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June 12, 2015

VIA UNITED STATES MAIL

Director
Office of Information Policy
United States Department of Justice
1425 New York Ave., Suite 1050
Washington D.C. 2530-0001

Re: Appeal of Agency Determination of FOIA Request No. 1207786-000

Dear Director:

We represent the Mattachine Society of Washington D.C. (“MSDC”) in the above referenced request for documents pursuant to the Freedom of Information Act (“FOIA”). The MSDC is a non-profit, non-partisan research and educational society that conducts original archival research at The National Archives, U.S. presidential libraries, the Library of Congress, the FOIA Library of the Federal Bureau of Investigation, the Stonewall National Museum and Archives, and other private and public repositories across the country. The mission of the MSDC is to uncover the often deleted political histories of lesbian, gay, bisexual and transgender (“LGBT”) Americans who faced persecution and discrimination at the hands of federal and state governments for over sixty-five years. The MSDC is dedicated to achieving full civil equality for LGBT Americans.

We, on behalf of the MSDC, hereby appeal the determinations of the Federal Bureau of Investigation (“FBI”) and Department of Justice (“DOJ”) with respect to the above referenced matter for the reasons detailed herein.

Background

Under the pretext of protecting national security, President Dwight D. Eisenhower issued Executive Order 10450 (“EO 10450”), declaring that the federal government could deny a citizen employment in “each department or agency of the Government” solely because that person was homosexual. Exec. Order No. 10, 450 § 2, 18 Fed. Reg. 2,489 (Apr. 29, 1953). We understand that then Assistant Attorney General Warren E. Burger (and later Chief Justice of the Supreme Court) was tasked with the responsibility of defending any action under EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the “Request”) to the Federal Bureau of Investigation (the “FBI”) seeking the production of documents concerning

EO 10450 dated from January 1, 1950 through December 31, 1990. The Request specifically sought all files in the FBI's possession created by and communications to or from Warren Burger concerning EO 10450.

More than two years later, on April 17, 2015, the FBI responded to the Request stating that "539 pages were reviewed and 253 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)) and 552(b)(7)(D). Additional documents were sent to other Government agencies for review.

On May 5, 2015, we received a letter from the Department of Justice, National Security Division ("DOJ") which released an additional number of pages. However, the DOJ stated that it had "reviewed these records and are releasing them in part." (Ltr. from K. Tiernan to L. Linsky, dated May 5, 2015 (the "DOJ Letter").) The DOJ claims that the following exemptions, pursuant to 5 U.S.C. § 552, justified the withholding of documents responsive to the Request: 552(b)(6) and 552(b)(7)(C).

We hereby appeal the FBI's and the DOJ's determinations and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions.

Reasons for Appeal

"Congress enacted the FOIA in order to 'pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.'" *Morley v. C.I.A.*, 508 F.3d 1108, 114 (D.C. Cir. 2007) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976); *Rose v. Dep't of Air Force*, 495 F.2d 261, 263 (2d Cir. 1974)). FOIA "adopts as its most basic premise a policy strongly favoring public disclosure of information of federal agencies." *Halpern v. F.B.I.*, 181 F.3d 279, 286 (2d Cir. 1999).

Based upon the information we have received in response to the Request, we believe that the FBI and DOJ have not met these standards. More specifically, we assert that (i) the scope of the FBI's search for documents was inadequate and (ii) the FBI has failed to meet its burden to demonstrate that the claimed exemptions apply. For the reasons stated below, the FBI should reconsider its initial response, expand its search, and produce more documents pursuant to the Request.

The FBI's Search for Documents Was Inadequate

At the time the FBI received the Request, it had a responsibility "to do a reasonably thorough search of its records and to turn over all responsive materials except those for which it could prove an exemption from disclosure." *Church of Scientology Int'l v. DOJ*, 30 F.3d 224,

229-30 (1st Cir. 1994). In judging whether an agency has conducted an adequate search, “the agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.” *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Here, the FBI has not provided any basis upon which the adequacy of its search can be reasonably evaluated. It has not disclosed what method it used to search for records, where it searched for records or what other possible search parameters it used to locate potentially responsive documents. At a minimum, we request that the FBI disclose this basic information so that the adequacy of the FBI’s search methodology can be scrutinized.

But, at a more fundamental level, it is apparent from the released documents themselves that the FBI’s search was inadequate. As noted above, the time period for the request was from 1950 through 1990. The FBI released documents from the approximate period of 1956 through 1959. There is no indication whatsoever that the FBI searched for documents outside of this time period. This is especially troubling given that EO 10450 was issued in April of 1953 and the documents produced by the FBI predominantly concern the amendment of EO 10450 in light of the Supreme Court’s decision in *Cole v. Young* which invalidated large portions of EO 10450.

Moreover, the FOIA request specifically requests all files in the FBI’s possession created by and communications to or from Warren E. Burger concerning EO 10450. There is not one record that was produced by the FBI upon which Mr. Burger was copied or authored.

We believe that the FBI’s search is patently inadequate and respectfully request that the FBI reevaluate whatever its search criteria is or may be and make an effort to locate additional responsive documents.

The FBI’s and DOJ’s Claimed Exemptions Are Inadequate

As the FBI and DOJ are undoubtedly aware, the court “‘impose[s] a substantial burden on an agency seeking to avoid disclosure’ through the FOIA exemptions.” *Morley*, 508 F.3d at 1114-15 (quoting *Vaughn v. Rosen*, 484 F.2d 820, 828 (D.C. Cir. 1973)). “As such, exemptions from disclosure must be narrowly construed and ‘conclusory and generalized allegations of exemptions’ are unacceptable.” *Id.* (quoting *Founding Church of Scientology of Wash., D.C., Inc. v. Nat’l Sec. Agency*, 610 F.2d 824, 830 (D.C. Cir. 1979)).

The FBI Letter and the DOJ Letter state that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552(b)(3) (citing Federal Rule of Criminal Procedure 6(e)); (ii) 5 U.S.C. § 552(b)(6); (iii) 5 U.S.C. § 552(b)(7)(C); and (iv) 5 U.S.C. § 552(b)(7)(D).

Other than identifying the claimed exemptions, neither the FBI Letter nor the DOJ Letter provide any further explanation or justification for withholding these documents. We respectfully request that the FBI and the DOJ provide an explanation for withholding these

documents other than with “conclusory and generalized allegations of exemptions.” *Morley*, 508 F.3d at 1115.

Because the FBI and DOJ have failed to provide their reasons for the claimed exemptions, we reserve all rights to challenge the claimed exemptions on their merits when those reasons are provided.

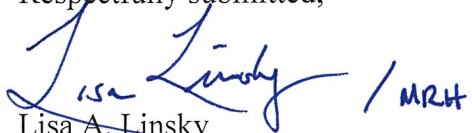
Conclusion

We look forward to your response to this appeal and the production of further documents in response to the Request. Please advise if the further production of documents associated with the Request requires administrative fees that will exceed \$500.00.

The information sought pursuant to this appeal and the Request is not for commercial use but rather in connection with the work of the Mattachine Society, a non-profit education and research organization.

Please feel free to contact me via phone or email with any questions.

Respectfully submitted,

Handwritten signature of Lisa A. Linsky in blue ink, with the initials "MLH" written to the right of the signature.

Lisa A. Linsky
on behalf of the Mattachine Society
of Washington D.C.