

EMPOWER OVERSIGHT

Whistleblowers & Research



May 17, 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 1627893-000

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

The Criminal Justice Information Services (“CJIS”) division of the Federal Bureau of Investigation (“FBI”) serves as a critical tool for local and state law enforcement, as well as national security and intelligence community partners. CJIS houses multiple data services for every police department and law enforcement agency in the United States.

Despite CJIS’s crucial mission, Empower Oversight has obtained information from whistleblowers that suggests CJIS is suffering from a lack of oversight. Most recently, Assistant Director (“AD”) Michael Christman has allegedly run CJIS as a personal fiefdom to reward those loyal to him and retaliate against those who are not. Not only is this an improper use of taxpayer dollars, but it also risks undermining CJIS’s many programs and the missions they serve.

Former employees report that various complaints have been filed against AD Christman, including with the FBI’s Inspection Division and U.S. Department of Justice’s Office of the Inspector General. See the March 29, 2024, FOIA Request for more information about these troubling reports. Requester Item 2.

Empower Oversight appeals the April 12, 2024, decision by Section Chief Michael Seidel of the FBI's Record/Information Dissemination Section denying Items 1, 7–9, and 11–15 of Empower Oversight's March 29, 2024, Request for records, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The rejected items of that Request are as follows:

1. For the period from March 12, 2021 to March 12, 2023, records reflecting all entries into and exits from CJIS or any of its buildings or rooms on weekends and federal holidays by Michael Christman, any senior executive service ("SES") personnel assigned to CJIS, or any GS-15 personnel assigned to CJIS.
7. Records of any complaints about Mr. Christman or investigations of Mr. Christman that were received or conducted by the FBI Inspection Division, FBI Office of Equal Employment Opportunity Affairs, FBI Office of the Ombudsman, Department of Justice ("DOJ") Office of the Inspector General, and/or DOJ Office of Professional Responsibility.
8. FBI Office of Professional Responsibility and/or FBI Office of Disciplinary Appeals records of any adjudications of misconduct allegedly committed by Michael Christman.
9. Records of Michael Christman's retirement from the FBI.
11. Records of any decisions to exempt Michael Christman, currently the AD of CJIS, from mandatory retirement.
12. Records of any communications, during the period from October 31, 2020 through the present, by or with Michael Christman, Director Christopher Wray, Deputy Director Paul Abbate, former Deputy Director Mark Bowdich, Associate Deputy Director Brian Turner, former Associate Deputy Director Jeffrey Sallet, Executive Assistant Director Timothy Dunham, Executive Assistant Director Larissa Knapp, and/or former Executive Assistant Director Jennifer L. Moore, regarding Michael Christman and exemption from mandatory retirement.
13. Records of any contracts or extensions of contracts with Michael Christman after his retirement from the FBI.
14. Records of any communications, during the period from October 31, 2020 through the present, by or with Michael Christman, Director Christopher Wray, Deputy Director Paul Abbate, former Deputy Director Mark Bowdich, Associate Deputy Director Brian Turner, former Associate Deputy Director Jeffrey Sallet, Executive Assistant Director Timothy Dunham, Executive Assistant Director Larissa Knapp, and/or former Executive Assistant Director Jennifer L. Moore, regarding Michael Christman's contract(s) or extensions of contracts with the FBI.
15. Records of Michael Christman's membership in the FBI Reserve Service, including any documentation of the decision to include him in that service, records of any payments received while in that service, and records indicating whether he was allowed to collect retirement payments while being paid for FBI Reserve Service.

The FBI denied the Request as to these Items, stating, "the FBI will neither confirm nor deny the existence of such records pursuant to FOIA exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C)." Requester Item 3.

ANALYSIS

Here, the FBI provided *Glomar* responses under Exemptions 6 and 7(C). Exemption 6 exempts “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy,” 5 U.S.C. § 552(b)(6), while 7(C) exempts “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.” § 552(b)(7)(C). Although similar, there are important distinctions between the two exemptions.

First, because “Exemption 7(C) shields from disclosure ‘records or information compiled for law enforcement purposes,’” the FBI “had to make a threshold showing that the FOIA request[s] seek[] records ‘compiled for law enforcement purposes.’” *Bartko v. U.S. Dep’t of Justice*, 898 F.3d 51, 64 (D.C. Cir. 2018). Second, “the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.” *U.S. Dep’t of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 756 (1989). “[W]hereas Exemption 6 requires that the invasion of privacy be ‘clearly unwarranted,’ the adverb ‘clearly’ is omitted from Exemption 7(C).” *Id.* Also, “whereas Exemption 6 refers to disclosures that ‘would constitute’ an invasion of privacy, Exemption 7(C) encompasses any disclosure that ‘could reasonably be expected to constitute’ such an invasion.” *Id.*

Thus, the FBI’s responses must be analyzed by first determining whether the cited exemptions apply to the requested records, and, if they do, “weigh[ing] the public interest in the release of information against the privacy interest in nondisclosure” under the standard of the appropriate exemption. *PETA v. Nat’l Inst. of Health*, 745 F.3d 535, 541 (D.C. Cir. 2014) (quoting *Schrecker v. U.S. Dep’t of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003)).

I. Threshold Showings: Exemption 7 Does Not Apply to the Vast Majority of Items 1, 7–9, and 11–15

The Requester admits that any records responsive to its requests would meet the threshold requirement for Exemption 6. But, as already explained, to invoke *Glomar* for Exemption 7(C), the FBI had “to make a threshold showing that the FOIA request[s] seek[] records ‘compiled for law enforcement purposes.’” *Bartko*, 898 F.3d at 64. The D.C. Circuit has held that courts may apply a more deferential attitude towards claims by law enforcement agencies, such as the FBI and OIG, that records were compiled for law enforcement purposes. *Pratt v. Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982). Yet, the court also observed that while a court’s measure of a law enforcement agencies’ law enforcement purposes is deferential, it is not “vacuous.” *Id.* at 421. Moreover, this deferential standard *only* applies “in the context of external investigations.” *Stern v. FBI*, 737 F.2d 84, 89 (D.C. Cir. 1984) (emphasis added).

The appropriate test to determine if records regarding an *internal* investigation were compiled for law enforcement purposes was described in *Rural Housing Alliance v. U.S. Dep’t of Agric.*, 498 F.2d 73, 82 (D.C. Cir. 1974). The question is whether “the purpose of the investigation was to consider an action equivalent to those which the Government brings against private parties, thus demonstrating that the ‘law enforcement purpose’ was not customary surveillance of the performance of duties by government employees, but an inquiry as to an identifiable possible violation of law.” *Id.* Furthermore, “[t]here can be no question that an investigation conducted by a federal agency for the purpose of determining whether to discipline employees for activity which does not constitute a violation of law is not for ‘law enforcement purposes’ under Exemption 7.” *Stern*, 737 F.2d at 90.

Items 1, 9, and 11–15 are purely administrative, and there is no indication that such records concern any violation of law. Thus, those are records that have not been compiled for law enforcement purposes making Exemption 7 inapplicable.

For Items 7 and 8, because most of the records requested from the FBI¹ were for internal investigations and/or employee monitoring, the deferential standard from *Pratt* does not apply. Two of the FBI entities listed in Item 7 primarily, if not exclusively, investigate or address administrative matters. The FBI Inspection Division investigates employees, but it primarily investigates them for violations of FBI policy, not violations of law. The FBI Ombudsman addresses employment grievances, not violations of law. The FBI's Office of Equal Employment Opportunity Affairs ("OEEOA") addresses alleged violations of Title VII, and, thus, Exemption 7 would apply to it. The FBI offices listed in Item 8, the FBI Office of Professional Responsibility ("OPR") and FBI Office of Disciplinary Appeals ("ODA"), are purely administrative entities. They decide administrative disciplinary cases and appeals, not violations of law. Thus, Exemption 7 does not apply to any of the requested records, except for OEEOA.

Accordingly, the more pro-disclosure standard of Exemption 6 applies to the vast majority of the requested records.

II. Public Interest Outweighs Privacy Interest

In determining whether the public interest in disclosure of the requested records outweighs the privacy interest in withholding them, "we first ask 'whether disclosure would compromise a substantial, as opposed to a *de minimis*, privacy interest.' If so, we 'balance the privacy interest in non-disclosure against the public interest.'" *Telematch, Inc. v. United States Dep't of Agric.*, 45 F.4th 343, 351 (D.C. Cir. 2022) (quoting *Consumers' Checkbook Ctr. for the Study of Servs. v. U.S. Dep't of Health & Hum. Servs.*, 554 F.3d 1046, 1050 (D.C. Cir. 2009)). The use of the "word substantial in this context means less than it might seem. A substantial privacy interest is anything greater than a *de minimis* privacy interest." *Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1229–30 (D.C. Cir. 2008). "Finding a substantial privacy interest does not conclude the inquiry; it only moves it along to the point where [a court] can 'address the question whether the public interest in disclosure outweighs the individual privacy concerns.'" *Id.* at 1230 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 35 (D.C. Cir. 2002)). "In other words, a privacy interest may be substantial—more than *de minimis*—and yet be insufficient to overcome the public interest in disclosure." *Id.*

Courts must also "balance the public interest in disclosure against the interest Congress intended the Exemption to protect." *U.S. Dep't of Def. v. Fed. Lab. Rels. Auth.*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989)) (evaluating an Exemption 6 argument). In the case of Exemption 6, "the statute instructs the court to tilt the balance in favor of disclosure." *Rural Housing Alliance v. U.S. Dep't of Agric.*, 498 F.2d 73, 77 (D.C. Cir. 1974). "FOIA's exemptions 'do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" *Multi Ag*, 515 F.3d at 1227. "And there is nothing about invoking Exemption 6 that lightens the agency's burden. In fact, 'under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.'" *Id.*

Outside of FOIA where there is a presumption of legitimacy accorded to the government's official conduct, "clear evidence is usually required to displace it." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004). In FOIA cases, though, "[g]iven FOIA's prodisclosure purpose[.]" the Supreme Court has adopted a "less stringent standard" that "is

¹ This request was also submitted to DOJ entities other than the FBI that have different investigative authorities. This appeal only addresses the FBI's denial of the requested records.

more faithful to [FOIA's] statutory scheme.” *Id.* The Court held that “[w]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure.” *Id.* “Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.” *Id.* Although *Favish* involved Exemption 7(C), both the D.C. Circuit and the Supreme Court have observed that the evidentiary requirement applies to Exemption 6 as well. *See Consumers’ Checkbook*, 554 F.3d at 1054 n.5; *Pubien v. U.S. Dep’t of Justice*, 273 F. Supp. 3d 47, 54 (D.D.C. 2017).

First, Christman has only a *de minimis* privacy interest in non-investigative administrative records (Items 1, 9, and 11–15). The FBI routinely issues press releases about its executives. In fact, it issued a press release on Christman’s retirement.² Considering Christman continued to be employed as an FBI agent after the mandatory retirement age, the public interest in learning how the FBI did this and why outweighs the minimal privacy interest Christman has in those records. Also, neither Christman nor any other FBI SES official at CJIS has a substantial privacy interest in determining if they entered CJIS or its buildings on weekends or holidays.

Second, the privacy interest in the investigative records (Items 7 and 8) is outweighed by the public interest in learning how the FBI addresses misconduct by high-level executives. Here, there is ample evidence to “warrant a belief by a reasonable person that the alleged Government impropriety might have occurred,” as explained in the Request:

- According to former CJIS employees, AD Christman has promoted multiple women with whom he appears to have engaged in inappropriate relationships. For instance, former employees have reported to Empower Oversight that AD Christman and a female CJIS employee were observed in a state of undress on a Saturday night in the CJIS gymnasium. That female employee has been promoted quickly.
- Further, during an all-employee conference, AD Christman reportedly claimed to have nightly phone calls with a female employee who did not report directly to him. This employee was given three awards in a short period of time, with monetary compensation totaling an estimated \$15,000.
- Additionally, since the end of the COVID-19 pandemic, CJIS has unevenly given permission to employees to work from home or telework. Former employees report that employees with close ties to AD Christman have been allowed to telework while others without a close relationship to AD Christman have not.
- When challenged on his behavior, AD Christman has reportedly responded by retaliating against employees. AD Christman has allegedly moved employees into temporary positions for “cross-training” as a means to retaliate. These allegations are consistent with the experience of Empower Oversight’s client Monica Shillingburg, who had made protected whistleblower disclosures about the FBI’s National Instant Criminal Background Check System while Christman served as a Deputy Assistant Director of CJIS. On returning to CJIS as AD, Christman took retaliatory action against Ms. Shillingburg, transferring her from a Unit Chief position to a non-supervisory position in another section. Empower Oversight has

² <https://www.fbi.gov/news/press-releases/fbi-criminal-justice-information-services-division-assistant-director-michael-a-christman-retires>.

filed a whistleblower reprisal complaint on her behalf with the Department of Justice Inspector General.³

- Former employees also report that AD Christman has made threats to move CJIS from West Virginia during all-employee or all-hands conferences. Moving an entire FBI division—particularly the FBI’s largest division—to a new state would ostensibly require funding approved by Congress. However, these threats appear to be designed to intimidate employees, many of whom are native West Virginians.
- Former employees report that various complaints have been filed against AD Christman, including with the FBI’s Inspection Division and U.S. Department of Justice’s Office of the Inspector General.

Having established that there were misconduct allegations against Christman, there is a substantial public interest in confirming these allegations. The requested records are related to Christman’s misconduct while he was a high-ranking FBI official. Thus, the records inherently reflect on the FBI’s and DOJ’s activities, not his as a private citizen. The public has an interest in knowing how the FBI addressed misconduct allegations against a high-ranking official. The D.C. Circuit has held that a finding of misconduct by a lower ranking FBI executive, a special agent in charge—at least two levels below Christman’s final position as Assistant Director—could be disclosed even under the more exacting standard of Exemption 7(C). *Stern v. FBI*, 737 F.2d 84, 93–94 (D.C. Cir. 1984). Thus, there is no basis to withhold the records of administrative investigations, and the public interest in disclosing the OEEOA records—to show if Christman engaged in unlawful discrimination—outweighs his privacy interest in withholding them.

Also, even if Christman had a substantial privacy interest in the non-investigative administrative records, they are outweighed by the public interest in disclosing misconduct and explaining the FBI’s decision to employ him after mandatory retirement age.

Finally, the misconduct allegations further confirm that the public interest in determining if Christman and other SES personnel were at CJIS and its buildings on weekends and holidays outweigh those officials’ minimal privacy interests in that information. Specifically, those records may shed light on the allegation of Christman’s reported tryst with a female employee on a Saturday night. See Requester Item 2 at 2.

In sum, the FBI’s reasoning for denying these Request Items fails. Exemption 7 does not apply to Items 1, most of 7, 8–9, and 11–15, because these records are either purely administrative in nature or were compiled for internal investigations or employee monitoring. Meanwhile, the public interest in disclosure of all Items outweighs any privacy interest. First, the privacy interest in the non-investigative administrative records is de minimis as they only document his employment at CJIS, including his presence at CJIS’ buildings, and how Christman was allowed to remain employed after the mandatory retirement age for FBI agents. Meanwhile, for all Items, ample evidence of serious government misconduct exists that warrants disclosure.

FOIA “mandates a strong presumption in favor of disclosure.” *Shapiro v. Cent. Intel. Agency*, 170 F. Supp. 3d 147, 153 (D.D.C. 2016) (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

³ <https://empowr.us/wp-content/uploads/2024/01/2024-1-16-TL-to-DOJ-OPR-OIG-MS-WB-Retaliation-w-Exhibits.pdf>.

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).

Empower Oversight respectfully requests that DOJ adheres to FOIA’s statutory mandate by reversing the denial of the referenced records.

Cordially,

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