

EMPOWER OVERSIGHT

Whistleblowers & Research



April 25, 2024

VIA DOJ OFFICE OF INFORMATION POLICY FOIA STAR PORTAL

Director Bobak Talebian
Office of Information Policy
U.S. Department of Justice
441 G Street, NW, Sixth Floor
Washington, DC 20530

RE: FOIA APPEAL OF REQUEST NUMBER NFP-156634

Dear Director Talebian:

INTRODUCTION

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization, which is dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help 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.

BACKGROUND

Empower Oversight represents Mr. Marcus Allen, a suspended employee of the Federal Bureau of Investigation (“FBI”). Mr. Allen served honorably in the United States Marine Corps from 2000 to 2005 as an intelligence analyst and rifleman. He received a Top Secret security clearance in 2001. Mr. Allen was deployed to Kuwait and served two tours in Iraq, contributing to Operation Iraqi Freedom. During those deployments Mr. Allen was exposed to live enemy fire on multiple occasions despite being there to serve in intelligence and analytical roles. The Marine Corps recognized his outstanding military service by awarding him the Navy and Marine Corps Commendation Medal and the Navy and Marine Corps Achievement Medal. In 2004, he was the Marine Corps Intelligence Activity Runner-Up for Intelligence Non-Commissioned Officer of the year.

Mr. Allen was hired by the FBI in 2015 as a Staff Operations Specialist in the FBI’s Charlotte Field Office. He has consistently received an “Exceeds Fully Successful” rating on his performance evaluations since he was hired by the FBI. In 2019, the Charlotte Field Office recognized him with its Employee of the Year Award. From 2015 to 2021, Mr. Allen was never disciplined or counseled in any form by the FBI.

On September 29, 2021, Mr. Allen sent an internal email to several colleagues expressing concern that FBI Director Christopher Wray had misled Congress and the public concerning whether the FBI had assets on the ground at the Capitol during the January 6, 2021, riot. By disclosing in good faith to supervisors in his direct chain of command his reasonable belief that Director Wray may have misled Congress, Mr. Allen's September 29, 2021, communications were protected under 5 U.S.C. § 2303, 50 U.S.C. § 3341(j)(1), 28 C.F.R. § 27.2, and Presidential Policy Directive/PPD-19 ("PPD-19") § B. However, as a reprisal for Mr. Allen's protected disclosure, the FBI not only initiated an investigation into his security clearance and suspended his clearance, in violation of 50 U.S.C. § 3341(j)(1) and PPD-19, it *also* suspended him from duty indefinitely without pay—a "personnel action" as defined by 5 U.S.C. § 2302(a)(2)(A)(ix), in violation of the above cited whistleblower protections. While not paying Mr. Allen, the FBI also claimed that he was subject to its "outside employment" rules and restricted him from getting another job. Specifically, when he requested permission to apply for a job, the FBI delayed responding to his request, forcing him to lose that opportunity and causing him and his family further financial distress.

See the February 12, 2024, FOIA Request for more information about Marcus Allen, his protected disclosure, and the unlawful retaliation against him. Requester Item 2.

Empower Oversight appeals the February 16, 2024, decision by Section Chief Michael Seidel of the FBI's Record/Information Dissemination Section categorically denying Empower Oversight's February 12, 2024, request for records, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, related to the FBI's and Department of Justice's ("DOJ") handling of requests from individuals who have been suspended from duty without pay to take outside employment. Specifically, the following Request for records was rejected:

1. All records in the custody of any FBI employee or official ranked as a GS-14 or higher, or an appointee, or any agent or immediate staff of any such person, created in the past two (2) years, regarding the FBI's position or policy that individuals on unpaid suspension are required to receive FBI approval for outside employment requests during the pendency of the suspension.
2. Records of any communications, during the period from April 5, 2023, through September 5, 2023, by or with any FBI Office of Integrity and Compliance personnel including, but not limited to, Catherine Bruno, Betty DeVall, Kevin Chenail, and Margaret Davis, discussing Marcus Allen and outside employment.
3. Records of any communications, during the period from April 5, 2023, through September 5, 2023, by or with any DOJ Civil Division personnel including, but not limited to, Sarah Suwanda and Christopher Hall, discussing Marcus Allen and outside employment.¹
4. Records of any communications, during the period from April 5, 2023, through September 5, 2023, by or with any FBI Charlotte Division personnel including, but not limited to, Special Agent in Charge Robert Wells, Chief Division Counsel John Ireland, Associate Division Counsel Kathryn Swinkey, Assistant Special Agent in Charge Jason Kaplan, Supervisory Intelligence Analyst Michael Costanzo, and Chief Security Officer Suzanne Pemleton, discussing Marcus Allen and outside employment.

¹ This request was addressed to both the FBI and DOJ Civil Division. Since Item 3 only requests records in the custody of the Civil Division, it is inapplicable to the FBI and not at issue in this appeal.

The FBI claims this Request is “overly broad and . . . does not comport with the requirements of 28 CFR § 16.3(b), as it does not provide enough detail to enable personnel to locate records ‘with a reasonable amount of effort.’” Requester Item 3.

ANALYSIS

Under FOIA, a “request is sufficient ‘if it enable[s] a professional employee of the agency who [i]s familiar with the subject area of the request to locate the record with a reasonable amount of effort.’” *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 454 (D.D.C. 2014) (quoting *Forsham v. Califano*, 587 F.2d 1128, 1141 (D.C. Cir. 1978) *aff’d sub nom. Forsham v. Harris*, 445 U.S. 169 (1980)) (alterations in original). “The linchpin inquiry is whether the agency is able to determine ‘precisely what records (are) being requested.’” *Yeager v. DEA*, 678 F.2d 315, 326 (D.C. Cir. 1982).

Additionally, “the Act puts no restrictions on the quantity of records that may be sought. In fact, the statute anticipates requests for voluminous records.” *Tereshchuk*, 67 F. Supp. 3d at 455, *aff’d sub nom. Tereshchuk v. Bureau of Prisons, Dir.*, No. 14-5278, 2015 WL 4072055 (D.C. Cir. June 29, 2015); *Shapiro v. Cent. Intel. Agency*, 170 F. Supp. 3d 147, 155 (D.D.C. 2016) (stating that FOIA “explicitly contemplates unusually large requests, affording reviewing agencies additional time” for such requests).

FOIA “mandates a strong presumption in favor of disclosure.” *Shapiro*, 170 F. Supp. 3d at 153 (quoting *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)). “FOIA’s exemptions ‘do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.’” *Multi Ag Media LLC v. Dep’t of Agric.*, 515 F.3d 1224, 1227 (D.C. Cir. 2008) (internal citations omitted).

Furthermore, when the adequacy of an agency’s search is challenged, the “agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Campbell v. U.S. Dep’t of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1999) (quoting *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)).

In *Shapiro*, the plaintiff’s FOIA request sought records from the CIA mentioning Nelson Mandela or his three listed aliases. 170 F. Supp. 3d at 154. The court denied a motion to dismiss, which made an argument based on burden, reasoning that the request “convey[ed] exactly which records [were sought],” and “the agency ha[d] not satisfactorily explained why processing the request would be unduly burdensome.” *Id.* at 156.

Here, Empower Oversight specifically requests only records pertaining to the outside employment of employees while on unpaid suspension. It further limits itself to only those records referencing policies, positions, or Marcus Allen, and only those within the dates listed. The Request even provides names of those potentially involved in relevant communications to assist in the search.

There should be no confusion as to “precisely what records are being requested.” The FOIA Request provides in detail what it is asking for, going so far as to provide date ranges and context to provide the FBI and DOJ with all the information they need to discern what records are relevant.

Likewise, nothing in the FOIA Request would place an unreasonable burden on the FBI. As already stated, the Request limits itself to precise dates and subjects. In comparison, the request made in *Shapiro* was far broader and contained no temporal limit, yet the court still rejected the CIA’s burden/overbreadth argument.

Finally, the FBI made no effort to clarify any portion of the Request. If it felt that it could not reasonably and precisely identify the records, there is no reason why it could not have asked for more information. Resorting straight to a categorical denial was unreasonable, especially considering the specificity of the Request.

Empower Oversight respectfully requests that DOJ reverse the categorical denial of the referenced records.

Cordially,

[/Tristan Leavitt/](#)
Tristan Leavitt
Empower Oversight
Founder and Chairman