PROTECT the PUBLIC'S TRUST

May 30, 2023

VIA Electronic Mail

Mr. Bobak Talebian
Director
Office of Information Policy
United States Department of Justice
441 G Street, N.W., 6th Floor
Washington, D.C. 20530

RE: Freedom of Information Act Appeal—Request No. 1585935-000, Records of Communications between Yoel Roth and Employees within the FBI's National Election Command Post

Dear Director Talebian:

Protect the Public's Trust ("PPT") hereby appeals the FBI's determination, attached hereto and dated March 27, 2023, which wrongfully withholds public records under the Freedom of Information Act ("FOIA").

The D.C. Circuit has declared that the "presumption favoring disclosure . . . is at its zenith under Exemption 6." *National Association of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002). The FBI's response to Plaintiff's request provides no basis for overcoming this presumption. Similarly, the public interest far outweighs any privacy interest supporting the FBI's claim of exemption under (b)(7)(c). There is minimal, if any, privacy interest in the existence of the requested records—both Mr. Yoel Roth and the FBI have publicly acknowledged that they communicated. There is tremendous public interest in knowing how the FBI interacted with Twitter, particularly with respect to suppressing speech by American citizens—as evidenced by the nearly 56 million views garnered by just one portion of the Twitter Files. When weighed against each other, the balance is not even close—records of communications between Twitter and the FBI should be substantially disclosed.

In addition, PPT's request is not overly broad. The FBI's conclusory statements to the contrary are procedurally deficient under 28 C.F.R. § 16.3(b), arbitrary, and capricious. The request identifies an office in the FBI and seeks communications with a single third-party individual. It provides a date range. It even provides an email address for Mr. Roth. An agency employee reasonably familiar with such communications can easily find these records. Moreover, if the FBI—a component of the Department of Justice—believes that a request does not adequately describe the records sought, it has a regulatory obligation to tell the requester what other information is needed. It has not done so.

Thus, you should immediately reverse the March 27 determination, process PPT's request, and produce the requested records.

I. PPT is Seeking Communications Between the FBI and a Third Party, Not Records "On" a Third Party

The FBI's letter mischaracterizes PPT's request. PPT is not seeking records "on one or more third party individuals." PPT is seeking communications between the FBI and a named individual, Mr. Yoel Roth. This difference is more than semantic. Records "on" an individual connotes records created by the FBI about a person, such as the FBI's "rap sheet" on a person. That is not what PPT is seeking. Records of communications *between* a government agency and a third-party individual are classic records of agency activities that are subject to release under FOIA.

II. A Glomar Response is Inappropriate Where the Agency Has Publicly Acknowledged that Such Records Exist

As the Department of Justice's own FOIA guide states, "Courts have found Glomar responses to not be appropriate . . . when the existence of the requested information has been officially acknowledged." Department of Justice Guide to the Freedom of Information Act: Exemption 6 at 85-86 (herein after DOJ Guide: Exemption 6"); *see also ACLU v. CIA*, 710 F.3d 422, 427 (D.C. Cir. 2013) (an agency may not issue a Glomar response if it has already publicly acknowledged the existence of the records sought).

The FBI itself has publicly acknowledged communications with Mr. Roth. *See* Deposition of Elvis Chan, *State of Missouri v. Biden*, Case No. 3:22-cv-01213 (W.D. La. Nov. 29, 2022), https://ago.mo.gov/docs/default-source/press-releases/doc-144-2---exhibit-a-chan.pdf (acknowledging meeting and communicating with Mr. Roth). The FBI has also acknowledged and commented on the "Twitter Files," which are referenced in the request and include multiple communications with Mr. Roth. For example, the FBI has stated publicly: "The correspondence between the FBI and Twitter show nothing more than examples of our traditional, longstanding and ongoing federal government and private sector engagements, which involve numerous companies over multiple sectors and industries. As evidenced in the correspondence, the FBI provides critical information to the private sector in an effort to allow them to protect themselves and their customers." *See* Jack Gibson, Adam Sabes, *FBI Responds to Twitter Files Disclosures, Says it Didn't Request 'Any Action' on Specific Tweets*, Fox News (Dec. 21, 2022), https://www.foxnews.com/politics/fbi-responds-twitter-files-disclosures-says-didnt-request-any-action-specific-tweets.

The suggestion that confirming or denying the existence of these records in the context of a FOIA request is necessary to protect privacy is risible. The FBI has acknowledged communications with Twitter and Mr. Roth exist and provided its own public spin on those communications. The American people have a right to see the communications themselves to evaluate the accuracy of the FBI's characterizations thereof.

III. PPT is Not Seeking "Personnel, Medical, or Similar Information" About Mr. Roth

PPT has not sought personnel, medical, or similar information about Mr. Roth or any other individual. At minimum, the public record shows that there are a number of communications between Mr. Roth and the FBI that cannot be properly classified as "personnel," "medical," or other similar files. *See generally* Matt Taibbi (@mtaibbi), Thread: *The Twitter Files, Part Six: Twitter, the FBI Subsidiary*, https://twitter.com/mtaibbi/status/1603857534737072128 (reporting over 150 email communications between Mr. Roth and the FBI between January 2020 and November 2022, including both "mundane" communications and requests for Twitter to take action).

Courts have previously determined that a record is not similar to a medical or personnel file when it is "substantially business in nature." *See* DOJ Guide: Exemption 6 at 5, n. 21. The FBI has publicly acknowledged that communications between itself and Twitter exist and suggested that those communications are purely business in nature—for example, stating "[t]he correspondence between the FBI and Twitter show nothing more than examples of our traditional, longstanding and ongoing federal government and private sector engagements."

IV. Any Privacy Interest in the Requested Records is Easily Outweighed by the Tremendous Public Interest

Even assuming *arguendo* that some responsive communications may be considered personnel, medical, or other similar files, courts have examined whether there is a substantial privacy interest in the records at issue, the public interest in the requester's request, and whether any infringement upon a substantial privacy interest would constitute a clearly unwarranted intrusion upon that interest in light of the public interest. *See* DOJ FOIA Guide: Exemption 6 at 1-2 ("DOJ FOIA Guide: Exemption 6"); DOJ FOIA Guide: Exemption 7(C) (examining similar factors); *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 756 (1989) (explaining that 7(c) is "somewhat broader" than 6 due to the omission of the word "clearly" and a change from "would constitute" an invasion of privacy to "could reasonably be expected to constitute" an invasion of privacy). These factors all counsel in favor of the release of the requested information.

A. There is No Substantial Privacy Interest Implicated by the Requested Records

There is no substantial privacy interest in the entirety of the requested records. As the Department of Justice has acknowledged, "[i]ndividuals generally do not possess substantial privacy interests in information that is particularly well known or is widely available within the public domain. Likewise, an individual generally does not have substantial privacy interests with respect to information that he or she has made public." DOJ FOIA Guide: Exemption 6 at 26-27.

The fact that Mr. Roth communicated with the FBI is a well-documented matter of public record; it is not hard to find nor practically obscure. Mr. Roth himself acknowledged as much publicly in several different forums. For example, in a declaration he submitted to the Federal Election Commission, Mr. Roth stated "[s]ince 2018, I have had regular meetings with the Office of the Director of National Intelligence, the Department of Homeland Security, the FBI, and industry peers regarding election security." *See* MUR 7821, Response of Twitter, Inc, *Declaration of Yoel Roth* at ¶ 10 (Dec. 17, 2020), https://www.fec.gov/files/legal/murs/7821/7821_07.pdf (emphasis added). He also alluded to such communications in a prepared public statement to the House Committee on Oversight and Accountability. Yoel Roth, *Statement of Yoel Roth* at 3, Hearing on "Protecting Speech from Government Interference and Social Media Bias, Part 1: Twitter's Role in Suppressing the Biden Laptop Story," House of Representatives Committee on Oversight and Accountability (Feb. 8, 2023), https://oversight.house.gov/wp-content/uploads/2023/02/Roth-House-Oversight-opening-statement-V4-Final.pdf ("In the recent reporting known as the Twitter Files, there was an attempt to portray interactions between Twitter and other social media platforms and the FBI as politically driven interference. *My experience of these interactions* was different." (emphasis added) (footnote omitted)).

Finally, the FBI itself has publicly acknowledged communications with Mr. Roth. *See* Deposition of Elvis Chan, *State of Missouri v. Biden*, Case No. 3:22-cv-01213 (W.D. La. Nov. 29, 2022), https://ago.mo.gov/docs/default-source/press-releases/doc-144-2---exhibit-a-chan.pdf (acknowledging meeting and communicating with Mr. Roth).

Moreover, the nature of the records supports the conclusion that there is not a substantial privacy interest. The Twitter Files and subsequent public statements make clear that Mr. Roth is not a person who is merely mentioned in law enforcement files or person of investigatory interest in a criminal investigation—he was one of the most significant liaisons between the FBI and Twitter for communicating and implementing official government actions.

There is simply no serious argument that Mr. Roth has a substantial privacy interest that requires neither confirming nor denying that he has communicated with the FBI.[1]

B. There is Tremendous Public Interest in Communications Between Mr. Roth and the FBI

As the Department of Justice FOIA Guide observes, "[p]ublic oversight of government operations is the essence of public interest under the FOIA, one of the purposes of which is to 'check against corruption and to hold the governors accountable to the governed." Accordingly, disclosure of information that informs the public of violations of the public trust has been found to serve a strong public interest and is accorded great weight in the balancing process." DOJ FOIA Guide:

[1] If there are specific communications that contain private information, the FBI can assert an exemption for those materials. However, under these circumstances, it cannot decline to provide *any* records or any explanation for why some information is protected.

Exemption 6 at 63 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)) (footnotes omitted).

PPT's request is directly aimed at providing "oversight of government operations," which constitute the "essence of public interest." The decision by Twitter and other social media companies to suppress information about the Hunter Biden laptop in the weeks immediately before the 2020 election was tremendously consequential and has led to plausible allegations that Twitter and other social media companies intervened to swing the course of the election. Mr. Roth's own declaration to the Federal Election suggests that Twitter's decision to suppress the Hunter Biden laptop story was directly related to communications with the federal government, including the FBI.

More generally, the role of the FBI in moderating content on Twitter, including political speech by American citizens, is of the utmost public interest. The American people have a right to know if their government was secretly subverting the First Amendment.

Finally, the role of the FBI in censoring information on Twitter and other social media platforms is a matter of substantial public debate. The "Twitter Files" are one of the biggest stories in the nation at this time. Mr. Taibbi's thread, "The Twitter Files, Part Six," referenced above, alone has nearly 56 million views. Moreover, the FBI's role in "coordinating" with Twitter has drawn substantial Congressional interest. For example, on December 23, 2022, the Ranking Member of the House Committee on the Judiciary sent a letter to Director Wray stating "[w]e are investigating politicalization and abuses at the Federal Bureau of Investigation . . . Newly released information shows the FBI has coordinated extensively with Twitter to censor or otherwise affect content on Twitter's platform," "reinforc[ing] our deep concerns about the FBI's misconduct and its hostility to the First Amendment." *Letter to Christopher A Wray* (Dec. 23, 2022), https://judiciary.house.gov/sites/evo-subsites/judiciary.house.gov/files/evo-media-document/2022-12-23-jdj-mj-to-fbi-re-twitter-files.pdf.

There is simply no serious argument that there is not overwhelming public interest in the release of a substantial portion of the communications between the FBI and its key contact at Twitter, Mr. Roth.

C. The Balance of Any Privacy Interest Against the Substantial Public Interest in the Substance of the Communications Weighs in Favor of Disclosure

The balance of any privacy interest against the substantial public interest in the substance of the communications requested weighs in favor of disclosure. As described above, there is a substantial public interest in the release of these communications. This public interest relates to providing a "check against corruption" and "hold[ing] the governors accountable to the governed." As such, it falls squarely within the core interests FOIA is intended to serve.

By contrast, for the reasons set forth above, any privacy interest in these communications is minimal. The fact of such communications has already been made public, including by the FBI and Mr. Roth. The communications relate to the conduct of government and corporate business. They do not (at least in substantial part) concern personal information, such as marital status, legitimacy of children, identity of fathers of children, medical conditions, welfare payments, alcohol consumption, family fights, personal reputations, birth dates, religious affiliations, citizenship or immigration dates, social security numbers, criminal histories, identities of crime victims, or personal financial information. *See generally* DOJ FOIA Guide: Exemption 6 at 74-77 (describing categories of personal information).

To the extent that personal contact information that is not already well-known or other personal information, such as that described above, is contained in responsive records, such information can be addressed through targeted redactions rather than blanket withholdings.

There is no justification for the wholesale withholding of the requested records on the basis of personal privacy. The records relate to matters of substantial public concern. Both the subject of the record and agency employees have publicly acknowledged that such records exist. Such records have also been the subject of substantial public discussion.

V. PPT's Request Reasonably Describes the Records Sought

PPT's request seeks records of communications between employees withing the FBI's National Election Command Post and a single individual, Yoel Roth. It provides a date range: January 1, 2020 through November 30, 2020. It even provides a known email address for Mr. Roth, Yoel@Twitter.com. The claim that this request is "overly broad" and "does not provide enough detail" to locate records with a reasonable amount of effort strains credulity.

VI. The FBI's Claim that PPT's Request Fails to Satisfy 28 C.F.R. § 16.3(b) is Procedurally Deficient, Arbitrary, and Capricious

Under 28 C.F.R. § 16.3(b), the FBI has an obligation to inform requesters of "what additional information is needed or why the request is otherwise insufficient." The FBI's letter fails to do so. Instead, it makes only bare, conclusory claims that it "does not provide enough detail to enable personnel to locate records 'with a reasonable amount of effort.'" It does not explain what additional details would purportedly be needed. As such, the FBI's denial letter is premature, procedurally deficient, arbitrary, and capricious.

VII. Conclusion

The Twitter Files, and subsequent public statements by both Mr. Roth and the FBI, make clear that the FBI was in frequent contact with Mr. Roth. The Twitter Files further show that the National Election Command Post was one element of the FBI involved in making requests to Twitter. *See* Matt Taibbi (Dec. 16, 2022), https://twitter.com/mtaibbi/status/1603857603867598859 ("In an

internal email from November 5, 2022, the FBI's National Election Command Post, which compiles and sends on complaints, sent the SF field office a long list of accounts that 'may warrant additional action'"). As such, PPT's request relates to oversight of agency activities, the core public interest FOIA is designed to promote.

The FBI's denial letter fails to state a valid basis for withholding all responsive records in their entirety. Accordingly, we respectfully request that you reverse this denial and produce responsive records immediately.

Sincerely,

Michael Chamberlain
Director
Protect the Public's Trust

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EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) 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, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;

(k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

You may seek dispute resolution services by emailing the FBI's FOIA Public Liaison at foipaquestions@fbi.gov. 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. You may also contact the Office of Government Information Services (OGIS). The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Enclosed for your information is a copy of the Explanation of Exemptions.

Sincerely,

Joseph E. Bender, Jr.
Acting Section Chief
Record/Information Dissemination Section
Information Management Division

Enclosure

U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

March 27, 2023

MORGAN YARDIS
PROTECT THE PUBLIC'S TRUST
SUITE 1682
712 H STREET NORTHEAST
WASHINGTON, DC 20002

Request No.: 1585935-000
Subject: Records of Communications between Yoel Roth and Employees within the FBI's National Election Command Post
(January 1, 2020 – November 30, 2022)

Dear Morgan Yardis:

This is in response to your Freedom of Information Act (FOIA) request. Below you will find informational paragraphs relevant to your request. Please read each item carefully.

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. Please visit www.fbi.gov, select "Services," "Information Management," and "Freedom of Information/Privacy Act" for more information about making requests for records on third party individuals (living or deceased).

Additionally, your request is overly broad and it does not comport with the requirements of 28 CFR § 16.3(b), as it does not provide enough detail to enable personnel to locate records "with a reasonable amount of effort." Therefore, your request is being closed.

If you submitted your request through the FBI's eFOIPA portal and you are receiving correspondence through standard mail, it was determined your request did not meet the eFOIPA terms of service.

Should you have questions regarding your request, please feel free to contact foipaquestions@fbi.gov. Please reference the FOIPA Request number listed above in all correspondence concerning your request.

If you are not satisfied with the Federal Bureau of Investigation's determination in response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, 441 G Street, NW, 6th Floor, Washington, D.C. 20530, or you may submit an appeal through OIP's FOIA STAR portal by creating an account following the instructions on OIP's website: https://www.justice.gov/oip/submit-and-track-request-or-appeal. Your appeal must be postmarked or electronically transmitted within ninety (90) days of the date of my response to your request. 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.