



August 17, 2023

Via FOIA STAR Portal

Office of Information Policy
United States Department of Justice
441 G Street NW, 6th Floor
Washington, DC 20530
Attn: Director

Freedom of Information Act Appeal: Closure of 1591577-000

Dear Director:

America First Legal Foundation files this Appeal of the Federal Bureau of Investigation's ("FBI") denial of America First Legal Foundation's ("AFL") Freedom of Information Act ("FOIA") Request No. 1591577-000 (Exhibit 1). In the FBI's response, the FBI provided its standard justification for denial, 'refusing to confirm or 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).' (Exhibit 3). This blanket denial, however, lacks legal foundation for the following reasons.

I. Standard of review

FOIA is meant "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). FOIA "directs that 'each agency, upon any request for records ... shall make the records promptly available to any person' unless the requested records fall within one of the statute's nine exemptions." *Loving v. Dep't of Def.*, 550 F.3d 32, 37 (D.C. Cir. 2008).

Also, the FBI is required to disclose records freely and promptly, to liberally construe AFL's requests, and to "make 'a good faith effort to search for requested records, using methods which can be reasonably expected to produce the information requested.'" *Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (quoting *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68). *See also NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989). At all times, FOIA must be construed to carry out Congress's open

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320 South Madison Avenue
Monroe, Georgia 30655

government mandate according to the ordinary public meaning of its terms at the time of its enactment. *See Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

II. The FBI's blanket denial lacks legal foundation

On April 27, 2023, AFL filed its FOIA request with the FBI. (Exhibit 1). On May 10, 2023, the FBI acknowledged the Request. (Exhibit 2). A few weeks later, on May 19, 2023, the FBI denied and closed AFL's FOIA request with a standard and only general reference to FOIA exemptions (b)(6) and (b)(7)(C). Clearly, the FBI made no attempt to segregate any documents that would be subject to these exemptions versus those documents that would be only subject to the deliberative process under (b)(6) for example. (Exhibit 3 at 1). Courts require agencies to clarify the scope of the request with the requester, "particularly when doing so is required by the agency's regulations." *U.S. Dep't of Just. Guide to the Freedom of Information Act Procedural Requirements* at 29 (Feb. 16, 2022), <https://bit.ly/3P2nEfd>. (citing *Ruotolo v. DOJ, Tax Div.*, 53 F.3d 4, 10 (2d Cir. 1995) (stating that agency failed to perform its "duty" to assist requester in reformulating request)).

The regulation relied upon in the FBI's denial specifically requires that, "[i]f after receiving a request [the FBI] determines that it does not reasonably describe the records sought, the component shall inform the requester what additional information is needed or why the request is otherwise insufficient." 28 C.F.R. § 16.3(b). The FBI has "no right to 'resist disclosure because the request fails reasonably to describe records unless it has first made a good faith attempt to assist the requester in satisfying that requirement.'" 53 F.3d at 10 (citing *Ferri v. Bell*, 645 F.2d 1213, 1221 (3d Cir. 1981)) (cleaned up). Further, the regulations, consistent with FOIA statute, promote production in part if not in whole. 28 CFR 16.6 (f) sets forth the process of Markings on released documents. 'Markings on released documents must be clearly visible to the requester. Records disclosed in part shall be marked to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if technically feasible.' The burden rests on the Agency to show it reasonably calculated to uncover relevant documents and segregate those that would cause harm if disclosed.

"FOIA Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that disclosure of such records would cause an enumerated harm. ... *Higgins v. United States DOJ*, 919 F. Supp. 2d 131, 145 (D.D.C. 2013) (citing 5 U.S.C. § 552(b)(7); see *FBI v. Abramson*, 456 U.S. 615, 622, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982). FOIA Exemption 7(C) protects from disclosure information in law enforcement records that "could reasonably be expected

to constitute an unwarranted invasion of personal privacy.” *Id.* (citing 5 U.S.C. § 552 (b)(7)(C)).

Upon receipt of a request under the FOIA, an agency must search its records for responsive documents. See 5 U.S.C. § 552(a)(3)(A). “An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was ‘reasonably calculated to uncover all relevant documents.’” [internal citations omitted]. The agency bears the burden of showing that its search was calculated to uncover all relevant documents.

Skinner v. United States DOJ, 744 F. Supp. 2d 185, 197 (D.D.C. 2010) (citing *Steinberg v. U.S. Dep’t of Justice*, 23 F.3d 548, 551, 306 U.S. App. D.C. 240 (D.C. Cir. 1994)).

Therefore, the FBI failed to perform its duty to review and segregate relevant documents that are not subject to standard exemptions. A broad-brush reference to § 552 (b)(6) or (b)(7) exposes the fact that no attempt was made to make a production in whole, much less in part. There was no detailed review or attempt to analyze select documents. Furthermore, without engaging or communicating with AFL until after the statutory response deadline, the FBI abruptly made an outright determination to close AFL’s FOIA request simply a general reference to standard FOIA exemptions. The FBI clearly did not make a good faith attempt in satisfying the requirements it is to meet in production.

AFL remains willing to work with the FBI in good faith to address its concerns. But the FBI’s blanket denial of AFL’s FOIA request is contrary to law and should not stand.

Sincerely yours,

/s/ Juli Haller

Julia Haller

America First Legal Foundation

EXHIBIT 1



April 27, 2023

Via eFOIPA Portal

Federal Bureau of Investigation
Attn: Initial Processing Operations Unit
Record/Information Dissemination Section
200 Constitution Drive
Winchester, VA 22602

Freedom of Information Act Request: Public Statement on the Hunter Biden Emails

Dear FOIPA Officer:

America First Legal Foundation is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. To that end, we file Freedom of Information Act (FOIA) requests on issues of pressing public concern, then disseminate the information we obtain, making documents broadly available to the public, scholars, and the media. Using our editorial skills to turn raw materials into distinct work, we distribute that work to a national audience through traditional and social media platforms. AFL's email list contains over 67,800 unique addresses, our Twitter page has 79,500 followers, the Twitter page of our Founder and President has over 436,000 followers, our Facebook page has 126,000 followers, and we have another approximately 31,800 followers on GETTR.

I. Background

50 U.S.C. § 3093(f) expressly prohibits the U.S. intelligence community, including the FBI, from engaging in covert action "intended to influence United States political processes, public opinion, policies, or media."

On October 19, 2020, Politico released a letter from 51 former intelligence officials, including political partisans John Brennan, Jim Clapper, and Michael Hayden, alleging that "the arrival on the US political scene of emails purportedly belonging to Vice President Biden's son Hunter, much of it related to his time serving on the Board of the Ukrainian gas company Burisma, has all the classic earmarks of a Russian information operation." The 51 former intelligence officials further alleged that "For

the Russians at this point, with Trump down in the polls, there is incentive for Moscow to pull out the stops to do anything possible to help Trump win and/or to weaken Biden should he win. A ‘laptop op’ fits the bill, as the publication of the emails are clearly designed to discredit Biden.” The officials concluded that “Our view that the Russians are involved in the Hunter Biden email issue” was shared by “*Executive Branch departments and agencies [and] It is high time that Russia stops interfering in our democracy.*”¹

This letter had a significant impact on the 2020 election. It was repeatedly cited by Democrat operatives to discredit the evidence of Biden’s political corruption. Also, it was used by Democrat-aligned media organs to suppress the evidence from Hunter Biden’s laptop on the grounds that it was hacked or faked Russian disinformation.

On March 16, 2022, the New York Times quietly admitted that the Hunter Biden laptop was genuine and that its contents were authentic.²

On April 20, 2023, the House Judiciary Committee revealed that the letter was the product of the Biden campaign.³

I. Custodians

- A. Christopher Wray
- B. FBI Supervisory Special Agent Elvis M. Chan
- C. FBI’s Foreign Influence Task Force Laura Dehmlow
- D. FBI employee Nikki Floris
- E. FBI employee Bradley Benavides
- F. FBI Supervisory Intelligence Analyst Brian Auten
- G. General Counsel Baker
- H. Mathew Perry of FBI OGC
- I. FBI employee Paul Abbate
- J. FBI employee Brian C. Turner
- K. FBI employee Jonathan Lenzner
- L. FBI employee Ryan T. Young
- M. FBI employee Tonya Ugoretz
- N. FBI employee Larissa L. Knapp
- O. Alan E. Kohler

¹ Clapper, Brennan, et al, *Public Statement on the Hunter Biden Emails* (Oct. 19, 2020), <https://bit.ly/3FPVfnV>. (Emphasis in original).

² Katie Benner, Kenneth P. Vogel and Michael S. Schmidt, *Hunter Biden Paid Tax Bill, but Broad Federal Investigation Continues*, N. Y. TIMES (Mar. 16, 2022), <https://bit.ly/3PuWUHf>.

³ Press Release, *New Testimony Reveals Secretary Blinken and Biden Campaign Behind the Infamous Public Statement on the Hunter Biden Laptop*, H. COMM. ON THE JUDICIARY (Apr. 20, 2023), <https://bit.ly/41VyVkS>.

II. Requested Records

AFL requests disclosure of the following records:

A. All emails, SMS text, Signal, WhatsApp, or other written or recorded communications, including recordings from Microsoft Teams Meetings or on encrypted messaging networks, to include external communications, or similar messaging platforms with the following terms:

- “Hunter J. Biden” and “laptop”
- “disinformation”
- “Russian hacking organization”
- “APT28”
- “Aspen Digital Hack-and-Dump Working Group”
- “The Burisma Leak”
- “Russian propaganda dump”

AND one of the following terms:

- Clapper
- Hayden
- Panetta
- Brennan
- Finger
- Ledgett
- McLaughlin
- Morell
- Vickers
- Wise
- Rasmussen
- Travers
- Liepman
- Moseman
- Pfeiffer
- Bash
- Snyder
- Gerstell
- Buckley
- Bakos
- Brandmaier
- Bruce
- Cariens
- Kolbe
- Corsell

- Davis
- George
- Hall
- Harrington
- Hepburn
- Kilbourn
- Marks
- Mendez
- Nakhleh
- O'Shea
- Priess
- Purcilly
- Polymeropoulos
- Savos
- Shapiro
- Sipher
- Slick
- Strand
- Tarbell
- Terry
- Treverton
- Tullius
- Vanell
- Wiley
- Wood

B. All records regarding the processing of these items.

- The relevant time frame is August 1, 2020, through the date of production.

III. Processing and Production

AFL, as a news media requestor, seeks a waiver of all search and duplication fees. The requested documents will be posted in their entirety on our website and made freely available to the public, and this request is not being made for commercial purposes.

Processing should occur in strict compliance with applicable state laws and regulations. Among other things, you must search the custodians' personal emails and devices. Encrypted messaging does not shield disclosable records from public view.

If you have any questions about our request or believe further discussions regarding search and processing would facilitate more efficient production, then please contact

me at FOIA@aflegal.org. Also, if AFL's fee waiver request is not granted in full, please contact us immediately upon making that determination.

To accelerate your release of responsive records, AFL welcomes production on an agreed rolling basis. Please provide responsive records in an electronic format by email. Alternatively, please provide responsive records in native format or in PDF format on a USB drive to America First Legal Foundation, 611 Pennsylvania Ave SE #231, Washington, DC 20003.

Thank you in advance for your cooperation.

Sincerely,

/s/ Julia Haller

America First Legal Foundation

EXHIBIT 2



U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

May 10, 2023

MS. JULIA HALLER
AMERICA FIRST LEGAL FOUNDATION
NUMBER 231
611 PENNSYLVANIA AVENUE SE
WASHINGTON, DC 20003

FOIPA Request No.: 1591577-000
Subject: Communications Regarding Public
Statement on the Hunter Biden Emails
(On or after August 1, 2020)

Dear Ms. Haller:

This acknowledges receipt of your Freedom of Information/Privacy Acts (FOIPA) request to the FBI. Below you will find check boxes and informational paragraphs about your request, as well as specific determinations required by these statutes. Please read each one carefully.

- ☒ Your request has been received at FBI Headquarters for processing.
- ☒ You submitted your request via the FBI's eFOIPA system.
 - ☐ Future correspondence about your FOIPA request will be provided in an email link unless the record file type is not supported by the eFOIPA system.
 - ☒ Correspondence for requests regarding living individuals, or containing audio, video, and high resolution photographs cannot be sent through the eFOIPA system. Future correspondence about your FOIPA request will be delivered through standard mail.
- ☐ The subject of your request is currently being processed and documents subject to the FOIPA will be released to you upon completion.
- ☐ Release of responsive records subject to the FOIPA will be posted to the FBI's electronic FOIA Library (The Vault), <http://vault.fbi.gov>, and you will be contacted when the release is posted.
- ☒ Your request for a public interest fee waiver is under consideration and you will be advised of the decision if fees are applicable. If your fee waiver is not granted, you will be responsible for applicable fees per your designated requester fee category below.
- ☒ For the purpose of assessing any fees, we have determined:
 - ☐ As a commercial use requester, you will be charged applicable search, review, and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(I).
 - ☐ As an educational institution, noncommercial scientific institution or representative of the news media requester, you will be charged applicable duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(II).
 - ☒ As a general (all others) requester, you will be charged applicable search and duplication fees in accordance with 5 USC § 552 (a)(4)(A)(ii)(III).

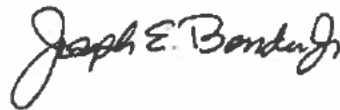
Please check the status of your FOIPA request at www.vault.fbi.gov by clicking on "Check Status of your FOIPA Request." Status updates are adjusted weekly. The status of newly assigned requests may not be available until the next weekly update. If the FOIPA has been closed, the notice will indicate that appropriate correspondence has been mailed to the address on file.

Additional information about the FOIPA can be found at www.fbi.gov/foia. 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 this 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.

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.

Sincerely,



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

EXHIBIT 3



U.S. Department of Justice

Federal Bureau of Investigation
Washington, D.C. 20535

May 19, 2023

MS. JULIA HALLER
AMERICA FIRST LEGAL FOUNDATION
NUMBER 231
611 PENNSYLVANIA AVENUE SE
WASHINGTON, DC 20003

Request No.: 1591577-000
Subject: Communications Regarding Public
Statement on the Hunter Biden Emails
(On or After August 1, 2020)

Dear Ms. Haller:

This acknowledges receipt of your Freedom of Information Act (FOIA) request to the FBI. The FOIPA Request Number listed above has been assigned to your request. Below you will find information relevant to your request. Please read each paragraph 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. As a result, your request has been closed. Please visit www.fbi.gov/foia and select "Requesting FBI Records" for more information about making requests for records on third party individuals (living or deceased).

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.

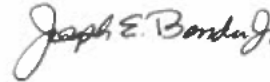
Should you have questions regarding your request, please feel free to contact foipaquestions@fbi.gov. Please reference the FOIPA Request number listed above in all correspondence concerning your request.

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.

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

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.