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November 22, 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 – DHS/OS/PRIV10-0824*
/S&T 10-0003.46**

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 stated that DHS was likely to have responsive records because of, *inter alia*, the existence of an agreement between Israel and the United States that 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]

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* NOTE: In its "final response" letter dated September 21, 2010, enclosed here as Exhibit E, the case number of this FOIA request was mistakenly written as "DHS/OS/PRIV 10-0284;" this case has been given the reference number "10-0824" in all prior correspondence.

[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 what she deemed the appropriate component of DHS had been queried and "[i]f any responsive records are located, they will be reviewed for determination of releasibility." Despite detailed reasons in the Resubmission for the need for expedite processing due to *inter alia* the need for US citizens planning to undertake travel to Gaza aboard as part of a flotilla to know the policies of, and protection from, the US government, as well as what steps the US was taking to ensure that evidence related to the killing of one US citizen and detention of others was safeguarded, that letter also indicated that our request for expedited processing had been denied. Our request for fee waiver was "held in abeyance pending the quantification of responsive records." *See* Ex. D

In a letter dated September 21, 2010, from Nicole Marcson, Assistant General Counsel, the Science and Technology Directorate (S&T) issued a response to our request, which it had received on September 8, 2010.[2] The letter termed this a "final response." After conducting a search for documents responsive to our request, the S&T purported to have identified a total of 49 pages of responsive documents, of which it states 6 pages were releasable in their entirety, 43 pages were partially released, and zero pages were withheld in their entirety. In fact, 43 pages were received by CCR, of which 15 pages had redactions. Through phone communication at 202 254-6819, we have tried – thus far without success – to clarify whether the letter should have read that 6 pages were in fact withheld in their entirety, rather than released in their entirety, as that could be an explanation for the fact that we only received 43 pages; there is no explanation that we can foresee of why the number of pages with redactions differs from that stated in the letter. Furthermore, the documents received by CCR were numbered in the upper right-hand corner by your office, with numbers ranging from 1 through 16; inexplicably, documents numbered 6, 8 and 9 are missing from the pile of documents received at our office. *See* Ex. E. ("S&T Response").

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), and to the extent that the current inconclusive and confusing S&T Response allows, CCR hereby appeals the DHS S&T's partial redaction of 3 pages under exemption (b)(2)(high), the redaction of the email address of one persons pursuant to exemption (b)(6), as well as the determination that the 43 released and partially released pages that we received comprise all of the records responsive to its Request/Resubmission.

[2] In a letter dated September 24, 2010, Vania Lockett informed us that the DHS Executive Secretariat identified a total of 4 pages of documents responsive to our request and based on the "subject matter of [the] request," she had transferred the Resubmission to Miles Wiley, the FOIA Officer for the Science and Technology Directorate (S&T).

The Material Withheld under (b)(2)(high) Has Not Been Shown to Be Entitled to Exemption under the FOIA

FOIA requires an agency to release all relevant documents unless an exemption applies. The S&T Response contained 3 instances of redaction under exemption (b)(2)(high) (see, document # 11, 13, p.2, and 16, on documents entitled "Situation Report" or "Overnight Brief"). Because the redactions contravene the objectives of the FOIA and no basis for the redaction has been put forth, CCR requests that the 3 pages containing these redactions be released in whole.

The S&T has failed to demonstrate how the 3 redactions, of what appears to be less than two-lines of text on the bottom of three separate pages, are exempt from disclosure under (b)(2)(high). The (b)(2)(high) exemption is reserved *only* for those documents or parts of documents the disclosure of which "may risk circumvention of agency regulations." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 369 (1976). In order to claim this exemption, "[t]he agency must show that the requested information it seeks to withhold relates predominantly to an agency's rules and practices for personnel. The agency must further show that the public has no legitimate interest in the information requested." *Rugiero v. Dep't of Justice*, 257 F.3d 534, 549 (6th Cir. 2001). The S&T has made no showing regarding the nature of the redacted information or the risk of circumvention that would result form its release.

Certain of the Material Withheld under (b)(6) is not Entitled to Exemption under the FOIA, and/or Must be Released in Order to provide the Public with Information Necessary to Fulfill the Objectives of FOIA.

Documents 1 and 2 attached to the Final Response include an email exchange between "Steve Traver" and "Aviv Ezra, Counselor – Congressional Affairs, Embassy of Israel," between 4:45pm on May 31, 2010 and June 1, 2010 at 1:02pm. The email exchange includes the following:

- An email containing a compilation of background materials (some with highlighted phrases) related to the blockade of Gaza and the attack on the Gaza-bound flotilla, sent on May 31, 2010, i.e., Memorial Day, from a Congressional Affairs officer of the Israeli Embassy to a "Steve Traver" whose professional affiliation is unknown, that demonstrates a certain level of familiarity between recipient and sender, as first names only are used in the correspondence;
- A response from "Steve Traver," who might be a U.S. government employee stating views of a particular government agency or official, or U.S. policy, when saying of the Gaza-bound flotilla: "We're not fooled by this 'peaceful' confrontation. Israel had no choice but to confront them.";

- The text of a letter addressed to "Sen. Gillibrand," but sent from the Israeli Congressional Affairs Counselor to "Steve Traver," criticizing the United Nations response to the attack on the flotilla;
- A response to the text directed to Senator Gillibrand from "Steve Traver" stating "Our sentiments exactly!"
- A final response from "Steve Traver," who describes himself as a 'military officer' and a 'technologist,' that includes conclusions made one day after the attack such as "it is obvious the Israelis were going to be killed by the mob on the ship" and projections about future strategies regarding future flotillas, including: "I'll bet the plan will use non-lethal technology (which we have and are getting more of) to soften up the crew so they'll be more compliant."

The email exchange is ultimately forwarded from Steve Traver at 1:22pm on June 1, 2010 to an "undisclosed-recipients" list, which according to the name at the top of the email, appears to include Starnes Walker.[3] As discussed below, there is no connection elaborated between Starnes Walker's receipt of this single email exchange – which appears to be advancing a policy position – and Israel, and while signaling an involvement of S&T in affairs related to Israel, only demonstrates the failure of the search to produce *all* responsive documents.

Based on the information contained in the email exchange between a "Counselor – Congressional Affairs" from the Embassy of Israel and Steve Traver, which includes the exchange of political views, policy reactions, and projections about the technology that might be used against future Gaza-bound flotillas, and which could constitute an effort by a foreign government to influence an official of the US government regarding a matter of U.S. policy, the public has a right to know who Steve Traver is, where he works, and if he is a U.S. employee, what agency or office of the U.S. government he was speaking for when he wrote to a foreign official using "we" and "our" to describe reactions to the Israeli attack on a humanitarian flotilla bound for Gaza, in which one U.S. citizen and eight other civilians were killed. That this email exchange was forwarded to the Director of a U.S. DHS office makes it even more important that the public know the precise origins of the views expressed in the email exchange.

The S&T failed to demonstrate how the redactions of Steve Traver's email address are exempt from disclosure under Exemption (b)(6), which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of *personal* privacy." 5 U.S.C. §552(b)(6) (emphasis added). *See*

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[3] A google search of "Starnes Walker" and "Department of Homeland Security" reveals that Starnes Walker is the Department of Homeland Security Director of Research, within Science & Technology Directorate Office of Research.

S&T Response documents labeled 1 and 2. The strong presumption of disclosure under the FOIA places the burden on the government to justify any withholding, and specifically redactions under exemption b(6). *Dept. of State v. Ray*, 502 U.S. 164, 173 (1991). "Unless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail." *Id.* at 177. Disclosure depends on "the characteristics revealed...and the consequences likely to ensue." *Id.* (internal quotations removed).

The S&T has not provided any reason to believe that the redacted email address would reveal any personal characteristics or result in any unjust consequence. We find it unlikely that the disclosure of the email address could have any such result as Mr. Traver's name has already been disclosed. As is the case with S&T's documents, when "a particular email address is the only way to identify the [recipient or sender] at issue from the disputed records, such information is not properly withheld under Exemption 6 because this minor privacy interest does not counterbalance the robust interest of citizens right to know what the government is up to.'" *Electronic Frontier Foundation v. Office of Director of National Intelligence*, 695 F.3d 949, 961 (9th Cir. 2010). Without the redacted email addresses there is no way to identify where Mr. Traver works or what his position is, and the "basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976) is defeated. Moreover, if indeed Mr. Traver is a government employee, then it is also incorrect to term such disclosure an invasion of "personal" privacy, as this would be a government-issued work-related email account.[4]

At the very least, the S&T should release the email exchange information/domain name for Mr. Traver's email addresses. The information is segregable and implicates no personal privacy concerns. The FOIA itself requires this segregation. 5 U.S.C. §552(b) (stating that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt...").

The S&T Has Failed to Demonstrate the Adequacy of its Search

FOIA requires the S&T 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 S&T 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 S&T must "construe a FOIA request liberally," *Nation Magazine v. U. S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995)(citing authorities).

[4] Contact details for government offices or individual employees is often available to the public. *See e.g.*, http://www.usa.gov/Contact/By_agency.shtml#D and http://www.state.gov/documents/organization/111781.pdf.

The S&T Response contains no information about the search it purports to have conducted. The S&T 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 S&T Response contains *no* detail about the search terms used. Indeed, the information that the S&T 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 S&T 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 specifically, due to the 2008 "Agreement between the United States of America and Israel on Cooperation in Science and Technology for Homeland Security Matters," we find it unlikely that a comprehensive, liberally construed search of the S&T's records would produce such a limited number of responsive documents to CCR's Request/Resubmission. The agreement between the United States and Israel deals specifically with the exchange of information regarding *science* and *technology* and would clearly have mandated communication between the S&T and the Israeli government regarding an incident that Israel openly considered to be a threat to its own homeland security.

The documents the S&T produced also suggest that a comprehensive search was not conducted. Twenty-seven of the 43 pages that the S&T sent to us because they were purported to be responsive to our Request and Resubmission were wholly irrelevant. *See* S&T Response documents labeled 4, 7, 10, 12, 14 and 15. It is doubtful that a properly conducted search would return documents, more than half of which have no apparent relevance to the incident in question. In addition, one document produced refers to a "classified version of this product" which was not produced or identified as responsive to our Request and Resubmission. *See* S&T Response document labeled 11. Surely, the classified and unclassified versions of the same document would show up in a search of relevant terms.

The documents we did received demonstrates that there are additional documents which should have been found had a proper search been conducted: the documents we received includes "Situation Report #7" (document labeled 11, dated June 3, 2010 at 0600 EDT) and "Situation Report #10" (document labeled 13, dated June 4, 2010 at 1800 EDT) from the Gaza Monitoring Group – where are, at least, Situation Reports 1-6, 8 and

9? Likewise, the documents we received includes "Overnight Brief No. 2," dated June 8 2010 – does Overnight Brief No 1 also include reference to the Gaza flotilla?

As discussed above, a question remains why Starnes Walker, the Department of Homeland Security Director of Research, within Science & Technology Directorate Office of Research, was forwarded an email exchange including policy positions expressed by the "Counselor – Congressional Affairs" from the Israeli Government. It is unlikely that Mr. Walker would receive only this document related to Israel; it is more likely that Mr. Walker would be included on other correspondence related to the exchange of information, including technology, between Israel and the United States, including but not limited for the purposes of responding to challenges to the blockade or to maintain the Israeli blockade of Gaza.

The S&T 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 S&T 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 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. Ms. Marcson's response, on behalf of the S&T, 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.[5] 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,

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[5] 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").