

December 13, 2016

VIA FACSIMILE AND POST

Office of Information Programs and Services
A/GIS/IPS/RL
United States Department of State
Washington, D.C. 20522-8100
United States of America

Re: Request Under Freedom of Information Act

To whom it may concern,

Privacy International (“PI”) submits this request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for access to records relating to the British-United States Communication Intelligence Agreement (now known as the “UKUSA Agreement”). Specifically, we request the following records¹:

1. Any records governing, amending, extending or appended to the UKUSA Agreement.
2. Any records relating to the implementation of the UKUSA Agreement by the United States government, including, but not limited to:
 - a. Regulations, policies, memoranda, legal opinions, strategy documents, directives, definitions, and technical manuals or specifications;
 - b. Records pertaining to planning, technical and other relevant conferences, including, but not limited to, minutes, reports and recommendations.
3. Any records construing or interpreting the authority of the United States Department of State (“State Department”) pursuant to the UKUSA Agreement; any regulations, policies or other implementing documents issued thereunder; or any other relevant authorities pertaining to the UKUSA Agreement.

¹ Records include, but are not limited to, letters, reports, memoranda, legal opinions, policy statements, notes, technical manuals, technical specifications, tape recordings, electronic records (including email, data, and computer source and object code), and any other materials.

4. Any records describing the standards that must be satisfied for the “exchange” of “products” of “operations relating to foreign communications,” as the State Department defines these terms, pursuant to the State Department’s authority under the UKUSA Agreement; any regulations, policies or other implementing documents issued thereunder; or any other relevant authorities governing the “exchange” of intelligence “products” under the UKUSA Agreement.²
5. Any records describing the minimization procedures used by the State Department with regard to the “exchange” of “products” of “operations relating to foreign communications,” as the State Department defines these terms, pursuant to the State Department’s authority under the UKUSA Agreement; any regulations, policies or other implementing documents issued thereunder; or any other relevant authorities governing the “exchange” of intelligence “products” under the UKUSA Agreement.³
6. Any other records governing the exchange of intelligence between the United States government and the governments of the United Kingdom, Canada, Australia and/or New Zealand.

Request for a Public Interest Fee Waiver

PI requests a waiver of search, review and duplication fees on the ground that disclosure of the requested records is in the public interest because it: (1) “is likely to contribute significantly to public understanding of the operations or activities of the government,” and (2) “is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). This request clearly satisfies both criteria.

First, the requested records concern “the operations or activities of the government.” The 1955 version of the UKUSA Agreement provides that “[t]he agreement governs the

² The 1955 version of the UKUSA Agreement, which is the most recent publicly available version of the agreement and was declassified by the NSA in 2010, lists the following “products”: “collection of traffic,” “acquisition of communications documents and equipment,” “traffic analysis,” “cryptanalysis,” “decryption and translation,” and “acquisition of information regarding communications organizations, procedures, practices and equipment.” U.K.-U.S. Communications Intelligence Agreement (UKUSA Agreement), May 10, 1955, § 4(a), available at https://www.nsa.gov/news-features/declassified-documents/ukusa/assets/files/new_ukusa_agree_10may55.pdf [hereinafter UKUSA Agreement]. PI requests any records describing the standards that must be satisfied for the “exchange” of “products” including, but not limited to, those contained in the preceding list.

³ Minimization procedures include, but are not limited to, regulations, policies, procedures or rules addressing the acquisition, processing, retention, dissemination, and destruction of information relating to United States persons that is acquired during the course of intelligence activities.

relations” between the United States and the United Kingdom “in communications intelligence.”⁴ UKUSA Agreement, § 2. It further provides that:

The parties agree to the exchange of the products of the following operations relating to foreign communications:-

- (1) Collection of traffic.
- (2) Acquisition of communications documents and equipment.
- (3) Traffic analysis.
- (4) Cryptanalysis.
- (5) Decryption and translation.
- (6) Acquisition of information regarding communications organizations, procedures, practices and equipment.

Id. at § 4(a). The UKUSA Agreement therefore documents the United States government’s agreement with the British (as well as Canadian, Australian and New Zealand) governments to exchange intelligence.

The requested records will also “contribute significantly to the public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii). The government’s surveillance powers, capabilities, and activities, including as they pertain to foreign intelligence, are matters of great public interest and concern. Very little information on the government’s agreement to exchange intelligence with the British, Canadian, Australian, and New Zealand governments, including the legal basis and scope of that power, currently exists in the public domain. A clearer understanding of this agreement and whether it appropriately accommodates the constitutional rights of American citizens and residents whose communications and/or data are implicated in the course of that exchange, matter significantly to the public.

Second, PI does not have a commercial interest in the disclosure of the requested records. PI is a registered charity in the United Kingdom that seeks to advance the right to privacy throughout the world. Dissemination of information about government activities, particularly with respect to surveillance, is a critical and substantial component of PI’s mission and work. PI does not seek to commercially benefit from these activities. Any information obtained through this request will be disseminated to the public at no cost for the purpose of educating the public and promoting the protection of civil liberties and human rights.

⁴ Appendix J to the 1955 version of the UKUSA Agreement further provides that “Canada, Australia and New Zealand will be regarded as UKUSA-collaborating Commonwealth countries.” Principles of UKUSA Collaboration with Commonwealth Countries other than the U.K., Appendix J, UKUSA Agreement.

Request for a Waiver of Search and Review Fees

In the alternative, PI requests a waiver of search and review fees on the ground that the requested records are not sought for commercial use and because PI is a “representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). As discussed above, PI does not seek the requested records for commercial use.

PI further qualifies as a representative of the news media because it “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); *see also* Nat’l Sec. Archive v. Dep’t of Def., 880 F.2d 1381, 1387 (D.C. Cir. 1989). PI conducts research on a variety of issues related to privacy and surveillance. It then publishes its research in a variety of formats, including research reports,⁵ policy papers,⁶ and frequent blog posts.⁷ This information is freely available via PI’s website.

For the reasons above, we respectfully request that all fees related to the search, review, and duplication of the requested records be waived. If these fees will not be waived, we ask that you contact us at the email address listed below should the estimated fees resulting from this request exceed \$100.

We request that responsive electronic records be provided electronically in their native file format, if possible. See 5 U.S.C. § 552(a)(3)(B). Alternatively, we request that the records be provided electronically in text-searchable PDF, in the best image quality in the State Department’s possession, and in separate, Bates-stamped files.

We further request that you provide an estimated date on which you will finish processing this request. See 5 U.S.C. § 552(a)(7)(B).

If this FOIA request is denied in whole or in part, please provide the reasons for the denial, pursuant to 5 U.S.C. § 552(a)(6)(A)(i). In addition, please release all segregable portions of otherwise exempt material in accordance with 5 U.S.C. § 552(b). Furthermore, if any documents responsive to this request are classified, please identify those documents, including a date and document number where possible, so we may begin the process of

⁵ *See, e.g.*, Edin Omanovic, Privacy International, *The Global Surveillance Industry*, July 2016, https://privacyinternational.org/sites/default/files/global_surveillance.pdf.

⁶ *See, e.g.*, Privacy International, *Submission to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Study on Telecommunications and Internet Access Sector*, Nov. 2016, <https://www.privacyinternational.org/sites/default/files/UN%20SR%20FOE%20Study%20on%20ICT%20Sector%20submission.pdf>.

⁷ *See, e.g.*, Eva Blum-Dumontet, *Friends, Followers, Police Officers, and Enemies: Social Surveillance in Thailand*, Sept. 20, 2016, <https://www.privacyinternational.org/node/935>.

requesting a Mandatory Declassification Review under the terms of Executive Order 13,526 (2010).

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact us at the email address listed below. Pursuant to 5 U.S.C. § 552(a)(6)(A)(i), we expect a response regarding this request within the twenty working-day statutory time limit.

Sincerely,

A handwritten signature in black ink, appearing to read "Scarlet Kim". The signature is fluid and cursive, with a prominent "S" and "K".

Scarlet Kim
Legal Officer
Privacy International

Phone: +44 (0) 20 3422 4321

Email: scarlet@privacyinternational.org



United States Department of State

Washington, D.C. 20520

DEC 14 2016

Dear Requester,

RE: Records relating to the British-United States Communication Intelligence Agreement (now known as the "UKUSA Agreement").

This is in response to your request dated 12-13-2016, which was received on 12-14-2016. We have assigned Case Control Number F-2016-17168 and will begin the processing of your request based upon the information provided in your communication.

The cut-off date is the date the search is initiated unless you have provided a specific timeframe.

We have considered your request for a fee waiver. Based upon the information provided in your letter, your request for a fee waiver has been granted; therefore, your request will be processed at no charge to you.

Unusual circumstances (including the number and location of Department components involved in responding to your request, the volume of requested records, etc.) may arise that would require additional time to process your request.

We will notify you as soon as responsive material has been retrieved and reviewed.

Should you have any questions, you may call our FOIA Requester Service Center at (202) 261-8484 or send an email to FOIAstatus@state.gov. Please refer to the Case Control Number in any communication.

 Sincerely,

Requester Communications Branch
Office of Information Programs & Services

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
Website: www.foia.state.gov

Inquiries:
Phone: 1-202-261-8484
FAX: 1-202-261-8579
E-mail: FOIAstatus@state.gov

February 24, 2017

BY USPS MAIL

Office of Information Programs and Services
U.S. Department of State, SA-2
Washington, DC 20522-8100
FOIAstatus@state.gov

RE: FOIA APPEAL, Case: F-2016-17168

Dear FOIA officer,

We are writing on behalf of our client, Privacy International. On December 13, 2016, Scarlet Kim, Legal Officer at Privacy International, submitted a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking records related to the British-United States Communication Intelligence Agreement ("UKUSA Agreement"). A copy of that request is enclosed.

On December 14, 2016, a FOIA officer from the State Department sent a letter to Ms. Kim in response, notifying her that her request for fee waiver had been granted, and that her request was being processed. As you know, FOIA requires the State Department to make a determination regarding whether to comply with Ms. Kim's request within 20 days of its receipt. Because this deadline has lapsed, we are writing to appeal the State Department's constructive denial of Ms. Kim's request. We look forward to the State Department's response to this appeal within 20 days. 5 U.S.C. 552 (a)(6)(A)(ii).

Sincerely,

Andrew Udelsman
Law Student Intern
andrew.udelsman@ylsclinics.org

From: Miller, Jeanne MillerJ5@state.gov
Subject: FOIA Request F-2016-17168
Date: 8 March 2017 at 17:29
To: scarlet@privacyinternational.org
Cc: andrew.udelsman@ylsclinics.org

JM

Ms. Kim,

Good afternoon. Reference is made to your December 13, 2016, Freedom of Information Act (FOIA) request for access to records relating to the British-United States Communications Intelligence Agreement (UKUSA Agreement). We also received a February 24, 2017, appeal submitted by Andrew Udelsman on your behalf. We are currently in the process of conducting a search for responsive records but have been unable to locate any to date. Please note that the majority of the Department of State records which are 25 years or older and considered permanent are transferred to the National Archives and Records Administration (NARA) in accordance with Title 22, Code of Federal Regulations, Part 171.6. Additionally, NARA maintains other agency records and could potentially have additional information related to the UKUSA Agreement. As such, you may wish to submit a FOIA request directly to NARA. Contact information for NARA is as follows:

National Archives & Records Administration
8601 Adelphi Road, Room 311
College Park, Maryland 20740-6001

If there is something specific you are seeking regarding the UKUSA or records younger than 25 years old, please let me know. Any information you can provide will certainly help us to narrow the scope and identify records more quickly. Please feel free to contact me via email or at the number below.

Regards,
Jeanne

Jeanne Miller
Branch Chief
A/GIS/IPS/CR/EAN
U.S. Department of State
SA-2, Suite 7004
Tel: 202-261-8312

Official
UNCLASSIFIED

From: Miller, Jeanne MillerJ5@state.gov
Subject: RE: FOIA Request F-2016-17168
Date: 18 May 2017 at 17:00
To: scarlet@privacyinternational.org
Cc: andrew.udelsman@ylsclinics.org

JM

Ms. Kim:

Good morning. This is in further response to your Freedom of Information Act request submitted to the Department of State. As I have not heard back from you, I wanted to confirm that you were able to get in touch with the National Archives and Records Administration before your request is administratively closed in this office. Your request will be held open for an additional twenty days pending response from you. If we do not hear from you, we will presume you are no longer interested and the request will be closed. No fees will be assessed. As always, please feel free to contact me if you have any questions.

Regards,
Jeanne

Jeanne Miller
Branch Chief
A/GIS/IPS/CR/EAN
U.S. Department of State
SA-2, Suite 7004
Tel: 202-261-8312

Official
UNCLASSIFIED

From: Miller, Jeanne
Sent: Wednesday, March 08, 2017 12:27 PM
To: 'scarlet@privacyinternational.org'
Cc: 'andrew.udelsman@ylsclinics.org'
Subject: FOIA Request F-2016-17168

Ms. Kim,

Good afternoon. Reference is made to your December 13, 2016, Freedom of Information Act (FOIA) request for access to records relating to the British-United States Communications Intelligence Agreement (UKUSA Agreement). We also received a February 24, 2017, appeal submitted by Andrew Udelsman on your behalf. We are currently in the process of conducting a search for responsive records but have been unable to locate any to date. Please note that the majority of the Department of State records which are 25 years or older and considered permanent are transferred to the National Archives and Records Administration (NARA) in accordance with Title 22, Code of Federal Regulations, Part 171.6. Additionally, NARA maintains other agency records and could potentially have additional information related to the UKUSA Agreement. As such, you may wish to submit a FOIA request directly to NARA. Contact information for NARA is as follows:

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Tel: 202-261-8312

Official
UNCLASSIFIED

From: Hannah Bloch-Wehba hannah.bloch-wehba@ylsclinics.org
Subject: Re: FOIA Request F-2016-17168
Date: 19 May 2017 at 16:37
To: MillerJ5@state.gov
Cc: Scarlet scarlet@privacyinternational.org

HB

Ms. Miller,

I represent Privacy International in connection with the above-referenced Freedom of Information Act ("FOIA") request to the Department of State.

I am writing to follow up on our phone call of May 18, 2017 regarding your email of the same date to Scarlet Kim. In that email, you notified Ms. Kim that your office was preparing to administratively close Privacy International's request. As you are aware, FOIA requires your office to make a determination regarding whether to comply with a request within 20 days of its receipt. As of this date, the Department still has not made a determination regarding the FOIA request, nor has it informed Ms. Kim (or counsel) regarding whether it has located any responsive records, whether the Department is invoking any exemptions to withhold records in whole or in part, or when it will produce those responsive records. As a result, the Department has not fulfilled its obligations under FOIA, and it is premature and inappropriate to "administratively close" the request.

As we discussed, moreover, the FOIA request is not limited to records more than 25 years old. Rather, the request encompasses any records, no matter how recent, relating to the UKUSA agreement, responsive to the enumerated categories. In this regard, it is worth noting that the UKUSA agreement may have been amended numerous times and may therefore be referred to by a title other than the "UKUSA agreement." Moreover, FOIA also requires the Department to produce any "reasonably segregable" portions of the records requested. See 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.").

Please direct further correspondence regarding this matter to me at this email address.

Very truly yours,

Hannah

--

Hannah Bloch-Wehba
Clinical Lecturer in Law | Stanton First Amendment Fellow | Research Scholar
Media Freedom & Information Access Clinic
Yale Law School
(203) 436-5824

From: Andrew Udelsman <andrew.udelsman@ylsclinics.org>
Date: Thursday, May 18, 2017 at 12:01 PM
To: Hannah Bloch-Wehba <hannah.bloch-wehba@ylsclinics.org>
Subject: Fwd: FOIA Request F-2016-17168

Begin forwarded message:

From: Miller, Jeanne <MillerJ5@state.gov>
Subject: RE: FOIA Request F-2016-17168
Date: May 18, 2017 at 11:58:21 AM EDT
To: scarlet@privacyinternational.org
<scarlet@privacyinternational.org>
Cc: andrew.udelsman@ylsclinics.org
<andrew.udelsman@ylsclinics.org>

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Jeanne

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A/GIS/IPS/CR/EAN
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