EMPOWER OVERSIGHT
Whistleblowers & Research

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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 FOR FOIPA REQUEST NO. 1651819-000

Dear Director Talebian:

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

The Federal Bureau of Investigation ("FBI") retaliated against several Empower Oversight clients for protected whistleblower disclosures and/or First Amendment-protected activities while employed by the FBI. The public has a strong interest in learning about any misconduct committed by FBI personnel and by whom such misconduct was committed.

Accordingly, on September 9, 2024, under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, Empower Oversight submitted to the FBI a request (attached as Requester Item 2) seeking records:

> for the period from September 28, 2021 through the date the FBI begins a search for the requested records, all records of communications by or with Christopher Wray, Paul Abbate, Jennifer Leigh Moore, Douglas Beidler, Lawrence Buckley, Jeffrey Veltri, Dena Perkins, Tasha Gibbs, Miriam Coakley, and Sean Clark that contain any of the following key words or phrases:
>
> 1) "Marcus Allen";
> 2) "Allen";
> 3) "Marcus";
> 4) [redacted]
> 5) [redacted]

6) [redacted]
7) [redacted]
8) [redacted]
9) "O'Boyle";
10) "Garret";
11) "Garrett";
12) [redacted];
13) "COVID";
14) "COVID-19";
15) "Covid";
16) "Covid-19";
17) "vaccine";
18) "vaccination";
19) "Trump";
20) "January 6";
21) "Jan 6";
22) "Jan. 6";
23) "J6";
24) "January 6, 2021";
25) "01/06/2021";
26) "Capitol";
27) "Capitol event";
28) "Holy";
29) "Spirit";
30) "Christian";
31) "religion";
32) "religious";
33) "Catholic";
34) "Project Veritas"
35) "Veritas"
36) "Richmond Lobby Day";
37) "RLD";
38) "Lobby Day";
39) "lobby day";
40) [redacted]; and
41) Boolean search with [redacted] AND "Allen."

A reasonable search for the requested records would include a key word search of a variety of communications accounts, including, but not limited to email accounts (both UNET and FBINET), instant messaging, and text messages.

On November 26, 2024, Section Chief Michael Seidel of the FBI's Record/Information Dissemination Section categorically denied this request. The denial letter asserts that the "request . . . does not provide enough detail to enable personnel to complete a search 'with a reasonable amount of effort,' it seeks a voluminous amount of records." Requester Item 3. Empower Oversight appeals this decision.

ANALYSIS

A FOIA request must "reasonably describe[]" the records sought. 5 U.S.C. § 552(a)(3)(A). "The linchpin inquiry is whether the agency is able to determine 'precisely what records (are) being requested.'" *Yeager v. Drug Enf't Admin.*, 678 F.2d 315, 326 (D.C. Cir. 1982) (holding request encompassing over 1,000,000 computerized records to be valid).

As a corollary to the "reasonably described" inquiry, courts have held that agencies are

not required to conduct wide-ranging, "unreasonably burdensome" searches for records. *See, e.g.*, *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.C. Cir. 1995). But "the Act puts no restrictions on the quantity of records that may be sought. In fact, the statute anticipates requests for voluminous records." *Tereshchuk v. Bureau of Prisons*, 67 F. Supp. 3d 441, 455 (D.D.C. 2014); *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). Accordingly, courts have held time and time again that requests seeking massive amounts of records are not unreasonably burdensome when those requests properly describe the records sought.[1]

The D.C. Circuit has held that even if the request "is not a model of clarity," an agency should carefully consider the nature of each request and give a reasonable interpretation to its terms and overall content. *LaCedra v. Exec. Off. for U.S. Att'ys*, 317 F.3d 345, 347–48 (D.C. Cir. 2003); *see, e.g.*, *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984). Other courts have followed suit.[2] Agencies should interpret FOIA requests "liberally" when determining which records are responsive to them. *Nation Mag. v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995).[3] The District Court for the District of Columbia has held that an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester." *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985). Another court found in a case that, despite the plaintiff's use of incorrect terminology in its request, "the accompanying definition [in attached memoranda] was sufficient to put the [agency] on notice of the documents . . . requested." *Amnesty Int'l USA v. C.I.A.*, 728 F. Supp. 2d 479, 499 (S.D.N.Y. 2010).

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

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[1] *See, e.g.*, *Ruotolo v. Dep't of Just., Tax Div.*, 53 F.3d 4, 9–10 (2d Cir. 1995) (finding that, although request would require 803 files to be searched "begin[ning] with the most current . . . and work[ing] backward in time," it was "reasonably described" and not "unreasonably burdensome");

Colgan v. Dep't of Justice, No. 14-740, 2020 WL 2043828, at *9 (D.D.C. Apr. 28, 2020) (finding that agency "fail[ed] to show that a search would be unduly burdensome" because "conclusory statements about the volume of material" neither "provide estimates of the cost of the search" nor discuss "whether the burden would be unusual");"

Kwoka v. Internal Revenue Serv., No. 17-1157, 2018 WL 4681000, at *5 (D.D.C. Sept. 28, 2018) ("[E]ven taking the IRS at its word, the Court does not find roughly 2,200 hours of review time to constitute an 'unreasonably burdensome search'");

Eakin v. United States Dep't of Def., No. 16-00972, 2017 WL 3301733, at *5 (W.D. Tex. Aug. 2, 2017) (holding that searching through 4.2 terabytes of data is not unreasonably burdensome and reasoning that "[i]t appears the most burdensome work is removing recently-created, non-responsive materials from the files in accordance with FOIA exemptions, rather than ascertaining or locating the responsive documents themselves");

Leopold v. Nat'l Sec. Agency, 196 F. Supp. 3d 67, 75 (D.D.C. 2016) (rejecting burdensome argument where "emails and their attachments can be searched using an eDiscovery tool without needing to open each email and its attachments individually" and where agency provided no evidence "regarding the burden associated with running such searches").

[2] *See, e.g.*, *Rocky Mountain Wild, Inc. v. U.S. Forest Serv.*, No. 15-0127, 2016 WL 362459, at *6 (D. Colo. Jan. 29, 2016) (finding that "when an agency learns that it has misunderstood the scope of a request, it has a duty to adjust its records search accordingly"); *Laws. Comm. for C.R. v. Dep't of the Treasury*, 534 F. Supp. 2d 1126, 1135–36 (N.D. Cal. 2008) (concluding that requests must be "interpreted liberally and . . . an agency cannot withhold a record that is reasonably within the scope of the request on the grounds that the record has not been specifically named by the requester"); *Laws. Comm. for C.R. v. Dep't of the Treasury*, No. 07-2590, 2008 WL 4482855, at *6 (N.D. Cal. Sept. 30, 2008).

[3] *See, e.g.*, *Allen v. Bureau of Prisons*, No. 00-0342, slip op. at 7–9 (D.D.C. Mar. 1, 2001) (concluding that agency took "an extremely constricted view" of plaintiff's FOIA request for all "records or transcripts" of intercepted phone calls by failing to construe audiotape recordings of those calls as being within request's scope), *aff'd*, 89 F. App'x 276 (D.C. Cir. 2004); *Horsehead Indus. v. EPA*, No. 941299, slip op. at 4 n.2 (D.D.C. Jan. 3, 1997) (ruling that "[b]y construing the FOIA request narrowly, [agency] seeks to avoid disclosing information").

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, first, the FBI's reasoning fails on its face because, as the case law makes plain, just because a request "seeks a voluminous amount of records" does not mean anything. In fact, as explained above, "the statute anticipates requests for voluminous records." *Tereshchuk*, 67 F. Supp. 3d at 455.

Second, Empower Oversight's request identifies precisely what records are sought: all records of communications by or with the named individuals containing the listed terms. There is no other way to be more specific. If the FBI has any ideas, it has not shared them with Empower Oversight.

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)). Empower Oversight respectfully requests that the Department of Justice adhere to FOIA's statutory mandate by reversing the incorrect denial of this request for records.

Cordially,

/Jason Foster/
Jason Foster
Empower Oversight
Chair & Founder