



DEPARTMENT OF THE NAVY  
COMMANDER NAVY INSTALLATIONS COMMAND  
716 SICARD STREET SE SUITE 100  
WASHINGTON NAVY YARD DC 20374-5140

5720  
Ser N9L/20U09  
Aug 11, 2020

Sent via email: [foia@americanoversight.org](mailto:foia@americanoversight.org)

Mr. Dan McGrath  
1030 15<sup>th</sup> Street NW  
Suite B255  
Washington, DC 20005

Dear Mr. McGrath:

SUBJECT: FREEDOM OF INFORMATION ACT REQUEST (FOIA) - DON-NAVY-2020-010993

This letter acknowledges receipt of your FOIA request, dated May 26, 2020, received at Commandant, Naval District Washington on or about June 1, 2020. Your request was forwarded to Commander, Navy Installations Command (CNIC) on July 27, 2020. You requested the following information:

- "1) All email communications (including email messages, email attachments, calendar invitations, and calendar invitation attachments) regarding potential arrangements for Secretary of State Mike Pompeo to receive military housing, including but not limited to housing on either the Potomac Hill campus or Fort Myer. Emails reflecting any negotiations, security considerations, cost discussions, and other logistics of the arrangement are responsive to this request.*
- 2) All email communications (including email messages, email attachments, calendar invitations, and calendar invitation attachments) regarding requests by Secretary Pompeo and his family related to any military residence, including but not limited to any Potomac Hill or Fort Myer residence and the condition thereof. Emails regarding the possibility or completion of any renovations, home improvements, furniture or décor purchases, or any other adjustments to the residence are responsive to this request.*
- 3) All email communications (including email messages, email attachments, calendar invitations, and calendar invitation attachments) regarding requests by Secretary Pompeo and his family related to staffing of their residence. Emails regarding hosting guests at the Pompeo residence, including any requests for staffing assistance or catering for such events, are responsive to this request.*
- 4) Records sufficient to identify housing costs projected to be incurred by the government as a result of Secretary Pompeo and his family living in any military housing, including but not limited to housing on either Potomac Hill or Fort Myer. Any assessments of*

*housing options and associated costs—such as expenses related to security, maintenance, upkeep, renovations, furniture, décor changes, etc.—are responsive to this request.*

*5) Records sufficient to identify actual housing costs incurred by the government as a result of Secretary Pompeo and his family living in military housing, including but not limited to housing on either Potomac Hill or Fort Myer. Any records of costs that have been incurred as a result of the choice for Secretary Pompeo to live in military housing—such as rental payments, security expenses, or costs related to maintenance, renovations, furniture, décor changes, etc.—are responsive to this request.*

*6) A copy of Secretary Pompeo's lease(s) for any military housing home he has occupied, including but not limited to any housing on Potomac Hill or Fort Myer, or other similar record reflecting Secretary Pompeo's agreement to pay for such residence."*

The enclosed record (legal opinion) is deemed responsive and is released subject to required redactions. The redacted portions of the record are exempt from disclosure under 5 U.S.C. § 552(b)(6). Exemption 6 protects the release of names and other personal identifying information of Department of Defense civilian employees, contractors, and military personnel, because it would constitute a clearly unwarranted invasion of personal privacy.

Additional records (numerous emails) deemed responsive were withheld as pre-decisional and deliberative in nature pursuant to 5 U.S.C. § 552(b)(5). Exemption 5 allows an agency to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency." *Id*; See *Nat'l Labor Relations Bd. v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975). We are withholding approximately 20 emails, in full, under Exemption 5 because they qualify to be withheld under the deliberative process privilege.

The deliberative process privilege protects the decision-making process of government agencies and encourages the "frank exchange of ideas on legal or policy matters" by ensuring agencies are not "forced to operate in a fish bowl." *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977). A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to (1) "assure that subordinates . . . will feel free to provide the decision maker with their uninhibited opinions and recommendations"; (2) "protect against premature disclosure of proposed policies"; and (3) "protect against confusing the issues and misleading the public." *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The deliberative process privilege protects materials that are both pre-decisional and deliberative. The privilege covers records that "reflect the give-and-take of the consultative process" and may include "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id*.

The materials that have been withheld under the deliberative process privilege of Exemption 5 are both pre-decisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among

5720  
Ser N9L/20U09  
Aug 11, 2020

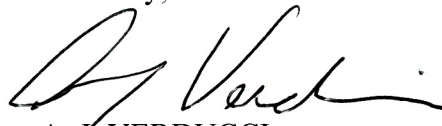
employees of the Department of the Navy. Their contents have been held confidential by all parties and public dissemination of this information would have a chilling effect on the agency's deliberative processes.

If you are not satisfied with this decision, you have the right to appeal this determination in writing to the General Counsel of the Department of the Navy, 1000 Navy Pentagon, Washington, D.C. 20350-1000. Your appeal must be postmarked within 90 calendar days from the date of this letter. A copy of your initial request and this letter must accompany the appeal. The appeal should be marked "FREEDOM OF INFORMATION ACT APPEAL" both on the envelope and the face of the letter. In order to expedite the appellate process and ensure full consideration of your appeal, your appeal should contain a brief statement of the reasons you believe this decision to be in error.

For this determination, you have the right to seek dispute resolution services from the DoD Navy Component FOIA Public Liaison, Mr. Chris Julka, at [christopher.a.julka@navy.mil](mailto:christopher.a.julka@navy.mil) or (703) 697-0031 or the Office of Government Information Services (<https://ogis.archives.gov/>).

The fees associated with the processing of your request have been waived. Please direct any questions to William Haskin via email at [william.haskin@navy.mil](mailto:william.haskin@navy.mil).

Sincerely,



A.J. VERDUCCI  
Counsel  
By direction



8 May 2018

From: [REDACTED], Office of Counsel, HQ CNIC  
To: [REDACTED] Counsel, Office of Counsel, HQ CNIC

Subj: Informal Request for GFOQ Housing, Secretary of State

1. *Purpose.* You have asked for my opinion as to whether the Navy may furnish General and Flag Officer Quarters (GFOQ) in the National Capital Region to the Secretary of State.
2. *Facts.* The Navy has been contacted—apparently through informal channels—by security officials of the Department of State (DOS), asking whether arrangements may be made to secure Navy GFOQ for the Secretary of State. No information has been provided regarding whether DOS intends to fund and procure the housing for the Secretary, or if a lease of the GFOQ is being sought by the Secretary in his personal capacity.
3. *Opinion.* The question of permitting the Secretary of State—or any other member of the Executive Cabinet—to occupy Navy Flag housing in the Washington D.C. area is problematic. A number of factual, legal, fiscal, and ethical issues must be examined and resolved prior to initiating any effort to assist the Secretary of State to obtain GFOQ. I have identified several of these issues in the discussion below, but a further analysis and resolution of these matters must be conducted within the Department of State Office of the General Counsel, given that they have more ready access to the facts needed to answer the issues and questions raised by the request.
4. *Discussion.*

**a. Practical Considerations**

- (1) *Lack of GFOQ Inventory.* At the outset, it should be noted and understood that the Navy's inventory of General Officer and Flag Quarters (GFOQ), both wholly Navy-owned and those administered under a Public-Private Venture (PPV) partnership, is barely adequate to provide shelter to the uniformed officers entitled by law to such housing. In the National Capital Region, there is a waiting list of Navy Flag Officers who have yet to be assigned housing in a GFOQ.
- (2) *Lack of Clarity Regarding Requirements.* In addition, the request by DOS fails to clearly specify the size and location of quarters required by the Secretary of State. It can be safely assumed, however, that DOS is probably seeking a family residence commensurate to that currently occupied by the most senior Navy leadership in the Capital Region. These residences are designated as "Special Command Positions" under DOD Directive 5105.53, Paragraph 4.15; CNIC Instruction 11103.3b, Enclosure 6. Such residences are extremely scarce, are specifically aligned to identified Navy billets (such as Chief of Naval Operations; Commandant of the Marine Corps), and are all currently occupied.

(3) *Eligibility Does Not Constitute Availability.* Based upon these practical considerations, the simple fact is that the Navy has no available GFOQ available for occupancy by the Secretary of State. Even to the extent that the Secretary of State might be eligible to stay in Government quarters (which, as discussed below, is questionable), it must be understood that “[e]ligibility for a Privatized GFOQ does not ensure availability or assignment to a particular unit.” CNICINST 11103.3B, Enclosure 3, Paragraph 4.

(4) *Other Government Quarters.* To the extent that the Secretary of State might seek military GFOQ in the National Capital Region, and assuming a government housing arrangement is permitted under the law, it may be observed that both the Army and Air Force have a number of installations in the area. Accordingly, it is unclear why DOS has come directly to the Navy for this requirement rather than coordinating the matter with DoD.

## **b. Legal Considerations**

In addition to the fact that the Navy does not have an available GFOQ to offer to the Secretary of State, there are also a number of legal considerations that must first be resolved prior to initiating any action on this request.

(1) *Statutory Preemption.* DOS Office of Counsel may wish to consider whether the operation of 10 U.S.C. § 2838, and the intent of Congress reflected therein, excludes the Secretary of State, or any other member of the President’s Cabinet, from the exclusive benefit conferred upon the Secretary of Defense. This statute specifically grants to the Secretary of Defense—and only the Secretary of Defense—the privilege to live in DoD GFOQ in the Washington D.C. area at a rate specifically identified in the statute of 105% of the monthly rate of basic allowance for housing of a General or Flag Officer. The clear language of the statute raises the well-established legal principle of *inclusio unius est exclusio alterius* (the inclusion of one is to the exclusion of all others). Since Congress clearly and explicitly identified only the Secretary of Defense as an eligible resident in housing usually reserved for military personnel, and that grant was unquestionably exclusive to the Secretary of Defense, the plain language of the seems to rule out similar treatment to other members of the President’s Cabinet.

(2) *Fiscal Issue.* Although military personnel are provided housing entitlements under the law, such does not generally apply to civilians on the government’s payroll unless specifically and particularly authorized (such as the President’s occupancy of the White House and the Vice President’s residence at the Naval Observatory). Given that obtaining and paying for housing is a personal responsibility of civilian employees of the Government, DOS Office of Counsel may need to consider whether the agency has been authorized by law and provided appropriations by Congress to expend time and agency resources to locate and secure personal housing for the Secretary of State. To the extent it is determined that no such authority or funding exists, DOS could potentially be in violation of the Antideficiency Act, 31 U.S.C. § 1341, by expending funds while engaging in an unauthorized activity.

(3) *Contractual Issue*. If it is determined that DOS is authorized to locate and arrange for the Secretary of State's personal housing, DOS Office of Counsel will need to determine if the agency can, or should, enter into a contract for lease of premises on the Secretary's behalf, and if so, whether funding for such a lease is available.

### **c. Financial Considerations**

Because the Secretary of State is not a member of the Armed Services, any housing services rendered to him will not have been provided for in the Navy's budget. Accordingly, all costs must be recovered. See generally, DoD FMR Volume 11A, Chapter 1. Indeed, failure to recover these costs, particularly if DOS is the funding entity, would result in a violation of Federal fiscal policy, since it would amount to an improper augmentation of the DOS budget. See, General Accounting Office, *Principles of Federal Appropriations Law* ("Redbook"), Third Edition, Volume II, Chapter 6(E).

(1) *Fair Market Rent*. While a special rental rate is statutorily authorized for the Secretary of Defense, no such provision of law authorizes the Secretary of State to reside in Government quarters at a capped rate. There are authorities that permit the assignment of housing to "civilian equivalents" to General and Flag Officers, but it is not clear that "civilian equivalents" encompasses personnel in non-DoD agencies. See generally, CNICINST 11103.3B, Paragraph 1; Paragraph 3(d); SECNAVINST 11101.73B, Paragraph 3(d). Unlike Flag Officers or civilian equivalents in the Navy and Department of Defense, the Secretary of State is not assigned to work in, for, or directly in support of the military agencies, and thus does not fall under the ambit of the DoD or Navy budget. Unlike, for instance, a DOS Political Advisor (POLAD), the Secretary of State does not report to, work for, or specifically and exclusively support a military Command. Accordingly, the Navy (or its PPV partner) would be required to assess rent at fair market value (indeed, if the PPV partner assessed a lower rental rate than fair market value, there would be a presumption that an improper gift is being made to the Secretary by a non-Federal source). For a GFOQ in the Washington D.C. area, fair market value rent will entail a substantial sum.

(2) *Maintenance Fees*. The Navy has a duty to properly maintain GFOQs, and most of these structures are historic buildings, requiring substantial expenditures for their upkeep. OPNAVINST 11101.45, Paragraph 3(b). The annual expenditures to maintain GFOQs are limited to \$35,000 (Under 5,000 square feet) and \$50,000 (Over 5,000 square feet), but exceeding this cap is not uncommon, and the Navy routinely submits reports to Congress regarding Over the \$50,000 Budget Cap Expenditures. CNIC Instruction 11103.3B, Enclosure 3. These costs can be generally broken down into three categories, each of which would entail additional charges to DOS or the Secretary of State:

- Utilities, including electrical, water, gas, and security monitoring.
- Expense items, such as lawn and garden maintenance, pest and termite control, and interior painting.
- Capitalized expenses, such as replacement of appliances, repair of roof, maintenance of HVAC and mechanical systems.

Of these three categories, the expenses of the first two would be the direct responsibility of the non-military tenant. The last would involve reimbursement based upon the incremental lifecycle costs of the materials, item of equipment, or other improvement. In the case of GFOQs operated by the PPV partner, the expenditure of funds for expenses and capital improvements does not come directly from the Navy budget. However, expenditures on GFOQs for maintenance and improvements directly impact the Navy Housing Operating Reserve Account (ORA), where monies are deposited for the overall improvement of all Navy Family Housing in the region. To the extent that the property inhabited by the Secretary of State will incur costs that negatively impact the accounts that support the upkeep and improvement of all regional Navy family housing—including that of junior officers and enlisted families—those costs should be recaptured and reimbursed by the non-DoD resident. Of course, the PPV partner could load these additional capital improvement expenses into the fair market rent formula, but based on CNIC’s experience in reviewing GFOQ requests to exceed the budget cap, it is reasonable to conclude that anticipating and formulating these costs based on only one unit (as opposed to spreading capital costs across the entire region) would present a formidable challenge.

*(3) Administrative Fees.* Fair market rent, utilities, expense items, and incremented capital investments, mentioned above would not necessarily be the sum total of required reimbursements. Additional administrative costs, incurred in managing, operating, and supervising the property, would also be involved. Although most Navy family housing units, including GFOQs, are directly managed by PPV partners from the private sector, the Navy plays a significant role in oversight, inspection, coordination, and administration, particularly in regards to significant GFOQ structures in the National Capital Region. For instance, Naval Facilities Engineering Command (NAVFAC) and Commander Navy Installations Command (CNIC) personnel, including engineers, real estate personnel, housing professionals, contracting personnel, and Navy attorneys routinely engage in work relating to PPV GFOQs. Since all costs must be reimbursed to the Navy, DOS or the Secretary of State would be responsible to pay for the work attributable to the unit in question.

*(4) Accounting Costs.* It is likely that the Navy would need to segregate the recordkeeping relating to the quarters occupied by the Secretary of State in order to properly account, and invoice, for the GFOQ in question. The costs associated with the setup and operation of this stand-alone process, including labor hours of housing personnel who collect and track such information, would also be attributable to the tenant and would need to be reimbursed.

#### **d. Ethical Considerations**

(1) *Use of Government Resources.* DOS Office of Counsel will need to determine whether the effort to obtain GFOQ housing for the Secretary of State constitutes an official agency act within the scope of their authority and funding, or whether the search for housing is more properly characterized as a personal matter of the Secretary. Subject to this determination, the Office of Counsel will then be able to determine, based upon their agency's rules of ethics, together with the U.S. Government Standards of Ethical Conduct For Employees of the Executive Branch, 5 C.F.R. § 2635.702 & 705, whether it is proper to permit the use of employee time and agency resources to locate and obtain housing for the Secretary of State.

(2) *Appearance of Impropriety.* The DOS Office of Counsel will require an opportunity to consider to what extent there might be a negative public perception relating to a civilian Secretary of State displacing a uniformed member of the military in a tight housing market. In accordance with CNICINST 11103.3B, Enclosure 3, Paragraph 5, Flag Officers are referred to Privatized GFOQs within each Navy Region. As mentioned earlier, there is a housing waiting list of Navy Flag personnel. DOS Office of Counsel may wish to consider whether placing the Secretary of State in Navy Flag quarters, while actual Navy Flag Officers—who are unquestionably entitled to such housing—continue to wait for assigned quarters, would raise the specter of the appearance of impropriety proscribed by the Standards of Ethical Conduct, 5 C.F.R. § 2635.101(b)(14).

5. *Conclusion.* Based upon the foregoing, I strongly recommend that the DOS action officer seeking information about the availability of a Navy GFOQ for the Secretary of State first coordinate the action with the DOS Office of General Counsel in order to consider and resolve the matters discussed above.

6. *Point of Contact.* I can be reached at Telephone: [REDACTED]; Email:

[REDACTED]

[REDACTED]

Senior Associate Counsel