

# Exhibit “A”

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division**

JAMES MADISON PROJECT

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Plaintiff,

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v.

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Civil Action No. 1:08cv1323

(GBL/TRJ)

CENTRAL INTELLIGENCE AGENCY

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Defendant.

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**RULE 56(f) DECLARATION OF MARK S. ZAID**

I, MARK S. ZAID, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am a person over eighteen (18) years of age and competent to testify. I make this Declaration on personal knowledge and in support of the plaintiff James Madison Project’s Opposition to Defendant’s Motion for Summary Judgment (filed April 6, 2009).

2. I am the Executive Director of the plaintiff James Madison Project (“JMP”) and have served in that position since I founded the organization in 1998. JMP is a Washington, D.C.-based non-profit organization created for the primary purpose of educating the public on issues relating to intelligence gathering and operations, secrecy policies, national security and government wrongdoing. Much of the work undertaken by JMP involves litigation under disclosure acts such as the Freedom of Information Act (“FOIA”). The principles underlying the objectives of the JMP are derived from the 1997 findings of The Commission on Protecting and Reducing Government Secrecy. Our

website, which contains further information and examples of JMP's activities, can be viewed at <http://www.JamesMadisonProject.org>.

3. I am also an attorney and I am admitted to practice law in the States of New York, Connecticut, Maryland and the District of Columbia, as well as the D.C. Circuit, Second Circuit and Fourth Circuit Court of Appeals, and the United States District Courts for the District of Columbia, Maryland, Eastern District of New York, Northern District of New York, the Southern District of New York and the Court of Claims. I have been submitting FOIA requests since approximately 1988 and I have been litigating claims pursuant to FOIA since 1993. Indeed, I have litigated numerous FOIA lawsuits against the CIA and I am quite familiar with their tactics and procedures to thwart requesters.

4. Of particular relevance, I have been teaching the D.C. Bar Association's Continuing Legal Education classes on FOIA since 2003, and I have been the co-editor of *Litigation Under the Federal Open Government Laws* since 2002 (the title was originally published annually by the American Civil Liberties Union between 1974-1997, and was revived by JMP). I daresay that, this book is the requesting community's "bible" for information pertaining to FOIA as it is written, unlike the Department of Justice's *Freedom of Information Act Guide*, from the requester's viewpoint. The book is now published bi-annually.

5. On September 2, 2008, JMP, under my name, submitted a FOIA request to the CIA requesting disclosure of the following categories of records:

- (1) the indexing and organizational structure of all CIA Systems of Records subject to FOIA, especially with respect to which Systems of Records are held by which CIA components (*excluding the Privacy Act Systems of Records detailed in the 22 July 2005 Federal Register*);

- (2) all or part of the CIA's current organizational structure (*excluding the National Clandestine Service*), especially organizational charts, outlines, or other graphical representations;
- (3) which CIA components are tasked with FOIA requests by CIA Information Management Services ("IMS"), especially with respect to which CIA offices are considered "components" by IMS for tasking purposes;
- (4) the search tools and indices employed by each CIA component from (3) above when processing FOIA requests;
- (5) discussions of the first and second recommendations made by JMP on 18 May 2008 (copy attached); and
- (6) any other records pertaining to the subject material of the first and second JMP recommendations of 18 May 2008.

6. By letter dated September 25, 2008, the CIA informed JMP that it had accepted our request for processing and that no fees would be assessed.

7. Given that we failed to receive any further response from the CIA, JMP filed this lawsuit on December 22, 2008.

8. The entire purpose of JMP's FOIA request was to flesh out an understanding of exactly how the CIA processes FOIA requests in order to avoid the very problem that JMP has now encountered. It is nothing short of ironic that a FOIA lawsuit seeking the disclosure of records that would more fully reveal the process by which the CIA searches for responsive records would itself be challenged for failing to "reasonably" describe the sought-after records.

9. Assuming for purposes of this paragraph that the CIA's argument that JMP's request did not reasonably describe the records were valid, the CIA's regulations state that "[c]ommunications which do not meet these requirements will be considered an expression of interest and the Agency will work with, and offer suggestions to, the potential requester in order to define a request properly." *See* 32 C.F.R. § 1900.12(c). At

no time, to the best of my knowledge, was JMP ever contacted by CIA to discuss clarification or modification of the language utilized or the scope of our requests.

10. The declaration of Delores Nelson, CIA Information and Privacy Coordinator, which was submitted in support of the CIA's Motion for Summary Judgment, indicates that sometime after accepting JMP's request for processing, although exactly when this occurred is not stated, the CIA essentially determined that it could not process JMP's request. This position was first articulated by the CIA to JMP in a letter dated February 10, 2009. Of course, JMP had already filed this lawsuit on December 22, 2008, so the CIA's administrative response was irrelevant.

11. The CIA is doing its best to subvert and undercut the very *raison d'être* of FOIA. The sad truth is that one can only speculate how many hundreds, or perhaps thousands, of legitimate FOIA requests have been unceremoniously rejected for processing due to the CIA's claims that the request did not reasonably describe the requested records. Most requesters would either lack the sophistication, energy, time or money to pursue a challenge to the CIA's refusal. In the unfortunate likelihood that the CIA refused JMP's request, this case was purposefully designed to confront the CIA's willful obstruction of the spirit, if not written, intent of FOIA to facilitate access to agency records and allow the public to know what our Government is up to.

12. As a result of earlier JMP FOIA lawsuits against the CIA, I have personally read several CIA declarations that used similar language to the Nelson Declaration with respect to how the CIA processes FOIA requests. Examples of three different CIA declarations are attached as Exhibit "1" (particular pages from the Declaration of Joseph W. Lambert in *James Madison Project v. C.I.A.*, 2009 WL 712486 (D.D.C. 2009));

Exhibit “2” (particular pages from the Declaration of Martha M. Lutz in *James Madison Project v. C.I.A.*, 2009 WL 780228 (D.D.C. 2009)); and Exhibit “3” (particular pages from the Declaration of Delores M. Nelson in *James Madison Project v. C.I.A.*, 593 F.Supp.2d 78 (D.D.C. 2009)).

13. JMP’s FOIA request in this case was drafted specifically after taking into account the information contained in these earlier CIA FOIA declarations. We designed the request in such a way as to make it as easy as possible for the CIA to comply and as difficult as possible for it to claim that the records sought were not “reasonably described.” We specifically anticipated the CIA’s search strategy. For Category One, the search would simply need to be tasked to each IRO to process a search in each component in the respective Directorate for records describing the component’s configuration of its records systems and unique characteristics of that configuration. For Category Three, the search would be even simpler. The request would need to be tasked to each IRO to conduct a search in his respective office for a list of components in his Directorate that are available for conducting searches. For Category Four, the request would merely need to be tasked to each IRO to process a search in each Directorate component for records pertaining to the component’s available search tools and methods that can be applied when processing FOIA requests.

14. Based on my nearly twenty years of litigating against the CIA in FOIA lawsuits, the CIA, likely not surprisingly, complicates its FOIA processing system more so than most other agencies. Because of the secrecy surrounding the CIA’s record systems, requesters oftentimes need to blindly craft FOIA requests and then fall to the mercy of

CIA personnel deciding whether on that particular day they will construe the request to be reasonable or not.

15. Indeed, I can easily state that the CIA is also one of the least “user friendly” of federal agencies in working or cooperating with FOIA requesters. It is incredibly difficult, if not sometimes downright impossible, to reach a “live” person in the CIA’s FOIA office. There is, unlike the majority of federal agencies, no ability of the public to communicate via e-mail with individuals employed by the CIA’s FOIA Office. While on some level there may be a degree of understanding that should apply given the CIA’s intelligence, and obviously secretive, missions, that argument might hold water if the same problems presented themselves with the CIA’s sister intelligence agencies such as, for example, the Defense Intelligence Agency, the National Security Agency or the National Reconnaissance Office.

16. In fact, I have personally dealt with the FOIA offices and personnel of these other intelligence agencies for years, and the experiences can be characterized as night and day when it comes to comparing them to the CIA. I have little to no difficulty reaching and speaking with the senior FOIA personnel in these agencies, as well as most federal FOIA offices outside of CIA, and communication occurs regularly via telephone, facsimile and e-mail. This includes instances where the agency FOIA official has contacted me on their own initiative and where I have reached out to them. Thinking back I can recall only one or two instances in nearly twenty years of litigating FOIA cases against the CIA that I actually received a telephone call from a CIA FOIA official seeking clarification concerning a submitted request.

17. Beyond challenging whether JMP reasonably described the records that we have requested, the CIA also asserts that our requests inappropriately seek answers to questions rather than the release of responsive records. We seek no such thing. Our requests were designed purely to identify the existence of responsive records and to, hopefully, require their release. Virtually any FOIA request can be construed or be implicitly interpreted to involve a question. For example, a FOIA request seeking “all records pertaining to the CIA’s interactions with Lee Harvey Oswald and a false defector program” could be construed to be asking the CIA to first answer the question of whether it actually *had* any involvement with either Oswald or a false defector program before processing could begin. That the CIA may mischaracterize JMP’s request in this manner—and it is not at all clear at this stage of the proceedings whether this was truly a determination rendered during administrative processing or simply an after-the-fact legal argument—should not outweigh JMP’s explicitly stated intentions to the contrary.

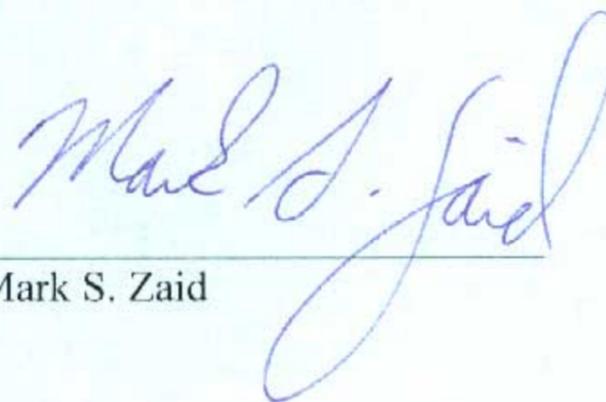
18. In JMP’s opinion the CIA is not entitled, for the legal reasons articulated in our brief, to summary judgment at this early stage of the proceedings. We can envision three ways in which this Court can proceed were it to agree with our position. First, it can simply order the CIA to process JMP’s requests and conduct the relevant searches. Two, it can order the parties to coordinate with each other and attempt to modify the requests to facilitate a proper search, and based on any agreed upon modification then conduct that search. JMP would, as with any FOIA request submitted to a federal agency, happily cooperate in trying to facilitate the processing of one of our requests. Finally, JMP could be permitted to undertake limited discovery. While rare to be sure, particularly when

involving the CIA, it is not at all unprecedented (as evidenced by the deposition of Louis Dube in the *U.S. Student Ass'n v. C.I.A.* case cited in our opposition brief).

19. Given that the CIA is challenging JMP's language as being unreasonable, we could envision a limited number of interrogatories that could address this point. This could include questions to determine the exact methods by which CIA processes FOIA requests, the training CIA FOIA officers receive to process requests and identifying prior examples of FOIA requests submitted to the CIA that were accepted and processed or denied as unreasonable for comparison purposes. A minimal number of depositions would be necessary to secure all the information that would be needed for the Court to adjudicate this dispute. Indeed, JMP would limit itself to just two depositions; specifically, the two CIA declarants, Delores Nelson and Joseph Lambert.

I do solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true to the best of my knowledge.

Date: April 6, 2009



Mark S. Zaid