

National Association of Criminal Defense Lawyers



President
Steven D. Benjamin Richmond, VA

President-Elect
Jerry J. Cox Mount Vernon, KY

First Vice President
Theodore Simon Philadelphia, PA

Second Vice President
E. G. Morris Austin, TX

Treasurer
John Wesley Hall Little Rock, AR

Secretary
Barry J. Pollack Washington, DC

Immediate Past President
Lisa Monet Wayne Denver, CO

Parliamentarian
Vicki H. Young San Francisco, CA

Directors
Chris Adams Charleston, SC
Brian H. Bleber Coral Gables, FL
Andrew S. Birrell Minneapolis, MN
Susan K. Bozorgi Miami, FL
Alexander Burin Houston, TX
Ellen C. Brotman Philadelphia, PA
William H. Buckman Moorestown, NJ
Ramon De La Cabada Miami, FL
Jean-Jacques Cabou Phoenix, AZ
Jay Clark Cincinnati, OH
Josh A. Cohen San Francisco, CA
Anthony Cotton Waukesha, WI
Aric M. Cramer St. George, UT
Candace C. Crouse Cincinnati, OH
Paul DeWolfe Baltimore, MD
Drew Findling Atlanta, GA
Richard K. Gilbert Washington, DC
Nina J. Ginsberg Alexandria, VA
Elissa Heinrichs Newtown, PA
Michael Helskell Fort Worth, TX
Bonnie Hoffman Leesburg, VA
Richard S. Jaffe Birmingham, AL
Ashish S. Joshi Ann Arbor, MI
Nellie L. King West Palm Beach, FL
Benjamin R. Labranche Baton Rouge, LA
Tracy Miner Boston, MA
Tyrone Monciffe Houston, TX
Norman R. Mueller Denver, CO
George H. Newman Philadelphia, PA
Timothy P. O'Toole Washington, DC
Maria H. Sandoval San Juan, PR
Melinda Sarafa New York, NY
David Smith Alexandria, VA
Jeffrey E. Thoma Fairfield, CA
Geneva Vanderhorst Washington, DC
Christopher A. Wellborn Rock Hill, SC
Steven M. Wells Anchorage, AK
Christie N. Williams Dallas, TX
William P. Wolf Chicago, IL

Executive Director
Norman L. Reimer Washington, DC

FREEDOM OF INFORMATION ACT APPEAL

April 26, 2013

Office of Information Policy
United States Department of Justice
1425 New York Avenue NW
Suite 11050

Re: Appeal of Request for Federal Criminal Discovery Bluebook, FOIA Request # 13-377

Dear Sir or Madam:

This is an appeal from the February 28, 2013, decision to withhold records responsive to Freedom of Information Act Request No. 13-377. That request was dated December 20, 2012, and filed by Kyle O'Dowd, Associate Executive Director for Policy, National Association of Criminal Defense Lawyers (NACDL). NACDL requested the Office of Legal Education publication entitled "Federal Criminal Discovery," believed to be published and/or distributed in March 2011 and possibly referred to as *The Federal Criminal Discovery Blue Book*. A copy of NACDL's request is attached as Exhibit A.

By letter dated February 28, 2013, Susan B. Gerson denied NACDL's request in its entirety. A copy of the denial letter is attached as Exhibit B. The denial letter purports that information responsive to NACDL's request is exempt from disclosure under 5 U.S.C. 552(b)(5) and 5 U.S.C. 552(b)(7)(E).

NACDL asserts that the requested document is required to be made public under FOIA and does not fall under either of the claimed exceptions:

- (1) 5 U.S.C. 552(b)(5). The requested document is not exempted under (b)(5) as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The denial letter did not explain how this exemption was relevant to its decision to withhold the requested document, and NACDL asserts that none of the grounds for this exemption apply here. The document does not constitute attorney's work product, attorney-client

communications, or “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.”

- a. Work Product: The requested document was not prepared for litigation. *PHE, Inc. v. DOJ*, 983 F.2d 248, 251 (D.C. Cir. 1993). The attorney work product privilege protects documents prepared by an attorney revealing the theory of the case or litigation strategy. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 154. Because the purpose of the privilege is to protect the adversarial trial process by shielding the attorneys’ preparation from scrutiny, *Jordan v. Dep’t of Justice*, 591 F.2d 73, 775 (D.C. Cir. 1978) (*en banc*), this exemption is clearly inapplicable.
 - b. Attorney Client Privilege: NACDL believes that the requested document was disseminated widely within the agency and/or without restrictions, and that no confidentiality exists and the privilege cannot apply. In addition, the document is not the type of confidential legal counsel protected by the privilege. The requested document does not constitute “confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice.” *Mead Data Central, Inc. v. Dep’t of the Air Force*, 566 F.2d 242 (D.C. Cir. 1977).
 - c. Deliberative Process: The requested document is neither predecisional nor deliberative. This privilege protects “documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.” *Nat’l Labor Relations Bd.*, 421 U.S. at 150 (quoting *Stiftung v. V.E.B.*, 40 F.R.D. 318, 324 (D.D.C. 1966)). The requested document likely reflects interpretations of current law and not discussions of proposed policies.
- (2) 5 U.S.C. 552(b)(7)(E). The requested document is not “records or information compiled for law enforcement purposes,” that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” There is no logical way in which the requested document could “create a risk of circumvention of the law.” This exemption does not apply to “garden-variety legal analysis,” which includes discussion and digests of caselaw. *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009). Nor does this exemption apply to materials within the scope of 5 U.S.C. § 552(a)(2), such as administrative staff manuals.

For the forgoing reasons, NACDL requests that this office reconsider the unjustified denial and require that the requested documents be provided.

Sincerely,

A handwritten signature in black ink, appearing to read 'K O'Dowd', with a long horizontal flourish extending to the right.

Kyle O'Dowd
Associate Executive Director for Policy

Exhibit A

National Association of Criminal Defense Lawyers



President
Steven D. Benjamin Richmond, VA

President-Elect
Jerry J. Cox Mount Vernon, KY

First Vice President
Theodore Simon Philadelphia, PA

Second Vice President
E. G. Morris Austin, TX

Treasurer
John Wesley Hall Little Rock, AR

Secretary
Barry J. Pollack Washington, DC

Immediate Past President
Lisa Monet Wayne Denver, CO

Parliamentarian
Vicki H. Young San Francisco, CA

Directors

Chris Adams Charleston, SC
Brian H. Bleber Coral Gables, FL
Andrew S. Birrell Minneapolis, MN
Susan K. Bozorgi Miami, FL
Alexander Bunin Houston, TX
Ellen C. Brotman Philadelphia, PA
William H. Buckman Moorestown, NJ
Ramon De La Cabada Miami, FL
Jean-Jacques Cabou Phoenix, AZ
Jay Clark Cincinnati, OH
Josh A. Cohen San Francisco, CA
Anthony Cotton Waukesha, WI
Aric M. Cramer St. George, UT
Candace C. Crouse Cincinnati, OH
Paul DeWolfe Baltimore, MD
Drew Findling Atlanta, GA
Richard K. Gilbert Washington, DC
Nina J. Ginsberg Alexandria, VA
Elissa Heinrichs Newtown, PA
Michael Heiskell Fort Worth, TX
Bonnie Hoffman Leesburg, VA
Richard S. Jaffe Birmingham, AL
Ashish S. Joshi Ann Arbor, MI
Nellie L. King West Palm Beach, FL
Benjamin R. Labranche Baton Rouge, LA
Tracy Mlner Boston, MA
Tyrone Moncriffe Houston, TX
Norman R. Mueller Denver, CO
George H. Newman Philadelphia, PA
Timothy P. O'Toole Washington, DC
Maria H. Sandoval San Juan, PR
Melinda Sarafa New York, NY
David Smith Alexandria, VA
Jeffrey E. Thoma Fairfield, CA
Geneva Vanderhorst Washington, DC
Christopher A. Wellbom Rock Hill, SC
Steven M. Wells Anchorage, AK
Christie N. Williams Dallas, TX
William P. Wolf Chicago, IL

Executive Director
Norman L. Reimer Washington, DC

December 20, 2012

Susan B. Gerson, Acting Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Room 7300, 600 E Street, N.W.
Washington, DC 20530-0001

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

Dear Ms. Gerson:

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 submitted by the National Association of Criminal Defense Lawyers ("NACDL").¹ This request seeks the Office of Legal Education publication entitled "Federal Criminal Discovery." On information and belief, this publication was published and/or distributed in March 2011 and may also be referred to as *The Federal Criminal Discovery Blue Book*.

I. Background

Following the exposure of discovery abuse in the prosecution of the late Senator Ted Stevens, the Department of Justice (DOJ) convened a working group to review the policies, practices, and training relating to discovery practices. One of the steps that the DOJ has taken to improve discovery practices is the availability of a Federal Criminal Discovery reference book, "which comprehensively covers the law, policy, and practice of prosecutors' disclosure obligations."² NACDL believes that every

¹ The National Association of Criminal Defense Lawyers (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).

² Cole, James M. Statement to the Senate Judiciary Committee. Hearing, June 6, 2012. Available at: <http://www.justice.gov/iso/opa/dag/speeches/2012/dag-speech-120606.html>; Accessed: 12/06/12.

American citizen is entitled to know the steps that DOJ has taken to ensure that federal prosecutors abide by the federal discovery rules. As the Federal Criminal Discovery reference book is part of DOJ's efforts to improve prosecutors' legal education pertaining to discovery rules, NACDL requests the book.

II. Requested Records

This Request seeks the Federal Criminal Discovery reference book in its entirety distributed in 2011 by the Office of Legal Education within the Executive Office for United States Attorneys to federal prosecutors nationwide.

III. Application for Expedited Processing

NACDL requests expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(d). There is a "compelling need" for these records because the information requested is urgently required by an organization "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)). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv).

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 10,000 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).

NACDL urgently requires 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). In addition, the request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence. 28 C.F.R. § 16.5(d)(1)(iv). The records directly relate to a highly public and controversial

debate over federal prosecutorial discovery practices. Discovery-related misconduct in the high-profile prosecution of the late Senator Ted Stevens led, in 2012, to a court-ordered investigation, a Justice Department Office of Professional Responsibility investigation, and three congressional hearings. In the last year alone, efforts to identify and address misconduct by the Stevens prosecutors have been the subject of dozens of stories in major news outlets (“widespread and exceptional media interest”), including: *Two Prosecutors in Stevens Case Appeal Disciplinary Action*, The Blog of Legal Times, June 27, 2012, available at <http://bit.ly/UMMStK>; Jon May, *Government's Response to Brady Reform Relies on Fear Not Fact*, White Collar Crime Prof Blog, June 15, 2012, available at <http://bit.ly/RAs1gH>; Ginny Sloan, *Congress Must Act to End Prosecutorial Misconduct*, Huffington Post, April 11, 2012, available at <http://huff.to/SH3YNo>; Elizabeth Murphy, *Schuelke: Congress Should Consider Discovery Legislation*, Main Justice, March 28, 2012, available at <http://bit.ly/VMdODT>; Jordy Yager, *Prosecutors compromised Stevens case*, The Hill, March 28, 2012, available at <http://bit.ly/UMMBai>; *Senate Judiciary Committee To Hold Hearings On Ted Stevens Report*, The Blog of Legal Times, March 21, 2012, available at <http://bit.ly/TsiDJ8>; *Editorial: Justice After Senator Stevens*, The New York Times, March 18, 2012, available at <http://nyti.ms/XAOMht>; Carrie Johnson, *Making Prosecutors Share: Stevens' Case Prompts Bill*, NPR, March 18, 2012, available at <http://n.pr/ZFlp2W>; *Federal prosecutors need to play fair with evidence*, Washington Post, March 18, 2012, available at <http://wapo.st/ZFlhk0>; Charlie Savage and Michael S. Schmidt, *A Call to Fire Prosecutors in Botched Stevens Trial*, The New York Times, March 17, 2012, available at <http://nyti.ms/UMM7B2>; John Bresnahan and Josh Gerstein, *Report blasts prosecutors in Ted Stevens case*, Politico, March 15, 2012, available at <http://politi.co/ZFkYWp>; Charlie Savage and Michael S. Schmidt, *Inner Workings of Senator's Trouble Trial Detailed*, The New York Times, March 15, 2012, available at <http://nyti.ms/12wfADU>; *How to Rein In Rogue Prosecutors*, The Wall Street Journal, March 15, 2012, available at <http://on.wsj.com/U83Llk>; *Ted Stevens Report: The Concealed Evidence and the Prosecutors*, The Blog of Legal Times, March 15, 2012, available at <http://bit.ly/XANUcx>; Carrie Johnson, *Report: Prosecutors Hid Evidence In Ted Stevens Case*, NPR, March 15, 2012, available at <http://n.pr/Tsi9CA>; Amanda Coyne, *Reactions to the report on Ted Stevens corruption trial*, Alaska Dispatch, March 15, 2012, available at <http://bit.ly/UEyq69>; *Ted Stevens Report: Stevens' Defense Attorneys Rip Prosecutors*, The Blog of Legal Times, March 15, 2012, available at <http://bit.ly/UMLSWH>; GW Rastopsoff, *Schuelke Report Released on Stevens Trial, Senator Murkowski Introduces Legislation*, Alaska Native News, March 15, 2012, available at <http://bit.ly/WjMpEo>; Meredith Shiner, *Lisa Murkowski Challenges DOJ on Ted Stevens Case*, Roll Call, March 13, 2012, available at <http://bit.ly/TWzCBS>; Sen. Lisa Murkowski, *Justice, not convictions, more important*, Anchorage Daily News, March 10, 2012, available at <http://bit.ly/UMN6kB>. More news stories related to the Stevens case are available at www.nacdl.org/discoveryreformnews/.

Partly in response to the Stevens case, discovery legislation has been introduced in the Senate, and the Justice Department's internal efforts to ensure discovery compliance have been at issue throughout this legislative debate. There is no doubt that public and media interest in the seriousness and efficacy of any Justice Department efforts to ensure that prosecutors meet their discovery obligations is extremely high (“questions about the government's integrity which affect public

Ms. Susan B. Gerson
December 20, 2012
Page 4

confidence”), and that the public and media have an urgent and compelling need for the information requested herein.

IV. Application for Waiver or Limitations of All Fees

NACDL requests a waiver of all search, review, and duplication fees associated with this Request. The requester is 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).

* * *

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. NACDL reserves the right to appeal a decision to withhold any information or to deny a waiver of fees.

NACDL also requests that you provide an estimated date on which you will complete processing of this request. *See* 5 U.S.C. §552(a)(7)(B).

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

Kyle O’Dowd
Associate Executive Director for Policy
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. *See* 5 U.S.C. 552(a)(6)(E)(vi).

Sincerely yours,



Kyle O’Dowd
Associate Executive Director for Policy

Exhibit B



U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information & Privacy Staff
600 E Street, N.W., Suite 7300, Bicentennial Building
Washington, DC 20530-0001
(202) 252-6020 FAX: 252-6047 (www.usdoj.gov/usao)

Requester: Kyle O'Dowd Request Number: 13-377

Subject of Request: Federal Criminal Discovery Bluebook

Dear Requester:

FEB 28 2013

Your request for records under the Freedom of Information Act/Privacy Act has been processed. This letter constitutes a reply from the Executive Office for United States Attorneys, the official record-keeper for all records located in this office and the various United States Attorneys' Offices.

To provide you the greatest degree of access authorized by the Freedom of Information Act and the Privacy Act, we have considered your request in light of the provisions of both statutes.

The records you seek are located in a Privacy Act system of records that, in accordance with regulations promulgated by the Attorney General, is exempt from the access provisions of the Privacy Act. 28 CFR § 16.81. We have also processed your request under the Freedom of Information Act and are making all records required to be released, or considered appropriate for release as a matter of discretion, available to you. This letter is a [] partial [X] full denial.

Enclosed please find:

- _____ page(s) are being released in full (RIF);
_____ page(s) are being released in part (RIP);
_____ page(s) are withheld in full (WIF). The redacted/withheld documents were reviewed to determine if any information could be segregated for release.

The exemption(s) cited for withholding records or portions of records are marked below. An enclosure to this letter explains the exemptions in more detail.

Section 552

Section 552a

- [] (b)(1) [] (b)(4) [] (b)(7)(B) [] (j)(2)
[] (b)(2) [X] (b)(5) [] (b)(7)(C) [] (k)(2)
[] (b)(3) [] (b)(6) [] (b)(7)(D) [] (k)(5)
_____ [] (b)(7)(A) [X] (b)(7)(E) [] _____
_____ [] (b)(7)(F)

[] In addition, this office is withholding grand jury material which is retained in the District.

A review of the material revealed:

Our office located records that originated with another government component. **These records were found in the U.S. Attorney's Office files and may or may not be responsive to your request.** These records will be referred to the following component(s) listed for review and direct response to you: _____

There are public records which may be obtained from the clerk of the court or this office, upon specific request. If you wish to obtain a copy of these records, you must submit a new request. These records will be provided to you subject to copying fees.

Please note that your original letter was split into separate files ("requests"), for processing purposes, based on the nature of what you sought. Each file was given a separate Request Number (listed below), for which you will receive a separate response:

See additional information attached.

This is the final action on this above-numbered request. You may appeal this decision on this request by writing to the **Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001.** Both the letter and envelope should be marked "FOIA Appeal." Your appeal must be received by OIP within 60 days from the date of this letter. If you are dissatisfied with the results of any such administrative appeal, judicial review may thereafter be available in U.S. District Court, 28 C.F.R. § 16.9.

Sincerely,



Susan B. Gerson
Assistant Director

Enclosure(s)