

# Exhibit D



February 1, 2023

***Submitted via OIP FOIA STAR Portal***

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

**Re: FOIA APPEAL (1554680-000)**

Dear OIP Director:

This is an appeal under the Freedom of Information Act (FOIA) on behalf of Karen Lowy and Daniel Jaffe, victims of the April 22, 2022 shooting that took place at/around Edmund Burke School in Northwest Washington D.C. (the "Shooting") for documents related to Raymond Spencer, the deceased suspect in the Shooting. My FOIA request (the "Request") was assigned the following identification numbers by the Federal Bureau of Investigation (the "FBI"): 1554680-000 (Subject: Spencer, Raymond) and 1554681-000 (Subject: Jaffe, Daniel). I received a response to the Request as it pertained to Raymond Spencer in a letter from the FBI dated December 16, 2022, which denied the Request in its entirety.

**I. Background Of The Request & The FBI's Denial.**

I enclose a copy of the Request and the FBI's denial of the same. The Request sought records concerning several categories of documents relating to Raymond Spencer (the "Suspect") of the Shooting, including (i) documents and information related to any weapons used by or in the Suspect's possession and recovered in connection with the Shooting; (ii) documents and information related to any ammunition used by or in the Suspect's possession and recovered in connection with the Shooting; (iii) documents and information related to any other equipment used by or in the Suspect's possession and recovered in connection with the Shooting, including but not limited to supposed "sniper nest" equipment, M-Lok, high-capacity drum, rifle scope and tripod to prop the weapons, recovered in connection with the incident; (iv) documents and information concerning the Shooting and the Suspect collected from or provided by the Ava Van Ness; (v) documents and information collected, received, and/or provided by any other law enforcement agency to the FBI in connection with the FBI's investigation into the Shooting and the Suspect; (vi) all video and body cam footage obtained in connection with the investigation into the Shooting and/or filmed by any law enforcement agency during the Shooting; and (vii) all reports and summaries generated by the FBI or by other law enforcement agencies and subsequently provided to or shared with the FBI in connection with the investigation into the Shooting or Suspect. See Exhibit A (FOIA Request).

The FBI first noted that the "request[ed] records concern[] one or more third party individuals" and advised that it may be possible to receive greater access to the requested records by submitting certain documentation, including proof of death. See Exhibit B (Dec. 7, 2022 Email).

I re-submitted proof of Spencer's death on December 14, 2022, after having previously sent articles reporting on his death to the FBI on November 16, 2022. See Exhibit C (Dec. 14, 2022 Email).

Two days later, the FBI issued a blanket denial of the Request on the basis that "the material you requested is located in an investigative file which is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A)." The FBI's denial of the Request acknowledged that 5 U.S.C. § 552(b)(7)(A) exempts from disclosure "records or information compiled for law enforcement purposes, *but only to the extent that production of such law enforcement records or information. . .could reasonably be expected to interfere with enforcement proceedings . . .*" See Exhibit D (Dec. 16, 2022 FOIA Denial Letter) (omissions in original).

## **II. There Is A Strong Public Interest In The Information Sought By The Request.**

The public has a strong interest in accessing the information sought in the Request, which pertains to a high-profile mass shooting that directly impacted my clients and implicates the public safety of District of Columbia residents, visitors, and workers.

The Request at issue was made on behalf of victims of the Shooting—one of whom was shot multiple times and gravely injured. Her life and the lives of her family members will never be the same as a result. Tragically, this is the case for millions of Americans. Ms. Lowy and Mr. Jaffe have a particularly strong interest in the disclosure of the information sought in the Request as they navigate and grapple with the aftermath of the Shooting. CDC data show that guns are now the leading cause of death of children in America.<sup>1</sup> More than 20,000 people were killed by firearms in each of 2021 and 2022—and tens of thousands more died by suicide using a firearm.<sup>2</sup> There already have been more than 3,500 gun-related deaths in 2023, and we are only a month into the year.<sup>3</sup> So far this year, there have been more mass shootings in America than there have been days.<sup>4</sup> And in addition to the tens of thousands of people killed by guns in the United States every year, there are many thousands more victims of gun violence—like my clients and their family—who suffer serious and long-lasting physical and emotional trauma. The gun violence epidemic has also been an area of focus for the U.S. House Oversight Committee, which has investigated and held several hearings on the issue of gun violence in the United States this summer alone on the practices and profits of gun manufacturers.<sup>5</sup> In sum, this is an issue of immense public interest and importance.

## **III. The FBI Has Failed To Carry Its Burden To Justify Denial Of The Request Under**

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<sup>1</sup> See <https://www.nejm.org/doi/full/10.1056/nejmc2201761>.

<sup>2</sup> <https://www.gunviolencearchive.org/past-tolls>.

<sup>3</sup> <https://www.gunviolencearchive.org/>.

<sup>4</sup> <https://www.gunviolencearchive.org/>.

<sup>5</sup> <https://oversightdemocrats.house.gov/legislation/hearings/examining-the-practices-and-profits-of-gun-manufacturers>.

### **Exemption 7(A).**

While there may be some narrow portion of the FBI's investigative file that is properly subject to withholding, the exemption the FBI has invoked does not justify blanket withholding of *all* information pertaining to the investigation into this high-profile event, which directly impacted my clients.

To justify the withholding of information pursuant to 5 U.S.C. § 552(b)(7)(A), an agency must show that “disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Just.*, 746 F.3d 1082, 1096 (D.C. Cir. 2014) (quoting *Mapother v. U.S. Dep't of Just.*, 3 F.3d 1533, 1540 (D.C. Cir. 1993)); *Bevis v. Dep't of State*, 801 F.2d 1386, 1388 (D.C. Cir. 1986) (to withhold documents under the law enforcement/investigatory exemption, agencies have “the burden of demonstrating”: (1) the documents requested have been “compiled for law enforcement purposes,” and (2) *disclosure of those documents would “interfere with enforcement proceedings.”*) (emphasis added) (internal quotation omitted).

This exemption is not intended to be a “blanket exemption” for any files or records that are relevant to an investigation. *North v. Walsh*, 881 F.2d 1088, 1100 (D.C. Cir. 1989). Rather, their disclosure must be reasonably expected to interfere in a “palpable, particular way” with a particular enforcement proceeding. *Id.*; see also generally *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 630 (1982) (Courts must construe FOIA's exemptions “narrowly,” as FOIA creates a presumption “in favor of disclosure.”) (citation omitted).

To this end, the FBI bears the burden to show that the withheld material “relate[s] to a ‘concrete prospective law enforcement proceeding.’” *Durrani v. U.S. Dep't of Just.*, 607 F. Supp. 2d 77, 89 (D.D.C. 2009) (quoting *Bevis*, 801 F.2d at 1389). “[R]elevant proceedings must be pending or reasonably anticipated[.]” *Sussman v. US Marshals Service*, 494 F.3d 1106, 1115 (D.C. Cir. 2007).

The FBI has not satisfied this burden. As a threshold matter, the FBI has not identified any actually pending or potential enforcement proceeding. This alone should be dispositive. See, e.g., *Durrani*, 607 F. Supp. 2d at 89 (“ICE's claim of an ongoing investigation, without any evidence of a pending or potential ‘enforcement proceeding,’ fails to provide a sufficient basis for withholding records under exemption 7(A)”). Further, the likelihood that the FBI ever *could* satisfy this burden is exceedingly low because the likelihood that there will be any enforcement proceeding relating to the Shooting is exceedingly low. It has now been more than nine months since the Shooting. The Suspect has been identified as the only suspect responsible for the Shooting. Given that he is deceased, he (obviously) cannot face criminal prosecution. And even setting aside the unlikelihood of any future criminal prosecution relating to the Shooting at this point, the FBI has not even attempted to satisfy its burden to demonstrate how disclosure of the information sought in the Request could reasonably be expected to interfere with any such proceeding.

This is underscored by the fact that there is information concerning the Shooting and the Suspect already in the public domain, including through several briefings and press

conferences provided by various law enforcement agencies in the days following the Shooting. It thus is necessarily the case that there is information in the investigative file that is not properly subject to withholding. In fact, the Fairfax County Police Department, which was also involved in responding to and investigating the Shooting, agreed to (and did) turn over its entire investigative file in response to a Virginia FOIA request similar to that at issue here. See Exhibit E (Fairfax County PD FOIA Response).

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My clients were told in June 2022 by a D.C. Metropolitan Police Department Detective that several of the law enforcement entities involved in responding to and investigating the Shooting had completed their investigations and their written reports, but they have not been provided these reports or any other additional information since then. They are – understandably – heartbroken and frustrated at the lack of cooperation they have received from the FBI and other law enforcement agencies in getting information about what happened to them. They deserve answers to their questions.

Should you have any questions about handling this appeal, please do not hesitate to contact me at the telephone number or email address below. Thank you for your consideration of this appeal.

Regards,

A handwritten signature in black ink that reads "K. Ali". The signature is written in a cursive, slightly stylized font.

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