



DEPARTMENT OF DEFENSE
FREEDOM OF INFORMATION DIVISION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 APR 2019

Ref: 18-FR-0619

Ms. Kay Murray
First Look Media Works, Inc.
114 Firth Ave.
New York, NY 10011

Dear Ms. Murray:

This is a final response concerning the March 6, 2018, Freedom of Information Act (FOIA) request, from your client, Mr. Sam Biddle, a copy of which is attached for your convenience. By letter dated April 30, 2019, you submitted an appeal of our original decision regarding this matter. As a result, the Office of the Chief Management Officer remanded the request to us for a new review. We re-opened the request under FOIA case number 18-FR-0619. We ask that you use this number when referring to this request.

The Office of the Under Secretary of Defense for Intelligence, a component of the Office of the Secretary of Defense (OSD), took another look at the responsive records and Colonel Drew Cukor, Chief, Algorithmic Warfare Cross Function Team, Office of the Under Secretary of Defense for Intelligence, in his capacity as an Initial Denial Authority, determined that the response sent to Mr. Biddle on February 12, 2019 was proper and the information withheld is exempt from public disclosure pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552 (b)(3) as release is forbidden by statute, specifically 10 USC §130e; Exemption 4 of FOIA 5 U.S.C. § 552 (b)(4); Exemption 5 of FOIA, 5 U.S.C. § 552(b)(5), and Exemption 6 of the FOIA, 5 U.S.C. § 552 (b)(6). Please see the attached reference sheet for an explanation of the statute and exemptions.

In this instance, fees for processing your request were below the threshold for requiring payment. Please note that fees may be assessed on future requests.

If you are not satisfied with this response, you may contact our OSD FOIA Public Liaison, Darrell Williams, at 571-372-0462 or by email at OSD.FOIALiaison@mail.mil. Also, please note that the Office of Government Information Services (OGIS) offers services to requesters who have disputes with Federal agencies. You may contact OGIS if you have concerns about the processing of your request. Their contact information is provided below:

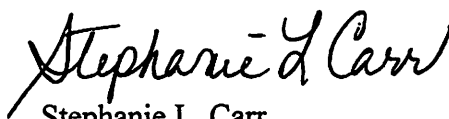
Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

You have the right to appeal to the appellate authority, Ms. Joo Chung, Director of Oversight and Compliance, Office of the Secretary of Defense, by writing directly to OCMO

Office of the Chief Management Officer, 4800 Mark Center Drive, ATTN: DPCLTD, FOIA Appeals, Mailbox# 24, Alexandria, VA 22350-1700. Your appeal must be postmarked within 90 calendar days of the date of this response. Alternatively, you may email your appeal to osd.foia-appeal@mail.mil. If you use email, please include the words "FOIA Appeal" in the subject of the email. Please also reference case number 18-FR-0619 in any appeal correspondence.

If you have any questions about the foregoing, please do not hesitate to contact the Action Officer assigned to your request, Ms. Nusheen Sikandar, nusheen.sikandar.civ@mail.mil or 571-372-0437.

Sincerely,



Stephanie L. Carr
Chief

Enclosures:
As stated.

187-0619
MAR 06 2018**Submit New Request****Requester Details**

M_Requester_Deatils_Note

Sam Biddle

Gawker Media
 960 Willoughby Avenue
 Apt 1P
 Brooklyn, NY 11221
 biddle@gawker.com

Requester Default Category: News Media

Custom Fields

Requester Control # :
 Previous Address 2 :

General Information

Action Office Instructions
 Request Type
 Requester Category

FOIA
 News Media

Shipping Address

Street1 114 5th Avenue
 Street2 18th Floor
 City New York
 State New York
 Country United States
 Zip Code 10011

Request Information

Description Document
 Description

Dear Sir or Madam:

This is a request for records under the provisions of the Freedom of Information Act.

I am requesting any and all records pertaining to the Algorithmic Warfare Cross-Functional Team's use of Google technology, software, or hardware. Please search between the date range of 1/1/17 and today's date, 3/6/18.

In order to help to determine my status to assess fees, you should know that I am a journalist working as a reporter for The Intercept, an online investigative news organization. This request is made as a part of a news-gathering effort and not for commercial use, and I am therefore eligible for a waiver of fees associated with the time spent to review responsive documents. I am also eligible for the first 100 pages of documents to be provided to me at no cost. I am willing to pay fees for this request up to \$100. If you estimate that the fees will exceed this limit, please notify me first.

To the extent possible, please furnish all responsive records in electronic format.

Please direct all correspondence regarding this request to me at sam.biddle@theintercept.com or my physical address at 114 5th Avenue., 18th Floor, NY, NY 10011 or call me at (202) 320-9984 with any questions.

Thank you for your attention to this request.

Date Range for Record
 Search:From
 Date Range for Record
 Search:To

01/01/2017
 03/06/2018

Fee Information

Willing Amount

\$100

Custom Fields

Requester #

The Freedom of Information Act (5 USC 552)

FOIA Exemptions

- (b)(1) Information specifically authorized by an executive order to be kept secret in the interest of national defense or foreign policy. Executive Order 13526 includes the following classification categories:
- 1.4(a) military plans, systems, or operations;
 - 1.4(b) foreign government information;
 - 1.4(c) intelligence activities, sources or methods, or cryptology;
 - 1.4(d) foreign relations or foreign activities of the US, including confidential sources;
 - 1.4(e) scientific, technological, or economic matters relating to national security, including defense against transnational terrorism;
 - 1.4(f) U.S. Government programs for safeguarding nuclear materials or facilities;
 - 1.4(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to US national security, including defense against transnational terrorism;
 - 1.4(h) weapons of mass destruction;
- (b)(2) Related solely to the internal personnel rules and practices of an agency
- (b)(3) Specifically exempted from disclosure by statute (other than 5 USC 552), for example:
- ARMEX Arms Export Control Act, 22 USC 2778(e)
 - EXPORT Export Administration Act of 1979, 50 App. USC 2411(c)(1)
 - FSA Foreign Service Act of 1980, 22 USC 4003 & 4004
 - INA Immigration and Nationality Act, 8 USC 1202(f)
 - IRAN Iran Claims Settlement Act, Sec. 505, 50 USC 1701, note
 - NSA50 National Security Act of 1947, 50 USC 403-1(i)
- (b)(4) Trade secrets and confidential commercial or financial information
- (b)(5) Interagency or intra-agency communications forming part of the deliberative process, attorney-client privilege, or attorney work product
- (b)(6) Personal privacy information
- (b)(7) Law enforcement information whose disclosure would:
- (A) interfere with enforcement proceedings
 - (B) deprive a person of a fair trial
 - (C) constitute an unwarranted invasion of personal privacy
 - (D) disclose confidential sources
 - (E) disclose investigation techniques
 - (F) endanger life or physical safety of an individual

Other Grounds for Withholding

- NR Material not responsive to a FOIA request, excised with the agreement of the requester

April 30, 2019

OCMO
Office of the Chief Management Office
4800 Mark Center Drive
ATTN: DPCLTD
FOIA Appeals
Mailbox #24, Alexandria VA 22350-1700

By email to: osd.foia-appeal@mail.mil

Re: Appeal of Denial of Freedom of Information Act Request No. 18-F-0619

Dear Sir or Madam:

This office represents The Intercept, an award-winning news organization, and its reporter Sam Biddle in connection with Mr. Biddle's above-referenced Freedom of Information Act ("FOIA") request to the Department of Defense ("DoD") dated March 6, 2018. I write to appeal the DoD's denial of Mr. Biddle's request.

The Request and DoD's Denial

On March 6, 2018, Mr. Biddle submitted a FOIA request (the "Request", Appendix A) to DoD seeking "records pertaining to the Algorithmic Warfare Cross-Functional Team's use of Google technology, software or hardware," using the date range January 1, 2017 to March 6, 2018. Nearly a year later, on February 12, 2019, DoD responded (the "Response," Appendix B) that the records responsive to the Request (the "Records"), estimated to be 5000 pages, would be withheld in their entirety, citing Exemptions 3, 4, 5 and 6 of FOIA, 5 USC §§ 552(b)(3); 552 (b)(4), 552 (b)(5) and 552 (b)(6). Specifically, DoD asserted that Exemption 3 applies because "release is forbidden by" 10 USC § 130e(f) on the ground that every one of the 5000 responsive records qualifies as "critical infrastructure security information" based on a determination by the Chief Management Officer dated December 18, 2018 (more than 10 months after the Request). DoD provided no explanation for its reliance on Exemptions 4, 5 and 6 to deny the Request.

For the reasons below, DoD has failed to sustain its burden of demonstrating that the entirety of the information requested qualifies as "critical infrastructure security information," the release of which would risk harm that outweighs the public interest in the information. Nor has DoD properly or adequately invoked Exemptions 4, 5 and 6, because it has not articulated the basis for its reliance on the exemptions as applied to specific Records, and there is likely to be information in the Records that are not exempt from disclosure under these provisions. We therefore appeal the denial and request that DoD: 1. provide the Records; and 2. demonstrate that any Records withheld, or any information redacted from Records that are produced, are exempt from disclosure under the specific Exemption on which DoD relies.

April 30, 2019

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The Public Interest in Project Maven

The DoD introduced the Project Maven initiative through a widely-distributed memorandum dated April 26, 2017 from then-Deputy Secretary of Defense Robert Work (Appendix C). The memo described the establishment of an “Algorithmic Warfare Cross-Functional Team” and its overall objectives, initial tasks, and processes by which it would “accelerate DoD’s integration of big data and machine learning” in order to “turn the enormous volume to data available to DoD into actionable intelligence and insights at speed.” The plan included the improvement of drone warfare capabilities, among other tasks and objectives. In July 2017, Col. Drew Cukor, chief of Project Maven in the Intelligence, Surveillance and Reconnaissance Operations Directorate-Warfighter Support, discussed the initiative at a Defense One Tech Summit, as reported by the DoD News, Defense Media Activity (Pellerin, Project Maven to Deploy Computer Algorithms to War Zone by Year’s End *Department of Defense News*, July 21, 2017; available at <https://dod.defense.gov/News/Article/Article/1254719/project-maven-to-deploy-computer-algorithms-to-war-zone-by-years-end/>). Col. Cukor described challenges and methodology, including the procurement of “computational power” and an “algorithmic development contract,” in process. He singled out Google and Eric Schmidt, Executive Chair of Google’s parent company, as one of the leading private sector businesses in “A.I.,” i.e., “artificial intelligence” or “machine learning,” and specified that the “immediate focus” of DoD in the A.I. arena would be on “advanced computer algorithms onto government platforms to extract objects from massive amounts of moving or still imagery.” He described an algorithm in technical terms, and explained that the immediate focus of the project was “38 classes of objects that represent the kinds of things the department needs to detect, especially in the fight against the Islamic State of Iraq and Syria” by “year’s end.”

The DoD’s use of AI for warfare is of great interest to the public. According to the Department’s own materials, it requested \$13.7 billion in taxpayer funds for “Investments in Technology Innovation,” including “Artificial Intelligence,” “Electronic Warfare” and “Cyber” among other items. (See DoD Budget Request for Fiscal Year 2019, available at https://comptroller.defense.gov/Portals/45/documents/defbudget/FY2019/FY2019_Budget_Req_est.pdf). Numerous news and scholarly articles covering the topic of DoD use of AI and of Project Maven have been published in the past two years. (See, e.g., Fang, Google is Quietly Providing AI Technology for Drone Strike Targeting Project, *The Intercept*, March 6, 2018, available at: <https://theintercept.com/2018/03/06/google-is-quietly-providing-ai-technology-for-drone-strike-targeting-project/>;). The DoD’s partnering with one of the world’s largest and richest technology companies, whose motto is famously “Don’t be evil,” to enhance its war-making capacity is also undeniably of interest to the public. Beginning in March 2018, several news outlets reported on Google’s participation in Project Maven, the internal protests of some 4,000 of its personnel, and the subsequent announcement by Google that it would cease its participation in Project Maven in 2019. (See, e.g., Fang, Google Won’t Renew its Drone AI Contract, but it May Still Sign Future Military AI Contracts, *The Intercept*, June 1, 2018, available at: <https://theintercept.com/2018/06/01/google-drone-ai-project-maven-contract-renew/>.) As reportedly stated by the chief scientist for A.I. at Google Cloud in an internal email, “Weaponized AI is probably one of the most sensitized topics of AI – if not THE most. This is red meat to the media” (Shane, Metz and Wakabayashi, How a Pentagon Contract Became an Identity Crisis

for Google, *The New York Times*, May 30, 2018, available at <https://www.nytimes.com/2018/05/30/technology/google-project-maven-pentagon.html?searchResultPosition=1>).

Argument

The Department must segregate and provide all non-exempt information found in the Records

The FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any persons requesting such record after deletion of the portions which are exempt,” 5 U.S.C. § 552(b) (2) (emphasis added)). DoD is therefore obligated to “disclose all reasonably segregable, nonexempt portions of the requested record(s).” *Roth v. U.S. Dep’t of Justice*, 642 F.3d 1161, 1167(D.C. Cir. 2011). Furthermore, DoD bears the burden of demonstrating that documents withheld contain no reasonably segregable disclosable information, and it must describe which passages in a document have been withheld and under which exemption. *Mokhiber v. U.S. Dept. of Treasury*, 335 F. Supp. 2d 65, 69 (D.D.C. 2004). The Response fails to satisfy DoD’s burden to show that the Records withheld contain no reasonably segregable information that is subject to disclosure.

This duty to segregate prohibits agencies from issuing “sweeping, generalized claims of exemption for documents.” See *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). Yet in its Response to the Request, the DoD has done exactly that. Beyond a rote repetition of the statutory description, it has proffered no explanation for its sweeping claim of exemption. It baldly concludes, in a Statement by the Chief Management Officer, that all 5000 pages of information responsive to the Request “qualifies as DoD critical infrastructure security information as defined by 10 USC § 130e(f) because it pertains to the capabilities and limitations of critical defense applications making use of Project Maven’s artificial intelligence technology.” This assertion -- that the material “pertains to” critical defense applications -- is the sole basis on which DoD relies to conclude that “gaining this information about Project Maven, individually or in the aggregate, would enable an adversary to identify capabilities and vulnerabilities in the Department’s approach to artificial intelligence development and implementation... [and]... would further provide an adversary with the information necessary to disrupt, destroy, or damage DoD, technology, military operations, facilities, and endanger the lives of personnel.” The Response goes on to invoke Exemptions 4, 5 and 6, without further explanation.

Critical Infrastructure Information Applies to Site-Specific Information

Categorizing a pilot program to develop, with a private sector partner, AI for DoD’s drone warfare capabilities as “critical infrastructure” fundamentally misreads 10 USC § 130e. As an exception to the policy of government transparency embodied in the FOIA, 10 USC § 130e permits (but does not require) the DoD to withhold from disclosure sensitive, but unclassified, information that reveals “vulnerabilities” in critical infrastructure that, if exploited, “would likely result in the significant disruption, destruction or damage of or to [DoD] operations, property or facilities,... (emphasis added). The statute describes such information as that “regarding the securing and safeguarding of explosives, hazardous chemicals, or pipelines, related to critical infrastructure or protected systems owned or operated by or on behalf of the Department of Defense, including vulnerability assessments prepared by or on behalf of the Department of Defense, explosives

safety information (including storage and handling), and other site-specific information on or relating to installation security." 10 USC § 130 e(f) (emphasis added).

Although we have found no federal court decision analyzing for purposes of the FOIA the scope of "critical infrastructure security information" under 10 U.S.C. §130e, Supreme Court precedent and the legislative history of the statute indicates that the definition excludes many or all of the Records, and indeed, excludes information about unclassified DoD tactics, techniques and rules of engagement altogether.

10 U.S.C. § 130e was adopted in 2012 the wake of the Supreme Court's 2011 decision in *Milner v. Department of Navy*, 131 S. Ct. 1259 (2011). In *Milner*, the Court held that Exemption 2 to the FOIA, which exempts from disclosure material that is "related solely to the internal personnel rules and practices of an agency," 5 U.S.C. § 552(b)(2), does not extend to cover Explosive Safety Quantity Distance information from which the Navy devised specialized maps to avoid chain reaction explosions for use by Navy personnel. ("We have often noted 'the [Freedom of Information] Act's goal of broad disclosure' and insisted that the exemptions be 'given a narrow compass,'" *Id.* at 1261, quoting *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151, 109 S. Ct. 2841, 106 L. Ed. 2d 112). Notably, the Court rejected the agency's argument that the exemption should be read to apply if disclosure of the information "would significantly risk circumvention of federal agency functions," finding this interpretation "disconnected from Exemption 2's text." *Id.*

Following *Milner*, in 2012, Congress enacted 10 U.S.C. § 130e to allow critical infrastructure security information – the kind of information held to be non-exempt in *Milner* – to be exempt from disclosure under Exemption 3 of the FOIA upon a written finding by the Secretary or his designate that the risk of disclosure outweighs the public's interest in the information. But the statute does not expressly extend to unclassified information about military tactics, techniques or rules of engagement. In fact, the DoD has repeatedly proposed that Congress amend 10 U.S.C. § 130e to allow DoD to "withhold sensitive, but unclassified military tactic, technique, or procedure information, or rule of engagement information, from disclosure" upon appropriate findings. (See Appendix D; DoD legislative proposals for FY2017 and FY2018, accessed at <https://fas.org/sgp/news/2016/03/ttp-foia-2016.pdf>, <https://fas.org/sgp/news/2017/06/dod-foia.pdf>) Congress has so far declined to add these categories to the definition. In light of this legislative history, it is a distortion of the language of the statute to include as "critical infrastructure security information" data about a pilot program for artificial intelligence development to improve drone warfare. The paucity of the Chief Management Officer's explanation as to how the requested information is "critical infrastructure security information" and why the public interest in disclosure does not outweigh the "danger" does not change this conclusion.

Assuming, arguendo, Project Maven data is "critical infrastructure information," the public interest in disclosure outweighs the Department's interest in secrecy

The DoD's conclusory Statement of the Basis for the Determination that the Records are exempt from disclosure does not compel a finding that the public's strong interest in this program, which the DoD itself recognizes in the Statement, does not outweigh the "risk of harm that might result"

if disclosed. (See Appendix B.) 10 USC § 130e is permissive, not mandatory, for purposes of the analysis required under the FOIA. It provides that upon an appropriate finding, the Secretary “may” withhold requested information, but he is not obligated to do so. The limited exemptions of FOIA do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of FOIA; consistent with FOIA’s goal of broad disclosure, these exemptions are consistently given a narrow compass. *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001).

As described above, the public has a compelling interest in the DoD’s use of drones for warfare engaged in by the United States, and in its use of AI provided by private sector technology companies to enhance this activity. This is particularly the case with regard to the participation of Google, one of the world’s largest and most powerful corporations with products and services used by billions of people worldwide. Google’s involvement was disclosed in the press beginning in March 2018 (see Fang, *Google Won’t Renew its Drone AI Contract, but it May Still Sign Future Military AI Contracts*, *supra*) and Google publicly withdrew from the program in May 2018 after protests from several thousand of its employees. (See Shane, Metz and Wakabayashi, *How a Pentagon Contract Became an Identity Crisis for Google*, *supra*).

Exemption 4 is not properly invoked and does not apply to the Records

Exemption 4 of the FOIA allows an agency to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential” where disclosure of the information is likely to cause substantial competitive harm to the person or entity that submitted the information. 5 USC § 552 (b)(4). But to invoke Exemption 4, the agency must “show exactly who will be injured by the release of [the] information and explain the concrete injury. *Delta Ltd. v. U.S. Customs & Border Prot. Bureau*, 393 F. Supp. 2d 15, 19 (D.D.C. 2005). DoD has not done so. As with its invocation of Exemptions 5 and 6, the Response simply recites, with no further explanation, the exemption. Notwithstanding this lack, it seems logical to conclude that many of the Records are not exempt from disclosure under Exemption 4.

Even if some of the Records contain trade secret information, the portions that are not “commercially valuable” must be disclosed because they do not give anyone a “competitive advantage . . . over competitors.” Google has announced its withdrawal from Project Maven, so it is unlikely that disclosure of some information in the Records will cause it substantial competitive harm. See *Taylor v. Babbitt*, 760 F.Supp.2d 80, 88 (D.D.C. 2011) (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984)). Records relating to Google’s participation in Project Maven that are not, or are no longer, trade secrets or confidential under Exemption 4 must be disclosed.

Exemption 5 does not apply to communications with private parties or historical documents

Although DoD makes no attempt to explain how Exemption 5 would apply to any of the responsive Records, it is clear that some number of them could not do so. To the extent any them involve communications between Google and any agency or other private party, they are not exempt under 5 USC § 552(b)(5). Records exchanged between an agency and a private third party are generally neither “inter-agency” nor “intra-agency.” *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 11 (2001). In addition, the standard for release under Exemption 5 is whether the records would

“normally” or “routinely” be released in civil discovery. *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 799-801 (1984). Finally, to qualify for Exemption 5 under the “deliberative process” privilege, records must be both (1) “predecisional” or “antecedent to the adoption of agency policy,” and (2) “deliberative,” meaning “actually ... related to the process by which agency policies are formulated.” *Jordan v. United States Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978). Project Maven was announced as an initiative broadly within the DoD and described in press accounts. Within this context, it is likely some Records do not fall into a recognized privilege in civil discovery, and are thus not exempt from disclosure.

Exemption 6 can apply to few, if any, of the Records

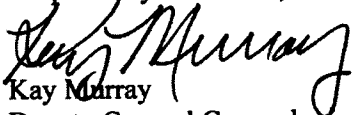
The DoD may assert Exemption 6, i.e., a personal privacy interest for individuals (not business entities), only to “protect intimate details of personal and family life, not business judgments and relationships,” *Sims v. Cent. Intelligence Agency*, 642 F.2d 562, 575 (D.C. Cir. 1980.) Thus, Exemption 6 does not “shield matters of such clear public concern as the names of those entering into contracts with the federal government.” *Id.* The Request does not seek intimate details of any individual’s personal life, and the DoD bears the burden of segregating from any responsive Records any such detail and then producing them.

Conclusion

The DoD acknowledges there are 5000 documents responsive to the Request, but invokes an inapposite statutory definition to withhold all of them from disclosure. By failing to conduct an adequate segregability analysis under any of the four exemptions on which it relies, and by withholding responsive Records or portions thereof, DoD is in violation of 5 USC § 552(b). We appeal the agency’s denial of the Records and request expedited processing of this appeal.

Thank you in advance for your response to this appeal. We anticipate that DoD will produce responsive documents within 20 business days. If you have any questions, please contact me at kay.murray@theintercept.com or at 917-710-6755.

Respectfully submitted,



Kay Murray
Deputy General Counsel
First Look Media

Cc: Sam Biddle