

APPENDIX I

PROBLEMS REGARDING THE STATE DEPARTMENT'S IMPLEMENTATION OF FOIA LAW

GAP has numerous concerns about the way in which the US Department of State handled the FOIA request that we submitted on May 21, 2007 (Case Number 200703339), including:

1) Lengthy processing delays in violation of the timelines established by law: GAP initially filed a FOIA request with the State Department on May 21, 2007. State, which had twenty working days from the receipt of this request to provide responsive records, notified GAP on September 18, 2007 that the processing of our request would begin. After receiving no further contact regarding this FOIA request, GAP filed an administrative appeal (on April 30, 2008). This appeal was denied because the FOIA request was purportedly "being processed." The Department did not give GAP documents until December 8, 2008, more than a year and a half after our request was made. GAP still has not, to date, received all the requested responsive documents.

2) Withholding responsive documents without listing them as withheld: In reviewing the released documents and the index of withheld responsive documents issued by the Department, GAP realized that there were numerous responsive documents that were missing that the Department had not listed as withheld. GAP only realized that these documents were missing because: 1) they were listed as attachments to documents that had purportedly been "released in full;" and 2) we knew that the Eurasia Foundation was required to submit certain financial reports because of government regulations and its grant agreement with the State Department.

GAP brought these missing documents to the State Department's attention in a letter dated October 27, 2009. On December 17 the Department responded and released two of the requested documents. It said that it was unable to locate two other documents, which "are likely to be duplicates of the enclosed copies." The Department then said that it would not release the remaining documents as they were "not responsive to GAP's FOIA request" as "they relate primarily, if not exclusively, to the Eurasia Foundation, and not the Foundation for the Future." The Department also said that it "has reason to believe that these documents may contain confidential commercial or financial information and that disclosure of this information could reasonably be expected to cause competitive harm to the Eurasia Foundation."

GAP contested these arguments in a January 5, 2010 letter. The withheld documents were budgets and financial reports that document how the Eurasia Foundation planned to use and did use grant funds provided to it by the U.S. government to establish the Foundation for the Future (FFF). GAP maintained that these documents related directly to the FFF, as they show how U.S. taxpayer money was spent to establish the FFF and the expenses predicted and incurred as a result of the FFF's establishment. GAP also presented a detailed assessment of why the commercial exemption did not apply in this case. In brief, the Eurasia Foundation is a non-profit organization and therefore has no profit-seeking commercial motive. Moreover, the relationship between the Eurasia Foundation and the Department of State was of the kind that preempted the application of this exemption, as the EF was obligated by its grant agreement to submit the

requested financial documents to the Department. Moreover, according to President Obama's January 21, 2009 memorandum, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails."

The State Department then informed GAP that they would have to run the documents by the Eurasia Foundation and receive its consent before releasing them. It took several weeks for the Department to contact the Foundation. When it did, the Foundation immediately sent a letter saying that it had "no hesitation" in releasing the documents and was "amenable to the release of any information related to our work on behalf of the US government to establish the Foundation for the Future."

On March 16, the State Department released most of the missing documents. However, it still withheld one document: the Eurasia Foundation's proposed budget, which would have listed exactly how the Eurasia Foundation planned to spend the grant award. The letter did not list this document as withheld; it was simply missing. GAP appealed for this document on March 19 but, to date, has not received a response from the State Department.

The documents released in March 2010 were clearly covered by GAP's original FOIA request and should have been released with the original documents. No reasonable person, juxtaposing the FOIA request and these documents, would conclude that they are unrelated. The withholding of these documents for nearly three years constituted an inexplicable lapse in compliance with FOIA regulations. It also raises a question about what other documents may have been inappropriately withheld.

3) The retroactive classification of documents: Through GAP's lawsuit against the Department of State, we learned that several documents that were originally UNCLASSIFIED were retroactively classified CONFIDENTIAL, including document E2, which reported on a meeting of the steering committee preparations for the November 2005 Forum for the Future meeting (denied in part); E47, which reports on efforts to encourage Spanish support for the Foundation (denied in part); and E184, a cable dated April 24, 2007 from the US Embassy Bern to the Department of State that reports Swiss concerns about the Foundation for the Future (denied in full).

4) The inappropriate withholding of "nonsegregable" information: On several occasions the State Department withheld full documents because it purportedly could not segregate the Foundation for the Future information from classified information. For example, the Department withheld document E60, a cable dated October 24, 2005 from the US Embassy Paris to the Department of State, which concerned "a wide range of bilateral or regional issues, of which the FFF is only one and frequently of secondary importance."ⁱ The Department, however, failed to offer a reason why it could not redact the rest of the document and release the information pertaining to the Foundation for the Future.

Similarly, the Department denied document E92, a cable dated November 22, 2005 from the US Embassy in Abu Dhabi to the Department, as the Department was "unable to segregate meaningful relevant releasable information from sensitive information that continues to merit protection."ⁱⁱ While some context is provided concerning the content of the cable and concerns

over sensitivity of the cable as a whole, there is still a complete lack of information concerning the FFF-related content to justify the determination of nonsegregability. The assertion that the Department was unable to segregate “meaningful relevant releasable information” is troubling in that it shows a tendency to treat all information as classified until proven otherwise.

5) The over-classification of documents based on “national security concerns”: GAP believes that the Department of State used a “national security concern” excuse to incorrectly classify numerous documents. The Department of State repeatedly failed to provide adequate specificity concerning the damage to national security that could reasonably result from the release of requested documents, and provided partially released documents with redactions that are selective and in bad faith.

For example, document E27 was redacted because it purportedly contained “foreign government information,” and information about “foreign relations or foreign activities of the United States,” that is authorized to be kept secret in the interest of national defense or foreign policy. This document, which was a cable from the US Embassy in London to the Department, is redacted in such a way as to provide positive comments from British officials but to withhold any discussion of concerns or doubts as to the proposed establishment of the FFF. The timing of the redactions and the nature of the memo indicate more the desire to avoid embarrassment than a desire to protect national security content. It is not clear how the concerns of the British government about a non-profit independent foundation affect the national security of the United States, especially considering that many of these concerns have already been made public by the Bretton Woods Project, a nongovernmental organization that submitted a freedom of information request in the U.K. for documents related to the Foundation for the Future. Similarly, the State Department withheld in full an April 24, 2007 cable that purportedly “reports Swiss concerns about the FFF, its independence, financing and management.”ⁱⁱⁱ This document was originally UNCLASSIFIED but was retroactively designated as CONFIDENTIAL and withheld.

Similarly, document E147, a cable from the US Embassy in Doha to the Department, was denied in full for the same national defense and foreign policy reasons. This cable “reports on the conversation of the State Department’s Counselor with the head of the Qatar Foundation.”^{iv} However, the cited FOIA exemptions were designed only to protect communication from foreign governments. They do not apply to the Qatar Foundation, which is a “private, chartered, nonprofit organization.”^v

If the withheld documents did contain information relevant to US national security, then it appears that the DOS allowed a security breach to occur. For example, document N148 was purportedly withheld in the interest of national defense or US foreign policy. However, that document was cc’d to Shaha Riza, who it appears did not have 1) a US security clearance; 2) US citizenship; or 3) formal “secondment” status with the State Department.

Many of these concerns have been echoed by other public interest groups. For example, the 2009 Liberty & Security Transition Coalition memo entitled “Preventing Over-Classification & Retroactive Classification and Promoting Declassification of Government Documents,” which was drafted by a coalition of more than 25 organizations and endorsed by GAP, states:

During the last 8 years unchecked secrecy has repeatedly corrupted the decision making process by allowing poor or inadequate analysis to prevail. Critically important governmental actions have been shrouded from scrutiny under the mantle of national security, with overclassification, selective and limited declassification, and improper reclassification of previously released information used to avoid oversight and accountability. Often, a claim of national security secrecy ends any public inquiry into allegations of misconduct and selective release of national security information allows the government to control public opinion and avoid embarrassment...

[O]verclassification undermines the integrity of the very system we depend upon to ensure our safety and security. Security classification has surged dramatically since September 11, 2001, reaching an all-time high of 23 million classification decisions in 2007, nearly triple the number in 2001... Officials from throughout the military and intelligence sectors have admitted that 50 percent or more of classification decisions are unnecessary or improper...

To facilitate sound decisions, it is critical that secrecy be applied only when necessary for national security purposes and that unnecessary constraints on coordination and consultation not be imposed for bureaucratic or political reasons. Government activities in the national security arena are of tremendous interest to the public, both because transparency ensures our actual security and because the records that chronicle the actions of government officials provide the accountability necessary for a healthy and vital democracy.^{vi}

ⁱ “Declaration of Celeste Houser-Jackson.” *Government Accountability Project v. Dept. of State*, Civil Action No. 1:08-cv-01295 (D.D.C, June 8, 2009) at p. 36.

ⁱⁱ *Ibid*, p. 39.

ⁱⁱⁱ Houser-Jackson, p. 50.

^{iv} Houser-Jackson, p. 43.

^v “Qatar Foundation leads initiative for safety provisions for Qatar schools.” Qatar Foundation. 29 July 2008. 7 October 2009 <<http://www.qf.org.qa/output/page585.asp>>.

^{vi} “Preventing Over-Classification & Retroactive Classification and Promoting Declassification of Government Documents.” Liberty and Security: Recommendations for the Next Administration and Congress. The 2009 Liberty & Security Transition Coalition. 2008. 7 October 2009 <http://2009transition.org/liberty-security/index.php?option=com_content&view=article&id=14&Itemid=24>.