

From: MBX OMB FOIA  
To: Joshua Phillips  
Date: Thu Mar 19 2020 11:12:11 GMT-0400 (Eastern Daylight Time)  
Subject: RE: [WARNING: UNSCANNABLE EXTRACTION FAILED][EXTERNAL] Submitting a FOIA Request to the Executive Office of the President (EOP / OMB) (2 of 3)

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Good Morning: This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated and received in this office on March 18, 2020. Your request has been logged in and is being processed. For your reference, the OMB FOIA number is 2020-276.

Thank you,  
Dionne Hardy

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**From:** Joshua Phillips <foiareporter@gmail.com>  
**Sent:** Wednesday, March 18, 2020 1:16 AM  
**To:** MBX OMB FOIA <MBX.OMB.FOIA@OMB.eop.gov>  
**Subject:** [WARNING: UNSCANNABLE EXTRACTION FAILED][EXTERNAL] Submitting a FOIA Request to the Executive Office of the President (EOP / OMB) (2 of 3)

To Whom it May Concern:

Please see the FOIA request, below, for the **Executive Office of the President (EOP)**, and the **Office of Management and Budget (OMB)**, as well as their contractors, consultants, and any relevant components referenced in my request.

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips

Journalist / Producer

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**Executive Office of the President (EOP),  
Office of Management and Budget (OMB) FOIA Request**

**Freedom of Information and Privacy Acts request:**

**OMB's FOIA Officer  
Dionne Hardy  
725 17th Street NW, Suite 9204  
Washington, DC 20503**

**(202) 395-FOIA  
(202) 395-3504 (fax)**

**FOIA Requester Service Center: (202) 395-FOIA**

**E-mail address: [OMBFOIA@omb.eop.gov](mailto:OMBFOIA@omb.eop.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](mailto:foiareporter@gmail.com)

**Phone:** 646.452.9969

**Internal reference number for this FOIA request:** EOP\_OMB\_2020\_03\_18\_2

REQUEST FOR EXPEDITED PROCESSING

I am requesting expedited processing of this request pursuant to 32 CFR § 1900.34(II). I am a professional journalist primarily engaged in disseminating information. Due to the declaration of a national emergency regarding Coronavirus / Covid-19, there is a clear urgency to inform the public concerning Federal Government activity with regard to Coronavirus/Covid-19. 32 CFR § 1900.34(II) states:

[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 when, under 32 CFR § 1900.34:

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

Here, I meet the criteria for a compelling need for expedited processing of this request.

**1. *I am a person primarily engaged in disseminating information***

I am a full-time member of the news media and have reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. I have been awarded a Heywood Broun Award and Alfred I. duPont-Columbia University Award for excellence in broadcast journalism, and reported for an Emmy award-winning FRONTLINE TV documentary. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

**2. *Certification pursuant to 32 CFR § 1900.34(c)***

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

DOCUMENTS REQUESTED

I request disclosure of any and all records for (a) documents requesting, authorizing or reflecting on, about, mentioning or referring to; (b) copies of documents on, about, mentioning or referring to; (c) copies of any correspondence on, about, mentioning or referring to — or documents generated by any complaints and reports on, about, mentioning or referring to, and; (d) copies of any correspondence on,

about, mentioning or referring to — or documents reviewed in any complaints and reports on, about, mentioning or referring to each of the following topics:

1. All policies, orders, decisions, regulations and/or memoranda on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
2. All policy, orders, decisions, regulations and/or memoranda (or memorandums) for any U.S. government staff and their contractors on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
3. All reports, draft reports, and/or notes on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
4. All memoranda (or memorandums) and/or draft memoranda (or draft memorandums) on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
5. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings or presentations on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
6. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to policy, orders, decisions, regulations and/or memoranda (or memorandums) for any and all U.S. government staff, and their contractors, on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
7. All photographs, images, digital data, video and audio recordings, and tape recordings on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
8. All written guidance, instructions, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
9. All records of instructions, training, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
10. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to instructions, training, and instructional material on, about, mentioning or referring to role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.

## **INSTRUCTIONS**

I request a copy of any and all records for the aforementioned "DOCUMENTS REQUESTED" from:

- **Executive Office of the President (EOP)**, including but not limited to the **Office of Management and Budget (OMB)**, as well as their contractors and consultants.

**1. *Instructions Regarding "Leads":***

As required by the relevant case law, the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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;***

If any of the records that I requested are publicly available, please indicate (a) where they are accessible and (b) which responsive records they are.

**3. *Request for Electronic and Paper/Manual Searches:***

I request that searches of any and all records on, about, mentioning or referring to the subject of my request may or should include, but not be limited to, electronic and paper/manual indices, filing systems, cross-reference filing systems, and locations. I further request that the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** conduct a search of its "soft files."

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

I request that the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** may or should include, but not be limited to, any and all filing systems, cross-reference filing systems, indices, and locations.

Also, please search your indices, filing systems, cross-reference 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 **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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 regarding and/or referring to tabletop, training exercises, role-playing scenarios

regarding or referring to “major domestic incident(s)” and/or pandemic(s), including but not limited to the following terms incident responses, shared experiences and lessons, Novel influenza, person-to-person transmission, travel bans, lag time, vaccines, ventilator shortages.

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

I request that in conducting its search, the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** disclose releasable records even if they are available publicly through other sources outside the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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, which may or should include, but not limited to, any and all of the following:

- **Documents, reports, drafts, memos, memoranda (or memorandums), as well as draft reports, draft documents, draft memos, draft memoranda (or draft memorandums);**
- **Notes, cables, briefings, phone call notes, meeting notes, policy papers, policy statements, press briefings;**
- **Correspondence records, electronic or otherwise, including but not limited to emails, faxes, audio, regular and/or standard mail;**
- **Photographs, images, digital data, video and audio recordings, tape recordings;**
- **PowerPoint presentation slides (or equivalent), bulletins, statistical data, surveys, computer source, object code, technical manuals, technical specifications;**
- **Records of complaints, responses to complaints and results of complaints, investigations, responses to investigations and results of investigations, internal reviews, responses to internal reviews and results of internal reviews, audits, responses to audits and results of audits, reports, responses to reports and results of reports;**

I also request that the search conducted by the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** may or should include, but not be limited to, the following records, documents, filing systems, cross-reference filing systems, indices, and locations:

- **Office of Management and Budget (OMB) E-mail Records and Backup Tapes;**
- **Record Schedule for the Statistical Policy Division, Office of Management and Budget;**
- **Office of Management and Budget Records of the Office of the Director;**
- **Record Schedule for the Human and Community Affairs;**
- **Organization and Special Studies Division, Office Management and Budget;**
- **Information Systems Division, Office of Management and Budget;**
- **Intergovernmental Relations and Regional Operations Division, Office of Management and Budget;**
- **Records Common to the Division Office and Branches;**

- **Intelligence Branch Budgetary Records;**
- **Office of Management and Budget (OMB) Records of the Office of Information and Regulatory Affairs (OIRA);**
- **Any unclassified email traffic transmitted on unclassified networks;**
- **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 regarding and/or referring to the destruction of those records. This includes, but is not limited to, any and all records regarding and/or referring to the events leading to the destruction of those records.

**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 regarding and/or referring 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**

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**

As mentioned above, I am a member of the news media and therefore 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 ask that you notify me first if there are any 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."

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government. The subject of the requested records concerns identifiable operations and activities of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government, specifically the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)'s tabletop, training exercises, role-playing scenarios regarding or referring to "major domestic incident(s)" and/or pandemic(s).**

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)'s tabletop, training exercises, role-playing scenarios regarding or referring to "major domestic incident(s)" and/or pandemic(s).**

The overwhelming preponderance of records I need to conduct my study are in the possession of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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 reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

*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,<sup>1</sup> 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*.<sup>1</sup> 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.<sup>2</sup>

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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.

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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

<sup>1</sup>The language in *National Security Archive v. Department of Defense* reads, “A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes

that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381,1387 (D.C. Cir, 1989).

<sup>2</sup>Though the courts have subsequently narrowed the applicability of the *National Security Archive v. Department of Defense* ruling in terms of requirements to qualify as are presentative of the news media (most notably in *Judicial Watch, Inc. v. United States Department Of Justice*), I still solidly satisfy even this narrowed understanding of “representative of the news media.” In contrast to *Judicial Watch*, I have clearly demonstrated a firm intention to disseminate to the public my analysis of requested information. I have identified articles, an exhibit, and a book within which I firmly intend to, and in some cases already have, disseminated my analysis of requested information. I have identified other news media representative whom I have already fruitfully provided my analysis of requested information, and with whom I firmly intend to continue collaborating on future disseminations of requested information. Ultimately, in contrast to *Judicial Watch*, which the court found to “merely make available...the requested information,” I have established “a firm intention to disseminate” my analysis of the requested information. See *Judicial Watch, Inc. v. United States Department of Justice*, 880 F.Supp. 2d 54, 59 (D.D.C. 2002).

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**Attachments:**

- [03/19/20-Msg#2-Attach:image001.png](#)

From: Joshua Phillips  
To: OMBFOIA@omb.eop.gov  
Date: Wed Mar 18 2020 01:16:21 GMT-0400 (Eastern Daylight Time)  
Subject: Submitting a FOIA Request to the Executive Office of the President (EOP / OMB) (3 of 3)

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To Whom it May Concern:

Please see the FOIA request, below, for the **Executive Office of the President (EOP)**, and the **Office of Management and Budget (OMB)**, as well as their contractors, consultants, and any relevant components referenced in my request.

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips  
  
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**Executive Office of the President (EOP),  
Office of Management and Budget (OMB) FOIA Request**

**Freedom of Information and Privacy Acts request:**

**OMB's FOIA Officer  
Dionne Hardy  
725 17th Street NW, Suite 9204  
Washington, DC 20503**

**(202) 395-FOIA  
(202) 395-3504 (fax)**

**FOIA Requester Service Center: (202) 395-FOIA**

**E-mail address: [OMBFOIA@omb.eop.gov](mailto:OMBFOIA@omb.eop.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](mailto:foiareporter@gmail.com)

Phone: 646.452.9969

**Internal reference number for this FOIA request: EOP\_OMB\_2020\_03\_18\_3**

### REQUEST FOR EXPEDITED PROCESSING

I am requesting expedited processing of this request pursuant to 32 CFR § 1900.34(II). I am a professional journalist primarily engaged in disseminating information. Due to the declaration of a national emergency regarding Coronavirus / Covid-19, there is a clear urgency to inform the public concerning Federal Government activity with regard to Coronavirus / Covid-19. 32 CFR § 1900.34(II) states:

[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 when, under 32 CFR § 1900.34:

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

Here, I meet the criteria for a compelling need for expedited processing of this request.

#### **1. *I am a person primarily engaged in disseminating information***

I am a full-time member of the news media and have reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. I have been awarded a Heywood Broun Award and Alfred I. duPont-Columbia University Award for excellence in broadcast journalism, and reported for an Emmy award-winning FRONTLINE TV documentary. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

#### **2. *Certification pursuant to 32 CFR § 1900.34(c)***

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

### DOCUMENTS REQUESTED

I request disclosure of any and all records for (a) documents requesting, authorizing or reflecting on, about, mentioning or referring to; (b) copies of documents on, about, mentioning or referring to; (c) copies of any correspondence on, about, mentioning or referring to — or documents generated by any complaints and reports on, about, mentioning or referring to, and; (d) copies of any correspondence on, about, mentioning or referring to — or documents reviewed in any complaints and reports on, about, mentioning or referring to each of the following topics:

1. All policies, orders, decisions, regulations and/or memoranda on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
2. All policy, orders, decisions, regulations and/or memoranda (or memorandums) for any U.S. government staff and their contractors on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
3. All reports, draft reports, and/or notes on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
4. All memoranda (or memorandums) and/or draft memoranda (or draft memorandums) on, about,

mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.

5. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings or presentations on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
6. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to policy, orders, decisions, regulations and/or memoranda (or memorandums) for any and all U.S. government staff, and their contractors, on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
7. All photographs, images, digital data, video and audio recordings, and tape recordings on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
8. All written guidance, instructions, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
9. All records of instructions, training, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
10. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to instructions, training, and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.

### INSTRUCTIONS

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

- **Executive Office of the President (EOP)**, including but not limited to the **Office of Management and Budget (OMB)**, as well as their contractors and consultants.

**1. *Instructions Regarding “Leads”:***

As required by the relevant case law, the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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;***

If any of the records that I requested are publicly available, please indicate (a) where they are accessible and (b) which responsive records they are.

**3. *Request for Electronic and Paper/Manual Searches:***

I request that searches of any and all records on, about, mentioning or referring to the subject of my request may or should include, but not be limited to, electronic and paper/manual indices, filing systems, cross-reference filing systems, and locations. I further request that the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** conduct a search of its “soft files.”

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

I request that the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** may or should include, but not be limited to, any and all filing systems, cross-reference filing systems, indices, and locations.

Also, please search your indices, filing systems, cross-reference 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 **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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 regarding and/or referring to tabletop, training exercises, role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s), including but not limited to the following terms incident responses, shared experiences and lessons, Novel influenza, person-to-person transmission, travel bans, lag time, vaccines, ventilator shortages.

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

I request that in conducting its search, the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** disclose releasable records even if they are available publicly through other sources outside the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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, which may or should include, but not limited to, any and all of the following:

- **Documents, reports, drafts, memos, memoranda (or memorandums), as well as draft reports, draft documents, draft memos, draft memoranda (or draft memorandums);**

- **Notes, cables, briefings, phone call notes, meeting notes, policy papers, policy statements, press briefings;**
- **Correspondence records, electronic or otherwise, including but not limited to emails, faxes, audio, regular and/or standard mail;**
- **Photographs, images, digital data, video and audio recordings, tape recordings;**
- **PowerPoint presentation slides (or equivalent), bulletins, statistical data, surveys, computer source, object code, technical manuals, technical specifications;**
- **Records of complaints, responses to complaints and results of complaints, investigations, responses to investigations and results of investigations, internal reviews, responses to internal reviews and results of internal reviews, audits, responses to audits and results of audits, reports, responses to reports and results of reports;**

I also request that the search conducted by the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** may or should include, but not be limited to, the following records, documents, filing systems, cross-reference filing systems, indices, and locations:

- **Office of Management and Budget (OMB) E-mail Records and Backup Tapes;**
- **Record Schedule for the Statistical Policy Division, Office of Management and Budget;**
- **Office of Management and Budget Records of the Office of the Director;**
- **Record Schedule for the Human and Community Affairs;**
- **Organization and Special Studies Division, Office Management and Budget;**
- **Information Systems Division, Office of Management and Budget;**
- **Intergovernmental Relations and Regional Operations Division, Office of Management and Budget;**
- **Records Common to the Division Office and Branches;**
- **Intelligence Branch Budgetary Records;**
- **Office of Management and Budget (OMB) Records of the Office of Information and Regulatory Affairs (OIRA);**
- **Any unclassified email traffic transmitted on unclassified networks;**
- **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 regarding and/or referring to the destruction of those records. This includes, but is not limited to, any and all records regarding and/or referring to the events leading to the destruction of those records.

**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 regarding and/or referring 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**

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**

As mentioned above, I am a member of the news media and therefore 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 ask that you notify me first if there are any 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.”

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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government. The subject of the requested records concerns identifiable operations and activities of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government, specifically the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)’s tabletop, training exercises, role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s).**

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)’s tabletop, training exercises, role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s).**

The overwhelming preponderance of records I need to conduct my study are in the possession of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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 reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

*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. Griffin*, 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, 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*.<sup>1</sup> 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.<sup>2</sup>

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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.

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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

<sup>1</sup>The language in *National Security Archive v. Department of Defense* reads, “A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381,1387 (D.C. Cir, 1989).

<sup>2</sup>Though the courts have subsequently narrowed the applicability of the *National Security Archive v. Department of Defense* ruling in terms of requirements to qualify as are presentative of the news media (most notably in *Judicial Watch, Inc. v. United States Department Of Justice*), I still solidly satisfy even this narrowed understanding of “representative of the news media.” In contrast to *Judicial Watch*, I have clearly demonstrated a firm intention to disseminate to the public my analysis of requested information. I have identified articles, an exhibit, and a book within which I firmly intend to, and in some cases already have, disseminated my analysis of requested information. I have identified other news media representative whom I have already fruitfully provided my analysis of requested information, and with whom I firmly intend to continue collaborating on future disseminations of requested information. Ultimately, in contrast to *Judicial Watch*, which the court found to “merely make available...the requested information,” I have established “a firm intention to disseminate” my analysis of the requested information. *See Judicial Watch, Inc. v. United States Department of Justice*, 880 F.Supp. 2d 54, 59 (D.D.C. 2002).

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#### **Attachments:**

- [03/18/20-Msg#1-Attach:anImage\\_47.tiff](#)

From: MBX OMB FOIA  
To: Joshua Phillips  
Date: Thu Mar 19 2020 11:14:52 GMT-0400 (Eastern Daylight Time)  
Subject: RE: [WARNING: UNSCANNABLE EXTRACTION FAILED][EXTERNAL] Submitting a FOIA Request to the Executive Office of the President (EOP / OMB) (3 of 3)

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Good Morning: This email acknowledges receipt of your Freedom of Information Act (FOIA) request to the Office of Management and Budget (OMB) dated and received in this office on March 18, 2020. Your request has been logged in and is being processed. For your reference, the OMB FOIA number is 2020-277.

Thank you,  
Dionne Hardy

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**From:** Joshua Phillips <foiareporter@gmail.com>  
**Sent:** Wednesday, March 18, 2020 1:16 AM  
**To:** MBX OMB FOIA <MBX.OMB.FOIA@OMB.eop.gov>  
**Subject:** [WARNING: UNSCANNABLE EXTRACTION FAILED][EXTERNAL] Submitting a FOIA Request to the Executive Office of the President (EOP / OMB) (3 of 3)

To Whom it May Concern:

Please see the FOIA request, below, for the **Executive Office of the President (EOP)**, and the **Office of Management and Budget (OMB)**, as well as their contractors, consultants, and any relevant components referenced in my request.

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips

Journalist / Producer

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[foiareporter@gmail.com](mailto:foiareporter@gmail.com)

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**Executive Office of the President (EOP),  
Office of Management and Budget (OMB) FOIA Request**

**Freedom of Information and Privacy Acts request:**

**OMB's FOIA Officer  
Dionne Hardy  
725 17th Street NW, Suite 9204  
Washington, DC 20503**

**(202) 395-FOIA**

Exhibit 8

(202) 395-3504 (fax)

FOIA Requester Service Center: (202) 395-FOIA

E-mail address: [OMBFOIA@omb.eop.gov](mailto:OMBFOIA@omb.eop.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](mailto:foiareporter@gmail.com)

**Phone:** 646.452.9969

**Internal reference number for this FOIA request:** EOP\_OMB\_2020\_03\_18\_3

### REQUEST FOR EXPEDITED PROCESSING

I am requesting expedited processing of this request pursuant to 32 CFR § 1900.34(II). I am a professional journalist primarily engaged in disseminating information. Due to the declaration of a national emergency regarding Coronavirus / Covid-19, there is a clear urgency to inform the public concerning Federal Government activity with regard to Coronavirus / Covid-19. 32 CFR § 1900.34(II) states:

[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 when, under 32 CFR § 1900.34:

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

Here, I meet the criteria for a compelling need for expedited processing of this request.

#### **1. *I am a person primarily engaged in disseminating information***

I am a full-time member of the news media and have reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. I have been awarded a Heywood Broun Award and Alfred I. duPont-Columbia University Award for excellence in broadcast journalism, and reported for an Emmy award-winning FRONTLINE TV documentary. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

#### **2. *Certification pursuant to 32 CFR § 1900.34(c)***

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

### DOCUMENTS REQUESTED

I request disclosure of any and all records for (a) documents requesting, authorizing or reflecting on, about, mentioning or referring to; (b) copies of documents on, about, mentioning or referring to; (c)

copies of any correspondence on, about, mentioning or referring to — or documents generated by any complaints and reports on, about, mentioning or referring to, and; (d) copies of any correspondence on, about, mentioning or referring to — or documents reviewed in any complaints and reports on, about, mentioning or referring to each of the following topics:

1. All policies, orders, decisions, regulations and/or memoranda on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
2. All policy, orders, decisions, regulations and/or memoranda (or memorandums) for any U.S. government staff and their contractors on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
3. All reports, draft reports, and/or notes on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
4. All memoranda (or memorandums) and/or draft memoranda (or draft memorandums) on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
5. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings or presentations on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
6. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to policy, orders, decisions, regulations and/or memoranda (or memorandums) for any and all U.S. government staff, and their contractors, on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
7. All photographs, images, digital data, video and audio recordings, and tape recordings on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
8. All written guidance, instructions, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
9. All records of instructions, training, PowerPoint presentation slides (or equivalent), and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.
10. All contemporaneous notes and/or minutes, presentation notes and/or minutes, notes and/or minutes taken before, during or after meetings regarding and/or referring to instructions, training, and instructional material on, about, mentioning or referring to incident responses and shared experiences and lessons regarding or referring to “major domestic incident(s)” and/or pandemic(s) from January 1, 2017 to the date this request is processed.



## INSTRUCTIONS

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

- **Executive Office of the President (EOP)**, including but not limited to the **Office of Management and Budget (OMB)**, as well as their contractors and consultants.

**1. *Instructions Regarding “Leads”:***

As required by the relevant case law, the **Executive Office of the President (EOP)**, the **Office of Management and Budget (OMB)**, and their 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;***

If any of the records that I requested are publicly available, please indicate (a) where they are accessible and (b) which responsive records they are.

**3. *Request for Electronic and Paper/Manual Searches:***

I request that searches of any and all records on, about, mentioning or referring to the subject of my request may or should include, but not be limited to, electronic and paper/manual indices, filing systems, cross-reference filing systems, and locations. I further request that the **Executive Office of the President (EOP)**, the **Office of Management and Budget (OMB)**, and their aforementioned components conduct a search of its “soft files.”

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

I request that the **Executive Office of the President (EOP)**, the **Office of Management and Budget (OMB)**, and their aforementioned components conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Executive Office of the President (EOP)**, the **Office of Management and Budget (OMB)**, and their aforementioned components may or should include, but not be limited to, any and all filing systems, cross-reference filing systems, indices, and locations.

Also, please search your indices, filing systems, cross-reference 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 **Executive Office of the President (EOP)**, the **Office of Management and Budget (OMB)**, and their 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 regarding and/or referring to tabletop, training exercises, role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s), including but not limited to the following terms incident responses, shared experiences and lessons, Novel influenza, person-to-person transmission, travel bans, lag time, vaccines, ventilator shortages.

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

I request that in conducting its search, the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** disclose releasable records even if they are available publicly through other sources outside the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their 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, which may or should include, but not limited to, any and all of the following:

- **Documents, reports, drafts, memos, memoranda (or memorandums), as well as draft reports, draft documents, draft memos, draft memoranda (or draft memorandums);**
- **Notes, cables, briefings, phone call notes, meeting notes, policy papers, policy statements, press briefings;**
- **Correspondence records, electronic or otherwise, including but not limited to emails, faxes, audio, regular and/or standard mail;**
- **Photographs, images, digital data, video and audio recordings, tape recordings;**
- **PowerPoint presentation slides (or equivalent), bulletins, statistical data, surveys, computer source, object code, technical manuals, technical specifications;**
- **Records of complaints, responses to complaints and results of complaints, investigations, responses to investigations and results of investigations, internal reviews, responses to internal reviews and results of internal reviews, audits, responses to audits and results of audits, reports, responses to reports and results of reports;**

I also request that the search conducted by the **Executive Office of the President (EOP), the Office of Management and Budget (OMB), and their aforementioned components** may or should include, but not be limited to, the following records, documents, filing systems, cross-reference filing systems, indices, and locations:

- **Office of Management and Budget (OMB) E-mail Records and Backup Tapes;**
- **Record Schedule for the Statistical Policy Division, Office of Management and Budget;**
- **Office of Management and Budget Records of the Office of the Director;**
- **Record Schedule for the Human and Community Affairs;**
- **Organization and Special Studies Division, Office Management and Budget;**
- **Information Systems Division, Office of Management and Budget;**
- **Intergovernmental Relations and Regional Operations Division, Office of Management and Budget;**

- **Records Common to the Division Office and Branches;**
- **Intelligence Branch Budgetary Records;**
- **Office of Management and Budget (OMB) Records of the Office of Information and Regulatory Affairs (OIRA);**
- **Any unclassified email traffic transmitted on unclassified networks;**
- **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 regarding and/or referring to the destruction of those records. This includes, but is not limited to, any and all records regarding and/or referring to the events leading to the destruction of those records.

**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 regarding and/or referring 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**

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

As mentioned above, I am a member of the news media and therefore 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 ask that you notify me first if there are any 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.”

#### 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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government. The subject of the requested records concerns identifiable operations and activities of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** and broader government, specifically the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)’s tabletop, training exercises, role-playing scenarios regarding or referring to “major domestic incident(s)” and/or pandemic(s).**

**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 **Executive Office of the President (EOP) and the**

**Office of Management and Budget (OMB)'s tabletop, training exercises, role-playing scenarios regarding or referring to "major domestic incident(s)" and/or pandemic(s).**

The overwhelming preponderance of records I need to conduct my study are in the possession of the **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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 reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

*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, 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*.<sup>1</sup> 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.<sup>2</sup>

**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 **Executive Office of the President (EOP) and the Office of Management and Budget (OMB)** 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.

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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

<sup>1</sup>The language in *National Security Archive v. Department of Defense* reads, “A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381,1387 (D.C. Cir, 1989).

<sup>2</sup>Though the courts have subsequently narrowed the applicability of the *National Security Archive v. Department of Defense* ruling in terms of requirements to qualify as are presentative of the news media (most notably in *Judicial Watch, Inc. v. United States Department Of Justice*), I still solidly satisfy even this narrowed understanding of “representative of the news media.” In contrast to *Judicial Watch*, I have clearly demonstrated a firm intention to disseminate to the public my analysis of requested information. I have identified articles, an exhibit, and a book within which I firmly intend to, and in some cases already have, disseminated my analysis of requested information. I have identified other news media representative whom I have already fruitfully provided my analysis of requested information, and with whom I firmly intend to continue collaborating on future disseminations of requested information. Ultimately, in contrast to *Judicial Watch*, which the court found to “merely make available...the requested information,” I have established “a firm intention to disseminate” my analysis of the requested information. *See Judicial Watch, Inc. v. United States Department of Justice*, 880 F.Supp. 2d 54, 59 (D.D.C. 2002).

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**Attachments:**

- [03/19/20-Msg#4-Attach:image001.png](#)



From: Joshua Phillips  
To: ogcfoiarequests@va.gov  
Date: Mon Apr 27 2020 17:40:20 GMT-0400 (Eastern Daylight Time)  
Subject: Submitting a FOIA Request to the Office of General Counsel (OGC)

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To Whom it May Concern:

Please see the FOIA request, below, for the **Veterans Administration**, and the **Office of General Counsel (OGC)**, as well as their contractors, consultants, and any relevant components referenced in my request.

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips  
  
Journalist / Producer  
  
+1.646.452.9969 - office  
+1.917.842.0755 - mobile  
[foiareporter@gmail.com](mailto:foiareporter@gmail.com)  
-- -- -- -- --

**Veterans Administration,**  
**Office of General Counsel (OGC) FOIA Request**

**Freedom of Information and Privacy Acts request:**

**To:**

**M. Renee Baxter**  
**810 Vermont Avenue, NW**  
**(026H) VACO**  
**Washington, D.C. 20420**

**(202) 461-7860**  
**(202) 273-9299 (Fax)**

**[E-mail: ogcfoiarequests@va.gov](mailto:ogcfoiarequests@va.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](mailto:foiareporter@gmail.com)  
**Phone:** 646.452.9969

REQUEST FOR EXPEDITED PROCESSING

I am requesting expedited processing of this request pursuant to 32 CFR § 1900.34(II). I am a professional journalist primarily engaged in disseminating information. Due to the declaration of a national emergency regarding Coronavirus / COVID-19, there is a clear urgency to inform the public concerning Federal Government activity with regard to Coronavirus / COVID-19, 32 CFR § 1900.34(II) states:

[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 when, under 32 CFR § 1900.34:

(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

Here, I meet the criteria for a compelling need for expedited processing of this request.

**1. *I am a person primarily engaged in disseminating information***

I am a full-time member of the news media and have reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. I have been awarded a Heywood Broun Award and Alfred I. duPont-Columbia University Award for excellence in broadcast journalism, and reported for an Emmy award-winning FRONTLINE TV documentary. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

**2. *Certification pursuant to 32 CFR § 1900.34(c)***

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

DOCUMENTS REQUESTED

I request disclosure of any and all records for **(a)** documents requesting, authorizing or reflecting on, about, mentioning or referring to; **(b)** copies of documents on, about, mentioning or referring to; **(c)** copies of any correspondence on, about, mentioning or referring to — or documents generated by any complaints and reports on, about, mentioning or referring to, and; **(d)** copies of any correspondence on, about, mentioning or referring to — or documents reviewed in any complaints and reports on, about, mentioning or referring to each of the following topics:

1. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees, on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019

or SARS-CoV-2) negligent death complaints, lawsuits and litigation from January 1, 2020 to the date this request is processed.

2. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees, on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation filed under the Federal Tort Claims Act (FTCA) from January 1, 2020 to the date this request is processed.
3. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees and Veterans Administration (VA) Nursing Homes, Community Living Centers, and State Veterans Homes on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation from January 1, 2020 to the date this request is processed.
4. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees and Veterans Administration (VA) Nursing Homes, Community Living Centers, and State Veterans Homes on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation filed under the Federal Tort Claims Act (FTCA) from January 1, 2020 to the date this request is processed.

### INSTRUCTIONS

I request a copy of any and all records for the aforementioned “DOCUMENTS REQUESTED” from the **Veterans Administration (VA)**, including but not limited to the **Office of General Counsel (OGS)**, as well as any of their contractors and consultants.

**1. *Instructions Regarding “Leads”:***

As required by the relevant case law, the **Veterans Administration, Office of General Counsel (OGC)** 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;***

If any of the records that I requested are publicly available, please indicate (a) where they are accessible and (b) which responsive records they are.

**3. *Request for Electronic and Paper/Manual Searches:***

I request that searches of any and all records on, about, mentioning or referring to the subject of my request may or should include, but not be limited to, electronic and paper/manual indices, filing systems, cross-reference filing systems, and locations. I further request that the **Veterans Administration, Office of General Counsel (OGC)** conduct a search of its “soft files.”

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

I request that the **Veterans Administration, Office of General Counsel (OGC)** conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Veterans Administration,**

Office of General Counsel (OGC) may or should include, but not be limited to, the following filing systems, cross-reference filing systems, indices, and locations:

**OGC Privacy Act System of Records**

- **01VA022 System name: Current and Former Accredited Representative, Claims Agent, and Representative and Claims Agent Applicant and Rejected Applicant Records—VA**
- **05VA026 System name: Individual Correspondence Records-VA.**
- **06VA026 System name: Claimant Private Relief Legislative Files-VA.**
- **16VA026 System name: Litigation Files – VA**
- **144VA026 System name: GCLAWS – General Counsel Legal Automated Workload System**

Also, please search your indices, filing systems, cross-reference 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 **Veterans Administration, Office of General Counsel (OGC)** 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 regarding and/or referring to **Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation**, including but not limited to the following terms **Veterans Administration (VA) Nursing Homes, Community Living Centers, State Veterans Homes, negligent death lawsuits, and Federal Tort Claims Act (FTCA)**.

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

I request that in conducting its search, the **Veterans Administration, Office of General Counsel (OGC)**

disclose releasable records even if they are available publicly through other sources outside the **Veterans Administration, Office of General Counsel (OGC)**.

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, which may or should include, but not limited to, any and all of the following:

- **Documents, reports, drafts, memos, memoranda (or memorandums), as well as draft reports, draft documents, draft memos, draft memoranda (or draft memorandums);**
- **Notes, cables, briefings, phone call notes, meeting notes, policy papers, policy statements, press briefings;**
- **Correspondence records, electronic or otherwise, including but not limited to emails, faxes, audio, regular and/or standard mail;**
- **Photographs, images, digital data, video and audio recordings, tape recordings;**
- **PowerPoint presentation slides (or equivalent), bulletins, statistical data, surveys, computer source, object code, technical manuals, technical specifications;**
- **Records of complaints, responses to complaints and results of complaints, investigations, responses to investigations and results of investigations, internal reviews, responses to internal reviews and results of internal reviews, audits, responses to audits and results of audits, reports, responses to reports and results of reports;**

I also request that the search conducted by the **Veterans Administration, Office of General Counsel (OGC)** may or should include, but not be limited to, the following records, documents, filing systems, cross-reference filing systems, indices, and locations:

- Any Inspector General reviews or audits of investigations;
- Unclassified email traffic transmitted on unclassified networks;
- Also, please search all of your indices, filing systems, cross-reference 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 regarding and/or referring to the destruction of those records. This includes, but is not limited to, any and all records regarding and/or referring to the events leading to the destruction of those records.

**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 regarding and/or referring 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**

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**

As mentioned above, I am a member of the news media and therefore 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 ask that you notify me first if there are any 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.”

**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 **Veterans Administration, Office of General Counsel (OGC)** and broader government. The subject of the requested records concerns identifiable operations and activities of the **Veterans Administration, Office of General Counsel (OGC)** and broader government, specifically the **Veterans Administration, Office of General Counsel (OGC)’s Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation.**

**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 **Veterans Administration, Office of General Counsel (OGC)’s Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation.**

The overwhelming preponderance of records I need to conduct my study are in the possession of the **Veterans Administration, Office of General Counsel (OGC)** 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 reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

*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, 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*.<sup>1</sup> 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.<sup>2</sup>

**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 **Veterans Administration, Office of General Counsel (OGC)** 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.

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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

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<sup>1</sup>The language in *National Security Archive v. Department of Defense* reads, “A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381,1387 (D.C. Cir, 1989).

<sup>2</sup>Though the courts have subsequently narrowed the applicability of the *National Security Archive v. Department of Defense* ruling in terms of requirements to qualify as are presentative of the news media (most notably in *Judicial Watch, Inc. v. United States Department Of Justice*), I still solidly satisfy even this narrowed understanding of “representative of the news media.” In contrast to *Judicial Watch*, I have clearly demonstrated a firm intention to disseminate to the public my analysis of requested information. I have identified articles, an exhibit, and a book within which I firmly intend to, and in some cases already have, disseminated my analysis of requested information. I have identified other news media representative whom I have already fruitfully provided my analysis of requested information, and with whom I firmly intend to continue collaborating on future disseminations of requested information. Ultimately, in contrast to *Judicial Watch*, which the court found to “merely make available...the requested information,” I have established “a firm intention to disseminate” my analysis of the requested information. *See Judicial Watch, Inc. v. United States Department of Justice*, 880 F.Supp. 2d 54, 59 (D.D.C. 2002).

**Attachments:**

- [04/27/20-Msg#1-Attach:anImage\\_0.tiff](#)

From: Joshua Phillips  
To: ogcfoiarequests@va.gov  
Date: Fri May 15 2020 16:36:47 GMT-0400 (Eastern Daylight Time)  
Subject: Following up on a FOIA request filed to your office on 4/27/20

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To Whom it May Concern:

On April 27, 2020, I filed a FOIA request (below) to your office. In my FOIA, I included a request for expedited processing. So far, I have not received any kind of acknowledgement letter from your office nor any indication about whether your office will grant my request for expedited processing.

I request that you please provide me with this information at your earliest convenience -- or feel free to contact me at this email address or via my phone (917.842.0755).

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips  
  
Journalist / Producer  
  
+1.646.452.9969 - office  
+1.917.842.0755 - mobile  
[foiareporter@gmail.com](mailto:foiareporter@gmail.com)  
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*The following includes the email message and FOIA request that I filed to your office on April 27, 2020...*

To Whom it May Concern:

Please see the FOIA request, below, for the **Veterans Administration**, and the **Office of General Counsel (OGC)**, as well as their contractors, consultants, and any relevant components referenced in my request.

Thank you for your assistance.

Regards,

Joshua Phillips

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Joshua Phillips  
Journalist / Producer  
+1.646.452.9969 - office  
+1.917.842.0755 - mobile  
[foiareporter@gmail.com](mailto:foiareporter@gmail.com)  
-- -- -- -- --

**Veterans Administration,**  
**Office of General Counsel (OGC) FOIA Request**

**Freedom of Information and Privacy Acts request:**

**To:**

**M. Renee Baxter**  
**810 Vermont Avenue, NW**  
**(026H) VACO**  
**Washington, D.C. 20420**

**(202) 461-7860**  
**(202) 273-9299 (Fax)**

**[E-mail: ogcfoiarequests@va.gov](mailto:ogcfoiarequests@va.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](mailto:foiareporter@gmail.com)  
**Phone:** 646.452.9969

**REQUEST FOR EXPEDITED PROCESSING**

I am requesting expedited processing of this request pursuant to 32 CFR § 1900.34(II). I am a professional journalist primarily engaged in disseminating information. Due to the declaration of a national emergency regarding Coronavirus / COVID-19, there is a clear urgency to inform the public concerning Federal Government activity with regard to Coronavirus / COVID-19, 32 CFR § 1900.34(II) states:

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(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

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**1. I am a person primarily engaged in disseminating information**

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**2. Certification pursuant to 32 CFR § 1900.34(c)**

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

**DOCUMENTS REQUESTED**

I request disclosure of any and all records for **(a)** documents requesting, authorizing or reflecting on, about, mentioning or referring to; **(b)** copies of documents on, about, mentioning or referring to; **(c)** copies of any correspondence on, about, mentioning or referring to — or documents generated by any complaints and reports on, about, mentioning or referring to, and; **(d)** copies of any correspondence on, about, mentioning or referring to — or documents reviewed in any complaints and reports on, about, mentioning or referring to each of the following topics:

1. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees, on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation from January 1, 2020 to the date this request is processed.
2. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees, on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation filed under the Federal Tort Claims Act (FTCA) from January 1, 2020 to the date this request is processed.
3. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees and Veterans Administration (VA) Nursing Homes, Community Living Centers, and State Veterans Homes on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation from January 1, 2020 to the date this request is processed.
4. Any and all correspondence records — electronic or otherwise, including but not limited to emails and recorded telephone messages — to, from, and carbon copied (or “cc”) to the Veterans Administration’s Office of General Counsel (OGS) staff senior leadership and political appointees

and Veterans Administration (VA) Nursing Homes, Community Living Centers, and State Veterans Homes on, about, mentioning or referring to Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation filed under the Federal Tort Claims Act (FTCA) from January 1, 2020 to the date this request is processed.

### **INSTRUCTIONS**

I request a copy of any and all records for the aforementioned “DOCUMENTS REQUESTED” from the **Veterans Administration (VA)**, including but not limited to the **Office of General Counsel (OGS)**, as well as any of their contractors and consultants.

**1. *Instructions Regarding “Leads”:***

As required by the relevant case law, the **Veterans Administration, Office of General Counsel (OGC)** 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;***

If any of the records that I requested are publicly available, please indicate (a) where they are accessible and (b) which responsive records they are.

**3. *Request for Electronic and Paper/Manual Searches:***

I request that searches of any and all records on, about, mentioning or referring to the subject of my request may or should include, but not be limited to, electronic and paper/manual indices, filing systems, cross-reference filing systems, and locations. I further request that the **Veterans Administration, Office of General Counsel (OGC)** conduct a search of its “soft files.”

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

I request that the **Veterans Administration, Office of General Counsel (OGC)** conduct a search of all of its directorates. Specifically, I request that the search conducted by the **Veterans Administration, Office of General Counsel (OGC)** may or should include, but not be limited to, the following filing systems, cross-reference filing systems, indices, and locations:

**OGC Privacy Act System of Records**

- **01VA022 System name: Current and Former Accredited Representative, Claims Agent, and Representative and Claims Agent Applicant and Rejected Applicant Records—VA**
  
- **05VA026 System name: Individual Correspondence Records-VA.**
  
- **06VA026 System name: Claimant Private Relief Legislative Files-VA.**
  
- **16VA026 System name: Litigation Files – VA**

- **144VA026 System name: GCLAWS – General Counsel Legal Automated Workload System**

Also, please search your indices, filing systems, cross-reference 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 **Veterans Administration, Office of General Counsel (OGC)** 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 regarding and/or referring to **Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation**, including but not limited to the following terms **Veterans Administration (VA) Nursing Homes, Community Living Centers, State Veterans Homes, negligent death lawsuits, and Federal Tort Claims Act (FTCA)**.

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

I request that in conducting its search, the **Veterans Administration, Office of General Counsel (OGC)** disclose releasable records even if they are available publicly through other sources outside the **Veterans Administration, Office of General Counsel (OGC)**.

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, which may or should include, but not limited to, any and all of the following:

- **Documents, reports, drafts, memos, memoranda (or memorandums), as well as draft reports, draft documents, draft memos, draft memoranda (or draft memorandums);**
- **Notes, cables, briefings, phone call notes, meeting notes, policy papers, policy statements, press briefings;**
- **Correspondence records, electronic or otherwise, including but not limited to emails, faxes, audio, regular and/or standard mail;**



- **Photographs, images, digital data, video and audio recordings, tape recordings;**
- **PowerPoint presentation slides (or equivalent), bulletins, statistical data, surveys, computer source, object code, technical manuals, technical specifications;**
- **Records of complaints, responses to complaints and results of complaints, investigations, responses to investigations and results of investigations, internal reviews, responses to internal reviews and results of internal reviews, audits, responses to audits and results of audits, reports, responses to reports and results of reports;**

I also request that the search conducted by the **Veterans Administration, Office of General Counsel (OGC)** may or should include, but not be limited to, the following records, documents, filing systems, cross-reference filing systems, indices, and locations:

- Any Inspector General reviews or audits of investigations;
- Unclassified email traffic transmitted on unclassified networks;
- Also, please search all of your indices, filing systems, cross-reference 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 regarding and/or referring to the destruction of those records. This includes, but is not limited to, any and all records regarding and/or referring to the events leading to the destruction of those records.

**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 regarding and/or referring 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**

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**

As mentioned above, I am a member of the news media and therefore 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 ask that you notify me first if there are any 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.”

**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 **Veterans Administration, Office of General Counsel (OGC)** and broader government. The subject of the requested records concerns identifiable operations and activities of the **Veterans Administration, Office of General Counsel (OGC)** and broader government, specifically the **Veterans Administration, Office of General Counsel (OGC)’s Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation.**

**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 **Veterans Administration, Office of General Counsel (OGC)’s Coronavirus or COVID-19 (or novel coronavirus disease-2019 or SARS-CoV-2) negligent death complaints, lawsuits and litigation.**

The overwhelming preponderance of records I need to conduct my study are in the possession of the **Veterans Administration, Office of General Counsel (OGC)** 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 reported for several news organizations including, most recently, the Center for Public Integrity and NPR. My work has also appeared in the *Washington Post*, *Newsweek*, *The Atlantic*, NPR, *The Nation*, *The Daily Beast*, *Salon*, the *San Francisco Chronicle*, and the *Atlanta Journal-Constitution*, among other publications. I have also reported and produced broadcast features for NPR, ProPublica, FRONTLINE, the BBC, Public Radio International (PRI), the Center for Investigative Reporting / *Reveal*, the Center for Public Integrity, PRX and Al Jazeera. And I have authored a book titled, *None of Us Were Like This Before: American Soldiers and Torture* (Verso Books, 2010).

*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

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*.<sup>1</sup> 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.<sup>2</sup>

**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 **Veterans Administration, Office of General Counsel (OGC)** 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.

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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

<sup>1</sup>The language in *National Security Archive v. Department of Defense* reads, “A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience.” *National Security Archive v. Department of Defense*, 880 F.2d 1381,1387 (D.C. Cir, 1989).

<sup>2</sup>Though the courts have subsequently narrowed the applicability of the *National Security Archive v. Department of Defense* ruling in terms of requirements to qualify as are presentative of the news media (most notably in *Judicial Watch, Inc. v. United States Department Of Justice*), I still solidly satisfy even this narrowed understanding of “representative of the news media.” In contrast to *Judicial Watch*, I have clearly demonstrated a firm intention to disseminate to the public my analysis of requested information. I have identified articles, an exhibit, and a book within which I firmly intend to, and in some cases already have, disseminated my analysis of requested information. I have identified other news media representative whom I have already fruitfully provided my analysis of requested information, and with whom I firmly intend to continue collaborating on future disseminations of requested information. Ultimately, in contrast to *Judicial Watch*, which the court found to “merely make available...the requested information,” I have established “a firm intention to disseminate” my analysis of the requested information. See *Judicial Watch, Inc. v. United States Department of Justice*, 880 F.Supp. 2d 54, 59 (D.D.C. 2002).

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**Attachments:**

- [05/15/20-Msg#1-Attach:anImage\\_0.tiff](#)