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VIA EMAIL

Ms. Amber Richer
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20530

Re: *Center for Public Integrity v. DoD et al.*, No. 19-3265 (D.D.C.)

Dear Ms. Richer:

I trust that you and the defendant agencies are aware that yesterday the website *Just Security* published passages from email correspondence between DoD and OMB officials (<https://www.justsecurity.org/67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/>) — in several cases passages that Defendants redacted in the documents they produced to us in response to the Court’s preliminary injunction.

Will Defendants confirm that the *Just Security* article accurately quotes these emails? Since yesterday, we have received independent confirmation that it does. Therefore we ask that Defendants release the passages reported by *Just Security*. Since their content has already been reliably reported, their release would not cause foreseeable harm to the interests protected by FOIA Exemption 5. In addition, the defendant agencies have discretion to release the emails at issue whether or not they are protected by Exemption 5, and we ask them to consider how the official and unofficial releases so far have served the public interest by informing the citizenry and how further releases of information would likewise serve the public interest.

In addition, the contents of several passages reported by *Just Security* strongly suggest that Defendants have improperly invoked Exemption 5 to justify the redactions they have made. Several of those passages appear to be post-decision communications, made after President Trump and other officials had decided to put a hold on the aid to Ukraine. In *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), the Supreme Court made clear that such post-decision communications, as opposed to pre-decisional communications, are not exempt.

Take, as examples, these passages: McCusker expressing concern about the legality of the hold by asking if the decision had been vetted by DoD’s general counsel; her statement that DoD “can no longer make [the] declarative statement” that the pause “will not preclude timely

execution” of the aid distribution; McCusker’s assertions that OMB “consistently misunderstands the process and timelines [DoD] [has] provided for funds execution” and that, starting on August 19th, the pause had put “our ability to execute at risk”; McCusker informing Duffey of the Senate Armed Services Committee’s question to DoD about whether OMB had directed DoD to halt execution of the Ukrainian funding, etc. These and other documents merely attempt to explain, justify or carry out the president’s decision, while not in any way providing deliberative advice or recommendations about whether such a decision should be made in the first place. We ask that Defendants release these passages and all others that are similarly not exempt under Exemption 5.

Sincerely,

Peter Newbatt Smith, Esq.
Research Editor and FOIA Counsel