



Smithsonian Institution

Office of General Counsel

Confidential Attorney-Client Communication

Date March 27, 2007

To Sheila P. Burke, Deputy Secretary and Chief Operating Officer

From John E. Huerta, General Counsel *JEH*

Subject **Request for Decision and Proposed Response to Pending FOIA Requests**

As you know, there are a number of pending requests under the Freedom of Information Act (FOIA) from a variety of requesters seeking two general types of information: (i) documents related to certain business contracts (Smithsonian on Demand, Harper Collins, and Corbis); and (ii) documents related to the compensation and reimbursement for expenses of Secretary Small and Gary M. Beer (GMB). Most of these requests have been pending for at least nine months. This Memorandum makes recommendations for responding to the pending requests and seeks your final decision.

I have explained in prior memoranda that, while the Smithsonian Institution is not subject to FOIA because it is not an executive branch agency, it is nevertheless an entity created by the federal government. Accordingly, the Institution has, as a matter of policy, long responded to FOIA requests and provided information to the public in a manner consistent with the spirit of FOIA and its underlying principles. Thus, when acknowledging receipt of the Washington Post's FOIA request for the Showtime contract, this office informed the Post (as it does all requesters) that:

The Smithsonian is not subject to the Freedom of Information Act. *See Dong v. Smithsonian Institution*, 125 F.3d 877 (D.C. Cir. 1998), *cert. denied*, 524 U.S. 922 (1998). The Smithsonian Institution provides information to the public in keeping with the mandate to "increase and diffuse knowledge." *See* 20 U.S.C. §§ 41 *et seq.* Your request will be handled in that context. The Smithsonian Institution adheres to the principles of the FOIA and relevant case law when answering requests.

FOIA applies by its terms to executive branch agencies. Because of the Smithsonian's unique status (a trust instrumentality receiving both appropriated and private funds), mission (dissemination of knowledge), and activities (including, for example, for-profit business activities), it sometimes can be difficult to determine whether disclosure (or non-disclosure) of a particular document is consistent (or not) with "the principles" of FOIA.

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This office previously circulated a draft directive formalizing the Institution's FOIA policy and addressing some of the unique issues the Institution faces in responding to public requests for information. We believe the Smithsonian's FOIA policy should be formalized, whether in the manner recommended in the draft directive or in some other appropriate fashion. However these issues are resolved, the pending requests should be treated in a consistent manner and pursuant to applicable Smithsonian FOIA policy. Any principles applied to particular documents to justify withholding or disclosing them should be applied consistently to similar documents.

Some of the requests (including all of the Washington Post requests) seek broad categories of documents, such as the Post request for "all documents related to the monetary and non-monetary compensation and reimbursement of expenses for Secretary Lawrence Small and members of his family since Mr. Small joined the Smithsonian." FOIA requires agencies to search for and disclose all extant responsive documents not exempt from disclosure under one of FOIA's statutory exemptions; it does not authorize agencies to provide only some responsive documents or a summary of information extracted from responsive documents. Because the Institution's policy is to adhere to the principles of FOIA, this office previously has advised and recommended that, in accordance with FOIA's principles, the Institution search for and disclose all responsive documents not otherwise exempt (with the exception of business contracts, which we discuss below). I continue to recommend this course of action.

On a practical level, recent events demonstrate that disclosure of the requested information is all but inevitable. The Washington Post already has obtained some of the key documents covered by its request — the Secretary's employment contract, the Cotton & Company report on the Secretary's expenses, the Acting Inspector General's January 16, 2007 letter to the Audit and Review Committee regarding the Cotton & Company report, and the Audit and Review Committee's review of the Secretary's expenses — and posted those documents on its website. The Post also has obtained Senator Grassley's February 21, 2007 letter to Chief Justice Roberts seeking broad-ranging information from the Board of Regents (also posted on its website). And Senator Grassley is continuing to request Smithsonian documents, including many documents covered by the Post's FOIA request. If the past is any guide, these documents, too, will be made public. It would be unfortunate, indeed, if one element of "the story" becomes the Institution's failure to respond to the Post's FOIA requests, particularly when the documents are likely to be made public anyway.

It is important to note that the potential costs to the Institution transcend any negative publicity. Senator Grassley has stated that he wants to "improve public accountability" at the Smithsonian, and has sent letters to Vice President Cheney, Senate Majority leader Reid, and House Majority leader Pelosi seeking their support. If the Institution's FOIA response draws criticism, Congress could reconsider the Smithsonian's exemption from FOIA and related statutes such as the Federal Advisory Committee Act, the Privacy Act, or even the Administrative Procedure Act. Any determination by Congress to cover the Smithsonian under these statutes would impact greatly the Institution's culture and the way the Smithsonian does business.

I considered other options in preparing this recommendation. For example, I considered whether the Institution, rather than providing all responsive documents, could simply provide summary documents and information. But it seems clear, at this point, that such an approach would be unlikely to satisfy the Post, and the Institution ultimately would be required to conduct a search and release responsive documents not exempt from disclosure consistent with FOIA's principles.

I turn now to the requests and the recommended OGC responses. For two requests raising unique issues — the requests for certain business and employment contracts — I analyze various options. For the remaining requests, I recommend that the Institution search for and disclose responsive documents not exempt from disclosure under FOIA.

I. REQUESTS CONCERNING COMPENSATION AND EXPENSES¹

Request No. 1: Documents regarding "salary" for Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)²

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA.

Request No. 2: Documents regarding "honoraria for making speeches and serving on boards" for Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not

¹As noted above, the Post request seeks "all documents related to the monetary and non-monetary compensation and reimbursement of expenses for Secretary Lawrence Small and members of his family since Mr. Small joined the Smithsonian." The Post then states that its request includes, but is not limited to, sixteen specific categories of information. I believe the Institution could focus on these sixteen categories of information in responding to the Post request as long as it so informs the Post. It is possible the Post will be dissatisfied and request that we conduct a broader search.

²The Washington Post submitted separate requests for information relating to Secretary Small and Gary Beer. The letters seek the same categories of information with respect to each person.

exempt from disclosure under FOIA. Our understanding is that neither the Secretary nor GMB has received honoraria as compensation for making speeches; if correct, provide that information. Provide to OGC any documents relating to any honoraria the Secretary or GMB received for serving on outside boards, so we can determine whether the documents are Institution records under FOIA.

Request No. 3: Documents regarding "contracts, agreements, memos of understanding, side agreements, correspondence, e-mails," etc., relating to employment of Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Option 1: Disclose the complete contracts and amendments after redacting personally-identifying information in accordance with FOIA and the Privacy Act. For federal civil servants, the terms and conditions of their employment are publicly available and enumerated in statutes and regulations. For the Secretary and GMB, the terms and conditions of their employment are contained only in their employment contracts. Therefore, equivalent information for Executive Level trust fund employees is not available except in the employment agreements. On the theory that the public has a right to know the compensation arrangement of senior public and non-profit officials, disclosure of the contracts would be warranted. The Secretary's employment contract already is posted on the Washington Post website.

Option 2: Extract relevant information from the employment contracts and disclose the categories of information required for federal employees under OPM regulations. Six categories are available from an employee's Official Personnel Folder: (i) name; (ii) present and past position titles and occupation series; (iii) present and past grades; (iv) present and past annual salary rates (including awards, bonuses, etc.); (v) present and past duty stations; and (vi) position descriptions, identification of job elements, and performance standards. See 5 C.F.R. § 293.311. Although neither

the Secretary nor GMB is a federal employee, the Institution could determine to release similar limited information from their employment contracts on the theory that the Smithsonian should follow federal guidelines in releasing trust personnel data. The Smithsonian typically has treated trust and federal employees the same when answering FOIA and Privacy Act requests (although, as explained above, for federal civil servants, the terms and conditions of employment already are publicly available). Because neither the Secretary nor GMB is on the federal pay scale, the Institution should disclose equivalent information relating to all monetary and non-monetary compensation.

Recommendation: Disclose the contracts and amendments (Option 1). The Post already has obtained the Secretary's employment agreement and published the agreement on its website. If the Secretary and GMB will not agree to disclose the contracts, then we should extract and disclose as much information as possible from the contracts (Option 1).

Request No. 4: Documents regarding "loans, cash advances or credit extended to" Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. If no loans, cash advances, or credit have been extended, provided that information.

Request No. 5: Documents regarding "expense account filings and reimbursements, including expenses for entertainment, travel, leasing of aircraft, cars or boats" for Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: For Secretary Small's expenses, search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. For GMB's expenses, refer request to OIG in light of pending OIG review of GMB expenses and so inform the requesters.

Request No. 6: Documents regarding "purchase of furniture" for the Secretary's and GMB's "office, conference rooms or executive suite" since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA.

Request No. 7: Documents regarding "health benefit costs, expenses and consideration" for the Secretary and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. To the extent this request seeks information related to medical services actually provided, the information is protected under the Privacy Act and FOIA and should not be disclosed.

Request No. 8: Documents regarding "housing relocation expenses" for the Secretary and Mr. Beer since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not

exempt from disclosure under FOIA. If no housing relocation expenses were paid, provide that information.

Request No. 9: Documents regarding "housing allowances, including the house allowance agreements, expenses or salary for work on" the Secretary's and GMB's "house or property" since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. Our understanding is that GMB has no housing allowance; if correct, provide that information.

Request No. 10: Documents regarding "automobile allowance, including all documents relating to the use of automobiles owned by the Smithsonian Institution and used by" Secretary Small and GMB since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. Our understanding is that neither the Secretary nor GMB has an automobile allowance; if correct, provide that information. Specific schedules of where the Secretary is driven and when are protected from disclosure under FOIA and the Privacy Act.

Request No. 11: Documents regarding "termination benefits, including all agreements regarding payments made should" the Secretary or GMB "depart the Institution"

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. Our understanding is that the Secretary has no termination benefits; if correct, provide that information.

Request No. 12: Documents regarding "any legal fees paid for by the Institution for " the Secretary or GMB "under the indemnification agreement with the Institution" since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. If the Smithsonian has paid no such legal fees, provide that information.

Request No. 13: Documents regarding "ethics, conflict-of-interest and financial-disclosure reports filed by" the Secretary or Mr. Beer since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Do not provide. Conflict-of-interest forms are protected from disclosure under the Privacy Act, which the Smithsonian follows as a matter of policy. Financial disclosure reports for the Secretary and GMB are confidential under the Ethics in Government Act and exempt from disclosure under FOIA.

Request No. 14: Copies of the Secretary's and GMB's "completed SI-1085 forms, or the equivalent" since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Do not provide. See Request No. 13, above.

Request No. 15: Documents regarding “any bonuses, performance incentives or other compensation (monetary or non-monetary) awarded or that could be awarded to” the Secretary or GMB, “including actual bonuses paid and agreements detailing [their] bonus agreements and incentive compensation” since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Search for responsive documents and disclose responsive documents or portions thereof not exempt from disclosure under FOIA. Our understanding is that the Secretary does not receive bonuses or performance incentives; if correct, provide that information.

Request No. 16: Documents regarding “audits, reports or investigations regarding” the Secretary’s or GMB’s “compensation or expenses” since joining SI

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Recommendation: Refer the request to OIG per our standard practice and so inform the requesters.

Request No. 17: “A copy of the Accountant’s Report which was prepared under the supervision of the Office of Inspector General in regards to Executive Compensation of the Secretary.”

Requester: Carl Malamud, Center for American Progress (February 1, 2007)

Recommendation: Refer the request to OIG per our standard practice and so inform the requester.

II. REQUESTS CONCERNING BUSINESS CONTRACTS

Request No. 1: Copies of "contracts, agreements, memos of understanding, side agreements, correspondence, e-mails and any and all documents relating to the agreement between the Smithsonian Institution and Showtime Networks"

Requesters: Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006) (quoted language is from here)
Wenonah Elms, LECG (consulting firm)
Carl Malamud, Center for American Progress
Gregory Klass, Georgetown Law Center
Thomas Susman, Ropes & Gray
Fred von Lohmann, Electronic Frontier Foundation
Julie Corley

Confidentiality Clause: Applies to "financial terms and provisions of this Agreement." The contract does not provide for disclosing information under FOIA.

Option 1: Disclose the redacted contracts already provided to Congress if Showtime will agree.³ If Showtime is unwilling to agree to publicly release the versions of the contracts provided to Congress (which were not heavily redacted), we should seek to obtain Showtime's agreement to disclose versions of the contracts that are redacted as little as possible, but in accordance with the confidentiality provision. Releasing any version of the contracts without Showtime's consent would be a breach of the confidentiality provision and is not recommended.

Redacting the contracts pursuant to the confidentiality provisions will withhold more information than is permitted under FOIA's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Under that exemption, a governmental entity, when disclosing a contract under FOIA, may redact

³The Showtime agreements actually comprise four separate contracts. While the Smithsonian is a party to three of those contracts, the fourth agreement is between Showtime and the joint venture (in which Showtime has a 90% interest). It is arguable that this management agreement is not even a Smithsonian record. Our recommendation is with respect to the other three agreements to which the Smithsonian is a party.

information submitted to it by a third party the disclosure of which would cause the third party substantial competitive harm (a standard roughly consistent with the Showtime contract's confidentiality clause). FOIA does not, however, permit a governmental entity to withhold its own confidential commercial information. Nevertheless, the Institution could, as a policy matter, argue to redact its own commercial and financial information when it is engaged in for-profit, revenue-generating business activities. Therefore, it would be appropriate, even applying the principles of FOIA, to carve out an exception for the disclosure of the Smithsonian's confidential commercial and financial information.

Option 2:

Do not disclose the contracts. This course would conflict with FOIA and current Smithsonian FOIA policy. FOIA contains no exemption for government contracts, although it does, as explained below, exempt from disclosure certain commercial and financial information submitted to the government by third parties. The only justification for refusing to disclose the Showtime contract would be to distinguish, for purposes of FOIA, between federal and trust expenditures, and argue that information about trust expenditures and activities is outside the scope of FOIA. The Institution has not drawn such a distinction in the past. Drawing this distinction in this context of FOIA would create a new precedent that could have implications beyond the instant requests (e.g., congressional reconsideration of the Institution's exemption from FOIA, the Privacy Act, the Federal Advisory Committee Act, and the Administrative Procedure Act).

Recommendation:

Provide the contracts redacted in consultation with Showtime (Option 1). We should seek to provide the FOIA requesters the same redacted versions provided to Congress. We do not recommend Option 2.

Request No. 2:

Copies of "contracts, agreements, memos of understanding, side agreements, correspondence, e-mails and any and all documents relating to the agreement between the Smithsonian Institution and HarperCollins"

Requesters:

Jacqueline Trescott & James Grimaldi, Washington Post (April 28, 2006)

Confidentiality