

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES MADISON PROJECT, et al.,

Plaintiffs,

v.

OFFICE OF DIRECTOR OF NATIONAL
INTELLIGENCE,

Defendant.

Civil Action No. 23-3457 (APM)

**DEFENDANT’S SUBMISSION IN RESPONSE TO
THE COURT’S APRIL 19, 2024, ORDER**

Defendant Office of the Director of National Intelligence (“ODNI”), through counsel, respectfully submits this response to the Court’s order issued at the status conference held in this Freedom of Information Act (“FOIA”) case on April 19, 2024. As stated in the minute entry following the status conference, the Court has ordered ODNI to “submit Ex Parte the agencies that have outstanding consults and number of pages” and to “submit the number of referrals made and to what agencies.” *See* Minute Entry for Status Conf., Apr. 19, 2024.

Identification by name of one of the agencies with outstanding consultations in this case requires the disclosure of classified information. Therefore, ODNI, through counsel, is concurrently lodging a classified supplemental filing for the Court’s *ex parte, in camera* review, which contains the name of this agency.

BACKGROUND

Plaintiffs’ FOIA request seeks the whistleblower complaint and its corresponding file found within the Intelligence Community’s Inspector General file number 23-0001. ODNI has

identified twenty-nine documents as responsive to the FOIA request, comprising 365 pages. ODNI has granted expedited processing and is treating the request as such in its processing of the request.

As defense counsel explained during the conference, a significant portion of the responsive documents are marked classified. More specifically, ODNI reports that twenty-seven of the twenty-nine documents are marked classified; of these, nineteen are marked SECRET, and eight are marked TOP SECRET, with most of the latter marked as containing Sensitive Compartmented Information. As defined in Executive Order 13,526, the unauthorized disclosure of SECRET or TOP SECRET classified information reasonably could be expected to respectively cause “serious” or “exceptionally grave damage” to U.S. national security, respectively. *See* Exec. Order No. 13,526, 75 Fed. Reg. 707 (Jan. 5, 2010), <https://www.govinfo.gov/content/pkg/FR-2010-01-05/pdf/E9-31418.pdf>. Sensitive Compartmented Information refers to information “concerning or derived from intelligence sources, methods or analytical process that is required to be protected within formal access control systems established by the DNI.” Intelligence Community Directive 703 ¶ D(2) (June 21, 2023), <https://www.dni.gov/files/documents/ICD/ICD-703.pdf>. ODNI provides this information to illustrate the sensitivity of the responsive records, and ODNI cannot confirm the accuracy of these classification markings until FOIA processing is complete. The two documents not marked classified may also ultimately contain information exempt from release as classified.

The responsive documents appear to implicate the equities of numerous agencies. In fact, most of the responsive documents were not generated by ODNI but rather were provided to the Inspector General during the investigation at issue. Thus, ODNI has sought consultation from ten different agencies or government organizations regarding a subset of those records. As explained in ODNI’s regulations, “[w]hen [a] record originates with ODNI but contains information of

interest to another agency or other Federal Government office, ODNI will typically consult with that other agency or office prior to making a release determination.” 32 C.F.R. § 1700.5(c)(1).

ODNI has also determined that it will need to make referrals in this litigation. As its regulations explain, “[w]hen ODNI believes that a different agency is best able to determine whether to disclose the record, ODNI typically will refer the record to that agency and ask that agency to respond to the requester concerning that record[.]” *Id.* § 1700.5(c)(2).

OUTSTANDING CONSULTATIONS

As previously reported, ODNI has sought consultation from ten different agencies or government organizations regarding a subset of the responsive records. *Jt. Status Rpt. of Apr. 8, 2024* (ECF No. 12). Substantial progress has already been made due to ODNI’s diligent inquiries with the consulted agencies and those agencies’ efforts. Five of the ten agencies have already completed their consult responses. A sixth agency expects to complete its consult response by the end of this week (i.e., by May 3, 2024), and a seventh agency has updated its expected response date to May 15, 2024, from August 1, 2024.

As ordered by the Court, ODNI is providing the identity of the agencies with outstanding consultations and the number of pages associated with each consultation.¹ ODNI also notes that certain pages pending consultation are undergoing review by multiple agencies simultaneously. ODNI offers this information to avoid any misimpression that the completion of any individual consult will allow ODNI to immediately process the record(s) at issue in that consult. Instead,

¹ As previously noted, where identification of a consulted agency by name is classified, ODNI continues to identify the agency in this filing by letter. Today, ODNI is lodging with a Department of Justice Classified Information Security Officer a classified supplement to this filing that identifies Agency B by name.

ODNI cannot complete processing as to any record where outstanding consults remain for that record.

1. Department of Defense. The Department of Defense continues to provide ODNI an estimated response date of July 8, 2024, concerning two outstanding consultation requests, which concern a total of thirty-two pages of records. The Department of Defense previously informed ODNI of an estimated date of July 8, 2024, for its response to a consult concerning twenty-nine pages of records. In addition, ODNI subsequently determined that the Department of Defense should be consulted regarding three additional pages of records and sent this additional consultation on April 9, 2024 and has confirmed the same estimated response date.

2. Central Intelligence Agency. The Central Intelligence Agency continues to inform ODNI of an estimated response date of July 31, 2024, for a consultation request concerning thirty-two pages of records.

3. Defense Intelligence Agency (previously, Agency A). The Defense Intelligence Agency provides an estimated response date of May 3, 2024, for the completion of two consultations that collectively encompass thirty-one pages of records, and it is no longer seeking non-attribution for the consults. The Defense Intelligence Agency previously informed ODNI of an estimated date of May 3, 2024, to respond to a consult concerning twenty-eight pages of records. ODNI subsequently determined that the Defense Intelligence Agency should be consulted regarding three additional pages of records and sent this additional consultation on April 9, 2024. The Defense Intelligence Agency continues to provide an estimated response date of May 3, 2024.

4. Agency B. Agency B provides an estimated response date of July 15, 2024, for three consultations that collectively encompass forty-two pages of records. First, Agency B previously informed ODNI of an estimated response date of July 15, 2024, to a consult concerning

twelve pages of records. ODNI subsequently determined that Agency B should be consulted regarding twenty-three additional pages of records, and it sent this second consultation to Agency B on April 10, 2024. Finally, on April 24, 2024, ODNI issued a further consult to Agency B concerning seven pages of records. This final consultation was in lieu of an anticipated referral as to this set of records. Agency B continues to inform ODNI of an estimated response date of July 15, 2024, for each of the consultations that has been requested.

5. U.S. Special Operations Command (previously, Agency E). The U.S. Special Operations Command (SOCOM) has provided ODNI with an updated response date estimate of May 15, 2024, for a consultation concerning five pages of records, and it is no longer seeking non-attribution in this case. SOCOM had previously informed ODNI of an estimated response date of August 1, 2024.

In further response to the Court, ODNI notes that it lacks control over the amount of time any consulted agency may take to complete its review and response regarding the consulted records. That said, and as previously noted, there has already been substantial progress in the consultations, and ODNI hereby provides some additional background context that may assist the Court in assessing the time estimates provided by the three agencies with outstanding consult responses to be provided by July 2024.

Agencies receiving consultations often task internal components with reviewing documents for classification and providing subject matter expert reviews. For classified information, ensuring that reviewing personnel have appropriate clearances increases the time needed to complete the consultation because the information at issue is often compartmented. Additionally, FOIA request backlogs add to the delay in completing consultations. For example, as reported in their 2023 Annual FOIA Reports, the Department of Defense had a backlog of

19,882 FOIA requests and CIA had a backlog of 3,844 FOIA requests. *See* Dep't of Defense, Freedom of Information Act (FOIA) Annual Report for Fiscal Year 2023 at 3, https://open.defense.gov/Portals/23/Documents/DoDFY2023AnnualFOIA_Report.pdf?ver=nu4Qkg28gA6zhkeTI4lo8w%3d%3d; Central Intelligence Agency, Freedom of Information Act (FOIA) Annual Report for Fiscal Year 2023 at 17, https://www.cia.gov/readingroom/docs/Final_CIA_FY2023_FOIA_Annual_Report-DOJ_%2820240118%29.pdf.

The importance of a deliberate and careful consultation process in this case is further underscored by the sensitivity of the documents at issue in that process. The consulted documents at issue in this case encompass documents marked TOP SECRET and SECRET, including documents marked as containing Sensitive Compartmented Information (SCI). Such documents likely contain substantial information exempt from disclosure under the FOIA, the erroneous disclosure of which could cause damage to national security and intelligence sources and methods.

As previously reported, each month, ODNI intends to request updates from the agencies with outstanding consultations. *Jt. Status Rpt. of Mar. 8, 2024* ¶ 4 (ECF No. 11).

REFERRALS

As previously reported, ODNI has determined that it will need to make referrals in this litigation, and it has anticipated doing so by May 10, 2024. *Jt. Status Rpt. of Apr. 8, 2024* ¶ 11. The Court has ordered ODNI to “submit the number of referrals made and to what agencies.” *See* Minute Entry on Apr. 19, 2024.

ODNI has determined that it intends to make referrals of records to three other agencies in this case—the Central Intelligence Agency, Department of Defense, and Defense Intelligence Agency.

ODNI notes that any of these referrals may be returned to ODNI for direct response should the referred agency determine that it cannot be publicly affiliated with a particular responsive record. *See* 32 C.F.R. § 1700.5(c)(3). ODNI cannot determine whether any aspect of the referrals will need to be returned for response by ODNI until the referred agencies receive and evaluate the referred records.

Dated: April 30, 2024
Washington, DC

Respectfully submitted,

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