

centerforconstitutionalrights

on the front lines for social justice

August 13, 2010

FOIA/PA
c/o Vania T. Lockett
Associate Director, Disclosure & FOIA Operations
The Privacy Office
U.S. Department of Homeland Security
245 Murray Drive, SW
STOP-0655
Washington, D.C. 20528-0655

Re: FREEDOM OF INFORMATION ACT RESUBMISSION
Reference No. DHS/OS/PRIV 10-0824

Dear Ms. Lockett:

On June 30, 2010, the Center for Constitutional Rights (“CCR”) filed a request for information under the Freedom of Information Act (“FOIA”) *inter alia* “seeking all records, regardless of format, medium, or physical characteristics, and including electronic records and information, audiotapes, videotapes and photographs, that reflect, relate or refer to... the May 31, 2010 Israeli military operation that occurred in international waters in the Mediterranean Sea involving a six-boat flotilla headed to Gaza with humanitarian supplies, including the U.S.-registered ‘*Challenger I*’ and the Comoros-registered ‘*Mavi Marmara*,’ which was forcefully intercepted by the Israeli Defense Forces, resulting in the death of 9 passengers on board the *Mavi Marmara* including one U.S. citizen and the injury of many more.” See Exhibit A.

In a letter dated July 15, 2010 and received in our office via facsimile on that date, the Department of Homeland Security (“DHS”) issued a response, stating that our request was too “limited,” suggesting that this was a matter under the purview of the Department of State, and requesting a resubmission of our request “containing a reasonable description of the records” we seek. See Exhibit B. (On June 30, 2010, CCR submitted requests to both the State Department and the Coast Guard for information related to the 31 May 2010 Israeli military operation against the Gaza flotilla. To date, no response has been received from the Department of State, and the Coast Guard responded in a letter dated July 19, 2010 in a final response, stating that no responsive records were located (FOIA-10-2771). We will be appealing the Coast Guard’s final response.)

Based on publically available information about the scope of DHS’s mandate, we have reason to believe that the information requested falls within DHS’s ambit, whose five main responsibilities include, but are not limited to, guarding against “terrorism” and protecting the United States and Americans citizens. In particular and without limiting the areas that could fall within the scope of the Request, the information sought could be found within the DHS’ Office of Intelligence and Analysis as well as pursuant to The Agreement between the United States of

centerforconstitutionalrights
on the front lines for social justice

America And Israel on Cooperation in Science and Technology for Homeland Security Matters (hereinafter “The Agreement”). The Agreement’s objective stated in Article 2 demonstrates the likelihood that the information we request falls under DHS’s or control: 2 “to establish a framework to initiate, encourage, develop and facilitate bilateral Cooperative Activities in homeland security-related science and technology, or with respect to other homeland security matters that contributes to the homeland security capabilities of both Parties in (c) the planning for an emergency, crises response, recovery and consequence management and mitigation for his-consequence events; [...] (i) exchange of information regarding emergency planning, response, recovery and mitigation; [...] and (k) other homeland security-related activities as determined by the Parties.” The Israeli Embassy has also remarked on the close relationship between the DHS and Israel and noted on its website that “American and Israeli law enforcement officers and Homeland Security officials regularly meet in both countries to study counter-terrorism techniques and new ideas regarding intelligence gathering and threat prevention.”¹

Particularly in light of The Agreement’s objective and Article 3, which states that Israel and the United States will exchange technologies, personnel and information, collaborate to develop technologies to counter “terrorist actions,” facilitate “prompt exchange of information” and facilitate the dissemination of information “consistent with applicable national laws, regulations, policies and directives,” and taking into account that the mandate of the Office of Intelligence and Analysis includes ensuring that “information related to homeland security threats is collected, analyzed, and disseminated,” CCR seeks in this resubmission of our FOIA request all records, regardless of format, medium, or physical characteristics, and including electronic records and information, audiotapes, videotapes and photographs, that reflect, relate or refer to:

- (1) Any and all records since January 1, 2010 that relate to and reflect any and all plans, reports, documents, discussions, meetings, or other communications, whether in person, by phone, mail, instant message, email, or any other method, that mention, refer or relate to any vessels or a flotilla of boats destined for Gaza in May 2010, including the U.S.-flagged *Challenger I*. Our request includes, but is not limited to records reflecting communications with inter-governmental organizations, such as the North Atlantic Treaty Organization (NATO), foreign governments, including the Government of Israel, and any communications with other agencies, departments or divisions of the United States, including but not limited to any communications which relate to possible, planned, or executed actions by the U.S. government in the Mediterranean Sea in response to Israel’s military operations at sea;

This request also includes but is not limited to:

- (2) Any and all records reflecting communications, in any format, with the Israel Defense Forces, or any other division, department or representative of the Government of Israel, either due to the requirements under The Agreement, specifically Article

¹ See, <http://www.israelemb.org/US-Israel-Relations/strategic-co-op.html>.

centerforconstitutionalrights
on the front lines for social justice

- 6(1)(c), or otherwise, prior to, on, or after May 31, 2010 in relation to the U.S.-registered *Challenger I*, including any requests, notices or indications from the Israeli government, including by and through the IDF, of its intentions to block, board or otherwise redirect the U.S.-registered vessel to a destination other than its intended destination of Gaza, and any responses to such requests, notices or indications of actions by the Israeli government;
- (3) Any and all records reflecting communications, in any format, with the Israel Defense Forces, or any other division, department or representative of the Government of Israel, either due to the requirements under The Agreement, specifically Article 6(1)(c), or otherwise, prior to, on, or after May 31, 2010 in relation to vessels included in the flotilla of boats destined to Gaza in May 2010, other than the U.S.-registered *Challenger I*, including any requests, notices or indications from the Israeli government, including by and through the IDF, of its intentions to block, board or otherwise redirect any vessel to a destination other than its intended destination of Gaza, and any responses to such requests, notices or indications of actions by the Israeli government;
- (4) Any and all records reflecting communications in any format with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, including but not limited to those communications pursuant to The Agreement, on or after May 31, 2010, in relation to the actions that occurred on board each of the six boats of the flotilla, including the U.S.-registered “*Challenger P*” and the “*Mavi Marmara*,” including but not limited to information regarding the status of U.S. and non-U.S. passengers, including the injured and the dead, while on board the vessels or in Israel, including in detention or medical facilities or other facilities, following the interception of the flotilla by Israel;
- (5) Any and all records reflecting communications in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to whereabouts, condition and status of the *Challenger I*, including the property on board that vessel and/or belonging to the passengers on board that vessel, and its return, including but not limited to information gathered or received pursuant to The Agreement and also in light of the Office of Intelligence and Analysis’ role to monitor foreign government initiatives that affect U.S. border security, threats of weapons of mass destruction, and threats of particular groups entering or reentering the United States;
- (6) Any and all records reflecting communications in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to whereabouts, condition and status of vessels included in the flotilla of boats destined to Gaza in May 2010, other than the U.S.-registered *Challenger I*, including the property on board each vessel and/or

centerforconstitutionalrights

on the front lines for social justice

belonging to the passengers on board that vessel, and its return, in particular but not limited to, those records gathered or received in accordance with The Agreement, specifically Article 3(1)(j), which requires facilitating a prompt exchange of information of Equipment and Material which may affect Cooperative Activity;

- (7) Any and all records reflecting communications, including but not limited to the transmission or exchange of instructions, guidelines, policy statements or standard operation procedures, in any format, with the Israel Defense Forces, or another other division, department or representative of the Government of Israel, on or after May 31, 2010 in relation to the preservation and safeguarding of any and all possible evidence or materials seized by or in the possession of Israel from, related to or relevant to the incident, including but not limited to computers, cameras, cell phones, SIM cards, personal devices, computer disks or memory chips, hard drives or other such devices, so as to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in any and all subsequent investigatory proceedings, including but not limited to criminal, civil or administrative proceedings, including but not limited to those gathered or received in accordance with The Agreement, specifically Article 3(1)(j), which requires facilitating a prompt exchange of information of Equipment and Material which may affect Cooperative Activity; and
- (8) Any and all records, including but not limited to those pursuant to The Agreement Article 6(1)(c), including but not limited to plans, reports, communications, instructions and documents since at least June 1, 2007 that relate to U.S. actions, policies, procedures or guidelines in relation to interception, inspection, safe-passage or any other action or response to vessels in the Mediterranean Sea that have as their destination Gaza, including but not limited to vessels undertaking humanitarian missions in response to the Israeli blockade of Gaza.

Please search for responsive records regardless of format, medium, or physical characteristics. Where possible, please produce records electronically, in PDF or TIF format on a CD-ROM. We seek records of any kind, including electronic records, audiotapes, videotapes, photographs, including satellite imagery where available, and back-up tapes. Our request includes any telephone messages, voice mail messages, daily agenda and calendars, information about scheduled meetings and/or discussions, whether in-person or over the telephone or via video-conference, agendas for those meetings and/or discussions, participants included in those meetings and/or discussions, minutes of any such meetings and/or discussions, the topics discussed at those meetings and/or discussions, email regarding meetings and/or discussions, email, facsimiles, cables or other communications sent as a result of those meetings and/or discussions, and transcripts and notes of any such meetings and/or discussions to the extent they relate to the aforementioned requested information.

centerforconstitutionalrights

on the front lines for social justice

The Requester

The Center for Constitutional Rights (“CCR”) is a not-for-profit, public interest, legal, and public education organization that engages in litigation, public advocacy, and the production of publications in the fields of civil and international human rights. CCR’s diverse dockets include litigation and advocacy related to human rights in times of armed conflict or occupation, as well as the protection of human rights defenders. CCR is a member of human rights networks nationally and internationally, and provides legal support to human rights defenders and movements. One of CCR’s primary activities is the publication of newsletters, know-your-rights handbooks, legal analysis of current international law issues, and other similar materials for public dissemination. These and other materials are available through CCR’s Development, Communications, and Education & Outreach Departments. CCR operates a website, www.ccrjustice.org, which addresses the issues on which the Center works. The website includes material on topical civil and human rights issues and material concerning CCR’s work. All of this material is freely available to the public. In addition, CCR regularly issues press releases and operates a listserv of over 50,000 members and issues “action alerts” that notify supporters and the general public about developments and operations pertaining to CCR’s work. CCR staff members often serve as sources for journalist and media outlets, including on international human rights.

Fee Waiver

CCR qualifies as a “representative[] of the news media” and the requested records are not sought for commercial use. Accordingly, we request a waiver of fees on the grounds that disclosure of the requested records is in the public interest and because disclosure “is likely to contribute significantly to the public understanding of the activities or operations of the government and is not primarily in the commercial interest of the requester[s].” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k) (records furnished without charge if the information is in the public interest, and disclosure is not in the commercial interest of institution). *See, e.g., McClellan Ecological v. Carlucci*, 835 F.2d 1282, 1285 (9th Cir. 1987).

The Requesters have a proven track-record of compiling and disseminating information to the public about government functions and activities, including the government’s record and position on international human rights and policy matters, and plans to disseminate any information disclosed as a result of this FOIA request through the channels described above. The Requesters have undertaken this work in the public interest and not for any private commercial interest. Similarly, the primary purpose of this FOIA request is to obtain information to further the public’s understanding of the U.S. government’s role in, and response, to an international incident which involved U.S. citizens, U.S. property, including a vessel registered in accordance with international regulations and entitled to certain protections under domestic and international law, and has involved the United States in formulating an international response to both the May 31, 2010 attack on the flotilla and the blockade of Gaza. Indeed, the Requesters have made the

centerforconstitutionalrights
on the front lines for social justice

FOIA requests filed to date related to the May 2010 attack on the flotilla, including the initial request to DHS, public through their web-site and through a press release,² and additional news outlets have reported on the Requests.³ As such, the subject of this request concerns the operations of the federal government and expenditures, and the disclosures will likely contribute to a better understanding of relevant government procedures by CCR and the general public in a significant way.

The public has an interest in knowing about the manner in which the federal government prepared for, and responded to, information regarding a possible attack on the flotilla destined for Gaza in May 2010. The public further has an interest in knowing what steps the United States took, and continues to take, in securing the rights and protections of U.S. citizens, and their property vis-à-vis a foreign military, and what steps the United States took to ensure that civilians of all nationalities engaged in stated humanitarian missions are protected from attack, in accordance with domestic policies and laws, and international humanitarian law.

The public further has an interest in knowing what the United States policy was, and is, in relation to the blockade of Gaza, including in relation to the list of prohibited goods including but not limited to spices, toys and candy that do not have a military purpose, and the delivery of humanitarian assistance to the civilian population of Gaza.

As stated above, the Requesters have no commercial interest in this matter. The Requesters will make any information that they receive as a result of this FOIA request available to the public, including the press, at no cost. Disclosure in this case therefore meets the statutory criteria, and a fee waiver would fulfill Congress' legislative intent in amending FOIA. *See Judicial Watch Inc. v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) ("Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers of noncommercial requesters.'").

Alternatively, we request a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("[F]ees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media."). CCR is an "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." *National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Publishing and disseminating information are some of our primary activities. As a "representative of the news media," we fit within this statutory and regulatory mandate. Therefore, fees associated with the processing of this Request should be limited accordingly.

² See, <http://www.ccrjustice.org/newsroom/press-releases/rights-group-files-foia-requests-regarding-israel-attack-flotilla-delivering-aid-gaza>.

³ See, "Rights group probes US agencies on foreknowledge of Israeli flotilla raid," Stephen C. Webster, July 1, 2010 available at: <http://rawstory.com/rs/2010/0701/rights-group-probes-agencies-foreknowledge-israeli-flotilla-raid/>; "Rights group seeks information on US knowledge of Israel flotilla raid," Hillary Stemple, July 2, 2010 available at: <http://jurist.org/paperchase/2010/07/rights-group-seeks-information-on-us-knowledge-of-israel-flotilla-raid.php>.

Expedited Processing

Expedited processing of this request is required because there is a “compelling need” for the information. 5 U.S.C. § 552(a)(6)(E)(i)(I). A “compelling need” is established when there exists an “urgency to inform the public concerning actual or alleged Federal Government activity,” when the requester is a “person primarily engaged in disseminating information,” 6 C.F.R. § 5.5(d)(ii).

There is an urgent need to inform the public of the policies, procedures, guidelines, action, responses or instructions given by the federal government to agencies, departments or divisions, about preparation, participation or reaction to attacks on U.S.- registered boats in international waters, to vessels with U.S. citizens onboard, or to vessels with civilians, including but not limited to civilians transporting humanitarian supplies. This request is urgent in that U.S. citizens or U.S.-registered vessels must know the support, protection, reactions and any actions or inactions they can expect from the United States government in the event that they are subject to attack, detention or deportation. In light of reports that US citizens are preparing to travel by ship on similar missions to that of the May 2010 Gaza flotilla, which came under attack by the IDF, such information is urgent.⁴

Further, in light of pending international investigations, whether criminal, civil or disciplinary in nature, and in light of the U.S. position, involvement or assistance in relation to such an investigation,⁵ there is an urgent need to inform the public of the policies, procedures, requests, demands or any other responses, actions or inactions, the United States has made to the government of Israel to safeguard evidence gathered in relation to the May 31, 2010 attack on the flotilla, including but not limited to the preservation of property in its original form seized by the government of Israel including but not limited to computers, cameras, cell phones, personal devices that have memory chips, hard drives or other such devices, and to ensure that evidence has not been destroyed, tampered with, altered or otherwise rendered suspect or unusable in subsequent investigatory proceedings. In light of the announced Israeli investigation and the commencement of work by that investigation commission,⁶ this matter is urgent.

⁴ See, e.g., “Americans organizing ship for Gaza flotilla,” JTA, July 21, 2010, available at: <http://www.jta.org/news/article/2010/07/21/2740136/amreicans-organize-ship-to-join-flotilla-to-gaza>; R. Mackey, “American Activists Plan Gaza Flotilla Ship Named for Obama Book,” New York Times, July 20, 2010, available at: <http://thelede.blogs.nytimes.com/2010/07/20/american-activists-plan-gaza-flotilla-ship-named-for-obama-book/>; and <http://ustogaza.org/>. See also, Y. Katz, “Future flotillas will be stopped,” The Jerusalem Post, August 12, 2010, available at: <http://www.jpost.com/Israel/Article.aspx?id=184473>.

⁵ See, Statement by the President of the Security Council, S/PRST/2010/9, June 1, 2009, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/382/79/PDF/N1038279.pdf?OpenElement> (calling for “a prompt, impartial, credible and transparent investigation conforming to international standards”); “United Nations Human Rights Council Panel to investigate Israeli raid on Gaza flotilla established,” available at: July, 23, 2010 available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10230&LangID=E>; “UN chief announces panel of inquiry into Gaza flotilla incident,” August 2, 2010, available at: <http://www.un.org/apps/news/story.asp?NewsID=35607&Cr=flotilla&Cr1=>.

⁶ See, “Statement by the Press Secretary on Israel’s investigation into the flotilla incident,” The White House, Office of the Press Secretary, June 13, 2010 available at: <http://www.whitehouse.gov/the-press-office/statement-press->

centerforconstitutionalrights
on the front lines for social justice

The Requester certifies that the above information is true and correct to the best of the Requesters' knowledge. *See* 6 C.F.R. § 5.5(d)(3).

Conclusion

If this Request is denied in whole or in part, CCR ask that the Department of Homeland Security justify all deletions by reference to specific exemptions of FOIA. The Requester expects DHS to release all segregable portions of otherwise exempt material, and reserves the right to appeal a decision to withhold any records or to deny the within application for expedited processing and waiver of fees.

If you have any questions regarding the processing of this request, please contact me at (212) 614-6455. Also, if CCR's request for a fee waiver is not granted in full, please contact me immediately upon making such determination. Please furnish all applicable Records to: Katherine Gallagher, Staff Attorney, Center for Constitutional Rights, 666 Broadway, 7th Floor, New York, N.Y. 10012.

Thank you for your prompt attention to this matter.

Sincerely,



Katherine Gallagher
Senior Staff Attorney
Center for Constitutional Rights
666 Broadway, 6th Floor
New York, NY 10012
Phone: (212)614-6455

[secretary-israels-investigation-flotilla-incident](#); I. Lemberg, "Israel opens official probe into deadly flotilla raid," CNN, June 28, 2010, available at: <http://www.cnn.com/2010/WORLD/meast/06/28/israel.raid.commission/index.html>; I. Kershner, "Netanyahu Speaks in Flotilla Inquiry," New York Times, August 9, 2010, available at: <http://www.nytimes.com/2010/08/10/world/middleeast/10flotilla.html?scp=1&sq=israel%20flotilla%20inquiry&st=cse>.