

FOIA/PA REQUEST

Case No.: 2012-0326
Date Rec'd: 9/19/12
Specialist: BLANEY
Related Case: 1



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September 18, 2012

Donna L. Sealing
FOIA/Privacy Officer
Nuclear Regulatory Commission
Mail Stop T5-F09
Washington, DC 20555

Re: Freedom of Information Act Request

Dear Ms. Sealing,

This is a request under the Freedom of Information Act (FOIA). I am an associate professor of law at Columbia Law School. I teach a course on The Law of Government Secrecy, and I have published articles on the theory of government secrecy and on the interpretation of the FOIA. From 2010 to 2012, I was a special advisor to the Legal Adviser at the U.S. Department of State. I am making this request because the information I seek will contribute to a scholarly project and to public knowledge on an important subject. My scholarly project explores the causes, consequences, and evolution of the U.S. government's response to unauthorized disclosures to the media of classified or confidential information.

1. Scope of Request

Pursuant to the FOIA, I hereby request that the Nuclear Regulatory Commission (NRC) provide me with records from 1970 through the present day, including Inspector General audits and associated reports, relating to the following subjects:

1. Criminal referrals of leaks: Any records that indicate or discuss the (i) number of, (ii) dates of, (iii) rationale for, or (iv) disposition of criminal referrals that the NRC or its personnel have made to the Department of Justice, based on suspected unauthorized disclosures to the media—commonly referred to and referred to herein as “leaks”—in violation of the Espionage Act of 1917 or other statutes. I further request any records that indicate or discuss (v) the news stories containing or reflecting the suspected leaks that led to the criminal referrals.
 - a. By “disposition,” I mean to include whether or not a criminal investigation was initiated, whether or not a suspect was identified, and whether or not any action—

criminal, civil, or administrative—was taken by the U.S. government against the suspected leaker.

2. Internal investigations of leaks: Any records that indicate or discuss the (i) number of, (ii) dates of, (iii) rationale for, or (iv) disposition of internal investigations by the NRC into possible leaks by agency employees or contractors in violation of federal statutes, executive regulations, or agency rules. I further request any records that indicate or discuss (v) the news stories containing or reflecting the leaks that led to the internal investigations.
 - a. By “disposition,” I mean to include whether or not a suspect was identified, whether or not a criminal referral was made to the Department of Justice and on what grounds, and whether or not any action—criminal, civil, or administrative—was taken by the NRC or the U.S. government against the suspected leaker.
3. Administrative and civil actions against leakers: Any records that indicate or discuss the (i) number of, (ii) dates of, (iii) rationale for, (iv) nature of, or (v) disposition of any administrative or civil actions—including but not limited to revocations of security clearance, reprimands, censures, terminations, fines, and lawsuits—taken by the NRC or the U.S. government against agency employees or contractors on account of their suspected leaking.

This request is not meant to be exclusive of any other records which, though not specifically requested, would have a reasonable relationship to the subject matter of the request. To the extent feasible, my preference is to receive records in electronic format.

2. Request for Expedited Processing

I respectfully ask that you expedite this request, pursuant to 5 U.S.C. § 552(a)(6)(E)(i). Agencies must provide for expedite processing of FOIA requests in cases of “compelling need.” *Id.* § 552(a)(6)(E)(i)(I). The “compelling need” standard is satisfied when the requester is “a person primarily engaged in disseminating information” and there is “urgency to inform the public concerning actual or alleged Federal Government activity.” *Id.* § 552(a)(6)(E)(v)(II).

A person “primarily engaged in disseminating information” need not be a journalist. Courts have consistently found, for example, that this term encompasses nonprofit organizations such as the Leadership Conference on Civil Rights (LCCR) and the Electronic Privacy Information Center (EPIC). *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 30 n.5 (D.D.C. 2004). As an academic, I am primarily engaged in researching legal questions and disseminating my findings and analyses to readers of legal scholarship, a readership that may include government officials, journalists, judges, lawyers, and interested members of the general public. My teaching duties do not render this engagement secondary. Disseminating information is at least as central to my work as it is to the work of organizations like LCCR and EPIC, which invest considerable resources on advocacy, litigation, policy reform, and other tasks distinct from their informational function.

The “urgency to inform” standard, as construed by the U.S. Court of Appeals for the District of Columbia Circuit, turns on three factors: “(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity.” *Al-Fayed v. CIA*, 254 F.3d 300, 310 (D.C. Cir. 2001). Applying these factors, a federal district court in California ordered expedited processing of a FOIA request similar to this one. *Gerstein v. CIA*, 2006 WL 3462658 (N.D. Cal. Nov. 29, 2006). Gerstein sought information about criminal referrals that the CIA and other agencies had made since January 1, 2001, in response to suspected classified information leaks. (Note, however, that whereas Gerstein sought the criminal referrals themselves as well as associated interagency correspondence, I am seeking records that *summarize, discuss, or tabulate* the referrals, investigations, and administrative and civil sanctions that have been applied in this area. Gerstein’s focus was on primary-source materials; my focus is on records that explain overall patterns and practices of enforcement.) There is no doubt that this request, like Gerstein’s, satisfies the third prong of the *Al-Fayed* test. See *id.* at *8 (records “unquestionably concern federal government activity”).

This request also involves “current exigency”—the first prong of the *Al-Fayed* test—because “the government’s ongoing efforts to address leaks of classified information” is an “an issue that is not only newsworthy, but [also] the subject of an ongoing national debate.” *Id.* at *6. As in *Gerstein*, this request follows on the heels of alleged classified information leaks that have sparked widespread media coverage, Department of Justice investigations, and congressional scrutiny. See, e.g., *Nat’l Sec. Leaks and the Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. (2012); Press Release, Dep’t of Justice, Statement of Attorney General Eric Holder on the Assignment of U.S. Attorneys to Lead Investigations of Possible Unauthorized Disclosures of Classified Information (June 8, 2012), <http://www.justice.gov/opa/pr/2012/June/12-ag-736.html>. A search of the LexisNexis database (“News, Most Recent 90 Days (English, Full Text)”) on September 7, 2012, for news stories published in the previous 90 days that included the terms “classified” and “leaks” yielded 1,847 responses. By comparison, in *Gerstein* the same search reportedly yielded 977 responses, a number the court considered significant. 2006 WL 3462658 at *5.

Finally, a delayed response to this request risks “compromis[ing] a significant recognized interest”—the second prong of the *Al-Fayed* test—because of the ongoing debate in Congress regarding national security leaks and possible reforms to the Espionage Act of 1917 and other laws that regulate unauthorized disclosures of government information. Courts have found a significant recognized interest in bolstering public debate on possible legislative action. See, e.g., *id.* at *7; *Leadership Conference on Civil Rights*, 404 F. Supp. 2d at 260. Currently, there are at least two bills pending in the Senate that address classified information leaks and that were motivated, in relevant part, by the recent spate of disclosures. See Intelligence Authorization Act for Fiscal Year 2013, S. 3454, 112th Cong. (2012) (enhancing administrative sanctions for federal officials who disclose classified information and mandating more stringent procedures for leak investigations); Deterring Public Disclosure of Covert Actions Act of 2012, S. 3367, 112th Cong. (2012) (permanently revoking security clearances of federal officials who disclose information related to a covert action).

The records I request, and the scholarly analysis they will make possible, are directly relevant to these bills and to others like them. To be able to deliberate and legislate intelligently

in this area, members of Congress and the public must first understand how the executive branch has been responding to suspected leaks. Yet at this time, little is known about basic matters such as the number and disposition of criminal referrals that have been made to the Department of Justice, or the number and nature of administrative sanctions that have been applied against suspected leakers.

As required by 5 U.S.C. § 552(a)(6)(E)(vi), I certify that the above information supporting my request for expedited processing is true and correct to the best of my knowledge and belief.

3. Request for Fee Waiver

I also respectfully ask for a waiver of all fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested information is “not primarily in [my] commercial interest,” as I seek the information in my capacity as a legal scholar, and “is likely to contribute significantly to public understanding of the operations or activities of the government.” *Id.* Specifically, this information will enhance public knowledge about a phenomenon—media leaks and the government’s response thereto—that is poorly understood and yet of tremendous interest to members of Congress and the press, to watchdog organizations and national security professionals, and to scholars of law and government.

The public typically learns of the government’s enforcement behavior in this area only in the rare event that a prosecution is initiated. The records I request from the NRC are not currently available to the general public and may shed new light on the government’s efforts to punish and deter leaking, prior to and apart from these criminal cases. I intend to incorporate whatever I learn from these records into a scholarly article for publication in a widely circulated law review. To the extent appropriate, the records themselves may also be appended to that article or posted on my Columbia Law School website.

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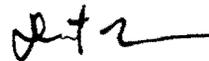
Should you deny any part of this request, please cite each specific exemption you believe justifies that denial. While I certainly do not wish to compromise significant law enforcement, national security, or privacy interests, I do not anticipate that any such interests will be implicated by most records—redacted as necessary pursuant to FOIA’s segregability requirement—that describe the government’s response to suspected leaks. In this regard, I emphasize once again that my primary interest is in learning *aggregate* information about the government’s enforcement practices, rather than the specifics of any given case: I am seeking records that summarize, discuss, or tabulate the referrals, investigations, and sanctions that have been applied in response to suspected leaking.

Furthermore, I note that the U.S. government has issued several major reports on the challenges presented by leaks and that, over the past 25 years, top officials from the Intelligence Community and the Department of Justice have publicly released data on unauthorized disclosures and criminal referrals on a variety of occasions. *See* GARY ROSS, WHO WATCHES THE WATCHMEN? THE CONFLICT BETWEEN NATIONAL SECURITY AND FREEDOM OF THE PRESS 9-10 (2011), available at <http://www.fas.org/sgp/eprint/ross.pdf> (summarizing these instances). These occasional, limited releases are inadequate to enable thorough analysis of the

government's practices, but they prove that the government can, at no discernible cost to its interests, publicly disclose information about how it identifies and responds to leaks.

Thank you very much for your assistance in this matter. Because I make this request in furtherance of my scholarly duties at Columbia Law School, an educational institution, please only charge me for reproduction costs and only after the first 100 pages. *See* 10 C.F.R. § 9.39(a). If you have any questions about handling this request, or if there will be any fees for searching, reviewing, or copying records in excess of \$100, please notify me as promptly as possible. My contact information is listed above.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Pozen', with a long horizontal flourish extending to the right.

David Pozen