

11 CV 8624
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN COOK

Plaintiff,

- against -

NATIONAL ARCHIVES & RECORDS
ADMINISTRATION,

Defendant.

X

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11 CV 8624

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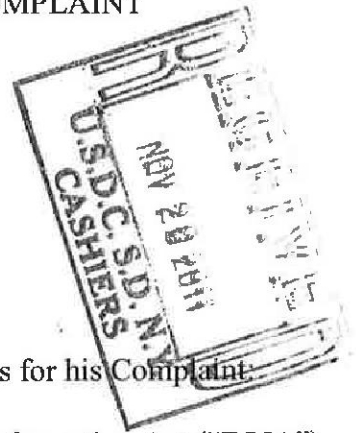
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COMPLAINT

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X



Plaintiff John Cook, by his undersigned attorney, alleges for his Complaint:

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, brought by journalist John Cook of Gawker Media, to order the production of agency records and information improperly withheld by Defendant National Archives and Records Administration ("NARA").

2. Under the Presidential Records Act ("PRA") of 1978, 44 U.S.C. § 2201 *et seq.*, for a definite period immediately after the conclusion of a presidential term, access to the administration's records is granted only to certain individuals. Specifically, records may be released to the former President or his designated representative and the former Vice President or his representative ["Designated Representatives"], and under certain circumstances to the incumbent President, courts, and members of Congress ["Other Officials"].

3. NARA has indicated that it is currently in possession of more than 10,000 pages of documentation related to special access requests by Designated Representatives and Other Officials for records of former President George W. Bush and former Vice President Dick Cheney.

4. John Cook, a staff journalist for Gawker Media, made a request under FOIA for copies of these special access requests and related correspondence. Mr. Cook does not seek the Administration's documents, which are protected from disclosure under the PRA; rather, he seeks only records of *which* Designated Representatives and Other Officials sought and were or were not granted access to *what* Administration documents.

5. Mr. Cook seeks these records in order to gain insight into the way in which the former President and Vice President have chosen to shape the public's perception of their time in office, and to provide this insight to the public through online news stories.

6. NARA has improperly denied Mr. Cook's request for records of special access requests made by Designated Representatives ["Designated Representatives Request"], citing FOIA Exemption 6, 5 U.S.C. § 552(b)(6) (relating to information the disclosure of which would constitute an unwarranted invasion of personal privacy).

7. NARA has also failed to promptly make available documents responsive to Mr. Cook's request for records of special access requests made by Other Officials ["Other Officials Request"] or to justify the legal basis for withholding them, even though it has conceded that it must release those records.

8. Through this action, Mr. Cook seeks declaratory and injunctive relief to compel the release of records that are being unlawfully withheld from the public.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

10. Venue is premised on Mr. Cook's principal place of business, the offices of Gawker Media, located at 210 Elizabeth Street, New York, NY 10012. Venue is thus proper in this district under 5 U.S.C. § 552(a)(4)(B).

11. Mr. Cook has exhausted all administrative remedies in respect to his Designated Representatives Request pursuant to 5 U.S.C. § 552(a)(4)(B) and is deemed to have exhausted all administrative remedies in respect to his Other Officials Request pursuant to 5 U.S.C. § 552(a)(6)(C).

PARTIES

12. Cook is a staff writer for Gawker.com and focuses on investigative stories. Gawker.com is published by Gawker Media, the parent company of eight separate Internet sites with a combined 32.3 million global visitors and 19.5 million U.S. visitors per month. Gawker.com itself receives 4.7 million U.S. visitors per month. Cook's principal place of business, the offices of Gawker Media, is located in this district at 210 Elizabeth Street, New York, NY 10012.

13. Defendant NARA is an independent agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1), headed by the Archivist of the United States, and has possession and control of the records that Mr. Cook seeks. Pursuant to the PRA, the Archivist of the United States has "responsibility for the

custody, control, and preservation of, and access to, the Presidential records” upon the conclusion of a President’s last term in office. 44 U.S.C. § 2203(f)(1).

FACTS

14. The National Archives and Records Administration (“NARA”) serves as the record keeper for the United States government. Under authority granted to it by the United States Congress through the Presidential Records Act of 1978 (“PRA”), 44 U.S.C. § 2201 *et seq.*, NARA is responsible for the custody, control, and preservation of, and access to, Presidential and Vice-Presidential records upon the conclusion of a President’s final term in office.

15. The PRA provides that Presidential and Vice-Presidential records are exempt from public access immediately after conclusion of a presidential term for a period of time lasting up to 5 years or 12 years depending on the category of record. After this initial period of restricted access, the records are made accessible to the public.

16. Records that can be restricted by the President or Vice President for a period of time not to exceed 12 years include 6 categories of records, such as records related to national defense, records properly classified pursuant to an Executive Order, records related to federal appointments, and confidential communications requesting or submitting advice. 44 U.S.C. §§ 2204(a), 2207.

17. Records that do not fall into one of the categories specified in § 2204(a) are exempt from public access for a period of no more than 5 years. 44 U.S.C. §§ 2204(b)(2), 2207.

18. The PRA provides for exceptions during the initial period of restricted access, enabling two categories of persons to be granted access. 44 U.S.C. §§ 2205, 2207.

19. The first category is Designated Representatives. Specifically, Presidential records are available to the former President or his designated representative, and Vice-Presidential records are available to the former Vice President or his designated representative. 44 U.S.C. §§ 2205(3), 2207.

20. The second category of individuals includes Other Officials. The PRA provides that the records may be made available under certain circumstances to an incumbent President, to a court of competent jurisdiction, and to members of Congress. 44 U.S.C. §§ 2205(2)(A)-(C), 2207.

21. On October 21, 2010, Mr. Cook submitted a FOIA request to NARA via facsimile seeking: (1) “copies of all requests for access to records received by the George W. Bush Presidential Library since February 1, 2009” and “any subsequent correspondence regarding those requests, with the exclusion of copies of records governed by the Presidential Records Act”; and (2) “copies of all requests for access to the records of former Vice President Dick Cheney received by NARA staff since February 1, 2009” and “any subsequent correspondence regarding those requests, with the exclusion of copies of records governed by the Presidential Records Act.” Mr. Cook also requested any Memoranda of Understanding between the Library and the researchers who were granted access, but he does not challenge NARA’s determination that no such records exist. (A true and correct copy of this request is annexed as Exhibit 1.)

22. By letter dated December 1, 2010, NARA partially denied Mr. Cook's request. The letter distinguished between public access requests made pursuant to the Freedom of Information Act and the "special access requests" by Designated Representatives and Other Officials. (A true and correct copy of defendant's response to Cook's request is annexed as Exhibit 2.)

23. NARA's letter stated that it treats the latter category—"special access requests from the White House, the former President and Vice President, the individuals they designate, Congress, and the courts"—as "researcher reference requests" and was therefore withholding them in full pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6) (relating to information the disclosure of which would constitute an unwarranted invasion of personal privacy). Ex. 2 at 1.

24. In contrast, NARA released partially redacted copies of the FOIA public access requests made during that period, because, according to NARA's letter, "FOIA requesters are not subject to the same right of privacy as our researchers." Ex. 2 at 2.

25. NARA's letter failed to provide an estimate of the volume of records being denied.

26. On January 3, 2011, Mr. Cook appealed NARA's denial of his request. Mr. Cook's appeal noted that there was no legal justification for treating the two classes of requesters differently, and that even under NARA's interpretation of personal privacy for research requests, NARA could not withhold an entire document because it could readily redact "information that could allow readers to identify the requesters in any special access request correspondence while releasing records concerning subject

areas, terms of access, and other data of potential interest to the public.” (A true and correct copy of this appeal is annexed as Exhibit 3.)

27. By letter dated February 23, 2011, NARA informed Mr. Cook of a delay in his appeal, “[d]ue to the volume of material . . . and the need to coordinate with two components within NARA.” NARA estimated that Mr. Cook’s request covered approximately 7,500 pages worth of material. (A true and correct copy of defendant’s February 23rd letter is annexed as Exhibit 4.)

28. By letter dated June 3, 2011, NARA responded to Mr. Cook’s January 3 appeal, partially granting and partially denying it. (A true and correct copy of defendant’s response to Mr. Cook’s appeal is annexed as Exhibit 5.)

29. NARA updated the estimate regarding the materials withheld, stating that “there are approximately 10,000 pages of documentation pertaining to special access requests.” Ex. 5 at 1-2.

30. NARA again denied release of the requests made by Designated Representatives of former President Bush and former Vice President Cheney, determining that they were “researcher reference requests . . . made on behalf of private citizens.” Ex. 5 at 3.

31. However, NARA reversed its earlier denial as to the requests by Other Officials (requests “made under 44 U.S.C. 2205(2), originating as part of a judicial process . . . or by representatives of the incumbent President . . . or by a Congressional committee or subcommittee”). NARA agreed to disclose those documents pending receipt of a check to cover copying fees. Ex. 5 at 3.

32. Mr. Cook mailed a check to NARA in the amount of \$180 on June 28, 2011.

33. By email dated September 7, 2011, NARA confirmed earlier receipt of Mr. Cook's check and noted that "NARA FOIA staff are presently continuing to process . . . [Mr. Cook's] FOIA request" and "are aiming to release another batch of materials as a further, interim response by the end of [September], provided that all clearances are obtained." (A true and correct copy of defendant's email to Mr. Cook is annexed as Exhibit 6.)

34. Mr. Cook has not received any documents to date.

COUNT 1

Unlawful Withholding of Records of Designated Representatives' Requests for Access Under FOIA Exemption 6

35. Mr. Cook repeats, alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

36. NARA is an agency subject to FOIA, 5 U.S.C. § 552(f), and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

37. Exemption 6 of FOIA applies only to personal information contained in medical and personnel records and similar files, and does not allow the withholding of non-personal information merely because it includes the names of private individuals.

38. NARA has no lawful basis under Exemption 6 or any other exemption for withholding records of requests by Designated Representatives.

39. NARA's failure to disclose this information violates FOIA.

40. Mr. Cook is entitled to an order compelling NARA to disclose this information.

COUNT 2

Failure To Promptly Make Available Records of Other Officials' Requests for Access in Violation of 5 U.S.C. § 552(a)(6)(A)

41. Mr. Cook repeats, realleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

42. NARA is an agency subject to FOIA, 5 U.S.C. § 552(f), and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

43. Under 5 U.S.C. § 552(a)(6)(A), NARA was required to provide documents or issue a denial within 20 business days of receiving Mr. Cook's request for records of special access requests made by Other Officials.

44. Under 5 U.S.C. § 552(a)(6)(C), a person making a request for materials under FOIA "shall be deemed to have exhausted his administrative remedies with respect to such a request if the agency fails to comply with the applicable time limit provisions" of FOIA.

45. Accordingly, Mr. Cook is deemed to have exhausted his administrative remedies as to the Other Officials Request.

46. NARA has asserted no lawful basis under FOIA for withholding documents requested by the Other Officials Request.

47. NARA's failure to provide this information violates 5 U.S.C. § 552(a)(6)(A).

48. Mr. Cook is entitled to an order compelling NARA to produce this information.

REQUEST FOR RELIEF

WHEREFORE, Mr. Cook respectfully requests that this Court:

- a. Declare that the records documenting requests by the Designated Representatives and the Other Officials, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;
- b. Order NARA to provide those records to Mr. Cook within 20 business days of the Court's order;
- c. Award the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
- d. Grant Cook such other and further relief as this Court deems just and proper.

Dated: New York, New York
November 28, 2011

Respectfully submitted,

PROSKAUER ROSE, LLP

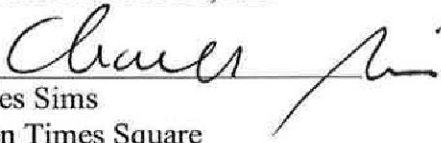
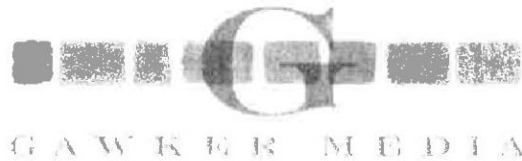

Charles Sims
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000
Counsel for Plaintiff

EXHIBIT 1



October 21, 2010

VIA FACSIMILE

FAX TO: FOIA Officer
National Archives and Records Administration
8601 Adelphi Road, Room 3110
College Park, MD 20740
Telephone: (301) 837-FOIA (3642)
FAX: (301) 837-0293
E-mail: foia@nara.gov

FAX FROM: John Cook
Gawker Media
528 16th St.
Brooklyn NY 11215
jjcook@earthlink.net
773.919.3832 (cell)
773.439.5391 (fax)

Dear Sir or Madam:

This is a request for records under the provisions of the Freedom of Information Act.

I seek copies of all requests for access to records received by the George W. Bush Presidential Library since February 1, 2009. I also seek any subsequent correspondence regarding those requests, with the exclusion of copies of records governed by the Presidential Records Act.

I also seek copies of all requests for access to the records of former Vice President Dick Cheney received by NARA staff since February 1, 2009. I also seek any subsequent correspondence regarding those requests, with the exclusion of copies of records governed by the Presidential Records Act.

I also seek any agreements or memoranda of understanding between the George W. Bush Presidential Library and any researchers, scholars, former government officials, or any other entities governing current or future access to records maintained by the Library.

In order to help determine my status to assess fees, you should know that I am a journalist working as a reporter for Gawker Media, an online news organization that serves roughly



G A W K E R M E D I A

40 million visitors each month. This request is made as apart of a newsgathering effort and not for commercial use, and I am therefore eligible for a waiver of fees associated with the time spent to review responsive documents. I am also willing to pay fees for this request up to \$100. If you estimate that the fees will exceed this limit, please notify me first.

To the extent possible, please furnish all responsive records in electronic format.

Please direct all correspondence regarding this request to me at jjcook@earthlink.net or my physical address at 528 16th St., Brooklyn NY 11215 or call me at (773) 919-3832 with any questions.

Please DO NOT address any correspondence to Gawker Media's corporate office. I will not receive it in a timely fashion. Please address all correspondence to my home office address in Brooklyn, N.Y.

Thank you for your attention to this request.

Sincerely,

A handwritten signature in dark ink, consisting of a large, stylized loop followed by a long, horizontal stroke that tapers off to the right.

John Cook
Gawker Media
773.919.3832 (cell)
jjcook@earthlink.net
528 16th St.
Brooklyn NY 11215

EXHIBIT 2



December 1, 2010

John Cook
Gawker Media
528 16th St.
Brooklyn, NY 11215

Re: Freedom of Information Act Request NGC11-013

Dear Mr. Cook:

This is in response to your Freedom of Information Act (FOIA) request of October 21, 2010. Your request was received in this office via fax on October 21, 2010, and assigned tracking number NGC11-013. Your request sought access to the following records:

1. All requests for access to records received by the George W. Bush Presidential Library since February 1, 2009, including subsequent correspondence regarding these requests;
2. All requests for access to the records of former Vice President Dick Cheney received by NARA staff since February 1, 2009, including subsequent correspondence regarding these requests.

The George W. Bush Presidential Library and the Presidential Libraries Materials Staff receive special access requests from the White House, the former President and Vice President, individuals they designate, Congress, and the Courts. The National Archives treats these requests as researcher reference requests. These files are organized as a system of records governed by the Privacy Act, in this case "NARA 2: Reference Request Files." These records include but are not limited to the following categories: correspondence between NARA staff and researchers containing information about the research topic(s), field(s) of interest, identification of requested records, and other information furnished by the researcher. A copy of the system of notice is included with this response.

The National Archives fully protects the privacy of our researchers. Therefore, these records are withheld in full pursuant to 5 U.S.C. 552(b)(6), the disclosure of which would constitute an unwarranted invasion of personal privacy.

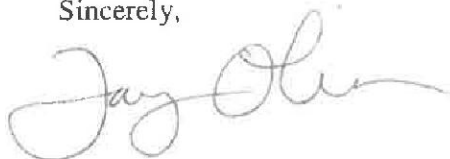
NARA has also received FOIA requests for G.W. Bush and Cheney Presidential and Vice Presidential records, even though these records do not become eligible for FOIA requests until January 20, 2014. As you are aware, FOIA requesters are not subject to the same right to privacy as our researchers. Enclosed are copies of these requests for President Bush and Vice President Cheney records. Please note, I have included only one response letter from the Bush Library since they are currently using a standard response until the records become eligible for the FOIA in 2014. Redactions have been performed for Personally Identifiable Information (PII) contained in some of these letters pursuant to 5 U.S.C. 552(b)(6), the disclosure of which would constitute an unwarranted invasion of personal privacy. One page also has redactions pursuant to 5 U.S.C. 552(b)(1), protection of classified information that may harm the national security of the United States.

3. Any agreements or memoranda of understanding between the George W. Bush Presidential Library and any researchers, scholars, former government officials, or any other entities governing current or future access to records maintained by the Library.

We conducted a thorough search of our records. No records pertaining to this part of your request were located.

You have the right to file an administrative appeal concerning any of the denials made in the processing of your request. Address your appeal to the Deputy Archivist (ND), National Archives and Records Administration, College Park, Maryland 20740. Your appeal should be received within 35 calendar days of the date of this letter and it should explain why you think the withheld material should be released. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." All correspondence should reference the tracking number NGC11-013.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jay Olin".

JAY OLIN
NARA Deputy FOIA Officer
Office of General Counsel

EXHIBIT 3



January 3, 2011

Ms. Adrienne C. Thomas
Deputy Archivist of the United States
National Archives and Records Administration
College Park MD 20740

Dear Ms. Thomas:

This is an appeal under the Freedom of Information Act.

On October 21, 2010, I filed a FOIA request with the National Archives and Records Administration, which administers the George W. Bush Presidential Library, seeking "copies of all requests for access to records received by the George W. Bush Presidential Library since February 1, 2009," as well as any subsequent correspondence. I also sought similar requests for access to the records of former Vice President Dick Cheney.

NARA received my request and assigned it tracking number NGC11-013. On December 1, 2010, NARA partially denied my request: While it released to me partially redacted copies of requests made under the Freedom of Information Act, NARA withheld in full all "special access requests from the White House, the former president and vice president, individuals they designate, Congress, and the courts." NARA claimed that disclosure of records associated with special access requests would constitute an "unwarranted invasion of personal privacy," and are exempt under 5 U.S.C. 552(b)(6).

This determination was in error. I ask that you instruct NARA to release all responsive correspondence concerning special access requests to me immediately.

The records I seek include, according to NARA, requests from "the White House, the former President and Vice President, individuals they designate, Congress, and the Courts." Under no conceivable circumstances could correspondence and other records concerning such requests be considered personal or private in nature. These are obviously professional inquiries being carried out in the due course of business—and in the case of requests from the White House, Congress, and the Courts, government business. NARA is attempting to contort the FOIA's privacy exemptions to cover professional researchers corresponding with a government agency regarding access to presidential records, a perverse misreading of the FOIA that is wholly unsupported by the statute or case law.

The incoherence of NARA's position is highlighted by the fact that it *did* release to me all requests made under the FOIA for access to presidential records, based on the conclusory claim that "FOIA requesters are not subject to the same right to privacy as our researchers." There is quite simply no reason in law why this should be so. NARA has arbitrarily and capriciously designated a class of people—those who requested presidential records via a



GLA W K E R M E D I A

vehicle other than the FOIA—and granted them an extraordinarily and unreasonably expansive privacy interest while treating run-of-the-mill FOIA requesters by a different standard. In reality, there is no justification in law for treating either class of requester differently, and neither class of requester can be reasonably said to fall under the (b)(6) exemption.

Furthermore, even if one were to adopt NARA's overly broad and ludicrous interpretation of "personal privacy" as it relates to research requests for presidential records, "personal privacy" can only be invaded if the identity of the person whose privacy is implicated becomes public. It would be a simple matter for NARA to redact information that could allow readers to identify the requesters in any special access request correspondence while releasing records concerning subject areas, terms of access, and other data of potential interest to the public. Such redactions are in fact required by the FOIA, which states at 5 U.S.C. § 552(b) that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt."

Finally the FOIA requires that "in denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request." NARA failed to provide me with an estimate of the volume of records being denied to me in this instance, and I am entitled to such an estimate.

I urge you to instruct NARA to comply in full with my request immediately.

Thank you for your attention to this matter. Please direct any correspondence regarding this appeal to my e-mail address, jjcook@earthlink.net, or home office at:

528 16th St.
Brooklyn NY 11215

You may also reach me at my cell phone, 773 919 3832.

Regards,

John Cook

EXHIBIT 4

NATIONAL ARCHIVES and
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001

www.archives.gov


NATIONAL
ARCHIVES

February 23, 2011

John Cook
528 16th St.
Brooklyn, NY 11215

Re: Freedom of Information Act Appeal Request NGC11-014A

Dear Mr. Cook:

Your request for the appeal of denied portions of your FOIA request (NGC11-013) is still being processed. Due to the volume of material (approximately 7,500 pages) and the need to coordinate with two components within NARA (the George W. Bush Library and the Presidential Library Materials Staff) I am informing you of a delay in your case.

If you have any questions regarding your case I may be reached by phone at (301) 837-0583 or by e-mail at joseph.scanlon@nara.gov.

Sincerely,



JOSEPH A. SCANLON
NARA FOIA Officer
Office of General Counsel

EXHIBIT 5



NATIONAL
ARCHIVES

JUN 3 2011

John Cook
528 16th St.
Brooklyn, NY 11215

Re: Freedom of Information Act Appeal NGC11-014A

Dear Mr. Cook:

This is in response to your Freedom of Information Act (FOIA) appeal in correspondence dated January 3, 2011. Your appeal was received in this office on January 4, 2011, and assigned tracking number NGC11-014A. My apologies for the delay in responding.

In relevant part, your initial FOIA request to the National Archives and Records Administration (NARA), dated October 21, 2010, requested "copies of all requests for access to records received by the George W. Bush Presidential Library since February 1, 2009," as well as subsequent correspondence. You also requested similar requests for access to the records of Vice President Cheney since February 1, 2009, as well as subsequent correspondence.

NARA responded to your FOIA request by letter dated December 1, 2010, granting your request in part and denying it in part. We released to you correspondence pertaining to requests filed by others under the FOIA for George W. Bush presidential records and Richard Cheney Vice Presidential records, as the law is clear that there is no privacy interest applicable to FOIA requests. However, we withheld documentation consisting of "special access requests," made pursuant to Section 2205 of the Presidential Records Act, 44 U.S.C. 2205, citing Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6), which pertains to disclosures that would constitute an unwarranted invasion of personal privacy. We justified doing so by citing to NARA's policy regarding restricting access to Privacy Act-covered systems of records, including researcher reference requests, citing to a NARA systems of record notice under the Privacy Act, "NARA 2: Reference Request Files."

In response to your request concerning the volume of documents being withheld, we subsequently informed you by correspondence dated February 23, 2011 that we estimated there to be 7,500 pages of withheld materials. We have now been able to further refine this estimate and have determined that there are approximately 10,000 pages of documentation

NATIONAL ARCHIVES *and*
RECORDS ADMINISTRATION

8601 ADELPHI ROAD
COLLEGE PARK, MD 20740-6001
www.archives.gov

pertaining to special access requests for George W. Bush Presidential and Cheney Vice Presidential records within the scope of your original FOIA request.

In your appeal letter, you note that the records you seek include requests from “the White House, the former President and Vice President, individuals they designate, Congress, and the Courts.” and that “[u]nder no conceivable circumstances could correspondence and other records concerning such requests be considered personal or private in nature.” You go on to say that “[t]hese are obviously professional inquiries being carried out in the due course of business.” You make an additional argument in your letter to the effect that even if these “professional” requestors were deemed to have privacy rights in their requests, NARA could as a “simple matter” redact the names of the requestors and provide the content of the requests themselves. In support you cite the FOIA statute at 5 U.S.C. 552(b), where it states that “any reasonably segregable portion of a record” shall be provided to requestors.

In response to your appeal, I asked that staff revisit the issue of whether all special access requests falling within the scope of your FOIA request should necessarily have been deemed to be treated as researcher reference requests falling within the scope of NARA 2: Reference Request Files. My determination is informed by the following factual and legal considerations.

With respect to special access requests made by representatives of a former president or vice president, I affirm NARA’s prior determination that these individuals are acting on behalf of private citizens, and thus their own identities and the nature of their requests for access to NARA archival holdings are shielded under the Privacy Act in the same manner as all researchers in NARA facilities. As a variety of case law recognizes, it is a truism that presidents and vice presidents, after they leave office, return to private life. *See, e.g., American Historical Association v. Peterson*, 876 F. Supp. 1300, 1314, 1315 (D.D.C. 1995) (“now that former President [George H.W.] Bush is a private citizen”); *Sun Oil Co. v. United States*, 514 F.2d 1020, 1021 (Ct. Cl. 1975) (deeming a former president to be a “private citizen”). I recognize that the former President and former Vice President enjoy a special statutory privilege to obtain records from their Administration, pursuant to 44 U.S.C. 2205(3), which states that “the Presidential records of a former President shall be available to such former President or his designated representative”; *see also* 44 U.S.C. 2207 (Vice-Presidential records shall be subject to the provisions of this chapter in the same manner as Presidential Records). However, I do not believe these provisions standing alone are sufficient to alter the “private citizen” status of a former president and vice president.

I understand from our staff that a very substantial majority of the documentation regarding special access requests appears to have originated from designated representatives of former President Bush and former President Cheney. With respect to this material, in response to your suggestion that the content of the requests could be disclosed while withholding the names of the requesting parties, I believe it would nevertheless constitute an invasion of

privacy were I to direct staff to release the content of what the former President or Vice President were interested in having researched among their papers.

On the other hand, I believe you are correct to point out that special access requests made under 44 U.S.C. 2205(2), originating as part of a judicial process (subpart (2)(A)), or by representatives of the incumbent President (subpart (2)(B)), or by a Congressional committee or subcommittee (subpart (2)(C)), would constitute official business, and thus would not be properly deemed to fall within the scope of "researcher reference" requests from private individuals. I am further informed that out of approximately 10,000 pages total, some 750 to 1000 pages of documentation constitute requests from other sources, including from the judiciary system, the incumbent President, or Congress. Subject to my remarks on fees for copying below, I believe you are entitled to have NARA staff further process this remaining documentation. In doing so, I will be directing staff to exempt from release by way of redaction any materials that are deemed to fall within any applicable FOIA exemptions, including but not limited to Exemptions 1, 5, 6, and 7. *See* 5 U.S.C. 552(b).

In your initial FOIA correspondence, you indicated a willingness to pay fees up to \$100. NARA's fee policy for representatives of the news media is as set out at 36 C.F.R. 1250.52(c), which states that fees for copying will be charged, except that we will not charge for copying of the first 100 pages of a request. Our best estimate at the present time is that you will owe \$180 in copying charges should you wish us to proceed with processing the remaining portion of your FOIA appeal that has been granted. If you wish us to proceed with processing, please send a check or money order, payable to "NARA," to Jay Olin, Office of General Counsel, Suite 3110, 8601 Adelphi Road, College Park, MD, 20740. When you provide a check as payment to NARA, please be advised that you authorize this agency to use the information from your check to make a one-time electronic funds transfer from your account or to process the payment as a check transaction. When NARA uses information from your check to make an electronic funds transfer, funds may be withdrawn from your account as early as the day we receive your payment, and you will not receive your check back from your financial institution.

In sum, because it is my determination that a substantial majority of the documentation within the scope of your request constitute in essence researcher reference requests that have been made on behalf of private citizens, I will affirm NARA's prior determination that your request be denied under FOIA Exemption 6. For the remaining special access requests as described above, your appeal is granted and NARA staff will proceed to further process your request upon receipt of a check covering the copying fees involved.

You may choose to deem this an interim response and thus need not consider that your administrative remedies have been completely exhausted. However, to the extent that your FOIA appeal has been denied in part, you have the right to seek judicial review in the United States District Court for the judicial district in which you reside or do business, in the District

of Columbia, or in the Eastern District of Texas (where records located at the George W. Bush Presidential Library reside).

Sincerely,

A handwritten signature in dark ink, appearing to read 'T. E. Mills', written over a light blue horizontal line.

THOMAS E. MILLS
Acting Deputy Archivist

EXHIBIT 6

From: Jason Baron [mailto:Jason.Baron@nara.gov]

Sent: Wednesday, September 07, 2011 3:51 PM

To: jeremy.kutner@yale.edu

Subject: Re: John Cook FOIA Request

Confirmed.

>>> <jeremy.kutner@yale.edu> 9/7/2011 3:50 PM >>>

Hi Jason,

Just a quick question. Could you confirm for me that you received Mr. Cook's check for the document processing and copying along with the date of receipt? Thanks so much.

Best,
Jeremy

Quoting Jason Baron <Jason.Baron@nara.gov>:

> REFERENCE NUMBERS

> FOIA request: NGC11-013

> Appeal: NGC11-014A

>

> Jeremy,

>

> Thanks for the email. Per the voice mail I left you on September 6,

> 2011, I wish to reconfirm that NARA FOIA staff are presently continuing

> to process the above-referenced FOIA request from Mr. Cook of Gawker

> Media. We are aiming to release another batch of materials as a

> further, interim response by the end of this month (September), provided

> that all clearances are obtained.

>

> Please feel free to contact me again, as I am more than willing to

> provide regular updates on our progress in processing this FOIA

> request.

>

>

> Jason R. Baron

> Director of Litigation

> Office of the General Counsel

> National Archives and Records Administration

> 8601 Adelphi Road, Suite 3110

> College Park, MD 20740

> tel. 301-837-1499 (direct)

> 301-837-1750 (main)

> 301-837-0293 (fax)

> email: jason.baron@nara.gov>>> "Jeremy Kutner" <jeremy.kutner@yale.edu>

> 9/7/2011 7:35 AM >>>

>

> Hi Jason,

>

> I'm writing to follow up on your phone call. Please let me know that
> you received this email. Thanks so much, and I hope all is well.

>

> Best,
> Jeremy

>

From: Jason Baron [mailto:Jason.Baron@nara.gov]
Sent: Wednesday, September 07, 2011 10:31 AM
To: jeremy.kutner@yale.edu
Subject: Re: John Cook FOIA Request

REFERENCE NUMBERS
FOIA request: NGC11-013
Appeal: NGC11-014A

Jeremy,

Thanks for the email. Per the voice mail I left you on September 6, 2011, I wish to reconfirm that NARA FOIA staff are presently continuing to process the above-referenced FOIA request from Mr. Cook of Gawker Media. We are aiming to release another batch of materials as a further, interim response by the end of this month (September), provided that all clearances are obtained.

Please feel free to contact me again, as I am more than willing to provide regular updates on our progress in processing this FOIA request.

Jason R. Baron
Director of Litigation
Office of the General Counsel
National Archives and Records Administration
8601 Adelphi Road, Suite 3110
College Park, MD 20740
tel. 301-837-1499 (direct)
301-837-1750 (main)
301-837-0293 (fax)
email: jason.baron@nara.gov>>> "Jeremy Kutner" <jeremy.kutner@yale.edu> 9/7/2011 7:35 AM >>>
Hi Jason,

I'm writing to follow up on your phone call. Please let me know that you received this email. Thanks so much, and I hope all is well.

Best,
Jeremy