



U.S. Department of Justice

Federal Bureau of Investigation

Washington, D. C. 20535-0001

September 28, 2000

Mr. Thomas Fitton
President
Judicial Watch, Inc.
501 School Street, S.W.
Suite 725
Washington, D.C. 20024

Re: FOIA Request For FALN/Los Macheteros-Related Documents
FOIA Request No. 907001

Dear Mr. Fitton:

The purpose of this letter is to respond to your letter addressed to this office dated September 2, 1999, in which you request access to certain records through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as well as a "blanket fee waiver" for these records. Specifically, you have requested documents related to the "commutation of sentences of prisoners belonging to or associated with the Fuerzas Armadas de Liberacion Nacional ("FALN")," and "Los Macheteros," as well as "clemency reports regarding President Clinton's sentencing commutation of convicted FALN and/or Los Macheteros members," and "political factors involved in the above-mentioned clemency, including, but not limited to the Senate aspirations of Hillary Rodham Clinton." For the reasons set forth herein, I have determined that a fee waiver for your request is not warranted at this time.

In your letter, you suggest that Judicial Watch should be considered a "representative of the news media" for fee purposes. In support of this position, you state that Judicial Watch allows "reporters into its offices to inspect the documents," issues press releases, appears on radio and television programs, and maintains a web site. However, the Office of Management and Budget fee guidelines define a "representative of the news media" as "any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." See Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. 10,012, 10,015, 10,018 (1987); see also 28 C.F.R. § 16.11 (b)(6) (1999). Furthermore, the D.C. Circuit Court of Appeals has indicated that "middlemen" who request records for use by others are not considered members of the media. National Security Archive v. United States Dept. of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989). Therefore, based upon the information you have provided, I have determined that Judicial Watch does not qualify as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II).

You also request a fee waiver regarding disclosure of records concerning FALN and Los Macheteros. As you are aware, the fact that you were granted a fee waiver with respect to disclosure of records pertaining to a different subject matter is not dispositive in this case. See, e.g., National Security Archive, 880 F.2d at 1388 (dictum) (fee waiver in one instance does not require same treatment in the future); Judicial Watch, Inc. v. DOJ, Civ. A. No. 97-2089, slip op. at 14 (D.D.C. July

14, 1998); Dollinger v. USPS, Civ. A. No. 95-CV-6174T, slip op. at 7-8 (W.D.N.Y. Aug. 24, 1995) (agency not bound by previous decision on fee waiver for similar request from same requester). A request for a fee waiver must be considered on a case-by-case basis. Wilson v. CIA, Civ. A. No. 91-0087, slip op. at 3 (D.D.C. Nov. 5, 1991) (agency must necessarily evaluate each fee waiver request on its own merits).

The FOIA's fee waiver standard speaks to whether or not disclosure of the requested information would be in the public interest. A fee waiver is appropriate only when "disclosure of the requested 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." 5 U.S.C. § 552(a)(4)(iii); see also 28 C.F.R. § 16.11(k) (six fee waiver standards to be considered). As the requester, you have the burden of establishing this public interest. See Larson v. Central Intelligence Agency, 843 F.2d 1483 (D.C. Cir. 1988); see also NTEU v. Griffith, 811 F.2d 644, 647 (D.C. Cir. 1987).

In support of your request for a fee waiver, you state that "Judicial Watch will . . . use the requested material to promote accountable government as a representative of the news media and the public . . . by disseminating relevant information which may be uncovered. . . ." and that the requested [i]nformation will benefit the public by identifying areas for future reform as well as deterring future abuses that could otherwise proliferate without scrutiny." These assertions are too vague to constitute a sufficient basis for a fee waiver. See Larson, 811 F.2d at 647 (when the public interest is asserted but not identified with reasonable specificity and circumstances do not clarify the point of the request, the agency is justified in denying the fee waiver because the public interest is indirect and speculative); see also Oglesby v. United States Dep't of the Army, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990) (conclusory statements insufficient to make public interest showing); American Fed'n of Gov't Employees v. United States Dept. of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986), aff'd, 907 F.2d 203 (D.C. Cir. 1990) (allegations of malfeasance too ephemeral to warrant waiver of search fees without further evidence that informative material will be found); Fazzini v. DOJ, Civ. A. No. 90-C-3303, slip op. at 11 (N.D. Ill. May 2, 1991) (allegations of government coverup, unsupported by objective evidence, do not create legitimate public interest for purposes of fee waiver). Furthermore, your statements that Judicial Watch "will ensure rapid dissemination of information," or that Judicial Watch is a "non-profit, non-partisan, tax-exempt" organization also do not provide sufficient grounds for my granting a fee waiver. See Oglesby, 920 F.2d at 66 n.11; Judicial Watch, Civ. A. No. 97-2089, slip op. at 13 (D.D.C. July 14, 1998). Thus, based on the information presented by you in your October 18, 1998 letter, your asserted public interest is too vague and speculative to warrant a fee waiver. See Larson, 811 F.3d at 648 (the reasonableness of the agency's refusal to grant a fee waiver depends on the information presented to it at the time of its decision).

The extent to which disclosure of the requested information is likely to contribute to the public's understanding of the FBI's operations and activities in a "significant way," as required by the FOIA, is dependent on the substantive nature of the disclosable information. 28 C.F.R. § 16.11 (k)(2)(ii). Based on our preliminary review of the responsive documents, we have concluded that the information that will be disclosable in response to your request will not contribute significantly to the public's understanding of the operations or activities of the FBI. At this time, it appears that the documents involved contain predominately public information and/or information that was used to prepare a public speech regarding the FBI's stand on the clemency of the FALN prisoners. These documents contribute little, if any, to the public's understanding of the operations of the FBI.

Because we have determined that you are a non-media, non-commercial requester pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II), you are entitled to two free hours of search time and 100 pages of records without incurring search or duplication charges. Please be advised that the search at FBIHQ

took more than two hours to complete. As a matter of discretion, we are providing you without charge these additional hours. At this time, we are releasing the first 105 pages of responsive documents to you which accompany this letter. The remaining responsive documents consist of approximately 1,750 pages. We presently estimate that processing and duplication costs for these responsive documents, will be approximately \$175. You may promise to pay the entire amount, or you may choose a particular amount that you are willing to pay for a set amount of documents at ten cents per page. If we have not received your promise to pay within thirty calendar days from the date of this letter, we will assume you are no longer interested in pursuing this matter, and your request will be administratively closed in our office. See 28 C.F.R. §§ 16.11(d) and (e).

Although I am aware that your request is the subject of ongoing litigation and that appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal in the event you disagree with my determination that Judicial Watch is not a "representative of the news media," or my denial of your fee waiver request. Such an appeal should be made in writing to the Co-Director, Office of Information and Privacy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001, within sixty days of the date of this letter. Both the letter and the envelope should be marked "Freedom of Information Act Appeal."

Sincerely yours,

A handwritten signature in cursive script, reading "John M. Kelso, Jr.", with a small period at the end.

John M. Kelso, Jr., Chief
Freedom of Information-
Privacy Acts Section
Office of Public and
Congressional Affairs

cc: AUSA Wyneva A. Johnson

U.S. Department of Justice



Federal Bureau of Investigation
935 Pennsylvania Ave., N.W.

Washington, D.C. 20535-0001

Mr. Thomas J. Fitton
Judicial Watch
Suite 725
501 School Street, S.W.
Washington, DC 20024

FALN Prisoners
Subject of Request: Clemency Issue
FOIPA No. 907001 /190-_____

Dear Requester:

Enclosed are copies of documents from FBI records. Excisions have been made to protect information exempt from disclosure pursuant to Title 5, United States Code, Section 552 (Freedom of Information Act) and/or Section 552a (Privacy Act). In addition, where excisions were made, the appropriate exempting subsections have been cited opposite the deletions. Where pages have been withheld in their entirety, a deleted page information sheet has been substituted showing the reasons or basis for the deletion. The subsections cited for withholding information from the enclosed documents are marked below:

Section 552		Section 552a
<input type="checkbox"/> (b)(1)	<input checked="" type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (d)(5)
<input checked="" type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)	<input type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(3) _____	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(1)
_____	<input checked="" type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(2)
_____	<input checked="" type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> (k)(3)
	<input type="checkbox"/> (b)(7)(F)	<input type="checkbox"/> (k)(4)
<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)	<input type="checkbox"/> (k)(5)
<input type="checkbox"/> (b)(5)	<input type="checkbox"/> (b)(9)	<input type="checkbox"/> (k)(6)
<input type="checkbox"/> (b)(6)		<input type="checkbox"/> (k)(7)

(See Form OPCA-16a, enclosed, for an explanation of these exemptions.)

Pursuant to your request, 105 pages(s) were reviewed and 105 page(s) are being released.

During the review of material pertinent to the subject of your request, documents were located which

- originated with another Government agency(ies).
These documents were referred to that agency(ies) for review and direct response to you.
- contain information furnished by another Government agency(ies). You will be advised by the FBI as to the releasability of this information following our consultation with the other agency(ies).

- If you desire, you may appeal any denials contained herein. Appeals should be directed in writing to the Co-Director, Office of Information and Privacy, U.S. Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001 within sixty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.
- The enclosed material is from the main investigative file(s) in which the subject of your request was the subject of the investigation. There are additional references to the subject(s) of your request in files relating to other individuals, organizations, events or activities. These additional mentions or references have not been reviewed to determine if, in fact, they are identifiable with the subject(s) of your request. Our experience has shown that such references are frequently similar to information contained in the processed main file(s). We will process these references if you now make a specific request for them. However, because of a significant increase in FOIPA requests and an expanding backlog, we have given priority to the processing of main investigative files and can only complete the processing of these additional references as time and resources permit.
- See additional information which follows.

Sincerely yours,

Chief
Freedom of Information-
Privacy Acts Section
Office of Public and Congressional Affairs

Enclosures (2)

Documents which appear to be responsive to your Freedom of Information Act request have been processed for release to you. No fees are assessed for the first 100 pages of duplication. Whereas there was no indication of a promise to pay for additional documents, only 105 pages have been processed.

No documents were found that were responsive to the portion of your request regarding "(p)olitical factors involved in the above-mentioned clemency, including but not limited to the Senate aspirations of Hillary Rodham Clinton."

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

- (b) (1) (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;
- (b) (2) related solely to the internal personnel rules and practices of an agency;
- (b) (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b) (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b) (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b) (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b) (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
- (b) (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b) (9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

- (d) (5) information compiled in reasonable anticipation of a civil action proceeding;
- (j) (2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k) (1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k) (2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k) (3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k) (4) required by statute to be maintained and used solely as statistical records;
- (k) (5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k) (6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k) (7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.