

From: Joshua Phillips <foiareporter@gmail.com>
Subject: Submitting a Department of Homeland Security FOIA Request (1 of 2)
Date: February 25, 2019 at 3:09:33 PM EST
To: foia@dhs.gov
Cc: "Parker, Jeremiah" <jeremiah.parker@hq.dhs.gov>, US DHS Privacy Office <foia@hq.dhs.gov>, crcl@dhs.gov

To Whom it May Concern:

Please see the FOIA request (**1 of 2**), below, for the U.S. Department of Homeland Security, including its Contractors and Consultants, including but not limited to the DHS Privacy Office, the Office of the General Counsel (OGC) – including, but not be limited to, the Immigration Law Division (IMM), the Legal Counsel Division (LCD), the National Protection and Programs Law Division (NPPLD), and the Technology Programs Law Division (TPLD) – the Office for Civil Rights & Civil Liberties (CRCL), and the Office of Partnership and Engagement (OPE), and any relevant components referenced in my request.

Please note: this is a follow up request that relates to a FOIA that I submitted to your office on September 22, 2018, and was assigned reference number 2018-HQFO-01095. (On November 27, 2018,

Exhibit A

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips

Journalist / Producer

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Department of Homeland Security FOIA Request

Freedom of Information and Privacy Acts request:

To: **FOIA/PA**
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive SW
STOP-0655
Washington, D.C. 20528-0655
703-235-0790 - phone
703-235-0443 - fax

foia@dhs.gov

This is a request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 and the Privacy Act, 5 U.S.C. § 552a. This request should be considered under both statutes to maximize the release of records.

REQUESTER INFORMATION

Name: Joshua Phillips
Address: 510 E. 84th St., #4C, New York, NY 10028
Email: foiareporter@gmail.com
Phone: 646.452.9969

REQUEST FOR EXPEDITED PROCESSING

Under 32 C.F.R. 1900.34(c), a request is to be given expedited processing when "a compelling need is established to the satisfaction of the Agency." A compelling need is deemed to exist "[w]hen the request is made by a person primarily engaged in disseminating information and the information is relevant to a subject of public urgency concerning an actual or alleged Federal government activity." 32 C.F.R. 1900.34(c)(2).

I am seeking expedited treatment for this request.

1. I am a person primarily engaged in disseminating information

I am a full-time member of the news media and have contributed to various publications including. I am currently reporting for the Center for Investigative Reporting. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, *The Nation*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also authored a book, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010), and have produced broadcast features for NPR, PRI, the BBC, Reveal, PRX and Al Jazeera. I have been awarded a Heywood Broun Award and Alfred I. duPont-Columbia University Award for excellence in broadcast journalism.

2. Certification pursuant to 32 C.F.R. 1900.34(c)

I certify the foregoing to be true and correct to the best of my knowledge and belief.

DOCUMENTS REQUESTED

I request the following records:

1. All reports, draft reports, spreadsheets and/or notes created from June 28, 2018 to the present that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation.
2. All emails, correspondence, draft emails and draft correspondence created from June 28, 2018 to the present that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation.
3. All written policies, orders, decisions, memoranda (or memorandums) created from June 28, 2018 to the present, that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation.
4. All records of meetings occurring from June 28, 2018 to the present that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation. This request includes any contemporaneous notes taken during such meetings by all attendees.
5. All records of presentations occurring from June 28, 2018 to the present that mention or refer to the Family Separation in the Summary, and/or any other reports that discuss family separation. This request includes any contemporaneous notes taken by all attendees during such presentations.
6. All records of investigations, inquiries and/or incident reviews created from June 28, 2018 to the present — including, but not limited to digital data and audio recordings — that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation.
7. All records created from June 28, 2018 to the present that mention or refer to Family Separation in the Summary, and/or any other reports that discuss family separation.

INSTRUCTIONS

I request a copy of all records for the aforementioned “DOCUMENTS REQUESTED” from:

The U.S. Department of Homeland Security, including its contractors, including but not limited to the DHS Office of Inspector General (DHS OIG), the Office for Civil Rights & Civil Liberties (CRCL), Office of Inspector General (CBP IG), and the U.S. Citizenship & Immigration Services (USCIS).

1. Instructions Regarding “Leads”:

As required by the relevant case law, the **Department of Homeland Security (DHS), and its aforementioned components** should follow any leads it discovers during the conduct of its searches and perform additional searches when said leads indicate that records may be located in another system. Failure to follow clear leads is a violation of FOIA.

2. Request for Public Records;

Please search for any records even if they are already publicly available.

3. Request for Electronic and Paper/Manual Searches:

I request that searches of all electronic and paper/manual indices, filing systems, and locations for any and all records relating or referring to the subject of my request be conducted. I further request that the **Department of Homeland Security (DHS), and its aforementioned components** conduct a search of its “soft files.”

4. *Request for Search of Filing Systems, Indices, and Locations:*

I request that the **Department of Homeland Security (DHS), and its aforementioned components** conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Department of Homeland Security (DHS), and its aforementioned components** include, but not be limited to, the following filing systems, indices, and locations:

Department of Homeland Security (DHS)

DHS/ALL-001 - Department of Homeland Security (DHS) Freedom of Information Act (FOIA) and Privacy Act (PA) Record System
DHS/ALL-002 - Department of Homeland Security (DHS) Mailing and Other Lists System
DHS/All-003 - Department of Homeland Security General Training Records
DHS/ALL-004 - General Information Technology Access Account Records System (GITAARS)
DHS/ALL-005 - Department of Homeland Security Redress and Response Records System
DHS/ALL-006 - Department of Homeland Security Accident Records
DHS/ALL-007 Accounts Payable System of Records
DHS/ALL-008 Accounts Receivable System of Records
DHS/ALL-009 - Department of Homeland Security Advisory Committees
DHS/ALL-010 Asset Management Records System of Records
DHS/ALL-011 - Department of Homeland Security Biographies and Awards
DHS/ALL-012 - Department of Homeland Security Childcare System of Records
DHS/ALL-013 - Department of Homeland Security Claims Records
DHS/ALL-014 Department of Homeland Security Personnel Contact Information
DHS/ALL-015 - Department of Homeland Security Employee Assistance Program
DHS/ALL-016 - Department of Homeland Security Correspondence Records
DHS/ALL-017 - Department of Homeland Security General Legal Records
DHS/ALL-018 - Department of Homeland Security Grievances, Appeals, and Disciplinary Action Records System of Records
DHS/ALL-019 Payroll, Personnel, and Time and Attendance Records System of Records
DHS/ALL-020 - Department of Homeland Security Internal Affairs
DHS/ALL-021 - Department of Homeland Security Contractors and Consultants
DHS/ALL-023 - Department of Homeland Security Personnel Security Management
DHS/ALL-024 - Department of Homeland Security Facility and Perimeter Access Control and Visitor Management
DHS/ALL-025 - Department of Homeland Security Law Enforcement Authority in Support of the Protection of Property Owned, Occupied, or Secured by the Department of Homeland Security
DHS/ALL-026 - Department of Homeland Security Personal Identity Verification Management System
DHS/All-027 - The History of the Department of Homeland Security
DHS/All-028 - Department of Homeland Security Complaint Tracking System
DHS/ALL-029 - Civil Rights and Civil Liberties Records
DHS/ALL-030 Use of the Terrorist Screening Database System of Records
DHS/ALL-031 - Information Sharing Environment Suspicious Activity Reporting Initiative
DHS/ALL-032 - Official Passport Application and Maintenance Records
DHS/ALL-033 - Reasonable Accommodations Records System of Records
DHS/ALL-034 - Emergency Care Medical Records System of Records Notice
DHS/ALL-035 Common Entity Index Prototype System of Records Notice
DHS/ALL-036 Board for Correction of Military Records System of Records Notice
DHS/ALL-037 E-Authentication Records System of Records
DHS/ALL-038 Insider Threat Program System of Records

DHS/USCIS/ICE/CBP-001 - Alien File, Index, and National File Tracking System of Records
DHS/OIG-002 Investigative Records System
DHS/CISOMB-001 Virtual Ombudsman System
DHS/USCIS/ICE/CBP-001 – Alien File, Index, and National File Tracking System of Records
DHS/USCIS-002 - Background Check Service
DHS/USCIS-003 - Biometric Storage System
DHS/USCIS-004 - Systematic Alien Verification for Entitlements Program System of Records
DHS/USCIS-005 - Inter-Country Adoptions Security
DHS/USCIS-006 - Fraud Detection and National Security Records (FDNS)
DHS/USCIS-007 - Benefits Information System
DHS/USCIS-008 - Refugee Access Verification Unit
DHS/USCIS-009 - Compliance Tracking and Monitoring System
DHS/USCIS-010 Asylum Information and Pre-Screening System of Records November
DHS/USCIS-011 - E-Verify Program
DHS/USCIS-012 Citizenship and Immigration Data Repository (CIDR)

Also, please search all of your indices, filing systems, and locations, including those I have not specified by name and those that I may not be aware of.

5. *Request regarding Photographs, other visual materials, digital data, video and audio recordings:*

I request that any photographs or other visual materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. For example, if a photograph was taken digitally, or if the **Department of Homeland Security (DHS), and its aforementioned components** maintains a photograph digitally, I request disclosure of the original digital image file, not a reduced resolution version of that image file nor a printout and scan of that image file. Likewise, if a photograph was originally taken as a color photograph, I request disclosure of that photograph as a color image, not a black and white image. Also, I request that any digital data, video and audio recordings materials responsive to my request be released to me in their original or comparable forms, quality, and resolution. Please contact me for any clarification on this point.

6. *Request for Duplicate Pages:*

I request disclosure of any and all supposedly “duplicate” pages. Scholars analyze records not only for the information available on any given page, but also for the relationships between that information and information on pages surrounding it. As such, though certain pages may have been previously released to me, the existence of those pages within new context renders them functionally new pages. As such, the only way to properly analyze released information is to analyze that information within its proper context. Therefore, I request disclosure of all “duplicate” pages.

7. *Request to Search Emails:*

Please search for emails relating to the subject matter of my request.

8. *Request for Search of Records — and Records Transferred to Other Agencies:*

I request that in conducting its search, the **Department of Homeland Security (DHS), and its aforementioned components** disclose releasable records even if they are available publicly through other sources outside the **Department of Homeland Security (DHS), and its aforementioned components**.

As part of this, I request a copy of all records for the aforementioned “DOCUMENTS REQUESTED,” from and between the aforementioned governmental bodies, centers, agencies, and departments, including but not limited to any all correspondence records, electronic or otherwise, including but not limited to, emails, faxes, tape recordings, regular or standard mail, as well as documents, memos, memoranda, notes, meeting notes, phone call notes, policy papers, policy statements, press briefings, cables, briefings, reports, drafts, photographs and images, power point slides, bulletins, statistical data, surveys, computer source and object code, technical manuals, technical specifications, as well as records of complaints, responses to and results of complaints, investigations, responses to and results of investigations, internal reviews, responses to and results of internal reviews, audits, responses to and results of audits, reports, responses to and results of reports.

I also request that the search conducted by the **Department of Homeland Security (DHS), and its aforementioned components** include, but not be limited to, the following records, documents, filing systems, indices, and locations:

- Any PREA Audit Reports;
- Any Office of Detention Oversight - Detention Facility Compliance Inspections;
- Any Intergovernmental Service Agreements;
- Any Immigration Statistics;
- Any ICE Staffing Charts;
- Any Final Opinions and Orders of Cases;
- Any Executive Order Documents;

- Any DHS Reports;
- Any Declined Detainer Outcome Report;
- Any Detention Facility Reviews/Audits;
- Any Detention Facility Statistics;
- Any Apprehensions by Border Patrol between Official Ports of Entry;
- Any CBP Contracts;
- Any CBP Background Investigation;
- Any Detention by Border Patrol or at Port of Entry;
- Expedited Removal by Border Patrol or at Port of Entry;
- Any CBP Human Resources;
- Any Import Trade Activity (ITRAC) Requests;
- Any I-94 Records;
- Any Passenger Name Record (PNR) (Travel Industry Reservation Data);
- Any Records Regarding My Inspection or Examination upon My Arrival at a U.S. Port of Entry;
- Any Information Regarding Entry and Exit;
- Any Voluntary Return;
- Any A-File;
- Any I-130 Records;
- Any N-400;
- Any Petition Status;

- Any Deportation Records;
- Any Detention and Removal Records ;
- Any Medical Records (While in Detention);
- Any Inquiries or Resolution Regarding Difficulties Experienced During Travel;
- Any Inspector General reviews or audits of investigations;
- Any unclassified email traffic transmitted on unclassified networks;
- I also request that the search conducted by the Department of Homeland Security (DHS) include, but not be exclusive or limited to, the following forms, records, or documents: Any forms or records that include but are not exclusive or limited to the FBI's 302's (or investigative reports), Letter Head Memos (or LHM's) and Electronic Correspondence (or EC's);
- Also, please search all of your indices, filing systems, and locations, including those I have not specified by name and those that I may not be aware of.

9. *Regarding Destroyed Records*

If any records responsive or potentially responsive to my request have been destroyed, my request include, but is not limited to, any and all records relating or referring to the destruction of those records. This includes, but is not limited to, any and all records relating or referring to the events leading to the destruction of those records.

INSTRUCTIONS REGARDING SCOPE AND BREADTH OF REQUESTS

Please interpret the scope of this request broadly. The **Department of Homeland Security (DHS), and its aforementioned components** is instructed to interpret the scope of this request in the most liberal manner possible short of an interpretation that would lead to a conclusion that the request does not reasonably describe the records sought.

ADDITIONAL INSTRUCTIONS REGARDING REQUEST

Please produce all records with administrative markings and pagination included. Please send a memo (copy to me) to the appropriate units in your office to assure that no records related to this request are destroyed. Please advise of any destruction of records and include the date of and authority for such destruction.

FORMAT

I request that any releases stemming from this request be provided to me in digital format (soft-copy) on a compact disk or other like media.

EXEMPTIONS AND SEGREGABILITY

I call your attention to President Obama's 21 January 2009 Memorandum concerning the Freedom of Information Act, in which he states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA [...] The presumption of disclosure should be applied to all decisions involving FOIA.

In the same Memorandum, President Obama added that government information should not be kept confidential "merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Finally, President Obama ordered that, “The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails.”

Nonetheless, if any responsive record or portion thereof is claimed to be exempt from production, FOIA/PA statutes provide that even if some of the requested material is properly exempt from mandatory disclosure, all segregable portions must be released. If documents are denied in part or in whole, please specify which exemption(s) is (are) claimed for each passage or whole document denied. Please provide a complete itemized inventory and a detailed factual justification of total or partial denial of documents. Specify the number of pages in each document and the total number of pages pertaining to this request. For “classified” material denied, please include the following information: the classification (confidential, secret or top secret); identity of the classifier; date or event for automatic declassification or classification review or downgrading; if applicable, identity of official authorizing extension of automatic declassification or review past six years; and, if applicable, the reason for extended classification beyond six years.

In excising material, please “black out” the material rather than “white out” or “cut out.” I expect, as provided by FOIA, that the remaining non-exempt portions of documents will be released.

Please release all pages regardless of the extent of excising, even if all that remains are the stationery headings or administrative markings.

In addition, I ask that your agency exercise its discretion to release records which may be technically exempt, but where withholding serves no important public interest.

FEE CATEGORY AND REQUEST FOR A FEE WAIVER

I am willing to pay any reasonable expenses associated with this request, however, as the purpose of the requested disclosure is in full conformity with the statutory requirements for a waiver of fees, I formally request such a waiver. I request a waiver of all costs pursuant to 5 U.S.C §552(a)(4) (A)(iii) (“Documents shall be furnished without any charge ... 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.”). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress’s legislative intent in amending FOIA. See *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309,1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’”).

Under 32 C.F.R. 1900.13(b), “Records 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.”

Should my request for a fee waiver be denied, I request that I be categorized as a member of the news media for fee purposes pursuant to 32 C.F.R. 1900.02(h)(3). According to 5 U.S.C. § 552(a)(4)(A)(ii), which codified the ruling of *Nat’l Security Archive v. Dep’t of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the term “a representative of the news media” means any person or entity that 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. This is consistent with the definition provided in 32 C.F.R 1900.02(h)(3)

As the legislative history of FOIA reveals, “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected. ... In fact, any person or organization which regularly publishes or disseminates information to the public...should qualify for waivers as a ‘representative of the news media.’” 132 Cong. Rec. S14298 (daily ed. Sept 30,1986) (emphasis in original quotation); and 2) “A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision.” 132 Cong. Rec. H9463 (Oct. 8,1986) (emphasis in original quotation)). Therefore, in accordance with the Freedom of Information Act and relevant case law, I, Joshua Phillips, should be considered a representative of the news media.

I. DISCLOSURE OF THE REQUESTED RECORDS IS IN THE PUBLIC INTEREST BECAUSE IT IS LIKELY TO CONTRIBUTE SIGNIFICANTLY TO THE PUBLIC UNDERSTANDING OF THE OPERATIONS AND ACTIVITIES OF THE GOVERNMENT.

A. The subject of the requested records concerns the operations and activities of the DoJ and broader government. The subject of the requested records concerns identifiable operations and activities of the DoJ and broader government, specifically the DoJ’s controversial detention and interrogation program.

B. The disclosure is likely to contribute to an understanding of government operations and activities because the disclosable portions of the requested records will be meaningfully informative about those operations and activities. The vast majority of disclosable information is not already in the public domain, in either a duplicative or a substantially identical form, and therefore the

disclosure would add substantial new information to the public's understanding of the DoJ's controversial detention and interrogation program.

The overwhelming preponderance of records I need to conduct my study are in the possession of the DoJ and not in the public domain.

C. The disclosure of the requested records will contribute to the increased understanding of a broad audience of persons interested in the subject, rather than merely my own individual understanding. Further, I will be collaborating with professionals who have great expertise in the subject area, and I have the ability and intention to effectively convey information to the public.

As explained herein in more detail, the audience likely to be interested in the subject is broad, and includes, historians of modern American government, politics, culture, and national security; journalists reporting on American politics, government, national security, and society; civil liberties attorneys; and the general public.

i) I firmly intend to analyze the requested records in order to facilitate significant expansion of public understanding of government operations. I am well qualified to perform this analysis.

I am a full-time member of the news media and have contributed to various publications including, most recently, the Center for Investigative Reporting. I have extensively reported on U.S. interrogation and detainee abuse-related issues. I have authored a book about this subject, titled, *None of Us Were Like This Before: American Soldiers and Torture*. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, *The Nation*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also produced broadcast features for NPR, PRI, the BBC, Reveal, PRX and Al Jazeera.

As should be clear from the above, I have the ability and firm intention to disseminate to the public significant expansions of understanding of government operations based on my analysis of the requested disclosures.

ii) Additional Note on Journalistic Research and the Public Interest:

The case law on this matter is emphatically clear that journalistic inquiry alone satisfies the FOIPA public interest requirement *National Treasury Employees Union v. Griffm*, 811 F.2d, 644, 649 (D.C. Cir. 1987).

Further, as articulated in the amendments to FOIA established by the OPEN Government Act of 2007,¹ I solidly meet the applicable definition of "a representative of the news media[.]" The OPEN Government Act of 2007 established that for FOIA purposes,

'a representative of the news media' means any person or entity that gathers information of potential interest to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. 552(a)(4)(A)(ii)

Based on my completed and firmly intended research, analysis, and information dissemination activities detailed at length herein, I clearly satisfy this description.

Further, the OPEN Government Act of 2007's definition of "a representative of the news media" is taken nearly verbatim from language used by the United States Court of Appeals, District of Columbia Circuit in the court's 1989 FOIA fee waiver-oriented ruling in *National Security Archive v. Department of Defense*. As the court also relatedly found in *National Security Archive v. Department of Defense*, a requester need not already have published numerous works in order to qualify as a representative of the news media. The court found that the express "intention" to publish or disseminate analysis of requested documents amply satisfies the above noted requirement for journalists to "publish or disseminate information to the public." *National Security Archive v. Department of Defense*, 880 F.2d 1386, (D.C. Cir, 1989). I have expressed a firm intention to continue disseminating significant analysis of documents obtained through FOIPA requests. And I have demonstrated my ability to continue disseminating significant analysis of documents obtained through FOIPA requests.

Therefore, in that I am "person or entity that gathers information of potential interest to the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience," I solidly meet the applicable definition of "a representative of the news media." As such, I have again more than satisfied the requirement for the fee waiver.

D. The disclosure of the requested records is likely to contribute "significantly" to public understanding of government operations and activities because disclosure would enhance to a significant extent the public's understanding of the subject in question as compared to the level of public understanding existing prior to the disclosure

i) See above Section I.

ii) As noted above, the overwhelming preponderance of records I need to conduct my study are in the possession of the DoJ and not in the public domain.

II. DISCLOSURE OF THE INFORMATION IS NOT PRIMARILY IN MY COMMERCIAL INTEREST.

Any commercial interest that I have which would be furthered by the requested disclosure is *de minimis*.

I am requesting the release of records to analyze for use in the dissemination of news articles. Though journalists do get paid for writing news articles, payment is not the primary purpose for which such work is conducted. As the D.C. Circuit explained in *National Treasury Employees Union v. Griffin*, 811 F.2d, 644,649 (D.C. Cir. 1987), “While private interests clearly drive journalists (and journals) in their search for news, they advance those interests almost exclusively by dissemination of news, so that the public benefit from news distribution necessarily rises with any private benefit. Thus it is reasonable to presume that furnishing journalists with information will primarily benefit the general public[.]”

The disclosure of records will significantly benefit the public interest, and this benefit to the public is of vastly greater magnitude than my minimal commercial interest.

Additionally, the courts and the legislature have been deeply invested in ensuring that FOIPA duplication and search fees are not used by government agencies to deliberately or otherwise thwart legitimate scholarly and journalistic research:

This was made clear in *Better Government Ass’n v. Department of State*, in which the court ruled that, “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests/ in particular those from journalists, scholars and nonprofit public interest groups.’ *Better Government Ass’n v. Department of State*, 780 F.2d 86,89 (D.C. Cir. 1986).

This point is further elaborated in *Ettlinger v. FBI*,

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. In 1974, Congress added the fee waiver provision as an amendment to the FOIA in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests. The 1974 Senate Report and the sources relied on in it make it clear that the public interest/benefit test was consistently associated with requests from journalists, scholars and non- profit public interest groups. There was a clear message from Congress that “this public-interest standard should be liberally construed by the agencies.” The 1974 Conference Report, in which differences between the House and Senate amendments were ironed out, retained the Senate-originated public-interest fee waiver standard and further stated “the conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” Further evidence of congressional intent regarding the granting of fee waivers comes from a 1980 Senate Subcommittee report The report stated that “excessive fee charges ... and refusal to waive fees in the public interest remain... ‘toll gates’ on the public access road to information.” The report noted that “most agencies have also been too restrictive with regard to granting fee waivers for the indigent, news media, scholars...” and recommended that the Department of Justice develop guidelines to deal with these fee waiver problems. The report concluded: The guidelines should recommend that each agency authorize as part of its FOIA regulations fee waivers for the indigent, the news media, researchers, scholars, and non-profit public interest groups. The guidelines should note that the presumption should be that requesters in these categories are entitled to fee waivers, especially if the requesters will publish the information or otherwise make it available to the general public.

The court, in its *Ettlinger v. FBI* decision, continued that on 18 December 1980, a policy statement was sent to the heads of all federal departments and agencies accompanied by a cover memorandum from then United States Attorney General Civiletti which stated that he had “concluded that the Federal Government often fails to grant fee waivers under the Freedom of Information Act when requesters have demonstrated that sufficient public interest exists to support such waivers.” The Attorney General went on to state: Examples of requesters who should ordinarily receive consideration of partial fee waivers, at minimum, would be representatives of the news media or public interest organizations, and historical researchers. *Such waivers should extend to both search and copying fees, and in appropriate cases, complete rather than partial waivers should be granted.*

III. ALTERNATIVELY, THE AGENCY SHOULD EXERCISE ITS DISCRETION TO GRANT A FEE WAIVER.

Although I am entitled to a waiver of fees under 32 C.F.R. 1900.13(b)(2), even if I were not entitled to fees under that provision the agency should grant me a fee waiver in the exercise of its discretion. Pursuant to 32 C.F.R. 1900.13(b)(1), “as a matter of administrative discretion, the interest of the United States Government would be served.” The agency should exercise its discretion here to award a fee waiver because release of the documents would be in the interest of the United States Government for the reasons stated above.

IV. CONCLUSION.

As demonstrated above, the disclosure of the requested records will significantly contribute to expanded public understanding of government operations. I have the intent and ability to disseminate this significant expansion of public understanding of government operations. The public interest in this significant expansion of public understanding of government operations far outweighs any commercial interest of my own in the requested release. Accordingly, my fee waiver request amply satisfies the rules of 32 C.F.R.1900.13(b). Legislative history and judicial authority emphatically support this determination. For these reasons, and based

upon their extensive elaboration above, I request a full waiver of fees be granted. I will appeal any denial of my request for a waiver of fees, and I will take the issue to the courts if necessary.

Please do not hesitate to contact me if you have any questions concerning this request.

Thank you for your assistance in this matter.

Joshua Phillips