

Exhibit 3



CENTER FOR IMMIGRATION STUDIES

FBI FREEDOM OF INFORMATION ACT APPEAL

SUBMITTED VIA FOIA PORTAL

November 1, 2023

Re: Appeal of FOIA Request NFP-154144 (CIS#0056)

To Whom It May Concern:

My client submitted a request for records (“**FOIA Request**”) from the files of Federal Bureau of Investigation (“**FBI**” or “**agency**”) pursuant to the Freedom of Information Act (5 U.S.C. § 552, as amended) (“**FOIA**”). On October 20, 2023, the agency provided its final determination (“**Final Response**”) concerning the FOIA Request. On behalf of my client, I now write to appeal the agency’s Final Response.

A. FOIA Request NFP-154144 (CIS#0056)

On October 6, 2023, my client submitted a request to FBI for the following:

All records sufficient to show any or all the following categories of information for each encounter Between Ports of Entry¹ with a person within the Terrorist Screening Database (TSDB)²:

- a. Nationality of person of interest**
- b. Foreign Terrorist Organization (FTO)**
- c. Category type of threat**
- d. Category level of threat (numerical)**
- e. Encounter location (identified by closest border station would be acceptable)**

This request intentionally excludes personally identifying information that would be presumed protected as part of ongoing investigations and seeks only information that could not be construed as obstructive to national security interests.

Information helpful to fulfilling this request: The timeframe for records sought in this request is January 1, 2021, by month, through the time by which search results are finally compiled for in-house government review.

¹ See <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy22> under the “Terrorist Screening Dataset Encounters” tab.

² See <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1>.

It would be preferred to receive responsive records compiled in an Excel spreadsheet, with each category of responsive records provided in columns corresponding to their respective {unnamed} person of interest, provided in rows per month.

(Attachment 1.)³

B. FBI's Final Response

On October 20, 2023, FBI issued a Final Response letter. The letter stated in relevant part:

The FOIA does not require federal agencies to answer inquiries, create records, conduct research, or draw conclusions concerning quarried data. Rather the FOIA requires agencies to provide access to reasonably described, nonexempt records. The questions posed in the reference letter are not FOIA request because they do not comply with the FOIA and its regulations. Therefore, your request is being administratively closed.

(Attachment 2.)

C. Argument

FBI has failed to conduct an adequate search of the requested records and improperly determined the request was not reasonably described. An agency's search is adequate only if it is "reasonably calculated to uncover all relevant documents." *Zemansky v. E.P.A.*, 767 F.2d 569, 571 (9th Cir. 1985) (quoting *Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984)) (internal quotation marks omitted). "An agency fulfills its obligations under FOIA if it can demonstrate *beyond material doubt* that its search was 'reasonably calculated to uncover all relevant documents.'" *Def. of Wildlife v. United States Border Patrol*, 623 F. Supp. 2d 83, 91 (D.D.C. 2009) (quoting *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999)) (citation omitted) (emphasis added). To satisfy its FOIA obligations, an agency needs to adequately describe the scope and methods of its searches, which can reasonably be expected to uncover the records sought and demonstrate that the places most likely to contain responsive materials were searched. *Davidson v. E.P.A.*, 121 F. Supp. 2d 38, 39 (D.D.C. 2000). At a minimum, the agency must specify "what records were searched, by whom, and through what process." *Steinberg v. U.S. Dep't of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1994).

Furthermore, FOIA requires a request to be "reasonably described" to enable a professional employee of the agency familiar with the subject matter to locate the records with a reasonable amount of effort. *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 227-228 (D.D.C. 2012). If the agency believes the request is overly burdensome, or overly broad, the agency bears the burden to provide "a sufficient explanation as to why." *Nation Magazine v. U.S. Customs Services.*, 71 F.3d 885, 892 (D.C. Cir. 1995). To determine whether a search for responsive records was adequate, a

³ All "Attachments" referenced herein are appended to this letter.

court must first determine the scope of the documents the plaintiff requested. *Wallick v. Agric. Mktg. Serv.*, 281 F. Supp. 3d 56, 66 (D.D.C. 2017). It has been long established that an agency has a duty to construe FOIA requests liberally. See *Hemenway v. Hughes*, 601 F. Supp. 1002, 1005 (D.D.C. 1985); *Conservation Force v. Ashe*, 979 F. Supp. 2d 90, 101-102 (D.D.C. 2013); *Rodriguez v. DOD*, 236 F. Supp. 3d 26, 36-38 (D.D.C. 2017). This means an agency is compelled to interpret requests broadly, even if a narrower reading is also reasonable. *Id.* An agency has a duty under FOIA to select the interpretation that would likely yield the greatest number of responsive documents. *Conservation Force*, 979 F. Supp. 2d at 102-03; *Nat'l Sec. Counselors v. CIA*, 849 F. Supp. 2d 6, 12 (D.D.C. 2012). Technical precision is not required in FOIA requests, and a request certainly should not fail where the agency knew or should have known what the requester was seeking all along. *Inst. for Justice v. IRS*, 941 F.3d 567, 572 (D.C. Cir. 2019).

First, FBI's search was inadequate because its Final Response provided no information regarding the adequacy of its search. (**Attachment 2.**) Without specifying what records were searched, by whom, and through what process, my client cannot assume FBI's search was adequate. *Steinberg*, 23 F.3d 552. Moreover, the lack of detail in FBI's Final Response regarding its search suggests it likely could not demonstrate beyond a material doubt that its search was reasonably calculated to uncover all relevant documents. *Valencia-Lucena*, 180 F.3d at 325.

Secondly, FBI improperly determined the FOIA Request was not reasonably described. The request sought all records sufficient to show any or all of the five categories of information described in the FOIA Request, "for each encounter Between Ports of Entry" with a person within the Terrorist Screening Database. The FOIA Request specifically cited the term "Between Ports of Entry" to the use of the phrase on U.S. Customs and Border Protection's ("CBP") website, which tracks the number of people CBP encounters in the "consolidated terror watchlist."⁴ (**Attachment 1.**) The request also cites its reference of the FBI's "Terrorist Screening Database" to a page on FBI's website, which elaborates upon its administration of the Terrorist Screening Center, which "maintains the U.S. government's consolidated Terrorist Watchlist." The cited FBI page further states⁵,

Today, state and local law enforcement officials, U.S. Customs and Border Patrol agents, Transportation Security Administration and State Department personnel, and other law enforcement officials have the TSC to help inform them if they are encountering a known or suspected terrorist. This information sharing has led to major improvements in counterterrorism efforts and public security, both at home and abroad. TSC makes terrorist identity information accessible through the National Crime Information Center system to more than 870,000 state and local officers nationwide.

⁴ See <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy22> under the "Terrorist Screening Dataset Encounters" tab.

⁵ See <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1>.

In addition, Department of Homeland Security documentation⁶ further indicates the coordination between the FBI and CBP on matters responsive to this FOIA Request, stating in relevant part:

To promote DHS' immigration enforcement priorities, U.S. Customs and Border Protection (CBP) Border Patrol interdicts migrants suspected of entering the United States without inspection and screens them for national security threats. Specifically, Border Patrol agents at stations and centralized processing centers (CPC) collect biographical and biometric information and submit this information to the Federal Bureau of Investigation (FBI) Terrorist Screening Center (TSC). The TSC determines whether a migrant is a positive match with the Terrorist Screening Data Set (Terrorist Watchlist), the U.S. Government's consolidated watchlist of "people reasonably suspected to be involved in terrorism (or related activities)."

Therefore, FBI should have reasonably known that the FOIA Request is seeking records regarding specific categories of information concerning its administration of the Terrorist Screening Center and its support to the operations and terrorist inquiries of CBP. My client has no reasonable way to know the format or the name of the specific records that may contain the different categories of records it seeks, but its request reasonably described the specific information it seeks, and provided specific citations to enable a professional employee of the agency familiar with the subject matter to locate the records with a reasonable amount of effort. *Freedom Watch, Inc. v. CIA*, 895 F. Supp. 2d 221, 227-228 (D.D.C. 2012).

FBI's Final Response which administratively closed the FOIA Requests for not being reasonably described indicates, (1) FBI failed to liberally construe the request, (2) FBI denied a request for records that it knew or reasonably should have known what the requester was seeking, and (3) FBI failed to sufficiently explain why it determined the request was overly burdensome or overly broad. *See Hemenway*, 601 F. Supp. at 1005; *Inst. for Justice*, 941 F.3d at 572; *U.S. Customs Services.*, 71 F.3d at 892. (**Attachment 2.**)

For the reasons detailed above, FBI failed to demonstrate beyond a material doubt that its search was reasonably calculated to uncover all relevant documents. *Valencia-Lucena*, 180 F.3d at 325; *Campbell*, 164 F.3d at 28. Moreover, FBI's administrative closure of the request was improper.

⁶ <https://www.oig.dhs.gov/sites/default/files/assets/2023-07/OIG-23-31-Jun23-Redacted.pdf>.

D. Appellate Request

Given the foregoing, my client hereby appeals and requests that the documents responsive to the FOIA Request be produced within 20 days of this appeal. Thank you for your time and attention to this matter. If you require any additional information, please contact me at **(202) 466-8185 ext. 126** or through email at **foia@cis.org**.

Very truly yours,

/s/ Colin M. Farnsworth

Colin M. Farnsworth, Esq.

Chief FOIA Counsel

Center for Immigration Studies



CENTER FOR IMMIGRATION STUDIES

FBI - FOIA REQUEST

VIA FOIA PORTAL

October 6, 2023

Re: Encounters with Persons on Terror Watch List (CIS#0056)

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, the Center for Immigration Studies (“the Center”), hereby requests the following records to be provided in electronic form foia@cis.org:

All records sufficient to show any or all the following categories of information for each encounter Between Ports of Entry¹ with a person within the Terrorist Screening Database (TSDB)²:

- a. Nationality of person of interest**
- b. Foreign Terrorist Organization (FTO)**
- c. Category type of threat**
- d. Category level of threat (numerical)**
- e. Encounter location (identified by closest border station would be acceptable)**

This request intentionally excludes personally identifying information that would be presumed protected as part of ongoing investigations and seeks only information that could not be construed as obstructive to national security interests.

Information helpful to fulfilling this request: The timeframe for records sought in this request is January 1, 2021, by month, through the time by which search results are finally compiled for in-house government review.

It would be preferred to receive responsive records compiled in an Excel spreadsheet, with each category of responsive records provided in columns corresponding to their respective {unnamed} person of interest, provided in rows per month.

If any responsive record or portion thereof is claimed to be exempt from production under

¹ See <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics-fy22> under the “Terrorist Screening Dataset Encounters” tab.

² See <https://archives.fbi.gov/archives/about-us/ten-years-after-the-fbi-since-9-11/just-the-facts-1/terrorist-screening-center-1>.

the provisions of FOIA, please provide sufficient identifying information with respect to each allegedly exempt record, or portion thereof, to allow the Center to assess the propriety of the claimed exemption. *Vaughn v. Rosen*, 484 F. 2d 820 (D.C. Cir. 1973). In addition, any portion of a responsive record that can be reasonably segregated must be provided, after redaction of any exempt material. 5 U.S.C. § 552 (b). The Center will accept a “rolling production” of documents if necessary to facilitate the production of responsive records.

For the purpose of this request, the term “record” shall mean: 1) any written, printed, or typed material of any kind, including without limitation all correspondence memoranda, notes, messages, letters, cards, facsimiles, papers, forms, telephone messages, diaries, schedules, books, reports, calendars, chronological data, minutes, charts, lists, ledgers, invoices, worksheets, receipts, returns, computer printouts, printed matter, prospectuses, statements, checks, statistics, surveys, affidavits, contracts, agreements, transcripts, magazine or newspaper articles, or press releases; 2) any electronically, magnetically, or mechanically stored material of any kind, including without limitation all electronic mail, email, text messages, or chats; 3) any audio, aural, visual, or video records, recordings, or representations of any kind; 4) any graphic materials and data compilations from which information can be obtained; and 5) any materials using other means of preserving thought or expression.

The Center also hereby requests a waiver of any and all fees and charges pursuant to 5 U.S.C. §§ 552(a)(4)(A)(ii)(II) and (a)(4)(A)(iii). First, the Center is entitled to a waiver of search fees under 5 U.S.C. § 552(a)(4)(A)(ii)(II) because under FOIA it qualifies as a member of the news media. *See National Security Archive v. Department of Defense*, 880 F. 2d 1381, 1387 (D.C. Cir. 1989) (“A representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”). The Center is a research institution whose mission is to provide immigration policymakers, the academic community, news media, and concerned citizens with reliable information about the social, economic, environmental, security, and fiscal consequences of legal and illegal immigration into the United States.³ In service of this mission, the Center regularly obtains information about the operations and activities of government through FOIA and other means, uses its editorial skills to turn the information into distinct works, and widely disseminates the information through a variety media platforms.⁴ The Center intends to do likewise with the records it receives through this request.

Secondly, the Center is entitled to a complete waiver of both search and duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). Under this provision, records “shall be furnished without any charge or at a charge reduced” if “the disclosure of the information 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 the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The Center is a 501(c)(3), not-for-profit, educational and research organization, and, by definition, it has no commercial purpose. The Center exists to educate the public about the operations and activities of the government concerning the issue of immigration, and to increase

³ See <https://cis.org/Center-For-Immigration-Studies-Background>.

⁴ See <https://cis.org/Publications>; see also <https://cis.org/Podcasts/Parsing-Immigration-Policy>; <https://www.facebook.com/CenterforImmigrationStudies/>; https://twitter.com/CIS_org; <https://www.youtube.com/@CenterforImmigrationStudies>.

public understanding of the effect of immigration on U.S. systems. Once the Center obtains the requested records, it intends to analyze them and widely disseminate the results of its analysis utilizing a variety of media platforms.⁵ It also will make the records available to other members of the media or researchers upon request.

Finally, access to the requested records should be granted within twenty (20) business days from the date of your receipt of this letter, otherwise the Center is further entitled to a complete waiver of search and duplication fees. 5 U.S.C. § 552(a)(4)(A)(viii). Furthermore, the agency's failure to respond in a timely manner shall be viewed as a denial of this request, and the Center may immediately take further administrative or judicial action.

If you would like to discuss the request or any issues raised in this letter, please feel free to contact us at 202-466-8185 ext. 126 or foia@cis.org. Thank you for your time and attention to this matter.

Sincerely,

Colin M. Farnsworth, Esq.
Chief FOIA Counsel
Center for Immigration Studies
1629 K Street, NW, Suite 600
Washington, DC 20006

⁵ *Id.*



Federal Bureau of Investigation
Washington, D.C. 20535

October 20, 2023

COLIN M. FARNSWORTH
CENTER FOR IMMIGRATION STUDIES
NUMBER 600
1629 K STREET NW
WASHINGTON, DC 20006

FOIPA Request No.: NFP-154144
Subject: Encounters with Persons on Terror
Watch List (On or After January 1, 2021)

Dear Colin Farnsworth:

This is in response to your Freedom of Information/Privacy Acts (FOIPA) request.

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. The questions posed in the referenced letter are not FOIA requests because they do not comply with the FOIA and its regulations. Therefore, your request is being administratively closed.

For questions on how to reasonably describe your request, please email us at foipaquestions@fbi.gov. Please reference the FOIPA Request number listed above in all correspondence concerning your request. Additional information about the FOIPA can be found at www.fbi.gov/foia.

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 this 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 emailing the FBI's FOIA Public Liaison at foipaquestions@fbi.gov. 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. You may also contact 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.

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