EMPOWER OVERSIGHT
Whistleblowers & Research

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April 16, 2025

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 1633871-001

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. 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 Federal Bureau of Investigation ("FBI"), through Special Agents John Morris and John Connolly, protected notorious Boston crime boss James Whitey Bulger for years. Connolly and Bulger were eventually prosecuted and convicted, while Morris was granted immunity for his testimony. Prosecutors used Morris as a star witness in both trials, which were heavily publicized.[1] Morris, Connolly, and Bulger were all prominently portrayed in the 2015 film *Black Mass*, which itself was based on a book detailing the corrupt bargain between them. The

[1] Deborah Feyerick and Kristina Sgueglia, '*Whitey' Bulger faces off with FBI agent who went from pal to prosecution witness*, CNN, June 28, 2013, https://www.cnn.com/2013/06/27/justice/massachusetts-bulger-trial/index.html; Ed Helmore, *FBI's links to Irish crime lord exposed,* The Guardian, June 1, 2002, https://www.theguardian.com/world/2002/jun/02/theobserver; Stephanie Simon, *Ex-FBI agent apologizes to victims at Bulger trial*, NBC News, July 1, 2013, https://www.nbcnews.com/news/us-news/ex-fbi-agent-apologizes-victims-bulger-trial-flna6C10505322; *Whitey' Bulger's Alleged Bribes and Threat Recounted By Corrupt FBI Agent*, ABC News, June 28, 2013, https://abcnews.go.com/US/whitey-bulgers-alleged-bribes-threat-recounted-corrupt-fbi/story?id=19521441.

existence of misconduct by the FBI and John Morris is not just publicly known, it is a part of popular culture.

(For more information, with detailed citations, about Morris, Bulger, and the FBI's protection of Bulger, see Empower Oversight's April 7, 2025 FOIA Request. Requester Item 2.)

Empower Oversight appeals FBI Record/Information Dissemination Section Chief Michael Seidel's April 10, 2025 denial of our request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Request sought the following Items:

1. John Morris's personnel file; and

2. Records of any investigations into or disciplinary action against John Morris for his involvement with James "Whitey" Bulger or Bulger's associates.

The FBI categorically denied the Request, stating, "[T]he 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

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.*

Accordingly, 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 Item 1

Empower Oversight admits that any records responsive to its requests would meet the threshold requirement for Exemption 6. But, as already explained, to invoke 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.

Morris's personnel file (Item 1) is 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.

II. The Public Interest Outweighs Any 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)). 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, Morris has only a *de minimis* privacy interest in non-investigative administrative records (Item 1), and, moreover, his career and misconduct are public knowledge. He testified in court to his own wrongdoing as a witness for the government in two highly publicized trials.[2] And his wrongdoing was further publicized in popular culture through books, movies, and television. Therefore, his privacy interest in the investigative records (Item 2) is also *de minimis*.

[2] *Supra* note 1

Second, any privacy interest in the requested Items is outweighed by the public interest in learning how the FBI addressed or failed to address Morris's misconduct, which helped protect a major crime boss and led to the deaths of several individuals. Here, there is ample evidence to "warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." Morris's own testimonies disclosed his misconduct, stating that he took bribes and information about other criminal organizations from Bulger and, in return, helped protect Bulger from federal prosecution and provided him with information about FBI investigations.[3] At one point, Morris tipped off Connolly, who tipped off Bulger's organization about an FBI informant.[4] Bulger had that informant killed.[5]

Having established Morris's and the FBI's misconduct, there is a substantial public interest in finding out how the FBI addressed or failed to address Morris's misconduct. The requested records inherently reflect on the FBI's activities, not his as a private citizen. The public has an interest in knowing how the FBI addressed the misconduct of an important FBI official.

Furthermore, even if Morris had a substantial privacy interest in the non-investigative administrative records (Item 1), they are outweighed by the public interest in shedding light on the FBI's handling of this severe misconduct.

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In sum, the FBI's reasoning for denying the Request fails. Exemption 7 does not apply to Item 1 because those records are purely administrative in nature. Meanwhile, the public interest in disclosure of both Items outweighs any privacy interest. First, the privacy interest in the non-investigative administrative records is *de minimis* as they only document Morris's employment at the FBI. Second, the privacy interest in the investigative records is also *de minimis* because his misconduct is public knowledge and has been acknowledged by the government when it used Morris as a witness. Meanwhile, for both Items, it has been established that serious government misconduct occurred, and, as such, the public interest in uncovering any other misconduct concerning this matter 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 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
Empower Oversight
President

[3] *Id.*

[4] *Id.*

[5] *Id.*