

U.S. Senate Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

**“Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005”**

Tuesday, March 15, 2005, 10 a.m., Dirksen Senate Office Building Room 226

WRITTEN QUESTIONS FROM SENATOR JOHN CORNYN

Questions for Meredith Fuchs

1. Section 6 of the OPEN Government Act may turn out to be the most controversial provision in the bill. That provision would create an enforcement mechanism to ensure that federal agencies comply with the 20-day time limit that exists *under current law*. Specifically, section 6 provides that, if an agency fails to respond within the current 20-day time limit, the agency effectively waives its right to assert certain FOIA exemptions, unless that agency can demonstrate, by clear and convincing evidence, good cause for its failure to comply with the time limit (or unless the exemption involves endangerment to national security, disclosure of personal private information protected by the Privacy Act of 1974, or proprietary information).

1.a. Based on your experience with FOIA, is this provision necessary?

Yes. Aside from litigation, there are no tools currently available to a FOIA requester to get agencies to process requests in a timely manner. There is no incentive in FOIA to get the agency to accomplish timely processing on its own initiative. There are no rewards or performance incentives associated with FOIA. Instead the FOIA personnel are often isolated from the rest of the agency and not provided sufficient high-level attention or resources. Nor are there any penalties for an agency's failure to meet its obligations.

And litigation itself is not a very appealing option. Most private attorneys will require a retainer upwards of \$15,000 to cover the cost of drafting a complaint and responding to a government motion for summary judgment. Most people do not have the resources to spend such a large sum on litigation. And, when lawsuits are brought, the government can simply relinquish records mid-stream in order to moot out the case and prevent the plaintiff from being able to obtain attorneys' fees to cover the cost of the suit. The record shows several high profile recent instances of exactly this kind of conduct.

Without a carrot or a stick to encourage compliance with FOIA, some agencies feel no pressure to anything to meet their obligations. In March 2005, the Archive filed a lawsuit against the United States Air Force, which has a particularly bad pattern of not processing FOIA requests. In that lawsuit the Archive specifically describes 82 individual FOIA requests that were filed between 1987 and 2004 that have not been processed. The correspondence for these requests

shows that the Archive made repeated attempts to facilitate the processing of the requests, such as by narrowing or clarifying the requests. In most cases no progress was ever made. Instead, the Archive received occasional letters from the Air Force asking us whether we had lost interest in the request given the passage of time. In some cases it has become apparent that the requested records have now been destroyed or have been lost in the intervening years since the request was made. The Archive tried repeatedly to discuss the underlying problems with the Air Force. I personally wrote to the Secretary of the Air Force and the Air Force General Counsel. I left telephone messages for the Air Force's principle FOIA contact. Nothing happened as a result of those efforts.

After all, why should an agency respond? If it can stonewall the FOIA requester long enough, the six year statute of limitations on FOIA requests (measured from the date the request is submitted) will run and the requester will not even be able to take the agency to court.¹

Something has to be done to spur agencies to comply with the law. The encouragement offered by the Department of Justice's Office of Information and Privacy is useful to improve how agencies handle FOIA requests, but it does not create an incentive to comply in the first place. The OPEN Government Act's Section 6 penalty would provide such an incentive for the first time.

1.b. Have you experienced agency delays, or are you aware of others who have experienced agency delays, that occurred primarily because the agency had no incentive to comply with the statutory deadlines already established by Congress? In those incidents, were the agencies capable of reasonably responding within the statutory deadline period?

The Archive has experienced numerous unexplained delays. We have open FOIA requests from almost every year of the Archive's 20 years in existence. For example, the Archive still has 57 FOIA requests pending that were filed with agencies 15 years ago in 1990, and 47 pending that were filed in 1991. Even moving to the more modern era of FOIA processing, the Archive still has at least 250 FOIA requests pending that were filed 8 years ago in 1997.

The Archive's experience is not unique. In November 2003, the Archive published a study on FOIA delay that looked at the ten oldest pending FOIA requests in 35 federal agencies. That study found that there were at least 17 agencies with FOIA requests that were more than 2 years old, and some that were as old as 15 years. (A chart illustrating the age range of each agency's ten oldest pending FOIA requests is attached). These included agencies such as the Federal Bureau of Investigation, Department of Defense, Army, Central Intelligence Agency, National Archives and Records Administration, Department of Energy, Defense Intelligence Agency, Department of Commerce, Environmental Protection Agency, Department of Justice, Department of Treasury, Department of Interior, Agency for International Development, Department of Health and Human Services and Navy. In fact, the oldest FOIA request identified by the Archive – one filed by an investigative reporter named Seth Rosenfeld that has been the subject of several lawsuits – still remains incomplete despite a court order that the FBI process it.

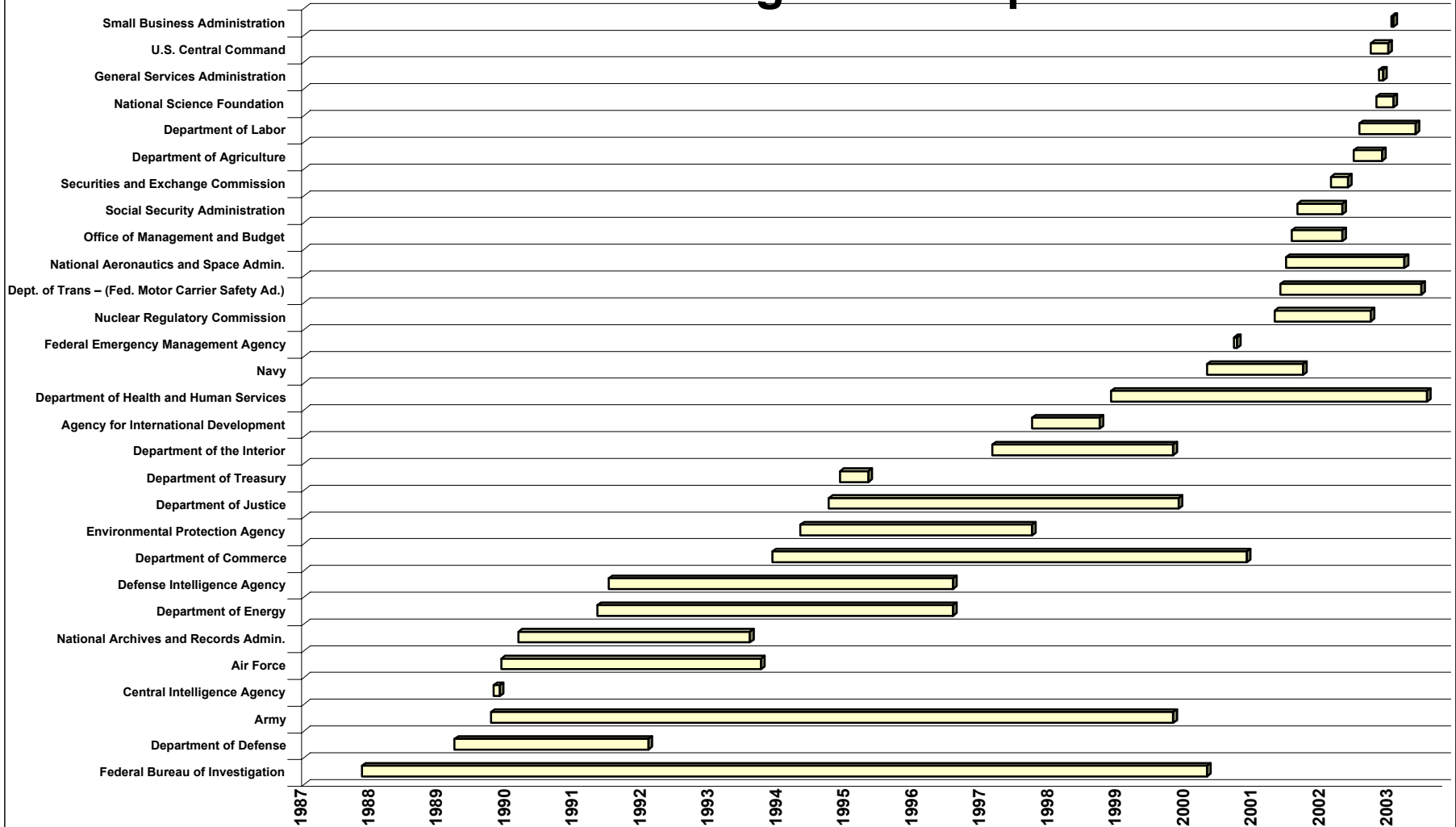
¹ In the case of the Archive's suit against the Air Force, the Archive was forced to refile almost 40 FOIA requests in a procedure that has been approved the courts.

We are in the process of updating our ten oldest study, which asks for information that should be immediately at hand in the agency FOIA offices and should not require the FOIA officer to seek records from program offices. Yet, the early returns show that the backlog problem has not been solved. For example, two Air Force components that have responded to our inquiry still have pending the same oldest FOIA request as they had pending in 2003. In one case it is a request filed in 1994 for three Air Force Histories covering the years 1968-1970. We do not understand why these records have not been reviewed in the eleven years that the request has been pending. In the case of the Federal Aviation Authority, the ten oldest FOIA requests currently pending with the agency are the same ten that were pending with the agency when the Archive conducted this study in 2003. These include, among others: (1) a 1997 request for comments submitted by tour operators in response to the Grand Canyon National Park NPRM; (2) a 1997 request for FAA interpretations or advisory opinions regarding a federal regulation from 1996; and (3) a 1997 request for releasable portions of a specific submission for approval of a proposed master interchange agreement. Our review reveals no reason why these FOIA requests have not been responded to. We are still awaiting responses from the vast majority of the agencies that are part of the survey and we will provide you with additional information as it becomes available.

You might think that locating the ten oldest pending FOIA requests at an agency would not be a hard task. After all, one would assume that the agency FOIA office would be able to quickly identify its pending FOIA requests. In fact, 25 out of the 35 agencies surveyed failed to respond to the Archive's FOIA request for copies of the ten oldest pending requests within the 20 business day statutory response time provided by FOIA. (A chart summarizing the response times is attached). Of those, 19 agencies responded between 21 and 184 business days after the FOIA requests were filed. At that point, the Archive published the results of its audit. An additional 6 agencies had not responded to the request at the time the audit was published, which was nine months after the FOIA requests were first made. Not only does this demonstrate how varied agencies' responsiveness can be to a FOIA request – in this case the exact same request to each agency, a request susceptible of little ambiguity, and one that would be expected to be at the fingertips of the FOIA processor – but it also demonstrates the complete absence of tracking systems at many agencies. The OPEN Government Act's provision for tracking and a FOIA hotline would be a real improvement over the currently haphazard filing systems of some agencies.

Finally, the costs of delay are not hard to think of, or even to prove. I have attached to this statement letters from agencies telling researchers that records have been lost, destroyed or transferred to another agency while requests were pending. If the goal is to avoid releasing information to the public, then delay and stonewalling have proven to be powerful tools.

Oldest Outstanding FOIA Requests



Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests
 National Security Archive FOIA Audit © 2003, The National Security Archive

AGENCY RESPONSE TIMES

NO. BUS. DAYS	AGENCY	DATES OF 10 OLDEST REQUESTS
1	Air Force – Education and Training Command	May 22, 1994 - July 29, 2003
3	Office of Personnel Management	No pending requests
3	National Science Foundation	September 11, 2002 – February 19, 2003
4	Department of Agriculture	July 19, 2002 - December 2, 2002
5	Defense Intelligence Agency	July 8, 1991 – August 1, 1996
6	Army – Criminal Investigation Command	March 22, 2000 - June 26, 2003
6	Navy - Naval Education and Training	July 25, 2003 (1 pending request)
7	Department of Education	No pending requests
10	Air Force – Combat Command	June 6, 1995 - May 6, 2000
10	Securities and Exchange Commission	March 5, 2002 - June 12, 2002
13	Small Business Administration	January 19, 2003 - January 30, 2003
14	Social Security Administration	September 7, 2001 - May 24, 2002
15	Army – Corps of Engineers	June 6, 2002 - June 27, 2003
15	Nuclear Regulatory Commission	May 7, 2001 - October 4, 2002
15	Navy – Naval Facilities Engineering Command	No pending requests
17	DOL – Mine Safety and Health Administration	August 1, 2002 - June 3, 2003
17	Navy - U.S. Pacific Fleet	No pending requests
18	Army – Admin. Assistant to Sec. of the Army	November 27, 2001 - April 29, 2002
18	Army - Total Army Personnel	March 5, 2001 - February 14, 2002
18	Navy - Naval Sea Systems	May 25, 2000 – October 10, 2001
19	Department of Commerce	December 28, 1993 – December 12, 2000
20	Army - Intelligence and Security Command	October 5, 1989 - October 3, 1999
20	National Archives and Records Administration	March 9, 1990 - August 18, 1993
21	Agency for International Development	October 14, 1997 - October 19, 1998
21	Federal Emergency Management Agency	September 24, 2000 - October 10, 2000
21	General Services Administration	September 13, 2002 - December 6, 2002
22	Department of Justice	October 17, 1994 - December 28, 1999
22	Environmental Protection Agency	May 23, 1994 - October 10, 1997
23	Department of the Interior	March 25, 1997 - November 5, 1999
26	Department of Defense	January 31, 1987 - February 3, 1992*
26	Navy- Naval Air Systems	February 13, 2002 - June 12, 2003
27	Air Force – Materiel Command	May 12, 1999 - August 12, 2003
33	DOT - Federal Motor Carrier Safety Admin.	June 4, 2001 - July 28, 2003
35	Department of Treasury	December 9, 1994 - May 24, 1995
38	Central Intelligence Agency	May 29, 1987 - November 22, 1989*
54	Office of Management and Budget	August 15, 2001 - May 31, 2002
89	Air Force - 11 th Wing	December 5, 1989 - December 2, 1993
130	Federal Bureau of Investigation	November 9, 1987 - May 28, 2000
147	Department of Energy	May 14, 1991 - August 7, 1996
150	Department of Health and Human Services	December 30, 1998 – August 29, 2001
178	National Aeronautics and Space Administration	July 12, 2001 - April 3, 2003
184	U.S. Central Command	October 10, 2002 - January 16, 2003
160+	Drug Enforcement Agency	- Request Pending
190+	Department of Housing and Urban Develop.	- Request Pending
190+	Department of Labor	- Request Pending
190+	Department of State	- Request Pending
190+	Department of Transportation	- Request Pending
190+	Department of Veterans Affairs	- Request Pending

* See endnote (i) and individual agency summary for information relevant to dating of ten oldest requests produced by this agency.

U.S. Department of
Homeland Security

United States
Coast Guard



Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-OPL
Phone: (202) 267-1777
Fax: (202) 267-4082

5720

CG FOIA #95-0220

NSA Archive File No. 930614DIA052

FEB - 5 2004

Ms. Kate Doyle
The National Security Archive
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, DC 20037

RECEIVED FEB 10 2004

Dear Ms. Doyle:

This is in response to your Freedom of Information Act (FOIA) request of July 21, 1993, in which you wrote to the Defense Intelligence Agency (DIA) asking for records detailing "the heroin trade in Colombia during the 1990s." In responding to your request, the DIA located one document that had originated from the Coast Guard. They forwarded this document to us on February 6, 1995, for review and direct response to you.

Upon receipt of the DIA referral, the Office of Information Management at Coast Guard Headquarters forwarded the letter to the Office of Law Enforcement for filing until it was ready to be processed. The Coast Guard's standard policy is to process FOIA requests in the sequence in which they are received. In Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976), the court approved the general practice of handling FOIA requests on a "first in, first-out" basis. This processing scheme also applies to referrals of FOIA requests from other Federal agencies.

Due to a myriad of law enforcement responsibilities and limited personnel resources the Office of Law Enforcement (G-OPL) has accumulated a large backlog of FOIA inquiries. This backlog impedes our ability to respond to FOIA requests more expeditiously. Unfortunately, now that we have reduced our backlog to the point at which your case is ready for processing, we are unable to locate the document that DIA referred to us for review.

We have conducted an exhaustive search for this document. We searched the applicable file system in the Office of Information Management, which was the first office in the Coast Guard to receive the document. This search proved unsuccessful. A similar search was performed on the applicable file system in the Office of Law Enforcement, which also was unsuccessful. Ultimately, we contacted the DIA in hopes that they would have a copy of this document. This effort also proved futile. Consequently, we have determined that a reasonable search for this document has been made and no other place within the Coast Guard exist where it is likely to be found. See, e.g., In re Wade, 969 F.2d 241 (7th Cir. 1992); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990)

We apologize for this administrative mishap and regret the substantial delay that our backlog has caused in processing your request.

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CG FOIA #95-0220
NSA Archive File No. 930614DIA052
FEB - 5 2004

This is not a denial of information. We have searched our records and have not found the responsive document referred to us from DIA. I am the person responsible for the "no records" determination in response to your request. Concurring with this decision is Lieutenant Brad Kieserman, Legal Advisor, Office of Law Enforcement. We are required by law to inform you that you may appeal the adequacy of our search. Your appeal must be made in writing and you must submit it within 30 days from the date of receipt of this letter. Your letter should indicate that you are making an appeal based on a "no records" determination of a request made under the FOIA, and the envelope should be prominently marked "FOIA Appeal." Include in your appeal the reason(s) you believe the search was inadequate and a copy of our response. Send your appeal to:

Commandant (CG-611)
U.S. Coast Guard Headquarters
2100 Second Street, S.W.
Washington, DC 20593-0001

Sincerely,



K. A. WARD
Captain, U. S. Coast Guard
Chief, Office of Law Enforcement
By direction of the Commandant

From "Ouellette, Robin" <ROuellette@COMDT.USCG.MIL>

Sent Friday, February 6, 2004 10:03 am

To "'belias@gwu.edu'" <belias@gwu.edu>

Cc

Bcc

Subject US COAST GUARD FOIA APPEAL A93-044

Ref: (a) Nat'l Security Archive FOIA Seq. #920944USG007

August 25, 1992: The Nat'l Security Archive (NSA) submitted a FOIA request, seeking a copy of a 35-page U.S. Coast Guard, Intelligence Coordination Center (ICC) document: The Baja Peninsula and Its Involvement in International Narcotics Trafficking (U).

May 21, 1993: ICC responded, partially denied your FOIA request by providing NSA 16 of the 35 pages, 6 of which appear to have been redacted in part. Only 11 released pages had page numbers. No remanence of the withheld remaining 19 pages were provided. ICC cited exemption (1) of the FOIA, classified documentation, as its basis for all withholding.

October 19, 1993: NSA appealed ICC's response, protesting the extent of deletions made and requested a second review. NSA also complained of the method the Coast Guard used for redacting portions of the record provided them.

Ms. Elias,

This is a follow-up to our PM conversation, February 5, 2004, regarding the status of your FOIA Appeal for reference (a). Please express your comments/concurrence on what I conveyed to you (as follows):

"I apologize for the inordinate delay in processing your FOIA appeal.

Prior to our conversation, I made inquiries for the FOIA request files from my Division as well as ICC. My efforts to date were unsuccessful in locating an unredacted version of the requested document.

Recently, I did obtain a copy of what ICC already provided NSA. ICC informed me that until five/six years ago, it did not maintain unredacted copies of documents with their FOIA request case files. ICC's entire work area is a secured location. If ICC still has an unredacted version of the document, an exhaustive search would be required of ICC's entire work area to locate it. I'm displeased not having located the document's reredacted version.

I concur with NSA's displeasure of the redaction method ICC exercised when processing it's FOIA request. In reviewing what was disclosed to NSA, I noted ICC use of white "patching-over" for withholding information, vice using black. This masks the extent of what information was withheld. There is no page accountability for those pages not provided NSA. Also, if ICC did attempt "line-by-line" segregation for releasing information, it failed to inform NSA that option was visited in its response letter.

Since the appeal process cannot proceed without access to an unredacted version of the document, I suggest the case file, itself, be "closed." Though a reasonable search for the unredacted version of the document was

conducted with negative result, vigilance for it will continue. Should it resurface, NSA will be contacted."

Robin D. Ouellette
ROBIN D. OUELLETTE
FOIA Appeals Case Officer
CG-611
e: rouellette@comdt.uscg.mil
v: 202/267-2300



DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

DEC 20 2004
Ref: 95-F-0876
950207DOD030

Mr. William Burr
National Security Archive
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037

Dear Mr. Burr:

This responds to your February 22, 1995, Freedom of Information Act (FOIA) request. It has been determined that the records you requested have been accessioned by the National Archives and Records Administration (NARA). Accordingly, we are referring your request to NARA at the following address for processing and direct response to you:

The National Archives at College Park
Director, Records Declassification Division
Rm 6350
8601 Adelphi Road
College Park, MD 20740-6001

There are no charges for processing this request, in this instance.

Sincerely,

C. Y. Talbott
Chief





DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY RI
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 AUG

Ref: 96-F-0653
960116DC

8 years
no docs.

Mr. William Burr
National Security Archive
George Washington University
2130 H Street, NW, Suite 701
Washington, DC 20037

Dear Mr. Burr:

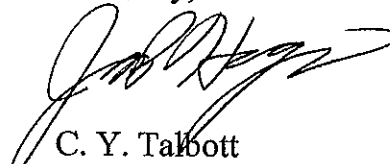
This responds to your March 25, 1996, Freedom of Information Act (FOIA) request which was received in this Office on March 28, 1996.

The Office of the Under Secretary of Defense for Policy has determined that documents responsive to your request have been accessioned by the National Archives and Records Administration (NARA). In the event you have not already done so, I recommend that you redirect your request to NARA, at the following address, for processing and direct response to you:

Director
Records Declassification Div (NND)
Room 6350
The National Archives at College Park
8601 Adelphi Road
College Park, MD 20740-6001

There are no charges for processing this request.

Sincerely,


C. Y. Talbott
Chief

