

# EMPOWER OVERSIGHT

Whistleblowers & Research



EMPOWR.us

September 7, 2023

**Via Electronic Transmission:** [MRUFOIA.Requests@USDOJ.Gov](mailto:MRUFOIA.Requests@USDOJ.Gov)

FOIA/PA Mail Referral Unit  
Department of Justice  
Room 115  
LOC Building  
Washington, DC 20530-0001  
Phone: (202) 616-3837

**RE: FOIA Request for Communications Regarding Hunter Biden Case**

Dear FOIA Officer:

## 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.

## BACKGROUND

Empower Oversight assists in representing Internal Revenue Service (“IRS”) Supervisory Special Agent (“SSA”) Gary Shapley, who in a May 26, 2023 transcribed interview with Majority and Minority staff of the U.S. House of Representatives Committee on Ways and Means made protected whistleblower disclosures about the Department of Justice’s (“the Department”) handling of the investigation and prosecution of Hunter Biden.<sup>1</sup> Pursuant to its authorities under 26 U.S.C. § 6103(f)(4)(B), the Committee voted on June 22, 2023 to release a transcript of its interview with SSA Shapley.<sup>2</sup>

Michael Schmidt, a reporter for *The New York Times*, contacted our legal team on June 27, 2023 to seek comment on a story he was writing. Mr. Schmidt said that Hunter Biden’s defense counsel had sent the Department a letter asking in writing that it investigate our client, SSA Shapley, for allegedly breaking laws protecting the privacy of grand jury deliberations.

<sup>1</sup> Available at [https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript\\_Redacted.pdf](https://waysandmeans.house.gov/wp-content/uploads/2023/06/Whistleblower-1-Transcript_Redacted.pdf).

<sup>2</sup> See <https://waysandmeans.house.gov/event/meeting-on-documents-protected-under-internal-revenue-code-section-6103>.

When asked for a copy of the letter, Mr. Schmidt claimed neither he nor his colleagues at the paper had a copy, and when pressed for details of the allegations on which he was seeking comment, his replies were vague and inconsistent. The story published by *The New York Times* failed to include our comment in full and failed to share with readers the detail that the Biden attorneys had made their allegations in writing, instead reporting merely: “Hunter Biden’s lawyers have told the Justice Department that Mr. Shapley has broken federal laws that keep grand jury material secret.”<sup>3</sup>

On June 28, 2023, we contacted the Justice Department Inspector General to report this effort to retaliate against SSA Shapley for his protected disclosures and intimidate him as a cooperating witness in the Inspector General’s investigation of those disclosures. That email describing the call with Mr. Schmidt in detail is attached here as Exhibit 1.<sup>4</sup>

Mr. Biden’s legal team has continued to press this baseless accusation. When House Ways and Means Chairman Jason Smith included SSA Shapley’s transcript in an *amicus* brief to the U.S. District Court for the District of Delaware,<sup>5</sup> Mr. Biden’s defense counsel contacted counsel for Chairman Smith on July 25, 2023 alleging the material “violated the court’s rules because it contained ‘grand jury and confidential tax payer information that must be sealed immediately.’”<sup>6</sup> After plea hearing on July 26, 2023, the next move from Mr. Biden’s attorneys was to file a motion to seal the record, again alleging that multiple exhibits attached to Chairman Smith’s *amicus* brief—including the transcript of SSA Shapley’s interview—“contain information that is patently considered grand jury material protected from disclosure,” and that “their dissemination is prohibited by law.”<sup>7</sup> These arguments were rejected by Judge Maryellen Noreika on August 17, 2023 when she issued an order finding that “broad allegations of harm are not sufficient” and “Defendant has failed to make any specific showing of harm,” thus denying the request to seal the record.<sup>8</sup>

Nevertheless, the public has a strong interest in understanding the arguments Mr. Biden’s defense counsel have made to the Department in an attempt to artificially gin up a retaliatory prosecution of our client in response to his legally protected whistleblowing.

## **RECORDS REQUEST**

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, to shed light on these frivolous accusations, Empower Oversight requests that the Department produce all communications sent by Mr. Biden’s legal team to the Department regarding our client, SSA Shapley.

## **DEFINITIONS**

“COMMUNICATION(S)” means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons, including but not limited to, face-to-face and telephone conversations, correspondence, memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, Slack messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

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<sup>3</sup> Glenn Thrush and Michael S. Schmidt, *Competing Accounts of Justice Dept.’s Handling of Hunter Biden Case*, N.Y. TIMES (Jun. 27, 2023), available at <https://www.nytimes.com/2023/06/27/us/politics/irs-official-justice-dept-hunter-biden.html>.

<sup>4</sup> Email from Jason Foster to Michael Horowitz, *et al.* (Jun. 28, 2023) (Attachment).

<sup>5</sup> *United States v. Biden*, No. 23-00274-MN (D. Del. Jul. 25, 2023) (Letter) [ECF Doc. 8].

<sup>6</sup> *United States v. Biden*, No. 23-00274-MN (D. Del. Jul. 25, 2023) (Exhibit A) [ECF Doc. 8].

<sup>7</sup> *United States v. Biden*, No. 23-00274-MN (D. Del. Jul. 26, 2023) (Motion to Seal Document) [ECF Doc. 17].

<sup>8</sup> *United States v. Biden*, No. 23-00274-MN (D. Del. Aug. 17, 2023) (Order on Motion to Seal Document) [ECF Doc. 42].

“DOCUMENT(S)” or “RECORD(S)” mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms “DOCUMENT(S)” or “RECORD(S)” include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records, ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“PERSON” means individuals, entities, firms, organizations, groups, committees, regulatory agencies, governmental entities, business entities, corporations, partnerships, trusts, and estates.

“REFERS,” “REFERRING TO,” “REGARDS,” “REGARDING,” “RELATES,” “RELATING TO,” “CONCERNS,” “BEARS UPON,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

“INCLUDING” means comprising part of, but not being limited to, the whole.

### **INSTRUCTIONS**

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive.

The singular form shall include the plural form and vice versa.

The present tense shall include the past tense and vice versa.

In producing the records described above, you shall segregate them by reference to each of the numbered items of this FOIA request.

If you have any questions about this request, please contact [REDACTED] by e-mail at [REDACTED].

### **FEE WAIVER REQUEST**

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but notes that it qualifies as a “representative of the news media” and requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, which helps insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seeks to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

Further, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public's understanding of the Department's handling of allegations that it or its employees was negligent or engaged in wrongdoing.

Empower Oversight is committed to government accountability, public integrity, and transparency. In the latter regard, the information that that Empower Oversight receives that tends to explain the subject matter of this FOIA request will be disclosed publicly via its website, and copies will be shared with other news media for public dissemination.

For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. Thank you for your time and consideration. Please do not hesitate to contact me with any questions.

Cordially,

[/Tristan Leavitt/](#)  
Tristan Leavitt  
President

# Exhibit 1

----- Forwarded message -----

From: [REDACTED]  
Date: Wed, Jun 28, 2023 at 11:09 AM  
Subject: Retaliatory Criminal Allegations  
To: Horowitz, Michael E.(OIG) [REDACTED], O'Neill, Michael S. (OIG)  
[REDACTED], Miles, Adam (OIG)  
CC: Tristan Leavitt [REDACTED], Lytle, Mark [REDACTED]

Here, from last night's NYT story, is evidence of lawyers for the President's son lobbying the Justice Department to retaliate against our client with a baseless criminal probe.

"White House officials dismissed Mr. McCarthy's impeachment threat as a 'distraction.' **And Hunter Biden's lawyers have told the Justice Department that Mr. Shapley has broken federal laws that keep grand jury material secret.** Mr. Shapley's lawyer, Mark D. Lytle, said his client "has legally protected rights to blow the whistle."



#### Competing Accounts of Justice Dept.'s Handling of Hunter Biden Case

[nytimes.com](https://www.nytimes.com)

When calling for comment, Mike Schmidt told us the claims were in a letter from Hunter Biden's lawyers to DOJ. When asked what specific information in Gary's protected disclosures were allegedly covered by 6(e) he said the WhatsApp message. We pointed out that information came in response to a search warrant and explained that grand juries do not issue search warrants. Schmidt then shifted ground and claimed that "there was some suggestion that the warrant was still under seal". We pointed out that even if a search warrant affidavit / filing were under seal that items / info collected pursuant to a warrant are not typically subject to such a seal. We asked to see a copy of the letter so we could understand the specifics of the allegation he was asking us to comment on—given that what he was saying didn't make much sense. Schmidt claimed neither he nor anyone at the Times had a copy of the letter.

He then went ahead and published the original unsupported 6(e) allegation anyway, and a small snippet of our comment, without mentioning the context of the letter or the substance of our reply to the vague allegations presented to us. As you know, there are virtually no legal protections against abusive, bogus criminal investigations as reprisal for protected whistleblowing. If lawyers for the President's son are trying to gin up such an investigation against our client, and put it writing, then that letter should be subject to extreme scrutiny.

Such a chilling effort to retaliate against our client for protected disclosures to your office and to Congress should be thoroughly investigated.

Please call me if you'd like to discuss further. Thanks.

Cordially,

Jason Foster

## Jason Foster

FOUNDER & CHAIR



**Mobile** [REDACTED]

**Email** [REDACTED]

**Web**

[www.empowr.us](http://www.empowr.us)

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