FEDERAL BUREAU OF INVESTIGATION
IN THE OFFICE OF INFORMATION POLICY
No. 1560664-000

AMERICAN CENTER FOR LAW AND JUSTICE

Requestor,

FOIPA REQUEST
No. 1560664-000

FREEDOM OF INFORMATION ACT APPEAL

THE AMERICAN CENTER FOR LAW AND JUSTICE

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STATEMENT OF PROCEEDINGS

On August 31, 2022, ACLJ submitted a FOIA request via Federal Express to the FBI. Pl.'s FOIA Requests, Ex. A, 1 [Hereinafter Exhibit A]. The Request sought "records pertaining to the Federal Bureau of Investigation's (FBI) interactions with and requests to social media and news platforms, including Facebook, to censor or 'be on high alert for' information in connection with the then-upcoming election, which according to Facebook's Mark Zuckerberg, resulted in censorship (or reduced "distribution" which was "meaningful") of information, including the Hunter Biden-related stories, on Facebook." Further: "Pursuant to FBI FOIA regulation 6 C.F.R. §5.3(b), this Background addresses 'the date, title or name, author, recipient, and subject matter of the record[s]' requested, to the extent known."

On September 1, 2022, Federal Express delivered ACLJ's FOIA request to the FBI, and delivery confirmations from Federal Express show that the FBI received ACLJ's FOIA requests on that date. *See* FedEx Delivery Confirmations attached as Exhibit B and incorporated herein by reference.

On September 21, 2022, the FBI acknowledged receipt of ACLJ's FOIA Request again. *See* FBI Acknowledgement attached as Exhibit C. The Acknowledgement stated, in part: "Your request has been received at FBI Headquarters for processing."

On October 3, 2022, the FBI responded to ACLJ's Request (Exhibit A) stating in relevant part: "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." *See* FBI Response attached as Exhibit D. It asserted FOIA exemptions (b)(6) and (b)(7)(C). Exhibit D.

The Response did not mention the requested communications with the personnel of Facebook, Twitter or other news media about being on “high alert” for “information in connection with an election” that does not include Hunter Biden.

This Administrative Appeal follows.

ARGUMENT

I. Withholding records, much less refusing to confirm or deny the existence of records, under Exemption 6 is improper.

"Exemption 6 permits the withholding of information only when two requirements have been met: first, the information must be contained in personnel, medical, or 'similar' files, and second, the information must be of such a nature that its disclosure would constitute a clearly unwarranted invasion of personal privacy." *United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 598 (1982).

A. The requested records are not "personnel," "medical" or "similar" files.

The requested records -- the FBI's "interactions with and requests to social media and news platforms, including Facebook, to censor or 'be on high alert for' information in connection with the then-upcoming election"—are not "personnel" or "medical" files. The records do not concern employee performance reviews, salary, or the medical history thereof as they are communications to "social media and news platforms" about "information in connection with the then-upcoming election."

The records cannot be "similar files" in the meaning of Exemption 6. "Similar files" are broadly defined to include any "Government records on an individual which can be identified as applying to that individual." *Jud. Watch of Fla., Inc. v. United States Dep't of Just.*, 102 F. Supp. 2d 6, 16 (D.D.C. 2000). However, "[i]nformation such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal . . . ." *Wash. Post Co.*, 456 U.S. at 600. A name is a matter of public record. Here, the ACLJ has requested records about FBI communications to third parties that might be about Hunter Biden, but the object of interest is the communication activity of the FBI – and not the activities of Hunter Biden or others.

B. Disclosure of the information would not constitute an unwarranted invasion of personal privacy.

The ACLJ seeks records of the FBI's communications to Facebook, Twitter and other social media that resulted in censorship of news relevant to the then upcoming 2020 election. The records sought may regard the *New York Post's* story about Hunter Biden or someone else, but the crux of the Request is the FBI's "be on high alert for" communication to the media.

In short, the personal privacy interest of Hunter Biden or anyone else is irrelevant because it is not a file on him, but instead, it is the FBI's files about the *Post's* reportage about him to Facebook and other media that is sought.

Further, the *Post's* story is a matter of public record and whatever privacy interest any private individual may have is obviated by the publicity as to that story. *i.e.*. at least as to whether there are records that exist.

II. The records sought are not gathered for law enforcement purposes, and the public interest in the citizen's right to be informed of Exemption 7(C) compels disclosure.

> To invoke any subsection of Exemption 7, an agency must first establish that the records were gathered for law enforcement purposes. *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 756, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). In assessing whether records are compiled for law enforcement purposes, the "focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. U.S. Dep't of Justice*, 284 F.3d 172, 176-77, 350 U.S. App. D.C. 337 (D.C. Cir. 2002) (citations and internal quotations omitted).

Jurdi v. United States, 485 F. Supp. 3d 83 (D.D.C. 2020). On the face of the requests, it is clear that the ACLJ does NOT seek records gathered for law enforcement purposes. For example, see request #7:

> All records of communications between the FBI's Director, Deputy Director, Chief of Staff, General Counsel, or any of their senior staff or assistants, or of any other FBI official of a GS-14 or appointee level or higher, ***with news, media or social media personnel or reporters (including forwarded email messages or CC or BCC email messages), about being on "high alert" or otherwise indicating in any way***

> ***that the FBI wanted such personnel or entities to censor or limit distribution of information connection with an election***, including but not limited to stories or infom1ation about Hunter Biden.

Exh. A, at 4-5 (emphasis added). To suggest this request, and the other requests, seeks records compiled for law enforcement purposes is absurd.

Then, "In an Exemption 7(C) analysis, the court must first determine if there is a privacy interest in the information to be disclosed, and then it balances the individual's privacy interest against the public interest in disclosure, considering only the extent to which disclosure 'further[s] the citizens' right to be informed about 'what their government is up to."'' *Pinson v. Dep't of Just.*, 313 F. Supp. 3d 88, 115 (D.D.C. 2018).

The inapplicability of any person's privacy interest has been discussed above and is incorporated by reference herein. This discussion addresses the public's right to know.

A. In the alternative, even if there is a protected privacy interest, disclosure is still required.

"[W]here there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety **might** have occurred." *Nat'l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 174 (2004).

The FBI is not to interfere in elections. *See generally*, 18 U.S.C. § 595 - **Interference by administrative employees of Federal, State, or Territorial Governments** ("[A] person employed in any administrative position by the United States, or any agency or instrumentality thereof, . . . [who] uses his official authority for the purpose of interfering with, or affecting, the

nomination or the election of any candidate for the office of President, . . . shall be fined under this title or imprisoned not more than one year, or both.").

The basis of the request is a public statement made by Mark Zuckerberg of Facebook. Specifically, Zuckerberg stated that the FBI asked Facebook and other media to "be on high alert for" information in connection with the then-upcoming election. This request resulted in, according to Mark Zuckerberg, censorship (or reduced "distribution" which was "meaningful") of information. *See* Exhibit A.

The statement of reduced "distribution" is corroborated by contemporary reports and testimony. The *Los Angeles Times* on October 14, 2020, reported the reduced distribution and pointed out that a story from a mainstream news organization had never previously been labeled "misinformation." *See* Suhauna Hussain, Chris Megerian, & Samantha Masunaga, *Facebook, Twitter Try to Contain Hunter Biden Report amid Disinformation Crackdown*, LOS ANGELES TIMES (Oct. 14, 2020), https://www.latimes.com/business/story/2020-10-14/facebook-twitter-content-moderation-new-york-post. On October 15, 2020, CNBC discussed the speed of Facebook and Twitter's response to the *New York Post* story. Lauren Feiner, *Facebook and Twitter CEOs Will Have to Answer to Senate Republicans after Biden New York Post Story Controversy*, CNBC (Oct. 15, 2020), https://www.cnbc.com/2020/10/15/facebook-twitter-ceos-set-to-answer-to-senate-after-reducing-ny-post-story-distribution.html. Furthermore, Mark Zuckerberg and Jack Dorsey, CEOs of Facebook and Twitter respectively, testified to Congress on October 28, 2020, that they had and were "regulating" social media content for misinformation in the 2020 presidential election. *Facebook and Twitter CEOs Testify on Regulating Social Media Content*, C-SPAN (Nov. 17, 2020), https://www.c-span.org/video/?478048-1/facebook-twitter-ceos-testify-regulating-social-media-content&live=.

If the FBI made the request, then it interfered in the 2020 election. Zuckerberg's statement to Joe Rogan is corroborated by the *LA Times* and CNBC reporting of the contemporaneous actions of Facebook and Twitter. Further, the contemporaneous statements of both Zuckerberg and Dorsey to Congress admit the truth and accuracy of the reports above. Thus, the "alleged Government impropriety" might have occurred. The Requested Records answer that question.

* * * * *

The FBI's categorical denial purports to deny *the entire FOIA and all requests therein,* even though the purported bases, Exemptions 6 and 7(c), could only *potentially* apply to small parts of responsive records. Every one of the requests clearly state that the sought records "include[e] but [are] not limited to stories or information about Hunter Biden."

Additional reasons support the ACLJ's appeal: Reasonably segregable records are to be produced. 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."). It is not believable that there are no reasonably segregable records responsive to the ACLJ's requests, and the FBI's categorical denial does not even come close to satisfying the applicable jurisprudential requirements.

CONCLUSION

For the foregoing reasons, ACLJ respectfully requests that the FBI produce the responsive records.

DATED this 3rd day of November 2022.

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