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*poster by Fred Moore for the
National Resistance Committee*

Resisters.info

Edward Hasbrouck
1130 Treat Avenue
San Francisco, CA 94110

+1-415-824-0214
edward@hasbrouck.org

<https://resisters.info>

27 January 2021

Chief, Special Access and FOIA Staff (RD-F), Room 5500
National Archives and Records Administration
8601 Adelphi Rd.
College Park, MD 20740-6001

(by e-mail to <Specialaccess__foia@nara.gov>)

FOIA REQUEST

Expedited processing requested

Fee benefit requested

Fee waiver requested

Dear FOIA Officer:

This is a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

I request copies of all records of the National Archives and Records Administration (NARA) of or pertaining to the current or past status, holding, transfer, legal custody, or responsibility for responding to FOIA requests with respect to any records previously held by the National Commission on Military, National, and Public Service (NCMNPS), including but not limited to:

(1) Any records of or pertaining to the ownership, custody, holding, or past or possible future acquisition, disposition, or transfer to or from NARA of any records formerly held by the NCMNPS.

(2) Any opinions, assessments, reports, decisions, directives, “memoranda for the record”, instructions to staff or components, or records of investigations or research concerning the status, legal custody, ownership of, or authority over, any records formerly held by the NCMNPS.

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(3) Any records of or pertaining to NARA's legal authority and/or legal duties with respect to any records formerly held by the NCMNPS, including any records of or pertaining to the existence, nonexistence, scope of, or legal basis for NARA's authority for disposition or transfer of such records.

(4) Any records of or pertaining to what agency or entity was, is, or might in the future be responsible for responding to FOIA requests for any records formerly held by the NCMNPS.

(5) All e-mail messages to, from, or within NARA containing any of the following case-insensitive text strings (not including the quotation marks) anywhere in the message headers or body, and all messages that are part of any "thread" of messages and replies containing any such message:

"National Commission on Military, National, and Public Service" (with Oxford comma)

"National Commission on Military, National and Public Service" (without Oxford comma)

"inspire2serve"

"NCMNPS"

"National Commission on Service"

(6) Any general guidance, recommendations, policies, procedures, reports, opinions, directives, "memoranda for the record", instructions to staff or components, or records of investigations or research concerning the status, legal custody, or ownership of, or authority over, records formerly held by temporary Federal agencies following the expiration of the legal mandate for any such agency.

(7) All attachments to any e-mail message responsive to any portion of this request described in clauses 1-6 above, regardless of whether any such attachment is stored within the message or as a separate file.

(8) The entirety of any document or electronic file containing any records responsive to any portion of this request described in clauses 1-7 above (so that no portion of any document or file containing any responsive portions should be withheld as "unresponsive").

(9) Any and all records of internal metadata contained in files responsive to any portion of this request described in clauses 1-8 above.

(10) All records of filesystem metadata pertaining to files responsive to any portion of this request described in clauses 1-8 above, including but not limited to records of (a) the filename of each responsive digital record, as it was found on a NARA, contractor, or service provider's workstation, server, storage device, or media; (b) the size of each file in bytes, KB, MB, or GB; (c) the name or other label or identifier of the workstation, server, storage device, or media on which the file was found; (d) the path to the file in the filesystem on which it was found; and (e) the file date(s) as recorded in the file, in that filesystem, and/or in any label(s) on physical devices or storage media.

Locations, offices, or subdivisions of NARA where responsive records are likely to be held, and which should be included in the search for responsive records, include, but are not limited to, the offices of NARA's General Counsel, Chief FOIA Officer, FOIA Public Liaisons, and Office of

Government Information Services (OGIS), as well as any NARA offices which do or did receive, hold, or have custody of any records previously held by the NCMNPS.

I request that all responsive records be provided in text-searchable, unencrypted electronic form.

I request that all records of e-mail messages be produced, in order of preference, in the form and format of “.mbx” files (most preferred), “.pst” files, or “.eml” files (least preferred), with each mailbox as a separate file, preserving all internal folders and sub-folders and including all attachments, in accordance with NARA recommendations for preferred e-mail file formats in *Appendix A to NARA Bulletin 2015-04*, <<https://www.archives.gov/records-mgmt/bulletins/2015/2015-04-appendix-a.html>>.

If e-mail messages are not readily reproducible as “.mbx”, “.pst”, or “.eml” files, or for any other records held in electronic form, I request that each such record be provided in the form of a discrete file with the same name and file format as the file is held by or on behalf of NARA, as a complete bitwise digital copy of the original word processor file, PDF file, e-mail file, or other digital file, including any file headers, embedded metadata, and all other file content.

I specifically request that you not create new documents or files in response to this request; not create “documents” such as page-view images or print views from digital records; not substitute such newly-created “documents”, images, or views for requested records held by you as digital files; and not split one file into multiple files or combine multiple files into one file.

In reporting on the quantities of records found, produced, and/or withheld, I request that you report quantities of digital data in KB, MB, TB, etc., and/or in counts of ASCII characters for ASCII data, not report files as “documents” if they are not in fact documents, and not report file sizes or quantities of records in “pages” if the records consist of files that are not stored in paginated formats.

If all or any part of this request or searches for responsive records are referred or delegated to other agencies, contractors, offices, or staff, I request that any referral, delegation, or search tasking instructions specifically include my request with respect to the form and format in which records are to be produced, so that records are not inadvertently converted to, or produced in, other forms or formats.

If you believe that you could respond to this request more quickly if responsive records are produced in a different form or format, please call me immediately at +1-415-824-0214 to discuss your proposed form of production and possible modification of this request to expedite your response.

Please waive any applicable fees. Release of this information is in the public interest because it will contribute significantly to public understanding of government operations and activities, including operations and activities of both NARA and the NCMNPS.

Acquiring, transferring, disposing of, and assessing the ownership and legal custody of records and the responsibility for responding to FOIA requests for particular records – the subject of the requested records – are central to NARA’s “operations and activities”. In addition, the information requested will “contribute significantly to public understanding of government operations and activities” by enabling members of the public to understand which agency or department is responsible

for responding to FOIA requests for records formerly held by NARA. Being able to identify which agency or department is responsible for responding to FOIA requests for particular records is, of course, the essential prerequisite to exercising any of the rights granted by the FOIA statute. If agencies could transfer legal custody or responsibility for responding to FOIA requests from one agency to another without disclosing what agency has acquired responsibility for responding to FOIA requests, FOIA rights would be rendered meaningless. Ownership records are essential to FOIA rights.

The NCMNPS was a temporary agency, and its statutory mandate expired 18 September 2020.

I made several FOIA requests to the NCMNPS. Many of the records I requested were never produced by the NCMNPS, and I was given notice of the denial of many of my requests too late to allow me to exercise my right to appeal those denials before the NCMNPS was dissolved. A week before the expiration of its mandate, the NCMNPS, although still subject to FOIA, began illegally refusing to “accept” FOIA requests even when they were delivered to, and actually received by NCMNPS staff at, the postal and e-mail addresses designated in the NCMNPS FOIA regulations. Many records vital to public understanding of the activities and operations of the NCMNPS thus remained undisclosed to the public at the expiration of the NCMNPS’s mandate.

On 16 September 2020, shortly before the dissolution of the NCMNPS on the expiration of its mandate, I was told as follows by Brigadier General Joseph Heck, Chair of the NCMNPS:

“[T]he Commission’s permanent records will be transferred to the National Archives Records Administration (NARA), and many of the Commission’s temporary records are subject to destruction under its published records schedule at the end of the Commission’s existence. Out of an abundance of caution, NARA intends to retain these temporary records until December 7, 2020, for the purpose of allowing you to address any further legal rights related to this specific FOIA request. Questions about this matter may be addressed to NARA’s FOIA Public Liaison Gary M. Stern, at garym.stern@nara.gov.”

This intention was confirmed to me by Mr. Stern of NARA that same day, 16 September 2020:

“I can also confirm that, per the statement in Joseph Heck's September 11, 2020, FOIA appeal response letter to you, NARA is currently in the process of taking interim custody, for a period of approximately 90 days, of the temporary records of the Commission that are appropriately scheduled for disposal upon the termination of the Commission on September 18, 2020. As Mr. Heck's letter states, NARA is doing so ‘for the purpose of allowing you to address any further legal rights related to this specific FOIA request,’ which include your right to seek judicial review. Accordingly, NARA will not be accepting any new FOIA requests with respect to this set of records.”

Mr. Stern provided no indication of the basis on which NARA intended not to “accept” any new FOIA requests for these records – nor is there any such basis, so far as I can tell and despite my diligent attempts to obtain an explanation from Mr. Stern or anyone at NARA. “Acceptance” of a FOIA request is not an act mentioned in the FOIA statute, much less a discretionary act. If a FOIA request for records held by an agency is received at the address designated in the agency’s FOIA regulations, the agency is required to search for and produce non-exempt records in accordance with FOIA.

Accordingly, believing that the records formerly held by the NCMNPS were being “transferred to” and would be “retained” in the “custody” of NARA, as I had been told by the NCMNPS and NARA, I submitted a FOIA request to NARA for certain of these records on 21 September 2021.

As Mr. Stern had threatened, NARA – apparently unlawfully, and without disclosing any basis for this action – refused to “accept” my request of 21 September 2020 with respect to some of the requested records, and unilaterally narrowed the scope of my request to include only certain records, on the basis of determinations by NARA and/or the former NCMNPS as to their intended retention period (and despite the fact that the records unilaterally excluded by NARA from the scope of its processing of my request were in fact, at the time of the request and its processing, in the actual control of NARA).

If NARA has come to believe, contrary to Mr. Stern’s earlier statements that NARA would be “taking custody of” and would “retain” these records, either (a) that NARA never actually acquired legal custody of these records, but that legal custody of them had actually passed to some other agency on the dissolution of the NCMNPS, or (b) that custody, although transferred to NARA, had since been transferred to some other agency, NARA would have been required by FOIA (a) to refer that portion of my request of 21 September 2020 to which NARA believes that potentially responsive records might be in the “legal custody” of another agency to that agency, and (b) knowing that these records – which NARA believes to be in the lawful custody of another agency although in the actual control of NARA – are potentially responsive to my pending FOIA request of 21 September 2020, not to delete, destroy, or dispose of any such records while that request is pending.

But I have received no notice of any referral of any portion of my request to NARA of 21 September 2020 to any agency outside NARA. Nor have I received any clue as to how or why NARA might believe simultaneously (a) that NARA has legal authority to delete, destroy, or dispose of records, but (b) that NARA does not have “legal custody” of these records or for some other reason is responsible neither for responding to FOIA requests to which these records might be responsive, nor for referring such requests to the agency NARA believes to be responsible for responding to them.

Instead, on 14 December 2020, Mr. Stern informed me, to my complete surprise (despite the completely false prefatory clause in Mr. Stern’s e-mail message, “as has already been explained to you”), that the “temporary records received by NARA from the NCMNPS that were *not* 'subject to a retention period beyond the termination of the Commission pursuant to the General Records Schedule (GRS)' are not in NARA's legal custody, and NARA will not respond to any FOIA requests for those records.... NARA will hold this set of the Commission's records for an additional 60 days, or until February 15, 2021.... We do not intend to respond to any further queries about this matter.”

Since then, I have been diligently but unsuccessfully seeking the assistance of Mr. Stern in his capacity as FOIA Public Liaison (in addition to those of General Counsel and Chief FOIA Officer), and the mediation services of NARA’s Office of Government Information Services (OGIS) in obtaining the assistance of the FOIA Public Liaison, in identifying the current legal custodian and/or agency responsible for responding to FOIA requests for these records, if not NARA.

Despite the requirement of the FOIA statute that the assistance of the FOIA Public Liaison and OGIS mediation services be “available” to FOIA requesters, but in accordance with the apparently

unlawful threat in Mr. Stern's e-mail message of 14 December 2020, neither Mr. Stern nor OGIS has responded to repeated e-mail and voicemail messages requesting their assistance in identifying the proper agency to which to submit FOIA requests for these records.

I have thus exhausted every possible "informal" means, short of a formal FOIA request for NARA records, of identifying the current legal custodian and agency responsible for responding

The records responsive to the present request are thus *essential* for myself or any other potential FOIA requester wanting to obtain access to certain of the the records formerly held by the NCMNPS, in order to determine the proper agency to which to submit requests for those records.

The records responsive to the present request are also critical to understanding whether NARA believes (a) that there are some circumstances in which records are in the custody and/or actual control of NARA or another agency, but that agency is not required to respond to FOIA requests for those records; (b) that there are some circumstances in which NARA or another agency may have authority to delete, destroy, or dispose of records, but not be required to respond to FOIA requests for those records; (c) that there are some circumstances in which records are held by a Federal agency, but no agency is responsible for responding to FOIA request for those records, and/or (d) that agencies can lawfully engage in a "shell game" in which undisclosed transfers of legal custody and/or responsibility for FOIA processing of potentially responsive records from, one agency to another can be used as a *de facto* "pocket veto" to effectively blackhole requests for such records. NARA's opinions on such matters are of vital importance to FOIA processing practices by all agencies, and to public understanding of them.

As a representative of the news media, I am gathering information on policies, procedures, and practices that is of current interest to the public as part of widespread public interest in the activities of NARA, the NCMNPS, and the exceptionally controversial subjects of the draft and Selective Service.

I am an award-winning freelance journalist, and the publisher of an informational Web site at <<https://resisters.info>> which is one of the most comprehensive and widely consulted sources of news, analysis, and background and reference information – including information obtained from the NARA and the NCMNPS in response to my FOIA requests and reporting, analysis, and commentary based on this information and other sources – about the NCMNPS and the issues of the draft, draft registration, compulsory "service", and Selective Service. The information obtained in response to this request will be made available to the public through publication of significant records on the Web, along with reporting, analysis, and commentary informed by the records released in response to this request.

If copying fees are not waived, please provide me with the opportunity to inspect and make my own copies of the responsive records. In light of the substantial risk of COVID-19 infection involved in traveling from San Francisco to College Park, Maryland, and the fact that most of the responsive records are likely held in digital form, I believe that it would be appropriate to provide for remote access and copying.

Please process this request on an expedited basis. I am a person primarily engaged in disseminating information to the public as a writer and journalist. There is an urgency to inform the public about Federal Government activity.

The statutory criteria for expedited processing are contained in 5 U.S. Code § 552 (a)(6)(E):

“(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records — (I) in cases in which the person requesting the records demonstrates a compelling need;...

“(v) For purposes of this subparagraph, the term “compelling need” means — ...

“(II) with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

NARA’s function is to hold and make available records, including records created by other Federal agencies. NARA’s activities include determining ownership of records and providing guidance for use by all Federal agencies concerning FOIA matters, including determinations of ownership and agency responsibilities for responding to request for records.

The purpose for the creation of the NCMNPS was to carry out or commission research and make recommendations to Congress, the President, and the public, which it did.

Congress is currently considering legislative proposals related to those recommendations, and the Supreme Court has been asked to review a decision in a case in which the NCMNPS was discussed, and records of its activities introduced, at every stage of the litigation.

The records responsive to this FOIA request will be essential for Congress, courts, and the public to understand the basis for the recommendations of the NCMNPS, and to assess the weight which should be given to any or all of those recommendations, now that the NCMNPS has dissolved.

Records from the NCMNPS are essential to avoid having the public, Congress and the courts be forced to rely on purely conclusionary reports and recommendations by the NCMNPS.

For example, records of research conducted or commissioned by the NCMNPS, including the terms of reference, questions assigned, limitations placed on research, assumptions made as the basis for research, research methodologies, who conducted the research (and what biases or preconceptions they may have had), and the sources consulted will be important to public understanding. None of the NCMNPS’s research records were disclosed by the NCMNPS prior to its expiration.

In addition, records of the NCMNPS’s are likely to be highly probative of the credibility that Congress should afford to NCMNPS witnesses and the NCMNPS’s report, and the weight that they should be given in Congressional decision-making.

There is thus an urgency to inform the public about the activities of the NCMNPS and which are relevant to ongoing and imminent litigation and Congressional debate.

As long as NARA fails to refer my outstanding request to whatever other agency it believes is responsible for responding to it, these records from the NCMNPS cannot even be requested until that other agency is identified, for which the NARA records responsive to the present request are *essential*.

Time is of the essence. Although Mr. Stern's threat of 15 December 2020 not to "hold" certain records received by NARA from the NCMNPS beyond 15 February 2021 appears on its face to be unlawful – if NARA holds and believes that it has authority to dispose of these records, NARA also has the duty *not* to dispose of them as long as it knows that a FOIA request to which they are potentially responsive is pending – that threat must nonetheless be taken seriously.

Without expedited processing of the present request, neither I nor other potential FOIA requesters might learn what agency NARA believes to have legal custody of, or to be responsible for responding to FOIA requests for, these records, until after 15 February 2021. By that time, NARA might have expunged, or authorized the expungement of, some or all of these records, forever hiding them from the public and excluding them from consideration by Congress and the U.S. Supreme Court.

Rep. Jackie Speier, Chair of the Subcommittee on Military Personnel of the House Armed Service Committee, stated in July 2020 that she plans to hold hearings on the issues raised by the report and recommendations of the NCMNPS "within a year". See my article, "2021 calendar of events related to Selective Service", <<https://hasbrouck.org/draft/calendar.html>>.

A petition for *certiorari* in *National Coalition for Men v. Selective Service System*, quoting from and citing my Web site in the petition as the source for relevant records released by the NCMNPS in response to some of my FOIA requests, was filed with the U.S. Supreme Court on 8 January 2020. See my article, "Supreme Court asked to review Constitutionality of current male-only draft registration requirement", 8 January 2021, <<https://hasbrouck.org/blog/archives/002587.html>>. Briefing with respect to *certiorari*, including preparation of briefs by *amici curiae*, is ongoing. Other records that the NCMNPS withheld from release, including in particular records which the NCMNPS designated as not to be retained and which may undermine the credibility or weight to be given to the NCMNPS report and recommendations or specific claims in them, are likely to be germane to briefing and argument in the Supreme Court. Time is of the essence to obtain those records from whatever agency is in legal custody of them in time for them to be submitted (by parties and/or *amici*) to, and considered by, the Supreme Court, with respect to *certiorari* and on the merits if *certiorari* is granted.

Time is also of the essence because, if legal custody of some records formerly held by the NCMNPS is held by some agency other than NARA and that agency has not been informed that those records are potentially responsive to the FOIA request I submitted to NARA on 21 September 2020, that other agency might delete, destroy, or dispose of those records at any time.

I have no commercial interest in this information. My reporting on this issue, while carried out in my capacity as a professional journalist, has been unpaid and not undertaken for profit.

If this request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal the adequacy of the search for responsive records or your decision to withhold any information, to deny a waiver of fees, or to deny expedited processing.

Pursuant to NARA regulations at 36 CFR § 1230.3(b), no responsive or *potentially* responsive records may be destroyed, deleted, or disposed of while this request is pending.

Please respond as soon as possible to confirm your receipt of this request, to advise the reference number assigned to this request and the expected date of completion of action with respect to this request.

I look forward to your complete reply within 10 days, as the FOIA statute and NARA's FOIA regulations require.

To avoid unnecessary delays, please contact me immediately by telephone at +1-415-824-0214 in San Francisco should you have any questions regarding this request.

Because the assistance of the FOIA Public Liaison in formulating this request has unlawfully been denied to me, I have been forced to frame this request broadly enough to be sure that it includes all records potentially relevant to identifying the proper agency from which to request records of the former NCMNPS before they might be irretrievably destroyed. I will be happy to consider narrowing this request if you can tell me what narrower request would more quickly identify the agency or agencies, if not NARA, which currently holds or is responsible for responding to FOIA requests for records formerly held by the NCMNPS. I request an opportunity to confer with the FOIA Public Liaison, as is my right pursuant to the FOIA statute, concerning possible narrowing of this request.

NARA has designated different addresses for submission of FOIA requests for different categories of records. In an abundance of caution, and in accordance with NARA's FOIA regulations, I am sending a copy of this request to NARA's main FOIA address, <foia@nara.gov>, to forward to whichever subsidiary office(s) are appropriate. ("If you are unable to determine where to send your request, send it to the NARA FOIA Officer (NGC), Room 3110, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001. That office will forward your request to the office(s) that have the records you are seeking.")

I certify under penalty of perjury that the statements above are true and correct to the best of my knowledge and belief.

Executed 27 January 2021 in the City and County of San Francisco, CA

Edward Hasbrouck

cc: NARA FOIA Officer (NGC), Room 3110
National Archives and Records Administration
8601 Adelphi Rd.
College Park, MD 20740-6001
by e-mail to <foia@nara.gov>