

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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NATIONAL PUBLIC RADIO, INC., and)	
HANSI LO WANG)	
)	Case No:
Plaintiffs,)	
)	
- against -)	
)	COMPLAINT FOR
UNITED STATES CENTRAL COMMAND)	DECLARATORY AND
)	INJUNCTIVE RELIEF FOR
)	VIOLATION OF THE FREEDOM
Defendant.)	OF INFORMATION ACT, 5 U.S.C.
)	§ 552 et seq.
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Plaintiffs National Public Radio, Inc. and Hansi Lo Wang (collectively, “NPR”), by and through their undersigned attorneys, bring this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, for declaratory, injunctive and other appropriate relief to compel the disclosures and release of documents from Defendant United States Central Command (“CENTCOM”). In support thereof, Plaintiffs allege as follows:

INTRODUCTION

1. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization and the leading provider of non-commercial news, information, and entertainment programming to the American public. Plaintiff Hansi Lo Wang is a journalist for NPR.

2. On July 14, 2021, Plaintiffs submitted two FOIA requests to Defendant CENTCOM for records regarding allegations of civilian harm resulting from the October 26-27, 2019 CENTCOM operation in northwestern Syria to capture or kill ISIS leader Abu Bakr al-Baghdadi. *See* Exhibits A and B. On July 16, 2021, CENTCOM acknowledged the two requests and consolidated them into a single request (“the Request”). *See* Exhibit C.

3. CENTCOM is one of eleven unified combatant commands of the U.S. Department of Defense. It directs and enables military operations and activities with allies and partners to increase regional security and stability in support of enduring U.S. interests in the central area of the globe, located between the European, African, and Indo-Pacific commands.¹ One of its command priorities is “maintaining Defeat-ISIS Campaign in Syria and Iraq.” On October 26-27, 2019, the U.S. conducted a military operation in Syria that resulted in the death of Abu Bakr al-Baghdadi, the then leader of ISIS. General McKenzie, CENTCOM commander, oversaw the operation.²

4. The records regarding civilian harm sought by the Requests are essential for ensuring transparency and accountability for the actions taken by the U.S. government. The public interest at stake in the release of these documents is of the utmost importance.

5. The Freedom of Information Act “focuses on the citizens’ right to be informed about ‘what their government is up to,’” by requiring the release of “[o]fficial information that sheds light on an agency’s performance of its statutory duties.” *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 750, 773 (1989) (citation omitted). “[D]isclosure, not secrecy, is the dominant objective” of FOIA. *Dept’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001) (internal quotation marks and citations omitted).

6. Defendant CENTCOM has failed to comply with its obligations under FOIA. As of the date of this filing, Defendant has not issued a final determination in response to Plaintiffs’ Requests and has yet to produce a single document.

¹ <https://www.centcom.mil/ABOUT-US/> (last accessed Sept. 28, 2021).

² Transcript of Department of Defense Press Briefing by Assistant to the Secretary of Defense for Public Affairs Hoffman and Gen. McKenzie, Commander, U.S. Central Command (Oct. 30, 2019), <https://www.centcom.mil/MEDIA/Transcripts/Article/2004535/departments-of-defense-press-briefing-by-assistant-to-the-secretary-of-defense-f/> (last accessed Sept. 29, 2021).

7. Plaintiffs bring this action to compel Defendant to immediately process and release to Plaintiffs all responsive records that it has unlawfully withheld.

PARTIES

8. Plaintiff National Public Radio, Inc. is a non-profit multimedia organization and the leading provider of non-commercial news, information, and entertainment programming to the American public. NPR's fact-based, independent journalism helps the public stay on top of breaking news, follow the most critical stories of the day, and track complex issues over the long term. NPR reaches approximately 53 million people on broadcast radio, podcasts, NPR apps, NPR.org and YouTube video content per month. NPR distributes its radio broadcasts through more than 1,000 non-commercial, independently operated radio stations, licensed to more than 250 NPR members and numerous other NPR-affiliated entities.

9. Plaintiff Hansi Lo Wang is a resident and citizen of the Southern District of New York, and an award-winning journalist who works as a national correspondent for NPR. Mr. Wang was the first journalist to uncover plans by former President Trump's administration to end 2020 census counting early.

JURISDICTION AND VENUE

10. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. §§ 701-706, and 28 U.S.C. § 1331.

11. Venue in the Southern District of New York is proper under 5 U.S.C. § 552(a)(4)(B) because NPR has its place of business in New York City and because Mr. Wang's FOIA Requests to CENTCOM occurred within the City and County of New York, within this District. Mr. Wang is also a resident and citizen of the Southern District of New York.

STATUTORY BACKGROUND

12. The Freedom of Information Act provides that any member of the public may request records from a United States agency. Upon receipt of a FOIA request, an agency must determine within 20 business days—or, in “unusual circumstances,” by 30 business days—whether it will comply with a request and notify the requestor of its determination and reasoning in writing. 5 U.S.C. §§ 552(a)(6)(A)(i) - B(i). This determination must also timely indicate the scope of the documents the agency intends to produce and the exemptions, if any, that it will apply to withhold documents.

13. In response to a FOIA request, an agency, after engaging in a reasonable search for responsive records, including of any field offices that may possess relevant materials, must disclose in a timely manner all records that do not fall within nine narrowly construed statutory exemptions. 5 U.S.C. §§ 552(a)(3)(A), (C), (b)(1)-(9).

14. Typically, a requester under FOIA must appeal agency action administratively before commencing litigation. However, if the agency has failed to abide by its obligations and issue a determination on the request or a determination on an administrative appeal within the statutory timeframe, the administrative appeal process is considered exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

15. Upon complaint, a district court can enjoin an agency from withholding records and order production of records improperly withheld. 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

16. As its name implies, CENTCOM covers the "central" area of the globe located between the European, Africa and Indo-Pacific Commands. On January 1, 2015, the command transitioned to NATO's Resolute Support mission. This mission focused on training, advising

and assisting the Afghan government and security forces in pursuit of a strong, stable Afghanistan.³

17. On October 26-27, 2019, the U.S. conducted a military operation in Syria that resulted in the death of Abu Bakr al-Baghdadi, the then leader of ISIS. Initial reports stated that several other militants were also killed in a convoy.⁴

18. Gen. McKenzie, in his press briefing about the operation on October 30, 2019, showed a video in which a van was fired upon. He described the van as “one of the vehicles that displayed hostile intent, came toward us, and it was destroyed.”⁵ There may have been other casualties as well, but Gen. McKenzie could not quantify them. “Q: Do you know how many casualties there may have been? GEN. MCKENZIE: So you know, we don't. Out there it's going to be hard to know. We use the figure of about 10 to 15, but I -- but we really don't know for sure, and I don't know that we're ever going to know that, because we're not going to go back out there and count.”⁶

19. NPR reported on December 3, 2019 that Syrians believed innocent civilians were killed during the raid.⁷ Two people in the van were killed, and a third was injured and lost his hand. According to NPR's reporting, the victims were farmers and minibus drivers who were

³ U.S. CENTRAL COMMAND website, About Us, <https://www.centcom.mil/ABOUT-US/> (last accessed Sept. 29, 2021).

⁴ “ISIS leader Abu Bakr al-Baghdadi killed in U.S. raid in Syria, Trump confirms” (Oct. 26, 2019), from NBC news, <https://www.nbcnews.com/news/world/abu-bakr-al-baghdadi-leader-isis-targeted-u-s-raid-n1072506> (last accessed Sept. 29, 2021).

⁵ Transcript of Department of Defense Press Briefing by Assistant to the Secretary of Defense for Public Affairs Hoffman and Gen. McKenzie, Commander, U.S. Central Command (Oct. 30, 2019), <https://www.centcom.mil/MEDIA/Transcripts/Article/2004535/departement-of-defense-press-briefing-by-assistant-to-the-secretary-of-defense-f/> (last accessed Sept. 29, 2021).

⁶ *Id.*

⁷ “Syrians Say Innocent Civilians Were Killed in U.S. Raid on Abu Bakr Al-Baghdadi” (Dec. 3, 2019), <https://www.npr.org/2019/12/03/784553329/syrians-say-innocent-civilians-were-killed-in-u-s-raid-on-abu-bakr-al-baghdadi> (last accessed Sept. 29, 2021).

driving through the village of Barisha at the time of the raid. The survivor told NPR: “I’m just a civilian. I didn’t have any weapons.”⁸

20. NPR journalist Daniel Estrin wrote to CENTCOM, asking about civilian casualties from the raid. On November 20, 2019, a Department of Defense official responded that this was the first report they had received of possible civilian casualties. The official said that the initial reports were that the van had fired on U.S. helicopters. The official promised that surveillance footage would be reviewed to determine if an investigation needed to be opened. *See Exhibit D.*

21. On February 20, 2020, Capt. William Urban, a CENTCOM public affairs officer, stated that CENTCOM has initiated a credibility assessment into an allegation of civilian casualties during the operation on Oct. 26-27, 2019. *See Exhibit E.*

22. On July 13, 2020, Capt. Urban stated that the credibility assessment found that “U.S. forces employed appropriate, necessary, and proportionately scaled use of force in response to actions against U.S. forces, which turned lethal after warnings were not heeded.” *See Exhibit F.*

23. On July 30, 2020, Major Beth Riordan, a CENTCOM public affairs officer, wrote to Mr. Estrin with a statement on Capt. Urban’s behalf. The statement explained the reasons CENTCOM believed the inhabitants of the van demonstrated hostile intent. *See Exhibit G.*

24. On October 27, 2020, NPR published a story about the attack questioning CENTCOM’s official narrative. *See Exhibit H.* In CENTCOM’s version of events, the van had failed to heed the U.S. helicopter’s warning shots, and instead accelerated toward the helicopter. The helicopter then fired on the van, and the men fled the van without raising their hands.

⁸ *Id.*

According to CENTCOM, U.S. forces perceived these actions to demonstrate hostile intent. *Id.* But relatives of the victims reject CENTCOM's claims and conclusions, telling NPR that the men were unarmed operators of a van service, not combatants. The sole survivor told NPR that he did not know what was happening during the helicopter attack, and that he was just trying to escape death. *Id.*

25. A report looking at civilian casualties during the Iraq and Afghanistan operations from 2001 through 2014 noted that “accurately determining hostile intent can be a serious challenge” and that the “problem is exacerbated in operational environments where ... combatants are not easily distinguishable from the civilian population.”⁹ It concluded that the consequences were “tragic” in that U.S. forces likely caused civilian casualties that were avoidable.

26. CENTCOM has a documented history of overlooking civilian deaths and injuries until challenged by the media. Earlier this year for example, CENTCOM claimed that an August 29, 2021 drone strike targeting ISIS-K members in Afghanistan was a “righteous strike” that had resulted in “no known civilian casualties.” But after stories in *The New York Times* and the *Washington Post* questioned that official narrative, CENTCOM subsequently announced that the air strike had in fact been a “tragic mistake” that had killed “as many as 10 civilians, including up to seven children.”¹⁰

27. A recent *New York Times* investigation alleged that military officials attempted to cover up a 2019 air strike in Baghuz, Syria that is believed to have killed several dozen civilians

⁹ “Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection,” Harvard Law School International Human Rights Clinic (Mar. 2016), <https://www.justsecurity.org/wp-content/uploads/2016/03/Tackling-Tough-Choices-Hostile-Intent-HLSIHR-2016.pdf> (last accessed Sept. 30, 2021).

¹⁰ Vanessa Romo, *Pentagon Reverses Itself and Now Says a Deadly Kabul Drone Strike Was an Error*, NAT'L PUB. RADIO, (Sept. 17, 2021), <https://www.npr.org/2021/09/17/1038381206/drone-attack-afghanistan-civilians-pentagon>.

including dozens of women and children. According to the *Times* report, officers at the time were aware of the mass civilian casualties — and had even flagged the strike as “a possible war crime” — but CENTCOM failed to properly investigate those deaths. Until the *Times* report was published on November 13, 2021, the military had never formally acknowledged the strike or the casualties. Instead, “at nearly every step, the military made moves that concealed the catastrophic strike.”¹¹

28. Given this history, there is intense public interest in demanding transparency from CENTCOM regarding its treatment of civilian casualties. The records sought in this Request, which pertain to yet another air strike where CENTCOM may have undercounted civilian deaths, are of vital public importance: disclosure of this information is likely to contribute significantly to public understanding of the operations of the federal government, specifically CENTCOM’s overall efforts (or lack thereof) to investigate allegations of civilian casualties resulting from its operations in Syria, Iraq, and Afghanistan.

PLAINTIFFS’ FOIA REQUESTS

29. Plaintiffs submitted two FOIA requests to Defendant CENTCOM on July 14, 2021.

See Exhibits A and B.

The First Request

30. The first request sought records from CENTCOM's investigation into civilian casualties resulting from the Oct. 26-27, 2019 CENTCOM operation to capture or kill Abu Bakr al-Baghdadi. *See* Exhibit A.

¹¹ Dave Philipps and Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES, (Nov. 13, 2021), <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>.

31. The request sought a copy of the credibility assessment (CIVCAS CCAR) or Commander-Directed Investigation (CDI/AR15-6) report pertaining to the incident, as well as all associated enclosures, exhibits and attachments.

32. The request also asked for all evidence reviewed in relation to the civilian casualty allegations surrounding the strike, including but not limited to: “closure report records, solatia assessment, ex-gratia assessment, open source information, assessments by US intelligence and fires professionals, legal review, video and full motion video footage, photos, post-strike imagery, screenshots and other images.”

33. The request limited the time period of the search to Oct. 26, 2019 through the date upon which the search was conducted.

The Second Request

34. The second request sought email communications pertaining to the van targeted in the U.S. strike as well as other casualties resulting from the strike during the Oct. 26-27, 2019 CENTCOM operation to capture or kill Abu Bakr al-Baghdadi. *See* Exhibit B.

35. The request further sought all communications, documents, memoranda, and/or attachments, which reference one or more of the following subjects: 1) an approaching “van” determined to display “hostile intent” and destroyed by U.S. forces in the al-Baghdadi raid; 2) an initial review of “surveillance footage” following claims of civilian casualties resulting from the targeting of the van and subsequent targeting of men who escaped the van. The review was carried out between November 2019 and February 2020; 3) Reference to a “credibility assessment”/ CIVCAS/ CCAR, regarding allegations of civilian harm resulting from the operation; 4) Reference to an “Commander-Directed Investigation”/ “CDI/AR15-6” which may have been conducted into allegations of civilian harm resulting from the operation; 5) Reference

to a “solatia” or “ex-gratia” assessment regarding allegations of civilian harm resulting from the operation.

36. Finally, the request also sought all communications addressed to, sent to, authored by, and/or referencing, one or more of the following: 1) Gen. Kenneth R. McKenzie; 2) Capt. William R. (Bill) Urban; 3) Maj. Beth Riordan; 4) Michael T. Lawhorn; 5) Maj. John Rigsbee; 6) Jonathan Raff Hoffman; 7) Daniel Estrin; 8) NPR or National Public Radio. The request limited the time period of the search to Oct. 26, 2019 through the date upon which the search was conducted.

Expedited processing and fee waiver

37. Plaintiffs sought expedited processing pursuant to 5 U.S.C. §§ 552(a)(6)(E)(v)(1)-(II) and 32 C.F.R. 286.8(e)(1)(ii)(B).

38. Plaintiffs also sought a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 32 C.F.R. 286.12 on the basis that disclosure of the requested records was in the public interest because disclosure was likely to contribute significantly to the public understanding of the activities or operations of the federal government and was not primarily in Plaintiffs’ commercial interest. *See* Ex. B. Mr. Wang further stated that he qualified for a fee waiver because of his role as a member of the news media.

DEFENDANT’S RESPONSE

39. On July 16, 2021, Defendant CENTCOM acknowledged receipt of the two requests from July 14 and merged them into a single request. The merged request was assigned the tracking number 21-0469. *See* Exhibit C. Defendant granted Plaintiffs’ request for a fee waiver but denied Plaintiffs’ request for expedited processing. *Id.* Defendant did not set a time to respond to the Request, stating “the actual processing time for these documents will depend upon

consultation with other DoD components, stateside, overseas, or other agencies.” *Id.* Defendant indicated that NPR’s request was #3048 in the agency’s queue. *Id.*

40. Defendants’ response was due within 20 working days, on August 11, 2021.

41. As of the filing of this Complaint, Plaintiffs have not received the required documentation from Defendant CENTCOM; nor have they received any responsive records or any other substantive reply to their Request. In fact, Plaintiffs have received no further correspondence from CENTCOM since the July 16 acknowledgement.

42. Despite its clear obligation under FOIA, Defendant has not provided any determination in response to the Request nor released any records responsive to the Request within the statutory timeframe.

43. Because Defendant has not complied with the statutory time limits set forth in the FOIA statute, Plaintiffs’ administrative remedies are considered exhausted under 5 U.S.C. § 552(a)(6)(C)(i).

CAUSE OF ACTION

(Violation of Freedom of Information Act) 5 U.S.C. § 552(a)

44. Plaintiffs incorporate the above paragraphs as if set forth fully herein.

45. Defendant CENTCOM has a legal duty under FOIA to determine whether to comply with a request within 20 days after receiving the Request or within 30 days after invoking an extension. Defendant CENTCOM also has a legal duty to timely notify the requestor of the agency’s determination and the reasons therefore.

46. NPR has a legal right under FOIA to obtain the agency records they requested in the Request. There is no legal basis for Defendant’s failure to timely respond to Plaintiffs’ Request and provide all records responsive to the Request to Plaintiffs.

47. Defendant has violated 5 U.S.C. § 552(a)(6)(A)-(B) and applicable regulations promulgated thereunder by failing to determine whether to comply with Plaintiffs' Request and communicate such determination to Plaintiffs within 30 days.

48. Defendant CENTCOM's failure to timely release agency records in response to Plaintiffs' Request has violated 5 U.S.C. § 552(a)(3)(A).

49. Defendant CENTCOM has violated 5 U.S.C. § 552(a)(3)(C)-(D) by failing to make reasonable efforts to search for records responsive to Plaintiffs' Request.

50. 5 U.S.C. § 552(a)(4)(B) authorizes the grant of injunctive relief to Plaintiffs NPR and Wang because Defendant CENTCOM continues to flout FOIA and improperly withhold agency records. Because Defendant's refusal to respond to Plaintiffs' Request prevents Plaintiffs from educating the public about the operations of CENTCOM and any related civilian casualties, Plaintiffs will continue to suffer irreparable injury from Defendant's withholding of government documents subject to Plaintiffs' Request in defiance of FOIA mandates.

51. 28 U.S.C. § 2201 authorizes declaratory relief because an actual and justiciable controversy exists regarding Defendant's improper withholding of agency records in violation of FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs NPR and Wang respectfully request that the Court award it the following relief:

A. Enter judgment that Defendant's failure to determine within the statutorily appointed 30 days whether to comply with the Request and timely notify Plaintiffs of such determination and its reason violates FOIA;

- B. Enter judgment that Defendant's unlawful withholding of the records requests violates FOIA;
- C. Enter an order requiring Defendant to immediately release any and all responsive and not otherwise exempt records to Plaintiffs;
- D. Award Plaintiffs their reasonable costs and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- E. Grant such further relief as the Court may deem just and proper.

Dated: New York, New York
December 8, 2021

Respectfully submitted,

/s/ Robert D. Balin

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