
June 15, 2004

Director,
Freedom of Information and Security Review (DFOISR)
1155 Defense Pentagon
Washington, D.C. 20301-1155

FOIA appeal

This is an appeal of USSTRATCOM's initial FOIA determination dated March 10, 2004 (see enclosure), in which the agency provides a “no record” response to my request of September 25, 2003, for the most recent USSTRATCOM Strategic Planning Study (as referenced), and assesses a fee of \$279.60 after denying my request for a fee waiver.

I realized that the appeal deadline of 60 days has been exceeded, but given the considerable fee STRATCOM has assessed for this “no document” response – far in excess of the \$50 limit I set in my initial request letter – I ask that you consider this appeal nonetheless. Moreover, STRATCOM denial of my requester status is flawed, undermines the law, and contradicts government guidance and court rulings.

If you agree to process this appeal then I ask that you consider the following points:

First, although I specifically asked in my request letter to be notified if the cost would exceed \$50, STRATCOM didn't do so but proceeded with a search that apparently generated a total cost of \$279.60. STRATCOM's letter explains that it couldn't assess the fee until the search had been done. Although I am willing to pay for all reasonable costs associated with this request, as I stated in my request letter, I shouldn't be liable for STRATCOM's inability to predict the cost of its FOIA processing.

Second, STRATCOM has denied my request for a fee waiver and assessed me a considerable fee “based on your assertion you are a member of the press. It is our opinion you are not, in fact, a viable member of the media but a private researcher who occasionally writes an article for a limited audience and as a freelance author rather than a paid, full-time reporter.”

STRATCOM's denial of my status as a “representative of the news media” requester is in error and attempts to establish criteria for requester categorization for which there is no legal basis in the law.

Contrary to STRATCOM's assertion, I do not claim to be "a member of the press" but rather a "representative of the news media," which is the term the law uses for fee determination. As you know, the statutory language does not define a "representative of the news media" as such, but DOD regulations nonetheless identify it as "a person actively gathering news for an entity organized and operated to publish or broadcast news to the public." This language is derived from the guidelines issued by the Department of Justice (DOJ) and the Office of Management and Budget (OMB) under the FOIA Reform Act. The DOJ's 2004 guide to fees and fee waivers, for example, states that a "representative of the news media" is defined as "*any person* actively gathering information of current interest to the public for an organization that is organized and operated to publish or broadcast news to the general public."

Nowhere does the law require, as STRATCOM's FOIA determination suggests, that a requester must be "a paid, full-time reporter" and not "a freelance author" to qualify for the representative of the news media category. On the contrary, DOJ Guidance explicitly states that this fee category "includes freelance journalists."

STRATCOM's denial of my status as a representative of the news media ignores the background information I provided in my request letter, and contradicts the legal interpretation of the representative of the news media requester category. As you know, OMB interprets "representative of the news media" to require affiliation with "an entity that is organized and operated to publish or broadcast news to the Public." (OMB Guidelines, Section 6.j.) My primary affiliation is with the Natural Resources Defense Council (NRDC), a non-profit non-governmental organization that for more than 30 years has collected information about government policy and programs, analyzed the material, and distributed it widely to the public (NRDC's web site is <http://www.nrdc.org/>). The request letter was made on NRDC letterhead, the return address is NRDC, and my contact telephone number is at NRDC.

In addition to this, I am also affiliated with the Bulletin of the Atomic Scientists, a well-known magazine that for more than 40 years has published news and background information about nuclear policy matters. I co-author the NRDC Nuclear Notebook column in each issue (see <http://www.thebulletin.org/issues/nukenotes/nukenote.html>), and I occasionally publish larger background articles in the magazine, the most recent of which was carried in the March/April 2004 issue (see <http://www.thebulletin.org/issues/2004/ma04/ma04kristensen.html>).

Furthermore, as I also mention in my request letter, I am affiliated with the SIPRI Yearbook, a reference book published by the Swedish International Peace and Research Institute and printed by Oxford Press (see <http://editors.sipri.se/pubs/yb04/ch15.html>).

STRATCOM's rejection of my media status significantly narrows the legal interpretation of the "representative of the news media" category. But the court has specifically rejected a narrow interpretation and ruled that, for purposes of the FOIA's free waiver provisions, a "representative of the news media" is "a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience." (National Security Archive vs. DOD, 881 F.2d at 1387).

In reaching this holding, the D.C. Circuit noted that "because one of the purposes of the [FOIA] is to encourage the dissemination of information in Government files...it is critical that the phrase 'representative of the news media' be broadly interpreted if the Act is to work as expected. (Id. at 1386, quoting 132 Cong. Rec. S14298 (daily ed. Sept. 30, 1986)(remarks of Sen. Leahy).

STRATCOM's contention that I disqualify as "representative of the news media" fundamentally conflicts the court's interpretation, and instead provides a narrow – and in several elements – unlawful application of the law. For example, STRATCOM argues that I only "occasionally writes an article for a limited audience." But as you know, the law does not provide any requirements that a requester must publish a certain amount of information or that the audience be of a certain size to qualify for as a "representative of the news media" requester.

It is also relevant that STRATCOM in the past used to categorize me as a "representative of the news media" and granted full fee waivers as a matter of routine. After a report I wrote in 1998 generated widespread public attention in the news media (the report was based on STRATCOM documents obtained under FOIA), however, STRATCOM's FOIA office decided to re-categorize my requester status and began denying my fee waiver requests. Although an agency is not legally bound by previous fee waiver decisions, for STRATCOM to re-categorize me and then use that decision to deny my request for a fee waiver by arguing that I am not "a member of the press," obviously requires STRATCOM to demonstrate that my status has changed so significantly that I no longer fulfill the law's requirements for "representative of the news media" requester status. As you can see, STRATCOM's denial letter does not do so.

Contrary to STRATCOM's FOIA determination, I fully qualify as a "representative of the news media" requester as defined by DOJ, OMB, DOD, and the courts. STRATCOM's FOIA determination, in contrast, goes beyond the provisions of the statute, the courts, and current guidance, and establishes new and restrictive fee determination and requester status requirements for which there is no legal basis.

Finally, the “no document” response is questionable because the request concerns a record that is clearly identified in the recent DOD/AF FY02 Amended Budget Estimates (see enclosure). The initial FOIA determination does not determine that that document has been destroyed or lost, so the agency appears to have failed to locate a record I have reasonable reason to believe might exist.

Release of the document in question can be expected to contribute significantly to public understanding of the operations and activities of the government and is not primarily in the commercial interest of the requester.

I therefore ask that you direct STRATCOM to recategorize me as a representative of the news media requester and grant the full fee waiver as requested.

Thank you in advance for your assistance.

Sincerely,

Hans M. Kristensen