

EXHIBIT C



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ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION

Yale Law School

October 17, 2021

Bobak Talebian
Director, Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

RE: Administrative Appeal of FOIPA Request No. NFP-131115

Dear Mr. Talebian:

We represent The New York Times Company, Lee Levine, and Stephen Wermiel in connection with the above-captioned Freedom of Information Act ("FOIA") request (the "Request") and write to administratively appeal its administrative closure by the Federal Bureau of Investigation ("FBI").

Counsel for the requesters submitted the Request on their behalf on September 17, 2021. The Request seeks records reflecting counterintelligence activities directed at *The New York Times* or any of its reporters, including as part of the Counterintelligence Program ("COINTELPRO"), a program that sought "to expose, disrupt misdirect, discredit or otherwise neutralize the activities of black nationalist, hate type organizations"¹ during the late 1960s and early 1970s. A copy of the Request is attached as Exhibit A. The FBI administratively closed the request on September 28, 2021, claiming the Request did not "reasonably describe[]" the records sought pursuant to 5 U.S.C. § 552(a)(3)(A) and 28 C.F.R. § 16.3(b). A copy of the FBI's letter closing the Request is attached as Exhibit B.

A FOIA request "reasonably describes" the requested records if the agency can locate them with "a reasonable amount of effort." 28 C.F.R. § 16.3(b); *see also* 5 U.S.C. § 552(a)(3)(A). The agency is required to use "some semblance of common sense" when interpreting FOIA requests, *Hall & Assocs. v. Env't Prot. Agency*, 83 F. Supp. 3d 92, 101 (D.D.C. 2015), and has "a duty to construe a FOIA request liberally," *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 583 (D.C. Cir. 2020) (citation omitted). The reasonable description requirement is "not to be used as a method of withholding records." *Pub. Emps. for Env't Resp. v. Env't Prot. Agency*, 314 F. Supp. 3d 68, 74 (D.D.C. 2018) (quoting *Bristol-Myers Co. v. Fed. Trade Comm'n*, 424 F.2d 935, 938 (D.C. Cir. 1970)).

The Request comports fully with FOIA and Department of Justice ("DOJ") regulations and was improperly closed. It was clear, precise, and contained specific information to allow the agency

¹ Memorandum from SAC, Albany to Director, FBI, dated August 25, 1967.



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to identify the requested records, including a date range and detailed descriptions of the subject matter. *See* 28 C.F.R. § 16.3(b). The Request undeniably provides sufficient detail to enable personnel to locate the requested records “with a reasonable amount of effort.” *See* 28 C.F.R § 16.3(b). Because the Request makes “reasonably clear” the materials desired, “FOIA’s text and legislative history make plain the agency’s obligation to bring them forth.” *Truitt v. Dep’t of State*, 897 F.2d 540, 544 (D.C. Cir. 1990); *see also Dep’t of Air Force v. Rose*, 425 U.S. 360 (1976) (explaining that the “basic purpose” of FOIA “reflect[s] ‘a general philosophy of full agency disclosure’” (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965))). Thus, the FBI’s refusal to locate and produce the records is improper.

The FBI’s response to the Request was deficient for another reason. When the FBI believes a request fails to reasonably describe the records sought, it must “inform the requester what additional information is needed or why the request is otherwise insufficient.” 28 C.F.R § 16.3(b). In such cases, the FBI may “delay[]” its response to a request, but it may not close it. *See, e.g., Tokar v. Dep’t of Justice*, 304 F. Supp. 3d 81, 92 (D.D.C. 2018) (noting that FBI “had a duty to confer with [the requester] to clear up any confusion”). The FBI failed to follow this process here.

Please promptly produce the requested records, and respond to this appeal within twenty working days. *See* 5 U.S.C. § 552(a)(6)(A)(ii). Thank you for your attention to this matter.

Sincerely,

David A. Schulz
Media Freedom & Information Access Clinic
Yale Law School
Tel: 917-733-9014
Email: david.schulz@yale.edu

EXHIBIT A



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Via FBI eFOIA Request Portal

September 17, 2021

Federal Bureau of Investigation
Attn: Initial Processing Operations Unit
200 Constitution Drive
Winchester, VA 22602

Re: Freedom of Information Act Request

To Whom It May Concern:

This is a request for disclosure of documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the Department of Justice ("DOJ") FOIA regulations, 28 C.F.R. § 16.1 *et seq.*, submitted on behalf of The New York Times Company, publisher of *The New York Times*, Lee Levine, and Stephen Wermiel. Mr. Levine and Mr. Wermiel are noted legal historians who are currently writing a book tracing the history of the reporter's privilege in the United States. These requesters seek FBI records reflecting any monitoring, surveillance, or counterintelligence activities aimed at *The New York Times* or any of its reporters as part of the Counterintelligence Program ("COINTELPRO"), which sought "to expose, disrupt misdirect, discredit or otherwise neutralize the activities of black nationalist, hate type organizations"¹ during the late 1960s and early 1970s.

This is also a request for a reduction or waiver of fees under 28 C.F.R. § 16.10(k).

Background

The FBI's COINTELPRO began in the 1950s as an effort to disrupt the Communist Party of the United States but, in the 1960s, was expanded to include other domestic groups, including the Black Panther Party. The FBI abandoned the program in the 1970s, and it later became the subject of congressional scrutiny, including during the 1975 Church Committee investigation into abuses by the FBI and other intelligence agencies. Congress was highly critical of COINTELPRO for abridging the First Amendment rights of the American people.

While the program was in effect, the FBI tried to press at least one *New York Times* reporter, Earl Caldwell, into becoming an informant. The agency sought from him information about the Black Panther Party, which he was then reporting on as a journalist for *The Times*. Caldwell later refused to disclose information he had learned about the Black Panthers when

¹ Memorandum from SAC, Albany to Director, FBI, dated August 25, 1967.

subpoenaed by the Department of Justice to do so before a federal grand jury. The government's effort to compel testimony from Caldwell reached the Supreme Court in 1972, and the Court's ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972), to this day remains its only decision addressing the existence of a First Amendment privilege protecting the confidentiality of a reporter's sources. Caldwell's loss in the Court led directly to the enactment of shield laws protecting reporter-source communications by many states.

A great deal of information about the FBI's targeting of so-called "black nationalist" groups was made public by the Church Committee, including information about FBI efforts to disrupt the ability of such groups to secure favorable publicity. But little information has been made public about any targeting of news organizations or journalists during this period as part of those efforts to affect the publicity given to black nationalist and other groups.

This request seeks records that will shed important new light on the FBI's actions during this period and contribute to public understanding of laws and regulations that may be needed to adequately protect the ability of reporters to gather news about disfavored social, religious, and political organizations.

Documents Requested

For the period July 1, 1968, to July 1, 1972, please produce for inspection and copying:

1. All records relating to COINTELPRO that reference *The New York Times*, either by its full name or in abbreviated form, like NY Times or NYT;
2. All records that reference *The New York Times*'s reporting on the Black Panther Party or any of its members;
3. All records relating to any effort by the FBI to influence *The New York Times*'s reporting on the Black Panther Party or any of its members; and
4. All records reflecting communications between the FBI and the Department of Justice relating to the issuance of subpoenas to *The New York Times* or any of its reporters.

Application for Waiver or Limitation of Fees

We also request that the FBI waive and/or limit the search, review, and duplication fees associated with this request. 28 C.F.R. § 16.10(k) states that the Bureau will waive or reduce fees if disclosure is "likely to contribute significantly to public understanding of the operations or activities of the government," and the request is not "primarily in the commercial interest of the requester." 28 C.F.R. § 16.10(k)(2). Both factors warrant a fee waiver in this instance.

First, the requested records indisputably "concern identifiable operations or activities of the Federal Government," 28 C.F.R. §16.10(k)(2)(i), and disclosure of these records is "likely to contribute significantly to public understanding of those operations or activities," 28 C.F.R. §16.10(k)(2)(ii). The events underlying this request led directly to *Branzburg v. Hayes*, 408 U.S. 665 (1972), the key Supreme Court precedent concerning the reporter's privilege, and to the

adoption of shield laws in many states. Disclosure of these records is likely to yield new information about the actions of the FBI that precipitated these important developments in press protection and facilitate public understanding and meaningful discussion of the proper role of the FBI in its interaction with the press, an issue that has taken on vital new importance today.

Second, disclosure is not primarily in the commercial interest of the requesters. 28 C.F.R. § 16.10(k)(2). The records are not sought for commercial use and will be disclosed to the public. Requesters do not seek these records to further any commercial, trade, or profit interest, but for journalistic use by both *The New York Times* and two noted legal writers on press freedom.

The requesters are therefore entitled to a waiver of search fees and review fees, and a waiver or reduction of duplication fees. If you require further information concerning the basis of this request for a fee waiver and/or limitation, please contact us at the email address listed below.

Should the FBI conclude that the requesters are not eligible for a waiver of all fees, we pre-authorize the expenditure of up to \$100.00 to process this request. Please contact us via email to obtain our authorization prior to charging any fees above that amount.

Response Requested in 10 Days

Your prompt attention to this request is appreciated, and we anticipate your response within ten (10) working days, pursuant to 28 C.F.R. § 16.5(a).

If this FOIA request is denied in whole or in part, we respectfully request that the FBI provide a reasonable description of any withheld materials, and a justification for the withholding of such materials, including a reference to the FOIA exemption (or other legal authority) supporting the withholding. 28 C.F.R. § 16.6(d)–(e).

Should you have any questions regarding this request, please contact me at your earliest convenience at the email address listed below. If it will accelerate release of responsive records, please also provide responsive material on a rolling basis. Also, if our request for a fee waiver is not granted in full, please contact me immediately upon making such a determination.

We look forward to working with you on this request. Thank you for your assistance and prompt attention to this matter.

Sincerely,

David A. Schulz
Media Freedom & Information Access Clinic
Yale Law School
Tel: 917-733-9014
Email: david.schulz@yale.edu

EXHIBIT B



U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

September 28, 2021

MR. DAVID SCHULZ
THE NEW YORK TIMES COMPANY
POST OFFICE BOX 208215
NEW HAVEN, CT 06520-8215

FOIPA Request No.: NFP-131115
Subject: New York Times
(Reporting on Black Panthers;
CONTELPRO; FBI Influencing Reporting;
FBI-DOJ Communications)

Dear Mr. Schulz:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request. The FOIA provides for access to government records where the records sought are "reasonably described" [Title 5, United States Code, Section 552(a)(3)(A)]. Your compound request does not comport with the requirements of 28 CFR § 16.3(b), as it does not provide enough detail to enable personnel to locate records "with a reasonable amount of effort". The FOIA does not require federal agencies to answer inquiries, create records, conduct research, or draw conclusions concerning queried data. Rather the FOIA requires agencies to provide access to reasonably described, nonexempt records. Therefore, your request is being administratively closed.

For questions on how to reasonably describe your request, please email us at foipaquestions@fbi.gov. You may also visit www.fbi.gov and select "Services," "Information Management," and "Freedom of Information/Privacy Act" for additional guidance.

If you are not satisfied with the Federal Bureau of Investigation's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: <https://www.justice.gov/oip/submit-and-track-request-or-appeal>. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so it may be easily identified.

Sincerely,

A handwritten signature in black ink, appearing to read "M. G. Seidel", is positioned above the typed name.

Michael G. Seidel
Section Chief
Record/Information
Dissemination Section
Information Management Division