

EMPOWER OVERSIGHT

Whistleblowers & Research



May 23, 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 22-OIG-224

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, former Assistant Director (“AD”) Michael Christman allegedly ran 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 were filed against former AD Christman, including with the FBI's Inspection Division and U.S. Department of Justice's Office of the Inspector General ("the OIG").

See the March 29, 2024, FOIA Request for more information about these underlying allegations. Requester Item 2.

Empower Oversight appeals the May 7, 2024, decision by Supervisory Government Information Specialist Deborah M. Waller of the OIG denying Empower Oversight's March 29, 2024, Request for records, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The only Item of that Request applicable to the OIG is as follows:

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.

The OIG categorically denied the Request, stating, "Without the consent of the individuals you mention, an official acknowledgement of an investigation involving them, or an overriding public interest, acknowledging the existence of such records could reasonably be expected to constitute an unwarranted invasion of personal privacy. 5 U.S.C. §552(b)(6) and (7)(C)." Requester Item 3.

ANALYSIS

Here, OIG 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." Section 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 OIG "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 OIG'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 Necessarily Apply to All of the Possible Requested Records

The Requester admits that any records responsive to its request would meet the threshold requirement for Exemption 6. But, as already explained, to invoke Exemption 7(C), the OIG 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 the 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.

Because the records requested from the OIG were for internal investigations and/or employee monitoring, the deferential standard from *Pratt* does not apply. Empower Oversight admits that some responsive records might meet the Exemption 7 threshold, such as any allegations of violations of law. However, other allegations of misconduct that involve violations of internal FBI policies and procedures would not meet that threshold. In fact, the OIG acknowledges in one of its own reports that “[u]nder FBI policy, FBI employees must report all allegations of misconduct to appropriate FBI officials—who in turn are required to report them to the OIG. As with other Department agencies, the OIG can investigate any of these allegations. Normally, the OIG investigates criminal allegations or *the most serious administrative allegations involving high-level FBI employees....*”¹ Christman was an AD, a high-level employee. Thus, the OIG likely investigated any administrative allegations against him, and Exemption 7 would not have applied to those allegations or investigations.

Accordingly, the more pro-disclosure standard of Exemption 6 applies to many of the possible responsive records.

II. Public Interest Outweighs Privacy Interest

Regardless of whether Exemption 7 applies or just Exemption 6, the public interest in disclosure outweighs Christman’s privacy interest in withholding the records. In making this determination, “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

¹ *I-2009-002 Review of the Federal Bureau of Investigation’s Disciplinary System* (May 2009) available at https://www.oversight.gov/sites/default/files/oig-reports/final_4.pdf (last visited May 21, 2024) at ii (emphasis added).

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 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, regarding any allegations or investigations of administrative violations, only Exemption 6 applies and the balance tilts in favor of disclosure.

Second, regardless of whether the allegations against Christman involved administrative or legal violations, the privacy interest in the investigative records 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 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.

- 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.
- 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 reportedly responded by retaliating against employees. AD Christman 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 filed a whistleblower reprisal complaint on her behalf with the OIG.²
- 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 the OIG. Having established that there were misconduct allegations against Christman, there is a substantial public interest in confirming these allegations. The requested records are all directly 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 activities as a private citizen. The public has an interest in knowing how the OIG 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 AD—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 or law enforcement investigations.

In sum, ample evidence of serious government misconduct exists that warrants disclosure.

² <https://empowr.us/wp-content/uploads/2024/01/2024-1-16-TL-to-DOJ-OPR-OIG-MS-WB-Retaliatio-n-w-Exhibits.pdf>.

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 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 this Request for records.

Cordially,

/Tristan Leavitt/
Tristan Leavitt
President
Empower Oversight