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Director
Office of Information Policy
United States Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, DC 20530-0001

VIA U.S. Post

Re: **FREEDOM OF INFORMATION ACT APPEAL - NO RECORDS**
(Request Number FOIA/PA #17-227)

Dear Office of Information Policy staff,

By this letter, Public Record Media (PRM) hereby appeals the “no records” determination issued by the National Security Division (NSD) of the U.S. Department of Justice (DOJ) in the above captioned matter.

Background

On May 25, 2017, PRM submitted a Freedom of Information (FOIA) request to DOJ seeking government records in the form of policies, memoranda, correspondence, and legal opinions relating to the use of certain legal tools to obtain information from members of the news media (the “Request”). The Request (attached as *Exhibit A*) was submitted to the main DOJ FOIA Referral Unit; was assigned tracking number 7016 0910 0001 0550 1714; and was subsequently routed to various components of DOJ, including NSD. Upon receipt, NSD assigned the Request number 17-227. (*Exhibit B*).

“No records” response

By letter dated August 10th, NSD issued a “no records” response to the Request, stating that “[t]his office conducted a search of the files of the National Security Division FARA Office. We did not locate any responsive records subject to FOIA.” (*Exhibit C*).

PRM appeals NSD’s “no records” determination in this matter. PRM’s appeal is premised on certain information available in the public record which indicates the likely presence of responsive records within NSD.

PRM's Request

PRM's Request seeks the following government records produced, transmitted, and/or maintained by DOJ between specific date ranges, as noted in the original Request:

1. Any and all DOJ policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations;
2. Any and all correspondence and/or memoranda (in written or electronic form) relating to modifications or proposed modifications to DOJ policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations;
3. Any and all correspondence (in written or electronic form) between staff members of the White House, including, but not limited to, staff of the Executive Office of the President and/or the President of the United States, and staff members of (DOJ) related to the prosecution and/or potential prosecution of journalists under the provisions of the Espionage Act (18 U.S.C. § 793);
4. Any and all memoranda and/or legal opinions (including legal opinions constituting final determination of policy and/or final opinions that are post-decisional in nature) related to the prosecution and/or potential prosecution of journalists under the provisions of the Espionage Act (18 U.S.C. § 793).

Documents sought in connection with Items 1 and 2 of PRM's Request deal with certain "policies and practices" of DOJ as they relate to obtaining information from members of the news media in connection with criminal and civil investigations, including investigations of unauthorized disclosures ("leaks").

Item 1 of the Request specifically seeks records relating to policies and practices of DOJ dating from the tenure of President Barack Obama. Under President Obama, DOJ undertook several leak investigations, including the investigation of former CIA official Jeffrey Sterling, as well as the investigation of government advisor Stephen Jin-Woo Kim. In those cases, DOJ sought information from members of the news media through - alternately - subpoenas and search warrants.

Under President Obama, DOJ also undertook a review of its policies and practices related to leak investigations involving members of the news media. The review was summarized in a July 12, 2013 document entitled "Department of Justice Report on Review of News Media Policies" (available at DOJ's web site at <https://www.justice.gov/>

[iso/opa/resources/2202013712162851796893.pdf](https://www.foia.gov/iso/opa/resources/2202013712162851796893.pdf)). The “News Media Policies” document noted that in May of 2013, former Attorney General Eric Holder undertook a “comprehensive evaluation” of DOJ’s “policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations.” The document further stated that the Attorney General would make “significant revisions to the Department’s policies regarding investigations that involve members of the news media.” The document then outlined certain policy modifications that DOJ would implement. “Policies and practices” stemming from the changes outlined in the July 12, 2013 document would have been implemented and/or in force during the time period that brackets Item 1 of PRM’s Request - July 12, 2013 to January 23, 2017.

On August 4, 2017, current Attorney General Jeff Sessions delivered public remarks (attached as *Exhibit D*) at a press briefing related to leaks of classified information to the news media. In his remarks, the Attorney General noted that, beginning in February of 2017, he had “listened to career investigators and prosecutors” regarding leak investigations, and noted that DOJ was in the process of “reviewing policies affecting media subpoenas.” Records sought through Item 2 of PRM’s Request seek “correspondence and memoranda ... relating to modifications or proposed modifications to DOJ policies and practices” referenced in Item 1 of the Request. The date range bracketing Item 2 of PRM’s request is from January 23, 2017 to May 25, 2017, the date of submission of the Request.

Responsive records are likely to exist within NSD

Given information in the public record, it is likely that - at minimum - records responsive to Items 1 and 2 of PRM’s Request exist within NSD.

In his August 4 public remarks, Attorney General Sessions specifically noted that he had “directed the National Security Division ... to prioritize cases involving unauthorized disclosures” and that DOJ was “reviewing policies that impact leak investigations.”

Information in the public record indicates that discussions within the administration of President Donald Trump about policies and practices related to leak investigations had occurred as early as February 14, 2017. In written remarks prepared for the Senate Select Committee on Intelligence by former FBI Director James Comey (attached as *Exhibit E*), Mr. Comey noted that during a February 14, 2017 meeting at the White House, President Trump made “a long series of comments about the problem with leaks of classified information.” Mr. Comey’s written statement also notes that he “spoke with Attorney General Sessions in person to pass along the President’s comments about leaks.” Mr. Comey’s written statement indicates that discussions about leak investigations may have begun as early as February of this year - a time period encompassed by PRM’s Request.

DOJ’s past practices for handling leak investigations have involved its NSD component. In June 14, 2000 testimony before the Senate Select Committee on Intelligence (see

Exhibit F), former Attorney General Janet Reno described the process by which DOJ handles investigations of unauthorized disclosures of classified information. In her remarks, the Attorney General noted that:

“Our Criminal Division is usually notified of a leak in writing by the agency whose information was disclosed ... Before opening a criminal investigation, the Criminal Division generally requires the agency requesting the investigation to submit the answers to eleven specific questions regarding what was leaked ... Once the answers to the eleven questions and request for investigation are received, our Internal Security Section evaluates the information and, where appropriate, sends a memorandum to the National Security Division of the FBI.”

Information available on DOJ’s web site (attached here as *Exhibit G*), describes the organization, mission, and function of NSD, and includes among its duties “coordinating and providing advice in connection with cases of unauthorized disclosure of classified information, and supporting resulting prosecutions.”

Given NSD’s past role in leak investigations, as well as the recent public statement by Attorney General Sessions regarding NSD’s ongoing leak investigation duties, it is likely that - at minimum - records responsive to Items 1 and 2 of PRM’s Request exist within NSD.

NSD’s search for records was inadequate

NSD’s August 10 response to PRM’s Request described NSD’s search for records, stating that:

“This office conducted a search of the files of the National Security Division FARA Office. We did not locate any responsive records subject to FOIA.”

NSD’s exclusive search of its FARA Office demonstrates that NSD’s search for records in this matter was inadequate.

The FARA Office within NSD is responsible for DOJ’s enforcement of the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq.* (See 2016 DOJ Office of Inspector General audit of NSD’s enforcement of FARA, available at <https://oig.justice.gov/reports/2016/a1624.pdf>.) OIG’s audit states that the “FARA Registration Unit (FARA Unit) of the Counterintelligence and Export Control Section within the ... National Security Division is responsible for the administration and enforcement of the Act.” Information available on DOJ’s web site (attached here as *Exhibit H*) states that the Foreign Agents Registration Act (FARA) “is a disclosure statute aimed at agents of foreign principals ... who are engaged in covered activities, on behalf of the foreign principal(s)”

DOJ's 2016 OIG audit describes the FARA office as having "limited staff ... responsible for a considerable range of activities." The audit describes the activities of the FARA Office as follows:

"The unit is responsible for processing and monitoring new and existing FARA registrations on an ongoing basis. This includes receiving, reviewing and processing documentation and payments, and addressing late or inaccurate submissions. The unit also performs periodic informal inspections to assess the adequacy of registrant reporting and disclosure, and conducts open source searches to identify individuals that may be obligated to register. It also provides, upon request, advisory opinions to individuals who are unsure whether FARA registration is required of them and maintains foreign agent submission in electronic and hard copy form for public consumption."

The OIG audit also describes criminal and civil enforcement of FARA, and the role of NSD's FARA Office in connection with these matters. Given the narrow focus of the FARA Office on matters related to the registration of foreign agents, it is unlikely that the office would hold records responsive to PRM's Request, as the Request seeks "policies and practices" related to media leak investigations. Rather, such records are likely to be located elsewhere within NSD. As noted by DOJ's 2016 OIG audit, the FARA Office is housed within the larger Counterintelligence and Export Control Section (CES) of NSD. According to an NSD organizational chart available on DOJ's web site (attached here as *Exhibit I*), CES is one of at least nine sections or offices that exist within NSD. Other sections include the "Office of Law and Policy" and the "Office of Intelligence" as well as NSD's Executive Office. A search for responsive records (in this case, records related to agency policies) should involve CES more broadly, as well as the policy and intelligence sections and/or offices of NSD.

An agency's search for records that does not encompass information systems or locations likely to hold those records is not adequate under caselaw interpreting FOIA. "It is elementary that an agency responding to a FOIA request must conduct a search reasonably calculated to uncover all relevant documents." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (internal punctuation and alterations omitted).

In *Kronberg v. U.S. Department of Justice*, 875 F. Supp. 861, 871-72 (D.D.C. 1995), DOJ was ordered to conduct a broader search for records, after failing to produce responsive records sought by a FOIA requester. "It is patently not credible that no such documentation exists ... In this case, Defendant has not satisfied its burden of demonstrating 'beyond material doubt' that the search was reasonable and adequate Further, Plaintiffs have cast serious doubt on the adequacy of Defendants' search. On January 18, 1995, Plaintiffs filed with this Court two documents obtained by other FOIA requesters which demonstrate that Defendant possesses some files which, if searched, would be reasonably expected to contain relevant documents but have not been accounted for either to Plaintiffs or to this Court." *Id.* at 870-71.

In *Pinson v. U.S. Dep't of Justice* 61 F. Supp. 3d 164, 180–81 (D.D.C. 2015), the court ordered DOJ to conduct a revised search after it had failed to produce records sought by a FOIA requester. “Agencies are not required to search every record system in which a responsive record may be found, but neither can they ignore a particular record system that is likely to produce responsive records.” *Id.* at 177. (citing *Negley v. FBI*, 658 F. Supp. 2d 50, 56 (D.D.C. 2009) and *Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 892 (D.D.C. 1995)). “Given the evidence that the OIG actually investigated the defendants ... the agency seemingly searched its database in a manner not reasonably calculated to produce results [T]his Court finds that the OIG has failed to establish that its search was reasonable and adequate under the circumstances.” *Id.*

As with *Kronberg* and *Pinson*, DOJ component NSD has conducted a search whose scope is so narrow that it would miss responsive documents housed elsewhere within its offices. NSD’s search was therefore inadequate, and should be expanded to encompass locations and information systems that are likely to house responsive records.

Responsive records would likely be covered by FOIA

NSD’s August 10 response to PRM’s Request noted that “[w]e did not locate any responsive records subject to FOIA.”

In general, the FOIA requires that “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, plans, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).

The FOIA permits government agencies to withhold certain information from disclosure based upon nine statutory “exemptions” found at 5 U.S.C. § 552(b)(1)–(9). “A federal agency must disclose agency records unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).” *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citing *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 465 U.S. 793–94 (1984)). When government agencies delete information from responsive records based on a FOIA exemption, “[t]he amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record.” 5 U.S.C. § 552(b).

Congress, in amending the FOIA in 1986, added three “exclusions” to the statute that are described in DOJ’s 2014 FOIA Guide (available on DOJ’s web site at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/exclusions.pdf>) as “special protection provisions” which “expressly authorize federal law enforcement agencies” to treat certain records as “not subject to the requirements” of FOIA. These special protection provisions are found at 5 U.S.C. § 552(c)(1)–(3).

Exclusion (c)(1) states:

Whenever a request is made which involves access to records described in subsection (b)(7)(A) and—

- (A) the investigation or proceeding involves a possible violation of criminal law; and
- (B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (iii) disclosure of the existence of the records could reasonably be expected to interfere with law enforcement proceedings, the agency may, during only such time as that circumstances continues, treat the records as not subject to the requirements of this section.

Exclusion (c)(2) states:

Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

Exclusion (c)(3) states:

Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information as provided in subsection (b)(1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

Records sought via PRM's Request do not fall within the bounds of FOIA's statutory exclusions. Records responsive to Items 1 and 2 of PRM's Request—the records most likely to be maintained within NSD—deal with certain “policies and practices” of DOJ, as well as correspondence and/or memoranda relating to changes to such policies and practices.

In regard to exclusion (c)(1), the exclusion is limited to records that would otherwise be covered by FOIA Exemption 7, which involves “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A). FOIA Exemption 7 has been interpreted by courts to cover records involved in a *specific* criminal investigation, either pending or

ongoing. *See Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995) (“To fit within Exemption 7(A), the government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm”); *see also NLRB v. Robbins Tire Co.*, 437 U.S. 214, 224 (1978) (government must show how records “would interfere with a pending enforcement proceeding”); *Juarez v. Dep't of Justice*, 518 F.3d 54, 58–59 (D.C. Cir. 2008) (government must show that its ongoing law enforcement proceedings could be harmed by premature release of evidence or information); *Lion Raisins, Inc. v. U.S. Dep't of Agric.*, 231 F. App'x 565, 566 (9th Cir. 2007) (exception applicable where “criminal investigation remains ongoing” and release of information could “jeopardize that investigation”). Since records sought by PRM relate to DOJ policy matters generally, rather than to specific enforcement proceedings, exclusion (c)(1) does not apply.

In regard to exclusion (c)(2), none of the requested records deals with information maintained by a criminal law enforcement agency under an “informant’s name or personal identifier.” Therefore exclusion (c)(2) does not apply.

In regard to exclusion (c)(3), the coverage of the exclusion hinges upon the records: (1) being under the cognizance of the Federal Bureau of Investigation; and (2) relating to “foreign intelligence or counterintelligence, or international terrorism.” In addition, (3) the “existence of the records” must be “classified information as provided in subsection (b)(1).” Subsection (b)(1) of FOIA (“FOIA Exemption 1”) relates to information that has been classified “under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy” and is “in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1).

In the case of records responsive to Item 1 of the Request, the existence of such records is not properly classified, as their existence is publicly documented on DOJ’s own web site. In DOJ’s June, 2013 “News Media Policies” document, specific modifications to certain DOJ policies and operations are described. Item 1 of PRM’s Request seeks the “policies and practices” that flow from the modifications described in DOJ’s “News Media Policies” document. As DOJ’s discussion of these modifications constitutes public information and is therefore available through FOIA, the final, modified “policies and practices” they describe would be similarly situated.

Records responsive to Item 2 of PRM’s Request are related to Item 1 records, in that they consist of correspondence and/or memoranda about modifications to Item 1 records. While certain segregable portions of such records may be exempt under FOIA Exemption 5 (the “deliberative process” privilege), 5. U.S.C. § 552(b)(5), the mere existence of such records should not be properly classified under FOIA Exemption 1, given that the records relate to modifications to policies and practices whose existence has been previously disclosed by DOJ through its “News Media Policies” document.

In the event that the government has retroactively applied a (b)(1) classification to any of the records sought under Item 1, such records cannot be withheld, as they have been

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officially acknowledged by DOJ through public release on the agency's own web site. "[W]hen information has been 'officially acknowledged,' its disclosure may be compelled even over an agency's otherwise valid exemption claim." *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 765 (D.C. Cir. 1990). The Attorney General's August 4 comments about "reviewing policies affecting media subpoenas" also serves as official acknowledgment of DOJ actions covered by Item 2 of PRM's request, overcoming (b)(1) classification.

Given that Item 1 and 2 records cannot be protected by FOIA Exemption 1—which is one of the prongs required for coverage by FOIA exclusion (c)(3)—the records do not qualify to be excluded from FOIA's coverage. Therefore, any records responsive to Items 1 and 2 of the Request that are held by NSD must be treated as subject to the FOIA.

NSD's search should be expanded, and responsive records should be produced

Given that NSD's search in this matter was unduly narrow and therefore inadequate, NSD's search for records should be conducted again, and expanded to cover all locations and information systems likely to contain responsive records. Responsive records that are located in the course of the new search are likely to be subject to FOIA, and therefore disclosable to PRM either in whole or in part.

If you have further questions regarding this matter, please contact me via telephone at 651-556-1381, or by U.S. Post.

Sincerely,

/s/Matt Ehling
Executive Director
Public Record Media