

**KOHN, KOHN & COLAPINTO, LLP**

Attorneys at Law

28 October 2010

Donna Sealing  
FOIA/PA Officer  
Nuclear Regulatory Commission  
Washington, D.C. 20555

**FOI/PA REQUEST**  
**Case No.:** 2011-0019  
**Date Rec'd:** 10-29-10  
**Specialist:** Dennis  
**Related Case:** \_\_\_\_\_

Re: FOIA Request – Kelly, Anderson, and Associates, Inc.

Dear Ms. Sealing:

This is a request on behalf of the National Whistleblowers Center (“NWC”) under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* for **copies of any and all records, including cross-references, pertaining to contracts between your agency and Kelly, Anderson, and Associates, Inc. (“KAA”) to perform investigations for the Office of the Inspector General (“OIG”) and any and all records describing OIG investigations performed by KAA personnel.** You may limit your search to records created since 2008.

The NWC is to be considered the requester for the purposes of any determinations you need to make. The law firm of Kohn, Kohn & Colapinto, LLP, is *not* to be considered a requester for *any* purposes, as the firm is merely representing the interests of the NWC.

When processing this request, please note that the DC Circuit has previously held that agencies have a duty to construe the subject material of FOIA requests *liberally* to ensure responsive records are not overlooked. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995). Accordingly, you are hereby instructed that the term “record” includes, *but is not limited to*: 1) all email communications to or from any individual within your agency; 2) memoranda; 3) inter-agency communications; 4) sound recordings; 5) tape recordings; 6) video or film recordings; 7) photographs; 8) notes; 9) notebooks; 10) indices; 11) jottings; 12) message slips; 13) letters or correspondence; 14) telexes; 15) telegrams; 16) facsimile transmissions; 17) statements; 18) policies; 19) manuals or binders; 20) books; 21) handbooks; 22) business records; 23) personnel records; 24) ledgers; 25) notices; 26) warnings; 27) affidavits; 28) declarations under penalty of perjury; 29) unsworn statements; 30) reports; 31) diaries; or 32) calendars, regardless of whether they are handwritten, printed, typed, mechanically or electronically recorded or reproduced on any medium capable of conveying an image, such as paper, CDs, DVDs, or diskettes. Furthermore, in line with the guidance issued by the Department of Justice (“DOJ”) on 9 September 2008 to all federal agencies with records subject to FOIA, agency records that are currently in the possession of a U.S. Government contractor for purposes of records management remain subject to FOIA. Please ensure that your search complies with this clarification on the effect of Section 9 of the OPEN Government Act of 2007 of the definition of a “record” for purposes of FOIA. In addition, you should not limit the search to records originated by your agency or exclude correspondence sent to outside third parties. Similarly, we request that all documents be reviewed in their entirety, and that no information be omitted on the grounds of “non-relevance.” Finally, please consider this letter an affirmative rejection of any limitation of your search to records created prior to the date of this request. To the contrary, we stipulate that this search should be restricted to records created prior to the date of the first substantive review of this request by FOIA personnel (as opposed to the date that receipt of the request was acknowledged by the FOIA office).

Lastly, you are specifically prohibited from adopting an overbroad interpretation of the terms “pertaining to,” “related to,” or “regarding” with respect to the scope of this request; an interpretation that

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“a request for all documents ‘related to’ a subject is overbroad because all documents ‘relate to’ others in some remote fashion” is specifically rejected. Therefore, in conclusion, you are hereby instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought.

If you deny all or part of this request, please cite the specific exemptions you believe justify your refusal to release the information or permit the review and notify us of your appeal procedures available under the law. In excising material, please “black out” rather than “white out” or “cut out.” In addition, we draw your attention to President Obama’s 21 January 2009 *Memorandum for the Heads of Executive Departments and Agencies*, directing federal agencies to adopt a presumption in favor of disclosure and stating that government information should not be kept confidential “merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears.” To permit us to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims. This description should include a list of the withheld documents, pursuant to *Shermco Indus. v. Sec’y of the U.S. Air Force*, 452 F. Supp. 306, 317 n.7 (N.D. Tx. 1978) (“A person cannot effectively appeal a decision about the releasability of documents . . . if he is not informed of at least a list of the documents to which he was denied access . . . and why those decisions were made. Denial of this information would in all likelihood be a violation of due process as well as effectively gutting the reasons for applying the exhaustion doctrine in FOIA cases.”).

## News Media:

The NWC is hereby requesting classification as a representative of the news media. The NWC is a non-profit organization under District of Columbia law, has the ability to disseminate information on a wide scale, and intends to use information obtained through FOIA in original works. According to 5 U.S.C. § 552(a)(4)(A)(ii), codifying the ruling of *Nat’l Security Archive v. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989),

the term ‘a representative of the news media’ 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.

The NWC has clear intent to “publish[ ] or otherwise disseminate[ ] information to the public.” *Id.* at 1386 (quoting the following legislative history: 1) “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected. . . . In fact, *any person or organization which regularly publishes or disseminates information to the public . . . should qualify for waivers as a ‘representative of the news media.’*” 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986) (emphasis in original quotation); 2) “A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, *or other entity that is in the business of publishing or otherwise disseminating information to the public* qualifies under this provision.” 132 Cong. Rec. H9463 (Oct. 8, 1986) (emphasis in original quotation)). The NWC has a 20-year history of advancing whistleblowing issues to protect the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation. Since 1988, the NWC has supported whistleblowers in the areas of environmental protection, nuclear safety, government ethics and corporate accountability. Lindsey Williams coordinates the NWC’s effort to educate the public regarding current whistleblower issues and to gain support for whistleblowers. Ms. Williams regularly writes about whistleblowers who have contacted the NWC for assistance, and the NWC continues to monitor and investigate these matters in an effort to disseminate information to Congress and the public about the allegations raised by these whistleblowers. The NWC also sponsors several educational and assistance programs, including an online resource center on

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whistleblower rights, a speakers bureau of national experts and former whistleblowers, and the NWC regularly contributes to the publication of articles on the Whistleblower Protection Blog, located at <http://www.whistleblowersblog.org>. Therefore, in accordance with the Freedom of Information Act and relevant case law, the NWC should be considered a representative of the news media.


**Fee Waiver:**

The requesters are also requesting a public interest fee waiver. There can be no question that the information sought would contribute to the public's understanding of government operations or activities and is in the public interest. Agency Inspectors General are the internal watchdogs of any agency, but contracting investigations to outside businesses exposes internal agency matters to third parties with their own priorities. KAA in particular markets itself to consumers partially on its ability to procure information about government agencies, and yet government employees are required to cooperate with many OIG investigations conducted by this outside third party. Knowing the extent to which your agency contracts KAA for OIG investigations is therefore clearly in the public interest.

We also specifically state for the record our unwillingness to pay any fees for this request. Please do not delay the processing of this request by needlessly requesting further confirmation of our unwillingness to pay fees or terminate the processing of this request for failure to provide you with such confirmation. This statement is a full and unequivocal refusal to pay *any* fees for this request.

Your cooperation in this matter would be appreciated. If you wish to discuss this request, please do not hesitate to contact me at [Kel@NationalSecurityLaw.org](mailto:Kel@NationalSecurityLaw.org) or by phone at 301-728-5908.

Sincerely,

  
Kel McClanahan

**FOIA Resource**

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**From:** intern@kkc.com  
**Sent:** Thursday, October 28, 2010 5:41 PM  
**To:** FOIA Resource  
**Subject:** FOIA Request  
**Attachments:** NuclearRegulatoryCommission.doc

Please see attached.