CREW | citizens for responsibility and ethics in washington

December 22, 2016

Melanie Ann Pustay
Director, Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, N.W.
Suite 11050
Washington, DC 20530-0001

Re: Freedom of Information Act Request No. 1362302-000

Dear Ms. Pustay:

Citizens for Responsibility and Ethics in Washington ("CREW") hereby appeals the refusal of the Federal Bureau of Investigation ("FBI") to process or release to CREW any records responsive to our Freedom of Information Act ("FOIA") request of November 22, 2016.

By letter dated and sent via email on November 22, 2016, CREW requested copies of all communication between agents or employees of the FBI and James Kallstrom from October 1, 2015 to that date. A copy of the request is attached as Exhibit A. As CREW explained in its request, in October 2015, President Obama said on 60 Minutes that Secretary of State Hillary Clinton's emails were not a national security issue. In an interview following that statement, Mr. Kallstrom was asked: "So you know a lot of the agents involved in the investigation. How angry must they be tonight?" Mr. Kallstrom responded that he had discussed the investigation with FBI agents, saying: "I know some of the agents. I know some of the supervisors and I know the senior staff. And they're P.O.'d, I mean no question."

In addition, CREW explained, FBI Director James B. Comey announced on July 5, 2016 that the FBI recommended to DOJ that no "charges were appropriate" with regard to former Secretary Clinton's use of a personal email system. According to Mr. Kallstrom, following that decision FBI agents again contacted him to him to discuss the investigation. For example, Mr. Kallstrom said he "talked to about 15 different agents today, both on the job and off the job, that are – you know, that are basically worried about the reputation of the agency they love." On September 28, 2016, Mr. Kallstrom said he had spoken to at least "a few [agents] on the job," and that those "involved in this thing feel like they've been stabbed in the back."

As CREW further explained, any unauthorized disclosure of information about an FBI investigation would violate the Privacy Act, 5 U.S.C. § 552a(b), and the Hatch Act, 5 U.S.C. § 7323(a)(1), if the disclosure was made with the purpose of affecting the result of the election. The requested records, therefore, would shed light on whether agents and employees violated federal law by disclosing information to Mr. Kallstrom, CREW noted.

In response, the FBI sent CREW a form letter dated December 1, 2016 (attached as Exhibit B). After acknowledging receipt of CREW's request, the FBI asserted that the records

concern one or more third parties and that it recognizes an important privacy in the requested information. The FBI further asserted that in the absence of an express written authorization and consent of the third party (presumably Mr. Kallstrom), proof that the subject of the request is deceased, or "a clear demonstration that the public interest in disclosure outweighs personal privacy interests," it can "neither confirm nor deny the existence of any records responsive to your request, which, if they were to exist, would be exempt from disclosure pursuant to FOIA Exemptions (b)(6) and (b)(7)(C)."

The FBI's determination is clearly in error and must be reversed. First, the FBI may not provide a *Glomar* response refusing to confirm or deny the existence of the requested records. "*Glomar* responses are an exception to the general rule that agencies must acknowledge the existence of information responsive to a FOIA request and provide specific, non-conclusory justifications for withholding that information." *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1178 (D.C. Cir. 2011). *Glomar* responses "are permitted only when confirming or denying the existence of records would itself cause harm cognizable under an FOIA exception." *Id.* (citations omitted). A *Glomar* response cannot be warranted here because Mr. Kallstrom acknowledged that FBI agents communicated with him about the investigation and Director Comey's decision. Moreover, the FBI failed to provide a non-conclusory justification for withholding all information about the existence of responsive records and, as explained below, the requested records cannot be withheld under either exemption cited by the FBI, and thus confirming or denying their existence would not cause harm under any exemption.

The FBI also may not categorically withhold the requested records under Exemptions 6 and 7(C). "A categorical approach is appropriate only if 'a case fits into a genus in which the balance *characteristically* tips in one direction." *CREW v. U.S. Dep't of Justice*, 746 F.3d 1082, 1095 (D.C. Cir. 2014) (quoting *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776 (1989)) (emphasis added by court). An agency may not categorically withhold records where there is a substantial public interest in disclosure. *Id.* at 1095-96. The public unquestionably has a significant interest in knowing whether FBI agents or employees violated federal law by communicating with Mr. Kallstrom about the investigation. As a result, the FBI may not categorically withhold the records.

In fact, the FBI may not withhold any of the requested records under Exemption 7(C). 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). None of the requested records were "compiled for law enforcement purposes." While they may contain information about an investigation, they are records of communications with a party entirely unrelated to the investigation, and thus were not compiled for law enforcement purposes. *See, e.g., Phillips v. Immigration and Customs Enforcement*, 385 F. Supp. 2d 296, 306 (S.D.N.Y. 2005) (report prepared for Congress not complied for law enforcement purposes).

Even if Exemption 7(C) applied, the FBI's determination is in error and must be reversed under both Exemptions (6) and 7(C) because the public interest in disclosure outweighs any

personal privacy interests. As noted, any unauthorized disclosure of information to Mr. Kallstrom about an FBI investigation would violate the Privacy Act and, if the disclosure was made with the purpose of affecting the result of the election, the Hatch Act. The requested records therefore would shed light on whether FBI agents and employees violated federal law, and the public unquestionably has a significant interest in knowing information about that subject. Nor is this a case in which there is a "bare suspicion" about impropriety by government officials, *see National Archives and Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), as Mr. Kallstrom himself asserted FBI agents talked to him about the investigation and Director Comey's decision.

These public interests clearly outweigh any privacy interests. The FBI asserted the privacy interests of a third party, presumably Mr. Kallstrom, are at issue here. CREW's request, however, does not seek information about an investigation into Mr. Kallstrom or his conduct, and thus the records do not concern him in a way that implicates his privacy interests. Rather, the communications CREW seeks concern the conduct of the FBI agents or employees who talked to Mr. Kallstrom about the investigation.

Even if the records did concern Mr. Kallstrom's conduct or his association with potentially illegal conduct of others, his privacy interests are minimal. Mr. Kallstrom is the FBI's former Assistant Director-in-Charge and thus a public official, and unquestionably a public figure. Throughout the investigation, he thrust himself into the middle of the debate concerning Secretary Clinton's private email server, including Director Comey's recommendation against bringing charges. *See, e.g.*, Wayne Barrett, Meet Donald Trump's Favorite FBI Fanboy, *Daily Beast*, Nov. 3, 2016 (*available at* http://www.thedailybeast.com/articles/2016/11/03/meet-donald-trump-s-top-fbi-fanboy.html). Moreover, there is no need to protect Mr. Kallstrom from being associated with the disclosure of information about the investigation. Mr. Kallstrom acknowledged FBI agents talked to him about the case, and he has no privacy interest in information he made public himself. *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995).

Finally, even if the requested records contain some information for which some privacy interest outweighs the public interest in disclosure, the FBI also did not comply with its duty under the FOIA to disclose all non-exempt, segregable portions of the records. The FOIA requires agencies to "disclose any reasonably segregable portion of a record . . . after deletions of the portions which are exempt." 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 FBI should have redacted any legitimately exempt information and disclosed the remainder of the records.

The FBI's initial determination refusing to confirm or deny the existence of the requested records and its determination withholding the requested records pursuant Exemptions 6 and 7(C)

of the FOIA plainly are in error and must be reversed. The FBI must be ordered to process CREW's request and disclose records responsive to it.

Sincerely,

Adam J. Rappaport
Chief Counsel