

EXHIBIT D



June 11, 2019

Director, Office of Information Policy
United States Department of Justice
Suite 11050, 1425 New York Avenue, NW
Washington, DC 20530-0001

Subject: Freedom of Information Act Request

To whom it may concern:

I am making this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. Please provide the Project On Government Oversight (POGO) with the following opinions from the Office of Legal Counsel (OLC):

1. Memorandum regarding “The Constitutional Separation of Powers Over Foreign Affairs and National Security” (Treanor/Koffsky) – 01/19/2001
2. Memorandum regarding “The President’s Authority to Provide Military Equipment and Training to Allied Forces and Resistance Forces in Foreign Countries” – 05/06/2003

In order to help to determine my status to assess fees, you should know that POGO is a representative of the news media publishing internet content, and this request is made as part of a news gathering, and not for commercial, use.

I request a waiver of all costs associated with fulfilling this submission pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Disclosure of the requested information will further 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, POGO. POGO will use the requested information to inform the public about an issue of great importance—how the executive branch interprets authority on issues of national security and foreign affairs, specifically pertaining to military involvement and support.

Set forth below is a detailed account of POGO’s planned use of the requested records that fully responds to the fee waiver criteria governed by 5 U.S.C. § 552(a)(4)(A)(iii).

(A) The subject of the request, i.e., whether the subject of the requested records concerns the operations or activities of the government.

As a nonprofit, nonpartisan organization committed to good governance, it is our mission to help the general public better understand how the government functions and whether it is doing so within the confines of constitutional authority. The public should have a clear picture of the limits of government power, especially when concerning military action funded by taxpayer dollars. As calls

for increased transparency in national security continue, the requested information would provide the public with a better understanding regarding the legitimacy of U.S. military and national security actions. The legal and policy basis for U.S. military operations has been previously disclosed to the general public during prior administrations, as seen by the release of the *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*.¹

(B) The informative value of the information to be disclosed, i.e., whether the disclosure is likely to contribute to an understanding of government operations or activities.

Issues relating to executive military authority, including the greenlighting of numerous controversial national security policies and programs, have garnered considerable media coverage and concern in Congress in recent years. POGO is uniquely positioned to provide the public with a better understanding of how government manages the military and protects national security. Specifically, Louis Fisher, a constitutional fellow at POGO, has worked extensively on research regarding the separation of war powers.

Having more detailed information about the limits of constitutional authority and the justification of certain controversial policies and programs is the only way to increase transparency in national security policy and, ultimately, determine whether the government is functioning effectively.

The legislative history of the fee waiver standard “clearly indicates” that Congress intended to create a public interest/benefit test for granting FOIA fee waivers that is to be “liberally construed,” and is “consistently associated with requests from...*non-profit interest groups* who it was intended to benefit.” (Emphasis added.) *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984); *Nat'l Treasury Employees Union v. Griffin*, 811 F.2d 644 (D.C. Cir. 1987); *Lybarger v. Cardwell*, 577 F.2d 764 (1st Cir. 1978).

(C) The contribution to an understanding of the subject by the general public is likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to public understanding, including whether the requester has expertise in the subject area as well as the intention and ability to disseminate the information to the public.

Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. POGO disseminates information about its activities to thousands of concerned citizens, policymakers, and the media via email, direct mail, and its website.² The information provided will be used for the following activities: publication by email and on our website; publication in reports and newsletters issued by POGO or by affiliated nonprofit organizations; efforts to educate Congress, the Executive Branch, and other policymakers in Washington, D.C.; and investigations conducted with the news media. POGO undertakes all of these actions to ensure the public is well-informed about the actions and operations

¹ See Just Security, “Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations,” December 2016. https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf

² <http://www.pogo.org>

of the federal government. In the past, the Department of Justice has proven to be helpful in its willing to comply with our requests for the release of legal opinions regarding matters such as the Foreign Agents Registration Act (FARA).³

(D) The significance of the contribution to public understanding, i.e., whether the disclosure is likely to contribute significantly to public understanding of government operations or activities.

The requested information will expand the public's knowledge of the current state of constitutional authority in national security affairs. All of POGO's investigations are available for free to the public on our website, our primary vehicle for disseminating information to the public. The site receives 107,000 page views monthly. Our blog⁴ has developed a devoted readership, averaging roughly 14,000 visitors monthly. Our collaborations with other organizations and the news media amplify our reach and increase public understanding of government activities.

(E) Whether disclosure of the information is not primarily in the commercial interest of the POGO.

POGO holds no commercial interest in the requested information. As discussed above, the information will be used strictly for the public interest. We do not charge for access to information posted on our website, or for reports, newsletters, and other printed materials.

If any of these requests are denied, in full or in part, please cite the exemption(s) pursuant to 5 U.S.C. § 552(b) that justify each denial. If an exemption applies, however, please consider exercising the agency's discretionary release powers to disclose the information. Additionally, please release all reasonably segregable portions of the information that do not meet an exemption.

We look forward to your response within 20 days of the receipt of this request, unless, in the case of "unusual circumstances," the time limitation is "extended by written notice." We are aware that we have a right to appeal this request if it is wholly or partially denied or if the agency fails to respond within 20 days. We are aware that, if successful, a federal district court may assess "reasonable attorney fees and other litigation costs" per 5 U.S.C. § 552(a)(4)(E).

Please contact me if this request requires further clarification. I can be reached at 202-347-1122, or via e-mail at msmithberger@pogo.org. Thank you for your prompt attention to this matter.

Sincerely,

Mandy Smithberger
Director, Center for Defense Information
Project On Government Oversight

³ See Project On Government Oversight, "Justice Department Reveals (Some) of How It Interprets Foreign Influence Law," June, 15, 2018. <https://www.pogo.org/investigation/2018/06/justice-department-reveals-some-of-how-it-interprets-foreign-influence-law/>

⁴ <http://www.pogo.org/blog/>