centerforconstitutionalrights
on the front lines for social justice

November 23, 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/PRIV 10-0824**

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 mandate of the DHS which includes guarding against "terrorism" and protecting the United States and American citizens, and 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]

[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 was deemed to be the appropriate component of DHS had been queried and "[i]f any responsive records are located, they will be reviewed for determination of releasibility. *See* Ex. D

In a letter dated September 24, 2010, Vania Lockett informed us that a search within the DHS Office of the Executive Secretariat ("ESEC") identified a total of 4 pages of documents responsive to our request and "[o]f those pages . . . 3 pages [were] releasable in their entirety and 1 page [was] partially releasable with certain information withheld pursuant to Title 5, U.S.C. § 552 (b)(2) high and (b)(6), FOIA Exemptions 2 and 6." We note that the redactions were not identified with the corresponding exemption used for each. The letter termed this a "final response" *See* Ex. E. ("ESEC Response").

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby appeals the DHS ESEC's partial redaction of 1 page under exemptions (b)(2)(high) and (b)(6) as well as their determination that the 4 released and partially released pages comprise all of the records responsive to its Request/Resubmission..

The Material Withheld is not Entitled to Exemption under the FOIA

FOIA requires an agency to release all relevant documents unless an exemption applies. "FOIA's strong presumption in favor of disclosure means that an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Electronic Frontier Foundation v. Office of Director of National Intelligence*, 695 F.3d 949, 955 (9th Cir. 2010) (internal quotations removed).

The ESEC has failed to demonstrate how its 3 redactions are exempt from disclosure under (b)(2)(high) or (b)(6). 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). Under exemption(b)(6), "[u]nless the invasion of privacy is 'clearly unwarranted,' the public interest in disclosure must prevail." *Dept. of State v. Ray*, 502 U.S. 164, 177 (1991). Disclosure depends on "the characteristics revealed...and the consequences likely to ensue." *Id.* (internal quotations removed). The ESEC has made no showing regarding the nature of the redacted information, the risk of circumvention that would result form its release, the nature of the privacy interests at stake or the consequences of disclosure.

The ESEC Has Failed to Demonstrate the Adequacy of its Search

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

The ESEC 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 ESEC Response contains no detail about the search terms used. Indeed, the information that the ESEC 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 ESEC 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, we find it unlikely that a comprehensive, liberally construed search of the ESEC's records would produce only 4 pages of responsive documents to CCR's Request/Resubmission. Moreover, according to the DHS' website, the ESEC has, among other duties, the responsibility for "dissemination of information and written communications from throughout the Department and our homeland security partners to the Secretary and Deputy Secretary." Surely, the ESEC would have had some communications with the rest of the DHS and its "homeland security partners" regarding the forceful interception of a U.S.-registered vessel in international waters.

The documents the ESEC produced also suggest that a comprehensive search was not conducted. For example, in the email sent from Ms. Catherine Dugan to Ms. Sarkis, the text of the email requests a response from Ms. Sarkis. The ESEC did not produce any subsequent emails even though the full chain of email exchanges would presumably show up in a search of relevant terms.

The ESEC 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 ESEC 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*, 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). Ms. Lockett's response, on behalf of ESEC, 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

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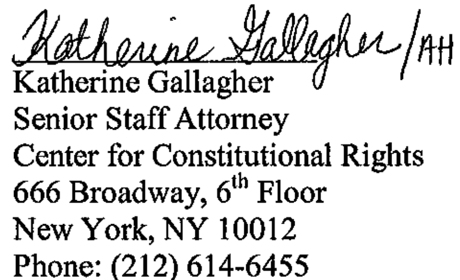
[2] The over-classification of documents was an issue cited by the 9/11 Commission in its final report as one factor impairing the efficient and effective sharing of information with the American public. *See* The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon 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

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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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").