

February 15, 2012

**By Facsimile (202) 514-1009 and First-Class Mail**

FOIA/PA Appeal  
Office of Information Policy  
U.S. Department of Justice  
1425 New York Ave., N.W.  
Suite 11050  
Washington, D.C. 20530-0001

Re: Freedom of Information Act Appeal in Request No. CRM-201200080F

Dear Sir/Madam:

Citizens for Responsibility and Ethics in Washington (CREW) hereby appeals the refusal of the Criminal Division of the U.S. Department of Justice (DOJ) to release to CREW any records responsive to CREW's Freedom of Information Act (FOIA) request of January 25, 2012.

By letter dated, sent by facsimile, and received by the Criminal Division on January 25, 2012, CREW requested copies of all records provided to the Criminal Division between 1996 and 1997 by the House Ethics Committee, then known as the House Committee on Standards of Official Conduct, relating to the committee's investigation of the use by then-House Speaker Newt Gingrich – currently a candidate for president of the United States – of charitable tax-exempt organizations to underwrite political activities and his false statements to the committee. CREW also requested records reflecting how DOJ responded to the evidence provided it by the House Ethics Committee. CREW specifically noted its willingness to discuss with DOJ the scope of its request and whether it can be narrowed or modified to better enable DOJ to process it. For your convenience, a copy of this request is attached as Exhibit A.

CREW sought both a fee waiver and expedition of its request, justified by the particular urgency to inform the public about the extent to which DOJ followed up on the substantial body of evidence developed by the House Ethics Committee concerning Mr. Gingrich. As CREW explained, this evidence and the allegations it concerns bear directly on Mr. Gingrich's suitability for president and have been the subject of numerous media reports as well as a matter of debate between Mr. Gingrich and other presidential contenders. Expedition is warranted in light of the critical importance of this information to voters in the upcoming presidential election. Separately by letter dated January 25, 2012, CREW requested expedition of its FOIA request from DOJ's Office of Public Affairs, based on the widespread and exceptional media interest in these matters. A copy of this letter is attached as Exhibit B.

By letter dated February 13, 2012, and received by CREW on February 14, 2012, Rena Y. Kim, Chief of the Criminal Division's FOIA/PA Section, acknowledged receipt of CREW's request and indicated without express authorization and consent of a "third party"—presumably Mr. Gingrich—any release would violate the Privacy Act, 5 U.S.C. § 552. Ms. Kim refused to confirm whether or not any responsive records exist and stated further CREW had failed to provide "a clear demonstration that the public interest in disclosure outweighs the personal privacy interests of the third party and that significant public benefit would result from the disclosure of the requested records". Further, Ms. Kim claimed any responsive records would be exempt from disclosure under FOIA Exemptions 6 and 7(C). A copy of this letter is attached as Exhibit C.

By refusing at the outset to process any aspect of CREW's FOIA request the Criminal Division has failed to meet its most basic obligations under the FOIA. As the court in *CREW v. Dep't of Justice*, 2012 U.S. Dist. LEXIS 2550 (Jan. 10, 2012 D.D.C.), ruled recently, this kind of categorical refusal to search for responsive records cannot be sustained where, as here, there is a substantial public interest in disclosure of the requested records. Specifically, the public has a "very strong" interest and "needs to know how DoJ carried out its statutory duties to investigation allegations of . . . corruption of members of Congress." *Id.* at \*24. Indeed, the public interest is at an apex when the records concern a now prominent candidate for the office of president at a time when he occupied a key leadership role in Congress.

The Criminal Division's reliance on the Privacy Act to justify refusing to process CREW's request is equally in error given the express acknowledgment in the Privacy Act that where the FOIA requires disclosure, the Privacy Act is not a bar to that disclosure. 5 U.S.C. § 552(a)(b)(2).

The Criminal Division's reliance on Exemptions 6 and 7(C) to justify its refusal to search for and produce responsive documents also is improper. Exemption 6 exempts from compelled disclosure "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). Exemption 7(C) exempts from disclosure records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). To determine if a privacy exemption properly applies, the privacy interest at stake must be balanced against the public interest in citizens being "informed about 'what their government is up to.'" *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762, 772-73 (1989) (internal citation omitted). Information that "sheds light on an agency's performance of its statutory duties falls squarely within" the public interest. *Id.* at 773; see also *U.S. Dep't of Defense v. FLRA*, 5120 U.S. 487, 497 (1994). Personal information may be withheld only when it "reveals little or nothing" about the government's conduct. *Reporters Comm.*, 489 U.S. at 773.

The records CREW requests unquestionably would inform the public about what government leaders were up to. Moreover, “matters of substantive law enforcement policy . . . are properly the subject of public concern,’ whether or not the policy in question is lawful.” *ACLU v. U.S. Dep’t of Justice*, 655 F.3d 1, 14 (D.C. Cir. 2011) (quoting *Reporters Comm.*, 489 U.S. at 766, n.18). As CREW explained in its request, the requested records are likely to contribute to greater awareness of how DOJ carried out its statutory duties to investigate Mr. Gingrich, particularly given the conclusion of the special counsel for the House Ethics Committee that the course Mr. Gingrich taught that was funded by tax-exempt groups involved activities “substantially motivated by partisan political goals.” See Exhibit B to CREW’s January 25, 2012 FOIA request. The House Ethics Committee investigation reportedly generated 150,000 pages of records and transcripts of interviews with approximately 70 people. See *id.* Clearly Mr. Gingrich’s past acceptance of funds from tax-exempt organizations bear directly on his suitability for president.

In addition, these documents would shed light on DOJ’s conduct in conducting an investigation of Mr. Gingrich and its failure to bring any charges against him. Considering the importance of this investigation, both after the referral from the House Ethics Committee and today, the public has a powerful interest in fully understanding DOJ’s conduct.

These public interests clearly outweigh any privacy interests. High-ranking government officials such as Mr. Gingrich have diminished privacy interests in the balancing conducted under Exemptions 6 and 7(C). See *Stern v. FBI*, 737, F.2d 84, 92-94 (D.C. Cir. 1984). Notwithstanding that diminished interest, the Criminal Division has refused to even engage in a meaningful balancing of interests, must less to recognize the public interest that so patently outweighs any privacy interests Mr. Gingrich enjoys.

Even if portions of the requested records contain some information for which some legitimate privacy interest outweighs the public interest in disclosure, it would not justify the Criminal Division’s refusal to comply with its duty under the FOIA to disclose all non-exempt, segregable portions of the requested records. See 5 U.S.C. § 552(b). “[T]he focus in the FOIA is information not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Mead Data Central, Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); see also *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 907 (D.C. Cir. 1999). The Criminal Division failed to comply with its duties under the FOIA when it refused to redact any legitimately exempt information and disclose the remainder of the records.

Accordingly, the Criminal Division’s initial determination that it could not process CREW’s FOIA request of January 25, 2012 without the express authorization and consent of third parties plainly is in error and must be reversed. The Criminal Division must be ordered to process CREW’s request immediately and on an expedited basis, and to withhold information

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pursuant to Exemptions 6 and 7(C) only after weighing any privacy interests against the compelling public interest in disclosure.

In this era of supposed greater transparency in government, it is especially disheartening that the Justice Department continues to reflexively invoke discredited arguments to evade its responsibilities under the FOIA. While parties may legitimately differ as to the application of a particular FOIA exemption to a particular piece of information, there should be no dispute that the agency in the first instance must process requests and release all non-exempt material. Once again, however, the Criminal Division has failed to meet this most basic of FOIA obligations, mandating your immediate reversal of its initial decision.

Sincerely,



Anne L. Weismann  
Chief Counsel

Enclosures