

# EMPOWER OVERSIGHT

Whistleblowers & Research



December 7, 2021

VIA ELECTRONIC TRANSMISSION: DOJ.OIP.FOIA@usdoj.gov

Georgianna Gilbeaux, Analyst  
Valeree Villanueva, FOIA Public Liaison  
c/o Office of Information Policy  
United States Department of Justice  
Sixth Floor  
441 G Street, NW  
Washington, DC 20530-0001

**RE: STATUS OF FOIA REQUESTS FOIA-2021-01701 AND FOIA-2021-02003**

Dear Ms. Gilbeaux and Ms. Villanueva:

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 has filed with the Department of Justice (“DOJ”) two requests for records under the Freedom of Information Act (“FOIA”).<sup>1</sup> The DOJ has acknowledged receipt of the requests and assigned an analyst to process them, but to date it has failed to advise Empower Oversight about the volume of the records that the DOJ possesses that are responsive to the requests; whether the responsive records are subject to one or more FOIA exemptions and, if so, which exemption(s); and when the DOJ will produce any responsive, non-exempt records.

The DOJ has avoided making clear “determinations” on Empower Oversight’s FOIA requests within the FOIA’s normal 20 business day deadline<sup>2</sup> by means of an ambiguous paragraph that it has inserted verbatim into its acknowledgement letters. Without actually identifying any “unusual circumstances” that would enable the DOJ to disregard the statutory

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<sup>1</sup> The FOIA is codified at 5 U.S.C. § 552.

<sup>2</sup> See generally 5 U.S.C. § 552(a)(6)(A)(i).

deadline for making a “determination,” the DOJ has nonetheless sought to benefit from delayed processing through the mere allusion to the possibility of unusual circumstances.

Empower Oversight respectfully requests clarification of the DOJ’s position. Please identify any actual “unusual circumstance(s)” or promptly process the FOIA requests if “unusual circumstances” were not present in this matter at the time of the DOJ’s acknowledgment letters.

### **FOIA Request FOIA-2021-01701**

On July 12, 2021, Empower Oversight filed with the DOJ a request for records under the FOIA. Empower Oversight’s July 12<sup>th</sup> FOIA request seeks records relating to:

1. the Justice Department’s consideration and hiring of Ms. [Susan] Hennessey, including all records related to her interest in joining the Department, consideration of her for any Department position, any statements of recommendation, evaluations of her qualifications, records relating to interviews with Ms. Hennessey, notes from any such interviews, and any offers of employment;
2. all forms completed by Ms. Hennessey in the application, hiring, and onboarding processes at Department of Justice;
3. all conflicts Ms. Hennessey reported or the Department assessed to apply to her;
4. all recusals applicable to Ms. Hennessey, including all records relating to any recusal or draft recusal of Ms. Hennessey from matters related to Special Counsel [John] Durham’s inquiry;
5. all records relating to Ms. Hennessey’s deleted tweets;
6. all records to or from the relevant Justice Department Ethics Officials, including Michael Nannes or Cynthia Shaw, regarding Ms. Hennessey;
7. Ms. Hennessey’s calendar entries from the first day of her employment at the Department to the present;
8. all records sent or received by Ms. Hennessey that include the terms “Durham,” “Special Counsel,” “Steele,” “dossier,” “Clinesmith,” or “Danchenko”; [and]
9. all records relating to Ms. Hennessey’s previous employer, Lawfare, and leaks regarding Special Counsel [Robert] Mueller’s investigation.

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

In support of its FOIA request, Empower Oversight explained that on June 29, 2021, Senators Charles Grassley and Ron Johnson wrote to Attorney General Merrick Garland and raised a number of serious questions about Ms. Hennessey’s work in the DOJ’s National Security Division.<sup>3</sup> The Senators noted that Ms. Hennessey has a history of expressing partisan views

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<sup>3</sup> Letter from Senators Charles E. Grassley and Ron Johnson to the Honorable Merrick Garland (June 29, 2021), available at [https://www.judiciary.senate.gov/imo/media/doc/grassley\\_johnson\\_to\\_justice\\_dept.hennesseyconflicts.pdf](https://www.judiciary.senate.gov/imo/media/doc/grassley_johnson_to_justice_dept.hennesseyconflicts.pdf).

concerning the Steele Dossier, the Federal Bureau of Investigation’s (“FBI”) Crossfire Hurricane investigation, the DOJ Office of Inspector General’s review of the Crossfire Hurricane investigation, and Special Counsel Durham’s investigation of intelligence, counterintelligence, and law enforcement activities directed at the 2016 presidential campaigns.<sup>4</sup>

Immediately following the 2020 presidential election Ms. Hennessey reportedly deleted *en masse* tens of thousands of her postings from her Twitter account.<sup>5</sup> In May 2021, *Fox News* reported that between November 16, 2020, and November 29, 2020, the number of tweets on her Twitter account dropped by more than 33,000.<sup>6</sup> By June 2021, *The Hill* reported, “Hennessey’s account currently shows 242 tweets[.]”<sup>7</sup> By scrubbing her social media, Hennessey obstructed a thorough examination of the nature and scope of her promotion of the Steele Dossier, defense of the Crossfire Hurricane investigation, and criticism of the Office of Inspector General’s review and Special Counsel Durham’s investigation.

In light of her prejudicial comments reported by the Senators and news media, along with Ms. Hennessey’s effort to frustrate additional research regarding her prior partisan rants on Twitter, her ability to appear objective and impartial in any official duties related to Special Counsel Durham’s investigation raises legitimate questions. Thus, there is an acute public interest in the transparency of the DOJ’s hiring of Ms. Hennessey, and what steps, if any, it has taken to mitigate the appearance—or reality—that Ms. Hennessey’s biases could undermine Special Counsel Durham’s independent work.

By letter dated July 22, 2021, the DOJ acknowledged receipt of Empower Oversight’s July 12<sup>th</sup> FOIA request; designated its request as FOIA-2021-01701; denied Empower Oversight’s request for expedited processing; postponed a decision on its request for a fee waiver pending a determination “whether fees will be implicated” by the same; identified the analyst assigned to Empower Oversight’s request; identified the FOIA liaison assigned to its request; and informed Empower Oversight of the availability of mediation services offered by the National Archives and Records Administration (“NARA”). Additionally, the DOJ advised:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can

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<sup>4</sup> *Id.*

<sup>5</sup> Keene, Houston, *New Biden DOJ Staffer Deleted over 39K tweets, Including Russia Collusion Accusations* (May 10, 2021), available at <https://www.foxnews.com/politics/biden-doj-susan-hennessey-deleted-tweets-russia-collusion>.

<sup>6</sup> *Id.*

<sup>7</sup> Beitsch, Rebecca, *Republicans Target Trump Critic’s Role at DOJ* (June 3, 2021), available at <https://thehill.com/policy/national-security/556676-republicans-target-trump-critics-role-at-doj>.

also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

To date, Empower Oversight has not received any further correspondence concerning its July 12<sup>th</sup> FOIA request, FOIA-2021-01701.

### **FOIA Request FOIA-2021-02003**

On August 19, 2021, Empower Oversight filed with the DOJ a FOIA request for records relating to:

1. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Attorney General regarding the Special Counsel's budget for fiscal year 2022.
2. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022.
3. All records of communications from January 21, 2021 to the present among personnel within the Office of the Attorney General and the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022.

Empower Oversight also requested: 1) a waiver of search and duplication fees associated with the DOJ's processing of its FOIA request, and 2) expedited processing.

In support of its FOIA request, Empower Oversight explained that on October 19, 2020, then Attorney General William Barr appointed Mr. Durham, then U.S. Attorney for the District of Connecticut, to serve as Special Counsel to investigate violations of law in connection with intelligence, counterintelligence, or law enforcement activities directed at the 2016 presidential campaigns. As Attorney General Barr stated in a letter to the House and Senate Judiciary Committees, the purpose of the appointment was "to provide [Special Counsel Durham] and his team with the assurance that they could complete their work, without regard to the outcome of the [2020 presidential] election."<sup>8</sup> The eventual findings and outcome of Special Counsel Durham's investigation are of extreme importance to the public, and one former FBI attorney has already been convicted for his misconduct.<sup>9</sup>

The Special Counsel regulations state that the Special Counsel shall have "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States attorney" and, subject to a few exceptions, "shall determine whether and to what extent to inform or consult with the Attorney General" about the conduct of his investigation.<sup>10</sup>

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<sup>8</sup> Available at <https://www.judiciary.senate.gov/imo/media/doc/Letter%20re%20Durham%20to%20Hill.pdf>.

<sup>9</sup> Phillips, Kristine; Johnson, Kevin, *Ex-FBI Lawyer Clinesmith Pleads Guilty to Falsifying Email in Russia Probe in Durham's First Case* (August 19, 2020), available at <https://www.usatoday.com/story/news/politics/2020/08/19/ex-fbi-lawyer-kevin-clinesmith-court-1st-durham-case-russia/3393941001/>.

<sup>10</sup> 28 C.F.R. § 600.6.

Despite the independence envisioned by the DOJ's regulations, there is a means by which the Attorney General can prematurely end a Special Counsel's investigation. The Special Counsel regulations state that "90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year."<sup>11</sup>

When asked during his confirmation hearing whether he would "commit to providing Special Counsel Durham with the staff, resources, funds, and time needed to thoroughly complete the investigation," Attorney General Garland failed to do so.<sup>12</sup>

As of August 19, 2021 (*i.e.*, the date Empower Oversight filed its FOIA request), the DOJ had not informed the public as to whether Attorney General Garland intended to end prematurely Special Counsel Durham's investigation.<sup>13</sup> As reported by *The Wall Street Journal*:

The special counsel regulations required Mr. Durham to have reported on the status of the investigation and submitted a proposed budget by July 1 for the next fiscal year that begins in October. Attorney General Merrick Garland could then determine whether the investigation would continue and establish the budget. A Justice Department spokeswoman declined to say whether Mr. Garland has decided to allow Mr. Durham's probe to continue beyond September or approved a budget for the next fiscal year[.]<sup>14</sup>

Further, *The Washington Post* reported that some of the witnesses in Special Counsel Durham's investigation have stated "that Attorney General Merrick Garland should push the special counsel to conclude his work."<sup>15</sup>

It is vitally important that the public get answers about Attorney General Garland's decision making concerning Special Counsel Durham's budget. Transparency from the DOJ is the only way to ensure public that political appointees in the administration do not improperly interfere with Special Counsel Durham's investigation.

By letter dated August 27, 2021, the DOJ acknowledged receipt of Empower Oversight's August 19<sup>th</sup> FOIA request; designated its request as FOIA-2021-02003; denied Empower Oversight's request for expedited processing pursuant to the DOJ's regulation at 28 C.F.R. § 16.5(e)(1)(ii), and advised that consideration of the request under 28 C.F.R. § 16.5(e)(1)(iv) remained pending with the Director of Public Affairs; postponed a decision on its request for a

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<sup>11</sup> 28 C.F.R. § 600.8(a)(1).

<sup>12</sup> Dunleavy, Jerry, *Merrick Garland Doesn't Promise to Protect Durham Investigation or Release Report* (February 22, 2021), available at <https://www.washingtonexaminer.com/news/grassley-garland-durham-investigation>.

<sup>13</sup> Later, on October 21, 2021, during "his first oversight hearing as attorney general, Mr. Garland told the House Judiciary Committee that the special counsel . . . had his budget approved for another year . . ." See, Benner, Katie, *Garland Parries Pressure from Both Sides in Congressional Testimony* (Updated October 27, 2021), available at <https://www.nytimes.com/2021/10/21/us/politics/garland-testimony-jan-6.html>.

<sup>14</sup> Viswanatha, Aruna; Gurman, Sadie, *Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters* (August 13, 2021), available at <https://www.wsi.com/articles/durham-probe-of-what-sparked-russia-investigation-examines-fbi-tipsters-11628857851>.

<sup>15</sup> Zapotosky, Matt; Hamburger, Tom, *Durham Grand Jury Explores Theory Someone Presented FBI with Fabricated Evidence in 2016 Russia Probe* (August 17, 2021), available at [https://www.washingtonpost.com/national-security/john-durham-investigation/2021/08/17/9131b1f4-fecd-11eb-a664-4f6de3e17ff0\\_story.html](https://www.washingtonpost.com/national-security/john-durham-investigation/2021/08/17/9131b1f4-fecd-11eb-a664-4f6de3e17ff0_story.html); see, Chaitin, Daniel, *Witnesses Grouse About Garland's Handling of Durham Inquiry: Report* (August 18, 2021), available at <https://www.washingtonexaminer.com/news/merrick-garland-john-durham-inquiry-witnesses>.

fee waiver pending a determination “whether fees will be implicated” by the same; identified the analyst assigned to Empower Oversight’s request; identified the FOIA liaison assigned to its request; and informed Empower Oversight of the availability of mediation services offered by the NARA. Additionally, the DOJ advised:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

By letter dated September 2, 2021, the DOJ denied Empower Oversight’s request for expedited processing pursuant to the DOJ’s regulation at 28 C.F.R. § 16.5(e)(1)(iv).<sup>16</sup> To date, Empower Oversight has not received any further correspondence concerning its August 19<sup>th</sup> FOIA request, FOIA-2021-02003.

## Analysis

During his confirmation hearing, on February 22, 2021, Attorney General Garland stated that he is “very much committed to transparency and to explaining Justice Department decision making.”<sup>17</sup> However, it is now clear that the DOJ will not promptly complete its response to Empower Oversight’s request, and the ambiguous—intentional or otherwise—form letters that the DOJ sent to it on July 22<sup>nd</sup> and August 27<sup>th</sup> raise serious questions concerning the DOJ’s commitment to being transparent<sup>18</sup> and satisfying its obligations under the FOIA.

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<sup>16</sup> Interestingly, the DOJ’s September 2<sup>nd</sup> letter repeated the information conveyed in its August 27<sup>th</sup> letter concerning “unusual circumstances;” the assignment of an analyst and a FOIA liaison; the DOJ’s multitrack processing; the placement of Empower Oversight’s request in the “complex”—slow—track; the postponement of a decision on Empower Oversight’s request for a fee waiver; and the availability of mediation services offered by the NARA. Indeed, the above-quoted “unusual circumstances” text that appears in both the July 22<sup>nd</sup> and August 27<sup>th</sup> letters from the DOJ also appears verbatim in the September 2<sup>nd</sup> letter.

<sup>17</sup> United States Senate, *Committee on the Judiciary: The Nomination of the Honorable Merrick Brian Garland to be the Attorney General of the United States: Day 1*, at approximately 1:21:45, (February 22, 2021), available at <https://www.judiciary.senate.gov/meetings/the-nomination-of-the-honorablemerrick-brian-garland-to-be-attorney-general-of-the-united-states-day-1>.

<sup>18</sup> Timeliness is an important aspect of transparency. As David T. Barstow—winner of four Pulitzer Prizes—has noted, Federal government officials sometimes misuse the FOIA to buy “themselves months if not years of delay and obstruction. It doesn’t matter that what [is sought] is completely and obviously a public record and that someday a judge will ultimately order them to release the documents. . . .” They calculate that the requester will get the message and just go away, which puts a premium on “elevating the importance of access, of authorized leaks, of journalists carrying favor with the right government officials to get information and to get information quickly. . . .” “Simply put, if journalists cannot rely on being able to go to source documents in a reasonably fast way, they are in a terribly weakened position when it comes to actually dealing day-in and day-out with high government officials.” Barstow, David T., *The Freedom of Information Act and the Press*:

## The Controlling Provisions of the FOIA

In relevant part, Subsection a(6) of the FOIA requires agencies to make determinations on FOIA requests, and to notify the requesters of such determinations, within 20 business days, unless “unusual circumstances” exist (*i.e.*, “[i]n unusual circumstances”) and the agencies provide the requesters with written notice “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched,” as follows:

### **(6)**

**(A)** Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

**(i)** determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

**(I)** such determination and the reasons therefor;

**(II)** the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

**(III)** in the case of an adverse determination—

**(aa)** the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

**(bb)** the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

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### **(B)**

**(i)** In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched....<sup>19</sup>

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*Obstruction or Transparency?*, Social Research, An International Quarterly, pp. 805 – 806 (Fall of 2010), available at [https://www.jstor.org/stable/40972290?read-now=1&seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/40972290?read-now=1&seq=1#page_scan_tab_contents).

<sup>19</sup> 5 U.S.C. § 552(a)(6).

For purposes of the FOIA, “unusual circumstances” are limited to the need to search for and collect the records from facilities or establishments that are separate from the office processing the request; to search for, collect, and appropriately examine a voluminous amount of records; or to consult with another agency, or two or more components of the same agency, that has a substantial interest in the determination on the records request.<sup>20</sup>

The extension of the 20 business day deadline because of “unusual circumstances” is confined to no more than 10 additional business days, unless the agency notifies the requester that it cannot process the FOIA request within 30 business days and provides the requester with the an opportunity to narrow the scope of his/her/its request so that it may be processed within the deadline, or arrange an alternative time period for processing, as follows:

**(B)**

**(i)** ...No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

**(ii)** With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C)....<sup>21</sup>

If an agency fails to comply with the applicable FOIA deadlines, then the requester “shall be deemed to have exhausted his administrative remedies” and may seek judicial review.<sup>22</sup>

The DOJ’s July 22<sup>nd</sup> and August 27<sup>th</sup> Letters Do Not Explicitly State the Existence of “Unusual Circumstances” that Prevent It from Complying with the FOIA’s 20 Business Day Deadline for Rendering a Determination

The DOJ’s July 22<sup>nd</sup> and August 27<sup>th</sup> letters (and its September 2<sup>nd</sup> letter, for that matter) appear to be form letters. More importantly, they do not expressly state that “unusual circumstances” exist. Rather, in keeping with nature of form letters and their frequent

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<sup>20</sup> 5 U.S.C. § 552(a)(6)(B)(iii).

<sup>21</sup> 5 U.S.C. § 552(a)(6); *see also*, 28 C.F.R. § 16.5(c).

<sup>22</sup> 5 U.S.C. § 552(a)(6)(C)(i).

unsuitability for differing factual scenarios, the operative language of the letters is strikingly ambiguous—perhaps intentionally so.

Citing and paraphrasing the definition of “unusual circumstances” under the FOIA, the acknowledgement letters that the DOJ transmitted to Empower Oversight on July 22<sup>nd</sup> and August 27<sup>th</sup> state:

**To the extent that** your request requires a search in another Office, consultations with other Department components or another agency, **and/or** involves a voluminous amount of material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. (Emphasis added.)

One reasonable interpretation of the operative language of the acknowledgement letters is that **if** either of Empower Oversight’s FOIA requests implicate either of the three actions that qualify as “unusual circumstances” under the FOIA, **then** such request “falls within ‘unusual circumstances,’” and “[a]ccordingly” the DOJ will avail itself of the benefits of identifying an extant “unusual circumstance.” In other words—without actually finding the existence of “unusual circumstances,” which would allow the DOJ to extend the 20 business day deadline for rendering a “determination” on an Empower Oversight FOIA request to 30 business days—the DOJ appropriates the benefits of such a finding. And then, DOJ effectively renders FOIA’s deadline for making a “determination” null and void, pending Empower Oversight’s agreement to narrow its FOIA request to the DOJ’s satisfaction or acceptance of an alternative timeframe for processing.

An alternative interpretation of the operative language of the acknowledgement letters is that **because** Empower Oversight’s FOIA requests implicate one or more of the three actions that qualify as “unusual circumstances,” such circumstances exist, and “[a]ccordingly” the DOJ will avail itself of the benefits of identifying an extant “unusual circumstance.”

One problem with the latter interpretation is that the DOJ does not expressly identify which of the three actions that qualify as “unusual circumstances” that it claims exist(s) in this case. And this deficiency is accentuated by the DOJ’s use of “and/or,” as opposed to “and,” in its paraphrasing of the three activities that qualify as “unusual circumstances” under the FOIA (*i.e.*, “search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material”). This verbiage supports a reasonable inference that the DOJ had not actually identified existing “unusual circumstances” when it transmitted its letters. Otherwise, it would have chosen “and” as the appropriate conjunction for the operative text, if more than one of the three activities existed. It is unlikely that the conjunction “or” would ever be appropriate. No conjunction is necessary if only one activity is present, and the conjunction “and” is appropriate if multiple activities exist. Whereas, the use of the conjunction “or” communicates that the DOJ is uncertain about the existence of one or more activities to which it alludes.

As the DOJ points out in its guidance for itself and other Federal agencies that respond to FOIA requests, responders must process such requests within 20 business days unless they issue a “written notice to the requester ‘setting forth the unusual circumstances for such extension and

the date on which a determination is expected to be dispatched.”<sup>23</sup> In other words, the DOJ was obligated to have identified an existing “unusual circumstance” before it transmitted its acknowledgement letters, and it should have informed Empower Oversight of the same. Empower Oversight should not have to speculate on the correct interpretation of the DOJ’s letters.

It appears that the DOJ may not have met its burden with respect to FOIA Requests FOIA-2021-01701 and FOIA-2021-02003. Accordingly, Empower Oversight respectfully requests that the DOJ expressly advise which “unusual circumstances,” if any, were applicable to FOIA Requests FOIA-2021-01701 and FOIA-2021-02003, when the existence of such circumstances were identified by the DOJ, and why the DOJ did not explicitly reference such circumstances in its letters of July 22<sup>nd</sup>, August 27<sup>th</sup>, and September 2<sup>nd</sup>. Alternatively, if the DOJ had not actually identified existing “unusual circumstances” on or before the dates of its July 22<sup>nd</sup> and August 27<sup>th</sup> letters, then please remedy the deficiency by immediately rendering the determination(s) required by Subsection a(6)(A)(i) of the FOIA.<sup>24</sup>

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

Cordially,

/Jason Foster/

Jason Foster  
Founder & President

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<sup>23</sup> DOJ, *Procedural Requirements, Department of Justice Guide to the Freedom of Information Act*, p. 35 (Posted August 20, 2021), available at <https://www.iustice.gov/oip/page/file/1199421/download#page=34>; see also, 28 C.F.R. § 16.5(c) (describing the DOJ’s rights and responsibilities whenever the FOIA’s 20 business day deadline cannot be satisfied “because of ‘unusual circumstances’”) (emphasis added); DOJ, *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons* (Updated July 22, 2021) (discussing the importance of FOIA Requester Service Centers and FOIA Public Liaisons generally, and the two responsibilities of FOIA Public Liaisons specifically, “[w]hen ‘unusual circumstances’ exist”), available at <https://www.iustice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>.

<sup>23</sup> 5 U.S.C. § 552(a)(6).

<sup>24</sup> In *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, the U.S. Court of Appeals for the District of Columbia Circuit instructed that:

in order to make a “determination” within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the “determination” is adverse.

*Citizens for Responsibility & Ethics in Washington*, 711 F.3d 180, 188 (D.C. Cir. 2013).