

U.S. Nuclear Regulatory Commission
Mail Stop TWFN-6 A60M
Washington, DC 20555-0001
Email: FOIA.resource@nrc.gov

November 9, 2020

Greetings,

This is a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. This request should be considered under both statutes to maximize the release of records.

REQUESTER INFORMATION

Name: Kenneth Klippenstein
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RECORDS SOUGHT

I respectfully request copies of all dissent channel cables, memos or any other similar type of submission received by your agency from January 1, 2009 to November 9, 2020.

BACKGROUND

Many federal agencies contain a messaging framework through which they are invited to express constructive criticism of government policy; this request will refer to such mechanisms as a "dissent channel." Some agencies may not formally call it a dissent channel but the purpose is the same. For example, The Central Intelligence Agency has "red teams" of intelligence officers and analysts "dedicated to arguing against the intelligence community's conventional wisdom and spotting flaws in logic and analysis."¹

In 1980, one year after the Three Mile Island nuclear meltdown, the Nuclear Regulatory Commission (NRC) created its Differing Professional Opinion process, a dissent resolution mechanism.²

In 2011 the U.S. Agency for International Development (USAID) created a dissent reporting mechanism they called the Direct Channel, and made it open to direct-hire employees and to contractors.³

¹ <https://www.nytimes.com/2016/07/02/opinion/washington-needs-more-dissent-channels.html>

² <https://www.pogo.org/report/2020/07/stifling-dissent/>

³ <https://www.pogo.org/report/2020/07/stifling-dissent/>

The Department of Energy mandated the creation of its own department-wide Differing Professional Opinion process in 2005 after reviewing investigations into a 2002 “near-miss” incident at a commercial nuclear power plant and the 2003 Columbia Space Shuttle disaster.⁴

After the 2003 Columbia shuttle disaster, the National Aeronautics and Space Administration (NASA) created a dissent resolution process with a broad mandate: Any “substantive disagreement with a decision or action that an individual judges is not in the best interests of NASA” can qualify.⁵

The Food and Drug Administration’s (FDA) Center for Drug Evaluation and Research has a hybrid dissent resolution system for its over 5,000 employees.⁶

PLEASE NOTE:

Reasonably Foreseeable Harm. The FOIA Improvement Act of 2016 amended the FOIA as follows (5 USC 552(a)(8)):

- (A) An agency shall—
 - (i) withhold information under this section only if—
 - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
 - (II) disclosure is prohibited by law; and
 - (ii) (I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
 - (II) take reasonable steps necessary to segregate and release nonexempt information....

INSTRUCTIONS REGARDING SEARCH

1. Instructions Regarding “Leads”:

As required by the relevant case law, your agency should follow any leads they discover during the conduct of their searches and perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

2. Request for Public Records:

Please search for any records even if they are already publicly available.

3. Request for Electronic and Paper/Manual Searches:

I request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of my request be conducted.

4. Request for Search of Filing Systems, Indices, and Locations:

I request that your agency search all of their offices and components which are likely to contain responsive records.

5. Request regarding Photograph and other Visual Materials:

⁴ <https://www.pogo.org/report/2020/07/stifling-dissent/>

⁵ <https://www.pogo.org/report/2020/07/stifling-dissent/>

⁶ <https://www.pogo.org/report/2020/07/stifling-dissent/>

I request that any photographs or other visual materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. For example, if a photograph was taken digitally, or if your agency maintains a photograph digitally, I request disclosure of the original digital image file, not a reduced resolution version of that image file nor a printout and scan of that image file. Likewise, if a photograph was originally taken as a color photograph, I request disclosure of that photograph as a color image, not a black and white image.

6. Request for Duplicate Pages:

I request disclosure of any and all supposedly “duplicate” pages. Scholars analyze records not only for the information available on any given page, but also for the relationships between that information and information on pages surrounding it. As such, though certain pages may have been previously released to me, the existence of those pages within new context renders them functionally new pages. As such, the only way to properly analyze released information is to analyze that information within its proper context. Therefore, I request disclosure of all “duplicate” pages.

7. Request to Search Emails:

Please search for emails relating to the subject matter of my request.

8. Request for Search of Records Transferred to Other Agencies:

I request that in conducting your search, your agency disclose releasable records even if they are available publicly through other sources outside your agency.

9. Regarding Destroyed Records

If any records responsive or potentially responsive to my request have been destroyed, my request includes, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

INSTRUCTIONS REGARDING SCOPE AND BREADTH OF REQUESTS

Please interpret the scope of this request broadly. Your agency is 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.

EXEMPTIONS AND SEGREGABILITY

I call your attention to President Obama’s 21 January 2009 Memorandum concerning the Freedom of Information Act, in which he states: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA [...] The presumption of disclosure should be applied to all decisions involving FOIA."

In the same Memorandum, President Obama added 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.”

Finally, President Obama ordered that “The Freedom of Information Act should be administered with clear presumption: In the case of doubt, openness prevails.”

Nonetheless, if any responsive record or portion thereof is claimed to be exempt from production, FOIA/PA statutes provide that even if some of the requested material is properly exempt from mandatory disclosure, all segregable portions must be released. If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For “classified” material denied, please include the following information: the classification (confidential, secret or top secret); identity of the classifier; date or event for automatic declassification or classification review or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification beyond six years.

In excising material, please “black out” the material rather than “white out” or “cut out.” I expect, as provided by FOIA, that the remaining non-exempt portions of documents will be released.

Please release all pages regardless of the extent of excising, even if all that remains are stationary headings or administrative markings.

In addition, I ask that your agency exercise its discretion to release records which may be technically exempt, but where withholding serves no important public interest.

ADDITIONAL INSTRUCTIONS REGARDING REQUEST

Please produce all records with administrative markings and pagination included. Please send a memo (copy to me) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

FORMAT

I request that any releases stemming from this request be provided to me in PDF format.

FEE CATEGORY AND REQUEST FOR A FEE WAIVER

I am the DC Correspondent for The Nation and a former contributor to The Young Turks and The Daily Beast. I have written extensively about intelligence community matters and will do the same here. My work has been referenced by The New York Times, The Washington Post, The Los Angeles Times, The Atlantic, and other major media outlets.

I am willing to pay any reasonable expenses associated with this request; however, as the purpose of the requested disclosure is in full conformity with the statutory requirements for a waiver of fees, I formally request such a waiver. I request a waiver of all costs pursuant to 5 U.S.C. §552(a)(4)(A)(iii) (“Documents shall be furnished without any charge ... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”)

Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for

noncommercial requesters.”) I incorporate by reference the explanation and attached materials in the above sections which demonstrates why the requested information is in the public interest.

DoD 5400.7-R C6.1.4.1 provides that “documents shall be furnished without charge, or at a charge reduced below fees assessed to the categories of requesters in subsection C6.1.5., below, when the Component determines that waiver or reduction of the fees is in the public interest because furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the Department of Defense and is not primarily in the commercial interest of the requester.”

Should my request for a fee waiver be denied, I request that I be categorized as a member of the news media for fee purposes pursuant to DoD 5400.7-R C6.1.5.7. According to 5 U.S.C. § 552(a)(4)(A)(ii), which codified the ruling of *Nat’l Security Archive v. Dep’t of Defense*, 880 F.2d 1381 (D.C. Circ. 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. This is consistent with the definition provided in DoD 5400.7-R C6.1.5.7.1.

As the legislative history of FOIA reveals, “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); and 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)). Therefore, in accordance with the Freedom of Information Act and relevant case law, I, Kenneth Klippenstein, should be considered a representative of the news media.

I have the intent and ability to disseminate this significant expansion of public understanding of government operations. The public interest in this significant expansion of public understanding of government operations far outweighs any commercial interest of my own in the requested release. Accordingly, my fee waiver request amply satisfies the rules of DoD 5400.7-R C6.1.4.1. Legislative history and judicial authority emphatically support this determination. For these reasons, and based upon the extensive elaboration above, I request a full waiver of fees be granted. I will appeal any denial of my request for a waiver administratively and to the courts if necessary.

Thank you for your time and attention in this matter.

Ken Klippenstein
Noelle Llamas