January 31, 2020

VIA ELECTRONIC MAIL – sara.tennant@usdoj.gov

Director, Office of Information Policy (OIP)
United States Department of Justice
Suite 11050
1425 New York Avenue, NW
Washington, D.C. 20530-0001

To the responsible FOIA Officer:

Pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552, I hereby appeal the denial of my request 1450487-000, regarding FBI External Intelligence Notes.

In its January 27, 2020 response to me, the FBI stated as follows:

"Material has been reviewed pursuant to Title 5, U.S. Code, Section 552, and this material is being categorically denied pursuant to (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E)."

For exemptions (b)(1) and (b)(3), the FBI provided no specific citations to applicable statutes, thus rendering the invocation over-broad and non-specific, a condition federal courts have found insufficient to sustain such invocations. The D.C. District Court in June of 2019 prohibited the FBI from invoking Exemption 1 to redact records because the FBI failed to meet its burden of demonstrating a connection between the withheld information and any harm to national security. *See Cable News Network, Inc. v. Fed. Bureau of Investigation*, No. CV 17-1167 (JEB), 2019 WL 2408644, at *9 (D.D.C. June 7, 2019). Judge Boasberg stated that agencies "must officer a *rationale* that is logical or plausible," rather than simply stating that it is logical or plausible that harm will ensue, and concluded that the FBI "provided no line of reasoning linking the disclosure of these redactions to any harm to the United States' relations with a foreign country or leader and a consequent harm to national security."

With respective to the FBI's invocation of exemptions (b)(6) and (b)(7)(c), the agency erred because it failed to perform the balancing analysis required by the FOIA's privacy exemptions. The exemptions permit an agency to withhold records only when the public's interest in disclosure is outbalanced by an individual's privacy interest. *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 948 (D.C. Cir. 1998). The public interest at stake is opening "agency action to the light of public scrutiny" so that citizens can "be informed about what their government is up to." *Dep't of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989).

Had the FBI weighed these interests correctly, it would have determined that the records should be released in some fashion, whether in part in or in full. Moreover, the FBI cannot invoke the aforementioned exemptions as they pertain to references to organizations.

With regard to exemption (b)(7)(e), Exemption 7(E) does not apply to "garden-variety legal analysis," which includes discussion and digests of caselaw (see *Mayer Brown LLP*, 562 F.3d

at 1194 n.1.) For example, the U.S. Court of Appeals for the District of Columbia Circuit held that an agency could not rely on Exemption 7(E) to withhold portions of an agency manual that merely discussed case law and statutes related to obscenity (see *PHE, Inc*., 983 F.2d at 251-52.) The court reasoned that the agency's explanation for why Exemption 7(E) applied — that the information would give defendants "a crystal ball view of what they will face from the prosecution" — was too vague (see *PHE, Inc*., 983 F.2d at 252.).

Additionally, Exemption 7(E) does not apply to those investigative techniques that are "routine" and "generally known to the public." (see *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). As one court explained, these would include "techniques that are commonly described or depicted in movies, popular novels, stories or magazines, or on television." (see *Albuquerque Publ'g Co. v. U.S. Dep't of Justice,* 726 F.Supp. 851, 858 (D.D.C. 1989). This includes, for example, "techniques such as eavesdropping, wiretapping, and surreptitious tape recording and photographing," which "the government should release . . . to [the requester] voluntarily." (*Id.*)

In order to help to determine my status to assess fees, you should know that I am Research Felow and scholar at the Cato Institute, an IRS-recognized 501(c)(3) nonprofit educational and public interest organization. As I am employed by an educational or noncommercial scientific institution, this request is made for a scholarly or scientific purpose and not for a commercial use. **I request a waiver of all fees for this request**.

Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. Whenever possible, please provide the requested information in electronic Portable Document Format (PDF).

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

I would appreciate your communicating with me by email or telephone, rather than by mail. My email address is peddington@cato.org and my cell number is 571-215-3468.

Please provide expedited processing of this request which concerns a matter of urgency. As a Research Fellow, I am primarily engaged in disseminating information. The public has an urgent need for information about EINs in light of press coverage on the May 30, 2019 Phoenix FO EIN, which claimed without substantiation that so-called "anarchist extremists" were plotting violence against federal employees or law enforcement personnel. The EIN in question appeared to be a form of political surveillance expressly prohibited by the Constitution and applicable federal law. Federal government domestic surveillance activities are a source of media stories on literally a weekly basis, making this a very high-profile topic of intense public and Congressional interest.

As a Cato scholar, I meet the statutory definition of a "representative of the news media" per *Cause of Action v. F.T.C.*, 799 F.3d 1108 (D.C. Cir. 2015) as Cato and its scholars (1)

gather information of potential interest (2) to a segment of the public; (3) use editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to one or more audiences. **Accordingly, I ask for expedited processing on that basis**. I certify that my statements concerning the need for expedited processing are true and correct to the best of my knowledge and belief.

I look forward to your determination regarding my request for expedited processing within 10 calendar days, as the statute requires. Thank you for your assistance.

Sincerely,

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