

December 18, 2019

Via Online Submission and FedEx

United States Department of Justice
U.S. Federal Bureau of Investigation
Office of Information Policy
441 G Street NW, Sixth Floor
Washington, D.C. 20001

Re: Administrative Appeal – FBI FOI/PA Tracking Number 1436663-000

To Whom It May Concern:

This letter serves as an administrative appeal of the October 3, 2019 email from the U.S. Federal Bureau of Investigation (the “Bureau” or “FBI”), attached as **Exhibit A** (the “Inquiry Response”), which failed to provide an adequate response pursuant to the Freedom of Information Act (“FOIA”) within the statutory timeframe. *See* 5 U.S.C. § 552(a)(6)(A)(i). The Bureau issued its Inquiry Request in response to a May 6, 2019 FOIA request submitted by the Brennan Center for Justice at NYU School of Law (the “Brennan Center”) and Defending Rights & Dissent (“DRD”) (together, “the parties”), attached hereto as **Exhibit B** (Request Number 143663-000) (the “FOIA Request”).

Specifically, DRD and the Brennan Center appeal (1) the Bureau’s failure to make a FOIA “determination” and provide responsive documents within the statutory timeline; (2) the Bureau’s constructive denial of the parties’ request; and (3) the Bureau’s overall pattern or practice of unreasonable delays in responding to FOIA requests that will interfere with the parties’ ability to promptly obtain non-exempt records from the agency in the future. DRD and the Brennan Center hereby appeal the foregoing and request all documents requested in the FOIA Request. Pursuant to 28 C.F.R. § 16.8(a), this administrative appeal is timely submitted within 90 calendar days of the Inquiry Response.

Factual Background

On May 6, 2019, DRD and the Brennan Center sent the FOIA Request to the Bureau seeking records related to the formation and activities of the Bureau’s Foreign Influence Task Force (“FITF”). (**Exhibit B.**) The FOIA Request asked for expedited handling because the information requested is of “widespread and exceptional media interest.” (*Id.*) As part of its FOIA Request, the parties asked for a fee waiver, in view of their status as non-profit organizations that would use the requested records to inform the public about matters of immense social importance. (*Id.*)

The Bureau first acknowledged receipt of the FOIA Request in a May 22, 2019 letter stating that the fee waiver request was under consideration and providing an alternative fee schedule if the fee waiver request were to be denied. (**Exhibit C.**) Following a telephone conversation between the Bureau and counsel for the Brennan Center, the Bureau sent a second letter on July 3, 2019 correcting the alternative fee schedule. (**Exhibit D.**) Neither of the letters indicated the scope of the documents to be produced nor the Bureau's rationale for any withholdings. Nor did these documents provide an estimated timeline for the production of responsive documents. (*See id.*)

Almost five months elapsed without further response. On October 3, 2019, the Brennan Center sent an email to the Bureau requesting a status update regarding the FOIA Request. The Bureau sent the Inquiry Response email the next day, stating in part that the parties' request was in Initial Processing and that the Bureau "do[es] not yet know into which track" the request would fall. (**Exhibit A.**) The Inquiry Response estimated that, "based on the average processing time for complex requests in the large processing track," the Bureau would complete action on this request 1,432 days from the date the FBI opened the FOIA Request. (*Id.*) The Inquiry Response further noted that "once the search has been completed," the Brennan Center could request an updated completion date, but failed to provide information on when the initial search would be completed. (*Id.*)

Argument

1. The Bureau violated FOIA by failing to respond to the FOIA Request within the statutory timeframes.

a. The Bureau did not meet FOIA's default determination timeframe.

FOIA requires that an agency (1) determine whether it will comply with a record request within 20 working days of receipt and (2) immediately notify the requester of the determination. 5 U.S.C. § 552(a)(6)(A)(i).¹ Following this determination, the agency "shall make the records *promptly* available" to the requester. 5 U.S.C. § 552(a)(3)(A) (emphasis added). The term "promptly" is "aimed at the sluggishness all too characteristic of bureaucracies." *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1171 (9th Cir. 2000). The statute thus requires that agencies produce and make available responsive records "typically . . . within *days or a few weeks* of a 'determination,' *not* months or years." *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 188 (D.C. Cir. 2013) (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(C)(i)) (emphases added).

The Bureau has failed to respond to the FOIA Request within the parameters mandated by FOIA. The Bureau's initial responses merely acknowledged receipt of the FOIA Request and indicated the potentially applicable fee schedules. The Inquiry Response supplied only a projected completion timeline. These communications did not explain "the

¹ In cases of "unusual circumstances," the deadline may be extended up to 10 additional days. 5 U.S.C. § 552(a)(6)(B)(i). The unusual circumstance extension must be communicated in writing to the requester. *Id.*

scope of the documents [the FBI] will produce and the exemptions it will claim.” *Citizens for Responsibility & Ethics*, 711 F.3d at 186. Further, the Bureau has failed to provide any responsive documents in the past six months. The FBI’s overall projected completion timeline of 1,432 days is in no way “prompt.” Although DRD and the Brennan Center appreciate the Bureau’s budgetary and personnel constraints, these “practical difficulties” do not excuse the Bureau from complying with the statutory mandate. *See Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1041 (9th Cir. 1999).

b. The Bureau did not meet FOIA’s expedited determination timeframe.

Moreover, the parties requested expedited processing of the FOIA Request. FOIA requires expedited processing of requests if the relevant party demonstrates a compelling need for the materials. 5 U.S.C. § 552(a)(6)(E)(i). A “compelling need” encompasses “request[s] made by a person primarily engaged in disseminating information” that relate to an issue to which there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(I-II). Expedition is also appropriate when there is “widespread and exceptional media interest” in the matter that presents “possible questions about the government’s integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(iv). Under the statute, the “determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request.” 5 U.S.C. § 552(a)(6)(E)(ii)(I).

Expedited processing is appropriate here. As noted in their Request, DRD and the Brennan Center seek these documents in order to produce and publicly disseminate a report on the Bureau’s FITF, about which there has been considerable media coverage. The public’s need for the requested information is urgent and great, as it will likely shed light on the FITF program’s potential to infringe on First Amendment Rights and personal privacy, as well as its ability to adequately combat election interference. *See Protect Democracy Project, Inc. v. U.S. Dep’t of Defense*, 263 F. Supp. 3d 293 (D.D.C. 2017) (finding expedition likely appropriate on analogous facts in action for equitable relief).

Because expedition is appropriate, the Bureau is required by statute to process the FOIA Request “as soon as practicable.” *See* 5 U.S.C. § 552(a)(6)(E)(iii); *Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep’t of State*, 300 F. Supp. 3d 540, 547 (S.D.N.Y. 2018); *Elec. Privacy Info. Ctr. v. Dep’t of Justice*, 416 F. Supp. 2d 30, 37 (D.D.C. 2006). The legislative history of the FOIA amendments “make clear that . . . its intent was to ‘give the request priority for processing more quickly than otherwise would occur.’” *Brennan Ctr. for Justice*, 300 F. Supp. 3d at 548–49 (citing *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 39). Absent a credible showing that disclosure within this period truly was not practicable, the Bureau’s failure to process the FOIA Request within 20 days is a violation of FOIA. *See id.*; *Elec. Privacy Info. Ctr.*, 416 F. Supp. 2d at 39 (noting that one to two months is sufficient time for an agency to process broad FOIA requests that may involve classified or exempt material).

DRD and the Brennan Center therefore appeal the Bureau's actions in failing to provide an adequate response to the parties' FOIA Request within the statutory timeframe. The parties request all responsive documents be produced by a date certain, as soon as is practicable.

2. *The Bureau's projected response timeline of 1,432 days is a de facto denial of the valid FOIA Request.*

Not only does the Bureau's projected timeline violate FOIA's prompt production requirement, it also constitutes a *de facto* unlawful withholding of non-exempt documents. "Congress evinced an increasing concern over the timeliness of disclosure, recognizing that delay in complying with FOIA requests may be tantamount to denial." *Brennan Ctr. for Justice*, 300 F. Supp. 3d at 546 (citation omitted). Even when an "agency does not deny a FOIA request outright," an agency's inadequate response may constitute an "improper" withholding." *Gilmore v. U.S. Dep't of Energy*, 33 F. Supp. 2d 1184, 1186 (N.D. Cal. 1998) (citing *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 n.12 (1989)); see also *Fiduccia*, 185 F.3d at 1041. "This is true regardless of whether the documents are ultimately determined not to be subject to disclosure." *Gilmore*, 33 F. Supp. 2d at 1187.

Unreasonable delays in disclosing non-exempt documents violate the intent and purpose of FOIA and often obviate the value of the information sought. See *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988). "The value of information is partly a function of time." *Fiduccia*, 185 F.3d at 1041. An estimated response time of multiple years "amounts as a practical matter in most cases to saying 'regardless of whether you are entitled to the documents, we will not give them to you.'" *Id.* Here, the FBI has told DRD and the Brennan Center that they must wait four years to get the information they request. This delay will render the Request utterly pointless; therefore, it amounts to a constructive denial of the parties' request for documents to which they are entitled.

Courts have confirmed that long production delays may be considered unlawful withholding of documents in contravention of FOIA. For example, in *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004), the requesters sought an injunction after the Department of Defense failed to produce, "with small exception," the requested documents and failed to claim any exemptions or objection nearly eleven months after acknowledging the request. The court found the agency's "glacial pace" of response was an unlawful withholding of documents and accordingly ordered that the agency produce the records and completed *Vaughn* index within 30 days, noting "many defendant agencies have indicated an ability to comply fully with plaintiffs' requests in far less time." See *id.* at 504-05. See also *Seavey v. U.S. Dep't of Justice*, 266 F. Supp. 3d 241, 248 (D.D.C. 2017) (rejecting FBI's assertions that it can only process 500 pages per month due to administrative burdens and ordering agency to meet requesters production goal within three years); *Ferguson v. FBI*, 722 F. Supp. 1137, 1140, 1145 (S.D.N.Y. 1989) (requiring production of documents related to covert investigations of political activists within 85 days and *Vaughn* indices shortly thereafter).

The Bureau's projected timeline for production is thus properly considered a *de facto* denial of DRD and the Brennan Center's lawful FOIA Request. The parties appeal this *de facto* denial and requests all responsive documents be produced by a date certain, as soon as is practicable.

3. FBI's projected completion timeline reflects a "pattern or practice" of unlawful delay.

The delay in processing DRD and the Brennan Center's Request is more than an isolated incident. The Bureau's "prolonged, unexplained delays in producing non-exempt records" signals that the "agency has a policy or practice of ignoring FOIA's requirements." *See Judicial Watch, Inc. v. U.S. Dep't of Homeland Sec.*, 895 F.3d 770, 780 (D.C. Cir. 2018). The Bureau has a documented history of backlogs, which it has admitted needs improvement. *See* Department of Justice, Chief FOIA Officer's Annual Freedom of Information Act Report: Fiscal Year 2018 at 21–22.² Further, the Bureau admitted in its Inquiry Response that it typically takes *five and a half years* to complete production for requests it places in its extra-large processing track. (**Exhibit A.**)

When an agency adopts a system for dealing with requests whose "net effect" is to "significantly increase the amount of time he must wait to obtain them," it has engaged in an improper withholding of documents. *McGehee v. CIA*, 697 F.2d 1095, 1110 (D.C. Cir. 1983). Here, the FBI has adopted an "Initial Processing" system of preliminary reviews that significantly stalls the Bureau's production of documents. This system, and the Bureau's overall pattern of consistent delay, has already harmed DRD and the Brennan Center. It further poses an imminent risk of future harm because it will impair DRD and the Brennan Center's future ability to lawfully access information, which they depend upon to continue their mission and work of informing the public. *See Judicial Watch, Inc.*, 895 F.3d at 776; *Thompson v. Sessions*, No. CV 16-3 (RDM), 2018 WL 4680201, at *1, *5 (D.D.C. Sept. 27, 2018), *aff'd sub nom. Thompson v. Barr*, No. 18-5332, 2019 WL 3949741 (D.C. Cir. July 29, 2019).

On information and belief, the agency has taken affirmative steps to obfuscate timely access to the documents. DRD and the Brennan Center thus appeal the Bureau's pattern and practice of extreme delay, amounting to unlawful *de facto* denials, in responding to FOIA requests.

Conclusion

The FBI has failed on multiple counts to comport with FOIA. The forgoing describes violations of law and disregard for the public need. For these reasons, DRD and the Brennan Center request that the FBI make a prompt and proper determination regarding its request and that all documents within the scope of the FOIA Request attached as Exhibit B and incorporated herein be disclosed. If any documents or portions of documents are withheld, DRD and the Brennan Center request an index or similar statement of the scope of the

² <https://www.justice.gov/oip/page/file/1042446/download>.

material withheld and a citation to the specific FOIA exemption section upon which the nondisclosure is based with an adequate explanation for why the exemption is applicable. Such index should also include information identifying the author, recipient and any copyees, a summary of the content, and the title and date.

A reply is requested within 20 working days as prescribed under 5 U.S.C. § 552(a)(6)(A)(iii). The determination on appeal should be sent to:

Francis X. Nolan
Eversheds Sutherland (US) LLP
1114 Avenue of the Americas, 40th Floor
New York, NY 10036-7703

Should you have any questions, please contact me at (212) 389-5083.

Sincerely,

/s/ Francis X. Nolan
Francis X. Nolan

Attachments

FN/jrr

EXHIBIT A

From: FOIPAQUESTIONS <FOIPAQUESTIONS@FBI.GOV>
Sent: Thursday, October 3, 2019 8:59 AM
To: Nolan, Frank <FrankNolan@eversheds-sutherland.us>
Subject: RE: Status inquiry for Request # 1436663-000

Dear Mr. Nolan,

Thank you for your inquiry regarding the status of your Freedom of Information Act/Privacy (FOIPA) request. A review of your request has determined the following:

The request is presently in Initial Processing, where the assigned analyst is searching for, retrieving and reviewing potentially responsive records.

Requests are processed in the order in which they are received through our multi-track processing system. Requests are divided into two primary tracks--simple (under 50 pages of potentially responsive documents) and complex (over 50 pages of potentially responsive documents). Complex requests are further divided into medium, large, and extra-large sub-tracks based upon request size. Simple track requests typically require the least amount of time to process. Currently, simple track cases average approximately 115 days from the date of receipt for processing. Our complex requests in the medium processing track are currently averaging 653 days, large processing track are currently averaging approximately 1,432 days, and extra-large processing track are currently averaging 2,008 days for processing.

The search for responsive records is ongoing for your request, so we do not yet know into which track it will fall. The estimated date of completion is therefore based on the average processing time of complex requests in the large processing track. Accordingly, the estimated date on which the FBI will complete action on your request is 1,432 days from the date the FBI opened your request. Once the search has been completed, you may request an estimated date of completion.

Additional information regarding the Freedom of Information Act/Privacy is available at <http://www.fbi.gov/> or <http://www.fbi.gov/foia/>. If you require additional assistance please contact foipaquestions@fbi.gov.

Please check the status of your request online at <http://vault.fbi.gov> by clicking on the "Check Status of Your FOI/PA Request" link. Status updates are performed on a weekly basis.

Respectfully,

Public Information Officer

Record/Information Dissemination Section (RIDS) FBI-Information Management Division
170 Marcel Drive, Winchester, VA 22602-4843
Direct: (540) 868-4593
Fax: (540) 868-4391
Questions E-mail: foipaquestions@fbi.gov

Do you have further questions about the FOI/PA process? Visit us at <http://www.fbi.gov/foia>

Please check the status of your request online at <https://vault.fbi.gov/fdps-1/@@search-fdps> Status updates are performed on a weekly basis.

Note: This is a non-emergency email address. If this is an emergency, please call 911 directly. If you need to report a tip for immediate action, please contact FBI Tips at <http://tips.fbi.gov/> or reach out to your local field office.

From: Nolan, Frank [<mailto:franknolan@eversheds-sutherland.com>]

Sent: Wednesday, October 02, 2019 1:28 PM

To: FOIPAQUESTIONS <FOIPAQUESTIONS@FBI.GOV>

Cc: Noland, Rich <richnoland@eversheds-sutherland.com>; Pinzur, Caren <carenpinzur@eversheds-sutherland.com>

Subject: Status inquiry for Request # 1436663-000

Good afternoon,

I write to inquire as to the status of the FOIA request identified in the subject line, above. I will also try reaching the FOIA officer by phone. Please let me know via email or by phone at my direct line, below. I've also attached our original FOIA request.

Thank you.

Frank Nolan

Frank Nolan | Counsel

Eversheds Sutherland (US) LLP

The Grace Building, 40th Floor | 1114 Avenue of the Americas, New York, NY 10036-7703, US

T: +1.212.389.5083

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EXHIBIT B

May 6, 2019

Via eFOIA and Certified Mail

Federal Bureau of Investigation
Attn: FOI/PA Request
Record/Information Dissemination Section
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4391/4997

To Whom It May Concern:

This letter constitutes a request under the Freedom of Information Act, 5 U.S.C. § 552, et. seq and is submitted on behalf of Defending Rights & Dissent and the Brennan Center for Justice at NYU School of Law (the “Brennan Center”). Defending Rights & Dissent and the Brennan Center would be happy to discuss this request via phone or e-mail in order to answer any questions regarding the scope or substance.

Background

In Autumn of 2017, FBI Director Christopher Wray directed the FBI to create a “Foreign Influence Task Force” (“FITF”).¹ In January of 2018, Jeffrey Tricoli, an FBI official involved with the FITF, made public comments that the FITF would alert social media companies and the public at large about foreign disinformation and social media manipulation. According to the same public comments, the FBI was cognizant of potential First Amendment issues and did not intend to act as the “thought police.”² The FITF was again in the news when Mr. Tricoli resigned in July 2018.³

On August 2, 2018, Director Wray spoke about the FITF at a joint press conference with National Security Advisor John Bolton, Director of National Intelligence Dan Coats,

¹ See Press Release, Federal Bureau of Investigation, The FBI Launches a Combating Foreign Influence Webpage (Aug. 30, 2018), available at <https://www.fbi.gov/news/pressrel/press-releases/the-fbi-launches-a-combating-foreign-influence-webpage> [hereinafter Combating Foreign Influence Webpage].

² Chris Strohm, *FBI Task Force to Expose Russian Social Media Manipulation*, Bloomberg (Jan. 10, 2018), <https://www.bloomberg.com/news/articles/2018-01-10/fbi-plans-task-force-to-expose-russian-social-media-manipulation>.

³ Emily Birnbaum, *FBI official overseeing election-meddling task force leaves agency: report*, Hill (July 16, 2018), <https://thehill.com/policy/cybersecurity/397172-fbi-agent-in-charge-of-election-meddling-task-force-leaves-position>.

then Secretary of Homeland Security Kirstjen Nielsen, and Director of the National Security Agency General Paul Nakasone. At the press conference, Wray cited as examples of foreign influence: “overtly and covertly manipulating news stories, spreading disinformation, leveraging economic resources, and escalating divisive issues.”⁴ Director Wray also mentioned that part of the FBI’s strategy included cooperation with the private sector. Director Wray said, “This year, we’ve met with top social media and technology companies several times. We’ve given them classified briefings, and we’ve shared specific threat indicators and account information, so they can better monitor their own platforms.”⁵

The press conference happened just days after Facebook removed 32 pages and accounts it determined were engaged in “coordinated inauthentic activity.”⁶ This included a controversial decision to remove the event page of an anti-racist rally that had a number of co-sponsors who were local, DC anti-racist activists.⁷ Director Wray was asked about the removal of the 32 pages and accounts during the press conference, but declined to comment on the specifics of the question. However, the FITF presumably will carry out its mission at least in part by monitoring, collecting, and analyzing information from social media platforms and networks.⁸

In late August, the FBI announced the creation of web pages designed for public consumption in conjunction with the FITF.⁹ The web pages describe the mission of the FITF to combat foreign influence operations as following a three-pronged approach: “investigations and operations,” in which the FITF works with local field offices to “counter the extensive influence and operations of our foreign adversaries”; “information and intelligence sharing,” in which the FITF and FBI coordinate with other intelligence agencies to “ensure a common understanding of the threat and a unified strategy to address it”; and “private sector partnerships,” in which the FITF engages strategically with private technology companies, including through “threat indicator sharing.”¹⁰

The FBI has disclosed little additional public information on the activities of the FITF since August 2018.

⁴ See Press Release, Federal Bureau of Investigation, FBI Director Christopher Wray’s Statement at Press Briefing on Election Security (Aug. 2, 2018), <https://www.fbi.gov/news/pressrel/press-releases/fbi-director-christopher-wrays-statement-at-press-briefing-on-election-security>.

⁵ *Id.*

⁶ Issie Lapowsky, *Fake Facebook Accounts Are Getting Harder to Trace*, Wired (July 31, 2018), <https://www.wired.com/story/facebook-uncovers-new-fake-accounts-ahead-of-midterm-elections/>.

⁷ Taylor Hatmaker, *Activists push back on Facebook’s decision to remove a DC protest event*, TechCrunch (Aug. 1, 2018), <https://techcrunch.com/2018/08/01/facebook-organizers-protest-no-unite-the-right-2/>.

⁸ Chip Gibbons, *The FBI is Setting Up a Task Force to Monitor Social Media* (Feb. 1, 2018), <https://www.thenation.com/article/the-fbi-is-setting-up-a-task-force-to-monitor-social-media/>

⁹ See Combating Foreign Influence Webpage, *supra* note 1.

¹⁰ *Id.*

Request

Date Range of Request: From January 1, 2017, to the present.

Description of Request: We are requesting the following categories of documents pertaining to the FITF's formation and mission to combat foreign influence operations:

1. All communications between the FITF, or any FBI personnel acting on behalf of the FITF, and employees or representatives of social media platforms or networks, including but not limited to Facebook, Twitter, Instagram, YouTube, LinkedIn, and WhatsApp, relating to the FITF and/or its mission;
2. All communications between the FITF, or any FBI personnel acting on behalf of the FITF, and private businesses concerning any product or service that searches, analyzes, monitors, or collects content posted on any social media platforms or networks relating to the FITF and/or its mission;
3. All agreements between the FBI and/or FITF and private businesses relating to the FITF and/or its mission pertaining to any product or service that searches, analyzes, monitors, or collects content posted on any social media platforms or networks.
4. All communications between the FITF, or any FBI personnel acting on behalf of the FITF, and state and local law enforcement relating to the FITF and/or its mission;
5. All communications between the FITF, or any FBI personnel acting on behalf of the FITF, and other federal agencies relating to the FITF and/or its mission;
6. Records reflecting the process for selecting social media accounts for monitoring or observation by the FITF, in connection with its mission, including key words or other search terms used in locating such accounts; and
7. Policies, procedures, or guidelines related to the protection of the First Amendment rights of US persons in connection with the FITF and/or its mission, including documents, records, or contractual provisions provided to vendors or contractors.

Request for Fee Waiver

Defending Rights & Dissent and the Brennan Center request a waiver of all fees for document search, duplication, and review associated with this request.

Defending Rights & Dissent is a non-profit organized under 26 U.S.C. § 501(c)(3) and a representative of the news media. Defending Rights & Dissent is the publisher of the Dissent NewsWire, an online publication that publishes original reporting about news pertaining to civil liberties. Defending Rights & Dissent has received an award from Project Censored for its original reporting and is a member of The Media Consortium.¹¹ In the past, Defending Rights & Dissent has produced original works based on information it has received through Freedom of Information Act requests, state level public records requests, or other similar requests.¹² Defending Rights & Dissent has engaged in extensive first hand reporting of the arrest and prosecutions of the Trump Inauguration protesters.¹³ Defending Rights & Dissent is routinely granted a fee waiver when filing FOIA requests.

The Brennan Center is also a non-profit organized under 26 U.S.C. § 501(c)(3), and likewise plans to analyze, publish, and publicly disseminate information obtained from this request. The requested records are not sought for commercial use and will be disclosed to the public at no cost. The Brennan Center qualifies as a “representative of the news media” for the same reasons that it is “primarily engaged in dissemination of information”—i.e., because the Brennan Center “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.”¹⁴ The Brennan Center has released over 100 publications in the form of reports and papers on various issues of public importance in the period since January 2011.¹⁵ The

¹¹ See Alexander Reid Ross, *Why Is the FBI Harassing Activists in Cascadia?*, Defending Rights & Dissent (Jan. 5, 2015), <https://rightsanddissent.org/news/why-is-the-fbi-harassing-activists-in-cascadia/>; See Member Directory, The Media Consortium, <https://www.themediaconsortium.org/member-directory> (last visited Oct. 26, 2018).

¹² See News Release, Defending Rights & Dissent, DRAD, DC NLG FOIA Request Uncovers That DC Police Spent Over \$300,000 in Weapons, Ammunition to Use against Inauguration Day Protesters (Oct. 30, 2017), available at <https://rightsanddissent.org/news/dr-ad-dg-nlg-foia-request-uncovers-dc-police-spent-300000-weapons-ammunition-use-inauguration-day-protesters/>; Chip Gibbons, *Who is Robert Wells and Why Did The FBI Consider Him A National Security Threat?*, Defending Rights & Dissent (June 3, 2016), <https://rightsanddissent.org/news/who-is-robert-wells-and-why-did-the-fbi-consider-him-a-national-security-threat/>; Chip Gibbons, *Senate Passes Bill Aimed at Silencing Pro-Palestinian Activism on Campuses*, Defending Rights & Dissent (Dec. 6, 2016), <https://rightsanddissent.org/news/senate-passes-bill-aimed-silencing-pro-palestinian-speech-campuses/>.

¹³ See Archive of J20 Articles, Defending Rights & Dissent, <https://rightsanddissent.org/news/topics/free-speech-assembly/j20/> (last accessed Oct. 26, 2018).

¹⁴ 5 U.S.C. § 552(a)(4)(A)(ii)(III); 28 C.F.R. § 16.10(b)(6); *Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989); see also *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 11 (D.C. Cir. 2003).

¹⁵ For representative examples of the Brennan Center's previous publications on issues of public concern, see Rachel Levinson-Waldman, *What the Government Does with Americans' Data* (2013), available at <https://www.brennancenter.org/sites/default/files/publications/Data%20Retention%20-%20FINAL.pdf>; Michael Price, *National Security and Local Police* (2013), available at https://www.brennancenter.org/sites/default/files/publications/NationalSecurity_LocalPolice_web.pdf; cf. *Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11-12 (finding that the Electronic Privacy Information Center was representative of the news media based on its publication of seven books about national and international policies relating to privacy and civil rights); see also *Nat'l Sec. Archive*, 880 F.2d at 1386 (deeming National Security Archive a representative of the news media after it published one book and indicated its intention to publish a set of documents on national and international politics and nuclear policy).

Brennan Center is therefore entitled to a waiver of search and review fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) and 28 C.F.R. § 16.10(d)(1).

As a noncommercial requester, the Brennan Center also qualifies for waivers as an “educational institution” pursuant to 28 C.F.R. § 16.10 (c)(1)(i). The Brennan Center qualifies as an educational institution because it is affiliated with the NYU School of Law, which is plainly an educational institution under the definition provided in 28 C.F.R. § 16.10(b)(4).¹⁶ Moreover, disclosure is not primarily in the Brennan Center’s commercial interests.¹⁷ As stated above, the Brennan Center plans to make any information disclosed as a result of this request available to the public at no cost. A fee waiver would therefore fulfill Congress’s legislative intent that FOIA be “liberally construed in favor of waivers for noncommercial requesters.”¹⁸

Request for Expedited Handling

Under the relevant regulations, expedited processing is appropriate where there is “widespread and exceptional media interest” in the information we are requesting and where “there exist possible questions about the government’s integrity which affect public confidence.”¹⁹ These factors are present here.

First, there has been a steady stream of stories about the FITF.²⁰ As such, there exists wide and exceptional media interest in the FITF. However, since the creation of the FITF’s webpage in August 2018, little or no information regarding its activities has been publicly disclosed.

In addition, there exist two sets of possible questions about the government’s integrity in regards to the FITF, both of which affect public confidence. First, there exist questions about the possibility that overly broad efforts to combat disinformation or improper foreign influence on social media could infringe on First Amendment protected rights. Observers have suggested that allegations of foreign influence have been used to silence disfavored points of view,²¹ including by removing social media pages.²² The FITF

¹⁶ See also *Nat’l Sec. Archive*, 880 F.2d at 1381.

¹⁷ See 28 C.F.R. § 16.10 (d)(1).

¹⁸ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 27, 190 (1986) (Statement of Sen. Leahy)).

¹⁹ 28 C.F.R. § 16.5 (e)(1)(iv).

²⁰ Strom, *supra* note 2; see also Gibbons, *supra* note 8; Birnbaum, *supra* note 3.

²¹ See, e.g. Matt Taibbi, *The New Blacklist*, Rolling Stone (Mar. 5, 2018),

<https://www.rollingstone.com/politics/politics-news/the-new-blacklist-202612/>; James Carden, *Russiagate Is Devolving Into an Effort to Stigmatize Dissent*, Nation (Dec. 28, 2017),

<https://www.thenation.com/article/russiagate-is-devolving-into-an-effort-to-stigmatize-dissent/>; Anoa Changa, *Please Stop Calling Black Activism ‘Divisive,’* Nation (Nov. 2, 2017),

<https://www.thenation.com/article/please-stop-calling-black-activism-divisive/>.

²² See, e.g. Rhet Jones, *Facebook Tempts Political Backlash With Massive Purge of 810 Pages and Accounts*, Gizmodo (Oct. 11, 2018), <https://gizmodo.com/facebook-tempts-political-backlash-with-massive-purge-o-1829690016>; Jillian C. York & Karen Gullo, *Facebook Deletes Anti-Unite the Right Event, Claiming Foreign*

potentially puts the FBI in the position of monitoring social media accounts and making determinations about what constitutes foreign propaganda and what constitutes legitimate speech.²³ The FBI clearly realizes the serious implications here, given their public assurances that they are not playing “thought police.” Nonetheless, questions about the FITF’s ability to impartially handle sensitive political speech, as well as its role in monitoring such speech, affects public confidence. Second, questions have also been raised that the FITF is not adequately addressing election interference.²⁴ Such concerns not only impact the public confidence in the FBI, but in the integrity of US elections.

Accordingly, Defending Rights & Dissent and the Brennan Center urgently need access to this information to inform the public of federal government activity that concerns the general public interest.

Conclusion

In the event that we are denied a fee waiver, we are willing to pay up to \$50 in costs for the reproduction of the records requested. Should the cost exceed \$50 we ask to be contacted. Should any part of this request be withheld in whole or in part, we ask that specific statutory exemptions to disclosure be cited. Any part of this request is segregable.

We would prefer the records requested in electronic copy. All records should be sent to Kara Ford at karaford@eversheds-sutherland.com. Alternatively, documents can be sent to:

Kara Ford
Eversheds Sutherland (US) LLP
1114 Avenue of the Americas
Grace Building, 40th Floor
New York, NY 10036

Please feel free to contact me with any questions at that email address above or at (212) 389-5016.

Sincerely,



Kara Ford

KDF/kf

Involvement, Elec. Frontier Found. (Aug. 3, 2018), <https://www.eff.org/deeplinks/2018/08/facebook-deletes-anti-unite-right-event-claiming-russian-involvement>.

²³ See Gibbons, *supra* note 18.

²⁴ See, e.g. Birnbaum, *supra* note 3.

EXHIBIT C



Federal Bureau of Investigation
Washington, D.C. 20535

May 22, 2019

MS. KARA FORD
EVERSHEDS SUTHERLAND LLP
GRACE BUILDING, 40TH FLOOR
1114 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

FOIPA Request No.: 1436663-000

Dear Ms. Ford:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the FBI, dated May 6, 2019. For administrative tracking purposes, additional FOIPA Request Numbers may be assigned if it is determined your request seeks records about multiple subjects. You will be notified of any additional tracking numbers if assigned. Below you will find check boxes and informational paragraphs about your request, as well as specific determinations per statute. Please read each one carefully.

- You submitted your request via the FBI's eFOIPA system.
 - We have reviewed your request and determined it is consistent with the FBI eFOIPA terms of service. Future correspondence about your FOIPA request will be provided in an email link unless the record's file type is not supported by the eFOIPA system.
 - We have reviewed your request and determined it is not consistent with the FBI eFOIPA terms of service. Future correspondence about your FOIPA request will be sent through standard mail.
- Your request for a public interest fee waiver is under consideration and you will be advised of the decision if fees are applicable. If your fee waiver is not granted, you will be responsible for applicable fees per your designated requester fee category below.
- For the purpose of assessing any fees, we have determined:
 - As a commercial use requester, you will be charged applicable search, review, and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(I).
 - As an educational institution, noncommercial scientific institution or representative of the news media requester, you will be charged applicable duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(II).
 - As a general (all others) requester, you will be charged applicable search and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(III).

Please check the status of your FOIPA request at www.fbi.gov/foia by clicking on **FOIPA Status** and entering your FOIPA Request Number. Status updates are adjusted weekly. The status of newly assigned requests may not be available until the next weekly update. If the FOIPA has been closed the notice will indicate that appropriate correspondence has been mailed to the address on file.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIA online portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. 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 contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing ogis@nara.gov. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, 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.

Sincerely,



David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Information Management Division

EXHIBIT D



July 3, 2019

MS. KARA FORD
EVERSHEDS SUTHERLAND LLP
GRACE BUILDING, 40TH FLOOR
1114 AVENUE OF THE AMERICAS
NEW YORK, NY 10036

FOIPA Request No.: 1436663-000

Dear Ms. Ford:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the FBI, dated May 6, 2019. For administrative tracking purposes, additional FOIPA Request Numbers may be assigned if it is determined your request seeks records about multiple subjects. You will be notified of any additional tracking numbers if assigned. Below you will find check boxes and informational paragraphs about your request, as well as specific determinations per statute. Please read each one carefully.

- You submitted your request via the FBI's eFOIPA system.
- We have reviewed your request and determined it is consistent with the FBI eFOIPA terms of service. Future correspondence about your FOIPA request will be provided in an email link unless the record's file type is not supported by the eFOIPA system.
- We have reviewed your request and determined it is not consistent with the FBI eFOIPA terms of service. Future correspondence about your FOIPA request will be sent through standard mail.
- Your request for a public interest fee waiver is under consideration and you will be advised of the decision if fees are applicable. If your fee waiver is not granted, you will be responsible for applicable fees per your designated requester fee category below.
- For the purpose of assessing any fees, we have determined:
 - As a commercial use requester, you will be charged applicable search, review, and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(I).
 - As an educational institution, noncommercial scientific institution or representative of the news media requester, you will be charged applicable duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(II).
 - As a general (all others) requester, you will be charged applicable search and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(III).

Please check the status of your FOIPA request at www.fbi.gov/foia by clicking on **FOIPA Status** and entering your FOIPA Request Number. Status updates are adjusted weekly. The status of newly assigned requests may not be available until the next weekly update. If the FOIPA has been closed the notice will indicate that appropriate correspondence has been mailed to the address on file.

For questions regarding our determinations, visit the www.fbi.gov/foia website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIA online portal by creating an account on the following web site: <https://www.foiaonline.gov/foiaonline/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. 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 contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing ogis@nara.gov. Alternatively, you may contact the FBI's FOIA Public Liaison by emailing foipaquestions@fbi.gov. If you submit your dispute resolution correspondence by email, 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.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Hardy", with a stylized flourish at the end.

David M. Hardy
Section Chief,
Record/Information
Dissemination Section
Information Management Division