February 7, 2018

U.S. General Services Administration
FOIA Requester Service Center (H1F)
1800 F St. NW, Room 7308
Washington, DC 20405

RE: Freedom of Information Act Appeal GSA-2017-001699

Dear FOIA Requester Service Center:

We write on behalf of the Campaign Legal Center ("CLC") to appeal the October 19, 2017 denial of CLC's September 27, 2017 Freedom of Information Act ("FOIA") request to the U.S. General Services Administration ("GSA"), which was assigned GSA-2017-001699. This denial is contrary to law and constitutes improper withholding of agency records.

CLC's FOIA request noted that pursuant to "41 C.F.R. § 301-70.907, federal agencies must submit reports to the GSA on a semi-annual basis with 'information about Senior Federal officials and non-Federal travelers who fly aboard their aircraft,' including details about the trips' purposes and the costs incurred."[1] The FOIA request sought:

> **[A]ll Senior Federal Travel Reports submitted to the General Services Administration in calendar year 2017** pursuant to 41 C.F.R. § 301-70.907.
>
> This request encompasses both digital and physical records and includes the reports that agencies submit through the GSA's online reporting tool, http://www.gsa.gov/sftr.[2]

GSA's denial stated only that:

> Per Code of Federal Regulations (CFR) 41 § 301-70.906, agencies must report to GSA use of Government aircraft to carry senior Federal officials and non-Federal travelers. However, agencies maintain ownership of their travel data and

[1] Request at 2.
[2] Request at 2-3 (emphasis in original).

> determine how that data is made available to the public, per CFR 41 § 301-70.908. Therefore, in order to obtain the travel information requested, you should submit your request directly to the agencies.
>
> Based on the above information, this constitutes a denial of your request.[3]

This denial is patently improper. First, as a preliminary matter, 41 C.F.R. § 301-70.908 states only that agencies that operate aircraft must make disclosable traveler records available to FOIA requesters; it does not state that such agencies are the *exclusive* avenue for FOIA requesters to obtain travel records.[4] More broadly, a GSA regulation clarifying that individual agency records are subject to FOIA does not absolve GSA of its own responsibilities under FOIA. Put another way, an agency cannot by regulation exempt itself from FOIA's statutory mandate.

Second, GSA cannot deny that the requested materials are "agency records," nor does it claim that any exemptions apply. Instead, GSA is referring requesters to the agencies from which these reports originated, which in this case constitutes improper withholding of agency records. The reports collected by GSA pursuant to Sections 301-70.906 and 301-70.907 are clearly "agency records," as defined in 5 U.S.C. 552(f)(2) and under the Supreme Court's two-part test in *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 126 (1989). The reports are clearly "obtain[ed]" by GSA—GSA's own regulations establish the requirement to file these reports,[5] and prescribe the specific content of the reports.[6] And GSA was "in control of the requested materials at the time the FOIA request [was] made": GSA maintains a centralized database of these reports, which are transmitted to GSA through an online portal on GSA's website;[7] GSA is the issuer of the applicable system of records notice for these reports;[8] and the agency uses data contained in the reports to compile an annual report of its own.[9] *See Tax Analysts*, 492 U.S. at 145.

FOIA anticipates that an agency may need to *consult* with another agency that has a "substantial interest" in the determination of a request. 5 U.S.C. § 552(a)(6)(B)(iii)(III). However, only in limited circumstances may an agency refer the entirety of a request to an originating agency, like when the request implicates records that are not desclassifiable by the agency that received the request. *See, e.g. McGehee v. CIA,* 697 F.2d 1095, 1109-10 (D.C.Cir.1983).

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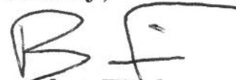
[3] Denial at 1.
[4] 41 C.F.R. § 301-70.908 states in relevant part that "an agency that operates aircraft must make records about travelers on those aircraft available to the public in response to written requests under the Freedom of Information Act (5 U.S.C. 552), except for portions exempt from disclosure under that Act (such as classified information)."
[5] 41 C.F.R. § 301-70.906.
[6] 41 C.F.R. § 301-70.907.
[7] *See* GSA Travel Reporting Tool, https://www.travel.reporting.gov/TRAVEL/TRAVELLogin.
[8] *See* GSA/PPFM-3 (Apr. 25, 2008), https://www.gpo.gov/fdsys/pkg/FR-2008-04-25/html/E8-8930.htm.
[9] Fiscal Year 2015 Senior Federal Travel Annual Report, U.S. GEN. SERVS. ADMIN. (2016), https://www.gsa.gov/cdnstatic/FY_2015_Senior_Federal_Travel_Summary_6-10-16.pdf.

In circumstances where a referral may be appropriate, the D.C. Circuit has admonished that "the advantages that would be secured by delegating *all* responsibility for reviewing the document . . . rather than engaging in . . . 'consultation' . . . must then be balanced against any inconvenience to the requester caused by the referral." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1118 (D.C. Cir. 2007) (citing *McGehee,* 697 F.2d at 1111 n. 71.). Referral constitutes an improper withholding of documents if the "net effect [of the referral procedure] is significantly to impair the requester's ability to obtain the records or significantly to increase the amount of time he must wait to obtain them." *Peralta v. U.S. Attorney's Office*, 136 F.3d 169, 175 (D.C. Cir. 1998) (citing *McGehee,* 697 F.2d at 1110), *see also Unrow Human Rights Impact Litig. Clinic v. U.S. Dep't of State*, 134 F. Supp. 3d 263, 279 (D.D.C. 2015). The D.C. Circuit has noted that it is "highly difficult to justify" "a referral procedure that, in practice, imposed very large burdens on requestors (*e.g.,* by compelling [requestors] to pay huge processing costs or to submit separate requests to a number of independent bodies) or that resulted in very long delays." *McGehee* at 1110, see also *Unrow* at 279-280.

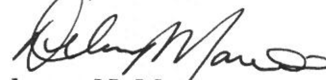
Here, there is plainly no concern about the originating agency needing to "declassify" travel records—and certainly no concern that any such need could not be resolved through consultation. Moreover, the inconvenience to requesters outweighs any advantages to GSA from referring requests for Senior Federal Travel Reports to component agencies: a referral would significantly impair requesters' ability to obtain such records and significantly increase the wait time to receive them. The effect of GSA's referral is to force CLC and other requesters to "submit separate requests to a number of independent bodies," specifically, to submit more than *130 separate requests* with each of the more than 130 agencies that file Senior Federal Travel Reports. Drafting 130 separate requests, obtaining the FOIA contact information for 130 separate agencies, following up with 130 FOIA officers, and waiting for responses from 130 different agencies—*even though GSA has already collected and assembled all of the reports in one place*—is unreasonably burdensome and would add significantly to the wait time to receive the reports. GSA's practice is so burdensome that few requesters would take on the monumental task of filing 130 separate FOIA requests every six months.

Such a substantial burden renders GSA's referral an improper withholding of agency records under controlling D.C. Circuit precedent. We respectfully request that your office reverse GSA's October 19, 2017, denial and direct the agency to promptly disclose the requested records to CLC.

Sincerely,



Brendan Fischer
Director, Federal and FEC Reform



Delaney N. Marsco
Ethics Counsel