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on the front lines for social justice

September 29, 2010

Chief, Requester Liaison Division  
Office of Information Programs and Services  
U.S. Department of State, SA-2  
Washington, DC 20522-8100

**Re: FREEDOM OF INFORMATION ACT APPEAL – Case No. 201004163**

Dear Chief, Requester Liaison Division,

On June 30, 2010, the Center for Constitutional Rights (“CCR”) filed a request with the Department of State (DOS) 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 from Wilma A. Manning, Chief Requester Communications Branch, dated August 24, 2010 and received in our office on August 30, 2010, the DOS issued an interim response, denying our request for a fee waiver, limitation of fees, and expedited processing. See Exhibit B (“DOS Response”).

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby timely appeals the Department of State’s denials of our requests for a fee waiver, limitation of fees and expedited processing.

The requested information in the “Requester Categories” sheet, Exhibit B, page 11, is included herein and is responsive to the requirements for establishing that CCR is a non-commercial use requester and that CCR should be considered a representative of the news media for the purposes of requesting materials pursuant to FOIA.

By way of amendment to the FOIA Request and in response to the indication in the DOS Response that the cut-off date for receiving information is the date the search was initiated, which is not specified in the DOS Response, CCR extends the date search to the current date, September 29, 2010, as the information sought in the letter concerns matters which continue through the present. In particular and by way of example, four months after the attack, and three months after the FOIA Request was sent, CCR has received no information from the DOS about

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its communications regarding the preservation of evidence and return of U.S. passengers' property and the U.S.-flagged ship. As Israel continues to retain control of this property, and the public has a need to know what the State Department has done to safeguard evidence and assist the U.S. passengers in retrieving their personal property seized by Israel, the date for the search must include all dates from May 2010 through the present, i.e., September 29, 2010. Of critical interest to the public is the communications regarding the preservation of evidence related to the death of U.S. citizen Furkhan Doğan, and the steps that the Department of State has taken to ensure that his death be properly and independently investigated, and that those responsible for his death, be held accountable. Future amendments to the FOIA Request may be required should the harms be on-going.

## Fee Waiver

Although prior case law has held that an agency is required to explain why a fee waiver is denied, the DOS Response does not explain or provide any reasoning as to why CCR was denied a fee waiver.<sup>1</sup> Nevertheless, CCR qualifies for a fee waiver either on the grounds that it is engaged in the dissemination of information to the public or because disclosure of the requested records is in the public interest and because the requested information "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]."

### **1. CCR is entitled to a fee waiver as an organization engaged in the dissemination of information to the public.**

CCR is entitled to a fee waiver as an organization engaged in the dissemination of information to the public as it is a "representative of the news media." In the regulations that Ms. Manning enclosed with the denial of our request, a "representative of the news media" is defined as any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that is of current interest to the public. 22 C.F.R. 171.11(o).

A public interest organization engaged in litigation and advocacy can qualify as a "representative of the news media." In *Electronic Privacy Info. Center v. DOD*, 241 F Supp. 2d 5, 11 (D.D.C. 2003), the court determined that the Electronic Privacy Information Center (EPIC), a public interest research organization, was a representative of the news media for the purposes of a fee waiver. In making this determination, the critical question is whether the entity in question "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." *EPIC*, 241 F. Supp. 2d at 11.

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<sup>1</sup> *Shermco Indus. v Sec'y of United States Air Force* (1978, ND Tex) 452 F Supp 306, 25 CCF P 82432, (required a statement as to why agency believes that waiver or reduction of fee is not in public interest and does not benefit general public) rev'd on other grounds (1980, CA5 Tex) 613 F2d 1314, 27 CCF P 80280.

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CCR publishes in-depth reports on critical issues that affect litigation and has authored reports on subjects such as jail expansion in upstate and suburban New York, torture at Guantánamo, extraordinary rendition, and resettlement issues and concerns of ex-detainees, among others.<sup>2</sup> In addition to publishing detailed reports, CCR informs the news media, issues press releases, publicizes the organization's concerns in leaflets, pamphlets, posters, advertisements, newsletters, know-your-rights handbooks and websites including through a "Facebook" page and a Twitter account, raises awareness by mounting public action campaigns, and hosts and participates in events, to inform the public of civil and international human rights issues. CCR also disseminates information through its heavily subscribed website, [www.ccrjustice.org](http://www.ccrjustice.org), and operates the listserv of over 50,000 members that issues "action alerts" that notify supporters and the general public about developments and operations pertaining to CCR's work. CCR's website addresses civil and human rights issues in depth, and serves as an invaluable resource to disseminate information to the public. In relation to the subject-matter of this request, CCR has issued various press releases and open letters on its website,<sup>3</sup> its President published an op-ed,<sup>4</sup> and CCR immediately set up a web-page on the Gaza Flotilla Freedom of Information Act requests, including the Request at issue.<sup>5</sup> In fact, since filing the FOIA requests on the Gaza flotilla to several government agencies, CCR has created a case page dedicated to the Gaza flotilla, including a legal report, and all responses and follow-up letters between the agencies and CCR, assembling the information gathered that has been received to date in such a manner as to render it user-friendly and informative.<sup>6</sup> Such a site has been set up in regard to other FOIA requests we have filed.<sup>7</sup>

Furthermore, CCR's mission fundamentally depends on disseminating information to the public.<sup>8</sup> As 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, one of CCR's primary activities is informing the public about civil and international human rights. As noted above, CCR informs the public of civil and international human rights issues through several mediums, including through reports, newsletters, press releases, pamphlets and posters, handbooks, and the CCR website.

Courts have already determined that entities similar to CCR are primarily engaged in dissemination of information. *See, e.g., Leadership Conference on Civil Rights v. Gonzales*, 404

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<sup>2</sup> Available at [www.ccrjustice.org/reports](http://www.ccrjustice.org/reports).

<sup>3</sup> See <http://www.ccrjustice.org/newsroom/press-releases/ccr-demands-return-property-and-evidence-seized-israel-flotilla>; <http://www.ccrjustice.org/newsroom/press-releases/ngos-gathered-kampala-call-end-impunity-crisis-following-israeli-attack-aid->; and <http://www.ccrjustice.org/newsroom/press-releases/ccr-condemns-israeli-2526%2523039%3Bs-killing-freedom-flotilla-participants>.

<sup>4</sup> "U.S. should not condone Israeli attack," Michael Ratner, June 15, 2010, available at: <http://progressivemediaproject.org/story/us-should-not-condone-israeli-attack>.

<sup>5</sup> See <http://www.ccrjustice.org/newsroom/press-releases/rights-group-files-foia-requests-regarding-israel-attack-flotilla-delivering-aid-gaza>.

<sup>6</sup> See <http://www.ccrjustice.org/ourcases/current-cases/gaza-freedom-flotilla>.

<sup>7</sup> See, e.g., [www.ccrjustice.org/GhostFOIA](http://www.ccrjustice.org/GhostFOIA) (FOIA requests related to ghost detention and extraordinary rendition); [www.ccrjustice.org/securecommunities](http://www.ccrjustice.org/securecommunities) (FOIA requests related to the "Secure Communities" ICE program).

<sup>8</sup> Available at [www.ccrjustice.org/missionhistory](http://www.ccrjustice.org/missionhistory) and [www.ccrjustice.org/movement-support](http://www.ccrjustice.org/movement-support).

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F. Supp. 2d 246, 260 (D.D.C. 2005); *ACLU v. DOJ*, 321 F. Supp. 2d at 29 n5; *EPIC*, 241 F. Supp. 2d at 11 (plaintiff, a non-profit educational institution, who published seven books and issued a bi-weekly electronic newsletter for eight years and nothing else, qualified as a representative of the news media).<sup>9</sup> A fee waiver because CCR is a representative of the news media would also satisfy case law and Congressional intent. (See Senator Leahy's remarks: "any person or organization which regularly publishes or disseminates information to the public. . . should qualify for waivers as a 'representative of the news media.'" *National Sec. Archive v. DOD*, 880 F.2d 1381, 1386 (D.C. Cir. 1989); 132 Cong.Rec. S14298 (daily ed. Sept. 30, 1986).

Given the context of CCR's wide range of activities engaged in disseminating and publishing information, the organization is "primarily engaged in disseminating information" and should be considered as a representative of the news media.

## **2. CCR qualifies for a fee waiver on the grounds that disclosure will contribute to the public understanding of government activities.**

CCR also seeks a fee waiver 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). Disclosure in this case meets the statutory criteria, and a fee waiver would fulfill Congress's legislative intent in amending the FOIA statute. 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.'" (citation omitted)).

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 U.S. position taken at the United Nations Human Rights Council on September 28, 2010 in response to the U.N. Fact-Finding Mission's Report failed to address *any* of the issues raised in the FOIA Request,<sup>10</sup> and the various references of the flotilla attack at State Department press briefings<sup>11</sup> have not included *any* information regarding, for example, the communications between the United States and Israel in the weeks and days prior to the May 31 attack; information regarding communications between the United States and Israel on May 31 and the days immediately following in regard to the fate of the U.S. passengers who had been on

<sup>9</sup> The determination that these entities – the Leadership Conference on Civil Rights and the Electronic Privacy Information Center – were primarily engaged in the dissemination of information was for the purpose of receiving expedited processing of their FOIA requests; however, the standard for this determination is similar for the question of whether a fee waiver should be granted.

<sup>10</sup> See Statement of Mrs. Eileen Chamberlain Donahoe, United States of American, available at: <http://www.un.org/webcast/unhrc/archive.asp?go=100928>.

<sup>11</sup> See e.g., Daily Press Briefing, July 1, 2010, available at: <http://www.state.gov/r/pa/prs/dpb/2010/07/143904.htm>; Daily Press Briefing, June 1, 2010, available at: <http://www.state.gov/r/pa/prs/dpb/2010/06/142472.htm>. See also Remarks on the Situation in Gaza following the flotilla tragedy, Special Envoy George Mitchell, June 3, 2010, available at: <http://www.state.gov/p/nea/rls/rm/142612.htm>.

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the flotilla, including U.S. citizen Furkhan Doğan who was killed in the attack; instructions or requests from the United States to Israel regarding the treatment of, processing or “deportation” of the U.S. passengers; and information regarding communications between the United States and Israel regarding the safe-guarding of evidence from the flotilla ships seized by Israel and remaining in the custody of Israel, and the return of the U.S. passengers’ personal property. None of this information is in the public domain and all of it falls within the scope of information that the public has an interest in, and a right to know, under FOIA.

As future ships with U.S. passengers on board travel to Gaza,<sup>12</sup> the public has an interest and a need to know what protections it can expect from the United States in regards to its citizens:

### 3. Alternatively, CCR is entitled to a limitation of processing fees.

Alternatively, if the DOS does not reverse its denial of CCR’s fee waiver request, CCR is entitled to 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”) and 22 C.F.R. § 171.15(c) (“The Department shall provide documents to requesters in [the representatives of the news media] category for the cost of reproduction alone, excluding charges for the first 100 pages.”)

First, in relation to the information sought in the “Requester Categories” sheet, CCR should not be considered a commercial use requester as CCR is a non-profit legal and educational organization.<sup>13</sup> We are seeking the information requested in the FOIA Request for the purposes of providing the public with the information requested,<sup>14</sup> and not for the purposes of furthering commercial, trade or profit interest of me individually or of CCR.

As described above in detail (Fee Waiver, Section 1), CCR publishes newsletters, annual reports, fact-sheets, op-eds and other information to the public, which satisfies the requirements of a representative of the news media. I have contributed to each of these publications, and will do so in relation to the FOIA requests and the information that CCR receives in response to this request. All of this information is available to the public free of charge through the CCR website

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<sup>12</sup> See, e.g., “Israel navy intercepts Gaza blockade aid boat,” BBC NEWS, Sept. 28, 2010, available at: <http://www.bbc.co.uk/news/world-middle-east-11425408> (identifying “US peace activists” among the passengers aboard the Gaza-bound *Irene*, intercepted by Israeli forces); “Jewish boat to Gaza’ intercepted by Israel”, N.Y. TIMES, Sept. 28, 2010, available at: <http://thelede.blogs.nytimes.com/2010/09/28/jewish-boat-to-gaza-intercepted-by-israel/?scp=2&sq=irene%20gaza&st=cse>. See also <http://ustogaza.org/> (website dedicated to describing efforts to send ships to Gaza with U.S. passengers on board until the Israeli blockade of Gaza is lifted).

<sup>13</sup> See <http://www.ccrjustice.org/about-ccr>. See also Independent Audit Report, 2009, available at: [http://www.ccrjustice.org/files/CCR\\_Audit\\_Report\\_063009.pdf](http://www.ccrjustice.org/files/CCR_Audit_Report_063009.pdf); Form 990 for 2008, available at: [http://www.ccrjustice.org/files/CCR\\_FORM\\_990\\_FY09.pdf](http://www.ccrjustice.org/files/CCR_FORM_990_FY09.pdf).

<sup>14</sup> The information will be posted on this case-page, free of charge: <http://www.ccrjustice.org/ourcases/current-cases/gaza-freedom-flotilla>.

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at [www.ccrjustice.org](http://www.ccrjustice.org), and printed materials or e-mail updates are also generated and distributed to members of the public.

Given the context of CCR's wide range of activities engaged in disseminating and publishing information through the methods and mechanisms described above, the organization qualifies as a representative of the news media. Therefore, fees associated with the processing of this Request should be limited accordingly.

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## Expedited Processing

CCR is also entitled to expedited processing. There is a compelling and 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. Again unfortunately, the denial of expedited processing was not explained or elaborated and no reason why provided as to what grounds CCR was denied expedited processing. Nevertheless, case law dictates that an agency is required to explain why the request for expedited treatment does not demonstrate the sufficient urgency.<sup>15</sup>

CCR qualifies for expedited processing under the Expeditious Processing Information Sheet, Exhibit B, because the information requested is "urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity" and the information is "urgently needed" because the value would be lost if not disseminated quickly. *See also* 22 C.F.R. § 171.12(b)(2). As noted above in Fee Waiver, Section 1, one of CCR's primary activities is disseminating information. As set forth in the Request, there is a compelling and 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 light of on-going inquiries and discussions regarding the attack, the death of U.S. citizen Furkhan Doğan, and the detention, injury and taking of the possessions of US passengers which still have not been returned.<sup>16</sup> This request is urgent in that U.S. citizens or

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<sup>15</sup> *Center for Auto Safety v Department of Justice* (1983, DC Dist Col) 576 F Supp 739, 1983-1 CCH Trade Cases P 65462, 13 Fed Rules Evid Serv 726, vacated, in part on other grounds (1983, DC Dist Col) 1984-1 CCH Trade Cases P 65862.

<sup>16</sup> *See, e.g.*, "Israeli Government Refuses to Secure Criminal Evidence," Ann Wright, Aug. 22, 2010, available at: <http://www.commondreams.org/view/2010/08/22-5>. There exists deep concern and a lack of information about what steps the United States had taken to ensure the protection of U.S. citizens, and has taken to ensure that the death of a U.S. citizen is being properly, impartially and thoroughly investigated in a timely manner; and lack of return of property by U.S. passengers and concern about the status of that property including the electronic equipment that

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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 U.S. citizens are considering travelling by ship on similar missions to that of May 2010, which came under attack by the Israeli Defense Forces,<sup>17</sup> such information is urgent, and there is a compelling need to receive responsive information from the DOS. Furthermore, as indicated in the FOIA Request filed nearly three months ago, Israel seized all property from the Gaza flotilla ships and this property constitutes evidence. To date, this property still has not been returned to the U.S. passengers and the public has a right to know what the State Department has communicated to Israel regarding the preservation of this evidence and the return of property. 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 with 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. Because of the fact that suppression of this material impedes all forms of independent investigation of the attack, the need for this information is urgent.

Courts have consistently recognized that ongoing media attention surrounding an issue is an indicator of urgency. See *Al-Fayed v. CIA*, 254 F.3d 300, 308 (D.C. Cir. 2001) (recognizing the fact that an issue “is the subject of current news coverage” is an important factor in deciding whether compelling need exists); *ACLU of Northern California v. DOD*, 2006 WL 1469418, \*7 (N.D. Cal. 2006) (“If anything, extensive media interest usually is a fact *supporting* not *negating* urgency in the processing of FOIA request”) (emphasis in original); *ACLU v. Department of Justice*, 321 F. Supp. 2d 24, 29-31 (D.D.C. 2004) (newspaper articles reflecting public concern a factor supporting finding of urgency). The request clearly relates to a current news story of general public interest and a subject of ongoing media attention (as well as Congressional scrutiny, given the controversy that exists over whether certain interrogation practices were lawful and authorized). From the time of the attack on May 31, 2010 and continuing through the present, nearly every major print, broadcast and web-based media outlet has covered the attack

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CCR believes likely contains information about the flotilla and the attack relevant to any investigations, and need to determine whether such evidence has been preserved, tampered with or destroyed, which, in addition to being in the public interest to know, could also impact the due process rights of those U.S. passengers on board the boats and others, including to bring actions to remedy the damage they have suffered.

<sup>17</sup> See, e.g., “Americans organizing ship to Gaza,” July 21, 2010, JTA, available at: [http://www.jta.org/news/article/2010/07/21/2740136/amreicans-organize-ship-to-join-flotilla-to-gaza?utm\\_source=twitterfeed&utm\\_medium=twitter](http://www.jta.org/news/article/2010/07/21/2740136/amreicans-organize-ship-to-join-flotilla-to-gaza?utm_source=twitterfeed&utm_medium=twitter); Robert 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/>. See also [www.ustogaza.org](http://www.ustogaza.org).

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on the flotilla.<sup>18</sup> Yet, significant questions remain unanswered about the U.S. knowledge of, role in, and response to the attack. This FOIA Request will help satisfy the urgent need to have some of those questions answered.

CCR is also entitled to expedited processing under the Expedited Processing Information Sheet, Exhibit B, because of substantial due process rights or substantial humanitarian concerns. *See also* 22 C.F.R. § 171.12(b)(1)-(2). The loss of substantial due process rights include those of the U.S. passengers in the flotilla who may have administrative, civil or criminal claims that can be assisted by the information released pursuant to this FOIA Request. CCR is also entitled to expedited processing because of humanitarian need. 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. This is especially true since more cargo ships carrying humanitarian aid are planning voyages to Gaza and Israel has already said it reserves the right to use force to stop new aid flotillas from reaching the Gaza Strip.<sup>19</sup>

Therefore, because CCR's request falls under a compelling need because one of our primary activities is dissemination of information or, in the alternative, because of due process rights or the humanitarian need to promote the welfare and interest of mankind, we are entitled to expedited processing of this request.

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<sup>18</sup> Indeed, just yesterday (Sept. 28, 2010), nearly four months after the attack, the *New York Times* included five flotilla-related stories. *See*

<http://query.nytimes.com/search/query?query=flotilla&d=&o=&v=&c=&n=10&dp=0&daterange=site1week&sort=newest>.

<sup>19</sup> *4 Flotilla Solidarity Ships to Sail to Besieged Gaza on September 18, 2010*, AL JAZEERA,

<http://www.aljazeera.com/News/2010/September/9%20n/4%20Flotilla%20Solidarity%20Ships%20to%20Sail%20to%20Besieged%20Gaza%20on%20September%2018,%202010.htm>; *Israel warns of force as Beirut refuses to bow on Gaza boat*, AFP, August 20, 2010,

[http://www.google.com/hostednews/afp/article/ALeqM5gQUFGTDrztHKYQZG6\\_fILJboSMNQ](http://www.google.com/hostednews/afp/article/ALeqM5gQUFGTDrztHKYQZG6_fILJboSMNQ).

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In closing, CCR requests that you reverse your denial of CCR's request for a fee waiver, limitation of fees, and expedited processing and that you begin the search of the requested records with urgency, as statutorily mandated. Requesters note that many government officials involved in classification determinations have been increasingly concerned over the past few years about the over-classification of information that results in less public accountability for government conduct. Accordingly, CCR demands that your office engage in an adequate and diligent effort to properly designate information, to disclose all responsive documents not properly subject to a FOIA exemption, and to comply with your obligations to provide segregable information when necessary.

We request a response to this appeal with twenty (20) working days.

Sincerely,



Katherine Gallagher  
Senior Staff Attorney  
Center for Constitutional Rights  
666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012  
Phone: (212) 614-6455

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**EXHIBIT A**

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June 30, 2010

Office of Information Programs and Services  
A/GIS/IPS/RL  
U.S. Department of State  
Washington, D.C. 20522-8100

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

The Center for Constitution Rights (CCR) ("Requester") makes this request for information regarding 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 Israel 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,<sup>1</sup> pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. Sec. 552 *et seq.*, and U.S. Department of State FOIA Regulations, 22 C.F.R. Part 171.

Specifically, CCR seeks 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*. This 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 but not limited to 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.

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<sup>1</sup> For more information on the attack on the May 31, 2010 attack on the flotilla, see, e.g., "Deaths as Israeli forces storm Gaza aid ship," BBC News, May 31, 2010, available at: [http://news.bbc.co.uk/2/hi/middle\\_east/10195838.stm](http://news.bbc.co.uk/2/hi/middle_east/10195838.stm); J. Zacharia, "Israeli troops raid aid flotilla headed for Gaza, killing nine" Washington Post, June 1, 2010, available at: "Security Council Condemns Acts Resulting in Civilian Deaths During Israeli Operation," Security Council, SC/9940, May 31, 2010, available at: <http://www.un.org/News/Press/docs/2010/sc9940.doc.htm>.

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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 that related 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 the steps taken, before, during or after May 31, 2010, by the United States to determine whether United States citizens, including citizens with dual nationality, were on board the flotilla of boats destined for Gaza in May 2010;
- (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, prior to, on or after May 31, 2010 in relation to United States citizens planning to, supporting, or undertaking travel to Gaza by sea;
- (4) 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, prior to, on, or after May 31, 2010 in relation to vessels included in the flotilla of boats destined to Gaza in May 2010, including but not limited to the U.S.-registered "*Challenger I*" and the "*Mavi Marmara*," 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;
- (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 the actions that occurred on board each of the six boats of the flotilla, including the U.S.-registered "*Challenger I*" 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;
- (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 the *Challenger I*, including the property on board that vessel and/or belonging to the passengers on board that vessel, and its return;

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- (7) 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 that vessel and/or belonging to the passengers on board that vessel, and its return;
- (8) 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; and
- (9) Any and all records, 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.

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## 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](http://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* 22 C.F.R. 171.17 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, including the death of one citizen by a foreign military and the injury, arrest and deportation of other citizens by a foreign government; 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

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blockade of Gaza. 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, including what consular protections U.S. citizens can expect and will enjoy from the Department of State, 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. This matter is particularly urgent in light of the updated travel warning issued on June 20, 2010 by the Bureau of Consular Affairs for Israel, the West Bank and Gaza, particularly in light of the Department of State's notice that "the ability of consular staff to offer timely assistance to U.S. citizens [in Gaza] is extremely limited."<sup>2</sup>

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, 1312 (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.

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<sup>2</sup> Travel Warning, U.S. Department of State, Bureau of Consular Affairs, Israel, the West Bank and Gaza, June 20, 2010 available at: [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_922.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_922.html).

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## 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 “the information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged Federal Government activity.” 22 C.F.R. § 171.12(b)(2). A requester can also demonstrate compelling need by a showing that the information sought is “urgently needed” and involves protecting against “impair[ing] substantial due process rights” or “harm[ing] substantial humanitarian interests.” 22 C.F.R. § 171.12(b).

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.

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,<sup>3</sup> 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,<sup>4</sup> this matter is urgent.

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<sup>3</sup> 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”).

<sup>4</sup> 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-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>

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Conclusion

If this Request is denied in whole or in part, CCR ask that the U.S. Department of State justify all deletions by reference to specific exemptions of FOIA. The Requester expects the DoS 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, 7<sup>th</sup> Floor, New York, N.Y. 10012.

Thank you for your prompt attention to this matter.

Sincerely,



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

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**EXHIBIT B**



United States Department of State

Washington, D.C. 20520

AUG 24 2010

Case Number: 201004163

Ms. Katherine Gallagher, Staff Attorney  
*Center for Constitutional Rights*  
666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012

Dear Ms. Gallagher:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request, dated June 30, 2010, for copies of documents concerning the May 31, 2010 Israeli military operation that occurred in the Mediterranean Sea involving a six-boat flotilla headed to Gaza.

We will begin the processing of your request based upon the information provided in your communication. We will notify you as soon as responsive material has been retrieved and reviewed.

We wish to advise you that the cut-off date for retrieving records is either the date you have given the Department by specifying a particular time frame, or the date the search initiated.

### Fees

The Freedom of Information Act (FOIA) requires agencies to assess fees to recover the direct costs of processing requests, unless a fee waiver has been granted.

According to our regulations, by making a FOIA request, you have agreed to pay all applicable fees up to \$25 unless a fee waiver has been granted. You may specify a willingness to pay a greater amount. If the estimated fees exceed this limit, you will be notified.

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Office of Information Programs and Services  
U.S. Department of State, SA-2  
Washington, DC 20522-8100  
Website: [www.foia.state.gov](http://www.foia.state.gov)

Inquiries:  
Phone: 1-202-261-8484  
FAX: 1-202-261-8579  
E-mail: [FOIAStatus@state.gov](mailto:FOIAStatus@state.gov)

- You have stated your willingness to pay the fees incurred in the processing of this request up to \$\_\_\_\_\_.
- Please let us know if you are willing to pay the fees that will be incurred in the processing of your request. You may set a limit of the maximum amount that you wish to pay. Please be advised that, without an agreement to pay fees, your request will be processed without cost up to the required first 2 hours of search time (for all other requester category only) and duplication of the first 100 pages (for all other, media, educational and non-commercial scientific requester categories).

We will notify you of the costs incurred in processing your request as soon as the search for, and review of, any responsive documents have been completed.

Based upon the information that you have provided, we have placed you in the requester category checked below. This request will be processed in accordance with the fee schedule designated for that category (see 22 C.F.R. 171, enclosed).

- Commercial Use Requesters -- Requires us to assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record(s) sought.
- Educational Institution Requesters -- Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.
- Non-commercial Scientific Institution Requesters -- Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.
- Representatives of the News Media -- Requires us to assess charges that recover the cost of duplicating the record(s) sought only, after the first 100 pages of duplication.
- All Other Requesters -- Requires us to assess charges that recover the full reasonable direct cost of searching for and duplicating the record(s) sought, after the first 100 pages of duplication, and the first two hours of search time.

- You have indicated your inclusion in a category different than the one indicated above. Please forward the information requested on the enclosed sheet titled "Requester Categories" to substantiate your inclusion in a particular category of requester.

### Fee Waiver

- Your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.
- Based upon the information provided in your letter, your request for a fee waiver has been denied. If you wish to appeal this decision, you may write to the Chief, Requester Liaison Division, at the address given on the bottom of this page. Your appeal should address the points listed in the enclosed sheet titled "Requests for Fee Waivers." Your appeal must be sent to us within 30 days from the date that you receive this letter.

### Expedition

- After consideration of your request for expedited processing under the Department's rules governing Freedom of Information Act requests, we have determined that your request does warrant expedited processing.

Although we cannot promise that the processing of your request will be completed by a specific date, it will be processed ahead of all other requests now pending with the Department, except for those other requests already determined to warrant expedition.

- Our published regulations regarding expedition, 22 C.F.R. 171.12(b), require a specific showing of a compelling need. Expeditionary processing is granted only in the following situations: (1) imminent threat to the life or physical safety of an individual; (2) urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged

Federal Government activity and the information is urgently needed in that a particular value of the information would be lost if not disseminated quickly; (3) substantial humanitarian reasons; and (4) loss of substantial due process rights. Your request does not meet any of the established criteria. Regrettably, I must advise that you have not provided adequate justification for expedition. However, you may be assured that we will make every effort to process your request in as timely a manner as possible. For your convenience, I have enclosed a copy of the Department's expeditious processing criteria.

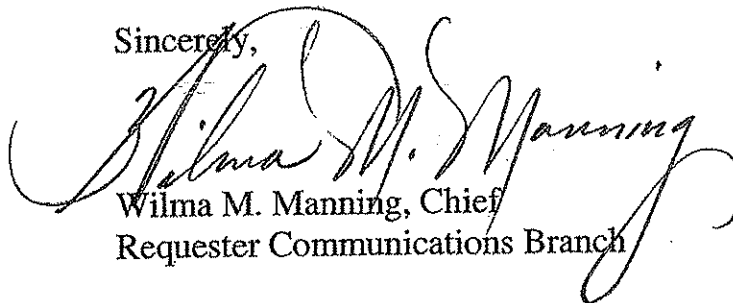
If you wish to appeal the denial of expedition, you may write to the Chief, Requester Liaison Division, at the address below, within 30 days of receipt of this letter.

While we will make every effort to meet the time limits cited in the FOIA (5 U.S.C. § 552), unusual circumstances may arise for extending the time limit (see enclosure). We appreciate your patience in this matter.

If you have any questions, please do not hesitate to contact us at the number or address below. We can provide faster service if you include the case number of your request in your communications with us.

We are pleased to be of service to you.

Sincerely,



Wilma M. Manning, Chief  
Requester Communications Branch

Enclosures: As stated.

**§ 171.15 Fees to be charged—  
categories of requesters.**

Under the FOIA, there are four categories of requesters: Commercial use requesters, educational and noncommercial scientific institutions, representatives of the news media, and all other requesters. The fees for each of these categories are:

(a) *Commercial use requesters.* When the Department receives a request for documents for commercial use as defined in § 171.11(l), it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The Department may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (*see* § 171.16(b)).

(b) *Educational and non-commercial scientific institution requesters.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution, as defined in § 171.11(m) and (n), and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(c) *Representatives of the news media.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 171.11(o), and the request must not be made for a commercial use. A request for records supporting

the news dissemination function of the requester shall not be considered to be a commercial use request.

(d) *All other requesters.* The Department shall charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

**§ 171.14 Fees to be charged—  
general.**

The Department shall seek to charge fees that recoup the full allowable direct costs it incurs in processing a FOIA request. It shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Department will not charge fees to any requester, including commercial-use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. With the exception of requesters seeking documents for a commercial use, the Department will provide the first two hours of search time and the first 100 pages of duplication without charge. By making a FOIA request, the requester shall be considered to have agreed to pay all applicable fees up to \$25.00 unless a fee waiver has been granted.

(a) *Searches for responsive records.* If the Department estimates that the search costs will exceed \$25.00, the requester shall be so notified. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request to meet the requester's needs at a lower cost. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(1) *Manual searches.* The Department will charge at the salary rate (*i.e.*, basic pay plus 16 percent of basic pay) of the employee making the search.

(2) *Computer searches.* The Department will charge at the actual direct cost of providing the service. This

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will include the cost of operating the central processing unit (CPU) for that portion of operating time that is directly attributable to searching for records responsive to a FOIA request and

operator/programmer salary attributable to the search.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are releasable. Charges may be assessed for the initial review only; *i.e.*, the review undertaken the first time the Department analyzes the applicability of a specific exemption to a particular record or portion of a record.

(c) *Duplication of records.* Records shall be duplicated at a rate of \$.15 per page. For copies prepared by computer, such as tapes or printouts, the Department shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Department shall charge the actual direct costs of producing the document.

If the Department estimates that the duplication costs will exceed \$25.00, the requester shall be so informed. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(d) *Other charges.* The Department shall recover the full costs of providing services such as those enumerated below:

(1) Certifying that records are true copies (*see* part 22 of this chapter); (2) Sending records by special methods such as express mail, overnight courier, *etc.*

(f) Payment shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Information and Privacy Coordinator.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.

**§ 171.11 Definitions.**

**Unusual Circumstances**

As used in this subpart, the following definitions shall apply:

- (a) *Freedom of Information Act* or *FOIA* means the statute codified at 5 U.S.C. 552, as amended.
- (b) *Department* means the United States Department of State, including its field offices and Foreign Service posts abroad;
- (c) *Agency* means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or any independent regulatory agency;
- (d) *Information and Privacy Coordinator* means the Director of the Department's Office of Information Programs and Services (IPS) who is responsible for processing requests for access to information under the FOIA, the Privacy Act, E.O. 12958, and the Ethics in Government Act;
- (e) *Record* means all information under the control of the Department, including information created, stored, and retrievable by electronic means, regardless of physical form or characteristics, made in or received by the Department and preserved as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Department or because of the informational value of the data contained therein. It includes records of other Government agencies that have been expressly placed under the control of the Department upon termination of those agencies. It does not include personal records created primarily for the personal convenience of an individual and not used to conduct Department business and not integrated into the Department's record keeping system or files. It does not include

records that are not already in existence and that would have to be created specifically to meet a request. However, information available in electronic form shall be searched and compiled in response to a request unless such search and compilation would significantly interfere with the operation of the Department's automated information systems.

(f) *Control* means the Department's legal authority over a record, taking into account the ability of the Department to use and dispose of the record as it sees fit, to legally determine the disposition of a record, the intent of the record's creator to retain or relinquish control over the record, the extent to which Department personnel have read or relied upon the record, and the degree.

- 63937 Federal Register / Vol. 69, No. 212 / Wednesday, November 3, 2004 / Rules and Regulations** to which the record has been integrated into the Department's record keeping system or files.
- (g) *Direct costs* means those costs the Department incurs in searching for, duplicating, and, in the case of commercial requests, reviewing documents in response to a FOIA request. The term does not include overhead expenses.
- (h) *Search costs* means those costs the Department incurs in looking for, identifying, and retrieving material, in paper or electronic form, that is responsive to a request, including page-by-page or line-by-line identification of material within documents. The Department shall attempt to ensure that searching for material is done in the most efficient and least expensive manner so as to minimize costs for both the Department and the requester.
- (i) *Duplication costs* means those costs the Department incurs in copying

a requested record in a form appropriate for release in response to a FOIA request. Such copies may take the form of paper copy, microfiche, audio-visual materials, or machine-readable electronic documentation (e.g., disk or CD-ROM), among others.

(j) *Review costs* means costs the Department incurs in examining a record to determine whether and to what extent the record is responsive to the FOIA request and the extent to which it may be disclosed to the requester. It does not include costs of resolving general legal or policy issues that may be raised by a request.

(k) *Unusual circumstances*. As used herein, but only to the extent reasonably necessary to the proper processing of the particular request, the term "unusual circumstances" means:

- (1) The need to search for and collect the requested records from Foreign Service posts or other separate and distinct Department offices;
- (2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request; or
- (3) The need for consultation with another agency having a substantial interest in the determination of the request or among two or more components of the Department that have a substantial subject matter interest therein. Such consultation shall be conducted with all practicable speed.

(l) *Commercial use request* means a request from or on behalf of one who requests information for a use or purpose that furthers the commercial, trade, or profit interest of the requester or the person on whose behalf the request is made. In determining whether a requester belongs within this category, the Department will look at the use to which the requester will put the information requested.

(m) *Educational institution* means a preschool, a public or private elementary or secondary school, an institution of undergraduate or graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program or programs of scholarly research.

(n) *Non-commercial scientific institution* means an institution that is not operated on a "commercial" basis, as that term is used in paragraph (l) of this section and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(o) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term news means information that is about current events or that would be of current interest to the public. News media include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase by the general public. Freelance journalists may be regarded as working for a news organization if they can demonstrate, such as by past publication, a likelihood of publication through a representative of the news media, even though not actually employed by it.

(p) *All other* means an individual or organization not covered by a definition in paragraphs (l), (m), (n), or (o) of this section.

### Expedition Processing Information Sheet

Expedited processing shall be granted to a requester after the requester requests such and demonstrates a compelling need for the information. A compelling need is deemed to exist where the requester can demonstrate one of the following:

1. A **Compelling Need** means that the failure to obtain the records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual.
2. A **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 Federal Government activity. An individual primarily engaged in disseminating information to the public. Representatives of the news media would normally qualify; however, other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public, not just to a particular segment or group.
  - (a) **Urgently Needed** means that the information has a particular value that will be lost if not disseminated quickly. Ordinarily this means a breaking news story of historical interest only, or information sought for litigation or commercial activities would not qualify nor would a news media publication or broadcast deadline unrelated to the news breaking nature of the information.
  - (b) **Actual or Alleged Federal Government Activity.** The information concerns some actions taken, contemplated, or alleged by or about the Government of the United States, or one of its components or agencies, including the Congress.
3. **Substantial Due Process** rights of the requester would be impaired by the failure to process immediately; or
4. **Substantial Humanitarian** concerns would be harmed by the failure to process immediately.

A demonstration of compelling need by a requester shall be made by a statement certified by the requester to be true and correct to the best of their knowledge.

### Fee Waiver Information Sheet

It is the Department's policy to treat each request for a fee waiver on a case-by-case basis. As noted in our letter, before we can make a decision about your request for fee waiver or fee waiver appeal, we need additional information concerning your request and your intended use of the requested documents. Please provide the following:

1. State why you believe the subject matter of your request concerns the operations or activities of the Federal Government.
2. From what other sources have you attempted to obtain this information? Have you tried to obtain this information from the Foreign Relations of the United States, the National Archives and Records Administration, or public libraries? Demonstrate the absence of the requested information from the public domain.
3. Provide a summary of your educational background and work experience, particularly in the field of foreign affairs, and your expertise in the subject area of your request.
4. Expand on your ability and intent to disseminate the information requested. E.g., Have you published or disseminated information in this or related fields in the past? Is the information requested to be used in a specific article or paper currently being prepared? When is the article to be published or the program to be aired? To what audience is the article or program aimed?
5. Identify the particular person who will actually use the requested information in scholarly or other analytical work and then disseminate it.
6. Describe any commercial interest which would be furthered by the disclosure of the requested information, e.g., will you be paid for the publication or dissemination of the requested information? If so, how much will you be paid and in what manner will you receive payment? Will you receive any other type of commercial benefit due to your dissemination of the requested information? A "commercial interest" is one that furthers a commercial, trade, or profit interest as those terms are commonly understood.
7. If your request for a fee waiver is not granted, we need your written assurance that you are willing to pay the fees associated with the processing of your request. You may set a limit on the amount you are willing to pay. In some cases, we will not be able to make a determination about a fee waiver until the processing of the request has been completed, at which time an independent evaluation will be made of the releasable material.

Please send this information to: Office of Information Programs and Services,  
A/GIS/IPS/RL, Room 8100, Department of State, 515 22<sup>nd</sup> Street, N. W., Washington,  
D.C. 20522-8100. Refer to your request number in your correspondence to us.

## Requester Categories

If you believe that you should NOT be considered a commercial use requester, please provide:

- Evidence that your use of the requested information will NOT further any commercial, trade, or profit interest of yourself or the person (s) on whose behalf the request is made.

If you believe that you should be considered an educational or non-commercial scientific institution requester, please provide:

- A statement, signed by the chairperson of your department, which indicates that your request is authorized by and under the auspices of a specific institution and that the requested records are not sought for a commercial use and are not intended to promote any particular product or industry, but are sought in furtherance of scholarly or scientific research.

If you believe that you should be considered a representative of the news media, please provide:

- Evidence that you are employed by an entity that is organized and operated to publish or broadcast news to the public.
- Evidence, if you are associated with a periodical publication such as a newsletter, that your product is available for purchase or subscription by the general public.
- Evidence, if you are a freelance journalist, of the likelihood of publication through the news media (e.g., a publication contract, examples of past publications, etc.).
- Evidence that the information you request is about current events or would be of current interest to the public.

**§ 171.15 Fees to be charged—  
categories of requesters.**

Under the FOIA, there are four categories of requesters: Commercial use requesters, educational and noncommercial scientific institutions, representatives of the news media, and all other requesters. The fees for each of these categories are:

(a) *Commercial use requesters.* When the Department receives a request for documents for commercial use as defined in § 171.11(l), it will assess charges that recover the full direct costs of searching for, reviewing for release, and duplicating the record sought. Commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents. The Department may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 171.16(b)).

(b) *Educational and non-commercial scientific institution requesters.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must show that the request is being made as authorized by and under the auspices of a qualifying institution, as defined in § 171.11(m) and (n), and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a noncommercial scientific institution) research.

(c) *Representatives of the news media.* The Department shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in § 171.11(o), and the request must not be made for a commercial use. A request for records supporting

the news dissemination function of the requester shall not be considered to be a commercial use request.

(d) *All other requesters.* The Department shall charge requesters who do not fit into any of the categories above fees that recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first two hours of search time shall be furnished without charge.

§ 171.14 Fees to be charged—  
general.

The Department shall seek to charge fees that recoup the full allowable direct costs it incurs in processing a FOIA request. It shall use the most efficient and least costly methods to comply with requests for documents made under the FOIA. The Department will not charge fees to any requester, including commercial use requesters, if the cost of collecting a fee would be equal to or greater than the fee itself. With the exception of requesters seeking documents for a commercial use, the Department will provide the first two hours of search time and the first 100 pages of duplication without charge. By making a FOIA request, the requester shall be considered to have agreed to pay all applicable fees up to \$25.00 unless a fee waiver has been granted.

(a) *Searches for responsive records.* If the Department estimates that the search costs will exceed \$25.00, the requester shall be so notified. Such notice shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request to meet the requester's needs at a lower cost. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(1) *Manual searches.* The Department will charge at the salary rate (*i.e.*, basic pay plus 16 percent of basic pay) of the employee making the search.

(2) *Computer searches.* The Department will charge at the actual direct cost of providing the service. This

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will include the cost of operating  
the central processing unit  
(CPU) for that portion of  
operating time that is directly  
attributable to searching for  
records responsive to a FOIA  
request and

operator/programmer salary  
attributable to the search.

(b) *Review of records.* Only requesters who are seeking documents for commercial use may be charged for time spent reviewing records to determine whether they are releasable. Charges may be assessed for the initial review only; *i.e.*, the review undertaken the first time the Department analyzes the applicability of a specific exemption to a particular record or portion of a record.

(c) *Duplication of records.* Records shall be duplicated at a rate of \$.15 per page. For copies prepared by computer, such as tapes or printouts, the Department shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, the Department shall charge the actual direct costs of producing the document.

If the Department estimates that the duplication costs will exceed \$25.00, the requester shall be so informed. The request shall not be processed further unless the requester agrees to pay the estimated fees.

(d) *Other charges.* The Department shall recover the full costs of providing services such as those enumerated below:

(1) Certifying that records are true copies (*see* part 22 of this chapter); (2) Sending records by special methods such as express mail, overnight courier, *etc.*

(f) Payment shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed to the Information and Privacy Coordinator.

(g) A receipt for fees paid will be given upon request. Refund of fees paid for services actually rendered will not be made.