U.S. Department of Justice

National Security Division

Washington, D.C. 20530

NSD FOI/PA #11-171

MAY 27 2011

Mr. Grant F. Smith
Director of Research
IRmep
P.O. Box 32041
Washington, D.C. 20007

Dear Mr. Smith:

While processing your September 23, 2010, Freedom of Information Act (FOIA) request, the Office of Information Policy of the Department of Justice located two records and referred them to the National Security Division (NSD) of the Department of Justice for processing. NSD received this referral on May 12, 2011.

We have reviewed these items and have determined to release them in full. Copies are enclosed.

Sincerely,

Kevin Tiernan
Records and FOIA Unit Chief

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RECEIVED JUSTICE PARDON ATTORNEY

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CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

FRANKFURT MUSCAT
HOUSTON NEWARK
LONDON PARIS
MEXICO CITY STAMFORD
MILAN WASHINGTON

ATTORNEYS AND COUNSELLORS AT LAW
101 PARK AVENUE
NEW YORK, NEW YORK 10178-0061

TELEPHONE 212-696-6000
FACSIMILE 212-697-1559
VOICE MAIL 212-696-6028
E-MAIL INFO@CM-P.COM
INTERNET WWW.CM-P.COM

Writers' Direct:
Telephone 212-696-6192
E-Mail: ELauer@curtis.com

Telephone 212-696-6067
E-Mail: JSemmelman@curtis.com

January 28, 2008

EXECUTIVE SECRETARIAT 2008 MAR 18 AM 10:04

RECEIVED DEPT OF JUSTICE

Via Federal Express
Hon. Michael Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: Request for Security-Cleared Attorneys' Access to Sentencing Docket For Purposes of Clemency Application on Behalf of Jonathan Pollard

Dear Mr. Attorney General:

We are pro bono counsel for Jonathan Pollard, now serving his twenty-third year of a life sentence for delivering classified information to the State of Israel. Mr. Pollard was arrested November 21, 1985, and sentenced to life in prison on March 4, 1987. Mr. Pollard has exhausted all of his remedies in the U.S. court system. His sole remaining avenue of relief from his life sentence is an application for executive clemency.

We write to request, most respectfully, that you make a determination that we have a "need to know" the contents of portions of the court sentencing docket marked classified and placed under seal in 1987 in Mr. Pollard's case, *United States v. Jonathan J. Pollard*, Crim. No. 86-0207 (D.D.C.), and that you so inform the United States Attorney for the District of Columbia, so that he can enter into an appropriate stipulation to that effect.

Before President Bush leaves office, we intend to make an application for executive clemency on Mr. Pollard's behalf. We believe that the President's consideration of that application would be assisted in significant respects if we – Mr. Pollard's security-cleared counsel – were afforded access to about forty pages of material filed with the court under seal, pursuant to a Protective Order, as part of the original sentencing docket in 1987. These forty pages consist of extracts from four documents reviewed at the time by Mr. Pollard and his then-counsel, and filed in redacted form in the public court docket. In addition, a fifth sealed document consists of the minutes of a sidebar conference that took place during the course of Mr. Pollard's sentencing on March 4, 1987.

The Materials

The materials at issue consist of portions of five documents:

- Declaration of Secretary of Defense Caspar W. Weinberger, filed with the Court Security Officer January 9, 1987 (the "Weinberger Declaration").
- Defendant Jonathan J. Pollard's First Memorandum in Aid of Sentencing (undated).
- Defendant Jonathan J. Pollard's Second Memorandum in Aid of Sentencing, served February 27, 1987.
- Government's Reply to Defendant's Sentencing Memorandum, served March 3, 1987.
- Page 57 (sidebar conference) of the minutes of sentencing dated March 4, 1987.

The redacted portions of these materials comprise approximately forty pages. Although shortly before the sentencing on March 4, 1987, Mr. Pollard and his then-attorney were permitted to read the first four documents (and even authored two of the documents), no one representing Mr. Pollard has since been allowed access to any these materials by the DOJ.

The Projections In The Weinberger Declaration

The public court docket materials indicate that prior to sentencing, then-Secretary of Defense Caspar W. Weinberger projected, in the Weinberger Declaration submitted to the sentencing judge, the possible harm that might arise as a result of Mr. Pollard's conduct. This is evidenced, for example, by Mr. Pollard's then-counsel's response to the Weinberger Declaration:

> Secretary Weinberger nowhere alleges that the United States has lost the lives or utility of any agents, that it has been obligated to replace or relocate intelligence equipment, that it had to alter communication signals, or that it has lost other sources of information, or that our technology has been compromised. *Indeed, the memorandum only discusses the possibility that sources may be compromised in the future, thus requiring countermeasures.*

(Defendant Jonathan J. Pollard's Second Memorandum in Aid of Sentencing, served Feb. 27, 1987, at p. 5) (underlining in original; italics added).

The prosecution responded with these words:

> [D]efendant argues that the Court should disregard the reasoned concerns of a U.S. cabinet member as to the real *potential for further injury* resulting from defendant's crimes. In short, defendant says that if the government cannot state with certainty that all the damage which could reasonably occur in fact has occurred before sentencing, an espionage defendant should not be held accountable for *potential harm* which he alone has wrought.

> . [D]efendant does not address the *specific, reasoned projections of damage resulting from the compromise of these documents which the Weinberger Declaration contains.*

(Government's Reply to Defendant's Sentencing Memorandum, served Mar. 3, 1987, at p. 19) (emphasis added).

While the public record therefore reflects that the Weinberger Declaration contained specific projections of potential future harm, the public record does not disclose what those projections were. The specific projections were marked classified and were placed under seal pursuant to a Protective Order.

The Protective Order

The Protective Order, dated October 24, 1986, contemplated future access by security-cleared non-governmental persons (such as successor counsel):

> *All other individuals* other than defendant, above-named defense counsel, appropriately cleared Department of Justice employees, and personnel of the originating agency, *can obtain access* to classified information and documents only after having been granted the appropriate security clearances by the Department of Justice through the Court Security Officer and the permission of this Court.

(Emphasis added). The Department of Justice ("DOJ") has conceded in open court in post-judgment proceedings in this case that this Protective Order, by its terms, provides for access beyond that allowed in other cases. Whereas in other cases, protective orders typically confine access to the pre-conviction litigation process, the Protective Order in this case is not so circumscribed:

> [T]oday these protective orders—these CIPA protective orders are drafted more carefully, shall we say, to circumscribe their use more directly to the case—the criminal case, and not for other purposes.

(Statement of AUSA, D.C. Cir. Tr. Mar. 15, 2005, at p. 29.) Thus, the Protective Order contemplates access for purposes beyond the narrow confines of the underlying criminal case. In this instance, access is being sought by security-cleared successor counsel in order to present an effective clemency application before President Bush leaves office.

How Access Will Assist In Preparing An Effective Clemency Application

We believe it likely that many, if not most, of the projections in the Weinberger Declaration have never come to pass. Although it may have been reasonable for the sentencing judge in 1987 to treat these projections seriously in deciding what sentence to impose, the

passage of over twenty years' time has likely demonstrated conclusively that the anticipated harm to the United States has not materialized and never will.

We believe we can fashion a compelling application for executive clemency, on the ground that the projections of harm that motivated the life sentence have not come to pass in the ensuing twenty-plus years. Accordingly, executive clemency is appropriate to remedy the injustice in continuing to require Mr. Pollard to serve the life sentence that was premised, in substantial measure, on those projections. However, in order to prepare a clemency application based on the facts, we need access to the sealed pre-sentencing docket materials filed with the court in 1987, so that we can see what the specific projections were, and (consistent with confidentiality requirements) ascertain which, if any, ever materialized.

Procedural History

In 2000, we took on Mr. Pollard's representation on a pro bono basis. We contacted the DOJ, and applied for the requisite security clearance needed to allow us to have access to these sealed docket materials. After conducting a lengthy background investigation, the DOJ granted each of us the security clearance needed to see the materials. Nevertheless, the DOJ denied us access to the materials, claiming we had no "need to know." We then filed a motion with the U.S. District Court for the District of Columbia in the underlying criminal case, *United States v. Pollard*, Crim. No. 86-0207 (D.D.C.), asking the court to allow us access pursuant to the Protective Order. We explained that we had a "need to know" what was in the sealed docket materials, in that we had to examine them in order to prepare an effective application for executive clemency with then-President Clinton.

That motion spawned several years of litigation. In the course of that litigation, the DOJ admitted that our "background investigations will support SCI access," but took the position that "[a]bsent a 'need to know' ruling from the Court or the government," access would not be allowed. (Aug. 3, 2001 letter from Michael P. Macisso, DOJ Court Security Officer, to Eliot Lauer.) Thus, the sole impediment to our gaining access was a "need to know" determination. The DOJ continued to take the position that we had no "need to know."

In 2005, the U.S. Court of Appeals for the District of Columbia Circuit ruled, in a 2-1 decision, that the court did not have jurisdiction to consider our motion for access to the court documents, because the doctrine of separation of powers provides the Executive Branch with sole jurisdiction to decide who may have access to court materials if the purpose of the access is to make a clemency application. *See United States v. Pollard*, 416 F.3d 48, 56-57 (D.C. Cir. 2005). The Court of Appeals expressly did not reach the issue of whether we have a "need to know." *Id.* at 56-57. On March 20, 2006, the U.S. Supreme Court denied our petition for a writ of certiorari. 547 U.S. 1021 (2006). The courts have thus left the decision whether to allow us access based on our "need to know" squarely and unambiguously with the Executive Branch.

Reasons for Allowing Access

By letter dated September 10, 2001, the DOJ has admitted that between November 19, 1993 and January 12, 2001, there were 24 instances in which DOJ personnel were unilaterally allowed access to the sealed docket materials. These dates coincide with points in time when Mr. Pollard's status was being considered by the Executive Branch. As the materials in question comprise a court sentencing file and not, for example, a defense or intelligence agency file, there is no question that the access afforded by the DOJ to its own personnel was in connection with efforts to oppose commutation or similar relief for Mr. Pollard. Surely if government personnel had a "need to know" the contents of these documents in order to oppose relief for Mr. Pollard, security-cleared defense counsel have at least the same "need to know" in order to seek relief. Basic fairness in the clemency process should tolerate no other result.

Certain published reports suggest that actual or projected harm may have been incorrectly linked to Mr. Pollard. Journalist John Loftus (a former DOJ attorney) wrote in the June 2003 issue of Moment Magazine that in connection with sentencing, Mr. Pollard was wrongly accused of acts that were later found to be the responsibility of Aldrich Ames and Robert Hanssen. Mr. Loftus reports that Ames, at the time thought to be a reliable CIA officer, is believed to have participated in preparing the damage assessment in the Pollard matter. We are not in a position to know whether Mr. Loftus's information is correct. However, it has received widespread publicity, and, if correct, raises a serious question as to the fundamental fairness of requiring Mr. Pollard to continue to serve out his life sentence.

Furthermore, in an interview with journalist and author Edwin Black ("IBM and the Holocaust") that was published in the June 14, 2002 issue of The Jewish Week, former Secretary Weinberger – whose personal involvement in the Pollard case was unprecedented – admitted that the case was "a very minor matter, but made very important." He reiterated during the interview that "the Pollard matter was comparatively minor. It was made far bigger than its actual importance." This statement is certainly at odds with Secretary Weinberger's statements in the public court record made directly to the sentencing judge, and substantiates our expectation that we will be able to show that the harm projected by Secretary Weinberger in 1987 did not materialize.

To make a serious and effective application for clemency based on fact and not on surmise, we should be permitted to see the sealed docket materials. The viewing could take place in a DOJ vault under strict conditions of confidentiality. We are only asking to see documents previously shown to Mr. Pollard and his counsel, and submitted to the court. We have the proper security clearances, and we certainly have the "need to know." The DOJ has expressly admitted that it "do[es] not question present counsel's integrity . . ." (Government's Opposition to Defense Counsel's Request to Access Sealed Classified Docket Materials, Dec. 8, 2000, at p. 3.)

We believe that the President would want to decide Mr. Pollard's clemency application on a full record, and on the basis of facts and evidence. While we recognize that the President is able to review the sealed docket materials and to decide a clemency application with or without counsel's input, the American system is based on advocacy. Moreover, in this high-profile case, which continues to engage the public's attention more than twenty-two years after Mr. Pollard's arrest, there is a public benefit, irrespective of the President's ultimate decision, in having Mr. Pollard's security-cleared counsel look at these materials and make a clemency presentation based on those materials (in a manner consistent with the requirements of confidentiality).

This is especially appropriate in this case, where Secretary Weinberger played such a significant role in the sentencing process. Indeed, Secretary Weinberger's description (in a sworn declaration submitted to the sentencing judge March 3, 1987, the day before sentencing) of Mr. Pollard's crime as "treason" was incorrect, and resulted, four years later, in the DOJ's admitting on-the-record in open court that it was "regrettable" that Secretary Weinberger had used the term "treason." (Statement of AUSA, D.C. Cir. Tr. Sept. 10, 1991, at p. 53) It is therefore especially critical, and fundamentally fair, for Mr. Pollard's security-cleared counsel to see what Secretary Weinberger projected as harm resulting from Mr. Pollard's conduct, in order to evaluate those projections in light of subsequent events, and to present arguments for clemency based on the facts.

As noted, the D.C. Circuit has ruled that it has no jurisdiction to decide whether or not to allow us access, and that such jurisdiction rests entirely with the Executive Branch. The Attorney General has the authority to allow us access. There is no issue as to our security clearances or our personal and professional integrity.

Nor is there any question that this determination is appropriate for the Attorney General. The materials in question were filed with the court, in a criminal case, pursuant to a Protective Order. They comprise a court sentencing file, not a defense or intelligence agency file. Unlike defense or intelligence agency files generated in the ordinary course, the materials were specifically prepared for submission to the court. They were drafted with full awareness that they would have to be shown to opposing counsel, which they were at the time. The materials therefore contain information that DOJ believed appropriate, even in 1987 when events were much fresher, to be seen by security-cleared counsel for Mr. Pollard.

There is no reason to deny us access to these materials. We urge, most respectfully, that you authorize access by simply agreeing that we have a "need to know," and that you so inform the United States Attorney for the District of Columbia so that he may enter into an appropriate stipulation in accordance with the Protective Order. Nothing more is sought or required.

We would welcome the opportunity to meet with you and your staff to review this letter and the supporting documents, and to explain further why our request is just and reasonable.

Respectfully,

Eliot Lauer

Jacques Semmelman

U.S. Department of Justice

National Security Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

June 12, 2008

Mr. Eliot Lauer and Mr. Jacques Semmelman
Curtis, Mallet-Prevost, Colt & Mosle LLP
Attorneys and Counsellors At Law
101 Park Avenue
New York, NY 10178

Dear Mr. Lauer and Mr. Semmelman:

Your January 28, 2008, letter to the Attorney General requesting access to classified information filed with the court in connection with the sentencing of Jonathan Pollard for the purpose of preparing an application for executive clemency has been referred to the National Security Division.

Beginning in 2000, you have sought access to these materials for this purpose through various motions filed in district court which were opposed by the government because you do not have a sufficient "need to know" this highly sensitive information as required by regulation. On January 12, 2001, Chief Judge Norma Holloway Johnson found that you had not demonstrated a "need to know" the contents of the classified materials. Your motions for reconsideration of this order have been denied. The letter of January 28 repeats many of the same arguments that were unavailing in the litigation and does not persuade us to change our longstanding position in this matter.

I trust you understand that we have given your arguments due consideration and that you are free to include any information in a clemency application that you believe should be taken into account.

Sincerely,

J. Patrick Rowan
Acting Assistant Attorney General