

Lisette Garcia

From: Turner, Alisa CIV WHS-ESD <Alisa.Turner@whs.mil>
Sent: Monday, March 25, 2013 6:36 AM
To: Lisette Garcia
Subject: RE: Appeal of partial fee waiver denial
Signed By: ALISA.TURNER@WHS.MIL

Thank you Ms. Garcia. I received it and it will be logged in.

Alisa N Turner
FOIA Appeals Team Chief
Defense Freedom of Information Policy Office

-----Original Message-----

From: Lisette Garcia [<mailto:LGarcia@JUDICIALWATCH.ORG>]
Sent: Friday, March 22, 2013 6:17 PM
To: Turner, Alisa CIV WHS-ESD
Subject: RE: Appeal of partial fee waiver denial

Hi, Ms. Turner:

Mr. Hogan listed you as the point of contact on FOIA appeals in his absence.

Thanks for your prompt attention to this matter.

Best, Lisette

-----Original Message-----

From: Lisette Garcia
Sent: Friday, March 22, 2013 6:13 PM
To: 'Hogan, James CIV WHS-ESD'
Cc: 'paul.jacobsmeier@whs.mil'; 'brandon.gaylord@whs.mil'
Subject: Appeal of partial fee waiver denial

Dear Jim:

Attached please find Judicial Watch's timely appeal of the Defense Department's partial denial of a fee waiver request respecting records of rental cars at Guantanamo Bay.

You'll note that the appeal is addressed to you, and not Secretary Hagel, per your request. I trust this will not impair the speed with which a determination issues.

Have a fine weekend, Lisette

-----Original Message-----

From: Hogan, James CIV WHS-ESD [<mailto:James.Hogan@whs.mil>]
Sent: Thursday, March 21, 2013 3:50 PM
To: Lisette Garcia
Subject: RE: March 11, 2013, FOIA Request

Lisette,

Sure. For OSD/JS, of course it's Aaron Graves. For the Army, it's Alecia Bolling.

Also, if you are ever pleased with the service received from a FOIA officer, that would definitely be the best time to email a 4-star general or a military department secretary! Trust me, that would be great (especially for Marco). FOIA is a thankless job, and if all that senior leadership hears is negative information, it doesn't help our cause. I emphasize to the DoD FOIA community whenever I teach FOIA that it's imperative that FOIA officers pick up the phone and call requesters in order to help them craft the request in such a way to make it easier for all.

Again, thank you very much for working with me.

Regards,

Jim

-----Original Message-----

From: Lisette Garcia [mailto:LGarcia@JUDICIALWATCH.ORG]
Sent: Thursday, March 21, 2013 3:46 PM
To: Hogan, James CIV WHS-ESD
Subject: RE: March 11, 2013, FOIA Request

Sounds great! Thanks for helping us make headway on this. The **only** thing I don't see below (and that we didn't discuss) was fuel. This is, of course, a cost associated with the rental cars that Judicial Watch's FOIA attempts to capture, too.

Other than that, if you could please email me the names of appropriate personnel for the various FOIA offices we talked about. It's nice to stay up with the times.

-----Original Message-----

From: Hogan, James CIV WHS-ESD [mailto:James.Hogan@whs.mil]
Sent: Thursday, March 21, 2013 3:31 PM
To: Lisette Garcia
Subject: March 11, 2013, FOIA Request

Lisette,

Thank you very much for taking my phone call and working with me on this request. As I stated, it's our objective to get the information to you that you are requesting in the most timely manner, as allowed by the Act (of course). In the future, please feel free to contact FOIA requesters directly if you have any questions at all on the handling of your FOIA requests, and if that doesn't work please contact me directly at 571-372-0463.

This email is an attempt to memorialize our conversation. Please feel free, of course, to correct anything that I misstate or misunderstand. The numbers correspond to the relevant items of your request.

1) and 2) For all temporary duty personnel, OSD/JS will ask the Defense Travel Management Office (DTMO) to search for responsive information. Additionally, USSOUTHCOM will conduct a search for information concerning rental car reimbursements made to any permanent party personnel and OSD/JS will ask OMC to search for information on reimbursements to its personnel made outside of DTS.

4) I've provided you with information on the Defense Travel Regulation, and also recommended to you that you search the DoD and Component issuance websites on any travel/transportation policy that is posted concerning the use of rental cars. Additionally, each Component will have a search done at their relevant Travel/Transportation policy offices for any additional guidance and for specific guidance concerning the use of rental cars at Guantanamo Bay.

3) The DoD Components will also search for any guidance that was communicated (email, memo, etc.) out from their relevant Travel/Transportation policy offices or command authorities concerning item 3).

Please let me know what you think. Of course, this clarification does not in any way address any other issues in your request such as fees and fee waivers.

Warmest Regards,

Jim Hogan



**Judicial
Watch**
*Because no one
is above the law!*

March 22, 2013

VIA CERTIFIED MAIL & FACSIMILE: (202) 613-3020

James Hogan, FOIA Appeals
U.S. Department of Defense
1155 Defense Pentagon
Washington, D.C. 20101-1155

Re: Appeal of Fee Waiver Denial Respecting 13-F-0598

Dear Mr. Hogan:

This letter timely appeals the March 20 denial¹ of a fee waiver request respecting 13-F-0598². Judicial Watch's March 11 request sought:

All records (including email communications, SOP, and payment documentation) relating to vehicle rental at Guantanamo Bay for the duration of the Obama administration.

I. Background

In denying Judicial Watch's request for a total fee waiver, the Department of Defense (DOD) concluded that Judicial Watch did not qualify as a "representative of the news media" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552, because the organization's website describes the organization as a nonprofit, nonpartisan government watchdog group rather than as a mere publishing company. Notably, DOD cited no legal authority for the proposition that, in order to qualify for news requester status under FOIA, an organization must hold itself out as a publishing company and nothing more. Indeed, such a reductionist view finds no support in the body of disclosure laws and regulations which govern this transaction.

¹ DOD's March 20 denial, signed by Brandon Gaylord for Paul Jacobsmeyer, is here attached as Exhibit A.

² Judicial Watch's March 11 FOIA is here attached as Exhibit B.

March 22, 2013

II. Authority

“FOIA mandates that responsive documents shall be furnished without any charge or at a charge reduced . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 123 (D.D.C. 2009)(citing 5 U.S.C § 552 (a)(4)(A)(iii))(emphasis in the original)(internal quotation marks omitted). “An agency is obliged to explain its refusal to waive fees.” *Judicial Watch, Inc. v. GSA*, 2000 U.S. Dist. LEXIS 22872 (D.D.C. Sept. 25, 2000)(citing *Samuel Gruber Educ. Project v. U.S. Dep't of Justice*, 24 F. Supp.2d 1, 11 (D.D.C. 1998)(further citations and internal quotation marks omitted). “Finally, Congress amended FOIA to ensure that it be liberally construed in favor of waivers for noncommercial requesters.” *S. Utah Wilderness Alliance v. U.S. Bureau of Land Mgmt.*, 402 F. Supp. 2d 82, 87 (D.D.C. 2005)(citing *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003))(further citations and internal quotation marks omitted).

III. Argument

Nevertheless, in light of the foregoing, DOD did find that Judicial Watch is a non-profit devoted to promoting government transparency and that the subject of this request serves the public interest by revealing the inner workings of our bureaucratic democracy. Hence, while not granting Judicial Watch a total fee waiver as a media requester, DOD did place this requester in the “other” category for fee purposes, reducing the overall cost of obtaining public records by granting the requester two hours of search time and 100 pages of duplication at no charge. Judicial Watch challenges the category in which it was placed and asks that DOD reconsider its original decision not to grant a total fee waiver given that Judicial Watch enjoys a wide following through the publication of its reports via TV, Internet, press, radio and in film. Indeed, Judicial Watch’s website – where documents obtained through FOIA are published – receives an average of 125,000 unique visitors per month. Hence, our organization is uniquely positioned to widely disseminate information demonstrating the operations of government.

In the alternative, Judicial Watch would ask that DOD approach the search and production of responsive documents with the economy mandated in FOIA and reiterated in our request. That is, to the extent possible, our organization asks that you release all records, to the extent possible, in electronic format – whether by email, CD, or DVD – in order to minimize the time burden to the agency of packing and shipping paper documents and the cost to the requester of duplication and mailing. Additionally, by conveying the records in electronic format – in keeping with FOIA’s electronic amendments of 1996 – DOD will help make the documents more readily accessible to the American public at large who, at the end of the day, is the actual owner of the records at issue. This would fulfill the spirit, as well as the letter, of FOIA.

Dep't of Defense

March 22, 2013

IV. Conclusion

Thus, having fully established that DOD decided Judicial Watch's fee waiver in the case of 13-F-0598 on the basis of factors not permitted under law while ignoring facts known the world over that qualify Judicial Watch's request to a total fee waiver, Judicial Watch now asks that the initial decision here appealed be reversed and that the requested media category be granted. In the alternative, Judicial Watch asks that DOD minimize costs to the requester and time burden to itself by releasing all responsive records electronically to the extent that they are available in that format.

Thank you for your prompt and thorough attention to this matter.

Respectfully submitted,



Lisette Garcia, J.D.
Senior Investigator
(202) 646-5172, ext. 303



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

20 MAR 2013

Ref: 13-F-0598

Ms. Lisette Garcia
Judicial Watch
425 Third St., SW
STE 800
Washington, DC 20024

Dear Ms. Garcia:

This is an interim response to your March 11, 2013, Freedom of Information Act (FOIA) request to this office, a copy of which is attached for your convenience. We received your request on March 19, 2013 and assigned it FOIA case number 13-F-0598.

You have also requested a waiver of both search and duplication fees pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii) as a member of the news media. In support of this request you state that "Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request."

An individual primarily engaged in disseminating information means a person whose primary activity involves publishing or otherwise disseminating information to the public. Representatives in the news media would normally qualify as individuals primarily engaged in disseminating information. Other persons must demonstrate that their primary activity involves publishing or otherwise disseminating information to the public. You state that "Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose." An Internet search revealed that Judicial Watch is a conservative, non-partisan educational foundation that promotes transparency, accountability and integrity in government, politics and the law and that you fulfill your educational mission through litigation, investigations, and public outreach. These activities do not demonstrate that the primary activity of Judicial Watch is publishing or disseminating information. I do not find that you would qualify as a representative of the news media, although you have demonstrated the ability to disseminate information in support of your investigative, legal and judicial activities.

I have determined that you should be placed in the "other" category for fee purposes as you have indicated that you do not seek access to these records for commercial purposes. The "other" fee category affords you two hours of search time and 100 pages of duplication free of charge.

Concerning your request for a fee waiver on the basis that 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 your commercial interest, decisions to waive or reduce fees are made on a case-by-case basis and cannot be made until a search for responsive records has been conducted and the volume and

nature of any responsive records have been determined. We have noted your willingness to pay \$350.00 in the event that a waiver is denied.

You should also know that we will be unable to respond to your request within the FOIA's 20 day statutory time period as there are unusual circumstances which impact on our ability to quickly process your request. These unusual circumstances are: (a) the need to search for and collect records from a facility geographically separated from this Office; (b) the potential volume of records responsive to your request; and (c) the need for consultation with one or more other agencies or DoD components having a substantial interest in either the determination or the subject matter of the records. For these reasons, your request has been placed in our complex processing queue and will be worked in the order the request was received. Our current administrative workload is 1,140 open requests. The action officer assigned to your request is Brandon Gaylord. He can be reached at brandon.gaylord@whs.mil or (571) 372-0413.

If you are not satisfied with this action, you may appeal to the appellate authority, the Director of Administration and Management, Office of the Secretary of Defense. To submit your appeal, you should write directly to the Defense Freedom of Information Policy Office, ATTN: Mr. James Hogan, 1155 Defense Pentagon, Washington, D.C. 20101-1155. Your appeal should be postmarked within 60 calendar days of the date of this letter, should cite to case number 13-F-0598, and should be clearly marked "Freedom of Information Act Appeal".

Sincerely,

for 
Paul J. Jacobsmeyer
Chief



**Judicial
Watch®**
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is above the law!*

13-F-05 98 Exhibit B

March 11, 2013

VIA CERTIFIED MAIL & FACSIMILE:

**(305) 437-1240; (571) 372-0462; (703) 604-8567; (703) 428-6522; (703) 604-6990;
(703) 693-5728**

FOIA Liaison Marco T. Villalobos
Joint Task Force, Guantanamo Bay
c/o SCPA-FOIA
SoCom, U.S. Dept. of Defense
9301 N.W. 33rd St.
Doral, FL 33172

FOIA Chief Robert Dickerson
U.S. Army FOIA/PA Office
7701 Telegraph Rd.
Alexandria, VA 22315-3905

FOIA Liaison Jim Hogan
OSD/JS FOIA Requester Service Center
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1155 Defense Pentagon
Washington, DC 20301-1155

FOIA Chief Robin Patterson
U.S. Navy FOIA/PA Office
2000 Navy Pentagon (DNS-36)
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FOIA Chief Jeanne Miller
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4800 Mark Center Dr., Ste. 14L24
Alexandria, VA 22350-1500

FOIA Chief John Espinal
U.S. Air Force – HQ/ICIO
1000 Air Force Pentagon
Washington, DC 20330-1000

Re: FOIA Request for Records Related to Car Rental at Guantanamo Bay

Dear Sir or Madam:

It has come to Judicial Watch's attention that military and civilian personnel based at Guantanamo Bay – whether on short- or long-term assignment – are often provided rental cars at the expense of the U.S. taxpayer. Many of the rental cars are secured through the on-base concession adjacent to the Naval Exchange at a retail rate of \$20 per day, or \$600 per month. In addition to use for traveling around the 20-mile base, the motor vehicles are used throughout the day for napping in air-conditioned comfort, despite the many suitable lodging tents and fixed buildings with air-condition capabilities. The issue of waste is a matter of the utmost public interest given the current sequester that threatens to decimate the federal workforce with furloughs and other immediately effective cost-cutting measures.

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March 11, 2013

Hence, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, Judicial Watch, Inc., (Judicial Watch) hereby requests that your office produce the following within twenty (20) business days:

- 1) All invoices, expense reports and any other documentation of obligation and/or payment for rental of motor vehicles at Guantanamo Bay;
- 2) All invoices, expense reports and any other documentation of obligation and/or payment for fuel associated with the use of any rented motor vehicle at Guantanamo Bay;
- 3) All communications (including emails, memoranda, or any other form of correspondence) respecting the rental of motor vehicles at Guantanamo Bay;
- 4) All Standard Operating Procedures (SOP), policy memoranda or other guidelines outlining authorized uses of rented motor vehicles as well as any prohibitions or warnings.

The time frame for this request is January 21, 2009 through the present.

In placing this request, Judicial Watch calls your attention to President Barack Obama's January 21, 2009 Memorandum concerning the Freedom of Information Act which states:

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA... The presumption of disclosure should be applied to all decisions involving FOIA.

Freedom of Information Act. Pres. Mem. of January 21, 2009, 74 Fed. Reg. 4683.

The memo further provides that "The Freedom of Information Act should be administered with a clear presumption: In the case of doubt, openness prevails."

Nevertheless, if any responsive record or portion thereof is claimed to be exempt from production under FOIA, please provide sufficient identifying information with respect to each allegedly exempt record or portion thereof to allow us to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). In addition, any reasonably segregable portion of a responsive record must be provided, after redaction of any allegedly exempt material. 5 U.S.C. § 552(b).

Judicial Watch also hereby requests a waiver of both search and duplication fees

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pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). Judicial Watch is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because it is a member of the news media. *Cf. National Security Archive v. Department of Defense*, 880 F.2d 1381, 1387 (D.C. Cir. 1989)(defining news media within FOIA context). Judicial Watch has also been recognized as a member of the news media in other FOIA litigation. *See, e.g., Judicial Watch, Inc. v. U.S. Department of Justice*, 133 F. Supp.2d 52 (D.D.C. 2000); and, *Judicial Watch, Inc. v. Department of Defense*, 2006 U.S. Dist. LEXIS 44003, *1 (D.D.C. June 28, 2006). Judicial Watch regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn this information into distinct works, and publishes and disseminates these works to the public. It intends to do likewise with the records it receives in response to this request.

Judicial Watch also is entitled to a complete waiver of both search fees and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records:

shall be furnished without any charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester.

5 U.S.C. § 552(a)(4)(A)(iii).

In addition, if records are not produced within twenty (20) business days, Judicial Watch is entitled to a complete waiver of search and duplication fees under Section 6(b) of the OPEN Government Act of 2007, which amended FOIA at 5 U.S.C. § 552 (a)(4)(A)(viii).

Judicial Watch is a 501(c)(3), not-for-profit, educational organization, and, by definition, it has no commercial purpose. Judicial Watch exists to educate the public about the operations and activities of government, as well as to increase public understanding about the importance of ethics and the rule of law in government. The particular records requested herein are sought as part of Judicial Watch's ongoing efforts to document the operations and activities of the federal government and to educate the public about these operations and activities. Once Judicial Watch obtains the requested records, it intends to analyze them and disseminate the results of its analysis, as well as the records themselves, as a special written report. Judicial Watch will also educate the public via radio programs, Judicial Watch's website, and/or newsletter, among other outlets. It also will make the records available to other members of the media or researchers upon request. Judicial Watch has a proven ability to disseminate information obtained through FOIA to the public, as demonstrated by its long-standing and

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continuing public outreach efforts.

Given these circumstances, Judicial Watch is entitled to a public interest fee waiver of both search costs and duplication costs. Nonetheless, in the event our request for a waiver of search and/or duplication costs is denied, Judicial Watch is willing to pay up to \$350.00 in search and/or duplication costs. Judicial Watch requests that it be contacted before any such costs are incurred, in order to prioritize search and duplication efforts.

In an effort to facilitate efficient delivery of responsive records as well as to suppress costs, Judicial Watch asks that documents be produced and delivered in electronic format (e.g. e-mail, .pdfs, DVDs) wherever possible, in keeping with FOIA's electronic amendments of 1996. When necessary to achieve at least partial timely compliance, Judicial Watch will also accept the "rolling production" of documents. Judicial Watch anticipates prompt receipt of the requested documents and a waiver of both search and duplication costs within twenty (20) business days. Thank you for your strict adherence to all applicable laws.

Sincerely,

A handwritten signature in black ink, appearing to read 'Lisette Garcia', with a stylized flourish at the end.

Lisette Garcia, J.D.
Senior Investigator
(202) 646-5172, ext. 303