user-friendly and informative. Such a site has been set up in regard to other FOIA requests we have filed.¹⁷

¹³ Available at www.ccrjustice.org/reports.

¹⁴ See <http://www.ccrjustice.org/newsroom/press-releases/ccr-demands-return-property-and-evidence-seized-israel-flotilla>; <http://www.ccrjustice.org/newsroom/press-releases/ngos-gathered-kampala-call-end-impunity-crisis-following-israeli-attack-aid->; and <http://www.ccrjustice.org/newsroom/press-releases/ccr-condemns-israel%2526%2523039%3Bs-killing-freedom-flotilla-participants>.

¹⁵ "U.S. should not condone Israeli attack," Michael Ratner, June 15, 2010, available at: <http://progressivemediaproject.org/story/us-should-not-condone-israeli-attack>.

¹⁶ See <http://www.ccrjustice.org/newsroom/press-releases/rights-group-files-foia-requests-regarding-israel-attack-flotilla-delivering-aid-gaza>.

¹⁷ See, e.g., www.ccrjustice.org/GhostFOIA (FOIA requests related to ghost detention and extraordinary rendition); www.ccrjustice.org/securecommunities (FOIA requests related to the "Secure Communities" ICE program).

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Even if a fee waiver required that one of CCR's primary activities is dissemination of information to the public, CCR meets this requirement as well. CCR's mission fundamentally depends on disseminating information to the public.¹⁸ As a not-for-profit, public interest legal and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights, one of CCR's primary activities is informing the public about civil and international human rights through the numerous mechanisms and forms described above.

Courts have determined that entities similar to CCR are primarily engaged in dissemination of information. See, e.g., *EPIC*, 241 F. Supp. 2d at 11 (plaintiff, a non-profit educational institution, who published seven books and issued a bi-weekly electronic newsletter for eight years and nothing else, qualified as a representative of the news media). See also *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n. 5 (D.D.C. 2004). A fee waiver because CCR is a representative of the news media would also satisfy case law and Congressional intent. (See Senator Leahy's remarks: "any person or organization which regularly publishes or disseminates information to the public. . . should qualify for waivers as a 'representative of the news media.'" *National Sec. Archive v. DOD*, 880 F.2d 1381, 1386 (D.C. Cir. 1989); 132 Cong.Rec. S14298 (daily ed. Sept. 30, 1986).

Given the context of CCR's wide range of activities engaged in disseminating and publishing information through the methods and mechanisms described above, the organization qualifies as a representative of the news media and is "primarily engaged in disseminating information."

3. Alternatively, CCR is entitled to a limitation of processing fees.

Alternatively, if the DOD does not reverse its denial of CCR's fee waiver request on the basis of its status as a representative of the news media or pursuant to the public interest provision, CCR is entitled to a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("[f]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by...a representative of the news media") and 32 C.F.R. § 286.28(e)(7) ("search and review fees shall be limited to duplication fees for the first 100 pages for 'representatives of the news media'"). CCR is an "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." *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). For all the reasons set forth herein, CCR fits within this statutory and regulatory mandate, and fees associated with the processing of this Request should be limited accordingly.

¹⁸ Available at www.ccrjustice.org/missionhistory and www.ccrjustice.org/movement-support.

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Expedited Processing

CCR is also entitled to expedited processing of the Request. As set forth in the Request, there is a compelling and urgent need to inform the public of the policies, procedures, guidelines, action, responses or instructions given by the federal government to agencies, departments or divisions, about preparation, participation or reaction to attacks on U.S.- registered boats in international waters, to vessels with U.S. citizens onboard, or to vessels with civilians, including but not limited to civilians transporting humanitarian supplies. This Request is urgent in light of on-going inquiries and discussions regarding the attack, the death of U.S. citizen Furkhan Dogan, and the detention, injury and taking of the possessions of U.S. passengers which still have not been returned.¹⁹ This request is urgent in that U.S. citizens or U.S.-registered vessels must know the support, protection, reactions and any actions or inactions they can expect from the United States government in the event that they are subject to attack, detention or deportation. U.S. citizens who had been passengers on the flotilla have due process rights that are jeopardized as time passes. In light of reports that US citizens are considering travelling by ship on similar missions to that of May 2010, which came under attack by the Israeli Defense Force,²⁰ such information is urgent, and there is a compelling need to receive responsive information from the DOD.

Further, in light of pending international investigations, whether criminal, civil or disciplinary in nature, and in light of the U.S. position, involvement or assistance in relation to such an investigation,²¹ there is an urgent need to inform the public of the policies, procedures, requests, demands or any other responses, actions or inactions, the United States has made to the government of Israel to safeguard evidence gathered in

¹⁹ See, e.g., "Israeli Government Refuses to Secure Criminal Evidence," Ann Wright, Aug. 22, 2010, available at: <http://www.commondreams.org/view/2010/08/22-5>. There exists deep concern and a lack of information about what steps the US had taken to ensure the protection of US citizens, and has taken to ensure that the death of a US citizen is being properly, impartially and thoroughly investigated in a timely manner; and lack of return of property by US passengers and concern about the status of that property including the electronic equipment that we believe likely contains information about the flotilla and the attack relevant to any investigations, and need to determine whether such evidence has been preserved, tampered with or destroyed, which, in addition to being in the public interest to know, could also impact the due process rights of those US passengers on board the boats and others, including to bring actions to remedy the damage they have suffered.

²⁰ See, e.g., "Americans organizing ship to Gaza," July 21, 2010, JTA, available at: http://www.jta.org/news/article/2010/07/21/2740136/amreicans-organize-ship-to-join-flotilla-to-gaza?utm_source=twitterfeed&utm_medium=twitter; Robert Mackey, "American Activists Plan Gaza Flotilla Ship Named for Obama Book," New York Times, July 20, 2010, available at: <http://thelede.blogs.nytimes.com/2010/07/20/american-activists-plan-gaza-flotilla-ship-named-for-obama-book/>. See also www.usfogaza.org

²¹ Statement by the President of the Security Council, S/PRST/2010/9, June 1, 2009, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/382/79/PDF/N1038279.pdf?OpenElement> (calling for "a prompt, impartial, credible and transparent investigation conforming to international standards").

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relation to the May 31, 2010 attack on the flotilla, including but not limited to the preservation of property in its original form seized by the government of Israel including but not limited to computers, cameras, cell phones, personal devices that have memory chips, hard drives or other such devices, and to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in subsequent investigatory proceedings. The loss of such evidence jeopardizes due process rights of the U.S. passengers, and other persons, aboard the May 31 flotilla. In light of the Israeli investigation and the commencement of work by that investigation commission,²² this matter is urgent.

The request clearly relates to a current news story of general public interest and a subject of ongoing media attention. From the time of the attack on May 31, 2010 and continuing through the present, nearly every major print, broadcast and web-based media outlet has covered the attack on the flotilla. Yet, significant questions remain unanswered about the U.S. knowledge of, role in, and response to the attack. This FOIA Request will help satisfy the urgent need to have some of those questions answered.

As stated above, one of CCR's primary activities is disseminating information, and therefore, CCR qualifies for expedited processing under 5 U.S.C. § 552(a)(6)(E)(v)(II). Courts have consistently recognized that ongoing media attention to an issue is an indicator of urgency. *See Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001) (recognizing the fact that an issue "is the subject of current news coverage" is an important factor in deciding whether compelling need exists); *ACLU of Northern California v. DOD*, 2006 WL 1469418, *7 (N.D. Cal. 2006) ("If anything, extensive media interest usually is a fact supporting not negating urgency in the processing of FOIA request") (emphasis in original); *ACLU v. Department of Justice*, 321 F. Supp. 2d 24, 29-31 (D.D.C. 2004) (newspaper articles reflecting public concern a factor supporting finding of urgency).

However, even if you find that dissemination of information is not one of CCR's primary activities, CCR still is entitled to expedited processing because of humanitarian need. "Humanitarian need means that disclosing the information will promote the welfare and interest of mankind." 32 C.R.F. § 286.4(d)(3)(iv). U.S. citizens or U.S.-registered vessels must know the support, protection, reactions and any actions or inactions they can expect from the United States government in the event that they are subject to attack, detention or deportation. This is especially true since more cargo ships are planning voyages to Gaza, including in U.S.-registered vessels, with U.S. passengers on board. The welfare and interests of U.S. citizens and other persons on such humanitarian

²² See, "Statement by the Press Secretary on Israel's investigation into the flotilla incident," The White House, Office of the Press Secretary, June 13, 2010 available at: <http://www.whitehouse.gov/the-press-office/statement-press-secretary-israels-investigation-flotilla-incident>; I. Lemberg, "Israel opens official probe into deadly flotilla raid," CNN, June 28, 2010 available at: <http://www.cnn.com/2010/WORLD/meast/06/28/israel.raid.commission/index.html>

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missions is clearly implicated in this situation, as evinced by the deaths, injuries and detentions of passengers on the May 31st flotilla.

Again, as stated above, your office's duties as well as agreements and cooperation with Israel demonstrate the OSD and the Joint Staff's office both have the ability and knowledge to fulfill our request. Therefore, because CCR's request falls under a compelling need because one of our primary activities is dissemination of information or, in the alternative, because of a humanitarian need to promote the welfare and interest of mankind, we are entitled to expedited processing of this request.

Clarification of Date Range

Finally, the FOIA Response requests clarification of the date range for which information is requested, stating that "we will interpret [the date range of prior to, on, or after, May 31, 2010] as meaning seven days prior to and seven days after May 31, 2010.

The following clarification of date ranges is made to the FOIA Request:

- for (1), the date range is all records since January 1, 2010 through the present, as stated in the Request;
- for (2) – (8), the date range is all records from January 2008-present;
- for (9), the date range is since at least June 1, 2007, as stated in the Request.

* * *

In closing, CCR requests that you reverse your denial of our request for a fee waiver and expedited processing and that you begin the search of the requested records with urgency, as statutorily mandated. Requesters note that many government officials involved in classification determinations have been increasingly concerned over the past few years about the over-classification of information that results in less public accountability for government conduct.²³ Accordingly, Requesters demand that your


²³ The over-classification of documents was an issue cited by the 9/11 Commission in its final report as one factor impairing the efficient and effective sharing of information with the American public. *See* The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States, 417 ("Current security requirements nurture overclassification and excessive compartmentation of information among agencies"); *see also* Memorandum from Lawrence J. Halloran to Members of the Subcommittee on National Security, Emerging Threats, and International Relations, *Briefing Memorandum for the hearing, Emerging Threats: Overclassification and Pseudo-classification*, scheduled for Wednesday, March 2, 1:00 p.m., 2154 Rayburn House Office Building, Feb. 24, 2005 (noting that the Information and Security Oversight Office's 2003 Report to the President found that "many senior officials

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office engage in an adequate and diligent effort to properly designate information, to disclose all responsive documents not properly subject to a FOIA exemption, and to comply with your obligations to provide segregable information when necessary.

We request a response to this appeal with twenty (20) working days.

Sincerely,


Katherine Gallagher
Senior Staff Attorney
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
Phone: (212) 614-6455

will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own").

666 broadway, 7 fl, new york, ny 10012
t 212 614 6464 f 212 614 6499 www.CCRjustice.org

EXHIBIT D



DEPARTMENT OF DEFENSE
DEFENSE FREEDOM OF INFORMATION POLICY OFFICE
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

NOV 05 2010

Ref: 10-A-1242-A1

Ms. Katherine Gallagher
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012

Dear Ms. Gallagher:

This is in response to your September 17, 2010, Freedom of Information Act (FOIA) appeal. We received your appeal on September 24, 2010.

Due to an extremely heavy FOIA workload, we are unable to complete your appeal within the statutory time requirement. In fairness to the general public, we make every effort to treat all requesters equally. Accordingly, responses are made on a first-in, first-out, easy-hard basis, and controlled in response queues. When the appellate review of your case is complete, you will be notified by the appellate authority, the Deputy Director of Administration and Management, Office of the Secretary of Defense, of the final decision. You may direct any questions concerning this appeal to Ms. Alisa Turner at (703) 588-6802, or alisa.turner@whs.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "James P. Hogan", is located below the "Sincerely," text.

James P. Hogan
Chief

EXHIBIT E



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

DEC 23 2010

Ref: 10-F-1242

Ms. Katherine Gallagher
Staff Attorney
Center for Constitutional Rights
666 Broadway, 6th Floor
New York, NY 10012

Dear Ms. Gallagher:

This is the final response to your June 30, 2010, Freedom of Information Act (FOIA) request for, "information regarding the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S. - registered "*Challenger I*" and the Comoros-registered "*Mavi Marmara*" which was forcefully intercepted by the Israeli Defense Forces, resulting in the death of 9 passengers on board the Mavi Marmara, including one U.S. citizen, and the injury of many more." The Joint Staff conducted a two-hour search and located four documents responsive to your request.

Mr. Mark Patrick, an Initial Denial Authority (IDA) for the Joint Staff, reviewed the responsive material and determined that one document, consisting of four pages, is exempt from release in its entirety pursuant to 5 U.S.C. § 552(b)(1), which pertains to information that is currently and properly classified in the interest of national defense or foreign policy, in accordance with Executive Order 13526, Section 1.4 (b), which concerns foreign government information; Section 1.4 (c), which concerns intelligence activities (including covert action), intelligence sources or methods, or cryptology; and Section 1.4 (d), which concerns foreign relations or foreign activities of the United States, including confidential sources; 5 U.S.C. § 552(b)(2), which pertains to information about internal practices and personnel rules, which if released would risk circumvention of agency regulations; and 5 U.S.C. § 552(b)(5), which pertains to certain inter- or intra-agency communications which contain information considered privileged as pre-decisional under deliberative process.

We have determined that the remaining documents require reviews by other agencies; one document requires a review by the Defense Intelligence Agency (DIA); one document requires a review by the Department of State (DOS), and one document requires a review by the National Geospatial-Intelligence Agency (NGA). Accordingly, we have referred the documents to these agencies for their processing and direct response to you. You may correspond with the DIA, the DOS, and the NGA at the following addresses:

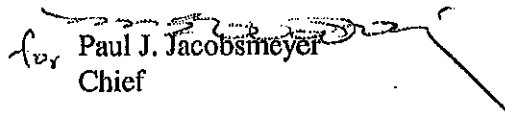
Defense Intelligence Agency
Attn: DAN-1A Rm E4-234
Washington, DC 20340-5100

Department of State
Director, Information Programs and Services
Room 8113 SA-2
Washington, DC 20522-8113
Office of Legal Advisor (Rm 6001 SA-2)

National Geospatial-Intelligence Agency (NGA)
FOIA Requester Service Center
4600 Sangamore Road, D-10 FOIA
Bethesda, MD 20816-5003

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense, by writing directly to the Defense Freedom of Information Policy Office, Attn: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20301-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 10-F-1242, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,


for Paul J. Jacobsmeier
Chief

Enclosures:
As stated