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September 13, 2023

FOIA/PA Unit
Criminal Division
U.S. Department of Justice, Room 803
Keeney Building, N.W.
Washington, DC 20530-0001
crm.foia@usdoj.gov
(202) 616-0307

Office of Public Affairs
U.S. Department of Justice, Room 1128
950 Pennsylvania Avenue, N.W.
Washington DC 20530-0001

Re: FOIA Request No. CRM-301743629 – Appeal of Constructive Denial of Request for Documents Regarding the Illegal Boeing Deferred Prosecution Agreement

Dear Criminal Division FOIA Unit:

I represent seventeen individuals representing the families of victims of two Boeing 737 MAX aircraft crashes (“Victims’ Families) in connection with Freedom of Information Act Request # CRM-301743629 to the Department of Justice, Criminal Division (the “Request”).¹ I write on their behalf in connection their earlier request. This letter is an appeal of the agency’s constructive denial of the Request, as well as its constructive denial of my request for expedited processing of the Request, pursuant to the FOIA statute, 5 U.S.C. § 552, and its implementing regulations. I hope that the Department will bring this matter to a quick resolution by rapidly producing all the requested documents, as outlined below.

¹ The seventeen individuals are: Naoise Connolly Ryan, Emily Chelangat Babu, Joshua Mwazo Babu, Catherine Berthet, Huguette Debets, Luca Dieci, Bayihe Demissie, Sri Hartati, Zipporah Kuria, Javier de Luis, Nadia Milleron and Michael Stumo, Chris Moore, Paul Njoroge, Yuke Meiske Pelealu, John Karanja Quindos, Guy Daud, and Iskandar Zen S. Each of these individuals lost a family member in the Boeing 737 MAX crashes.

BACKGROUND

On April 26, 2022, I submitted the initial FOIA Request in this matter, covering a variety of topics related to DOJ's investigation of the two aircraft crashes noted above, as well as DOJ's reaching a deferred prosecution agreement ("DPA") with The Boeing Company as a result of that investigation. The Request, including the specific documents requested, is attached hereto as Exhibit A. I also requested expedited processing of the Request. My colleague, Joseph T. Murphy, and I sent follow-up emails inquiring about the status of the request last year—on May 4, May 17, August 29, and October 24, 2022. The Criminal Division emailed Mr. Murphy on May 23, 2022, acknowledging the FOIA request and also on August 31, 2022, acknowledging that the request was under review, but (1) provided no documents; and (2) gave no indication as to a determination with respect to the Request itself or to the request for expedited processing.

Nearly seven months after I made my Request for the Victims' Families, on November 15, 2022, the Department sent a form letter denying the request for expedited treatment without meaningful explanation. That letter is attached hereto as Exhibit B. Again, the Department provided no documents and gave no indication as to its position on the substance of the Request itself.

I heard nothing further from the Department until more than three months later. On February 22, 2023, the Department sent me another letter, indicating that "processing" the Request would take between 12 and 18 months. That letter is attached hereto as Exhibit C. Once again, the agency failed to provide documents while saying nothing about the substance of the Request (*i.e.*, whether it would deny it in whole or in part).

On August 25, 2023, I filed a supplement to the Request, explaining that, due to new information and changed circumstances, expedited processing was now warranted. I explained in detail that the Request satisfied two separate and independent grounds for expedited processing under the DOJ Regulations. First, because the Victims' Families stand to lose "substantial due process rights," the Request qualifies for expedited treatment under 28 C.F.R. § 16.5(e)(1)(iii). Second, because the requested documents concern a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," expedited treatment is warranted under 28 C.F.R. § 16.5(e)(1)(iv). More than ten days have passed since the renewed request for expedited treatment, but I have heard nothing from the Department. That supplement is attached as Exhibit D.

DISCUSSION

As I am sure you know, FOIA strongly favors full, timely disclosure of records and information. As the Supreme Court has explained, FOIA "was enacted to facilitate public access to Government documents," and specifically was "designed to pierce the veil of

administrative secrecy and to open agency action to the light of public scrutiny.” *Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (cleaned up). FOIA therefore creates a “strong presumption in favor of disclosure” and squarely “places the burden on the agency to justify the withholding of any requested documents.” *Id.* Indeed, “the Supreme Court [has] reminded appellate courts” that FOIA seeks a “goal of broad disclosure” and the Court has therefore “insisted that the exemptions be given a narrow compass.” See *ACLU v. Dep’t of Justice*, 655 F.3d 1, 5 (D.C. Cir. 2011) (Garland, J.) (quoting *Milner v. Dep’t of the Navy*, 562 U.S. 562, 571 (2011)); see also *Evans v. Fed. Bureau of Prisons*, 951 F.3d 578, 586 (D.C. Cir. 2020) (“the congressional philosophy in the adoption of FOIA favors disclosure, not concealment”).

FOIA further requires that an agency make a determination whether to release or deny a request within 20 days. 5 U.S.C. § 552(a)(6)(A)(i). Where, as here, the Department has simply refuses to timely make that determination, that constitutes a constructive denial of the Request. The Department received the Request almost 18 months ago and there still has been no determination; the Department has constructively denied the Request.

The same is true of the renewed and updated request for expedited treatment, which was submitted on August 25, 2023. Under the statute and DOJ’s implementing regulations, the agency must make a determination as to expedited treatment within 10 days of receiving the request. 5 U.S.C. § 552(a)(6)(E)((ii)(I); 28 C.F.R. § 16.5(e)(4). Because 10 days have passed and the Department has not responded, this request has been constructively denied as well.

Because the applicable time limits have passed without a determination as to expedited processing or as to a denial of the Request, the Victims’ Families are entitled to initiate litigation without filing an administrative appeal. See 5 U.S.C. § 552(a)(6); *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, 711 F.3d 180, 189 (D.C. Cir. 2013). The Victim’s Families are using this administrative appeal, however, in the hope of resolving the matter quickly without need for court intervention.

The Victims’ Families appreciated their Zoom meeting with Attorney General Merrick Garland on January 26, 2022. And since that meeting, General Garland has expressed the importance of openness and transparency. On Tuesday, March 15, 2022, General Garland issued new guidelines to strengthen the federal government’s commitments to transparency in government operations and the fair and effective administration of FOIA. The Attorney General’s guidelines directed the heads of all executive branch departments and agencies to apply a presumption of openness in administering the FOIA. The guidelines also emphasized that the proactive disclosure of information is fundamental to the faithful application of the FOIA and noted the Justice Department’s efforts to encourage proactive agency disclosures.

“At the Justice Department, and across government, our success depends upon the trust of the people we serve. That trust must be earned every day,” said Attorney General Garland. “For more than fifty years, the Freedom of Information Act has been a vital tool for advancing the principles of open government and democratic accountability that are at the heart of who

we are as public servants. Together with our partners across the federal government, the Justice Department will work every day to uphold those principles, which are essential to the rule of law.” To the Victims’ Families, those words ring hollow. Here there are possible questions about the government’s integrity. Indeed, a federal district court judge has found that the Justice Department behaved illegally — e.g., violated the CVRA — in negotiating the DPA. And yet the Department refused to produce its communications with Boeing surrounding the illegal negotiations. The Department should live up to General Garland’s statements by quickly producing the documents at issue here.

We respectfully request the Department to produce the responsive documents without further delay to ensure that the Victim’s Families do not lose their substantial due process rights.

Thank you for your prompt attention to this plea for administrative relief. I look forward to receiving your response no later than 20 days from now. Given the time-sensitive nature of this issue I ask that you email your response to me at the email address above, i.e., cassellp@law.utah.edu.

Sincerely,



Paul G. Cassell
Counsel for Naoise Ryan other Victims’
Families