centerforconstitutionalrights

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November 15, 2010

Associate General Counsel (General Law)
U.S. Department of Homeland Security
Washington D.C. 20528

By First Class Mail

Re: **FREEDOM OF INFORMATION ACT APPEAL – Case No. 10-OIA-0052**

Dear Associate General Counsel,

On June 30, 2010, the Center for Constitutional Rights ("CCR") filed a request with the Department of Homeland Security ("DHS") 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* Ex. A ("Request").

In a letter dated July 15, 2010, from Vania T. Lockett, Associate Director, Disclosure and FOIA Operations, DHS stated that our initial request was too "limited" and asked for the request to be resubmitted with additional detail. *See* Ex. B. The FOIA request was given the number DHS/OS/PRIV 10-0824. We resubmitted our request, with additional detail, in a letter dated and mailed August 13, 2010. (*See* Ex. C, "Resubmission") In our Resubmission, we identified the Office of Intelligence and Analysis ("OI&A) as an office that was likely to have responsive records based on *inter alia* its mandate including ensuring that "information related to homeland security threats is collected, analyzed, and disseminated," and because of the existence of an agreement between Israel and the United States[1] that, *inter alia*, provides for the exchange of technologies, personnel and information, collaboration to develop technologies to counter "terrorist actions," facilitate "prompt exchange of information" and facilitate the dissemination of information "consistent with applicable national laws, regulations, policies and directives."

[1] The Agreement between the United States of America And Israel on Cooperation in Science and Technology for Homeland Security Matters, dated 29 May 2008, available at: http://www.dhs.gov/xlibrary/assets/agreement_us_israel_sciencetech_cooperation_2008-05-29.pdf.

In a letter dated August 26, 2010, Vania Lockett informed us that "based on an initial review of [the] request," she was submitting the Resubmission to Quinton Mason, the FOIA officer for OI&A. *See* Ex. D

In a letter dated September 14, 2010, and post-marked October 13, 2010, the DHS Office of Intelligence and Analysis issued a response, stating that the office had conducted a "comprehensive" search but was unable to locate or identify *any* responsive records. (emphasis added) The letter termed this a "final response" claiming that it had conducted "an adequate search." *See* Ex. E. ("OI&A Response").

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby appeals the DHS OIA's determination that the OI&A does not have any responsive records to its Request/Resubmission.

The OIA Has Failed to Demonstrate the Adequacy of its Search

FOIA requires the OI&A to conduct a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). The OI&A has a duty to demonstrate that it exercised all reasonable efforts to ensure that it included what was requested in the search conducted. *See Amnesty Int'l USA v. CIA*, No. 07 Civ. 5435, 2010 U.S. Dist. LEXIS 78659, *36-37 (S.D.N.Y. Aug. 2, 2010) (citing authorities). Additionally, the OI&A must "construe a FOIA request liberally," *Nation Magazine v. U. S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)(citing authorities).

Beyond the bald assertion that a "comprehensive search" was conducted, the final response contains no information about the search it purports to have conducted. The OI&A Response wholly fails to demonstrate 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). The OI&A Response contains no detail about the search terms used. Indeed, the information that the OI&A has provided about the search process contains neither meaningful detail that would 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 at 892 (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). Contrary to these requirements, the OI&A provided no information about where the office searched, what search terms were used, whether the search was conducted electronically or by hand, and why the office chose to conduct the search in the manner it did.

Based on the information provided in the Resubmission regarding the mandate of DHS, the relationship between Israel and the United States in exchanging information related to *inter alia* home-land security, and the particular duties of OI&A, we find it unlikely that a comprehensive, liberally construed search of the OI&A's records would not produce a single responsive documents to CCR's Request/Resubmission. Moreover, according to the DHS' website, the OI&A has "a mandate to integrate the [DHS'] intelligence components and functions." This mandate consists of coordinating intelligence between various department components within DHS, including the Coast Guard. Surely, the OI&A would have had some communications with the Coast Guard regarding the forceful interception of a U.S.-registered vessel in international waters.

The Office of Intelligence and Analysis has the duty to demonstrate that it exercised all reasonable efforts to ensure that it 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 and Resubmission, and the OI&A did not seek further clarification about the nature or scope of the Request and Resubmission. Agencies may not "read the request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester." *Id.* (quoting *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985)). Lacking any information about the search terms used or the manner in which the search was conducted, we are not in a position to fully assess whether our Request/Resubmission was narrowly construed or whether the search was properly performed, although the results – none – strongly suggest that the search was inadequate.

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. Mr. Mason's response, on behalf of OI&A, fails to provide any of the required information to demonstrate the adequacy of the search.

* * *

In closing, CCR requests that you make an adequate and reasonable search for the records we requested. 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.[2] Accordingly, we 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 within twenty (20) working days.

Sincerely,

Katherine Gallagher/ah

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[2] 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 Unites 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").