

Ms. Stephanie Carr
Chief, Freedom of Information Division
OSD/JS FOIA Requester Service Center
1155 Defense Pentagon
Washington, DC 20301
Email: whs.mc-alex.esd.mbx.osd-js-foia-requester-service-center@mail.mil

March 4, 2024

Re: Freedom of Information Act Request for Records Relating to the President's Legal Authority to Launch Military Strikes in Yemen

Dear Ms. Carr,

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Defense Department's implementing regulations, 32 C.F.R. pt. 286, the Protect Democracy Project hereby requests that your office produce within 20 business days the following records:

1. Any and all records, including but not limited to emails, memoranda, calendar entries, and meeting agendas that reflect, discuss, or otherwise relate to the President's legal authority to launch military strikes in Yemen on January 11, January 22, and February 3. This request includes, but is not limited to, internal Department of Defense communications, communications between Department of Defense officials and the Executive Office of the President, and communications between Department of Defense officials and other agencies.
2. Any and all records, including but not limited to emails, memoranda, calendar entries, and meeting agendas that reflect, discuss, or otherwise relate to the application of the War Powers Resolution to the administration's military strikes in Yemen, particularly the application, or lack of application, of the termination provision in the War Powers Resolution, 50 U.S.C. § 1544(b), to the administration's strikes. This request includes, but is not limited to, internal Department of Defense communications, communications between Department of Defense officials and the Executive Office of the President, and communications between Department of Defense officials and other agencies.
3. In addition to the records requested above, we also request records describing the processing of this request, including records sufficient to identify search terms used

and locations and custodians searched, and any tracking sheets used to track the processing of this request. If your agency uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

The timeframe for this request is October 18, 2023, through the date that searches are conducted for records responsive to this FOIA request. *See* 32 C.F.R. § 286.7(a).

EXPEDITED PROCESSING

The Protect Democracy Project requests that you expedite the processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E) and 32 C.F.R. § 286.8(e). This request meets the criteria for expedited processing because “[t]he information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity,” 32 C.F.R. § 286.8(e)(1)(i)(B). As explained below in more detail in the section of this request regarding a fee waiver, the Protect Democracy Project intends to disseminate publicly the information obtained in response to this request. It is essential for the public to know the legal authority under which the President has taken and is taking military action.

Since November 2023, Houthi militants have carried out dozens of attacks on international merchant vessels and other targets throughout the Red Sea and Gulf of Aden. On December 18, 2023, in response to continued Houthi attacks, the Department of Defense announced the creation of Operation Prosperity Guardian, a multinational security operation made up of the United Kingdom, Bahrain, Canada, France, Italy, Netherlands, Norway, Seychelles, and Spain, to defend freedom of navigation from Houthi aggression in the Red Sea and the Gulf of Aden.¹ Despite this strategic operation, the Houthi attacks have continued, with the militant group launching at least 58 attacks since November 19, 2023.² The White House notified Congress that on January 11, 2024, the United States responded by striking Houthi-controlled facilities in Yemen as part of a multinational coalition, and again struck Houthi infrastructure in Yemen on January 22 and February 3 of this year.³

¹ Press Release, Statement from Secretary of Defense Lloyd J. Austin III on Ensuring Freedom of Navigation in the Red Sea (Dec. 18, 2023), <https://tinyurl.com/282f4yc5>.

² Charlie Savage, *Biden Lawyers Wrestle With Lack of Congressional Blessing for Houthi Conflict*, N.Y. Times (Feb. 22, 2024), <https://tinyurl.com/v6pjz98v>.

³ Letter from President Biden to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution (Jan. 12, 2024) (“Jan. 12 WPR Letter”), <https://tinyurl.com/mtsxycct>; Letter from President Biden to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers

In our democracy, the Constitution requires Congress to approve acts of war. The U.S. response to Houthi aggression in Yemen and in and around the Red Sea has happened without congressional authorization, and the conflict is now rapidly approaching the 60-day parameter set by the War Powers Resolution of 1973. *See* 50 U.S.C. § 1544(b).

Tragically, two U.S. Navy Seals — Special Operator First Class Christopher J. Chambers and Special Operator Second Class Nathan Gage Ingram — were killed during a mission on January 11 to intercept weapons headed toward Houthi militants off the coast of Somalia.⁴ In a conflict that has already taken the lives of two U.S. service members and endangers many more, the President must provide the public with details regarding the legal authorities on which he is relying for strikes against Houthi targets in Yemen. By understanding the legal basis on which the President has acted, the public can determine their view of the ongoing military conflict with the Houthis and advise their elected representatives accordingly.

To date, the Administration has not released any formal legal opinion or analysis setting forth its justification for its more than 30 strikes in northern Yemen.⁵ The President's letters to Congress on January 12 and 24 and February 5 have been notably devoid of legal analysis. Those letters state that the President acted “to protect United States citizens both at home and abroad and in furtherance of United States national security and foreign policy interests, pursuant to my constitutional authority as Commander in Chief and Chief Executive and to conduct United States foreign relations.”⁶ Since then, neither the President nor any Administration official has publicly released a legal opinion, analysis, memorandum, or other written record of the legal justification under domestic and international law authorizing the military action inside Yemen. It is therefore incumbent upon the government and urgent for your office to share any responsive records in an expedited fashion, as that is the only way for citizens in a democracy to engage in the ongoing public discourse about military actions taken on our nation's behalf.

Resolution (Jan. 24, 2024) (“Jan. 24 WPR Letter”), <https://tinyurl.com/4v9r39hv>; Letter from President Biden to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution (Feb. 5, 2024) (“Feb. 5 WPR Letter”), <https://tinyurl.com/38nshp3s>.

⁴ Yan Zhuang, *2 Navy SEALs Declared Dead After Mission to Stop Iranian Weapons*, N.Y. Times (Jan. 22, 2024), <https://tinyurl.com/4x798vs8>; Dave Phillips, *Pentagon Names Two SEALs Lost in Raid in Arabian Sea*, N.Y. Times (Jan. 22, 2024), <https://tinyurl.com/4skdaefv>.

⁵ Savage, *supra*.

⁶ Jan. 12 WPR Letter; Jan. 24 WPR Letter; Feb. 5 WPR Letter.

Under penalty of perjury, and pursuant to 32 C.F.R. § 286.8(e)(3), I hereby affirm that the foregoing is true and correct to the best of my knowledge and belief. And pursuant to 32 C.F.R. § 286.8(e)(4), I seek your decision to grant or deny expedited processing within 10 calendar days of your receipt of this request.

FEE WAIVER

FOIA provides that any fees associated with a request are waived 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.” 5 U.S.C. § 552(a)(4)(A)(iii). The core mission of the Protect Democracy Project, a 501(c)(3) organization, is to inform public understanding on operations and activities of the government. This request is submitted in consort with the organization’s mission to gather and disseminate information that is likely to contribute significantly to the public understanding of executive branch operations and activities. Courts have found that Protect Democracy “easily” satisfies the criteria for a requester primarily engaged in disseminating information. *Protect Democracy Project v. U.S. Dep’t of Def.*, 263 F. Supp. 3d 293, 298 (D.D.C. 2017); *see Protect Democracy Project v. U.S. Dep’t of Just.*, 498 F. Supp. 3d 132, 139 (D.D.C. 2020). The Protect Democracy Project has no commercial interests.

In addition to satisfying the requirements for a waiver of fees associated with the search and processing of records, the Protect Democracy Project is entitled to a waiver of all fees except “reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Federal law mandates that fees be limited to document duplication costs for any requester that qualifies as a representative of the news media. *Id.* The Protect Democracy Project is a 501(c)(3) good government organization that qualifies under FOIA as a “representative of the news media.” The purpose of the Protect Democracy Project is to “gather information of potential interest to a segment of the public, use its editorial skills to turn the raw materials into distinct work, and distribute that work to an audience.” *See Nat’l Sec. Archive v. U.S. Dep’t of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Indeed, the Protect Democracy Project has routinely demonstrated its ability to disseminate information about its FOIA requests to a wide audience.⁷ *See Protect Democracy Project, Inc. v. U.S. Dep’t of*

⁷ *See, e.g.,* Lisa Rein, *Watchdog Group, Citing “Integrity of Civil Service,” Sues Trump to Find Out if Feds Are Being Bullied*, Wash. Post (Apr. 27, 2017), <https://tinyurl.com/bdcnpv77>; Ben Berwick, *Going to Court for Civil Servants, Take Care* (Apr. 28, 2017), <https://tinyurl.com/2vm6jexz>; Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. Times (May 8, 2017), <https://nyti.ms/2pX82OV>; Justin Florence, *What’s the Legal Basis for the Syria Strikes? The Administration Must Acknowledge Limits on its Power to Start a War*, Lawfare (May 8,

Just., 498 F. Supp. 3d at 139 (Protect Democracy Project “listed examples of previous instances when it ‘disseminate[d] information about its FOIA requests to a wide audience.’”). The Protect Democracy Project will disseminate information and analysis about this request—and any information obtained in response—through its website (protectdemocracy.org); its X feed (<https://twitter.com/protctdemocracy>), which has more than 46,000 followers; its email list of approximately 30,000 people; and by sharing information with other members of the press. The Protect Democracy Project should therefore be considered a “representative of the news media” for fee waiver purposes. *See* 32 C.F.R. § 286.12(b)(6), (d)(1), (e)(1).

RESPONSIVE RECORDS

We ask that all types of records and all record systems be searched to discover records responsive to our request. We seek records in all media and formats. This includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; voicemails; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials. However, you need not produce press clippings and news articles that are unaccompanied by any commentary (e.g., an email forwarding a news article with no additional commentary in the email thread).

We ask that you search for records from all components of the Department of Defense that may be reasonably likely to produce responsive results, including but not limited to the Office of the Secretary of Defense and the Office of the General Counsel. We also ask that you search all systems of record, including electronic and paper, in use at your agency, as well as files or emails in the personal custody of your employees, such as personal email accounts, as required by FOIA and to the extent that they are reasonably likely to contain responsive records. The Protect Democracy Project would prefer records in electronic format, saved as PDF documents, and transmitted via email or CD-rom.

If you make a determination that any responsive record, or any segment within a record, is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). When you deem a portion of a record exempt, we ask that the remainder of the record be provided, as required by 5 U.S.C. § 552(b).

2017), <https://tinyurl.com/mww7c8t8>.

Given the 20-day statutory deadline, 5 U.S.C. § 552(a)(6)(A)(i), we hope to be as helpful as possible in clarifying or answering questions about our request. Please contact me at FOIA@protectdemocracy.org or (202) 579-4582 if you require any additional information. We appreciate your cooperation, and look forward to hearing from you very soon.

Sincerely,

Elise Wirkus
Policy Advocate
The Protect Democracy Project
2020 Pennsylvania Avenue NW, #163
Washington, DC 20006
FOIA@protectdemocracy.org
(202) 579-4582