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September 9, 2010

Defense Freedom of Information Policy Office
Attn: Mr. James Hogan
1155 Defense Pentagon
Washington D.C. 20301-0115

By First Class Mail and Fax

Re: **FREEDOM OF INFORMATION ACT APPEAL – Case No. 10-0226**

Dear Mr. Hogan,

On June 30, 2010, the Center for Constitutional Rights (“CCR”) filed a request with the United States Central Command (USCENTCOM) 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 P*’ 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 ...and 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 destination Gaza, including but not limited to vessels undertaking humanitarian missions in response to the Israeli blockade of Gaza.” *See* Exhibit A.

In an email dated July 12, 2010 and received in our office on the same date, the Central Command issued a response, claiming “that USCENTCOM has no equities of the request and that this falls under EUCOM’s purview,” and administratively closed our request. *See* Exhibit B. Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby appeals the Central Command’s determination that this request does not fall under its purview. (CCR submitted a request to the United States European Command on June 30, 2010, and on July 16, 2010 received an interim response (10-F-058), in which it denied our request for expedited processing.)

For the reasons set forth below, CCR has reasonable grounds to believe that USCENTCOM has responsive records due to its engagement with Egypt, a country in its Area of Responsibility, in relation to matters including but not limited to the “Middle East peace process” and the monitoring of the Egyptian-Gaza border, and its overall concern with “the Palestinian question.”

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The FOIA request falls squarely under the purview of the Central Command.

The mission of the Central Command is to “promote[] cooperation among nations, responds to crises, and deter[] or defeat[] state and nonstate aggression” in order to establish regional security and stability.¹ The Central Command’s Area of Responsibility (AoR) includes Egypt.² The Central Command has recognized the leadership role that Egypt plays in the region, its role in the Middle East peace process, and specifically its role in relation to the situation in Gaza including its role in monitoring the border between Egypt and Gaza: “Egypt remains a leading Arab state, a stabilizing influence in the Middle East, and a key actor in the Middle East Peace Process [...] Egypt has played a pivotal role in the international effort to address worsening instability in Gaza.”³ As of the date of the attack on the Gaza-bound flotilla that forms the basis of this Request, Egypt was cooperating with Israel in the blockade of the Gaza Strip.⁴ Indeed, USCENTCOM liaised, coordinated, and cooperated with Egypt on border-control issues related to Gaza: “CENTCOM continues to work *closely* with the Egyptian security forces to interdict illicit arms shipments to extremists in Gaza and to prevent the spread of Gaza’s instability into Egypt and beyond.”⁵ (emphasis added)

Department of Defense Secretary Robert Gates has also discussed a number of issues with Egypt, including “the Palestinian-Israeli issue.”⁶ He has also noted that he wishes to expand the United States and Egypt’s “military-to-military relationships in ways that promote regional stability.”⁷ In March, then-CENTCOM Commander, David Petraeus, remarked in his testimony before the Senate Armed Services Committee on the “distinct challenges to our ability to advance our interests in the AOR” caused by insufficient progress towards a comprehensive Middle East peace that addresses “the Palestinian question.”⁸ He also remarked on the importance of an eventual resolution of the Israeli-Palestinian conflict, saying that the “the impasse in [the Israeli-Palestinian] negotiations [] does contribute, if you will, to the overall environment within which we operate.”⁹

Based on the foregoing, it is apparent that the Central Command is involved with *inter alia* matters of the blockade against Gaza, with policies related to border-control between Egypt and Gaza, with the interdiction of arms shipments into Gaza, with the current situation in Gaza,

¹ <http://www.centcom.mil/en/about-centcom/our-mission/>

² <http://www.centcom.mil/en/countries/aor/>

³ <http://www.centcom.mil/en/egypt/>

⁴ “Egypt Opens Gaza Border Crossing After Israeli Raid,” NPR, June 1, 2010 available at: <http://www.npr.org/templates/story/story.php?storyId=127305118&ps=cprs>.

⁵ <http://www.centcom.mil/en/egypt/>.

⁶ “Secretary of Defense Robert Gates After Meeting with President Mubarak,” Embassy of the United States: Egypt, Press Release, May 5, 2009, available at: <http://cairo.usembassy.gov/pa/tr050509.htm>.

⁷ *Id.*

⁸ Statement of General David H. Petraeus, U.S. Army Commander, U.S. Central Command, before the Senate Armed Services Committee on The Posture of U.S. Central Command, Mar. 16, 2010, p.12, available at: <http://armed-services.senate.gov/statemnt/2010/03%20March/Petraeus%2003-16-10.pdf>.

⁹ Mark Landler and Helene Cooper, “Obama Speech Signals a U.S. Shift on Middle East,” N.Y. Times, Apr. 14, 2010, available at: <http://www.nytimes.com/2010/04/15/world/middleeast/15mideast.html>.

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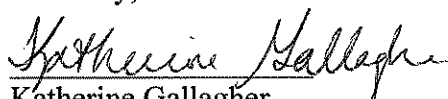
with “the Palestinian question,” and is monitoring, if not more actively involved in, matters related to the Middle East peace process related to the Israeli-Palestinian conflict. It is therefore reasonable to conclude that the Central Command has information related to the May 31, 2010 attack on the Gaza-bound flotilla and the U.S. policy towards the blockade of Gaza, that forms the basis of the Request under appeal. Accordingly, it is erroneous to have concluded that USCENTCOM has “no equities of the request” and have administratively closed our Request.

* * *

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.¹⁰ 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 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”).

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EXHIBIT A

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June 30, 2010

By Email: foiaoffice@centcom.mil

United States Central Command
ATTN: CCJ6-RDF (FOIA)
7115 South Boundary Boulevard
Macdill AFB, Tampa, FL 33621-5101

Re: Freedom of Information Act Request

Dear FOIA Request 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 the

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, "*Israeli 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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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;
- (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 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

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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 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 seeks 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

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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 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

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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 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.

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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,² 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 subsequent investigatory proceedings. In light of the announced Israeli investigation and the commencement of work by that investigation commission,³ 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).

² 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”).

³ 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>

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Conclusion

If this Request is denied in whole or in part, CCR ask that the U.S. Central Command justify all deletions by reference to specific exemptions of FOIA. The Requester expects USCENCOM 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

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EXHIBIT B

Katherine Gallagher

From: Freedom of Information Act [foiaoffice@centcom.mil]
Sent: Monday, July 12, 2010 11:37 AM
To: Katherine Gallagher
Subject: RE: FOIA request: Center for Constitutional Rights
Attachments: FOIA request: Center for Constitutional Rights

Ms. Gallagher,

USCENTCOM has received your FOIA request via email and postal; while processing the request, we determined that USCENTCOM has no equities of the request and that this falls under EUCOM's purview. We contacted EUCOM and they informed us that they have already received this request and is currently working on this.

Please contact (see below) if you have any questions concerning this request:

HQ USEUCOM
FOIA Requestor Service Center
Unit 30400
APO AE 09131

Phone: 49 011 711 680-7161

Fax: 49 011 711 680-8092

Your request is being Administratively Closed; if you're 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. 20301-0115. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 10-0226 and should be clearly marked "Freedom of Information Act Appeal.

v/r
FOIA Team