



U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

March 1, 2023

BY ECF

Hon. Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, New York 10007

**Re: *New York Times & Khan v. U.S. Department of Defense,*
22 Civ. 9481 (DLC)**

Dear Judge Cote:

Counsel for Plaintiffs The New York Times Company (“The “Times”) and Azmat Khan (“Khan”) (collectively, “Plaintiffs”) and Defendant the United States Department of Defense (“DoD”) write respectfully in this action brought pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), to update the Court on the status of this matter, and to request that the initial pretrial conference currently scheduled for March 2, 2023, be adjourned until a date convenient for the Court during the first two weeks of April to allow the parties to continue to discuss a schedule for further proceedings. The parties propose to file a status report on March 31, 2023, in which the parties will either jointly propose a plan for further proceedings or request that the conference proceed as scheduled.

As set forth in the parties’ joint letter dated December 29, 2022, this case concerns four FOIA requests submitted by Khan, a reporter with the Times, seeking records from three DoD components relating to reported civilian casualties from military operations. Khan submitted one FOIA request to the United States Africa Command (“AFRICOM”), two requests to the United States Central Command (“CENTCOM”), and one request to the United States Army (“Army”). The status of DoD’s processing of the requests is set forth below.

1. The AFRICOM Request

The AFRICOM request, submitted on September 16, 2022, seeks records concerning 37 alleged incidents of civilian casualties. AFRICOM has completed its search and identified 174 potentially responsive records, comprising approximately 1200 pages.

AFRICOM has begun reviewing these records to confirm they are responsive and to identify information that is exempt from disclosure under one or more FOIA exemptions. Most if not all of the responsive records reside on classified record systems, contain classified information, and implicate the equities of multiple components within AFRICOM, other combatant commands, and other components or agencies. AFRICOM expects to process the records on a rolling basis,

but will need to refer most if not all of the documents to these other components or agencies for consultation. The parties continue to meet and confer concerning a processing schedule for the AFRICOM request.

2. The Army Request and the September 18, 2022 CENTCOM Request (collectively, the “Baghuz Requests”)

Two of the FOIA requests—the request submitted to Army and one of the two requests submitted to CENTCOM—concern a civilian casualty incident in Baghuz, Syria on March 18, 2019. The Secretary of Defense tasked U.S. Army General Michael X. Garrett, commander of U.S. Army Forces Command, to conduct an independent review of the incident, which was completed in late 2021.

The FOIA request to Army, submitted on October 6, 2022, seeks General Garrett’s report and all of the evidentiary materials he considered. Army has completed its search for responsive records. The Office of Secretary of Defense (“OSD”) is currently reviewing the results of the search to confirm their responsiveness, and then will refer those records to CENTCOM for processing, which is likely to include consultations with other combatant commands or DoD components.

The FOIA request to CENTCOM, submitted on September 18, 2022, separately seeks records concerning the Baghuz incident and in DOD’s view is likely to be largely if not entirely duplicative of the Army request. DoD has proposed that CENTCOM, after receiving the referral from OSD/Army, process the records resulting from the Army search, and hold the separate CENTCOM request in abeyance pending that processing. Plaintiffs are considering that proposal.

The parties are also discussing a proposed schedule for CENTCOM’s processing of the records referred by OSD/Army. In CENTCOM’s view, any processing schedule will need to account for the records CENTCOM is already processing in response to prior FOIA requests filed by Ms. Khan. *See Khan v. DoD*, 18 Civ. 5334 (DLC) (“*Khan I*”); *Khan v. DoD*, 21 Civ. 8105 (DLC) (“*Khan II*”). CENTCOM has advised Plaintiffs that, once it receives the referral of documents from OSD and Army, CENTCOM is willing to prioritize processing of the records in this case over the remaining records in *Khan II*, if Plaintiffs prefer. Plaintiffs are considering CENTCOM’s position.

3. The November 9, 2019 CENTCOM Request

The other CENTCOM request, submitted on November 9, 2021, seeks records concerning 65 condolence or *ex gratia* payments referred to in a DoD report and one payment identified in congressional correspondence, as well as records concerning the underlying incidents that led to the payments. CENTCOM has advised Plaintiffs that it may not be possible to process this request given the limited information provided, but CENTCOM will advise Plaintiffs when it has exhausted its efforts.

* * *

The parties do not anticipate any discovery at this time, as FOIA actions are generally resolved through summary judgment without discovery. *See, e.g., Wood v. FBI*, 432 F.3d 78, 85 (2d Cir. 2005); *Carney v. DOJ*, 19 F.3d 807, 812–13 (2d Cir. 1994). However, counsel for the parties have met and conferred to discuss the status of the DoD’s processing of the various requests and are continuing to discuss DoD’s proposals set forth above. The parties believe that additional discussions may allow them to present a joint proposal to the Court, or at a minimum will narrow any issues in dispute. Accordingly, the parties respectfully request that the Court adjourn the initial conference until a date convenient for the Court during the first two weeks of April to allow these further discussions. The parties propose to file a further status report on March 31, 2023, in which the parties would either jointly propose a plan for further proceedings or request that the conference go forward as scheduled.

We thank the Court for its consideration of this letter.

Respectfully,

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*The conference is
cancelled.
Status report is due
3/31/23.*

*Amie Cole
3/1/23*

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