



U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

JUL 31 2008

E.J. Hurst, Esq.  
PMB No. 124  
550M Ritchie Highway  
Severna Park, MD 21146

Re: Appeal No. 06-1604  
Request No. 2006-02285  
JGM:SRO

Dear Mr. Hurst:

You appealed from the fee waiver determination of the South Central Regional Office of the Federal Bureau of Prisons (BOP) on your request for access to nineteen enumerated items pertaining to Federal Correctional Institution La Tuna. I note that you also appealed BOP's decision to withhold certain records from you pertaining to items (4) through (6) of your request. I regret the substantial delay in responding to your appeal.

The statutory standard for evaluating fee waiver requests provides that fees shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In determining whether you have satisfied this statutory standard, I considered the six factors set out in the Department of Justice regulation that effects this statutory standard. See 28 C.F.R. § 16.11(k) (2007) (copy enclosed). The first four of these factors concern the "public interest" requirement; the fifth and six factors concern whether your interest in the records is primarily commercial.

On the basis of all of the information available to me, I have concluded that your request for a waiver of fees was properly denied. Although the records pertain at least in part to the operations or activities of the government and the extent of your commercial interest in the records is unclear, you have failed to satisfy other relevant factors.

To qualify for a fee waiver, you must make an adequate showing that release of the information to you is in the public interest. See *Oglesby v. Dep't of the Army*, 920 F.2d 57, 66 n.11 (D.C. Cir. 1990). You have not done so. You contend that these records may shed light on various forms of negligence and misconduct that you allege may have taken place at FCI La Tuna. Yet, your allegations regarding understaffing due to overseas military commitments, inadequate inmate medical care, an unsanitary Special Housing Unit, and inadequate staff responses to two prison disturbances are utterly unsupported by any evidence. In one instance, you even placed the burden on BOP to prove a negative: that it does not abuse its prisoners as certain Department of Defense personnel have done in certain well known instances. Speculative

or conclusory allegations of agency wrongdoing are not sufficient to demonstrate that records sought under the Freedom of Information Act are of sufficient public interest to qualify for a fee waiver. See AFGE v. U.S. Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (finding allegations of malfeasance to be too ephemeral to warrant waiver of fees without further evidence that informative material will be found), aff'd on other grounds, 907 F.2d 203 (D.C. Cir. 1990); cf. NARA v. Favish, 541 U.S. 157, 174 (holding, in the context of Exemption 7(C)'s closely related public interest balancing test, that where the "public interest" asserted is to show negligence or improper performance of the agency officials' duties, "the requester must establish more than a bare suspicion in order to obtain disclosure"), reh'g denied, 541 U.S. 1057 (2004). Even if there were any credible basis for your allegations, the majority of the records you seek would not be releasable to you or would otherwise not significantly enlighten the public on such misconduct.

Furthermore, the fee waiver regulations require that you have both the intent and ability to disseminate the requested information to the public. You have demonstrated neither the intent nor the ability to disseminate the requested information to the public. Regarding your intent to disseminate the information, while you stated your intention to do so, I note that you plan to use the requested records in furtherance of your representation of an inmate in a possible civil rights action. Inasmuch as a primary purpose of your records request is to assist you in litigation against the government, it appears that you and your client would be the primary beneficiaries of this information. Thus, the grant of a fee waiver on this basis would not contribute to "public understanding" as required by the fee waiver standard. Further, you have failed to demonstrate the ability to disseminate the requested information to the public. I note that your assertions that you regularly contribute to certain internet listserves and blogs such as FedCURE and BOP Watch, your statement that you make regular filings in federal court, and your stated intent to place the requested records on your website are not sufficient for this purpose, despite your academic credentials. This alone is a sufficient basis for denying a fee waiver request. See Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir. 1988).

You should contact BOP within sixty days of the date of this letter to inform it of your willingness to pay none, all, or a portion of the estimated fees associated with your request (see BOP's letter to you dated January 8, 2007). If you inform BOP that you wish to pay none of the assessed fee, it will conduct two hours of search and will release to you the first 100 releasable pages of records that it locates through that search. If you agree to pay all or some portion of the assessed fee, BOP will process your request in accordance with your agreement to pay. If you do not contact BOP within sixty days of the date of my letter, BOP will administratively close your request.

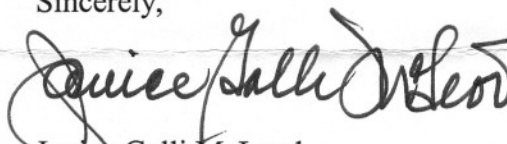
You also appealed BOP's decision to withhold from you records responsive to items (4) through (6) of your request, which pertain to the names, ranks, duty stations, qualifications, and duty logs of La Tuna's Special Operations and Response Team (SORT) officers and other "use of force" teams. BOP properly withheld this information because it is protected from disclosure under the FOIA pursuant to:

5 U.S.C. § 552(b)(7)(C), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties; and

5 U.S.C. § 552(b)(7)(F), which concerns records or information compiled for law enforcement purposes the release of which could reasonably be expected to endanger the life or personal safety of an individual.

If you are dissatisfied with my action on your appeal, you may file a lawsuit in accordance with 5 U.S.C. § 552(a)(4)(B).

Sincerely,

A handwritten signature in black ink that reads "Janice Galli McLeod". The signature is written in a cursive style with a large initial "J" and "M".

Janice Galli McLeod  
Associate Director

Enclosure

CODE OF FEDERAL REGULATIONS  
DEPARTMENT OF JUSTICE

28 CFR Sec. 16.11(k) (2007)

(k) *Requirements for waiver or reduction of fees.* (1) Records responsive to a request will be furnished without charge or at a charge reduced below that established under paragraph (c) of this section where a component determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee waiver requirement is met, components will consider the following factors:

(i) *The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government."* The subject of the requested records must concern identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities.* The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be "likely to contribute" to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. Components shall not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is "important" enough to be made public.

(3) To determine whether the second fee waiver requirement is met, components will consider the following factors:

(i) *The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.* Components shall consider any commercial interest of the requester (with reference to the definition of "commercial use" in paragraph (b)(1) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."* A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Components ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (k)(2) and (3) of this section, insofar as they apply to each request. Components will exercise their discretion to consider the cost-effectiveness of their investment of administrative resources in this decision-making process, however, in deciding to grant waivers or reductions of fees.