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August 13, 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  
Appeal Number AP-2015-04578

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”) as well as the associated appeal.<sup>1</sup> We are in receipt of a letter dated June 22, 2015 from the Federal Bureau of Investigation (“FBI”) providing an additional partial response to the above referenced request for documents.

After having reviewed the materials provided with the June 22 letter, on behalf of the MSDC, we hereby appeal the determinations of the FBI with respect to the above referenced matter. This appeal is related to the same appeal listed above as it all stems from the same FOIA request. As a result, we respectfully request that this appeal be consolidated with Appeal Number AP-2015-04578.

### 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

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<sup>1</sup> 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.

Court) was tasked with the responsibility of defending any action actions taken pursuant to the authority found in EO 10450.

On or about January 25, 2014, the MSDC submitted a FOIA request (the "Request") to 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, dated Apr. 17, 2015 (the "FBI Letter").) The FBI claimed 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, dated May 5, 2015 (the "DOJ Letter").) The DOJ claimed 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).

On June 12, 2015, the MSDC appealed the determinations of the FBI and the DOJ and requested that additional information be released pursuant to the Request (the "Appeal").

On June 22, 2015, we received a letter from the FBI responding to the Request stating that "476 pages were reviewed and 254 pages are being released." (Ltr. from D. Hardy to L. Linsky, dated June 22, 2015 (the "Second 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)(1); 552(b)(3) (citing 50 U.S.C. § 403g); 552(b)(7)(C); and 552(b)(7)(D). The FBI indicated that additional documents were sent to other Government agencies for review. In addition, the FBI indicated that it is consulting with another agency concerning the Request.

On July 14, 2015, the Office of Information Policy for the DOJ sent a letter to undersigned counsel acknowledging receipt of the Appeal on June 23, 2015. The Appeal was assigned appeal number AP-2015-04578.

In addition to the above referenced Appeal, we hereby appeal the FBI's determinations with respect to the Second FBI Letter and respectfully request that the FBI (i) reconsider the scope of its search for documents and (ii) reconsider its application of the claimed exemptions. Moreover, we respectfully request that this appeal be consolidated with the prior Appeal to streamline the administrative process.

### **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 has 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. It appears, however, that the FBI only produced documents created after 1959. This is troubling because 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* in 1959 which invalidated large portions of EO 10450. The MSDC has a good faith basis to believe that there are responsive documents concerning actions and activities by government officials and agencies which occurred in the immediate aftermath of the issuance of EO 10450, and in the years prior to the *Cole v. Young* decision.

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 Second FBI Letter states that certain documents are being withheld pursuant to the following exemptions: (i) 5 U.S.C. § 552 (b)(1); (ii) 5 U.S.C. § 552(b)(3) (citing 50 U.S.C. § 403g); (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, the Second FBI Letter does not provide any further explanation or justification for withholding these documents. We respectfully request that the FBI 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 (which should be consolidated with the above referenced 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.

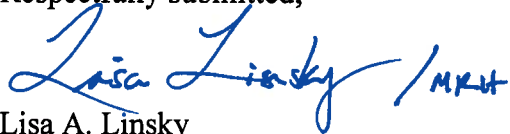
Federal Bureau of Investigation

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

Respectfully submitted,



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

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