

EXHIBIT C



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October 18, 2021

Mr. Bobak Talebian
Director, Office of Information Policy
U.S. Department of Justice
441 G Street, NW, 6th Floor
Washington, D.C. 20530

Re: **Freedom of Information Act Administrative Appeal (FOIPA Request No. 1499523-000)**

Dear Mr. Talebian,

This letter constitutes National Public Radio's ("NPR") appeal of the Federal Bureau of Investigation's ("FBI") denial of NPR Reporter Eric Westervelt's June 24, 2021, Freedom of Information Act ("FOIA") request.¹ Ex. A. Mr. Westervelt's request sought information on the incidents in Lafayette Square, Washington, D.C., on May 30 and June 1, 2020.

The FBI sent a response on July 21, 2021, stating that it had completed its search and that the information requested was in an "investigative file" exempt from disclosure under FOIA's Exemption (b)(7)(A) (law enforcement records that could reasonably be expected to interfere with enforcement proceedings). Ex. B. We write to appeal that decision.

The Freedom of Information Act arose from concerns over the "mushrooming growth of Government secrecy." H.R. Rep. No. 89-1497, at 2 (1966). It "focuses on the citizens' right to be informed about 'what their government is up to,'" by requiring the release of "[o]fficial information that sheds light on an agency's performance of its statutory duties." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (citation omitted).

The government "always bears the burden to show that a given document is covered by an exemption and should be withheld." *Rosenfeld v. DOJ*, 57 F.3d 803, 808 (9th Cir. 1995). This burden must be construed in light of the Act's command that its exemptions "be interpreted narrowly." *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). And even where agencies may withhold records, the law favors transparency: "Congress has encouraged the agencies to

¹ For ease of reference, the request is attached hereto as Exhibit A.

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disclose” even “exempt material for which there is no compelling reason for withholding.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980).

In 2016, Congress amended the text of the FOIA to state that an agency may only withhold information if “the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption.” 5 U.S.C. § 552(a)(8)(A). The legislative history indicates that the purpose of that amendment was to “establish a ‘presumption of openness’ in FOIA.” *Rosenberg v. Dep’t of Def.*, 342 F. Supp. 3d 62, 72–73 (D.D.C. 2018) (citing H.R. Rep. No. 114-391, at 9 (2016); S. Rep. No. 114-4, at 3, 7.).

Exemption 7(A)

Exemption 7(A) allows the government to withhold information only if it can demonstrate that release “could reasonably be expected to interfere with” enforcement proceedings. The exemption requires a two-step analysis. First, there must be a pending or reasonably anticipated law enforcement proceeding. *See Citizens for Responsibility & Ethics in Wash. v. DOJ*, 658 F. Supp. 2d 217, 228-9 (D.D.C. 2009) (failure to identify ongoing or concretely expected law enforcement proceeding did not meet agency’s burden for withholding information). Second, release of the information must be reasonably expected to cause some articulable harm to that proceeding. *See id.* at 230-1 (in the absence of an identifiable enforcement proceeding, court could not determine whether harm would occur).

First, the FBI has failed to identify any ongoing or expected law enforcement proceedings arising from the Lafayette Square incidents, which took place well over a year ago. As in the *Citizens* case cited above, hypothetical future proceedings do not qualify as a reasonably anticipated investigation for the purposes of establishing Exemption 7(A).

Second, as in the *Citizens* case, without identifying an actual or prospective law enforcement proceeding, the FBI cannot meet the burden of articulating the harm that disclosure would cause.

Given the compelling public interest in the government’s response to a lawful protest held in a public park, we request that the FBI release the information that has been improperly withheld, as the FBI has made no attempt to meet its burden of defining how Exemption (b)(7)(A) applies. The failure to release the information is incompatible with the purpose of FOIA: to promote openness in government and ensure informed citizens.

To the extent that the FBI does not release these records, NPR is prepared to fully pursue the public’s right of access to these documents through litigation. We hope that such action will not be necessary.

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Please do not hesitate to contact us if you have any questions about this appeal at (415) 276-6552, or via email at thomasburke@dwt.com.

Sincerely,
Davis Wright Tremaine LLP

Thomas R. Burke

cc: Eric Westervelt, NPR
Micah Ratner, Esq., NPR
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