
March 10, 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 November 24, 2003 (see enclosure), in which the agency provides a "no record" response to my request for a STRATCOM 2002 briefing to the Defense Science Board.

I realize that the 60-day deadline has been exceeded, but since STRATCOM's response was sent to my previous address (The Nautilus Institute) I have only now received the letter. I ended with The Nautilus Institute in January 2003 and informed STRATCOM of my current address on June 3, 2003. Therefore I ask that you consider this appeal nonetheless. In doing so, I ask that you consider the following points:

First, STRATCOM has failed to consult me about the expected fee. In my request letter I agreed to pay all reasonable costs but asked that the agency inform me if the expected fee will exceed \$50. STRATCOM's letter assesses me a fee of \$269.

Second, STRATCOM has assessed me the fee despite no document was located. The agency does not state explicitly in its denial letter why the public interest clause is not honored by waiving the fee. Nor does it determine that the document has been lost or destroyed. The STRATCOM document was clearly identified in Defense Science Board, "Acquisition of National Security Space Programs," May 2003, p. 48. Since my request is reasonable and focused, I should not be penalized as a requester for pursuing a clearly identified STRATCOM document just because the agency's researcher cannot find it. This point is particularly relevant in this case because of the considerable fee (\$269) charged for nothing.

Third, STRATCOM's denial of my requester status as a "representative of the news media" is wrong. The letter explains that this denial is "based on your assertion you are a member of the press. It is our opinion you are not, in fact, a viable member 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."

This determination 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 letter, 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. This is important because the requester category relates to dissemination not payroll. As you know, the statutory language of the law 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 2000 guide to fees and fee waivers also 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 requester determination suggests, that a representative of the news media category 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 clearly states that the statute "provides no specific presumption that journalistic status alone is to be dispositive under the fee waiver standard overall." Instead it warns that "such a presumption would run counter to the 1986 amendments that set forth a specific fee category for representatives of the news media."

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.

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 write a column for the Bulletin, the NRDC Nuclear Notebook, which is published in each issue, and I occasionally publish larger background articles in the magazine, the most recent of which is carried in the latest issue

(<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/yb03/about15a.html>).

STRATCOM's rejection of my media status significantly narrows the legal interpretation of the representative of the news media category. In fact the court has specifically rejected a narrow interpretation of "representative of the news media" category 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 an 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 the representative of the news media category.

In the past, STRATCOM has routinely categorized 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.

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