



February 16, 2021

Director Bobak Talebian
Office of Information Policy (OIP)
United States Department of Justice
441 G Street, NW
6th Floor
Washington, DC 20530

**RE: FREEDOM OF INFORMATION ACT APPEAL;
FOIPA Request No.: 1484080-000**

Dear Director Talebian:

This letter is an appeal ("Appeal") in accordance with the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the corresponding department/agency implementing regulations.

This Appeal is submitted by the American Center for Law and Justice ("ACLJ").¹

To summarize, the underlying FOIA request ("Request"), dated December 16, 2020, which is the subject of this Appeal, seeks records pertaining to the FBI's knowledge and efforts surrounding the breaking story that the Chinese spy known as Christine Fang, or Fang Fang, had a lengthy relationship with Representative Eric Swalwell. The Background of the Request, provided pursuant to DOJ FOIA regulation 28 C.F.R. §16.3(b), addresses "the date, title or name, author, recipient, subject matter of the record[s]" requested, to the extent known. The Request is incorporated by reference as if fully set forth herein.

The Request included the following two parts:

For purposes of this Request, and unless otherwise indicated, the timeframe of records requested herein is January 1, 2011, to the date this request is processed.

Pursuant to FOIA, 5 U.S.C. § 552 *et seq.*, ACLJ hereby requests that the FBI produce the following:

¹The ACLJ is a not-for-profit 501(c)(3) organization dedicated to the defense of constitutional liberties secured by law. The ACLJ regularly monitors governmental activity and works to inform the public of such affairs. The ACLJ and its global affiliated organizations are committed to ensuring governmental accountability and the ongoing viability of freedom and liberty in the United States and around the world.

1. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by James Comey, Andrew McCabe, Christopher Wray, Robert Mueller, or any Deputy Director of the FBI, including by utilizing any alias, referencing, connected to, or regarding in any way Christine Fang (or Fang Fang, or Fang) or Rep. Eric Swalwell, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, FBI electronic mail or message accounts, non-FBI electronic mail or message accounts, personal electronic mail or message accounts, FBI servers, non-FBI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

2. All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any FBI official, agent or employee, referencing, connected to, or regarding in any way Christine Fang (or Fang Fang, or Fang) or Rep. Eric Swalwell, including but not limited to any record located on backup tapes, archives, any other recovery, backup, storage or retrieval system, FBI electronic mail or message accounts, non-FBI electronic mail or message accounts, personal electronic mail or message accounts, FBI servers, non-FBI servers, and personal servers, as well as any electronic mail or message carbon copied to agency account recipients, any electronic mail or message carbon copied to non-agency account recipients, any electronic mail or message forwarded to agency account recipients, any electronic mail or message forwarded to non-agency account recipients, and attachments to any electronic mail or message.

ACLJ FOIA Request, at 4-5. The ACLJ also requested a Vaughn index. *Id.* at 5.

By letter dated December 30, 2020, the FBI assigned **FOIPA Request No.: 1484080-000**, and asserted what amounts to a “Glomar response” to the entire Request, broken into four assertions:

The FBI is an intelligence agency as well as a law enforcement agency. In its capacity as an intelligence agency, the FBI compiles records while carrying out its responsibilities to investigate threats to national security and gather foreign intelligence. The FBI can neither confirm nor deny the existence of records responsive to your request pursuant to FOIA Exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C) and (b)(7)(E) of 5 U.S.C. § 552.

The nature of your request implicates records the FBI may or may not compile pursuant to its national security and foreign intelligence functions. Accordingly, the FBI cannot confirm or deny the existence of any records about your subject as the mere acknowledgment of such records existence or nonexistence would in and of itself trigger harm to national security interests per Exemption (b)(1) and/or reveal intelligence sources and methods per Exemption (b)(3); 50 U.S.C. § 3024(i)(1).

Additionally, you have requested records on one or more third party individuals. Please be advised the FBI will neither confirm nor deny the existence of such records pursuant to FOIA exemptions (b)(6) and (b)(7)(C), 5 U.S.C. §§ 552 (b)(6) and (b)(7)(C). The mere acknowledgement of the existence of FBI records on third party individuals could reasonably be expected to constitute an unwarranted invasion of personal privacy. This is our standard response to such requests and should not be taken to mean that records do, or do not, exist. As a result, your request has been administratively closed.

Finally, FOIA Exemption (b)(7)(E) protects “records or information compiled for law enforcement purposes when disclosure would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” How the FBI applies its investigative resources against a particular allegation, report of criminal activity, or perceived threat is, itself a law enforcement technique or procedure that the FBI protects pursuant to Exemption (b)(7)(E) of 5 U.S.C. § 552. Accordingly, a confirmation by the FBI that it has or does not have responsive records would be tantamount to acknowledging where the FBI is or is not applying investigative resources thus disclosing the scope of law enforcement techniques and procedures.

FBI FOIA Response, at 1.

The ACLJ appeals the FBI’s determination. We respectfully request that your office remand this matter to the FBI, with instructions to proceed with processing the Request.

Administrative Appeals

The FOIA “provide[s] a statutory administrative appeal process, allowing the agency to complete its disclosure process *before* courts step in.” *Oglesby v. United States Dep’t of Army*, 920 F.2d 57, 65 (D.C. Cir. 1990). An agency “response is sufficient for purposes of requiring an administrative appeal if it includes: the agency’s determination of whether or not to comply with the request; the reasons for its decision; and notice of the right of the requester to appeal to the head of the agency if the initial agency decision is adverse.” *Oglesby*, 920 F.2d at 65 (citations omitted). The administrative appeal requirement protects an “agency’s power to correct or rethink initial misjudgments or errors.” *Id.* at 64.

“FOIA requires each requestor to exhaust administrative remedies’ before seeking judicial review.” *Freedom Watch v. NSA*, 783 F.3d 1340, 1344 (D.C. Cir. 2015) (quoting *Sinito v. DOJ*, 176 F.3d 512, 516, 336 U.S. App. D.C. 86 (D.C. Cir. 1999)). “Following his administrative appeals, or if the agencies do not respond within twenty days of the appeal, the appellant will be deemed to have fully exhausted his administrative remedies and may bring suit.” *Oglesby*, 920 F.2d at 65-66.

Glomar Responses

Under FOIA and in some circumstances, “an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception.” *Gardels v. CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982). This is known as a “Glomar response” (a term that comes from the case *Phillippi v. CIA*, 655 F.2d 1325, 1327 (D.C. Cir. 1981)), and is proper if the existence vel non of an agency record is itself exempt from disclosure. *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007). “To justify a Glomar response, the agency must supply the court with a detailed affidavit that explains why it cannot provide a substantive response pursuant to a FOIA exemption.” *Schaerr v. United States DOJ*, 2020 U.S. Dist. LEXIS 13772, at 14 (D.D.C. Jan. 28, 2020).

A FOIA requestor may compel disclosure of information, and overcome a Glomar response, however, where either an official acknowledgment as to the existence of the documents has been made, or by a sufficient showing that the agency did not evaluate the request in good faith. *Minier v. CIA*, 88 F.3d 796, 803 (9th Cir. 1996). *Schaerr v. United States DOJ*, 2020 U.S. Dist. LEXIS 13772, at 17; *ACLU*, 628 F.3d at 620.

When there are documents, “the existence of which the government contends it may be unable to confirm or deny, procedures can be established to identify such documents *in camera* or to a special master with proper clearance.” *ACLU v. Dep’t of Def.*, 339 F. Supp. 2d 501, 540 (S.D.N.Y. 2004).

“The standard that the district court must apply in making its de novo review of the agency’s classification decision, then, is whether unauthorized disclosure of the materials reasonably could be expected to cause the requisite harm.” *Lesar v. United States Dep’t of Justice*, 636 F.2d 472, 481 (D.C. Cir. 1980). “The agency may satisfy this standard by submitting affidavits to the court that describe with reasonable specificity the nature of the documents at issue and the justification for nondisclosure; the description provided in the affidavits must show that the information logically falls within the claimed exemption.” *Id.*

As to the assertions of Exemptions 1 and 3, the FBI’s simplistic statement lacks sufficient specificity to demonstrate that disclosing the existence or nonexistence of any records “reasonably could be expected to cause the requisite harm.” The cultivation of America politicians (such as a “Midwestern mayor”) by a “Christine Fang” for the Chinese government is already known,² as is the FBI’s prior creation of a unit to counter “China’s interference in local and state politics.”³ The FBI’s general, conclusory, and unsupported assertion of national security interests lacks the “logical fit” with national security concerns necessary to justify application of Exemption 1 and 3.

² Bethany Allen-Ebrahimian, *Exclusive: Suspected Chinese spy targeted California politicians*, AXIOS, Dec. 8, 2020, <https://www.axios.com/china-spy-california-politicians-9d2dfb99-f839-4e00-8bd8-59dec0daf589.html>.

³ Bethany Allen-Ebrahimian, *Exclusive: How the FBI combats China’s political meddling*, AXIOS, Feb. 12, 2020, <https://www.axios.com/fbi-china-us-political-influence-0e70d07c-2d60-47cd-a5c3-6c72b2064941.html>.

The FBI could cure this deficiency with a sufficiently specific affidavit providing a meaningful application of the broad assertions to the specific requests contained in the ACLJ's Request.

Further, the FBI (and other agencies) routinely acknowledges the existence of records, and even produce them, while withholding or redacting the exempt parts on the basis of Exemption 6 or 7, as well as 1 or 3. *Indeed, this has happened in multiple FOIA requests submitted by the ACLJ and others.* In the example above, the names of the "Midwestern mayors" were not revealed to *Axios*. Rep. Swalwell has even given interviews about Fang's approach to him.⁴ An admission of the existence of records would not reveal something not already known. The FBI's response in this case fails to explain why, in this case, those statutory exemptions justify a Glomar response.

Boiled down to its core, the Request at issue sought: (1) "All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by James Comey, Andrew McCabe, Christopher Wray, Robert Mueller, or any Deputy Director of the FBI, including by utilizing any alias, referencing, connected to, or regarding in any way Christine Fang (or Fang Fang, or Fang) or Rep. Eric Swalwell; and, (2) "All records, communications or briefings created, generated, forwarded, transmitted, sent, shared, saved, received, or reviewed by any FBI official, agent or employee, referencing, connected to, or regarding in any way Christine Fang (or Fang Fang, or Fang) or Rep. Eric Swalwell."

It is preposterous to conclude that every single record identified in these requests merits the extreme Glomar response. The ACLJ could concede, hypothetically, that *some* requested records might merit a lawfully applied Glomar response. But not all. For example, the two parts of the Request list the subject matter of Fang Fang **or** Rep. Swalwell in the disjunctive, using "**or**." It is impossible to accept that there is not an FBI record that references or regards Rep. Eric Swalwell that does not merit a categorical Glomar response based on Exemption 1, 3, 6, or 7. The FBI's response prevents any meaningful analysis of whether, or to what extent, the laws cited indeed support the Glomar response as to any particular record. Instead, it indicates that the FBI simply decided that it did not want to search for responsive records that do not merit a Glomar response. This violates the letter and spirit of the FOIA.

⁴ Alana Wise, *FBI Briefs Pelosi And McCarthy On Rep. Swalwell's Ties To Suspected Chinese Spy*, NPR (Dec. 18, 2020), <https://www.npr.org/2020/12/18/948210355/fbi-briefs-reps-pelosi-mccarthy-on-rep-swalwells-ties-to-suspected-chinese-spy> (Quoting Rep. Swalwell from a CNN interview).

CONCLUSION

We respectfully request that you remand our Request to the FBI with directions to (1) perform a thorough search of all sources reasonably likely to contain records responsive to each category in our FOIA request and (2) comply with all disclosure obligations under FOIA, including but not limited to producing responsive records with properly applied redactions, affidavits meaningfully explaining the FBI's decisions, and/or a *Vaughn* index.

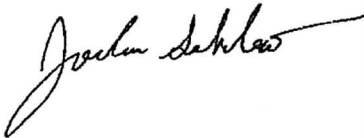
Thank you for your prompt consideration of this Appeal. Please furnish all applicable records and direct any responses to:

Jordan Sekulow, Executive Director
Benjamin P. Sisney, Senior Litigation Counsel
American Center for Law and Justice

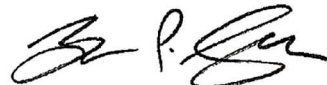
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Respectfully submitted,



Jordan Sekulow
Executive Director



Benjamin P. Sisney
Senior Litigation Counsel