



U.S. Immigration
and Customs
Enforcement

March 3, 2015

Shawn Musgrave
MuckRock News
Dept MR 15759
P.O. Box 55819
Boston, MA 02205

RE: 2015-ICFO-66842, 2015-ICAP-00167

Dear Mr. Musgrave:

This is in response to your correspondence dated February 5, 2015 appealing U.S. Immigration and Customs Enforcement's (ICE) fee classification of you as a non-commercial requestor. Your initial Freedom of Information Act (FOIA) request, dated January 23, 2015, sought various records regarding Operation Safeguard and a full FOIA fee waiver.

On February 5, 2015, the ICE FOIA Office denied your request for a full fee waiver and labeled you a non-commercial requestor for fee assessment purposes. With respect to the denial of the fee waiver, the ICE FOIA Office determined you did not establish factors 4, 5, and 6 of the fee waiver analysis.

In correspondence dated February 5, 2015, you appealed ICE FOIA's classification of you as a non-commercial requestor for fee assessment purposes. In your appeal, you state you are a journalist who covers unmanned aerial vehicles (UAVs) and the Department of Homeland Security extensively for numerous news outlets. You request fee classification as a member of the news media.

A requestor bears the burden of satisfying the statutory and regulatory standards of the fee waiver.¹ Fee waivers are properly granted "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester."² The Department of Homeland Security (DHS) FOIA Regulations at 6 C.F.R. §5.11(k) set forth six factors to examine in determining whether the applicable legal standard for a fee waiver has been met. Those six factors are as follows: (1) whether the subject of the requested records concerns "the operations or activities of the government;" (2) whether the disclosure is "likely to contribute" to an understanding of government operations or activities; (3) whether disclosure of the requested information will contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons; (4) whether the contribution to public understanding of government operations or activities will be "significant;" (5) whether the requestor has a commercial interest

¹ See: Friends of the Coast Fork v US, 110 F. 3d 53 at 55 (1997).

² See: Piper v. U.S. Dep't of Justice, 294 F. Supp. 2d 16,24 (D.D.C. 2003).

that would be furthered by the requested disclosure; and (6) whether the magnitude of any identified commercial interest to the requestor is sufficiently large in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requestor. A *de novo* review of the six factors was conducted to evaluate your appeal.

As to the first requirement, the information you requested regarding Operation Safeguard likely concerns the operations or activities of the government.

The second requirement mandates the disclosure is "likely to contribute" to the understanding of the public at large regarding specific government operations or activities. In order for the disclosure to "likely contribute" to an understanding of government operations, the disclosable portions of the requested information must be meaningfully informative in relation to the subject matter of the request.³ Note that a plethora of documentation regarding Operation Safeguard is already available online. As noted in your original FOIA request, Operation Safeguard has been the topic of reports prepared by the Congressional Research Service. An online search shows Operation Safeguard was studied by the Federation of American Scientists and the Center for International Policy, as well as by elected members of the US Senate, such as Senator Maria Cantwell of Washington.

The third requirement mandates the disclosure of the requested information contribute to the understanding of the public at large, as opposed to the individual understanding of the requestor or a narrow segment of interested persons.⁴ Moreover, a requestor must establish an ability to disseminate the information to the public at large.⁵ In your original correspondence dated January 23, 2015, you state you are a journalist who covers UAV's and DHS. You cite to a few news articles to demonstrate your published work. However, you do not specifically indicate how you plan to publish, or otherwise analyze and make publically available, the information gathered on Operation Safeguard from your most recent FOIA request.

The fourth requirement mandates the disclosure and subsequent contribution to public understanding of government operations or activities be "significant." To warrant a waiver or reduction of fees, the public's understanding of the subject matter in question must be likely to be enhanced by the disclosure to a significant extent. As discussed above, a significant amount of material regarding Operation Safeguard already exists in the public forum. Therefore, it is unlikely any disclosure pursuant to this FOIA request will raise the public's understanding of the Operation (and UAVs) to a significant extent.

In response to your appeal, ICE completed a careful review of the public interest requirements of the fee waiver request (above factors 1-4). As indicated above, you have not established the disclosure of information is "likely to contribute" to the understanding of the public at large regarding specific government operations or activities. Information regarding the programs you referenced is

³ See: Carney v. DOJ, 19 F. 3d 807, 814 (2d Cir. 1994); Manley v. Dept. of the Navy, No. 1:07-cv-721, 2008 WL 4326448 at *4(S.D. Ohio Sept. 22 2008) (quoting with approval agency's regulation requiring "assessment of the 'substantive content of the record...to determine whether disclosure is meaningful'").

⁴ See: Forest Guardian v. U.S. Dept. of Interior, 416 F.3d at 1179 (10th Cir. 2005).

⁵ See: Ortloff, No. 98-2819. slip op. at 21 (D.D.C. Mar. 22, 2002).

already available online and has been for several years. Further, you have not proven any disclosure in response to your FOIA request and the subsequent contribution to public understanding of government operations or activities will be "significant."

Therefore, ICE determined the denial of your request for a fee waiver was proper in all respects and you have not shown you qualify for a fee waiver as required under 6 C.F.R. § 5.11(k)(2). Examination of the commercial nature of the requestor and information is not necessary, as you failed to satisfy the public interest requirements of the fee waiver.

Additionally, ICE evaluated your request to be classified as a representative of the news media for fee assessment purposes. A representative of the news media is "any person or entity that 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."⁶ Additionally, Congress incorporated into the statutory definition the OMB Fee Guidelines definition of "news" as "information that is about current events or that would be of current interest to the public."⁷ Freelance journalists can be considered representatives of the news media if they can demonstrate a solid basis for expecting publication through a news media entity, whether or not the journalist is actually employed by the entity.⁸

Your FOIA request dated January 23, 2015 indicates Operation Safeguard was commenced by ICE in 2003 and subsequently evaluated by Congress in 2005, approximately ten years ago. You failed to adequately prove that any specific information regarding Operation Safeguard is of current interest to the public.

Further, as stated in the fee waiver analysis above, you did not provide any information indicating you expect to be published as a result of the information gleaned from this FOIA request. You did not explain how you to plan to use any information regarding Operation Safeguard obtained through FOIA to create a distinct piece of written work and distribute that work to a broad section of the population. In your original FOIA request, you stated "the requested documents will be made available to the general public free of charge as part of the public information service at MuckRock.com." This is the only statement you make regarding your plans for the information gained on Operation Safeguard. Note that simply posting information gained from a FOIA request online is insufficient to meet the publication and dissemination requirement.

Therefore, ICE FOIA's initial assessment of you as a non-commercial requestor for fee adjudication purposes is affirmed. As a non-commercial requestor, search fees and duplication costs will be assessed. You are entitled to two hours of search time and 100 pages of responsive documents at no charge.

This decision is the final action of U.S. Immigration and Customs Enforcement concerning your fee waiver request. Inasmuch as you consider this to be a denial of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B) in the United States

⁶ OPEN Government Act 3; *See: Nat'l Sec. Archive V. DOD*, 880 F. 2d 1381, 1387 (D.C. Cir. 1989).

⁷ OMB Fee Guidelines, 52 Fed. Reg. at 10,018.

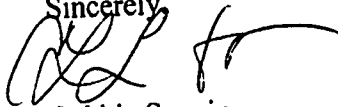
⁸ *See: Brown v. U.S. Patent and Trademark Office*, 445 F. Supp. 2d 1347, 1356-57 (M.D. Fla. 2006).

District Court in the district in which you reside or have a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Should you have any questions regarding this appeal, please contact ICE at ice-foia@dhs.gov. In the subject line of the email, please include the word "appeal," the appeal number, which is **2015-ICAP-00167**, and the FOIA case number, which is **2015-ICFO-66842**.

Sincerely



Debbie Seguin
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ICE Office of the Principal Legal Advisor
U.S. Department of Homeland Security