



**U.S. Department of Justice**

*United States Attorney  
Southern District of New York*

---

*86 Chambers Street, 3<sup>rd</sup> Floor  
New York, New York 10007*

February 19, 2021

SETTLEMENT COMMUNICATION  
SUBJECT TO FED. R. EVID. 408

By Email

David Schulz, Esq.  
Phil Spector, Esq.  
James Fitch  
Michael Linhorst  
Nicole Ng  
Brandon Willmore  
Media Freedom and Information Access Clinic  
Yale Law School

Re: *Ryan Goodman v. U.S. Dep't of Defense*,  
No. 20-cv-8349 (LJL)

Dear Counsel:

We write in response to your email dated January 21, 2020, in which you posed several questions to the Department of Defense (“DoD”) with regard to DoD’s responses to Plaintiff’s FOIA requests.

For the reasons stated in DoD’s motion for summary judgment, DoD has fully responded to the FOIA requests, which did not describe the specific records sought but rather sought records “sufficient to show” certain requested information. DoD is not required to provide additional information to respond to the FOIA requests. FOIA does not require government agencies to “produce or create explanatory material,” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161-62 (1975), or to “answer questions,” *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 59, 64 (D.D.C. 2003); *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985). Nor do we concede that the information requested in your January 21 email is necessarily “relevant” to the FOIA requests.

Nevertheless, and subject to these objections, DoD provides the below responses to your questions in the interest of avoiding further litigation of this matter. DoD provides the below responses with the understanding that they may result in a resolution of the pending litigation, and are therefore protected by Federal Rule of Evidence 408.

*DMDC Reporting*

With regard to your request titled “Criteria for Determining DMDC Numbers,”<sup>1</sup> DoD responds as follows:

“Permanently assigned,” as used by DMDC, means anyone on permanent change of station orders with a unit that is permanently assigned to the state or country listed. An example would be a person on three year orders to a unit located at the Washington Navy Yard, Offutt Air Force Base in Nebraska, or Royal Air Force Lakenheath in England. If someone on such orders is temporarily assigned away from the unit to which they are permanently assigned (and to which they will return), whether that means deployment to Iraq or a temporary duty assignment to temporarily conduct work at, for example, the Pentagon or to provide hurricane relief in a foreign nation, they will continue to be accounted in DMDC reports in their permanent assignment and not the temporary mission.

As reflected in the quarterly reports to Congress, the only uniformed personnel permanently assigned to Afghanistan, Iraq, and Syria, and not considered deployed to the region, are under Department of State Chief of Mission authority either to conduct security cooperation functions that are not part of Operation INHERENT RESOLVE or to augment Baghdad Embassy Compound security.

“Temporary,” as used by DMDC, means an assignment at a location other than an individual’s permanently assigned duty location. “Contingency,” as used by DMDC, means a military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law pursuant to Title 10, United States Code, Section 101(a)(13).

The term “temporary,” as utilized by DMDC, does not correspond to the term “temporary” in Temporary Enabling Forces (TEF) under the revised force management construct

---

<sup>1</sup> This request states: Criteria for Determining DMDC Numbers. Plaintiff’s second FOIA request sought “Records sufficient to show the criteria for counting or determining the number of military personnel by country reported in the DMDC quarterly manpower report, ‘Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned By Duty Location and Service/Component.’” The redacted records produced thus far apparently do not explain the DMDC accounting criteria. Specifically, the DMDC website explains that its quarterly manpower report distinguishes between “personnel who are permanently assigned for duty” and “personnel on temporary duty or deployed in support of contingency operations” at each location. DoD Personnel, Workforce Reports & Publications, Defense Manpower Data Center, Caution-[https://www.dmdc.osd.mil/appj/dwp/dwp\\_reports.jsp](https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp) < Caution-[https://protect2.fireeye.com/v1/url?k=64acb2db-3b378a17-64ab963e-0cc47adca7dc-6c985e4069e569f2&q=1&e=6cf9f9db-be84-48fa-a243-491141515b31&u=https%3A%2F%2FCaution-www.dmdc.osd.mil%2Fappj%2Fdwp%2Fdwp\\_reports.jsp](https://protect2.fireeye.com/v1/url?k=64acb2db-3b378a17-64ab963e-0cc47adca7dc-6c985e4069e569f2&q=1&e=6cf9f9db-be84-48fa-a243-491141515b31&u=https%3A%2F%2FCaution-www.dmdc.osd.mil%2Fappj%2Fdwp%2Fdwp_reports.jsp) >. Because, “[s]tarting in December 2017,” the DMDC report only contains permanent troops, interpreting these accounting practices requires understanding how DMDC defines “permanently assigned,” “temporary,” and “contingency” troops. The produced documents also fail to disclose how the DMDC report’s permanent vs. temporary/contingency categories relate to the “Baseline” and “Temporary Enabling Forces” numbers in DoD’s revised force management construct that replaced the old Force Management Level (FML).

approved by Secretary Mattis in 2017. Under the current accounting method, the “baseline forces” category includes all forces that must be counted toward the Presidentially authorized force level (PAFL). These personnel are deployed in support of contingency operations for purposes of the DMDC reports. The current accounting also includes “temporary enabling forces” that are not counted toward the PAFL. Although they typically are on temporary duty, some may be permanently assigned but for a brief period of time are not yet counted within the baseline—for example, they may be in the process of doing a “hand-off” with the personnel they are replacing, and once that handoff is completed they are moved into the baseline.

With regard to your request titled “Reason for Redacting DMDC Numbers for Afghanistan, Iraq, and Syria,”<sup>2</sup> DoD responds as follows:

DoD has produced “[r]ecords sufficient to explain the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports.” Specifically, DoD has produced the action memos and implementation plans approved by Secretary Mattis, which document and fully explain the decision to no longer publicly disclose these numbers. In compliance with Secretary Mattis’ decision to only report approximate force levels publicly, DMDC stopped including numbers of DoD personnel in Afghanistan, Iraq and Syria in the quarterly report posted on the DMDC website as of December 2017.

To the extent you are asking why the public approximate numbers contained in the unclassified quarterly reports to Congress are not published in the DMDC quarterly reports, DoD notes that the quarterly reports to Congress are prepared by the Office of the Secretary of Defense for Policy (OSD(P)) pursuant to Section 1267 of the National Defense Authorization Act (“NDAA”) for FY 2018. The DMDC reports are not intended to fulfill requirements of Section 1267.

DoD is in compliance with Section 595 of the NDAA for FY 2019. In the case of Iraq, Syria and Afghanistan, “the top-line numbers” of deployed Armed Forces personnel are classified. Section 595 the 2019 NDAA does not require publication of classified information.

---

<sup>2</sup> This Request states: Reason for Redacting DMDC Numbers for Afghanistan, Iraq, and Syria. Plaintiff’s second FOIA request also sought “Records sufficient to explain the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria in DMDC quarterly reports.” DoD’s productions disclose that “DMDC removed specific numbers of military and civilian personnel from its public reporting and now directs readers to the Department of Defense Public Affairs office,” which provides “publicly reported approximate numbers” instead. DoD’s productions also address the decision to provide approximate numbers to Congress in an unclassified quarterly report and precise numbers in a classified annex. But nowhere does the production disclose the basis for the decision to stop providing the numbers in any form in the quarterly reports on DMDC’s publicly accessible website. We also note that because plaintiff’s request for information explaining the decision to stop publicly disclosing these numbers for Afghanistan, Iraq and Syria is not yet answered, and because DoD does not appear to be regularly distributing its “publicly reported approximate troop counts” except in reports to Congress, it remains unclear how DoD is complying with its duty under Section 595 of the 2019 NDAA to “make publicly available, on a quarterly basis, on a website of the Department, the top-line numbers of members of the Armed Forces deployed for each country.”

That provision is codified as a Note to Section 122a of Title 10, which expressly states that its terms do not apply to reports that contain classified information, information exempt from disclosure under FOIA, or “any other type of information that the Secretary of Defense determines should not be made available to the public in the interest of national security.” 10 U.S.C. § 122a(b)(2).

*Public Approximate Troop Counts*

With respect to your first request under the heading of “Publicly Reported Approximate Troop Counts,”<sup>3</sup> DoD responds that as explained above, the criteria for calculating the “publicly reported approximate numbers” under the revised force management construct are not related to the DMDC country totals. OSD(P), rather than DMDC, prepares the quarterly reports to Congress pursuant to Section 1267 of the 2018 NDAA.

With respect to Plaintiff’s second request under the same heading,<sup>4</sup> DoD responds that its Public Affairs office consistently provides approximate troop counts to members of the media upon request, as explained in the May 2018 correspondence with Members of Congress produced in response to the FOIA request.

In addition, DoD’s Office of Inspector General publishes periodic reports to Congress, which include approximate troop counts, at <https://www.dodig.mil/Reports/Lead-Inspector-General-Reports/>. DoD also publishes its semi-annual reports to Congress regarding Operation Freedom’s Sentinel pursuant to Section 1225 of the 2015 NDAA, as amended. See [https://media.defense.gov/2020/Jul/01/2002348001/-1/-1/1/ENHANCING\\_SECURITY\\_AND\\_STABILITY\\_IN\\_AFGHANISTAN.PDF](https://media.defense.gov/2020/Jul/01/2002348001/-1/-1/1/ENHANCING_SECURITY_AND_STABILITY_IN_AFGHANISTAN.PDF) (July 2020); <https://media.defense.gov/2020/Jan/23/2002238296/-1/-1/1/1225-REPORT-DECEMBER-2019.PDF> (January 2020); <https://media.defense.gov/2019/Jul/12/2002156816/-1/-1/1/ENHANCING-SECURITY-AND-STABILITY-IN-AFGHANISTAN.PDF> (July 2019).

Very truly yours,

AUDREY STRAUSS  
United States Attorney for the  
Southern District of New York

By: /s/ Ilan Stein  
ILAN STEIN  
SARAH NORMAND  
Assistant United States Attorneys

---

<sup>3</sup> This request states: Concerning plaintiff’s request for the criteria for counting troops under both DMDC and FML (now revised force management construct): How do the criteria for calculating the “publicly reported approximate numbers” under current construct relate to the pre-December 2017 DMDC country totals?

<sup>4</sup> This request states: Concerning plaintiff’s second FOIA request for an explanation of the decision to stop publishing the number of military personnel assigned to Afghanistan, Iraq, and Syria: Has the government actually been providing to the public the unclassified approximate number submitted to Congress? For example, have members of the media been consistently able to receive them upon request?

86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2525/2709  
E-mail: ilan.stein@usdoj.gov  
sarah.normand@usdoj.gov