



OFFICE OF THE SECRETARY OF DEFENSE  
1950 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1950

ADMINISTRATION AND  
MANAGEMENT

Ref: 09-A-0890

JUL 14 2009

Ms. Melissa Goodman  
Staff Attorney  
American Civil Liberties Union (ACLU) Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004-2400

Dear Ms. Goodman:

This responds to your June 12, 2009, Freedom of Information Act (FOIA) appeal. You appealed the Office of Freedom of Information (OFOI) decision of May 6, 2009, to deny media status and expedited processing in response to your April 23, 2009, FOIA request.

I have reviewed your appeal at the appellate level and I have determined that your request to be classified as a "representative of the news media" should be denied. The FOIA sets three standards that must be met for a requester to qualify as a representative of the news media:

1. Requester must be a person or entity that gathers information of potential interest (news) to a segment of the public. The FOIA defines 'news' as information that is about current events or that would be of current interest to the public.
2. Requester must use its editorial skills to turn the raw materials into a distinct work.
3. Requester must distribute that work to an audience.

After reviewing your appeal, I have determined that you do not meet standards 1 and 3, as listed above. The first criterion that must be met to be considered a representative of the news media is that the requester gathers the information in the public interest. Representatives of the news media normally are organized to seek out and gather information generated by public interest, not information generated by internal interests the organizations may have. This is what qualifies these organizations to be considered as members of the news media. However, the ACLU selectively chooses what information to seek out and gather. This information is generally selected to promote or advocate the legislative and policy proposals the ACLU supports. This may allow the ACLU to claim to be "our nation's guardian of liberty," but it does not qualify it as a representative of the

news media. Additionally, you have not proven that you have the ability to disseminate the requested information to the general public. You state that the ACLU issues newsletters and reports throughout the year. These products do not reach the general public and primarily serve to update your membership on your group's activities. Much of the information you publish is not news, but promotes policy proposals and lobbies for various issues. Because you do not meet the standards set by the FOIA, you do not qualify as a "representative of the news media."

You sought expedited processing on the basis of compelling need. DoD Regulation 5400.7-R § C1.5.4.3.2. states that compelling need "means that the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity." As stated above, I have determined that the ACLU is not primarily engaged in disseminating information to the general public. Additionally, the U.S. District Court has declared a three-pronged test to determine "compelling need" based on whether or not the information is "urgently needed" (*Al-Fayed v. CIA*, 245 F.3d 300 (D.C. Cir. 2001)). The three prongs of the test are as follows:

1. Whether the request concerns a matter of current exigency to the American Public.
2. Whether the consequences of delaying a response would compromise a significant recognized interest.
3. Whether the request concerns federal government activity.

I have determined that your initial request meets the third prong of the "urgently needed" test. However, I have determined that you have not met the first or second prongs of the test. You do not meet the standard of the first prong because information about the Bagram detention facility (including its purpose, lists of prisoners, conditions, actions of the guards and interrogations) has been made public over the last several years by the release of government documents and numerous stories by members of the media. The Bagram detention facility is no longer a "breaking news story," nor is it a matter of current exigency to the American people. Additionally, you do not meet the second prong because you have not proven that the consequences of delaying a response would compromise a significant recognized interest. You state that "the critical detention policy debate is happening now and it will reach its climax in the coming months." You have offered no proof that the debate regarding this facility will end in the coming months or identified an imminent action indicating the requested information will lose its value if it is procured through the normal FOIA channels.

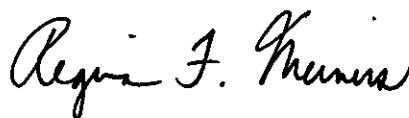
In *Al-Fayed v. CIA*, the District Court also states that the legislative history of the FOIA declares that "the specified categories for compelling need are intended to be narrowly applied," because "given the finite resources generally available for fulfilling

FOIA requests, unduly generous use of the expedited processing procedure would unfairly disadvantage other requesters who do not qualify for its treatment.” The court then concludes that “an unduly generous approach would also disadvantage those requesters who do qualify for expedition, because prioritizing all requests would effectively prioritize none.” Because you have not proven a compelling need for the information, OFOI will continue to process your request in the standard queue.

Since you do not qualify for media status, you have been placed in the “other” fee category and are ineligible for a reduction in FOIA fees. In your letter dated June 1, 2009, you agreed to pay up to \$200 in FOIA fees. Therefore, you will receive six and a half hours of search time as an “other” requester (two hours free search time as an “other” requester and four and a half hours at the rate of \$44 per hour). Your fee waiver request will be considered once the search for responsive documents has been completed and the volume and nature of any responsive documents have been determined. At that time, OFOI will determine if disclosure of the information “contributes significantly to public understanding of the operations or activities of the Government” and whether disclosure of the information “is not primarily in the commercial interest of the requester.” Please note that previous instances where your organization may have been granted a reduction or waiver of FOIA fees are not relevant as fee waivers are granted on a case-by-case basis.

You have the right to judicial review of this decision in a United States District Court, in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,



Regina F. Meiners  
Acting Deputy Director