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FREEDOM OF INFORMATION ACT APPEAL

October 10, 2013

Chair, Agency Release Panel
ATTN: Ms. Michelle Meeks
Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Certified Mail No.
7012 3050 0000 7421 9162

Re: FOIA Request F-2013-01664

Dear Ms. Meeks:

I hereby appeal the September 12, 2013 decision by Ms. Michelle Meeks to deny a waiver of search, review, and copying costs for the above-referenced request.

The Agency's decision is in conflict with its own regulations, specifically 32 C.F.R. § 1900.13(b)(2), and it clearly violates the FOIA's fee waiver provisions. Mr. Talbot is not a "commercial requester"; rather, he is a distinguished journalist whose work has been widely recognized and acknowledged as making a significant contribution to the public understanding of U.S. Government operations.

Mr. Talbot is the founder and former editor-in-chief of Salon.com, the online news magazine. He is a former editor of "Mother Jones" magazine, one of the country's most acclaimed vehicles for investigative journalism. His work has also appeared in "The New Yorker," "Time," the Los Angeles Times, and the San Francisco Chronicle, as well as numerous other publications. Mr. Talbot has received numerous awards for his outstanding work, including Online Journalism Association awards for general excellence and investigative journalism, National

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Magazine Awards for investigative journalism, Ohio University's E.W. Scripps School of Journalism Award for Lifetime Achievement, and the Society of Professional Journalists Award for Lifetime Achievement. He has also lectured at the Nieman Foundation for Journalism at Harvard.

Mr. Talbot has written investigative articles on a broad spectrum of topics directly concerning government operations and functions, including nuclear safety, toxic waste disposal, climate change, automobile safety, medical industry abuses, election fraud, political corruption, and veterans healthcare scandals, *inter alia*. Further, he wrote the critically acclaimed book Brothers: The Hidden History of the Kennedy Years, an investigative analysis of the policies and actions of President John F. Kennedy and Robert F. Kennedy and events surrounding their assassinations. Without question, this body of investigative work has contributed significantly to the public understanding of United States Government operations and activities. Mr. Talbot is clearly a representative of the news media as defined in the CIA regulations set forth at 32 C.F.R. § 1900.02(h)(3). Depriving him of a fee waiver because he makes his living as an investigative journalist would turn the law on its head and thwart explicit Congressional intent in enacting the FOIA fee waiver provisions.

The C.I.A.'s decision to deny Mr. Talbot a fee waiver also directly violates the Agency's own guidelines for fee waiver determinations set forth at 32 C.F.R. § 1900.13(b), which explicitly states that "[r]ecords will be furnished without charge or at a reduced rate whenever the Agency determines:

- (2) That it is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the United States Government and is not primarily in the commercial interest of the requester. ..."

Section 1900.13(b) explicitly identifies six mandatory factors which the Agency must consider in making such determinations, all of which, when applied in this case, overwhelmingly confirm that Mr. Talbot is entitled to a waiver. The first four factors which must be taken into account in any fee waiver determination all pertain to whether the requested records concern the operations or activities of the United States Government (§1900.13(b)(i)); and, if so, whether disclosure of the records is likely to contribute to an understanding of U.S. Government operations and activities (§1900.13(b)(ii)); and, if so, whether disclosure of the

records will contribute to public understanding of U.S. Government operations or activities (§1900.13(b)(iii); and, if so, whether the disclosure of the records is likely to contribute significantly to public understanding of U.S. Government operations and activities (§1900.13(b)(iv)).

Mr.. Talbot has requested records about William Harvey and F. Mark Wyatt in the context of research he is conducting for a book regarding the history of U.S. intelligence practices during World War II and the Cold War. The book will be published by Harper Collins. This project is clearly in the public interest because it is “likely to contribute significantly to the public understanding of the operations and activities of the United States Government , . .” 32 C.F.R. § 1900.13(b)(2). There is no question that U.S. intelligence services have played a critical role in U.S. post-war foreign policy, although the extent to which this is true has never been fully disclosed.

Former C.I.A. Agent F. Mark Wyatt himself publicly acknowledged having paid huge sums of taxpayer money to influence the outcome of elections in foreign countries. William Harvey has long been suspected of involvement in the assassination of President John F. Kennedy (many records pertaining to Harvey were released pursuant to the JFK Assassination Records Act). For either of these reasons alone, records responsive to Mr. Talbot’s request about Wyatt and Harvey are of particular interest in significantly furthering public understanding of Government operations.

The disclosure of the photographs and travel records of Wyatt and Harvy will shed light on government operations and activities by showing who they were, what they did, and when they and where they did it. Such information is of interest to the public because it shows “what the government was up to.”

The remaining two factors set forth in Agency implementation regulations which must be considered in fee waiver determinations concern whether the requester has a commercial interest in the records in question that would be furthered by their disclosure (§1900.13(b)(v)); and, if so, whether the disclosure is primarily in the commercial interest of the requester (§1900.13(b)(vi)). When considering these two factors in the context of Mr. Talbot’s body of investigative work over the past few decades, it is apparent that his primary objective as a journalist in general and with this project in particular is to contribute to public understanding of the operations of the U.S. Government. The fact that he earns a living as a journalists supports rather than undermines the case for a public interest

fee waiver. Mr. Talbot's intention to publish a book does not necessarily mean that the nature of his interest in the records he has requested is "commercial." See Davy v. C.I.A., 550 F.3d 1155, 1160 (D.C. Cir. 2008), citing S.Rep. No. 854, 93d Cong. 2d Sess. 19 (1974).

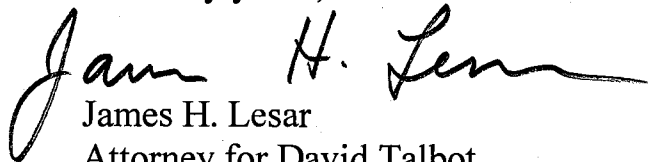
The FOIA explicitly provides that a fee waiver shall be granted when it "is in the public interest because furnishing the information can be considered as primarily benefitting the general public." 5 U.S.C. § 552a(4)(A). As the U.S. District Court for Massachusetts noted almost 30 years ago, "The legislative history of the FOIA clearly indicates that Congress intended that the public interest standard for fee waivers embodied in 5 U.S.C. § 552(a)(4)(A) be liberally construed." Ettlinger v. F.B.I., 596 F.Supp. 867, 872 (D.Mass. 1984). That Court underscored that "the public interest/benefit test was consistently associated with requests from journalists, scholars and non-profit public interest groups." Id., citing S.Rep. No. 854, 93^d Cong., 2d Sess. 11 (1974). In this regard, Mr. Talbot clearly falls into the first category of journalists, as well as the second category of scholars.

Courts in the D.C. Circuit and the Circuit itself, as well as other federal circuits, have consistently interpreted the FOIA's fee waiver provisions liberally, in accordance with explicit Congressional intent. See, e.g. Schoenman v. F.B.I., 604 F.Supp.2d 174, 194 (D.D.C. 2009) (noting the legislative history of the 1986 FOIA amendments "makes clear" that fee waiver provisions should be liberally construed in favor of fee waivers); Citizens for Responsibility and Ethics in Washington v. Dep't of Health and Human Servs., 481 F.Supp2d 99, 113 (D.D.C. 2006) (Congress mandated that FOIA fee waiver provisions must be construed liberally); McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (Ninth Cir. 1987) (quoting 132 Cong. Rec. 27, 90 (1986) to the effect that the FOIA fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters."). In this regard, thirty five years ago the D.C. Circuit "embraced the view that a distinction is to be drawn between the plaintiff who seeks to advance his private commercial interests and thus needs no incentive to file suit, and a newsman who seeks information to be used in a publication . . .," as, again, Mr. Talbot intends in this case and as noted in the Senate Report. Davy v. C.I.A., 550 F.3d 1155, 1158 (D.C. Cir. 2008), citing Nationwide Bldg. Maint., Inc. v. Sampson, 559 F.2d 704, 711 (D.C.Cir. 1977) (both citing S.Rep. No. 93-854).

It should also be noted that a fee waiver request should be evaluated “based on the potential contribution the requested information would have on the public’s understanding, . . .” Ctr. For Medicare Advocacy, Inc. v. Dep’t of Health and Human Servs., 577 F.Supp.2d 221, 240 (D.D.C. 2008). Here, again, Mr. Talbot overwhelmingly meets the legal standard, given the fact the records in question concern the actions of two intelligence operatives in the post-war era at least one of whom has been consistently and repeatedly linked to the Kennedy assassination.

In sum, Mr. Talbot is clearly a representative of the news media as defined in Agency FOIA Implementation Regulation set forth at 32 C.F.R. § 1900.02(h)(3). Depriving him of a fee waiver because he makes his living as an investigative journalist would turn the law on its head and thwart explicit Congressional intent in enacting the FOIA fee waiver provisions in the first place. Because Agency FOIA implementation regulations, the FOIA itself, the legislative history of the fee waiver provisions, and legal authority all confirm -- without exception -- that Mr. Talbot is entitled to a fee waiver, he hereby appeals the decision denying him such a waiver and requests reconsideration.

Sincerely yours,


James H. Lesar
Attorney for David Talbot