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on the front lines for social justice

November 8, 2010

Judge Advocate General
1322 Patterson Avenue SE, Suite 3000
Washington Navy Yard DC 20374-5066

Fax Number: 202-685-5472

By First Class Mail and Fax

Re: **FREEDOM OF INFORMATION ACT APPEAL: DNS-36F/10U228651**

Dear FOIA Appeals Officer,

On June 30, 2010, the Center for Constitutional Rights (“CCR”) filed a request with the United States Navy 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 ...and 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.” See Exhibit A (“Request”).

In a letter dated September 9, 2010, signed by Robin W. Patterson, Head, DON PA/FOIA Policy Branch Acting, and postmarked September 10, 2010, (thereby exceeding the maximum 30 day response deadline under 5 U.S.C.S. § 552 (a)(6)), the Navy issued a response, claiming it is “unable to process” the Request because the Navy is “unable to identify any affiliation between the information [CCR seeks] and the Department of the Navy.” and closed CCR’s request. Oddly, the Response recommended that CCR file its Request with NATO Headquarters in Belgium, a non-US body that is

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not bound by the FOIA.¹ Furthermore, it failed to inform CCR of the right to appeal and who to appeal to, another violation of the statute, 5 U.S.C.S. § 552 (a)(6)(A)(i). See Exhibit B.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(6), CCR hereby appeals the Navy's determination there is no affiliation between the information CCR seeks and the activities of the Navy.

The Request falls squarely under the purview of the Navy.

The lackluster Response provided by the Navy demonstrates a fundamental failure to comply with the requirement of the FOIA. The Navy did not even attempt to make an adequate search and has not demonstrated that "all files likely to contain responsive materials . . . were searched," *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). For the reasons set forth below, CCR has reasonable grounds to believe that the Navy has responsive records due to its engagement and cooperation with Israel and its defense forces, its operations in the Mediterranean, and its role in protecting U.S. interests, including the safety and security of U.S. citizens and U.S. property, including U.S.-registered vessels.

The mission of the Navy is to maintain, train and equip combat-ready Naval forces capable of winning wars, deterring aggression and maintaining freedom of the seas.² Furthermore, part of the Navy's "Cooperative Strategy for 21st Century Seapower" also includes protecting and defending U.S. allies to move freely on the oceans, and to protect against enemies.³ The Navy has recognized that "Israel is a strong ally of the United States" and a "bilateral partner" on several occasions, and the members of the U.S. have visited Israel in a showing of "strong ties" between the two countries, including the Secretary of the Navy.⁴

The U.S. Navy often engages in joint exercises with Israel, including the Juniper Cobra exercises.⁵ These exercises take place every two years, and the most recent exercise focused on missile defense. In particular, the exercise focused on deployment of forces

¹ The Response also recommended that CCR file its Request with the Coast Guard. CCR did file such a Request on June 30, 2010 and received an equally unresponsive and inadequate answer from the Coast Guard: on July 19, 2010 the Coast Guard closed the Request, asserting that it did not locate a single responsive document to the Request. CCR filed an appeal with the Coast Guard on September 13, 2010 and to date – nearly two months since it filed the appeal and in excess of the 20 days in which to receive a response to its appeal letter – the Coast Guard has not acknowledged, let alone responded to, CCR's appeal.

² <http://www.navy.mil/navydata/organization/org-top.asp>.

³ <http://www.navy.mil/maritime/MaritimeStrategy.pdf>.

⁴ U.S., Israel Navies Exchange Invaluable Insight During Haifa Port Visit, Navy Press Release, March 9, 2009, http://www.navy.mil/search/display.asp?story_id=43253; Secretary of the Navy Visits Israel, Navy Press Release, March 26, 2008, http://www.navy.mil/search/display.asp?story_id=36007.

⁵ NAVEUR-NAFVAF Sailors Arrive in Israel for Juniper Cobra 2010, Navy Press Release, Oct. 27, 2009, http://www.navy.mil/search/display.asp?story_id=49244.

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and a simulation of attacks.⁶ Notably, Admiral James G. Stavridis, the commander of European Command and Supreme Allied Commander, Europe, described U.S.-Israel cooperation in this program to Congress when describing “Afloat Ballistic Missile Defense.”⁷ Admiral Stavridis further described U.S. cooperation, and annual exercises, with Israel and Turkey: “RELIANT MERMAID 2009: USS STOUT and members of the United States Naval Forces Europe – Sixth Fleet participated in the tri-lateral maritime search and rescue exercise RELIANT MERMAID 2009 with maritime forces from Turkey and Israel. *This annual exercise contributed to overall joint readiness in response to possible humanitarian assistance efforts or maritime search and rescue operations in the Eastern Mediterranean Sea and helped improve engagement between Turkey and Israel, key U.S. allies and partners in the region.*”⁸ (emphasis added).

Admiral Stavridis further identified the conflict between Israel and Palestine as an issue of concern and one that required regional communication, which necessarily includes Israel: “Conflict persists between Israel and Palestinian groups. The sources, complexities, and significant tertiary effects of these regional conflicts require an integrated interagency approach in concert with our European partners and security organizations.”⁹

The United States and Israel, as strong allies, also share significant information on defense, including Naval defense. In fact, since the U.S.S. Cole Attack and the events of September 11, the U.S. Navy has declared that it has started to share information and techniques with Israel, since Israel and the IDF have been dealing with terror for “decades” and the IDF has “tremendous experience in these operations.”¹⁰ The U.S. Navy has said that it can learn from Israel’s experience so the Navy in order to prepare its forces and ensure that the Navy does not provide “easy targets.” The two navies’ sharing of information and techniques “demonstrate the ever-growing reliance on bilateral operations.”¹¹ The U.S. Navy has also declared the importance of exchanging good

⁶ *Id.*

⁷ “A survivable sea-based ballistic missile defense system is an important component of the phased adaptive approach to defend the Homeland, as well as Allies and partners in Europe and Eurasia. United States Naval Forces Europe is developing the necessary ballistic missile defense command and control architecture while mitigating vulnerabilities to the sea-based ballistic missile defense network with air and undersea capabilities. A United States Naval Forces Europe Flag Officer commanded JUNIPER COBRA 2010, a joint missile defense exercise with Israel, incorporating all aspects of both land and seabased missile defense and stands as a hallmark of the future of our ballistic missile defense program.” See, House and Senate Armed Service Committees, TESTIMONY OF ADMIRAL JAMES G. STAVRIDIS, UNITED STATES NAVY COMMANDER, UNITED STATES EUROPEAN COMMAND BEFORE THE 111TH CONGRESS 2010, March 9-10 2010, p. 20, available at: <http://www.eucom.mil/documents/EUCO-posture-statement-03-09-10.pdf>

⁸ *Id.* at 23.

⁹ *Id.* at 33-34.

¹⁰ U.S., Israel Navies Exchange Invaluable Insight During Haifa Port Visit, Navy Press Release, March 9, 2009, http://www.navy.mil/search/display.asp?story_id=43253.

¹¹ *Id.*

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practices and “lessons learned” as these practices “builds trust and understanding in how each other’s navies operate...”

Furthermore, U.S. Navy has a robust presence in the Mediterranean. The area of responsibility (AoR) Sixth Fleet (U.S. Naval Forces Europe-Commander, U.S. Naval Forces Africa (NAVEUR-NAVAF)) “covers approximately half of the Atlantic Ocean, from the North Pole to Antarctica; as well as the Adriatic, Baltic, Barents, Black, Caspian, Mediterranean and North Seas.”¹² In light of the close relationship between the U.S. and Israel, and the presence that the U.S. Navy had in the vicinity of the flotilla attack, it is likely that the U.S. Navy has knowledge or understanding of Israel’s actions in repelling the demonstrators on May 31, and further, that the U.S. Navy has is exchanging on-going information regarding the events of that date. This is not only because of the large amount of cooperation between the IDF and the US Navy, but also because the US Navy has fleets stationed in and around that area.

Based on the foregoing, it is apparent that the Navy is involved with *inter alia* matters of the Israeli blockade against Gaza, with patrolling the Mediterranean and awareness of national navies in international waters, including the Israeli military, with the current situation in Gaza, and is monitoring, if not more actively involved in, matters related to the Middle East peace process related to the Israeli-Palestinian conflict. It is therefore reasonable to conclude that the Navy has information related to the May 31, 2010 attack on the Gaza-bound flotilla and the U.S. policy towards the blockade of Gaza, that forms the basis of the Request under appeal. Accordingly, it is erroneous to have concluded that the Navy has lacks “any affiliation” with the Request and to have administratively closed the Request.

* * *

In closing, CCR requests that you make an adequate and reasonable search for the records we requested. 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.¹³ Accordingly, we demand that your office engage in an adequate

¹² <http://www.naveur-navaf.navy.mil/AORPAGE.html>

¹³ The over-classification of documents was an issue cited by the 9/11 Commission in its final report as one factor impairing the efficient and effective sharing of information with the American public. See The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States, 417 (“Current security requirements nurture overclassification and excessive compartmentation of information among agencies”); see also Memorandum from Lawrence J. Halloran to Members of the Subcommittee on National Security, Emerging Threats, and International Relations, *Briefing Memorandum for the hearing, Emerging Threats: Overclassification and Pseudo-classification, scheduled for Wednesday, March 2, 1:00 p.m., 2154 Rayburn House Office Building*, Feb. 24, 2005 (noting that the Information and Security Oversight Office’s 2003 Report to the President found that “many senior officials

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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,



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will candidly acknowledge that the government classifies too much information, although oftentimes the observation is made with respect to the activities of agencies other than their own”).