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June 26, 2009

Martha Diaz-Ortiz
FOIA and Privacy Act Officer
Broadcasting Board of Governors
330 Independence Ave., SW
Cohen Building, Room 3349
Washington, DC 20237
(202) 203-4585 fax

Sent via first class mail and facsimile

Re: National Committee to Free the Cuban Five FOIA Request No. 09-007

Dear Ms. Diaz-Ortiz:

I am in receipt of your correspondence dated June 3, 2009, which was faxed to our office at 9:10 p.m. on that date.

The BBG represents in your June 3, 2009 letter that it will undertake its further search for records as soon as we "inform [you] in writing that [the National Committee to Free the Cuban Five is] willing to assume full financial responsibility for fees."

This is an incomprehensible demand with respect to the production of the underlying contracts which BBG has itself identified already in its initial search for responsive materials.

This is our final demand for immediate production of these underlying documents. We seek to avoid litigation and have endeavored to do so, however, the refusal to produce these documents is arbitrary and capricious and in willful violation of the Freedom of Information Act, particularly given this refusal persists even after the requestor satisfied your demand that it represent it would assume full responsibility for associated fees and costs for these documents.

In our March 19, 2009 correspondence we represented that, without waiving and while asserting objections to the imposition of search and other costs, the Committee would assume full financial responsibility for fees for the production of the underlying contracts which you had identified in your search as reflected in the spreadsheet BBG produced.

“[T]he Committee requests that the BBG produce the contracts as listed in the attached spreadsheet and if payment is necessary for this request, please advise the sum you are seeking, which will be immediately tendered while reserving objection.”

See March 19, 2009 letter from Mara Verheyden-Hilliard to Martha Diaz-Ortiz.

In our March 30, 2009 correspondence we reiterated that

“In our letter of almost two weeks ago, we identified that the Committee wished to procure immediate release of certain contracts as listed in the spreadsheet provided with the March [19], 2009 letter and stated that if the BBG was asserting that payment was necessary for this request, for BBG to advise the sum it is seeking, which would be immediately tendered while reserving objection.”

See March 31, 2009 letter from Mara Verheyden-Hilliard to Martha Diaz-Ortiz.

By letter dated May 4, 2009, among other things the Committee appealed “the BBG’s failure and refusal to process the Committee’s request despite the Committee’s agreement that it will pay requested fees in order to receive the information requested while reserving the right to challenge the imposition of fees.”

For whatever reason, in its appeal denial the Access Appeal Committee did not address the failure to produce the underlying contracts regarding which the National Committee to Free the Five had represented in writing an assumption of financial responsibility for all associated costs, while reserving and without waiving any objection to the imposition of such documents.

Having represented in March 19, 2009, the assumption of financial responsibility for the fees and costs associated with the production of the underlying contracts, and reiterated that assumption in its March 30, 2009 correspondence, and appealed the failure to produce these documents notwithstanding the assumption of these costs, BBG still refuses to produce the documents on the basis that the National Committee to Free the Five must first assume the financial responsibility for the production of the contracts.

What makes this agency failure all the more striking is the fact that your search has already identified the contracts. It should take minimal effort to produce the contracts which BBG has already identified by journalist-contract employee name, contract number and contract date.

The Committee can do no more than what it has done. It has exhausted its efforts and remedies at the agency level with respect to the production of the underlying contracts records. Unless they are produced forthwith, the National Committee to Free the Five shall exercise its right to initiate litigation to compel production of these already-identified contracts.

With respect to the broader and full scope of materials within the Committee’s FOIA request, your June 3, 2009 correspondence demands a payment of “\$31,192.80, plus duplication costs” as an initial payment towards estimated “costs for the search and duplication of those documents.” You also indicate that BBG may or will charge additional unspecified amounts without limitation for additional search and duplication costs.

This excessive demand for fees is unhelpfully and unfortunately abstruse. The absence of detail prevents us from meaningfully responding and, if appropriate, modifying the scope of the request to avoid particularly burdensome or costly search efforts. The failure to distinguish the minimal costs associated with producing the underlying contracts which BBG has already identified prevents us from advancing a payment for those costs (while preserving and maintaining objections to such imposition).

We are inquiring, herein, for clarification as to how these costs were estimated and whether the asserted costs can be reduced. We request an itemization. If a narrowing or redefining of the request would serve to facilitate production and to lower costs, we will consider that. It is our experience that sometimes the narrowing of a request can reduce asserted costs, and sometimes an expansion of a request to conform with categories of materials as they are organized within the agency can reduce asserted costs.

Ultimately, the claimed costs cannot be imposed. Having failed to have timely issued a determination as to the Committee's January 23, 2009 Freedom of Information Act request, BBG is now barred by statute from assessing search fees or duplication in this matter. 5 U.S.C. §552(a)(4)(A)(viii).

Even so, we are willing to discuss reformulating or limiting the request if doing so can result in production of the material deemed relevant by the requestor and also reduce the burden of response upon the agency.

Because the imposition of search and duplication fees is barred, as above, we shall file an appeal as to the assessment of such fees. Notwithstanding such appeal, we request that you withdraw the proposed assessment of fees and produce the requested materials. Notwithstanding such appeal and our confidence that there is no basis for the imposition of any fees, we also are willing to discuss ways in which the request may be narrowed or reformulated to decrease search efforts on the agency.

With respect to the underlying contracts that have been identified to date, we continue to request, as we have in all of our correspondence, the delivery of those contracts immediately. The requestor has stated it shall tender and assume full responsible for payment of associated costs for these documents, reserving the right to continue to assert its objections to the assessment of such costs. If there is any basis for your continued failure to produce these documents, please so advise in written response to this communication.

Sincerely,



Carl Messineo