



BRENNAN CENTER

FOR JUSTICE

at New York University School of Law

February 22, 2011

Via FedEx & Facsimile

Carmen L. Mallon
Chief of Staff
Office of Information Policy
Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001

**Re: REQUEST UNDER FREEDOM OF INFORMATION ACT /
Expedited Processing Requested**

To Whom It May Concern:

This letter constitutes a request (“Request”) pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et seq.*, and the Department of Justice Implementing Regulations, 28 C.F.R. § 16.1 *et seq.* The Request is jointly submitted by the National Association of Criminal Defense Lawyers (“NACDL”) and the Brennan Center for Justice at New York University School of Law (“Brennan Center”). NACDL and the Brennan Center seek Department of Justice (“DOJ”) records concerning guidance on use of the “public safety exception” to *Miranda v. Arizona* in terrorism or national security investigations.

I. Background

Following the arrest of Umar Farouk Abdulmutallab, the so-called “underwear bomber,” on December 25, 2009, Attorney General Eric Holder proposed the idea of legislation to modify the “public safety exception” to the requirements of *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966), an exception first recognized by the Supreme Court in *New York v. Quarles*, 467 U.S. 649, 655-56 (1984). *See, e.g., This Week* (ABC television broadcast May 9, 2010) (interview with Eric Holder) (transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR201005090_1488.html); *Meet the Press* (NBC television broadcast May 9, 2010) (interview with Eric Holder) (transcript available at http://www.msnbc.msn.com/id/37024384/ns/meet_the_press/ns/meet_the_press). According to the *New York Times*, such legislation would have helped “open a window of time after an arrest in which interrogators could question a terrorism suspect without an interruption that might cause the prisoner to stop talking.” Charlie Savage, *Proposal Would Delay Hearings in Terror Cases*, N.Y. TIMES, May 14, 2010, at A11.

Since that time, legislative efforts related to the public safety exception have not progressed in Congress. However, recent news reports indicate that the Department of Justice has issued formal guidance on use of the public safety exception in terrorism investigations. Attorney General Holder first revealed the existence of this new policy in a statement to the *New York Times* reported on December 30, 2010. Charlie Savage, *For Holder, New Congress Means New Headaches*, N.Y. TIMES, Dec. 30, 2010, at A12. According to the newspaper, Mr. Holder “disclosed that the department had sent ‘guidance’ to agents emphasizing that under existing law, they can question terrorism suspects about immediate threats to public safety before reading them Miranda warnings.” *Id.* In January 2011, Justice Department spokesman Dean Boyd reportedly confirmed the existence of this guidance, stating that “we have formalized guidance that outlines the appropriate use of the well-established public safety exception to providing Miranda rights.” Justin Elliot, *Obama Administration Keeps New Policy on Miranda Secret*, SALON, Jan. 19, 2011, http://www.salon.com/news/politics/war_room/2011/01/19/obama_holder_doj_miranda; Ryan J. Reilly, *Effort to ‘Modernize’ Miranda Looks Dead, But DOJ Wouldn’t Release New ‘Guidance’*, TALKING POINTS MEMO, Jan. 21, 2011, http://tpmmuckraker.talkingpointsmemo.com/2011/01/effort_to_modernize_miranda_looks

[dead but doj wouldnt release new guidance.php](#). Mr. Boyd also acknowledged that “the guidance has been distributed to relevant agencies,” but added that the DOJ would not publicly reveal their content. *Id.*; see also Adam Serwer, *The Miranda Dodge*, WASH. POST, Jan. 20, 2011, http://voices.washingtonpost.com/plum-line/2011/01/the_miranda_dodge.html.

II. Requested Records

This Request seeks all legal memoranda, procedures, policies, directives, guidelines, and other guidance issued by the Justice Department and/or any of its components after December 25, 2009, regarding use of the “public safety exception” to *Miranda v. Arizona* in the course of terrorism or national security investigations, including the “guidance” referred to by Attorney General Holder in the December 30, 2010, *New York Times* article and described by DOJ spokesman Dean Boyd in January 2011.

III. Application for Expedited Processing

This Request warrants expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and implementing regulation 6 C.F.R. § 16.5(d). There is a “compelling need” for these records because the information requested is urgently required by organizations “primarily engaged in disseminating information” to “inform the public concerning actual or alleged Federal Government activity,” 5 U.S.C. 552(a)(6)(E)(v); 28 C.F.R. § 16.5(d)(1)(ii). See *Am. Civil Liberties Union v. Dep’t of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding non-profit, public interest group 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” to be “primarily engaged in disseminating information”) (quoting *Elec. Privacy Info. Ctr. v. Dep’t of Def.*, 241 F. Supp. 2d 5, 11 (D.D.C. 2003)).

NACDL is a 501(c)(6) non-profit organization that is “primarily engaged in disseminating information” within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii). NACDL publishes a monthly magazine called *The Champion* that features timely and informative articles on the latest developments in criminal justice. The magazine directly circulates to approximately 11,000 recipients, including lawyers, law libraries, law professors, federal and state judges, members of the news media, and members of the public interested in the

administration of justice. NACDL also publishes a monthly electronic newsletter and daily news brief, both of which are distributed to NACDL members via e-mail. Additionally, NACDL regularly issues news releases to the press and public that are widely disseminated through e-mail, Facebook, and Twitter, and posted on NACDL's website, www.nacdl.org. Finally, NACDL has a long history of publishing reports about governmental activity and criminal justice issues that are broadly circulated and available to the public at little or no cost, including manuals and government reports obtained through FOIA. *See, e.g., Nat'l Ass'n of Crim. Def. Law. v. Dept. of Justice*, 182 F.3d 981 (D.D.C. 1999).

The Brennan Center is a 501(c)(3) non-profit organization that is also “primarily engaged in disseminating information” within the meaning of 5 U.S.C. § 552(a)(6)(E)(v)(II) and 28 C.F.R. 16.5(d)(1)(ii). During last year alone the organization released fifteen publications in the form of reports and papers. *Cf. Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was a representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); *see also Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1386 (D.C. Cir. 1989) (National Security Archive deemed a representative of the news media after publishing one book and indicating its intention to publish a set of documents on national and international politics and nuclear policy). The writing and publication of reports regarding U.S. policy on issues ranging from voting rights to counterterrorism efforts to campaign finance laws and beyond is part of the Brennan Center's regular practice, which it will continue to employ for the foreseeable future.¹

Furthermore, NACDL and the Brennan Center urgently require the information sought by this Request in order to inform the public of federal government activity that concerns the general public interest. *See* 5 U.S.C. 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(d)(1)(ii). The records directly relate to a highly public and controversial debate over the propriety of issuing *Miranda* warnings in terrorism investigations and the legitimate scope of the public safety exception. This issue has been the subject of widespread and ongoing media interest since at least 2009. *See*,

¹ A complete list of the Brennan Center's recent publications is available at <http://www.brennancenter.org/content/resources/publications/P0/>.

e.g., CNN, Tom Ridge: Terror Suspect Doesn't Deserve 'Full Range' of Rights, <http://articles.cnn.com/2009-12-29/politics/1kl.tom.ridge.terrorism> (last visited Feb. 10, 2011); Devlin Barrett, *Details of Arrest of Bombing Suspect Disclosed*, WASH. POST, Jan. 24, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/23/AR2010012302678.html>; Walter Pincus, *Under Plan, Intelligence Agencies Would Be Consulted Before Reading of Rights*, WASH. POST, Feb. 13, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/12/AR2010021205277.html>; Anne E. Kornblut, *Obama Weighs Miranda Change*, NEWSDAY, May 10, 2010, at A2; Ari Shapiro, *Obama Rethinking 'Miranda' Rights*, NPR, May 11, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=126759938>; Editorial, *The Threat to Miranda*, N.Y. TIMES, May 16, 2010, at A9; Charlie Savage, *For Attorney General, New Congress Means New Headaches*, N.Y. TIMES, Dec. 31, 2010, at A12. If the Department of Justice has “formalized” its position (in the words of its own spokesperson) and disseminated guidance on this issue, then there is an urgent need to inform the public regarding the nature of that guidance.

IV. Application for Waiver or Limitation of All Fees

NACDL and the Brennan Center request a waiver of all search, review, and duplication fees associated with this Request. The requesters are eligible for a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.11(c)(3), (d), and for a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k)(1).

First, NACDL and the Brennan Center plan to analyze, publish, and publicly disseminate information obtained from this Request. The requested records are not sought for commercial use and will be disclosed to the public at no cost. Second, NACDL and the Brennan Center qualify as “representative[s] of the news media” for the same reasons that they are “primarily engaged in dissemination of information” – i.e., because each organization “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii)(III); *Nat'l Sec. Archive*, 880 F.2d at 1387; *see also supra*, Part III; *Elec. Privacy Info. Ctr.*, 241 F.

Supp. 2d at 11. NACDL and the Brennan Center are therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.11(c)(3), (d).

As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” and a “noncommercial scientific institution” pursuant to 28 C.F.R. § 16.11(c) and (d). The Brennan Center qualifies as an educational institution because it is affiliated with the NYU School of Law, which is plainly an educational institution under the definition provided in 28 C.F.R. § 16.11(b)(4); *see also Nat’l Sec. Archive v. Dep’t of Def.*, 880 F.2d 1381 (D.C. Cir. 1989). The Brennan Center qualifies as a “noncommercial scientific institution” according to 28 C.F.R. § 16.11(b)(5) because it is a non-profit, non-partisan public policy and law institute that conducts research and disseminates to the public information about issues affecting justice and democracy that is not intended to promote any particular product or industry.

NACDL and the Brennan Center are also entitled to a waiver of all fees, including duplication fees, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k)(1). The widespread and ongoing media attention demonstrates the substantial public interest in this issue. *See* cited articles *supra*, Part III. Disclosure of the requested records is therefore in the public interest because it is likely to contribute significantly to public understanding of how the Department of Justice conducts criminal investigations. *See* 28 C.F.R. § 16.11(k)(1)(i). Moreover, disclosure is not primarily in the requesters’ commercial interests. As stated above, NACDL and the Brennan Center plan to make any information disclosed as a result of this Request available to the public at no cost. A fee waiver would therefore fulfill Congress’s legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 CONG. REC. 27, 190 (1986) (Statement of Sen. Leahy)).

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Pursuant to applicable statute and regulations, we will expect a determination regarding expedited processing within 10 calendar days. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(d)(4).

If the Request is denied in whole or in part, please justify all withholdings or redactions by reference to specific exemptions under the FOIA and provide all segregable portions of otherwise exempt material. We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees.

Thank you for your prompt attention to this matter. Please furnish the applicable records to:

Michael Price
National Association of Criminal Defense Lawyers
1660 L St. N.W., 12th Floor
Washington, D.C. 20036

I affirm that the information provided supporting the request for expedited processing is true and correct to the best of my knowledge and belief.

Sincerely yours,



Michael Price
National Security Coordinator
National Association of Criminal Defense Lawyers
1660 L St. N.W., 12th Floor
Washington, D.C. 20036
(202) 872-8600 x258
michael@nacdl.org



Elizabeth Goitein
Co-Director, Liberty and National Security Program
Brennan Center for Justice
1730 M Street, NW, Suite 413
Washington, DC 20036
(202) 249-7192
elizabeth.goitein@nyu.edu