

Exhibit D



A-2024-00947

Requester: Tsoi, Chun Hin

Status: Submitted

Appeal

Appeal Information

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Request Information

Request Number	1585062-00
Component	FBI
Subject of Request	GAETZ, MATT

Basis for Appeal

Description of Appeal

Re: FOIA Appeal - FBI FOIA No. 1585062-00

Dear FOIA Officer:

Citizens for Responsibility and Ethics in Washington ("CREW") submits this appeal of the November 24, 2023 determination of the Federal Bureau of Investigation ("FBI") denying and refusing to process the above-referenced Freedom of Information Act ("FOIA") request. Because the FBI's denial is improper, the agency should reverse its initial determination and promptly search for and release any responsive records to CREW.

Background

On February 22, 2023, CREW submitted a FOIA request to the FBI seeking "all records related to the now-closed investigation conducted by DOJ and the Federal Bureau of Investigation ('FBI') of Rep. Matt Gaetz (R-FL) that are not covered by grand jury secrecy pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, including but not limited to DOJ's decision not to bring criminal charges against Rep. Gaetz." Attachment 1.

By letter dated November 24, 2023, the FBI "categorically denied" CREW's request "pursuant to FOIA exemptions (b)(6) and (b)(7)(C)" because CREW's request "ha[s] not sufficiently demonstrated that the public's interest in disclosure (relating to the operations and activities of the government) outweigh the personal privacy interests of these individual(s)." Attachment 2. The FBI acknowledged "the existence of FBI records" relevant to this request, but claimed those records are exempt because "processing these third party records would constitute an unwarranted invasion of personal privacy." Id.

CREW now timely appeals the FBI's November 24, 2023 determination.

The FBI's Failure to Process CREW's Request and Categorical Withholding of Records is Improper

The FBI invoked Exemptions 6 and 7(C) to argue that all "records on third party individual(s) [. . .] are categorically denied." Attachment 2. While acknowledging the existence of these records, the FBI stated that "processing these third party records would constitute an unwarranted invasion of personal privacy." Id. (emphasis added). Based on the FBI's response, including the statement that the records sought were "categorically denied," it is our understanding that the FBI never processed CREW's initial request with respect to these documents. By refusing even to process CREW's request, the FBI violated FOIA.

FOIA places mandatory obligations on agencies. Upon receiving a request, agencies must promptly make records available as long as the request "(i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C.A. §552(a)(3)(A). Here, the FBI does not claim that CREW's request does not "reasonably describe" the records sought, nor does it claim CREW's request was not "made in accordance with the published rules." Id. The FBI instead claims that merely "processing" these records "would constitute an unwarranted invasion of personal privacy." Attachment 2. But both Exemptions 6 and 7(C) concern the privacy interest in "disclosure" or "production," not processing. 5 U.S.C.A. §552(b)(6) and (b)(7)(C).

The FBI could argue after processing the request that the records are exempt from disclosure pursuant to Exemption 6 and Exemption 7(C). However, for such an exemption to be invoked, the agency must first process the request to determine the universe of responsive records. Because CREW's request reasonably described the records sought and was made in accordance with the published rules, and because Exemptions 6 and 7(C) does not concern privacy interest in agency processing of personal information, the FBI was required to process the request.

The FBI is Improperly Withholding Material Under FOIA Exemptions 6 and 7(C)

Even if the FBI had processed CREW's initial request, its reliance on Exemptions 6 and 7(C) is misguided.

Exemption 6 applies to "personnel and medical files and similar files when the disclosure of such information would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). With respect to "other similar files," the exemption is "intended to cover detailed Government records on an individual which can be identified as applying to that individual." U.S. Dep't of State v. Wash. Post. Co., 456 U.S. 595, 602 (1982). To justify the claimed exemption, the agency must demonstrate a "substantial" privacy interest in the information. Multi AG Media LLC v. USDA, 515 F.3d 1224, 1229-30 (D.C. Cir. 2008). Only if a substantial privacy interest is implicated will a court proceed to balance "the individual's right of privacy against the preservation of the basic purpose of [FOIA] 'to open agency action to the light of public scrutiny.'" Dep't of Air Force v. Rose, 425 U.S. 352, 372 (1976); see also DOD v. Fed. Labor Relations Auth., 510 U.S. 487, 495-96 (1994).

Here, the FBI has articulated no concrete privacy interest in the withheld

here, the FBI has articulated no concrete privacy interest in the withheld information, let alone a "substantial" one. Absent such a showing, the withheld material must be released in full. See *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973) ("[T]he Government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of 'conclusory and generalized allegations of exemptions ...').

The FBI's Exemption 7(C) claims fail for similar reasons. To fall within Exemption 7(C), information must have been compiled for law enforcement purposes and its disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). This standard is similar to, but "'somewhat broader' than[,] Exemption 6"; thus, if information is withheld under both exemptions and passes Exemption 7's "compiled for law enforcement purposes" threshold, there is "no need to consider Exemption 6 separately because all information that would fall within the scope of Exemption 6 would also be immune from disclosure under Exemption 7(C)." *Roth v. DOJ*, 642 F.3d 1161, 1173 (D.C. Cir. 2011). Although Exemption 7(C) "establishes a lower bar for withholding material [than Exemption 6]," the privacy interest in withholding material still must be weighed against the public interest in its release. *Am. C.L. Union v. DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011). Courts have approached the balancing of these interests on a case-by-case basis that considers the public interest in disclosure against the private interest in exemption, "the rank of the public official involved and the seriousness of the misconduct alleged." *CREW v. DOJ*, 746 F.3d 1082, 1095 (D.C. Cir. 2014) (quoting *Kimberlin v. DOJ*, 139 F.3d 944, 949 (D.C. Cir. 1998)). As with its Exemption 6 claim, the FBI fails in the first instance to articulate any concrete privacy interest at stake and thus fails to meet its burden under Exemption 7(C).

Even if the FBI had satisfied Exemption 6 and 7(C)'s threshold requirements, the overwhelming public interest in disclosure would outweigh any privacy interest at stake. Courts have recognized an overriding public interest in "matters of substantive law enforcement policy[.]" *Reporters Comm.*, 489 U.S. at 766 n.18. That interest is heightened further where, as here, the investigation implicates a prominent public official. *CREW v. Dep't of Justice*, 746 F.3d at 1094. In its denial, the FBI claimed that CREW failed to "sufficiently demonstrate[]" that the public interest in disclosure outweighed third parties' privacy interest. Attachment 2. This is incorrect. CREW's FOIA request explained that the record sought "would help explain why Rep. Gaetz—a prominent member of Congress—was not charged with any crime despite public reporting suggesting an abundance of evidence that he likely violated sex-trafficking laws and the conviction of his close associate on similar charges." Attachment 1. The request also explained that "The public has a vital interest in learning whether the decision not to prosecute Rep. Gaetz was motivated, even in part, by considerations apart from the sufficiency of the evidence against him." *Id.*

The fact that Rep. Gaetz "reportedly asked Mark Meadows, then White House chief of staff for President Trump, 'for a preemptive pardon from Trump regarding the sex-trafficking investigation,'" *id.*, further strengthens that the subject of this request is in the public interest. Disclosure of the requested information—including documents related to the investigation of one of the highest profile politicians—would directly further the public interest in knowing "what their government is up to." *DOJ v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 772-773 (1989).

The FBI Failed to Disclose All Non-Exempt Segregable Portions of the Requested Records

Even if the requested records contain some information that is rightly exempt under exemptions 6 and 7(C) or Exemption 7(A) pursuant to "a pending or prospective law enforcement proceeding relevant to these responsive records," Attachment 2, the FBI was required under the FOIA to still disclose all non-exempt, segregable portions of the records. 5 U.S.C. § 552(b); see also *CREW v. DOJ*, 746 F.3d at 1096 (that some information in the requested investigatory records may be exempt "does not justify the blanket withholding of all responsive documents.").

"The 'segregability requirement applies to all . . . documents and all exemptions in the FOIA,'" including those that the FBI invokes in its denial. *Schiller v. NLRB*, 964 F.2d 1205, 1209 (D.C. Cir. 1992)) (quoting *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984)). And while it is not necessary to segregate materials that are, by definition, wholly exempt, see *Judicial Watch, Inc. v. DOJ*, 432 F.3d 366, 371 (D.C. Cir. 2005) (referencing documents that were wholly exempt under the attorney work product exemption), it is the agency's responsibility to demonstrate that the records are wholly exempt "with reasonable specificity." *Armstrong v. Exec. Off. of the President*, 97 F.3d 575, 580 (D.C. Cir. 1996).

Here, the FBI has all but confirmed that it violated its segregability obligations by refusing even to process CREW's FOIA request. The FBI's assertion of a blanket withholding without conducting a search and releasing all non-exempt material violates its statutory obligations under the FOIA.

Conclusion

For the foregoing reasons, the FBI should reverse its initial

For the foregoing reasons, the FBI should reverse its initial determination and promptly search for and release any responsive records to CREW. Please direct any communications about this appeal to me at jtsoi@citizensforethics.org.

Sincerely,
Chun Hin Tsoi
Legal Fellow
Citizens for Responsibility and Ethics in Washington

Based on Denial of Fee Waiver	No
Based on Denial of Expedited Processing	No
Requester Item Type 1	Supplemental Information
Requester Items 1	2023.02.22 FBI FOIA Request.pdf
Requester Item Type 2	Supplemental Information
Requester Items 2	2023-11-24 Records Denied.pdf
Requester Item Type 3	
Requester Items 3	

Requester Contact Information

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Expedited Processing Information

Expedited Processing Requested?	No
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