

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**THE NATIONAL SECURITY )  
ARCHIVE )  
2130 H Street, N.W., Suite 701 )  
The Gelman Library )  
The George Washington University )  
Washington, D.C. 20037, )**

**Plaintiff,**

v.

C.A. No. \_\_\_\_\_

**U.S. DEPARTMENT OF STATE )  
2201 C Street, N.W. )  
Washington, D.C. 20520, )**

**Defendant.**

**COMPLAINT**

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Plaintiff The National Security Archive (the “Archive”) seeks injunctive and other appropriate relief for the processing and release of agency records it requested from Defendant U.S. Department of State (“State”) on June 30, 2016. Specifically, the Archive seeks disclosure of records transmitted through State’s “Dissent Channel” from 1971 to July 4, 1991, including documents State previously withheld under a FOIA exemption no longer available to it. More than nine months after submitting its FOIA request, the Archive has yet to receive a single responsive document, a justification for State’s withholding, or an explanation for its inaction.

**Jurisdiction and Venue**

2. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B), (a)(6)(E)(iii).

3. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B).

### **The Parties**

4. Plaintiff The National Security Archive is an independent non-governmental research institute and library. The Archive was established in 1985 to promote research and public education about the U.S. governmental and national security decision-making process. It collects, analyzes, and publishes documents acquired through FOIA in order to promote and encourage openness and government accountability. The Archive serves as a repository of government records on a wide range of topics pertaining to national security, intelligence, and the foreign and economic policies of the U.S. The Archive is a representative of the news media as defined in 5 U.S.C. § 552(a)(4)(A)(ii).

5. Defendant U.S. Department of State is an agency within the meaning of 5 U.S.C. § 552(f)(1). State is headquartered in the District of Columbia.

### **Background**

#### ***The “Dissent Channel”***

6. During the years 1969 to 1973, the war in Vietnam generated deep divisions within State as to the wisdom of U.S. foreign policy. In 1971, Secretary of State William Rogers created a formal mechanism through which employees could express disagreement with their government’s policies: the “Dissent Channel.”<sup>1</sup> The Dissent Channel remains an open and

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<sup>1</sup> Hannah Gurman, *The Dissent Papers: the Voices of Diplomats in the Cold War and Beyond* 170–71 (2012) (“It was in this, the worst crisis of legitimacy in the history of American foreign relations, in which diplomats as well as the public had come to distrust the foreign policy establishment, that the State Department created its official ‘Dissent Channel.’”); see also Warren Christopher, Secretary of State, Message on the Dissent Channel (Aug. 8, 1995), available at <https://2001-2009.state.gov/s/p/of/abt/18990.htm> (“Secretary of State William Rogers created the Dissent Channel in 1971 as controversy rose over the Vietnam War and he determined that existing channels for transmitting new or dissenting ideas were inadequate.”).

active outlet for State employees to voice their disagreement with U.S. government policies today.

7. According to the Foreign Affairs Manual, which sets forth the Dissent Channel's purpose and parameters, the Channel

was created to allow its users the opportunity to bring dissenting or alternative views on substantive foreign policy issues, when such views cannot be communicated in a full and timely manner through regular operating channels or procedures, to the attention of the Secretary of State and other senior State . . . officials in a manner which protects the author from any penalty, reprisal, or recrimination.

2 FAM ¶ 071.1(b) (2011).

8. The Dissent Channel effectuates State's "strong interest in facilitating open, creative, and uncensored dialogue on substantive foreign policy issues within the professional foreign affairs community, and [the agency's] responsibility to foster an atmosphere supportive of such dialogue." *Id.*<sup>2</sup>

9. "Any U.S. citizen who is a regular or re-employed annuitant employee of . . . State or [the] Agency for International Development, may use the Dissent Channel," 2 FAM ¶ 071.3, by submitting a "telegram or memorandum," *id.* ¶ 073(b), to State's Office of Policy Planning, *id.* ¶ 074.1. Upon receipt of a submission, the Office of Policy Planning immediately "distributes copies [of it] to the Secretary, the Deputy Secretary, the Deputy Secretary for Management and Resources, the Under Secretary for Political Affairs, the Executive Secretary, . . . the Chair of the Secretary's Open Forum," and, where appropriate,

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<sup>2</sup> The Dissent Channel has been praised by many, including Secretaries of State. Indeed, Secretary of State Warren Christopher declared that the "Dissent Channel provides an established, proven, and effective instrument for ensuring that . . . alternative views are heard by senior policymakers." See Christopher, *supra* note 1; see also Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 59, 125 (2014) ("This Dissent Channel is . . . a successful method of ensuring the agency operates interactively instead of entirely through command-and-control leadership.").

“other senior [State] officials.” *Id.* ¶ 074.1(b) (emphasis omitted).

10. The Dissent Channel process does not end with a qualifying employee’s submission of a telegram or memorandum, however. The Director of Policy Planning must provide a “substantive reply, normally within 30-60 working days.” *Id.* ¶ 074.1(d).

11. Importantly, State employees “may use the Dissent Channel without fear of pressure or penalty.” *Id.* ¶ 075.1(a) (emphasis omitted). Reprisal for Dissent Channel use is strictly prohibited. *See id.* ¶ 075.1–2.

12. State employees have used the Dissent Channel on hundreds of occasions since its establishment.<sup>3</sup> From the first memorandum in April 1971 challenging the Nixon administration’s failure to condemn genocide in East Pakistan<sup>4</sup>; to Thomas Boyatt’s 1974 critique of U.S. complacency prior to a coup in Cyprus<sup>5</sup>; to John Brady Kiesling’s 2003 declaration of opposition to the war in Iraq<sup>6</sup>; to 51 State employees’ 2016 disagreement with President Obama’s approach to the conflict in Syria<sup>7</sup>; to hundreds of State employees’ 2017 protest of President Trump’s Executive Order on immigration<sup>8</sup>, the Dissent Channel has allowed State employees to express their dissenting views about the greatest foreign policy challenges facing the U.S. But aside from the very few occasions on which Dissent Channel

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<sup>3</sup> “[W]ell over 200 Dissent messages [were] received” in the Channel’s first 24 years. *See* Christopher, *supra* note 1. The number of Dissent Channel submissions made in the last 22 years is unclear.

<sup>4</sup> *See* U.S. Dep’t of State, *Dissent from U.S. Policy Towards East Pakistan*, available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB79/BEBB8.pdf>; *see also* Gurman, *supra* note 1, at 177.

<sup>5</sup> *See* Gurman at 180.

<sup>6</sup> *See id.* at 192.

<sup>7</sup> *See* Mark Lander, *51 U.S. Diplomats Urge Strikes Against Assad in Syria*, N.Y. TIMES, June 16, 2016, available at <https://www.nytimes.com/2016/06/17/world/middleeast/syria-assad-obama-airstrikes-diplomats-memo.html>.

<sup>8</sup> *See Dissent Channel: Alternatives to Closing Doors in Order to Secure Our Borders*, available at <https://assets.documentcloud.org/documents/3438487/Dissent-Memo.pdf>.

submissions have been subpoenaed, leaked, or otherwise disclosed, these views have been hidden from public view.

*The Archive's 1997 FOIA Request*

13. On June 1, 1997, the Archive submitted to State a FOIA request for “[c]opies of all records transmitted through the ‘Dissent Channel’ from its creation in 1971 to the present,” including “copies of all responses to Dissent messages from 1971 to the present” (the “1997 Request”).<sup>9</sup>

14. On April 23, 2003, State denied the 1997 Request in its entirety.<sup>10</sup>

15. Two months later, on June 23, 2003, the Archive appealed State’s denial of the 1997 Request to the agency’s Appeals Review Panel (the “Panel”).<sup>11</sup>

16. On March 9, 2005, the Panel responded to the Archive’s appeal. The Panel wrote:

After careful consideration of all the issues involved in the use and protection of [State]’s dissent channel, the Panel has concluded that such messages are **deliberative and pre-decisional in nature, and are therefore protected by the deliberative process privilege**. . . . [Accordingly,] the Panel has determined that approximately 530 documents must be withheld in full **under subsection (b)(5) of the Freedom of Information Act, 5 USC 552(b)(5)**. **Like all dissent channel communications, these documents are protected by the deliberative process privilege**; the Panel declines to waive that privilege with respect to these documents.<sup>12</sup>

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<sup>9</sup> See the Archive, Text of June 1, 1997 FOIA Request (on file with the Archive).

<sup>10</sup> See Letter from Office of Info. Programs and Servs., State, to the Archive (Apr. 23, 2002) (on file with the Archive).

<sup>11</sup> See Exhibit A, Letter from Francis Terry McNamara, Co-Chairman, the Panel, to Thomas S. Blanton, Dir., the Archive (Mar. 9, 2005), at 1 (“[The Panel] . . . has considered your appeal of June 23, 2003 for the release of dissent channel records previously withheld in full[.]”).

<sup>12</sup> *Id.* at 1–2 (emphasis added).

The Panel did, however, elect to waive the deliberative process privilege in full as to seven documents and in part as to 60 documents.<sup>13</sup> It produced these 67 documents to the Archive.

17. In addition, State “referred” five documents “to other federal agencies” to assist in making “a final determination . . . as to their release.”<sup>14</sup> More than five years later, on August 20, 2010, the Panel produced to the Archive one of the five documents in full and the other four in part.<sup>15</sup>

18. State’s full response to the 1997 Request thus consisted of 8 documents produced in their entirety, 64 documents produced in part, and approximately 530 documents withheld completely.

### **The FOIA Request at Issue: The 2016 Request**

19. On June 30, 2016, more than 19 years after making the 1997 Request, the Archive submitted to State the FOIA request at issue in this case (the “2016 Request”). The Archive asked for “[c]opies of all records transmitted through the ‘Dissent Channel’ from its creation in 1971 until July 4, 1991. This includes Dissent messages and the responses to these messages prepared by the Policy Planning staff.”<sup>16</sup>

20. The Archive made clear that the 2016 Request “include[d] but [was] not limited to the approximately 530 documents identified and denied under FOIA Exemption Five in [the

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<sup>13</sup> *Id.* at 1.

<sup>14</sup> *Id.*

<sup>15</sup> See Exhibit B, Letter from Francis Terry McNamara, Co-Chairman, the Panel, to Thomas S. Blanton, Dir., the Archive (Aug. 20, 2010), at 1.

<sup>16</sup> See Exhibit C, Letter from Nate Jones, Dir. of the FOIA Project, the Archive, to John Hackett, Dir. of the Office of Info. Programs and Servs., State (June 30, 2016), at 1.

Panel’s] letter dated March 9, 2005.”<sup>17</sup> FOIA Exemption Five encompasses the deliberative process privilege.<sup>18</sup>

21. The timing of the Archive’s request was not coincidental. Earlier on the same day the Archive submitted it, President Obama signed into law the FOIA Improvement Act of 2016 (the “Improvement Act”), Pub. L. No. 114-185, 130 Stat. 538 (2016). The Improvement Act established, among other things, that “the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested.” *See* 5 U.S.C. § 552(b)(5) (2012). Its enactment thus rendered unusable, for records created prior to middle of 1991, the *sole exemption* State relied upon to withhold approximately 530 documents otherwise responsive to the 1997 Request.

22. In a July 8, 2016 letter, State acknowledged receipt of the 2016 Request.<sup>19</sup>

23. To this day, however, State has failed to produce *a single record* in response to the 2016 Request. Further, State has not informed the Archive of the reasons for its noncompliance with FOIA nor communicated *anything* to the Archive regarding the 2016 Request.

### **Cause of Action**

#### ***Violation of the Freedom of Information Act for Wrongful Withholding of Agency Records***

24. Plaintiff the Archive repeats and realleges paragraphs 1–23.

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<sup>17</sup> *Id.*

<sup>18</sup> *See* U.S. Dep’t of Justice, *U.S. Dep’t of Justice Guide to FOIA: Exemption 5* (May 7, 2014), at 3, available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exemption5.pdf> (stating that the “deliberative process privilege” is one of the “three primary, most frequently invoked privileges that have been held to be incorporated into Exemption 5”).

<sup>19</sup> *See* Exhibit D, Letter from Office of Info. Programs and Servs., State, to Nate Jones, Dir. of the FOIA Project, the Archive (July 8, 2016).

25. Defendant State has wrongfully withheld agency records requested by Plaintiff the Archive.

26. Plaintiff the Archive has exhausted the applicable administrative remedies with respect to Defendant State's wrongful withholding of the requested records.

27. Plaintiff the Archive is entitled to injunctive relief with respect to the release and disclosure of the requested records.

**Requested Relief**

WHEREFORE, Plaintiff the Archive prays that this Court:

- A. order Defendant State to promptly disclose the requested records in their entirety and make copies available to Plaintiff the Archive;
- B. provide for expeditious proceedings in this action;
- C. award Plaintiff the Archive costs and reasonable fees incurred in this action; and
- D. grant such other relief as the Court may deem just and proper.

Respectfully Submitted,

SKADDEN ARPS SLATE MEAGHER & FLOM  
LLP

/s/ Clifford M. Sloan

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