

EMPOWER OVERSIGHT

Whistleblowers & Research



December 6, 2021

VIA ELECTRONIC TRANSMISSION: RobinsonKN@state.gov

Kellie Robinson, Public Liaison
U.S. Department of State
A/GIS/IPS/PP
2201 C Street N.W., Suite B266
Washington, D.C. 20520-0000

RE: STATUS OF FOIA REQUEST REFERENCE NUMBER F-2021-09684

Dear Ms. Robinson:

INTRODUCTION

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

Empower Oversight, pursuant to the Freedom of Information Act (“FOIA”),¹ has filed with the U.S. Department of State (“DOS”) a request for records that contain information implicating American citizens’ enjoyment of their Second Amendment right to keep and bear arms. The DOS has acknowledged receipt of Empower Oversight’s FOIA request and assigned it a reference number, denied Empower Oversight’s request for expedited processing, placed its request in the “complex processing track,” and advised that it is unable to respond to Empower Oversight’s request “within the 20 days provided by the statute due to ‘unusual circumstances.’” The DOS also invited Empower Oversight to contact its FOIA Requester Service Center or its FOIA Public

¹ The FOIA is codified at 5 U.S.C. § 552.

Liaison if it would like information concerning the “estimated date of completion” of its request.

Nearly three months have elapsed since Empower Oversight received any correspondence from the DOS and, to date, the DOS has not advised Empower Oversight about the volume of the records that the DOS possesses that are responsive to its request; whether the responsive records are subject to one or more FOIA exemption(s) and, if so, which exemption(s); and when the DOS will produce any responsive, non-exempt records.

Accordingly, Empower Oversight hereby respectfully requests information concerning the status of, and completion date for, its FOIA request. Empower Oversight also requests advice concerning dates/times that you will be available to discuss actions that we can jointly take to accelerate the DOS’s response (e.g., adjust the scope of the request or devise an alternative time frame for production).

BACKGROUND

A. Empower Oversight’s FIOA Request

On August 26, 2021, Empower Oversight filed with the DOS a request for records under the FOIA. Empower Oversight’s August 26th FOIA request seeks:

1. All records of communications from January 20, 2021 to the present to, from, or copying personnel in the Bureau of International Security and Nonproliferation, the Office of the Under Secretary for Arms Control and International Security Affairs, the Office of the Legal Advisor, the Office of the Deputy Secretary of State, and the Office of the Secretary of State regarding restrictions on imports of ammunition manufactured or located in Russia.
2. All records of communications from January 20, 2021 to the present between State Department personnel and any personnel from, or representatives of, Everytown for Gun Safety, Moms Demand Action, Giffords, the Giffords Law Center to Prevent Gun Violence, and Brady.
3. All records of communications from January 20, 2021 to the present between State Department personnel and any Congressional members or staff regarding ammunition manufactured or located in Russia.

In addition, Empower Oversight requested: 1) a waiver of search and duplication fees associated with the DOS’s processing of its FOIA request, and 2) expedited processing.

In support of its FOIA request, Empower Oversight explained that on August 20, 2021, the DOS announced a ban on the importation of ammunition manufactured or located in Russia.² The DOS purportedly imposed the ban as part of an assortment

² DOS, *U.S. Imposes Additional Costs on Russia for Aleksey Navalny Poisoning* (August 20, 2021), available at <https://www.state.gov/u-s-imposes-additional-costs-on-russia-for-aleksey-navalny-poisoning/>;

sanctions against Russia for the poisoning of Russian opposition figure Aleksey Navalny in August of 2020. However, there is ample reason to suspect that the DOS's allusion to the poisoning of Mr. Navalny is merely a pretext, and that the true purpose of the ban is to restrict American citizens' access to ammunition. Hence, Empower Oversight seeks documents so the public can determine for itself the facts surrounding the DOS's ban, which is unlikely to appreciably impact the Russian government but will meaningfully affect the American public's exercise of their Second Amendment right.

In 2020, then-candidate Biden ran on a stark gun control platform.³ One of the many planks of his platform included an explicit plan to restrict citizens' access to ammunition by seeking legislation to outlaw online ammunition sales; namely, "Biden will enact legislation to prohibit all online sales of firearms, ammunition, kits, and gun parts."⁴ In April of 2021, after no such law had passed, President Biden publicly stated "[w]hether Congress acts or not, I'm going to use all the resources at my disposal as President" to pursue an ambitious gun control agenda.⁵ In late June of 2021, the Biden Administration announced that it would pursue a "whole-of-government approach"⁶ across government agencies to pursue gun control, with President Biden publicly stating that the "entire administration ... will continue taking action where we can."⁷

Eight weeks later, citing the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 ("CBW Act"),⁸ and ostensibly as part of a second round of sanctions against Russia for its use of the Novichok nerve agent in the August 2020 poisoning of Mr. Navalny, the DOS imposed "a restriction on the permanent importation of firearms or ammunition manufactured or located in Russia pursuant to new or pending permit applications."⁹

see also, Gutowski, Stephen, *Biden Bans Russian Ammo Amid Continued Shortage*, (August 20, 2021) <https://thereload.com/biden-bans-russian-ammo-amid-continuing-shortage/>.

³ See generally, Biden-Harris Democrats, *The Biden Plan to End Our Gun Violence Epidemic* (Undated), available at <https://joebiden.com/gunsafety/>.

⁴ Biden-Harris Democrats, *The Biden Plan to End Our Gun Violence Epidemic* (Undated), available at <https://joebiden.com/gunsafety/>.

⁵ The White House, *Remarks by President Biden on Gun Violence Prevention* (April 8, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/>.

⁶ The White House, *Fact Sheet: Biden-Harris, Administration Announces Comprehensive Strategy to Prevent and Respond to Gun Crime and Ensure Public Safety* (June 23, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/23/fact-sheet-biden-harris-administration-announces-comprehensive-strategy-to-prevent-and-respond-to-gun-crime-and-ensure-public-safety/>.

⁷ The White House, *Remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy* (June 23, 2021), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/23/remarks-by-president-biden-and-attorney-general-garland-on-gun-crime-prevention-strategy/>.

⁸ See, Pub. Law No. 102-138, 105 STAT. 722, (October 28, 1991). The CBW Act is codified at 22 U.S.C. 5601 - 5606, and Section 5605(b)(2)(D) authorizes the President to impose importation sanctions against foreign governments that have used—or have prepared to use—chemical or biological weapons.

⁹ DOS, *U.S. Imposes Additional Costs on Russia for Aleksey Navalny Poisoning* (August 20, 2021), available at <https://www.state.gov/u-s-imposes-additional-costs-on-russia-for-aleksey-navalny-poisoning/>.

The poisoning of Mr. Navalny is a clear human rights violation, and other sanctions announced that day properly targeted the operatives involved in poisoning him as well as the entities that developed Russia's chemical weapons.¹⁰ However, the DOS's press release identified no relationship between Russian-based ammunition manufacturers, exporters, or importers, and Mr. Navalny's poisoning.¹¹

Assessing these circumstances, the National Rifle Association ("NRA") has noted that:

[T]he ammunition import restriction seems more aimed at punishing American gun owners and businesses than as a foreign policy tool to influence the Russian Federation.

Ammunition exports to the United States are only a small percentage of the GDP of the Russian Federation, but Russian origin ammo makes up a large part of the American ammunition supply. American gun owners were already suffering from a market where demand was exceeding available supply. This new move by the Biden Administration will severely worsen the present supply problems.¹²

According to one press report, roughly 40% of all ammunition sold in the United States originates from Russia.¹³ And, consistent with the NRA's assessment, it has been widely reported that the United States has been in the midst of a historic

Although the CBW Act expressly authorizes the President to impose importation sanctions, Executive Order 12851 (June 11, 1993), as amended by Section 5(b)(7) of Executive Order 12938 (November 14, 1994), delegates the President's authority to the Secretary of State.

¹⁰ Those sanctions were issued pursuant to:

- The International Emergency Economic Powers Act, Pub. Law No. 95-223, 91 STAT. 1626 (October 28, 1977);
- The National Emergencies Act, Pub. Law No. 94-412, 90 STAT. 1255 (September 14, 1976);
- Section 212(f) of the Immigration and Nationality Act of 1952, Pub. Law No. 82-414, 66 STAT. 163 (June 27, 1952);
- Executive Order 13382 (June 28, 2005); and
- Executive Order 14024 (April 15, 2021).

See, U.S. Department of the Treasury, *Treasury Sanctions Russian Operatives and Entities Linked to the Poisoning of Aleksey Navalny, Chemical Weapons Program* (August 20, 2021), available at <https://home.treasury.gov/news/press-releases/jy0328>. The Treasury Department's press release announcing these sanctions omits any reference to the DOS's ban on importing Russian ammunition and includes no sanctions against individual Russian-based ammunition manufacturers, exporters, or importers. *Id.*

¹¹ See, DOS, *U.S. Imposes Additional Costs on Russia for Aleksey Navalny Poisoning* (August 20, 2021), available at <https://www.state.gov/u-s-imposes-additional-costs-on-russia-for-aleksey-navalny-poisoning/>.

¹² NRA Institute for Legal Action, *Biden Administration Bans Importation of Russian Ammunition* (August 22, 2021), available at <https://www.nraila.org/articles/20210822/biden-administration-bans-importation-of-russian-ammunition>.

¹³ Guns & Ammo Staff, *Russian Ammo Imports Halted, May Send Demand, Prices and Shortages to New Levels* (August 21, 2021), available at <https://www.gunsandammo.com/editorial/russian-ammo-imports-banned-halted/424581>.

ammunition shortage that is expected to last for years.¹⁴ Hence, the DOS's ban is likely to exacerbate the ammunition shortage and drive up prices, "infringing" American citizens' exercise of their Second Amendment rights to keep and bear arms.

Simply put, the DOS's use of the CBW Act—a law designed to punish foreign nations for using chemical and biological weapons—to potentially cut off 40% of the American public's ammunition supply is a drastic step that deserves intense public and Congressional scrutiny. And, in view of President Biden's past statements on gun control and the disconnect between the DOS's stated purpose for imposing the ammunition ban and its likely effects, it is reasonable to question whether the DOS's justification is a mere pretext.

The Supreme Court has held, under the Administrative Procedure Act ("APA"),¹⁵ that courts can set aside an agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" when the agency's stated rationale for the action is pretextual or contrived.¹⁶ Where the evidence "tells a story that does not match" the explanation given by an agency, such a disconnect can be evidence that the agency's stated reasoning is in fact contrived, and thus is grounds for setting the agency's action aside.¹⁷ The Supreme Court has emphasized the legal requirement that "agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public."¹⁸ Like the Secretary of Commerce's justification for his long-held desire to reinstate the citizenship question on the 2020 Census questionnaire, which the Supreme Court considered in Department of Commerce v. New York, the DOS's decision to ban the importation of Russian ammunition because of the poisoning of Mr. Navalny appears to be pretextual, *i.e.*,

- The President has said that:
 - He wanted to restrict the availability of ammunition; and
 - He would use the entire administration to pursue his gun control agenda; and
- The DOS has taken action restricting the availability of ammunition, but it claims that it is doing so as a sanction against the use of chemical and/or biological weapons, as opposed to a means to further the President's gun control agenda.

¹⁴ *E.g.*, Patrick Reilly, *US Sees Ammunition Shortage Amid Record Firearms Purchases: Report* (August 1, 2021) available at <https://nypost.com/2021/08/01/us-sees-ammunition-shortage-amid-record-firearms-purchases-report/>; Martha Bellisle, *Ammunition Shelves Bare as U.S. Gun Sales Continue to Soar* (July 31, 2021) available at <https://apnews.com/article/sports-business-health-coronavirus-pandemic-gun-politics-86e61939eb4ae1230e110ed6d7576b70>; Stephen Gutowski, *Manufacturers Say Ammo Shortage Will Stretch Out for Years* (May 21, 2021) available at <https://thereload.com/manufacturers-say-ammo-shortage-will-stretch-out-for-years/>.

¹⁵ Pub. Law No. 79-404, 60 STAT. 237 (June 11, 1946). The APA is codified at 5 U.S.C. § 500 *et seq.*

¹⁶ See, Department of Commerce v. New York, 588 U.S. ___, 139 S. Ct. 2551, *18 (2019), available at https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf.

¹⁷ See, Department of Commerce v. New York, 588 U.S. ___, 139 S. Ct. 2551, *32 (2019).

¹⁸ See, Department of Commerce v. New York, 588 U.S. ___, 139 S. Ct. 2551, *33 (2019).

There is a clear public interest in discovering through the FOIA how the DOS has performed its duties in this matter. And, transparency from the DOS is the only way to preserve the public trust that the DOS has not deceptively twisted the CBW Act sanctions process in order to further the President Biden's gun control agenda by administrative fiat.

B. The DOS's Response to Empower Oversight's FOIA Request

By email dated August 26, 2021 (the same day that Empower Oversight submitted its request), the DOS acknowledged receipt of Empower Oversight's FOIA request, assigned reference number F2021-09684 to the request, denied Empower Oversight's request for expedited processing, and placed its request on the "complex processing track." The DOS also advised that it would not comply with the FOIA's normal 20 business day deadline for rendering a determination under Subsection a(6)(A)(i), as follows:

This Office will not be able to respond within the 20 days provided by the statute due to "unusual circumstances." See 5 U.S.C. § 552(a)(6)(B)(i)-(iii). In this instance, the unusual circumstances include the need to search for and collect requested records from other Department offices or Foreign Service posts.

If you have any questions regarding your request, would like to narrow the scope or arrange an alternative time frame to speed its processing, or would like an estimated date of completion, please contact our FOIA Requester Service Center or our FOIA Public Liaison by email at FOIAstatus@state.gov or telephone at 202-261-8484. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, email at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

To date, Empower Oversight has not received any further correspondence concerning its August 26th FOIA request, F-2021-09684.

RESOLUTION

Given that the DOS's ban on the importation of ammunition from the Russian Federation so clearly implicates the lawful enjoyment of a Constitutional right, DOS should appreciate the need for transparency in its decision making. Transparency is the only thing that will confirm whether the DOS's stated reasons for implementing the ban were legitimate or pretextual.

Accordingly, Empower Oversight respectfully requests information concerning the status of, and the currently estimated completion date for, its FOIA request.

Empower Oversight also requests that you provide Bryan Saddler—who may be reached at bsaddler@empowr.us—with advice concerning dates that you will be available to discuss actions that Empower Oversight and the DOS could cooperatively take to accelerate the DOS's response.

Thank you for your time and consideration. Please don't hesitate to contact me with any questions.

Cordially,

/Jason Foster/

Jason Foster
Founder & President