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*Last Updated: 07/12/2023*

August 6, 1986

MEMORANDUM FOR KEVIN R. JONES  
DEPUTY ASSISTANT ATTORNEY GENERAL  
OFFICE OF LEGAL POLICY  
DEPARTMENT OF JUSTICE

FROM: J. MICHAEL SHEPHERD *Jms*  
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Illustrative Freedom of Information Act Requests  
from the National Security Archive

As you requested, attached are the relevant pleadings from two Freedom of Information Act requests by Eli Gottesdiener for "Presidential successor basing options" and other plans and materials that may have been developed for the protection of the President and National Command Authority in the event of national security emergency. I expect that a summary judgment motion will be filed in Gottesdiener v. United States Secret Service at the end of this month.

Mr. Gottesdiener identifies himself as a member of the Georgetown Law Journal staff and a legal consultant to the National Security Archive.

Attachments

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELI GOTTESDIENER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 85-3614
	)	
FEDERAL EMERGENCY MANAGEMENT	)	Defendants Affidavit of
AGENCY,	)	
	)	William F. Williams
Defendant.	)	
	)	
	)	

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AFFIDAVIT

I, William F. Williams, being duly sworn, depose and say as follows:

(1) From December 10, 1982 to April 3, 1986 I was the Acting Associate Director, Emergency Operations Directorate, Federal Emergency Management Agency (FEMA), Washington, D.C. In that position, I held Top Secret classification authority. Having held the position during the past year, I am familiar with plaintiff's Freedom of Information Act (FOIA) request of September 27, 1985 for records, identified as "Presidential Successor Basing Options" dated February 1980. I am familiar with the document which has been identified by FEMA as responsive to plaintiff's request. I am also familiar with the procedures followed in processing requests for information in FEMA files pursuant to Title 5, United States Code, Section 552, commonly known as the Freedom of Information Act. I am personally familiar with the procedures followed in responding to plaintiff's FOIA request for records from FEMA files.

(2) On October 11, 1985, when I denied plaintiff's FOIA request, I was familiar with and considered many factors concerning the requested document, which include the following. The requested document was entitled "Presidential Successor Basing Options", dated February 1980, the authors of which included C.W. Hulbert and C.T. Battle. The document was produced as a result of a contract between Defense Civil Preparedness Agency (DCPA) and Systems Planning Corporation. [The document contained paragraphs which were all portion-marked "Secret", which were all contained on pages marked "Secret". The document contains 33 pages and pertains to options and the vulnerability of those options as they relate to Presidential Successor Basing Options.] I was aware of the content of the document and its impact on national security. The document contained options which the President and the United States may or may not use in the past, present or future. No other documents were named or referenced in this document. Further, I was very familiar with the contents and criteria of Executive Order 12356 and the Emergency Operations Directorate classification guide established under the criteria provided for under Executive Order 12356. I was fully aware of the circumstances surrounding the declassification review of this document conducted on March 30, 1984 whereby I determined that the document was properly classified at the Secret level. [I was aware that there had been no change made to Executive Order 12356 and no change made in any criteria or circumstance which would warrant a declassification of any portion of the document. Being aware of all pertinent factors, including the above, the passage of time from March 30, 1984 to October 11, 1985 did not diminish the necessity to properly maintain the level of security as Secret.]

HISTORY AND DESCRIPTION OF THE SEARCH FOR RECORDS AND  
COMMUNICATIONS RELATIVE TO PLAINTIFF'S REQUEST

(3) By letter dated September 27, 1985, (Exhibit 1) addressed to Federal Emergency Management Agency, c/o FOIA Control Officer, Office of Public Affairs, Washington, D.C., plaintiff requested pursuant to the FOIA certain documents which include the following: "A study by Systems Planning Corporation carried out for the DCPA and now in the FEMA Library entitled 'Presidential Successor Basing Options. Work Unit # 4222EO38. DCPA01-78-C-0280 8002 AD-2. Authors: C.W. Hulbert; C.T. Battle."

(4) By letter dated October 1, 1985, Peg Maloy, Acting Director, Office of Public Affairs, acknowledged receipt of plaintiff's request, stating that the request was received in that office on October 1, 1985. Ms. Maloy further explained that the time limits for processing FOIA requests begin upon receipt of the request in the Office of Public Affairs and the due date for FEMA's reply was October 15, 1985. However, because the Office of Public Affairs functions primarily at the appellate level, plaintiff's request had been referred to the Emergency Operations Directorate for initial processing. A copy of this letter is attached hereto and incorporated by reference herein as Exhibit 2.

(5) By memorandum dated October 1, 1985--which was attached to the office copy of Exhibit 2--Linda Keener, Freedom of Information Act Specialist, requested my office to conduct a search of the files in Emergency Operations for the requested document and to make the initial response. A copy of this memorandum is attached hereto and incorporated by reference herein as Exhibit 3.

(6) By letter dated October 11, 1985, I sent a letter to plaintiff withholding the requested document, stating that the document had been reviewed and found to be classified under criteria established by Executive Order 12356, that the document contained no unclassified, reasonably segregable portion which could be released, and that it was withheld under 5 USC 552 (b)(1). The letter also informed plaintiff of his appeal rights. A copy of this letter is attached hereto and incorporated by reference herein as Exhibit 4.

(7) By letter dated October 25, 1985, addressed to me, plaintiff appealed my October 11, 1985 denial of his FOIA request concerning the "Presidential Successor Basing Options " document. A copy of this letter is attached hereto and incorporated by reference as Exhibit 5.

(8) By letter dated October 30, 1985, Peg Maloy, Acting Director, Office of Public Affairs, acknowledged receipt of plaintiff's appeal, stating that the appeal was received in that office on October 30, 1985 and that FEMA's response was due on November 27, 1985. A copy of this letter is attached hereto and incorporated by reference as Exhibit 6.

(9) By letter dated November 1, 1985, James J. Delaney, II, Acting Deputy Director, Federal Emergency Management Agency, denied plaintiff's appeal, further stating that the document had been reviewed and found properly classified at the Secret level under Section 1.3(a)(2) of Executive Order 12356, that a declassification review was conducted on March 30, 1984 by myself in response to a similar Freedom of Information Act request, that the document consists of 33 pages and relates to Presidential Successor Basing

Options, and that disclosure of any portion of this document reasonably could be expected to cause serious damage to the national security and is properly exempt from disclosure under 5 USC 552(b)(1). Mr. Delaney further advised plaintiff of his judicial review rights. A copy of this letter is attached hereto and incorporated by reference as Exhibit 7.

(10) By letter dated November 6, 1985, Peg Maloy, Acting Director, Office of Public Affairs, referenced plaintiff's October 25, 1985 letter (Exhibit 5) and his telephone conversation with Linda Keener of her staff, regarding plaintiff's inquiry as to whether a 1978 report of the same title existed. Plaintiff was advised that there was only one document, the 1980 report, which resulted from a contract which was awarded in 1978 by Defense Civil Preparedness Agency (DCPA), a predecessor agency of FEMA, to Systems Planning Corporation. A copy of this letter is attached hereto and incorporated by reference as Exhibit 8.

(11) By letter dated January 14, 1985 (sic), plaintiff appealed, under the Freedom of Information Act, the "assumed" denial of his request for a fee waiver pertaining to various FOIA requests submitted to FEMA by him. Plaintiff "assumed" a denial because he had not yet received an answer to his request. A copy of this letter is attached hereto and incorporated by reference as Exhibit 9.

(12) By letter dated January 28, 1986, Robert H. Morris, Deputy Director, Federal Emergency Management Agency, notified plaintiff, on the top paragraph page 3 of that letter, that since ~~the~~ study entitled, Presidential Successor Basing Options, was withheld in its entirety, that because the search revealed

that the document must be withheld, there was no photocopying and therefore no fees would be charged. A copy of this letter is attached hereto and incorporated by reference as Exhibit 10.

CLASSIFIED MATERIAL

(13) This document, Presidential Successor Basing Options, has been reviewed as a result of a previous FOIA request and determined on March 30, 1984 to be classified in its entirety. I was the classification authority who on March 30, 1984 determined that the document entitled Presidential Successor Basing Options, dated February 1980, is properly classified as Secret. The classification review was based on Emergency Operations Directorate classification guides established under the criteria provided for under Executive Order 12356. The document was not re-reviewed anew in that the criteria established for classification review remained the same on October 11, 1985, when plaintiff's request was initially denied, as the previous review date of March 30, 1984. Further, when plaintiff's request was processed, I was aware that there was no change of circumstances since the previous review and I determined that the document was properly classified.

(14) This document is presently classified in accordance with Executive Order 12356, National Information Security Directive dated April 6, 1982. The document is classified Secret because its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Exemption (b)(1) of the Freedom of Information Act (FOIA), 5 USC 552 protects information: (a) specifically authorized under criteria established by an



Executive Order to be kept Secret in the interest of national defense or foreign policy, and (b) are in fact properly classified pursuant to such Executive Order. The applicable Executive Order currently in effect and under which the document has been withheld is Executive Order 12356. The document was properly classified as Secret under Section 1.3(a)(2) of that Order.

(15) Specifically the withheld material has been classified to protect national security information concerning the continuity of government functions of the United States Government and to protect the vulnerability of those functions against disruption or destruction by enemy action. The knowledge of the continuity of government options, the criteria to be used in the exercise of the options, how the options may be exercised, and the vulnerabilities of each option, would materially aid an enemy in designing overt and/or covert attacks against the United States Government and its continuity of government capabilities; would increase the probability of success of such attacks if launched; and would materially assist a potential enemy in analyzing the probable net effects of possible future general wars. The continuity of government programs provide for the continuation of the essential non-military governmental functions in the event of an emergency situation, which would include war. Certain critical Federal Department/Agencies must provide continuous uninterrupted capabilities. The knowledge of possible Presidential/United States responses to wartime contingencies could materially assist a potential enemy in planning against the United States including efforts to disrupt governmental authority. It is therefore critical that certain continuity of government plans or options available to the President or potential Presidential successors be kept Secret

in that release of such information would compromise the program and materially aid potential enemies.

Respectfully submitted,

William F. Williams  
William F. Williams

Subscribed and Sworn to before me this 10 day of April, 1986.

Luzerna Street  
NOTARY PUBLIC

My commission expires

July 1, 1986



THE GEORGETOWN LAW JOURNAL  
GEORGETOWN UNIVERSITY LAW CENTER  
WASHINGTON, D. C. 20001

September 27, 1985

Federal Emergency Management Agency  
c/o FOIA Control Officer  
Office of Public Affairs  
Washington, D.C. 20472

FOIA # 157-85  
FEMA # 1490-85

Dear Sir or Madam:

Pursuant to the Freedom of Information Act (5 U.S.C. sec. 552, as amended), I hereby request disclosure of the following records for inspection and possible copying:  
(Please see attachment)

If you regard any of these records as exempt from required disclosure under the Act, I hereby request that you exercise your discretion to disclose them nevertheless. I further request that you disclose the listed documents as they become available to you without waiting until all the documents have been assembled.

I am willing to narrow or waive this request and the necessity for mandatory declassification review if suitable unclassified, open source or other background materials are available.

I am making this request my own behalf. The materials released pursuant to this request will be used in preparation of a law review article to be published in the Georgetown Law Journal, of which I am a member. The article surveys the legal structure of various institutional components of the national security establishment, including the Office of the President, the National Security Council, and elements of the Department of Defense. In addition to being used for this article, all materials received pursuant to this request will be indexed, analyzed, housed and disseminated by the National Security Archive for use by university and other major research libraries, not-for-profit public interest organizations, journalists and the general public. I presently serve as a legal consultant to the Archive.

Accordingly, I request that, pursuant to 5 U.S.C. sec. 552 (a)(4)(A), you waive all fees in the public interest because the furnishing of the information sought by this request will primarily benefit the public.

I further ask, in the event fees are not waived, that you immediately inform me of the specific basis for such a decision. If you also decline to waive fees on appeal, I am prepared to pay your normal search fees (and copying fees if I decide to copy any records), but I request that you notify me if you expect the search fees to exceed \$50. I look forward to hearing from you.

Sincerely,

  
Eli Gottesdiener

EG/ibm

cc: National Security Archive: National Security Information Policy & Litigation  
Advisory Board

Exhibit 1

1. A study by Systems Planning Corporation carried out for the DCPA and now in the FEMA Library entitled "Presidential Successor Basing Options. Work Unit # 4222EO38. DCPA01-78-C-0280 8002 AD-2. Authors: C.W. Hulbert; C.T. Battle.

2.

- AD-408 574 (Search Control # from Defense Documentation Center (DSA) Bibliography AD-868 950=/AML27): Continuity of Corporate Management in the Event of Nuclear Attack. 1963; 89 pages. American Society of Corporate Secretaries, Inc. NY.



# Federal Emergency Management Agency

Washington, D.C. 20472

October 1, 1985

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
Georgetown University Law Center  
Washington, D.C. 20001

Dear Mr. Gottesdiener:

This is in reference to your letters of September 27, 1985, in which you request, under the Freedom of Information Act, the following:

1. All Presidential Emergency Action Documents;
2. All chapters of, annexes to, and reports required by Federal Emergency Plan D;
3. A study by Systems Planning Corporation carried out for the DCPA and now in the FEMA Library entitled, "Presidential Successor Basing Options. Work Unit #4222E038. DCPA 01-78-C-0280 AD-2, Authors: C.W. Hulbert; C.T. Battle; and
4. AD 408 574 (Search Control No. from Defense Documentation Center (DSA) Bibliograph AD 868 950/AML27): Continuity of Corporate Management in the Event of Nuclear Attack, 1963; 89 pages, American Society of Corporate Secretaries, Inc., New York.

The FEMA FOIA Regulations, 44 CFR Part 5, provide that the time limits for processing requests begin upon receipt of the request by the Office of Public Affairs. We received your request in this office on October 1, 1985. Therefore, our response is due on October 15, 1985.

Because this office functions primarily at the appellate level, your request has been referred to our National Preparedness Programs Directorate and our Emergency Operations Directorate for initial processing. We have instructed those offices to respond directly to you as soon as possible.

Sincerely,

*Peg Maloy*

Peg Maloy  
Acting Director  
Office of Public Affairs

*Exhibit 2*

cc: CF(2)  
GC  
NPP(Ruple, for action)  
OP(Queisenberry, for action)  
PA  
LMKeener/10-1-85/646-3981  
FEMA #'s: 1489-85 and 1490-85  
FOIA #'s: 156-85 and 157-85

Tom Ruple, NPP--

Your office's response is due on October 15, 1985. Please coordinate with Delores Queisenberry, OP, as to which documents are under NPP and which are under NPP. Please provide a copy of your office's response to my office with a completed copy of FEMA Form 13-2. Thanks.

Linda Keener

Delores Queisenberry, OP--

Your office's response is due on October 15, 1985. Please coordinate with Tom Ruple, NPP, as to which documents are under OP and which are under OP. Please provide a copy of your office's response to my office with a completed copy of FEMA Form 13-2. Thanks.

Linda Keener



# Federal Emergency Management Agency

Washington, D.C. 20472

OCT 11 1985

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
Georgetown University Law Center  
Washington, D.C. 20001

Dear Mr. Gottesdiener:

This is in response to your Freedom of Information Act (FOIA) letters of September 27, 1985, in which you request the following:

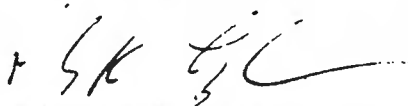
1. All Presidential Emergency Action Documents;
2. All chapters of, annexes to, and reports required by Federal Emergency Plan D;
3. A study by Systems Planning Corporation carried out for the DCPA entitled, "Presidential Successor Basing Options," and
4. "Continuity of Corporate Management in the Event of Nuclear Attack," 1963, prepared by the American Society of Corporate Secretaries, Inc. New York.

One document identified as "Presidential Successor Basing Options," dated February 1980, has been reviewed and found to be classified under criteria established by Executive Order 12356. This document contains no unclassified, reasonably segregable portion which could be released. Therefore, this document is withheld under 5 USC 552 (b)(1).

Insofar as you may consider this decision to constitute a partial denial of your request, you may appeal in writing within 30 days of receipt of this letter. Your letter of appeal should include a brief summary of why you believe the document should be released, and should be addressed to the Federal Emergency Management Agency, Director, Office of Public Affairs, Washington, D.C. 20472.

Additional material which you have requested will be the subject of subsequent correspondence.

Sincerely,

  
5- William F. Williams  
Acting Associate Director  
Emergency Operations

ELL 674



THE GEORGETOWN LAW JOURNAL  
GEORGETOWN UNIVERSITY LAW CENTER  
WASHINGTON, D. C. 20001

25 October 1985

Mr. William F. Williams  
Acting Associate Director, Emergency Operations  
Federal Emergency Management Agency  
Washington, D.C. 20472

Dear Mr. Williams:

This is to appeal the de facto denial of documents sought under the Freedom of Information Act in a response I received from your office, dated 11 October, regarding my request of 27 September 1985 to FEMA. I am also making an interim appeal from the denial of materials of which your 11 October letter informed me.

My request filed with FEMA on 27 September 1985 asked for two studies prepared for the Defense Civil Preparedness Agency (DCPA), one of which was a study by Systems Planning Corporation entitled "Presidential Successor Basing Options". In addition to naming the study, I provided FEMA with the names of the authors, the FEMA work unit number, and the DCPA control number.

In a response dated 11 October, you informed me that one document identified as "Presidential Successor Basing Options," dated February 1980, had been reviewed and found to be classified under criteria established by Executive Order 12356. The letter stated that the document contains no unclassified, reasonably segregable portion which can be released. As a result, the letter concluded, the document is being withheld under FOIA Exemption 1.

Inadequacy of Initial Determination

Your letter lists Exemption 1 as the authority that this document must be denied in full and invokes "the criteria" of Executive Order 12356. The letter does not inform me either of the classification category of section 1.3(a) that procedurally qualified the document for classification consideration or that, after careful review of the substance of the document, the requisite standard had been met in this case, for this particular document.

The level at which the document was classified was also not disclosed. Indeed, though the document was originally classified (assuming it was classified at the date of completion or submission) under Executive Order 12065, no mention is made of this fact nor do you indicate whether the document was re-reviewed and classified under Executive Order 12356.

First, this response is insufficient under 5 U.S.C. sec. 552 (a)(6)(A) and amounts to a denial of administrative due process, guaranteed by the FOIA, because it makes meaningful appeal impossible. See Shermco Industries Inc. v. Secretary of the Air Force, 452 F. Supp. 306, 317 n. 7 (N.D. Tex 1978), rev'd on other grounds, 613 F. 2d 1314 (5th Cir. 1980)(denial of due process and exhaustion of remedies where determination response fails to include minimal elements to allow appeal). Second, the response

Exh. 6.4 5



strongly suggests that full review for declassification and segregation was not conducted as required by law.

The right to efficient, prompt and full disclosure of information by federal agencies presupposes a system whereby meaningful appeal can be had, within agencies, after the government has initially denied a request in whole or in part. The court in Shermco found that requesters under the FOIA are legally entitled to, among other things, at least a list of documents withheld and to be informed as to the reasons why the agency is not releasing withheld records. Id. at 317. This means providing the requester not just with bare notification of the authority the agency believes justifies its denial decision but with the specific logical and factual basis upon which denial decisions were made. Indeed, the Court of Appeals for the D.C. Circuit has explicitly ruled that "the objective of the Vaughn requirements, to permit the requesting party to present its case effectively, is equally applicable to proceedings within the agency." Mead Data Central, Inc. v. Department of the Air Force, 566 F. 2d 242, 251 (D.C. Cir. 1977). At a minimum, then, you should provide:

1. Basic factual material including the length, addressees, originator, and nature of the withheld item.
2. Explanations and justifications for denial including the identification of the procedural categor(ies) of E.O. 12356 under which the withheld documents were found to be subject to classification, at what level the entire document was ultimately classified and the nature and variety of the document's portion marking and, most importantly, explanations of how each exemption fits the withheld material.

FEMA FOIA implementing regulations, 44 CFR I, Pt. 5, do not, unfortunately, reflect the minimal initial response requirements of the Act. By way of illustration, we cite agency regulations which do, in the main, conform to the FOIA's initial response requirements. Defense Department Regulation 5400.7-R, "Freedom of Information Act Program," provides that the official designated to respond, in addition to informing the requester of the initial denial authority and the specific exemption on which the denial is based, must also "explain to the requester the basis for the determination in sufficient detail to permit the requester to make a decision concerning appeal... the explanation should include a summary of the applicable criteria for classification, as well as an explanation, to the extent reasonably feasible, of how those criteria apply to the particular records in question." 5-204(c) at V-4 (emphasis supplied).

I respectfully request that, notwithstanding the above, the appeal of the denial of documents following this section be considered immediately. Should you uphold the initial denial of this material after consideration of the appeal, kindly redress the deficiencies of the initial determination letter as described above. This will ensure administrative due process at the appeal stage should the arguments below fail to produce release of materials.

An additional point must be made concerning the procedural inadequacy of the response. Your letter states that the record located responsive to my request was dated February 1980. Information I provided FEMA indicates that the study requested was produced in 1978. The control number provided was DCPA 01-78-C-0280 AD-2. The document was cataloged in 1978 ("78") and DCPA had already been reorganized into

FEMA by February 1980. There are, then, at least two records responsive to my request. I expect to hear shortly on the results of a review of the originally requested document.

### Appeal

I believe the initial denial determination to have been in error for the following reasons:

Given the nature of materials involved here it is inconceivable that major portions cannot be safely excised and released. This is not a plan for the actual dispersal of presidential successors, but merely, as the title suggests, a study examining various broad possibilities. In fact, I believe the bulk of the document is concerned only theoretical questions. The document was prepared not by government planners responsible for program implementation but rather, by private contractors. Moreover, the FEMA library reference for the 1978 version of this study indicates that the highest classification level of material within the documents was found to be--several years ago--only Secret, demonstrating either that the few references made to actual operational plans, relocation sites or vehicles either were never very sensitive and have certainly lost some of their confidentiality with the passage of time or that such references are not to be found within the document at all and the document consists entirely broad hypotheticals, devoid of realistic and factual specificity.

Under any circumstance, because of the broad and frequent discussion of these issues in other unclassified materials, we believe that few items of information in this document are likely to cause harm to the national security if disclosed again in this document.

Moreover, at least some portion of the substance of this document is no more or less than a general recitation of information which can be developed through the publicly available facts as of:

1. the political and practical problems with dispersing presidential successors day in day out;
2. the risk of escalation through emergency dispersal in a crisis;
3. the identities, attitudes and travel plans of presidential successors;
4. the temporal restrictions imposed by intercontinental or depressed trajectory ballistic missiles;
5. the physical limitations and vulnerabilities of airborne and ground mobile command centers;
6. the problems of effective command and control;
7. and the territorial limits of the United States or North America imposed upon dispersal of national leadership.

It has been my experience that an entire section of such a document only rarely warrants classification in its entirety. In so far as any detail contained therein might

require classification to protect a b(1) category of information, the deletion of limited references-- usually a sentence, word or phrase-- will permit the release of a segregable portion.

I look forward to hearing from you.

Sincerely,

Eli Gottesdiener

cc: National Security Archive: National Security Information and Policy Litigation  
Advisory Board



# Federal Emergency Management Agency

Washington, D.C. 20472

October 30, 1985

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
Georgetown University Law Center  
Washington, D.C. 20001

Dear Mr. Gottesdiener:

This is in reference to your letter of October 25, 1985, in which you appeal, under the Freedom of Information Act, the decision of William F. Williams, Acting Associate Director, Emergency Operations, dated October 11, 1985, denying you access to the document identified as "Presidential Successor Basing Options" dated February 1980 under 5 U.S.C. 552(b)(1).

The FEMA FOIA Regulations, 44 CFR Part 5, provide that the time limits for processing requests begin upon receipt of the request by the Office of Public Affairs. We received your request in this office on October 30, 1985. Therefore, our response is due on November 27, 1985.

Sincerely,

Peg Maloy  
Acting Director  
Office of Public Affairs

F.L.L. 6



# Federal Emergency Management Agency

Washington, D.C. 20472

NOV 1 1985

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
Georgetown University Law Center  
Washington, D.C. 20001

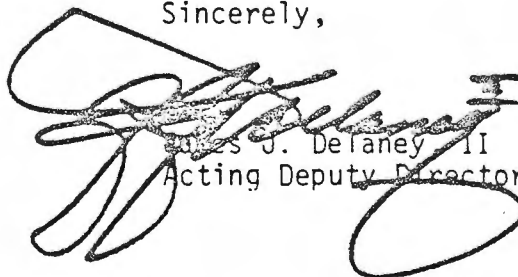
Dear Mr. Gottesdiener:

This is in reply to your letter of October 25, 1985, in which you appeal, under the Freedom of Information Act, the decision of William F. Williams, Acting Associate Director, Emergency Operations, dated October 11, 1985, denying you access to the document identified as "Presidential Successor Basing Options" dated February 1980 under 5 U.S.C. 552(b)(1).

We have reviewed the subject document and found that all portions of the document are properly classified at the Secret level under Section 1.3(a)(2) of Executive Order 12356. A declassification review was conducted on March 30, 1984, by William F. Williams, Acting Associate Director, Emergency Operations, in response to a similar Freedom of Information Act request from Scott Armstrong, formerly with the Washington Post. The document consists of 33 pages and relates to Presidential Successor Basing Options. Disclosure of any portion of this document reasonably could be expected to cause serious damage to the national security and is properly exempt from disclosure under 5 U.S.C. 552(b)(1).

You may seek judicial review of this decision in the district court in the district in which you reside, have a principal of business, or in the district court of the District of Columbia.

Sincerely,



James J. Delaney II  
Acting Deputy Director



# Federal Emergency Management Agency

Washington, D.C. 20472

November 6, 1985

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
- Georgetown University Law Center  
Washington, D.C. 20001

Dear Mr. Gottesdiener:

This is in reference to your letter of October 25, 1985, and telephone conversation with Linda Keener of my staff, regarding documents identified as Presidential Successor Basing Options. Our agency responded to a February 1980 report and your letter suggests that a 1978 report exists because you have a control number for the report identified as DCPA-01-78-C-0280 AD-2.

Mrs. Keener advised you that our agency had only located one document but that we would again conduct a search to ensure that we did not have a 1978 report. The DCPA 01-78-C-0280 AD-2 control number is an identification of a 1978 contract awarded by the DCPA and the February 1980 report resulted from the 1978 contract. The February 1980 report does in fact reflect the DCPA 01-78-C-0280 control number.

We trust this satisfies your inquiry and assure you that our agency only has one report which has been addressed in our November 1, 1985, letter from James J. Delaney, II, Acting Deputy Director.

Sincerely,

A handwritten signature in cursive script, appearing to read "Peg Maloy", is written over the typed name.

Peg Maloy  
Acting Director  
Office of Public Affairs

Exhibit 8



THE GEORGETOWN LAW JOURNAL  
GEORGETOWN UNIVERSITY LAW CENTER  
WASHINGTON, D. C. 20001

January 14, 1985

FOIA # 011-86  
FEMA # 191-86

Federal Emergency Management Agency  
Deputy Director  
c/o Linda Keener, FOIA Control Officer  
500 C Street, Southwest  
Washington, D.C. 20472

Dear Mrs. Keener:

This is primarily to request copies of all releaseable materials found responsive to my FOIA request of 22 October 1985 for information concerning REX-ALPHA, REX-BRAVO, HILEX and other related exercises. A partial response dated 9 January 1986 lists on an enclosure the documents now available for release. But this letter is also to secure a fee waiver for all materials released and releaseable to me to date.

The 9 January 1986 letter, signed by Mr. Maguire, the Associate Director for National Preparedness, informs that "[i]f your fee waiver request or reduction of fees is not granted, the photocopying fees of \$.15 per page may be appropriate. In addition, if your fee waiver or reduction of fee [sic] is not granted, you will have to reimburse our agency for the photocopying fees and search fees, if applicable..."

Though the 10 day timelimit for reply to requests (including fee waiver requests) has expired and though significant material responsive to my request is now ready for release, no response to my fee waiver has yet been made. Accordingly, I am appealing the de facto denial of my waiver request, pursuant to 5 U.S.C. Section 552 (a)(6)(A)(i).

In my original request letter of 22 October, I requested information concerning, generally and in pertinent part, FEMA-sponsored procedural exercises designed to assist in enhancing Continuity of Government. Information on this topic is plainly a matter of the highest public import and interest. However, to demonstrate that I have the ability and intent to widely and effectively disseminate this information, I explained that I was preparing a law review article for publication in the Georgetown Law Journal. I noted that I am a member of the Journal. I described the article as a survey of the legal structure of various institutional components of the national security establishment, including the Office of the President, the National Security Council, and elements of the Department of Defense. Finally, I stated that in addition to being used for my article, all materials received pursuant to this request will be indexed, analyzed, housed and disseminated by the National Security Archive for use by university and other major research libraries, not-for-profit public interest organizations, journalists and the general public. I noted that I serve as a consultant to the Archive.

Exhibit 9

Between the time I filed my original request and the 9 January letter, FEMA had informed me, in a letter dated 8 November 1985, that my request for a waiver of search and photocopying fees (made in each of my requests to the agency) "will be handled on a case-by-case basis depending on the subject matter and public benefit to be served by the information being made available."

The letter further stated that "in order to assist our agency in evaluating your request for a waiver or reduction of fees, we need to receive further information, such as specifically how the various types of information you have requested will be used; to whom it will be distributed; costs, if any, to the public or specific groups of obtaining such information; your qualifications, such as expertise in the subject areas and specialized knowledge to extract and effectively convey information to the public; and any personal or commercial benefits to be derived from release of the requested information."

Though I am willing to supply, for the purposes of this appeal, additional information in support of my request, the information already provided is dispositive, as a matter of law, on the issue of my entitlement to a fee waiver. Moreover, beyond my letter and request, FEMA has additional evidence of my intent and ability to disseminate information obtained through these requests.

My legal entitlement to a fee waiver will be demonstrated below, after the numbered items which directly follow.

#### Supplemental Information in Support of the Request for a Fee Waiver

1. Documents concerning emergency readiness of the federal government and the exercises which test this preparedness will be incorporated directly into my study of the legal structure of the various institutional components of the national security establishment. Information gleaned from these materials will test various hypotheses about the continuity and disruption of legal relationships envisioned by the Constitution and by statute, as a result of conscious design as well as by circumstance, in the event of a national nuclear emergency. For example, REX-ALPHA exercises examine current Presidential Successor support procedures as well as Military Assistance to Civil Authorities, areas of particular importance to my work.
2. The Georgetown Law Journal is where I will be publishing my article, unless I receive a more attractive offer from one of the other national law reviews. The piece is still in its preliminary form. There will be no commercial gain from these efforts. In addition, I envision follow-on articles using the same material.
3. As FEMA is aware, I am a former research associate of the Center for Defense Information, a Washington-based not-for-profit research and library facility led by retired military officers. Of particular relevance to my FEMA request, (among my varied contributions to the work of the Center) I co-authored a major study on the Reagan Administration's Civil Defense and Continuity of Government programs. President Reagan's Civil Defense Program, Defense Monitor, Vol. XI, Number 5 (1982)(I.S.S.N. #0195-6450). This study reached several thousand members of the public as regular recipients of the Center's publications and, due to heavy demand, has undergone at least one reprint. Moreover, the study was the subject of national news stories written by such diverse journalists as Jack Anderson and Tom Wicker of The New York Times and was entered, in full, by Senator William Proxmire (D-Wisconsin) into the Congressional Record.



federal agencies must follow their own regulations unless those regulations are rescinded or amended in strict compliance with the requirements of the APA. See Morton v. Ruiz, 415 U.S. 199, 235 (1974); Service v. Dulles 354 U.S. 363, 388 (1957); see also United States v. Nixon, 418 U.S. 683 (1974). This is particularly so where the agency's revised practice involves a dramatic change in direction from regulations in effect. See National Wildlife Federation v. Watt, 571 F. Supp. 1145, 1157 (D.D.C. 1983); see generally Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, \_\_\_ U.S. \_\_\_, 103 S.Ct. 2856 (1983). In essentially adopting DOJ criteria for fee waiver determinations, FEMA disregards its own validly promulgated regulations regarding fee waiver requests and relies on an entirely new and different set of regulations.

The delay in making a fee waiver determination, the series of immaterial questions and the specific references to FEMA "evaluation[s] of all materials released... [and] the substantive portions of the records being released"<sup>1</sup> make it clear that FEMA is either following the Justice Department guidelines and stands ready to apply these factors, or, on its own, has managed to adopt a unlawful adjudicative posture. Irrespective of explanation, the result violates to the straightforward requirements of the fee waiver provision.

FEMA FOIA regulations, 44 CFR Chapter I Section 5.42(a) and (b),<sup>2</sup> make no provision for the number and kinds of questions put to me. Both Section 5.42(a) and 5.42(b) correctly state the controlling, objective test to be applied to a waiver request-- by simply restating the words of the Act-- but, 5.42(b), the regulation that governs fee waiver requests, errs seriously in describing the agency's duties once this test has been made. The regulations provide in pertinent part that "[r]ecords may be furnished without charge... if the Headquarters FOIA Officer or Regional Director determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public" (emphasis supplied). The law, on the other hand, mandates that once the standard is met, fees shall be waived. 5 U.S.C. (a)(4)(A). Thus, as stated, the FEMA regulations would appear to vest more discretion in the agency than the law allows. However, whether or not FEMA so reads its regulations' invitation to disregard the results of the legal standard, the Justice Department guidelines (or their FEMA-created equivalent) the agency is prepared to use in making a fee waiver test contravene the letter and spirit of this standard.

The illegitimacy of the Justice Department guidelines is unmistakable. Stressing that "federal agencies are obligated to safeguard the public treasury," the DOJ guidance's first three factors are:

- 1) whether, according to the agency, the public has a "legitimate" or "genuine" interest in the information requested.

- 2) whether the disclosable records are of "value" to the public, "in fact informative on the issue to be found of public interest", or "meaningfully contributes to the public development or understanding of the subject." In addition, this second

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<sup>1</sup> Letter from Peg Maloy, Acting Director, Office of Public Affairs, to the requester, dated 10 January 1986 (concerning, in part, the pending fee waiver determination regarding request securing the release of Nine Lives Exercise materials and the FPA circular, "Plan for Succession to the Presidency Under Emergency Condition." MY appeal of the de facto denial of the fee waiver applies also and equally to this request and these materials.

factor advises that "[w]here the information that can be disclosed in response to a FOIA request is of only marginal value in informing the public, the public benefit derived from disclosure is diminished accordingly."

3) whether the requested information is already available in the public domain.

The Rose Memorandum, which comes complete with legal "authority," was clearly designed to guide agencies away from the clear, objective inquiry the fee waiver provision calls for, which I lay out below. Suffice it to say that a review of relevant case law cited in the Memorandum will reveal important cases favorable to the granting of fee waivers were not considered and that critical aspects of cited cases were deliberately ignored. "[C]ases and pieces of cases chosen to provide as many different reasons for denying fee waivers as possible and to make the consideration of fee requests as complex as possible." Letter from Glenn English, Chairman of the House Government Operations Subcommittee, addressed to all agency heads shortly after the issuance of the Rose Memorandum. A notable example is how the Department conveniently neglected to mention the liberal construction policy, the single most important factor in the interpretation of the fee waiver provision, enunciated by Congress and relied upon by the courts (see discussion below).

The law provides that "[d]ocuments shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public." 5 U.S.C. Section 552 (a)(4)(A).

The plain language of the Act makes clear that Congress intended that the assessment of fees not be a bar to private individuals or public interest groups seeking access to government documents. The predicate of the fee waiver is clear: it was seen as crucial in the effort to maximize the number and importance of government records made available to the general public, in order to strengthen public awareness of its government's operations and policies and to insure government employees serve the public in an atmosphere of openness and accountability. As a cornerstone of its 1974 overhaul strengthening the law, Congress adopted the fee waiver provision to the law in 1974 because it concluded that agencies were charging high fees to discourage certain types of requesters or requests. The 1974 Senate Report on the FOIA amendments specifically incorporated into its findings a House Committee on Government Operations Report, issued in 1972 after a long investigation into the implementation of the FOIA, which recognized "that search and copying charges may be used by an agency to effectively deny public access to agency records". 1974 S. Rep. No. 854, Amending the FOIA at 11, reprinted in 1975 FOI Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents, Joint Committee Print, 94th Cong., 1st Sess., 163 (1975) (hereafter "Sourcebook") (quoting 1972 H. Rep. No. 1419 at 57). In amending the Act, Congress stressed that "fees should not be used for the purpose of discouraging requests for information or as obstacle to disclosure of requested information." Conf. Rep., H.R. Rep. No. 1380, 93rd Cong., 2d Sess. 8 (1974), reprinted in Source Book at 225. The evidence seems to raise the very real question as to whether FEMA has not been actively proceeding in the proscribed manner.

Congress consistently associated certain types of requesters with the fee waiver provision and intended that they be routinely be granted waivers. Among the requesters referred to repeatedly in the legislative history are journalists,

researchers, scholars and non-profit public interest organizations. See Senate Comm. on the Judiciary, Amending the FOIA, S. Rep. No. 854, 93rd Cong., 2d Sess 10-19 (1974)(hereafter "Senate Report"), reprinted in the 1975 FOIA Source Book, at 162-71; Bonine, Public Interest Fee Waivers Under the FOIA, 1981 Duke L.J. 213, 238-244 (1981). See also Ettlinger v. FBI, 596 F. Supp. 867, 872 (D. Mass. 1984). Congress intended that a waiver of fees be extended to this class of requesters because the result of their individual efforts to obtain and make use of government documents was to publicize the functioning of government-- the central goal of the FOIA and, indeed, the ideal upon which our democracy ultimately rests. Because their work did primarily benefit the general public, it was appropriate that their effort to secure the release of relevant government documents be at no personal cost to them. A waiver was also seen as vital to encourage and facilitate the work of opening important records of government to the public, often for the first time.

By consistently associating them with the entitlement to a fee waiver, Congress established the presumption that requesters such myself-- bona fide scholars, researchers, professors, journalists and non-profit public interest groups-- were doing work beneficial to the public.

These requesters satisfy the standard that their requests are designed "primarily" to benefit the public.

My experience with the fee waiver provision has lead me to conclude that agencies have great difficulty with word "primarily" in the phrase "primarily benefiting the general public." When the fee waiver provision says that the furnishing of the information can be considered as "primarily" benefiting the public, that is to be read as the information is sought "principally," "of first importance" for a public purpose as opposed to a private, commercial interest. As noted above, the legislative history designates a whole class of requesters and requests that presumptively "can be considered as primarily benefiting the general public." The fact is, 5 U.S.C. section 552 (a)(4)(A) leaves to agency discretion only the objective task of determining whether information is being requested to benefit the general public rather than the individual requester. FEMA language, in its 10 January letter for example, demonstrates its misconstruction of the legal standard for a waiver: after I supply the requested information, your letter declares, and the agency completes its "evaluation" of the substance of the releaseable material, "we will be able to better balance the public interest in each request..." (emphasis supplied).

As the District Court for the District of Columbia has held, the "central issue" to be considered by the agency in a fee waiver determination is "whether furnishing the information will primarily benefit the public at large or whether any benefit will inure principally to the specific individual requesting the documents." Eudey v. CIA, 478 F. Supp. 1175, 1177 (D.D.C. 1979). Not whether the agency finds the request and requester beneficial to the "public interest."

This theme also resounds in the case law construing the fee waiver standard. For example, as recently as Judge Oberdorfer's March 1985 opinion in Badhwar v. United States Department of the Air Force, 615 F. Supp. 698 (D.D.C. 1985), the courts have consistently interpreted the fee waiver provision as allowing agencies only to ask whether the information is being requested for the benefit of the general public or whether it is being requested for the benefit of the requester alone. In Badhwar, the court overturned as arbitrary and capricious the Air

Force's refusal-- based on a Justice Department-induced misunderstanding of the fee waiver law-- to waive fees for reporters working for Jack Anderson investigating the safety of military aircraft. Id. at 707-08.

And, to cite another example, in Eudev v. CIA, supra, the court concluded that the CIA's decision not to grant a fee waiver to an historian at the University of California doing research for a book analyzing U.S. foreign policy was arbitrary and capricious. Since the plaintiff was not seeking information primarily to benefit herself, the CIA's denial of her fee waiver request was found to be inconsistent with the FOIA's statutory test. 478 F. 2d at 1177. Accord Allen v. FBI, 551 F. Supp. 694, 697 (D.D.C. 1982)(release of information to Kennedy assassination researcher "would benefit the public at large rather than just the plaintiff himself"); Allen v. DOD, Civ. No. 81-2543, slip op. at 11 (D.D.C. August 24, 1984) ("the legislative history of the fee waiver provision indicates that it was intended to aid historians and scholars because their work is presumed to be beneficial to the public"); Diamond v. FBI, 548 F. Supp. 1158, 1160 (S.D.N.Y. 1982)(historian entitled to a fee waiver because he was not seeking documents relating solely to himself); c.f. Ely v. United States Postal Service, No. 84-5222, slip op. at 3 (D.C. Cir. February 1, 1985)(requester seeking information concerning only himself not entitled to waiver because the information was not sought for public benefit); Rizzo v. Tyler, 438 F. Supp. 895 (S.D.N.Y. 1977)(same).

Congress did not intend agencies to analyze for themselves whether a particular topic under investigation by a journalist, scholar, or public-interest organization is a proper subject for public concern and debate. E.g., Ettlinger, 596 F. Supp. at 875.

After a thorough review of the FOIA's legislative history, the court in Ettlinger overturned the FBI's denial of a historian's fee waiver request and emphatically rejecting the notion that the fee waiver provision authorizes agencies to assess for themselves the public's "genuine" or "legitimate" interest in records requested under the Act. The court said that the FOIA does not permit an agency to make a de novo determination as to the intrinsic value of the subject matter on which information is requested...What an agency may not do, particularly in the case of scholars and historical researchers who have documented their qualifications, is substitute its own judgement for that of an objectively reasonable judgement by the requester as to the scholarly, historical or academic value of the requester's research.... Nothing in the statute or its legislative history authorizes an agency, in making these evaluations, to make its own finding as to whether or not a particular subject is worthy of scholarly or historical attention and to deny a fee waiver on that basis.

596 F. Supp. at 875.

Indeed, so strong was the presumption that the release of government records benefits the public that Congress, in the legislative history of paragraph (a)(4)(A), called for a liberal interpretation of the "primarily benefitting the public" standard. Senate Report at 12, reprinted in Source Book at 164; see also Ettlinger, 596 F. Supp. at 872 (Congress sent "clear message" of liberal interpretation to agencies). This mandate is purposefully ignored by the Rose guidelines.

Nevertheless, a liberal interpretation of the public benefit standard is not necessary. Under even the most strict interpretation, a law student working on a leading law journal and writing an article for publication, such as myself, falls squarely within the class of requesters Congress defined as meeting the public benefit standard.

It is manifest that I possess a particular expertise to identify, analyze and publish information concerning FEMA policies and programs, including unusual and previously publically undisclosed FEMA activities. I note that not only on the basic facts and the law do I enjoy the strong presumption of the entitlement to a waiver of fees but that, in addition, FEMA faces an additional, adverse presumption if it chooses to deny my waiver on appeal. That is, that a denial of my fee waiver request will be based on improper motives, suggested by the facts that 1) I am suing FEMA in federal court over the denial of a document, sought in a separate FOIA and 2) that I have published material FEMA considers hostile to its missions and functions. FEMA reaction to the above-cited Defense Monitor I co-authored was so adverse as to elicit an attempt to refute a number of its points. See FEMA document, "Charges made in 'Defense Monitor' on proposed Civil Defense program vs. Facts." (no date or document number; on file with the requester).

I am entitled to a waiver and, accordingly, a denial of my waiver request will be seen as unlawful by a court applying the "arbitrary and capricious" standard of review under the FOIA. See Eudey, 478 F.2d 1177 (discussing standard by which court will evaluate agency denial of fee waiver request). When a waiver has been denied, the agency action will be deemed arbitrary and capricious where there is nothing to indicate that furnishing the information cannot be considered as primarily benefiting the public. Fitzgibbon v. CIA, Civ. No. 76-700 (D.D.C. Jan. 10, 1977).

Regarding the second of the DOJ factors-- whether the releasable information is in fact informative and meaningfully contributes to the public's understanding of the subject matter-- this inquiry bears no relation to the criteria the Congress and the courts have found relevant to objective fee waiver determinations. FEMA adopts this factor when it conditions my waiver upon its "evaluation" of the "substantive portions of records being released."

Whether or not an agency is ever authorized to examine the contents of the requested materials to see if the information therein "will meaningfully contribute to the public development or understanding of the subject matter" (or if they are limited to a review of the objective credentials and intentions of the requester), it is clear that the information to be examined is not the information the agency deems releasable, but rather the information originally requested. Eudey, 478 F. Supp. at 1177 (nature of the information sought). The fact that only a small amount of this information is ultimately released or releasable can have no impact whatsoever upon the original determination whether or not the requester meet the public interest benefit standard and is or not legally entitled to a waiver of fees. 2

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2 This is reinforced by the fact that the gap between what is sought and what is ultimately released is a result of withholding accomplished through agency discretion, and not the operation of law (unless there happens to a (b)(3) Exemption claimed in which there is no agency discretion to release materials).

The court in Eudey found that the CIA's determination not to waive fees-- based on its assessment that few documents would be released in response to the plaintiff's request-- was arbitrary and capricious and thus unlawful "because it was based on a factor that is not controlling under the terms of the statute." "The statute does not permit a consideration of how many documents will ultimately be released. The Court notes, moreover, that a single document may, in the present context, substantially enrich the public domain." Eudey, 478 F. Supp. at 1177. This holding was recently expressly affirmed by the D.C. District Court in Leach v. U.S. Customs Service, slip op. at 8 (October 22, 1985)(not proper for agency to consider amount of material expected to be produced in response to a FOIA request).

(The third Rose factor is whether or not the information already exists in the public domain. Apart from the fact that agencies rarely inform the requester where these materials are, this factor assumes that the information, if in fact already in the public domain, exists in the same form or same detail or was in fact originated and destined for same individuals or organizations as the requested materials. Of course, this will rarely be the case; most often one is dealing with information released in two different manners and contexts: from official, operational files as opposed to information packaged and prepared for, dissemination by public affairs offices. The burden is on the agency, not the requester, as throughout the Act, to show that the materials are substantively the same and the request unnecessarily repetitious, thus not deserving of a waiver with respect to these redundant material.)

Finally, the DOJ guidelines stress the costs involved to public must be considered in reaching a fee waiver determination. The FEMA correspondence carries a strong implication to the same effect. Yet, the cost of granting a fee waiver, represented as a percentage of the total costs of FOIA implementation, is at best insignificant. For example, a report generated for the National Security Archive from the Office of the Secretary of Defense data base detailing, by calendar year, total collectable costs and total costs waived, when coupled with information from DOD's annual FOIA Report to Congress, see DOD FOIA Program CY 1984 (Report to Congress) Item 10 B (CY Costs and Fees collected), indicate that relative to the overall administrative costs of the FOIA, for CY 1984 the cost to OSD of granting fee waivers was less than 1%. Government-wide these figures have been estimated to be no higher than a few per cent. See e.g., "Agency Fee Waiver Policies under the FOIA," Common Cause Study (May 1984) at 3-4.

Perhaps more importantly, even if the loss of revenues due to fee waivers were more substantial, nothing in the Act or its legislative history allows costs to be considered in the determination of whether or not to grant a fee waiver. Fitzgibbon, Civ. No. 76-700, slip op. at 3; Senate Subcomm. Report at 78-79 (reason "highly questionable, if not unlawful") and 90 n. 80 (neither statute nor legislative history suggest balancing public benefit and cost of granting waiver is appropriate); Bonine, Fee Waivers at 250-55. In Fitzgibbon, the court said that the CIA had applied "an inappropriate standard" when it factored into its decision to deny a fee waiver what it felt was "an obligation to the public to collect fees for processing" FOIA requests. "Any such perceived obligation is irrelevant to the purposes of 5 U.S.C. sec. 552(a)(4)(A)." Civ. No. 76-700, slip op. at 3.

Finally, I trust that copies of all releasable materials found responsive to my request will be mailed to me within the next few days, care of the Georgetown Law Journal, while my appeal is under consideration. I note that delay in making responsive records ready for release available to requesters is actionable under the



law. 5 U.S.C Section 552 (a)(6)(B)(agency "shall make records promptly available"); see Lybarger v. Caldwell, 577 F.2d 764, 767 (1st Cir. 1978). And, should you force me to litigate these issues, I will have to ask the court to issue a written finding, pursuant to 5 U.S.C. Section 552 (a)(4)(F), that the circumstances surrounding the de facto withholding raise questions whether agency personnel acted arbitrarily or capriciously, for the purpose of Civil Service Commission or FEMA disciplinary action.

Sincerely,



Eli Gottesdiener

cc: National Security Archive: National Security Information Policy and Litigation  
Advisory Board



# Federal Emergency Management Agency

Washington, D.C. 20472

JAN 28 1986

Mr. Eli Gottesdiener  
The Georgetown Law Journal  
Georgetown University Law Center  
Washington, D.C. 20001

Dear Mr. Gottesdiener:

This is in reply to your letter of January 14, 1986, in which you appeal, under the Freedom of Information Act, the assumed denial of your request for a fee waiver since we have not responded to that issue yet.

As was reflected in our letter of November 8, 1985, your request for a fee waiver will be considered on a case-by-case basis. Our agency has provided partial responses to a number of your requests. In many of your requests, records are classified and must undergo a declassification review to ensure proper classification which requires time to accomplish this process.

Although your requests initially requested that unclassified portions of documents be made available to you prior to doing a declassification review, it was agreed during the telephone conversation of January 22, 1986, between yourself and Linda Keener of our Office of Public Affairs that our agency would automatically do a declassification review of any records which were classified prior to releasing information in the future to avoid duplication of pages where maybe only an unclassified title could be provided initially and possibly additional information on the pages could be released after the declassification review.

Exh. 6.7 10



During this telephone conversation you also requested that all documents be forwarded to you rather than first inspecting them as initially requested in your letter. We have no objection to doing this since you have agreed to pay up to \$50.00 for each request for normal search fees and photocopying fees of documents which you decide to take, if a fee waiver is not granted.

We have considered your request for a fee waiver and agree that to the extent that the requested records are not already in the public domain, a fee waiver of the search and photocopying fees is appropriate. However, records containing information already in the public domain may not warrant a fee waiver, even if the subject is of public interest. See Chauvin v. HHS, Civil No. 83-9073, slip op. at 5-6 (S.D.N.Y. May 22, 1984). Also, in Blakely v. Department of Justice, 549 F. Supp. at 364-65, the Court held that where a record is available for public inspection, providing requester with own free copy would not primarily benefit public. In addition, if the total accumulated costs assessed for a particular request do not exceed \$10.00, the fees would be waived as specified in our FEMA Regulations. However, a waiver under this provision cannot be determined until the entire request has been processed and we know how many pages of publicly available information has been released.

The decision regarding a fee waiver is as follows regarding each FOIA request and materials which have been provided to you:

(1) FOIA No. 156-85 (your letter dated September 27, 1985)-- Federal Emergency Plan D, which includes all chapters of, annexes to, and Presidential Emergency Action Documents, is currently undergoing declassification review. Since you have been provided with the 12 pages of Plan D which have already been released under the FOIA to the Bay Area Lawyers Alliance for Nuclear Arms Control under your FOIA appeal, FOIA No. 185-85, we believe that a photocopying fee of \$1.80 would be appropriate. However, because only portions of other pages of Plan D were relevant to that request, the entire document has not been previously processed and released and because the total assessed fees are less than \$10.00, we will waive all search and photocopying fees for processing this request.

(2) FOIA No. 157-85 (your letter dated September 27, 1985) -- The study entitled, Presidential Successor Basing Options, was withheld in its entirety and our agency did not have a copy of the report entitled, Continuity of Corporate Management in the Event of Nuclear Attack. We will waive all search and photocopying fees for processing of this request.

(3) FOIA No. 179-85 (your letter dated October 18, 1985) -- On January 9, 1985, the Associate Director, National Preparedness, advised you that 15 documents were available for inspection. The REX-84 ALPHA EXPLAN and REX-84 ALPHA Exercise Evaluation Report were previously reviewed for release under a FOIA request from The Progressive. We advised you that these documents were available for inspection at our Agency free of charge but you requested to receive copies. Therefore, we have instructed their office to make copies of the 15 documents and forward them to you as soon as possible. These two documents consist of 213 pages and the photocopying fee of \$31.95 is appropriate. The remaining 13 documents have not been previously reviewed for release under the FOIA and we have determined that a waiver of the search and photocopying fees is appropriate for these 13 documents.

On December 18, 1985, and January 3, 1986, the Acting Associate Director, Emergency Operations, advised you that copies of unclassified portions of three documents entitled, Nine Lives 2 Exercise Evaluation, Nine Lives 3 Final Report, and FPA Plan #1-77, Plan for Succession to the Presidency Under Emergency Conditions" were available for inspection. Since these documents have not been previously reviewed for release under the FOIA, we have determined that a waiver of the search and photocopying fees is appropriate for these 3 documents.

The remainder of this request is still being processed. As specific documents are identified as relevant to your request, you will be further advised as to whether they are in the public domain or not and if any photocopying fee would be applicable.

(4) FOIA Nos. 180-85; 197-85; and 209-85 (your letters of October 18, 1985; October 28, 1985; and November 4, 1985) -- These requests are still being processed. As specific documents are identified as being relevant to your requests, you will be further advised whether they are in the public domain or not and if any photocopying fees are applicable.

THE GEORGETOWN LAW JOURNAL  
GEORGETOWN UNIVERSITY LAW CENTER  
WASHINGTON, D. C. 20001

September 30, 1985

Secret Service  
Department of the Treasury  
Office of Public Affairs, Room 805  
1800 G Street, N.W.  
Washington, D.C. 20223

Dear Sir or Madam:

Pursuant to the Freedom of Information Act (5 U.S.C. sec. 552, as amended), I hereby request disclosure of the following records for inspection and possible copying:  
(Please see attachment)

If you regard any of these records as exempt from required disclosure under the Act, I hereby request that you exercise your discretion to disclose them nevertheless. I further request that you disclose the listed documents as they become available to you without waiting until all the documents have been assembled.

I am willing to narrow or waive this request and the necessity for mandatory declassification review if suitable unclassified, open source or other background materials are available.

I am making this request my own behalf. The materials released pursuant to this request will be used in preparation of a law review article to be published in the Georgetown Law Journal, of which I am a member. The article surveys the legal structure of various institutional components of the national security establishment, including the Office of the President, the National Security Council, and elements of the Department of Defense. In addition to being used for this article, all materials received pursuant to this request will be indexed, analyzed, housed and disseminated by the National Security Archive for use by university and other major research libraries, not-for-profit public interest organizations, journalists and the general public. I presently serve as a legal consultant to the Archive.

Accordingly, I request that, pursuant to 5 U.S.C. sec. 552 (a)(4)(A), you waive all fees in the public interest because the furnishing of the information sought by this request will primarily benefit the public.

I further ask, in the event fees are not waived, that you immediately inform me of the specific basis for such a decision. If you also decline to waive fees on appeal, I am prepared to pay your normal search fees (and copying fees if I decide to copy any records), but I request that you notify me if you expect the search fees to exceed \$50. I look forward to hearing from you.

Sincerely,

Eli Gottesdiener

EG/ibm

cc: National Security Archive; National Security Information Policy & Litigation  
Advisory Board

Exhibit A

All materials, documents, studies, reports, legal memoranda, mission statements, organization charts, briefing books, manuals, directives, and instructions relating in whole or in part to:

1.

the initial (1971 or earlier) and current concept, definition, implementation, and operating principals of:

- (a) the National Command Authority;
- (b) the presidential authority to release nuclear weapons;
- (c) all delegation, succession and devolution of either the NCA or the presidential authority to release nuclear weapons.

2.

Secret Service Continuity of Operations Policy and Planning, including but not limited to: United States Secret Service (USSS) programs and responsibilities under Executive Order 11490; USSS national security crisis planning; USSS assignment to protect the National Command Authorities, the Secretary and Deputy Secretary of Defense, the Joint Chiefs of Staff and other officials in the Department of Defense, the Speaker of the House, the President Pro Tempore of the Senate, members of the Cabinet and the Supreme Court; and, USSS assignment and relocation to government Emergency Relocation Sites and Presidential Emergency Facilities.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ELI GOTTESDIENER,

404 E Street, Southeast  
Washington, D.C. 20003  
(202) 546-2169

Plaintiff,

v.

Civil Action No.

UNITED STATES  
SECRET SERVICE

1800 G Street, Northwest  
Washington, D.C. 20223

Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. Section 552, as amended, ("FOIA") to order the production of an agency record concerning the United States Secret Service's Assignment to Protect the National Command Authority which was improperly withheld from plaintiff.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. Section 552 (a)(4)(B).

3. Eli Gottesdiener, as a member of the Georgetown

Law Journal, is the requestor of the agency record which has been improperly withheld.

4. Defendant United States Secret Service ("USSS") is an agency of the United States, and has possession of the record plaintiff seeks.

5. By letter dated September 30, 1985, plaintiff wrote the USSS, seeking access to information concerning, in pertinent part, the USSS Assignment to Protect the National Command Authority.

6. By letter dated October 18, 1985, plaintiff was denied access to the requested information on the ground that it is exempt from disclosure under Exemption 1 of the FOIA, 5 U.S.C. Section 552 (b)(1).

7. By letter dated November 8, 1985, plaintiff sought relief from defendant's failure to provide, in its October 18 response, the minimal elements of a proper initial agency denial determination. Plaintiff requested, in pertinent part, basic factual material concerning the withheld document in order to meaningfully exercise the right, conferred by the FOIA, of administrative appeal, 5 U.S.C. Section 552 (a)(6)(A).

9. By letter dated January 13, 1986, plaintiff insisted that the USSS reply to its November 8, 1985 request for the minimal elements of an initial denial determination. Plaintiff also questioned the contradiction between the USSS' October 18 letter, invoking Exemption 1 of the FOIA to exempt the responsive document from disclosure, and the USSS' December 12 letter, which indicated that the declassification review for

10. By letter dated February 21, 1986, defendant replied that plaintiff's January 13, 1986 letter was interpreted as "a decision of [plaintiff's] original waiver of declassification review...." Defendant's letter indicated that the document in question was identified as classified by the Secret Service and was reviewed for possible release only after receipt of plaintiff's January 13 letter. Defendant further stated, just as it had four months prior, that this document was determined to be properly classified and to contain no unclassified reasonably segregable portions which could be released.

11. Having not received a reply to its November 8 and January 12 requests for the minimal elements of an initial denial determination, plaintiff has exhausted its administrative remedies and is now required to seek relief through the institution of this action.

12. Plaintiff has a right of access to the requested information contained in the agency record under 5 U.S.C. Section 552 (a)(3), and there is no legal basis for defendant's denial of such access.

WHEREFORE, plaintiff prays that this Court:

(1) Order defendant to make the information available as requested;

(2) Expedite the proceeding in this action as provided in 5 U.S.C. Section 552 (a)(4)(B);

(3) Award plaintiff his costs and reasonable attorney fees in this action, pursuant to 5 U.S.C. Section

pursuant to 5 U.S.C. Section 552 (a)(4)(A);

(4) Issue a written finding, pursuant to 5 U.S.C. Section 552 (a)(4)(F), that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding; and

(5) Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

By 

Eli Gottesdiener  
Pro Se Litigant  
404 E Street, Southeast  
Washington, D.C. 20003

Dated: March 3, 1986



THE WHITE HOUSE

ADMINISTRATIVE

August 1, 1986

MEMORANDUM FOR JAY B. STEPHENS

FROM:

J. MICHAEL SHEPHERD *JMS*

SUBJECT:

Attached Letter Regarding Freedom of Information  
Act Denial from the State Department

Mr. R. H. Mitman of the Committee for Judicial [sic] Reform wrote the attached letter of June 23, 1986, to the "Counselor to the President," enclosing the attached copy of a letter he wrote to Georgene S. Cassels of the State Department complaining about State's failure to produce information he requested under the Freedom of Information Act. Based upon his earlier requests directed to the President and White House staff members, I presume that he continues to seek copies of all documents relating to: (1) the cost of transportation and support for Presidential travel, including political travel; (2) the cost of operating the White House and other Presidential locations such as Camp David, the Presidential yacht, and the California ranch, including security measures; and (3) title to the White House furnishings obtained from private donations. The letter to which you are responding asks only: "Will you please state the President's present position on the requested information?"

I recommend that we respond by reaffirming Fred Fielding's attached letters to Mr. Mitman that declined to comply with his Freedom of Information Act requests, and defer to the State Department on whatever request he may have pending before him. Attached for your review and signature is a response to Mr. Mitman.

Attachments

THE WHITE HOUSE

WASHINGTON, D.C. 20503

August 1, 1986

JBS/JMS:jck  
JBStephens  
✓JMShepherd  
Chron.

Dear Mr. Mitman:

Thank you for your letter of June 23, 1986, which enclosed a copy of a letter you sent to Georgene S. Cassels regarding a Freedom of Information Act request you submitted to the Department of State. You did not provide a copy of your request, but we assume from your letter that it was similar to the requests you submitted to several officials of the White House Office in 1983.

As former Counsel to the President Fred F. Fielding advised you in response to those requests, the Supreme Court has decided that the White House Office, an entity whose "sole function is to advise and assist the President," is not an "agency" subject to the Freedom of Information Act. Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 156 (1980). We defer to the Department of State regarding the handling of requests submitted to it.

Sincerely,

**ORIGINAL SIGNED BY J.B.S.**

Jay B. Stephens  
Deputy Counsel to the President

Mr. R. H. Mitman  
Committee for Judicial Reform  
P.O. Box 9686  
North Hollywood, CA 91609

THE WHITE HOUSE

WASHINGTON

July 23, 1986

MEMORANDUM FOR BRENDA S. REGER  
SENIOR DIRECTOR  
INFORMATION POLICY/SECURITY REVIEW

FROM: J. MICHAEL SHEPHERD *ms*  
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: Attached FOIA Request

As requested by your attached memorandum of June 24, 1986, this office has reviewed the attached documents referred to you by the State Department for your views on their availability under the Freedom of Information Act, and has no objection to their release.

Thank you for bringing this matter to our attention.

Attachments

NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

June 24, 1985

41926642

MEMORANDUM FOR PETER WALLISON  
Counsel to the President

FROM: *12-6 c*  
BRENDA S. REGER

SUBJECT: Freedom of Information Act Referral  
Request of Scott Armstrong

The Department of State has forwarded the attached documents for a determination on release. They have no objection to release.

The National Security Council Staff has completed its review and has no objection to the release of the documents from a national security point of view.

Please review and return the documents to us with your recommendation on a response to State.

Attachments

- Tab I - Documents
- Tab II - Request

12  
April 6, 1982

Dear Mr. Penniman:

I warmly applaud your readiness to take up the challenging task of helping to bring the elections in El Salvador and the efforts of our U.S. observation mission to such a successful conclusion.

Your role in this regard was a valuable service to our country and to the cause of freedom. On behalf of all Americans, I express appreciation to you for your bravery and perseverance in bringing your vast knowledge and experience to bear on this critically important effort.

With warmest personal regards,

Sincerely,

Ronald Reagan

Mr. Howard Penniman

American Enterprise Institute

for Public Policy Research

1150 17th Street, N.W.

Washington, D. C.



12

April 6, 1980

Dear Mr. Soemmen:

Your vast knowledge of elections and your wealth of experience were invaluable in planning for our observer role at the El Salvador elections and in ensuring the success of our mission.

The cause of hemispheric stability and the progress of democratic ideals found important support in your courageous and untiring work. On behalf of the United States Government and all our people I salute your indispensable contribution in this critically important step toward democracy and freedom.

You have my personal appreciation, my hopes for your rapid recovery from the injury you sustained and my warmest personal regards.

Sincerely,

Ronald Reagan

Mr. William Soemmen

Elections Research Center

1619 Massachusetts Avenue, N.W.

Washington, D. C.



THE WHITE HOUSE  
WASHINGTON

May 21, 1984

84 107 17

Dear Mr. Scammon:

Eight months ago I asked you to serve on the National Bipartisan Commission on Central America. I did so with confidence based on my keen appreciation of your unmatched understanding of the political process. I knew that I could count on you to help bring about a reasoned, bipartisan consensus on the nature of the economic, political and security situation in Central America, one of the most pressing foreign policy issues facing us today.

The Commission's report is a landmark contribution to our understanding of that region's complex problems. Most importantly, you have given us a practical blueprint that will help my Administration and the Congress come to grips with these problems and make progress toward their solution.

In this regard, I hope the same spirit of bipartisanship that went into preparing the report will go into the passage of the Democracy, Peace and Development Initiative legislation I have proposed. That legislation is drawn from the recommendations of the Commission, and I am confident that it represents well the blueprint you helped create. I firmly believe, and I am sure you agree, that early passage will signal to the Central American countries the commitment of the United States to their economic well-being and political security.

Sincerely,

*Ronald Reagan*

The Honorable Richard M. Scammon  
Elections Research Center  
1619 Massachusetts Avenue, N.W.  
Washington, D.C. 20036



Case Control No. 8403202

MEMORANDUM

TO: Ms. Brenda S. Reger  
Director, FOI  
National Security Council

FROM: John R. Burke *JRB*  
Deputy Assistant Secretary  
Classification/Declassification Center  
Bureau of Administration

SUBJECT: FOI/PA Request of Scott Armstrong

In processing the attached request, the Department of State located three documents that originated with your agency which are being referred to you for review and direct response to the requester. Please advise us if the classification of the documents is changed so we may amend our files.

We have no objection to release of the documents attached.

Comments:

If you have any questions about this referral, please contact Sharon B. Kotok on 632-8484.

Attachments:

- (a) Documents Nos. 12, 13, 23
- (b) Copy of requester letter.



# The Washington Post

1150 15TH STREET, N. W.

WASHINGTON, D. C. 20071

(202) 334-6000

WRITER'S DIRECT TELEPHONE NUMBER

334-7422

8-27-84

F  
STEWART

1984 SEP 13 PM 4:49

Mr. Frank Machak  
Information and Privacy Staff  
Department of State  
2201 C Street, N.W.  
Washington, D.C. 20520

Dear Mr Machak:

Pursuant to the Freedom of Information Act (5 U.S.C. §552 as amended), I hereby request disclosure of the documents described on the attached page for inspection and possible copying.

If you regard any of these documents as exempt from required disclosure under the Act, I hereby request that you exercise your discretion to disclose them nevertheless.

I further request that you disclose the listed documents as they become available to you, without waiting until all the documents have been assembled.

I am making this request on behalf of The Washington Post, a newspaper of general circulation in the Washington, D.C. metropolitan area and throughout the United States. The records disclosed pursuant to this request will be used in the preparation of news articles for dissemination to the public. Accordingly, I request that, pursuant to 5 U.S.C. §552 (a)(4)(A), you waive all fees in the public interest because the furnishing of the information sought by this request will primarily benefit the public. If, however, you decline to waive all fees, I am prepared to pay your normal search fees (and copying fees if I decide to copy any records), but I request that you notify me if you expect the search fees to exceed \$100.

I look forward to hearing from you.

Sincerely,

(m) *Jeffrey A. Nason*  
Scott Armstrong  
Staff Writer  
The Washington Post

State FOIA

8-27-84 Replacing 6-8-84

January 1980 to present cables, airmgrams, letters, reports,  
correspondence re:

1. Richard Scammon;
2. Howard Penniman

(We have State 81-329419 and SS 81-9772, so it is not necessary to  
repeat those cables

83 - State 112862