

# Exhibit D



February 13, 2019

**Via Electronic Mail**

DHA Freedom of Information Service Center  
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Falls Church, Virginia 22042-5101  
Fax: 1-703-275-6386  
Email: dha.ncr.pcl.mbx.foia-requests@mail.mil

**RE: Request for a Waiver of Search and Review Fees**

Dear FOIA Office,

We write on behalf of the Innocence Project (“IP”), which we represent with respect to its Freedom of Information Act Request (“Request”) submitted on or about February 26, 2018. The Request, has been assigned tracking number 2018-186 by your office and seeks copies of the following records:

- The National Museum of Health and Medicine’s archive of the American Board of Forensic Odontology (“ABFO”) records (OHA 90.75).
- Electronic communications between the National Museum of Health and Medicine and the ABFO regarding the Innocence Project’s request for documents sent on June 30, 2017, including, but not limited to, communications between Laura Cutter and David Shackelford.

We write in order to clarify and supplement IP’s initial request for a limitation of fees, on the grounds that IP qualifies as both a “representative of the news media” and “educational institution” requester under the FOIA statute and applicable DoD regulations. We also write to assert that IP is entitled to a public interest waiver of all fees.

The request remains pending. The last correspondence from DHA to IP’s co-counsel, Julia Baker, was on June 26, 2018. To our knowledge, DHA has not yet made any determination with respect to fee category, fee waiver, or any other issue.

**I. Request for a Waiver of Search and Review Fees**

IP’s initial request sought a limitation of fees. We write to clarify and supplement the bases for granting this limitation as both a “representative of the news media” and an “educational institution” requester. *See* 32 C.F.R § 286.12(b)(4), (6), (d)(1), (e)(1) (search and review fees shall not be charged to representatives of the news media or educational institution requesters). Fees associated with the processing of the Request should thus be “limited to reasonable standard charges for document duplication.” 5 U.S.C. § 552(a)(4)(A)(ii)(II).

Moreover, because more DHA has failed to comply with the time limits specified by FOIA, duplication charges cannot be assessed either. 5 U.S.C. § 552 (a)(4)(A)(viii)(I).

IP qualifies as a “representative of the news media” because the organization is an “entity that actively gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii); 32 C.F.R. § 286.12(b)(6). A representative of the news media includes organizations that “disseminate solely on the Internet.” 32 C.F.R. § 286.12(b)(6). Further, “news” is defined as “information that is about current events or that would be current to the public.”

Innocence Project publishes investigative reports concerning exonerations, faulty science, and other such areas that relate to the prosecution of innocent individuals. IP’s website has a page specifically dedicated to “news” where the IP publishes approximately one article every week about recent exonerations, relevant legislation, scientific discoveries, and personal accounts of exonerated individuals.<sup>1</sup> These reports are published on IP’s website for public consumption.

Further, IP publishes press releases on its website that detail its activities and inform the public about IP-assisted exonerations, as well as court proceedings as its cases progress. These press releases are intended to keep the public up to date and informed about exonerations and the progress that IP is making toward freeing innocent people who have been wrongfully convicted.<sup>2</sup>

IP also has a “Special Features” section of its website dedicated to news stories it has written that hold special significance to IP’s readership.<sup>3</sup> These special features are intended for a public audience that has an interest in wrongful convictions and other issues related to criminal justice. IP’s news articles, press releases, and special features are all available to the public at large, with the intent to inform people about current events of broad interest.

For these reasons, IP qualifies as a representative of the news media. It conducts research and publishes news on a variety of issues related to the exoneration of innocent people falsely convicted of crimes, including the faulty forensic science that is often implicated in cases of false conviction, and relevant legislation. IP is “primarily engaged in the dissemination of information” and is therefore a “representative of the news media.” 32 C.F.R. § 286.12(b)(6).

The courts have repeatedly recognized that non-profit public interest groups qualify as “representatives of the news media” when they gather information and subsequently create newsletters, books, articles, and similar publications based on that information for dissemination to the general public. For example, one organization that advocates on issues regarding electronic privacy was held to be a “representative of the news media” for purposes of the FOIA

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<sup>1</sup> See Innocence Project, <https://www.innocenceproject.org/category/news> (last visited Feb. 9, 2019).

<sup>2</sup> See Innocence Project, <https://www.innocenceproject.org/category/press-release> (Last visited Feb. 9, 2019).

<sup>3</sup> See Innocence Project, <https://www.innocenceproject.org/category/special-features> (Last visited Feb. 13, 2019).

because it produces an electronic newsletter and publishes books. *See Elec. Privacy Info. Ctr. v. DOD*, 241 F. Supp. 2d 5, 10-15 (D.D.C. 2003); *see also, e.g., Cause of Action v. IRS*, 125 F. Supp. 3d 145 (D.C. Cir. 2015); *Nat'l Sec. Archive v. DOD*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); *Serv. Women's Action Network v. Dep't of Def.*, 888 F. Supp. 2d 282, 287 (D. Conn. 2012); *ACLU of Wash. v. DOJ*, No. C09-0642RSL, 2011 WL 887731, at \*10 (W.D. Wash. Mar. 10, 2011); *Ctr. for Pub. Integrity v. HHS*, No. 06-1818, 2007 WL 2248071, at \*5 (D.D.C. Aug. 3, 2007); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004); *Judicial Watch, Inc. v. DOJ*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000).

IP similarly publishes articles and disseminates them online as a way to take the information they have gathered through their activities and distribute newsworthy stories to the public informed about newsworthy exonerations and recent events that may have an impact on future efforts to exonerate the innocent. Therefore, IP meets the requirement for a fee waiver in this instance.

Separately, IP also qualifies as an “educational institution” requester and fees should be limited on that basis as well. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 286.12(d)(1)(i). Department of Defense regulations define an “educational institutional” as “any school that operates a program of scholarly research.” 32 C.F.R. § 286.12(b)(4). IP was founded in 1992 at the Benjamin N. Cardozo School of Law (“Cardozo Law”) at Yeshiva University. It continues to be closely affiliated with Cardozo Law. For example, many of the people who work at IP are cross-appointed on the faculty at Cardozo Law. Cardozo Law and IP jointly operate a Clinic where students “work with prisoners, crime labs, prosecutors, and defense lawyers, and review case histories, including transcripts, medical reports, and appellate briefs.”<sup>4</sup> IP and Cardozo Law have remained closely affiliated for over 25 years and have continuously engaged in joint scholarly research and educational efforts. IP staff, including staff cross-appointed with Cardozo Law regularly publish scholarly articles in academic journals related to their work. IP thus qualifies an educational institution requester.

## **II. Request for a Public Interest Fee Waiver**

Separately, IP is entitled to a public-interest waiver of all fees because disclosure of the records sought here “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)(iv); 32 C.F.R. § 286.12(l). IP is a non-profit organization and has no commercial interest whatsoever in the request. Moreover, there are at least two reasons why the records sought here are of significant public interest and would shed important light on government activities.

First, there is a strong public interest in IP’s access to archives of the American Board of Forensic Odontology (“ABFO”), which include records regarding the use of forensic dentistry

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<sup>4</sup> *See* Cardozo Law, Innocence Project, <https://cardozo.yu.edu/clinics-professional-skills/clinics/innocence-project> (Last visited Feb. 11, 2019).

techniques in particular cases as well as records that document the research, development, training, and guidelines that underlie forensic dentistry methods.

Access to the archives would shine essential new light on the use and misuse of forensic science in public prosecutions and other governmental activities. For instance, the archive contains the most extensive and complete records regarding the use of “bite mark” evidence in criminal cases. The reliability of such “bite mark” evidence has been largely debunked in recently years, and numerous individuals have been exonerated after being convicted on the basis of bite mark evidence. Access to the archive would serve the public interest by shedding entirely new light on the scope of bite mark use by the government at the federal and state levels. The archives would also illuminate the professional standards, guidelines, and trainings that were employed by forensic bite mark experts

The archives also include information about other forensic dentistry methods including, for example, age-estimation techniques. Such techniques have been used by the federal government for various reasons including, for example, to determine whether individuals entering the country are minors and therefore entitled to special protections under the law.<sup>5</sup> Access to the archives would shed new and important light on how these techniques are carried out, as well as the professional standards, guidelines, training, and empirical research that underlines such methods.

Second, there is a strong public interest in IP’s request for correspondence between the National Museum of Health and Medicine and the ABFO. IP sought to obtain access to the archives through the Museum’s standard protocols for granting researchers access. The Museum denied that request, apparently after consultation with the ABFO. There is a strong public interest in understanding how the Museum is rationing access to its public archives, and whether it is doing so at the direction of the ABFO, which has often been hostile to the efforts of IP to research, understand, and challenge the validity of forensic bite mark evidence. Disclosure of the communications in question would thus shed light directly on the activities of the Museum and the public’s ability to access public archives that it maintains.

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<sup>5</sup> See, e.g., Brendan Parent & Nancy Neveloff Dubler, *The Unethical Behavior of Forensic Dentists at Our Southern Border*, STAT News, Feb. 13, 2019, <https://www.statnews.com/2019/02/13/unethical-behavior-forensic-dentists-southern-border/>.

Thank you for your prompt attention to this matter.

Sincerely,

s/Jonathan Manes

Jonathan Manes, *supervising attorney*

John Zakour, *student attorney*

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