

EXHIBIT M

April 22, 2015

BY POST

OSD/JS FOIA Requester Service Center
Office of Freedom of Information
Department of Defense
1155 Defense Pentagon
Washington, D.C. 20301-1155

Re: Freedom of Information Act Appeal – 15-F-0891

Dear FOIA Officer,

I write to administratively appeal the constructive denial of my Freedom of Information Act (“FOIA”) request due to the failure of the Department of Defense (“DoD”) to respond within the statutory time limit. I also write to appeal DoD’s denial of my request for expedited processing.

I. The Request

On March 9, 2015, I submitted a request under the FOIA (the “Request”) to DoD (Ref. No. 15-F-0872), in which I sought the following records:

- (1) Records sufficient to disclose any and all guidance that has been given to the Office of Military Commissions, presiding officers, counsel, or any other person(s) in the courtroom about what may not be said in open public sessions or included in written submissions in prosecutions before the military commissions at the Guantanamo Bay Naval Station;
- (2) Records sufficient to disclose the means by which any original classifying authority can monitor or interrupt the 40-second delayed audio-video transmission of military commission proceedings to prevent the public disclosure of classified information or other information of the kinds covered by Rule 506 of the Military Commission Rules of Evidence; and
- (3) Records sufficient to disclose the number of security officers assigned to the military commissions, including security officers detailed to the specific defense teams, together with the duties and authorities of those security officers, the total annual cost of those security officers, and any instructions or training provided to those officers.

A full and correct copy of that Request is attached as Exhibit A. DoD received my Request on March 10, 2015.

Copies of the Request were also submitted to the Department of the Navy (Ref. No. 15-F-0891) and to the National Security Agency (Ref. No. 80727). In final responses dated March 18,

2015, and March 23, 2015, all three requests were consolidated before your office under case number 15-F-0891. Copies of these letters are attached as Exhibits B and C, respectively.

On March 12, 2015, DoD issued an interim response to my Request, in which DoD denied my request for expedited processing and invoked the “unusual circumstances” extension under 5 U.S.C. § 552(a)(6)(B)(i). A copy of this letter is attached as Exhibit D.

II. DoD’s Failure to Respond and Constructive Denial

The FOIA requires an agency to respond to a request for records within twenty (20) working days. *See* 5 U.S.C. § 552(a)(6)(A)(i). An agency may, when facing certain unusual circumstances, may notice of the unusual circumstances and set a date that would not “result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.” DoD’s letter of March 12, 2015, alleged unusual circumstances within the scope of §552(a)(6)(A)(i) but did not set a specific date for a final response. Under the same statutory provision, any extension longer than ten days must be accompanied by “an opportunity to limit the scope of the request so that it may be processed within that time limit.” I did not receive an opportunity to narrow the request, so DoD is limited to a ten working day extension. *See* 5 U.S.C. § 552(a)(6)(B)(i).

Therefore, DoD’s response was due at the latest thirty (30) working days after initial receipt of the Request on March 10, 2015. Those thirty days expired on April 21, 2015. DoD’s failure to respond to my Request within the time period required by the FOIA serves as a constructive denial of the Request, and I am deemed to have exhausted my administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

III. DoD’s Improper Denial of My Request for Expedition

Additionally, I would like to appeal the denial of my request for expedited processing. As a journalist, I must report news in a timely fashion. The activities at Guantanamo Bay Naval Base are a matter of lively current debate and exceptional media interest. Indeed, there has been particular public attention to the matter recently in the wake of the report by the Senate Select Committee on Intelligence of the C.I.A. Detention and Interrogation Program (the “Senate torture report”), published in December 2014. Recent media discourse has made reference to the audio muting device, operated by an outside censor in January 2013, in the context of due process violations. *See, e.g.,* Jason D. Wright, *The Sin of Torture & Guantánamo Bay*, Amnesty International, <https://www.amnesty.org/en/articles/blogs/2015/01/the-sin-of-torture-guantánamo-bay/>.

The information I am requesting about the trial proceedings at Guantanamo Bay is needed in conjunction with the trials that are scheduled to take place in the coming months. The public has a right to disclosure of records regarding the conduct of trials at Guantanamo before the next trials take place.

Recently the trial of Abd al-Rahim al-Nashiri has been put on hold pending the resolution of a charge that retired Maj. Gen. Vaughn Ary, the senior Pentagon official responsible for ordering military commissions, unlawfully influenced the proceedings. Three high-ranked military legal officers testified on that issue on March 27, 2015. Once that charge is resolved, the

trial will move forward, with up to four additional witnesses the defense has requested. Al-Nashiri is one of five high-level detainees named in the recent Senate torture report as having been subjected to torture and interrogation methods, and his trial is therefore a matter of tremendous media interest and public attention.

The particular value of the information I have requested will be diminished if I cannot publish information before the upcoming trials. Without knowledge of the precise court procedures at Guantanamo, the American people will be deprived of the opportunity to meaningfully participate in a debate on this question of enormous public interest and concern. As a member of the news media, I have a “compelling need” to gain access to the records requested in order to inform the public-at-large about actual or alleged Federal Government activity. The requested records serve an “urgent purpose” and the circumstances mandate expedited processing.

The information above is true and correct to the best of my knowledge and belief.

IV. Conclusion

I respectfully request that DoD respond to this appeal within twenty (20) working days. *See* 5 U.S.C. § 552(a)(6)(A)(ii). If you have any questions or concerns, please do not hesitate to telephone me at (267) 288-7444. Please direct any correspondence, including responsive records, to me by e-mail at mattathias.schwartz@gmail.com.

Sincerely,

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