

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EMPOWER OVERSIGHT)	
WHISTLEBLOWERS & RESEARCH,)	
601 King Street, Suite 200)	
Alexandria, VA 22313-3151)	
)	
Plaintiff,)	
)	Case No. _____
v.)	
)	
U.S. DEPARTMENT OF JUSTICE,)	
950 Pennsylvania Avenue NW)	
Washington, DC 20530-0001,)	
)	
Defendant.)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff Empower Oversight Whistleblowers & Research (hereinafter “Empower Oversight”) brings this action against Defendant U.S. Department of Justice (“DOJ”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”), including obtaining access to records maintained by DOJ.

2. The records at issue are the subject of two related FOIA Requests, dated July 12, 2021 and August 19, 2021, respectively (collectively, the “Requests”). The Requests concern questions of objectivity and impartiality concerning Special Counsel John Durham’s investigation, including as to individual personnel and the DOJ’s monetary commitment to continuing Special Counsel Durham’s investigation.

July 12, 2021 FOIA Request

3. The July 12, 2021 FOIA Request relates to the hiring of Ms. Susan Hennessey at the DOJ’s National Security Division. Among other things, the National Security Division

“supervises the investigation and prosecution of cases affecting or relating to national security, including any cases involving foreign interference in elections or violent extremist threats to elections.” *See, e.g.*, Press Release, *Justice Department Releases Information on Election Day Efforts to Protect the Right to Vote and Prosecute Ballot Fraud*, U.S. DEP’T OF JUST. (Oct. 29, 2020), *available at* <https://www.justice.gov/opa/pr/justice-department-releases-information-election-day-efforts-protect-right-vote-and-prosecu-1>.

4. Before joining the Biden Administration, Ms. Hennessey was employed as a Senior Fellow in Governance Studies at The Brookings Institution and Executive Editor of the Brookings-affiliated Lawfare blog. *See Susan Hennessey*, BROOKINGS INST. (last accessed Feb. 17, 2022), *available at* https://www.brookings.edu/?author_name=susan-hennessey; *Homepage*, LAWFARE (last accessed Feb. 17, 2022), *available at* <https://www.lawfareblog.com/> (stating that the blog is “published by the Lawfare Institution in cooperation with Brookings”). She also worked as a CNN legal and national security analyst. *See Susan Hennessey*, CNN (last accessed Feb. 17, 2022), *available at* <https://www.cnn.com/search?q=susan+hennessey> (search for “Susan Hennessey” returning numerous articles referencing her contributor title).

5. The topic of “foreign interference in elections”—in particular, Russian interference—dominated headlines and political discussion in the aftermath of the 2016 president election. The controversy concerning so-called “Russian collusion” and related matters, which spawned numerous investigations by the Department of Justice and Congress, continues to the present day. *See, e.g.*, Brooke Singman et al., *Clinton campaign lawyer Sussman files motion to dismiss Durham prosecution*, FOX NEWS (Feb. 17, 2022), *available at* <https://www.foxnews.com/politics/clinton-campaign-lawyer-susmann-durham-probe-motion-to-dismiss>; *Trump-Russia collusion*, THE HILL (last accessed Feb. 14, 2022), *available at*

<https://thehill.com/social-tags/russian-collusion> (compiling “all latest Trump-Russia collusion News”); WASH. POST (last accessed Feb. 14, 2022), *available at* <https://washingtonpost.com/search> (showing 5,429 search results for “Russian collusion”).

6. The July 12, 2021 Request relates in particular to the ongoing work of Special Counsel John Durham. On May 13, 2019, former Attorney General Barr assigned then-United States Attorney John Durham to conduct a preliminary review into certain matters concerning the 2016 presidential election campaigns, which developed into a criminal investigation. *See* Order No. 4878-2020, *Appointment of Special Counsel to Investigate Matters Related to Intelligence Activities and Investigations Arising Out of the 2016 Presidential Campaigns*, OFFICE OF THE ATT’Y GEN. (Oct. 19, 2020); *see also* DOJ *Appointment Letter for Attorney General Durham Signed by Attorney General Barr*, AM. OVERSIGHT (Aug. 19, 2020), *available at* <https://www.americanoversight.org/document/doj-appointment-letter-for-attorney-general-durham-signed-by-attorney-general-barr> (containing a Feb. 6, 2020 letter from former Attorney General Barr to Durham, appointing him as a Special Attorney to the Attorney General in advance of commencement of criminal proceedings in federal court).

7. Due to the “extraordinary circumstances” relating to those matters, on October 19, 2020, Barr appointed Durham to serve as Special Counsel, authorizing Durham to investigate whether any violations of law occurred “in connection with the intelligence, counter-intelligence, or law-enforcement activities directed at the 2016 presidential campaigns, individuals associated with those campaigns, and individuals associated with the administration of President Donald J. Trump, including but not limited to [the federal investigation of Trump campaign associates known as] Crossfire Hurricane and the investigation of Special Counsel Robert S. Mueller, III.” *See supra* Order No. 4878-2020.

8. Special Counsel Durham’s ongoing investigation has thus far resulted in two indictments, including of Russian national Igor Danchenko. *See Special Counsel’s Office*, U.S. DEP’T OF JUST. (last accessed Feb. 17, 2022), *available at* <https://www.justice.gov/sco-durham> (linking to press releases for both indictments); Press Release, *Russian National Indicted for Making False Statements to the FBI*, U.S. DEP’T OF JUST. (Nov. 4, 2021), *available at* <https://www.justice.gov/sco/pr/russian-national-indicted-making-false-statements-fbi>.

Danchenko was indicted and arrested for making false statements in connection with his role in compiling a document, published in early January 2017 and widely known as the “Steele dossier,” which contained “salacious allegations about [then-President-elect] Trump and his supposed ties to Russia.” *See* Marshall Cohen, *The Steele dossier: A reckoning*, CNN (Nov. 18, 2021), *available at* <https://www.cnn.com/2021/11/18/politics/steele-dossier-reckoning/index.html>; *see also* Luke Harding, *Russian source for Steele’s Trump dossier arrested by U.S. authorities*, THE GUARDIAN (Nov. 4, 2021), *available at* <https://www.theguardian.com/us-news/2021/nov/04/trump-russia-steele-dossier-igor-danchenko>.

9. Mr. Danchenko was previously employed by the Brookings Institution, which received a subpoena from Special Counsel Durham in December 2020. *See, e.g.*, Margot Cleveland, *Why Special Counsel John Durham Subpoenaed The Brookings Institution*, THE FEDERALIST (Nov. 12, 2021), *available at* <https://thefederalist.com/2021/11/12/why-special-counsel-john-durham-is-investigating-the-brookings-institution/>; Charlie Savage & Adam Goldman, *Subpoenaing the Brookings Institution, Durham Focuses on Trump-Russia Dossier*, N.Y. TIMES (updated Nov. 4, 2021), *available at* <https://www.nytimes.com/2021/04/12/us/politics/durham-investigation-brookings->

institution.html. Mr. Danchenko is one of many links between Brookings and matters potentially under investigation by Special Counsel Durham.

10. In each of her roles—including on behalf of Brookings—Ms. Hennessey was a prolific public commenter regarding matters within the purview of Special Counsel Durham. She opined publicly on the Steele dossier, as well as on both former Special Counsel Mueller’s investigation and Special Counsel Durham’s ongoing investigation. *See, e.g.*, Jordan Boyd, *GOP Senators Press DOJ on Russia Hoaxer Susan Hennessey’s Role in Durham Probe*, THE FEDERALIST (June 30, 2021), available at <https://thefederalist.com/2021/06/30/gop-senators-press-doj-on-russia-hoaxer-susan-hennesseys-role-in-durham-probe/> (Hennessey citing to “growing signs that there are serious problems with the IG report” concerning the FBI’s Russia investigation, and “questions” as to whether the report is a “political document driven by Barr’s conspiracy theories”); *A Dangerous Pick at Justice*, WALL ST. J. (May 12, 2021) (noting that Ms. Hennessey tweeted after the 2020 election that Durham’s work was “partisan silliness”); Brian Stelter, *How a single poll question illustrates America’s divide over Trump and Russia*, CNN (Feb. 14, 2019), available at https://lite.cnn.com/en/article/h_a255d33f90f7d2efa478ff8c35127301; Quina Jurecic, *Devin Nunes’s Mystery Memo: Repeating the Cycle of Distraction*, LAWFARE (Jan. 20, 2018), available at <https://www.lawfareblog.com/devin-nuness-mystery-memo-repeating-cycle-distraction> (Hennessey predicting a Congressional memorandum relating to the Steele Dossier “will be largely incoherent”); Susan Hennessey & Benjamin Wittes, *Robert Mueller’s show of strength: A quick and dirty analysis*, BROOKINGS INST. (Oct. 30, 2017), available at <https://www.brookings.edu/blog/fixgov/2017/10/30/robert-muellers-show-of-strength-a-quick-and-dirty-analysis/> (referencing former Special Counsel Mueller’s initial indictments as a “remarkable show of strength” and former President Trump’s tweets as to the same as “antics”).

11. However, not all of Ms. Hennessey's prior commentary remains available to the public. Many comments by Ms. Hennessey on matters within the purview of Special Counsel Durham were reportedly deleted *en masse* between November 2020 and May 2021, with her Twitter account dropping by approximately 39,000 tweets. *See, e.g.,* Houston Keene, *New Biden DOJ staffer deleted over 39K tweets, including Russia collusion accusations*, FOX NEWS (May 10, 2021), *available at* <https://www.foxnews.com/politics/biden-doj-susan-hennessey-deleted-tweets-russia-collusion>.

12. On May 10, 2021, Ms. Hennessey announced she was joining DOJ's National Security Division as senior counsel. *See* Harper Neidig, *CNN legal analyst joins DOJ's national security division*, THE HILL (May 10, 2021), *available at* <https://thehill.com/policy/national-security/552649-cnn-legal-analyst-joins-dojs-national-security-division>.

13. On June 29, 2021, Senators Charles Grassley and Ron Johnson wrote to Attorney General Merrick Garland, raising concerns about Ms. Hennessey's role in the DOJ's National Security Division and potential impact on matters such as the Durham inquiry. Letter from Sens. Grassley & Johnson to Att'y Gen. Garland, June 29, 2021, *available at* https://www.judiciary.senate.gov/imo/media/doc/grassley_johnson_to_justice_dept.hennesseyconflicts.pdf. The senators emphasized Ms. Hennessey's history of expressing strongly-held views on matters within the National Security Division's purview, and questioned whether Ms. Hennessey would approach her official duties at the agency tasked with overseeing election interference in an objective and impartial matter. *See supra* ¶ 3.

14. Concerns regarding objectivity and impartiality based on public commentary are hardly novel. For example, Ms. Hennessey herself has raised such questions in the context of

former Attorney General Barr. In assessing the then-Attorney General remarks at a Constitution Day speech at Hillsdale College, Ms. Hennessey and her co-author stated:

“The **concern of Barr’s critics—ourselves included**—is that Barr has exercised his undoubted supervisory powers in an **improper, even corrupt, fashion**, and that he has done so in a **sustained effort to undermine** the results of Robert Mueller’s investigation. **The criticism is that he has exercised those powers to frustrate legitimate investigations and prosecutions . . . to protect individuals close to the president who appointed him and to serve Trump’s personal and political interests** in attacking investigations of himself.”

Susan Hennessey & Benjamin Wittes, *What Bill Barr Said and What it Means*, LAWFARE (Sept. 17, 2020), <https://www.lawfareblog.com/what-bill-barr-said-and-what-it-means> (emphasis added).

15. Similarly here, in light of Ms. Hennessey’s prejudicial comments regarding matters under investigation by DOJ, Empower Oversight notes the serious questions—highlighted by concerned Senators, and accentuated by the deletion of thousands of prior statements on Twitter—concerning the ability of DOJ to appear objective and impartial in light of Ms. Hennessey’s potential exercise of official duties related to Special Counsel Durham’s investigation.

16. There is an acute public interest in ensuring the continued independence of Special Counsel Durham’s ongoing investigation—and therefore in gaining access to documents relating to the DOJ’s hiring of Ms. Hennessey, and what steps, if any, the Department has taken to mitigate the appearance that Ms. Hennessey’s biases and/or conflicts could interfere with or prejudice Special Counsel Durham’s important work. Accordingly, Empower Oversight filed the FOIA Request described herein.

August 19, 2021 FOIA Request

17. The records at issue in the August 19, 2021 Request relate to Attorney General Garland's decisionmaking concerning Special Counsel Durham's budget.

18. As former Attorney General Barr explained in a letter to the U.S. House and Senate Judiciary Committees, the purpose of the Special Counsel appointment was "to provide [Durham] and his team with the assurance that they could complete their work, without regard to the outcome of the election." Letter from Att'y Gen. Barr to Chairman Graham et al., Dec. 1, 2020, *available at* <https://www.judiciary.senate.gov/imo/media/doc/Letter%20re%20Durham%20to%20Hill.pdf>.

19. The outcome of the Durham investigation is of vital importance to the public. For example, one former FBI attorney has been convicted and the Trump dossier source was recently charged with lying to the FBI. Press Release, *FBI Attorney Admits Altering Email Used for FISA Application During "Crossfire Hurricane" Investigation*, U.S. DEP'T OF JUST. (Aug. 19, 2020), <https://www.justice.gov/usao-ct/pr/fbi-attorney-admits-altering-email-used-fisa-application-during-crossfire-hurricane>; Press Release, *Russian National Indicted for Making False Statement to the FBI*, U.S. DEP'T OF JUST., (Nov. 4, 2021), <https://www.justice.gov/sco/pr/russian-national-indicted-making-false-statements-fbi>.

20. As another recent example, in late 2021, a grand jury indicted Michael Sussman, a lawyer representing both a U.S. technology executive and the Clinton campaign, for making false statements to the FBI in 2016. *See* Press Release, *Grand Jury Indicts D.C. Attorney with Making False Statements to the FBI in 2016 Regarding Alleged Communications Between Trump Organization and Russian Bank*, U.S. DEP'T OF JUST. (Sept. 16, 2021), <https://www.justice.gov/sco/pr/grand-jury-indicts-dc-attorney-making-false-statements-fbi-2016-regarding-alleged>. Litigation continues to develop in that matter, as highlighted in court filings

and media reports just this month. *See, e.g., Harper Neidig, Durham alleges cyber analysts ‘exploited’ access to Trump White House Server, THE HILL (Feb. 14, 2022), available at <https://thehill.com/regulation/court-battles/594126-durham-alleges-cyber-analysts-exploited-access-to-trump-white-house>.*

21. The Special Counsel regulations provide that the Special Counsel shall exercise “the full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney” and subject to limited exceptions, “shall determine whether and to what extent to inform or consult with the Attorney General” about the conduct of his or her investigative responsibilities. 28 C.F.R. § 600.6.

22. However, despite this independent authority, the same set of regulations provide that “90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. *The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year.*” 28 C.F.R. 600.8(a)(2) (emphasis added).

23. However, as of late fiscal 2021, “a Justice Department spokeswoman declined to say whether Mr. Garland has decided to allow Mr. Durham’s probe to continue beyond September or approved a budget for the next fiscal year.” Aruna Viswanatha & Sadie Gurman, *Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters*, WALL ST. J. (Aug 13, 2021).

24. When asked during his confirmation hearing whether he would “commit to providing Special Counsel Durham with the staff, resources, funds, and time needed to thoroughly complete the investigation,” Attorney General Garland declined to do so. Jerry Dunleavy, *Merrick Garland Doesn’t Promise to Protect Durham Investigation or Release Report*, WASH. EXAM’R

(Feb. 22, 2021), *available at* <https://www.washingtonexaminer.com/news/grassley-garland-durham-investigation>.

25. As the most recent indictments in late 2021 and ongoing litigation reveal, *see supra* ¶¶ 19-20, it is vitally important that the public receive assurances on whether Special Counsel Durham's work will continue to be funded, not prematurely terminated. Accordingly, Empower Oversight filed the FOIA Request described herein.

JURISDICTION AND VENUE

26. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

27. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(b) and 28 U.S.C. § 1391(e)(1).

PARTIES

28. Plaintiff Empower Oversight is a nonprofit, nonpartisan educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. Empower Oversight has its principal place of business located at 601 King Street, Suite 200, Alexandria, VA 22313-3151. Empower Oversight works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, as well as work to hold authorities accountable to act on such reports.

29. Defendant DOJ is a federal administrative agency within the meaning of 5 U.S.C. § 552(f)(1), with its principal place of business located at 950 Pennsylvania Avenue NW, Washington, DC, 20530. Upon information and belief, the DOJ has possession, custody, and control of the records, within the meaning of 5 U.S.C. § 552(f)(2), to which Empower Oversight seeks access.

LEGAL STANDARD

30. FOIA requires a federal administrative agency to promptly make available requested, non-exempt agency records in response to a request that (a) reasonably describes such records and (b) “is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]” 5 U.S.C. § 552(a)(3)(A); *see also* 28 C.F.R. § 16.3(b).

31. In making available such records, fees applicable to processing requests shall be limited to reasonable standard charges for document duplication when records are sought by a “representative of the news media,” defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” 5 U.S.C. § 552(a)(4)(ii); *see also* 28 C.F.R. § 16.10(b)(6). Otherwise, with other limited exceptions, the DOJ charges fees for processing (*i.e.*, document search and/or review) FOIA requests. 28 C.F.R. § 16.10(a).

32. FOIA requires an agency to respond to a valid request within twenty (20) days (exempting Saturdays, Sundays, and legal public holidays) (hereinafter “working days”) upon receipt of such request, including notifying the requestor immediately of its determination, the reasons therefor, and the right to appeal any adverse determination. 5 U.S.C. § 552(a)(6)(A)(i); *see also* 28 C.F.R. § 16.5(c).

33. In certain circumstances, an agency may instead provide notice to the requester that “unusual circumstances” merit additional time—up to an additional ten (10) working days—to respond to the request. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); *see also* 28 C.F.R. § 16.5(c) (requiring DOJ to “notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed”). In the event the agency provides notice to the requester of “unusual circumstances,” and that it is not able to respond to

the records request within the statutory deadline, the agency must provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request.” 5 U.S.C. § 552(a)(6)(B)(ii); *see also* 28 C.F.R. § 16.5(c).

34. If an agency does not respond to a FOIA request by the statutory deadline, the requester is deemed to have exhausted administrative remedies and may immediately pursue judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

July 12, 2021 FOIA Request

35. On July 12, 2021, Empower Oversight sought all records relating to the following:
- a. The Justice Department’s consideration and hiring of Ms. Hennessey, including all records related to her interest in joining the Department, consideration of her for any Department position, any statements of recommendation, evaluations of her qualifications, records relating to interviews with Ms. Hennessey, notes from any such interviews, and any offers of employment;
 - b. All forms completed by Ms. Hennessey in the application, hiring, and onboarding processes at Department of Justice;
 - c. All conflicts Ms. Hennessey reported or the Department assessed to apply to her;
 - d. All recusals applicable to Ms. Hennessey, including all records relating to any recusal or draft recusal of Ms. Hennessey from matters related to Special Counsel Durham’s inquiry;
 - e. All records relating to Ms. Hennessey’s deleted tweets;
 - f. All records to or from the relevant Justice Department Ethics Officials, including Michael Nannes or Cynthia Shaw, regarding Ms. Hennessey;
 - g. Ms. Hennessey’s calendar entries from the first day of her employment at the Department to the present;
 - h. All records sent or received by Ms. Hennessey that include the terms “Durham,” “Special Counsel,” “Steele,” “dossier,” “Clinesmith,” or “Danchenko”;
 - i. All records relating to Ms. Hennessey’s previous employer, Lawfare, and leaks regarding Special Counsel Mueller’s investigation.

See Exhibit (“Ex.”) A.

36. In addition, Empower Oversight requested a waiver of search and duplication fees associated with the DOJ's processing of its FOIA request and expedited processing. *See id.*

37. By letter dated July 22, 2021, the DOJ acknowledged receipt of the July 12th FOIA request, designated the request as FOIA-2021-01701, denied the request for expedited processing, and postponed a decision on its request for a fee waiver pending a determination "whether fees will be implicated" by the same. *See Ex. B.* In addition, DOJ identified the analyst and FOIA liaison assigned to Empower Oversight's request, and noted the availability of mediation services offered by the National Archives and Records Administration ("NARA"). *See id.* at 2.

38. In addition, the DOJ advised:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." *See* 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

See id. at 1-2.

August 19, 2021 FOIA Request

39. On August 19, 2021, Empower Oversight sought all records relating to the following:

- a. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Attorney General regarding the Special Counsel's budget for fiscal year 2022;

- b. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022;
- c. All records of communications from January 21, 2021 to the present among personnel within the Office of the Attorney General and the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022.

See Ex. C.

40. In addition, Empower Oversight requested a waiver of search and duplication fees associated with the DOJ's processing of its FOIA request and expedited processing. *See id.*

41. By letters dated August 27, 2021 and September 2, 2021, the DOJ acknowledged receipt of Empower Oversight's August 19th FOIA request, designated its request as FOIA-2021-02003, denied Empower Oversight's request for expedited processing pursuant to 28 C.F.R. § 16.5(e)(1)(iv)(16.5(e)(1)(ii), and advised that consideration of the request under 28 C.F.R. § 16.5(e)(1)(iv) remained pending with the Director of Public Affairs. *See Exs. D-E.* In addition, DOJ postponed a decision on its request for a fee waiver pending determination of "whether fees will be implicated," identified the analyst and FOIA liaison assigned to the request, and noted the availability of mediation services offered by the NARA. *See id.*

42. In addition, the DOJ included the same apparent boilerplate language concerning "unusual circumstances," *see supra* ¶ 38:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." *See* 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also

agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

See Ex. E at 1-2.

Subsequent Correspondence with DOJ Regarding the Requests

43. On December 7, 2021, Empower Oversight sent a letter electronically to the respective analyst and FOIA public liaison, inquiring about the status of both FOIA Requests. A copy of this letter is attached as Ex. F. Specifically, Empower Oversight requested that DOJ advise which unusual circumstances, if any, were applicable to the Requests, and why the DOJ did not explicitly reference such circumstances in either its July 22, 2021 or August 27, 2021 letters.

44. On December 14, 2021, the DOJ FOIA Liaison (the “Liaison”) acknowledged receipt by email of the December 7, 2021 letter and agreed to confer by telephone. In that same email, DOJ requested clarification as to the final subpart of Empower Oversight’s July 12, 2021 Request. *See supra* ¶ 35(i).

45. On December 15, 2021, Empower Oversight and the Liaison spoke by telephone, which the Liaison then memorialized in an email. In the call, the Liaison explained that the DOJ’s Office of Information Policy (“OIP”) does not serve as a document custodian for its client offices and typically does not have access to their records. In its email, the Liaison cited to the need to search in offices for records as the reason for placing the Requests into the “unusual circumstances” category.

46. In its December 15, 2021 email, the Liaison offered that the Departmental Executive Secretariat search for public records that may be responsive to Empower Oversight’s Request, and stated that if that option were agreed to, DOJ would then provide an “estimate on an interim response.”

47. On January 20, 2021, Empower Oversight responded to the December 14, 2021 email, reiterating that the final subpart of its July 12, 2021 Request was sufficiently specific, but reiterating certain factual background to clarify its significance.

48. On January 26, 2022, Empower Oversight accepted the offer to have the Departmental Executive Secretariat search for and produce any records concerning the August 19, 2021 Request and the DOJ's consideration thereof.

49. Empower Oversight has received no further correspondence from the DOJ concerning its FOIA Requests, including an estimated date for an interim response, let alone a final determination.

50. Empower Oversight has been forced to expend resources to prosecute this action as to both FOIA requests.

CLAIMS FOR RELIEF

Count I

Failure to Comply with Statutory Deadlines in Violation of FOIA, 5 U.S.C. § 552(a)(6)

51. Plaintiff realleges and incorporates by reference each of the foregoing allegations, contained in paragraphs 1-50, as if fully set forth herein.

52. To date, Defendant has not provided a final determination as to either the July 12, 2021 or August 19, 2021 FOIA Requests.

53. More than 20 working days have passed since each of the Requests was received by the DOJ. *See supra* ¶¶ 37, 41; *see also* Exs. B, D-E.

54. FOIA requires the DOJ to have provided a final determination within 20 working days of each Request. The DOJ may extend this 20-day period in the event of "unusual circumstances," as defined by 5 U.S.C. § 552(a)(6)(B)(iii), for a maximum of 10 working days, but must specify the unusual circumstances for such extension and the date on which a

determination is expected. *See* 5 U.S.C. §§ 552(a)(4)(A)(viii)(II)(aa), 552(a)(6)(B)(i-ii); *see also* 28 C.F.R. § 16.5.

55. As to both the July 12, 2021 and the August 19, 2021 Requests, the DOJ failed to provide a final determination within 20 working days of the Request. *See* 5 U.S.C. § 552(a)(6).

56. In addition, or in the alternative, the DOJ failed to definitively state whether unusual circumstances exist to extend that 20-day deadline. Instead, DOJ responded with a boilerplate paragraph that “to the extent” either Request was deemed to satisfy certain criteria, the request would constitute “unusual circumstances.” *See supra* ¶¶ 38, 42.

57. Even to the extent unusual circumstances did exist as DOJ appears stated for the first time on December 15, 2021, *supra* ¶ 45, DOJ failed to identify a discrete “unusual circumstance,” in violation of FOIA. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); *see also* 28 C.F.R. § 16.5(c).

58. In addition, DOJ failed to identify a date by which it expected to render a determination in the event of such unusual circumstances, also in violation of FOIA. 5 U.S.C. § 552(a)(4)(viii)(II)(aa); *see also* 28 C.F.R. § 16.5(c). Instead, in apparent reference to the 10-day “unusual circumstances” provision, DOJ stated in both its initial response letters, almost half a year ago: “[W]e will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute.” *See* Ex. B, Exs. D-E. In other words, DOJ fully acknowledged that it would defy the statutory deadlines, yet neither provided a rationale (identification of the unusual circumstance), nor a projected date for its final determination.

59. As far more than 30 working days have passed since receiving the July 12, 2021 and August 19, 2021 requests (and notably, even more than 20 working days have passed since Empower Oversight agreed to the Executive Secretariat search that would yield an “estimate of an

interim response,” *see supra* ¶¶ 46-47), even the statutory extension for “unusual circumstances” has long since passed. Therefore, even “to the extent” each Request could have legitimately constituted “unusual circumstances,” DOJ failed to comply with the statutory deadline.

60. DOJ has thus failed to timely make the statutorily required determination on Empower Oversight’s July 12, 2021 and August 19, 2021 Requests, in violation of FOIA. *See* 5 U.S.C. § 552(a)(6).

61. Empower Oversight has constructively exhausted all administrative remedies required by FOIA as to each Request. *See* 5 U.S.C. § 552(a)(6)(C)(i).

62. Empower Oversight is entitled to declaratory and injunctive relief in connection with the DOJ’s unlawful failure to make a determination as to each Request. *See* 5 U.S.C. § 552(a)(6).

Count II

Unlawful Withholding of Agency Records in Violation of FOIA, 5 U.S.C. § 552(a)(3)

63. Plaintiff realleges and incorporates by reference each of the foregoing allegations, contained in paragraphs 1-62, as if fully set forth herein.

64. FOIA requires Defendant to process records requests and promptly provide the requested records or the reasonably segregable portion of records not subject to a FOIA exemption. 5 U.S.C. § 552(a)(3)(B).

65. However, the DOJ has neither provided Empower Oversight any responsive documents in response to either the July 12, 2021 or the August 19, 2021 Request, nor has it claimed that any responsive records are exempt from disclosure.

66. Empower Oversight is entitled to declaratory and injunctive relief in connection with the DOJ’s unlawful failure to timely produce responsive records as to the Six Requests. 5 U.S.C. § 552(a)(3)(B).

RELIEF REQUESTED

WHEREFORE, Plaintiff prays that this Court:

- A. Declare that the DOJ failed to make timely determinations on each of Empower Oversight's July 12, 2021 and August 19, 2021 Requests, in violation of FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
- B. Declare that the DOJ failed to promptly provide records responsive to each of Empower Oversight's July 12, 2021 and August 19, 2021 Requests, in violation of FOIA, 5 U.S.C. § 552(a)(3);
- C. Order the DOJ to immediately conduct a reasonable search for all records responsive to each of Empower Oversight's July 12, 2021 and August 19, 2021 Requests, as required by FOIA, 5 U.S.C. § 552(a)(3)(C);
- D. Order the DOJ to immediately provide determinations on each of Empower Oversight's July 12, 2021 and August 19, 2021 Requests, as required by FOIA, 5 U.S.C. § 552(a)(6)(A)(i);
- E. Order the DOJ to promptly disclose to Empower Oversight all responsive, non-exempt records for the July 12, 2021 and August 19, 2021 Requests, as required by FOIA, 5 U.S.C. § 552(a)(3);
- F. Award Empower Oversight its costs and reasonable attorneys' fees incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- G. Grant such other relief as the Court may deem just and proper.

February 22, 2022

Respectfully submitted,

/s/ Michael J. Schrier

Michael J. Schrier (VSB #65916)
HUSCH BLACKWELL LLP
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*Attorneys for Plaintiff Empower Oversight
Whistleblowers & Research*

EXHIBIT A

EMPOWER OVERSIGHT

Whistleblowers & Research



July 12, 2021

VIA ELECTRONIC TRANSMISSION: FOIA STAR, NSDFOIA@USDOJ.GOV,
PRAO.FOIA@USDOJ.GOV, JMDFOIA@USDOJ.GOV

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
6th Floor
441 G St NW
Washington, DC 20530

Arnetta Mallory, FOIA Initiatives Coordinator
National Security Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 6150
Washington, DC 20530

Marguerite A. Driessen, Attorney Advisor
Professional Responsibility Advisory Office
Department of Justice
441 G Street, NW, 6th Floor
Washington, DC 20530

Karen McFadden
FOIA Contact
Justice Management Division
Department of Justice
Room 1111 RFK, 950 Pennsylvania Avenue, N.W.
Washington, DC 20530

RE: SUSAN HENNESSEY, FREEDOM OF INFORMATION ACT REQUEST

Dear Mr. Hibbard, Ms. Mallory, Ms. Driessen, and Ms. McFadden:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities help to hold those authorities accountable to act on such reports.

On June 30, 2021, Senators Charles Grassley and Ron Johnson wrote to Attorney General Merrick Garland raising a number of serious questions about Ms. Susan Hennessey’s work in the National Security Division.¹ In light of her prejudicial comments on Twitter about Special Counsel John Durham’s ongoing investigations, which she later deleted *en masse*, her

¹ “Senators Raise Concerns over More Conflicts of Interest and Political Bias in Recent Justice Dept. National Security Hire,” *Senate Judiciary Committee Press Release* ([Jun 30, 2021](#)); letter from Senators Charles Grassley and Ron Johnson to Attorney General Merrick Garland ([Jun 29, 2021](#)).

ability to appear objective and impartial in any official duties related to those investigation is obviously in question.

There is an acute public interest in access to documents relating to the Justice Department's hiring of Ms. Hennessey, and what steps, if any, the Department has taken to mitigate the appearance that Ms. Hennessey's biases could interfere with Special Counsel Durham's independent work.

Accordingly, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, please provide all records relating to:

1. the Justice Department's consideration and hiring of Ms. Hennessey, including all records related to her interest in joining the Department, consideration of her for any Department position, any statements of recommendation, evaluations of her qualifications, records relating to interviews with Ms. Hennessey, notes from any such interviews, and any offers of employment;
2. all forms completed by Ms. Hennessey in the application, hiring, and onboarding processes at Department of Justice;
3. all conflicts Ms. Hennessey reported or the Department assessed to apply to her;
4. all recusals applicable to Ms. Hennessey, including all records relating to any recusal or draft recusal of Ms. Hennessey from matters related to Special Counsel Durham's inquiry;
5. all records relating to Ms. Hennessey's deleted tweets;
6. all records to or from the relevant Justice Department Ethics Officials, including Michael Nannes or Cynthia Shaw, regarding Ms. Hennessey;
7. Ms. Hennessey's calendar entries from the first day of her employment at the Department to the present;
8. all records sent or received by Ms. Hennessey that include the terms "Durham," "Special Counsel," "Steele," "dossier," "Clinesmith," or "Danchenko";
9. all records relating to Ms. Hennessey's previous employer, Lawfare, and leaks regarding Special Counsel Mueller's investigation.

Please ensure the Department's searches include all relevant custodians in the National Security Division, the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Justice Management Division, the Professional Responsibility Advisory Office, the Department's Ethics Officials Michael Nannes and Cynthia Shaw, and the Department's White House Liaison.

Fee Waiver Request

Empower Oversight requests a waiver of fees associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii). The information sought is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government. Empower Oversight is a non-profit organization as defined under

Section 501(c)(3) of the Internal Revenue Code and has no commercial interest in making this request.

The public has a significant interest in the ongoing probe by Special Counsel Durham, the decision of the Biden Administration to hire an outspoken critic of that probe, and that decision's potential to affect the Durham probe absent proper Departmental safeguards.² Empower Oversight is committed to government accountability and public integrity through the power of information and is accordingly committed to public disclosure of documents via its website.

Request for Expedited Processing

Empower Oversight also requests expedited processing of this request. Special Counsel Durham's ongoing investigation is of massive public interest, and there is extensive interest in ensuring the integrity of his investigation. The information requested is urgently needed to inform the public concerning actual or alleged federal government activity, namely the steps the Department has taken to ensure Ms. Hennessey's appearances of bias do not affect Special Counsel Durham's investigation. The request is of widespread and exceptional media interest and the information sought involves possible questions about the government's integrity which affect public confidence.³ As noted above, Empower Oversight is engaged in disseminating information to the public through its website and working with media.⁴ It is important that this request be processed and the results publicly disseminated prior to the conclusion of Mr. Durham's work, so that the public can have confidence in its integrity.

Thank you for your prompt attention to this matter.

Cordially,

/Jason Foster/

Jason Foster
Founder & President

² See e.g., "New Biden DOJ staffer deleted over 39K tweets, including Russia collusion accusations," *Fox News* ([May 10, 2021](#)); "Susan Hennessey Brings Resistance Twitter to the Biden DOJ," *National Review* ([May 10, 2021](#)); "House Republicans see 'political bias' in DOJ hire of outspoken Trump critic," *The Washington Times* ([June 3, 2021](#)).

³ *Id.*

⁴ Mission, *Empower Oversight* (<https://empowr.us/mission/>).

EXHIBIT B



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

July 22, 2021

Jason Foster
Empower Oversight
2615 Columbia Pike
#445
Arlington, VA 22204
info@empowr.us

Re: FOIA-2021-01701
DRH:GMG

Dear Jason Foster:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated and received in this Office on July 12, 2021, in which you requested records concerning the hiring of Susan Hennessey of the National Security Division.

You have requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." See 28 C.F.R. § 16.5(e)(1)(ii) (2018). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. This Office cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally.

You have also requested expedited processing of your request pursuant to the Department's standard involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." See 28 C.F.R. § 16.5(e)(1)(iv). Pursuant to Department policy, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. § 16.5(e)(2). The Director has determined that your request for expedited processing should be denied. Please be advised that, although your request for expedited processing has been denied, it has been assigned to an analyst in this Office and our processing of it has been initiated.

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time

-2-

needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handing your request, Georgianna Gilbeaux, by telephone at the above number or you may write to them at the above address. You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 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.

If you are not satisfied with my response to this request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, 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 submitted within ninety 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."

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. Hibbard", with a small "DR" monogram to the right.

Douglas R. Hibbard
Chief, Initial Request Staff

EXHIBIT C

EMPOWER OVERSIGHT

Whistleblowers & Research



August 19, 2021

Via Electronic Transmission
Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
6th Floor
441 G St NW
Washington, DC 20530

RE: Freedom of Information Act Request

Dear Mr. Hibbard:

Introduction

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization that enhances independent oversight of government and corporate wrongdoing. We help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and we hold those authorities accountable to act on such reports.

Background

We write today seeking information about whether Attorney General Merrick Garland has sought to prematurely terminate Special Counsel John Durham’s investigation. On October 19, 2020, then Attorney General William Barr appointed Mr. Durham to serve as Special Counsel to investigate violations of law in connection with the intelligence, counterintelligence, or law enforcement activities directed at the 2016 presidential campaigns. As then Attorney General Barr stated in a letter to the House and Senate Judiciary Committees, the purpose of this appointment was “to provide [Durham] and his team with the assurance that they could complete their work, without regard to the outcome of the election.”¹ The eventual findings and

¹ <https://www.judiciary.senate.gov/imo/media/doc/Letter%20re%20Durham%20to%20Hill.pdf>

outcome of the Durham investigation are of extreme importance to the public, and one former FBI attorney has already been convicted for his misconduct.²

The Special Counsel regulations state that the Special Counsel shall exercise “the full power and independent authority to exercise all investigative and prosecutorial functions of any United States attorney” and, subject to a few exceptions, “shall determine whether and to what extent to inform or consult with the Attorney General” about the conduct of his investigation.³

Despite this independence, there is still a mechanism by which the current Attorney General can prematurely end the Special Counsel’s investigation. The Special Counsel regulations state that “90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year.”⁴

Unfortunately, the Department has failed to inform the public as to whether Attorney General Garland intends to prematurely end the Special Counsel’s investigation. As reported by *The Wall Street Journal*:

The special counsel regulations required Mr. Durham to have reported on the status of the investigation and submitted a proposed budget by July 1 for the next fiscal year that begins in October. Attorney General Merrick Garland could then determine whether the investigation would continue and establish the budget. **A Justice Department spokeswoman declined to say whether Mr. Garland has decided to allow Mr. Durham’s probe to continue beyond September or approved a budget for the next fiscal year[.]**⁵

As reported by *The Washington Post*, some of the witnesses in the Special Counsel’s investigation have stated “that Attorney General Merrick Garland should push the special counsel to conclude his work.”⁶ When asked during his confirmation hearing whether he would “commit to providing Special Counsel Durham with the staff,

² Kristine Phillips and Kevin Johnson, *Ex-FBI Lawyer Clinesmith Pleads Guilty to Falsifying Email in Russia Probe in Durham’s First Case*, USA TODAY (Aug. 19, 2020).

³ 28 C.F.R. § 600.6.

⁴ 28 C.F.R. § 600.8(a)(1).

⁵ Aruna Viswanatha and Sadie Gurman, *Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters*, WALL STREET JOURNAL (Aug. 13, 2021).

⁶ Matt Zapotosky and Tom Hamburger, *Durham Grand Jury Explores Theory Someone Presented FBI with Fabricated Evidence in 2016 Russia Probe*, WASHINGTON POST (Aug. 17, 2021); see Daniel Chaitin, *Witnesses Grouse About Garland’s Handling of Durham Inquiry: Report*, WASHINGTON EXAMINER (Aug. 18, 2021).

resources, funds, and time needed to thoroughly complete the investigation,” Attorney General Garland failed to do so.⁷

With the fiscal year ending next month, it is vitally important that the public get answers as soon as possible about the government’s conduct. Transparency from the Department is the only way to ensure public trust that political appointees in the current administration have not improperly interfered with the Special Counsel’s investigation. In light of this, we are filing this FOIA request to seek key facts.

Records Request

1. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel’s Office and personnel in the Office of the Attorney General regarding the Special Counsel’s budget for fiscal year 2022.
2. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel’s Office and personnel in the Office of the Deputy Attorney General regarding the Special Counsel’s budget for fiscal year 2022.
3. All records of communications from January 21, 2021 to the present among personnel within the Office of the Attorney General and the Office of the Deputy Attorney General regarding the Special Counsel’s budget for fiscal year 2022.

Definitions

“COMMUNICATION(S)” means every manner or method of disclosure, exchange of information, statement, or discussion between or among two or more persons, including but not limited to, face-to-face and telephone conversations, correspondence, memoranda, telegrams, telexes, email messages, voice-mail messages, text messages, meeting minutes, discussions, releases, statements, reports, publications, and any recordings or reproductions thereof.

“DOCUMENT(S)” or “RECORD(S)” mean any kind of written, graphic, or recorded matter, however produced or reproduced, of any kind or description, whether sent, received, or neither, including drafts, originals, non-identical copies, and information stored magnetically, electronically, photographically or otherwise. As used herein, the terms “DOCUMENT(S)” or “RECORD(S)” include, but are not limited to, studies, papers, books, accounts, letters, diagrams, pictures, drawings, photographs, correspondence, telegrams, cables, text messages, emails, memoranda, notes, notations, work papers, intra-office and inter-office communications, communications to, between and among employees, contracts, financial agreements, grants, proposals, transcripts, minutes, orders, reports, recordings, or other documentation of telephone or other conversations, interviews, affidavits, slides, statement summaries, opinions, indices, analyses, publications, questionnaires, answers to questionnaires, statistical records,

⁷ Jerry Dunleavy, *Merrick Garland Doesn’t Promise to Protect Durham Investigation or Release Report*, WASHINGTON EXAMINER (Feb. 22, 2021).

ledgers, journals, lists, logs, tabulations, charts, graphs, maps, surveys, sound recordings, data sheets, computer printouts, tapes, discs, microfilm, and all other records kept, regardless of the title, author, or origin.

“REFERS,” “REFERRING TO,” “REGARDS,” REGARDING,” “RELATES,” “RELATING TO,” or “PERTAINS TO” mean containing, alluding to, responding to, commenting upon, discussing, showing, disclosing, explaining, mentioning, analyzing, constituting, comprising, evidencing, setting forth, summarizing, or characterizing, either directly or indirectly, in whole or in part.

Instructions

The words “and” and “or” shall be construed in the conjunctive or disjunctive, whichever is most inclusive. The singular form shall include the plural form and vice versa. The present tense shall include the past tense and vice versa.

Fee Waiver Request

Empower Oversight agrees to pay up to \$25.00 in applicable fees, but requests a waiver of any fees that may be associated with processing this request, in keeping with 5 U.S.C. § 552 (a)(4)(A)(iii).

Empower Oversight is a non-profit educational organization as defined under Section 501(c)(3) of the Internal Revenue Code, and has no commercial interest in making this request. Accordingly, pursuant to 5 U.S.C. § 552 (a)(4)(A)(ii)(II), it is subject only to “reasonable standard charges for document duplication.”

Moreover, the information that Empower Oversight seeks is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.

The public has a significant interest in understanding the Justice Department’s conduct regarding Special Counsel Durham’s investigation. Empower Oversight is committed to government accountability and public integrity and is committed to public disclosure of documents via its website, and by providing these documents to the media for public dissemination. Hence, information it receives that either confirms or dispels the public integrity concerns described above will be published to empower Americans to accurately assess the proper level of public confidence they should have in the integrity of the Department of Justice—making this request undeniably eligible for a waiver or reduction of fees under 5 U.S.C. § 552 (a)(4)(A)(iii)

Request for Expedited Processing

Empower Oversight also requests expedited processing of this request. Special Counsel Durham’s ongoing investigation is of massive public interest, and there is extensive interest in ensuring the integrity of his investigation. The information requested is urgently needed to inform the public concerning actual or alleged federal government activity, namely whether Attorney General Garland has taken steps to prematurely end the Special Counsel’s investigation

by cutting off his budget next month. As noted above, Empower Oversight is primarily engaged in disseminating information to the public. The request is of widespread and exceptional media interest⁸ and the information sought involves possible questions about the government's integrity which affect public confidence. It is important that this request be processed and the results publicly disseminated prior to the conclusion of Mr. Durham's work, so that the public can have confidence in its integrity.

For ease of administration and to conserve resources, we ask that documents be produced in a readily accessible electronic format. In the event our request for a fee waiver is denied or if you have any questions about this request, please contact us immediately.

Thank you for your prompt attention to this matter.

Cordially,

/Bryan Saddler/

⁸ *E.g.*, Michael Lee, *Senate Republicans Demand Durham Report Be Made Public*, FOX NEWS, (Aug. 19, 2021); Aruna Viswanatha and Sadie Gurman, *Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters*, WALL STREET JOURNAL (Aug. 13, 2021); Matt Zapotosky and Tom Hamburger, *Durham Grand Jury Explores Theory Someone Presented FBI with Fabricated Evidence in 2016 Russia Probe*, WASHINGTON POST (Aug. 17, 2021).

EXHIBIT D



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

August 27, 2021

Bryan Saddler
Empower Oversight
2615 Columbia Pike
No. 445
Arlington, VA 22204
bsaddler@empowr.us

Re: FOIA-2021-02003
DRH:GMG

Dear Bryan Saddler:

This is to acknowledge receipt of your Freedom of Information Act (FOIA) request dated and received in this Office on August 19, 2021, in which you requested records concerning the budget of Special Counsel John Durham for Fiscal Year 2022 since January 21, 2021.

You have requested expedited processing of your request pursuant to the Department's standard permitting expedition for requests involving "[a]n urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information." See 28 C.F.R. § 16.5(e)(1)(ii) (2018). Based on the information you have provided, I have determined that your request for expedited processing under this standard should be denied. This Office cannot identify a particular urgency to inform the public about an actual or alleged federal government activity beyond the public's right to know about government activities generally.

You have also requested expedited processing of your request pursuant to the Department's standard involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." See 28 C.F.R. § 16.5(e)(1)(iv). Pursuant to Department policy, we directed your request to the Director of Public Affairs, who makes the decision whether to grant or deny expedited processing under this standard. See id. § 16.5(e)(2). Please be advised that as of the date of this letter, a decision on your expedition request is still pending. Once a determination has been made, we will promptly notify you. Nevertheless, please be advised that your request has been assigned to an analyst in this Office and our processing of it has been initiated.

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple

-2-

tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handing your request, Georgianna Gilbeaux, by telephone at the above number or you may write to them at the above address. You may contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 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.

If you are not satisfied with my response to this request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, 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 submitted within ninety 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."

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. Hibbard", with a small "RH" monogram at the end.

Douglas R. Hibbard
Chief, Initial Request Staff

EXHIBIT E



U.S. Department of Justice
Office of Information Policy
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

September 2, 2021

Bryan Saddler
Empower Oversight
2615 Columbia Pike
No. 445
Arlington, VA 22204
bsaddler@empowr.us

Re: FOIA-2021-02003
DRH:GMG

Dear Bryan Saddler:

This is to further acknowledge receipt of your Freedom of Information Act (FOIA) request dated and received in this Office on August 9, 2021, in which you requested records concerning the budget of Special Counsel John Durham for Fiscal Year 2022 since January 21, 2021.

By letter dated August 27, 2021, this Office acknowledged receipt of your request and advised you that your request for expedited processing pursuant to the Department's standard involving "[a] matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence," See 28 C.F.R. § 16.5(e)(1)(iv) (2018), was still pending with the Director of Public Affairs for determination. See *id.* § 16.5(e)(2). Please be advised the Director has determined that your request for expedited processing should be denied. Although your request for expedited processing has been denied; it has been assigned to an analyst in this Office, and our processing of it has been initiated.

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to

-2-

discuss either of these options. Any decision with regard to the application of fees will be made only after we determine whether fees will be implicated for this request.

If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact the analyst handing your request, Monique Hill, by telephone at the above number or you may write to them at the above address. You may also contact our FOIA Public Liaison, Valeree Villanueva, for any further assistance and to discuss any aspect of your request at: Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001; telephone at 202-514-3642.

Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, 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.

If you are not satisfied with this Office's determination in response to your request for expedited processing, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice, Sixth Floor, 441 G Street, NW, Washington, DC 20530-0001, 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 submitted within 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."

Sincerely,

A handwritten signature in blue ink, appearing to read "Douglas R. Hibbard", with a small "DR" monogram at the end.

Douglas R. Hibbard
Chief, Initial Request Staff

EXHIBIT F

EMPOWER OVERSIGHT

Whistleblowers & Research



December 7, 2021

VIA ELECTRONIC TRANSMISSION: DOJ.OIP.FOIA@usdoj.gov

Georgianna Gilbeaux, Analyst
Valeree Villanueva, FOIA Public Liaison
c/o Office of Information Policy
United States Department of Justice
Sixth Floor
441 G Street, NW
Washington, DC 20530-0001

RE: STATUS OF FOIA REQUESTS FOIA-2021-01701 AND FOIA-2021-02003

Dear Ms. Gilbeaux and Ms. Villanueva:

Empower Oversight Whistleblowers & Research (“Empower Oversight”) is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. We work to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities, and seek to hold those authorities accountable to act on such reports by, among other means, publishing information concerning the same.

Empower Oversight has filed with the Department of Justice (“DOJ”) two requests for records under the Freedom of Information Act (“FOIA”).¹ The DOJ has acknowledged receipt of the requests and assigned an analyst to process them, but to date it has failed to advise Empower Oversight about the volume of the records that the DOJ possesses that are responsive to the requests; whether the responsive records are subject to one or more FOIA exemptions and, if so, which exemption(s); and when the DOJ will produce any responsive, non-exempt records.

The DOJ has avoided making clear “determinations” on Empower Oversight’s FOIA requests within the FOIA’s normal 20 business day deadline² by means of an ambiguous paragraph that it has inserted verbatim into its acknowledgement letters. Without actually identifying any “unusual circumstances” that would enable the DOJ to disregard the statutory

¹ The FOIA is codified at 5 U.S.C. § 552.

² See generally 5 U.S.C. § 552(a)(6)(A)(i).

deadline for making a “determination,” the DOJ has nonetheless sought to benefit from delayed processing through the mere allusion to the possibility of unusual circumstances.

Empower Oversight respectfully requests clarification of the DOJ’s position. Please identify any actual “unusual circumstance(s)” or promptly process the FOIA requests if “unusual circumstances” were not present in this matter at the time of the DOJ’s acknowledgment letters.

FOIA Request FOIA-2021-01701

On July 12, 2021, Empower Oversight filed with the DOJ a request for records under the FOIA. Empower Oversight’s July 12th FOIA request seeks records relating to:

1. the Justice Department’s consideration and hiring of Ms. [Susan] Hennessey, including all records related to her interest in joining the Department, consideration of her for any Department position, any statements of recommendation, evaluations of her qualifications, records relating to interviews with Ms. Hennessey, notes from any such interviews, and any offers of employment;
2. all forms completed by Ms. Hennessey in the application, hiring, and onboarding processes at Department of Justice;
3. all conflicts Ms. Hennessey reported or the Department assessed to apply to her;
4. all recusals applicable to Ms. Hennessey, including all records relating to any recusal or draft recusal of Ms. Hennessey from matters related to Special Counsel [John] Durham’s inquiry;
5. all records relating to Ms. Hennessey’s deleted tweets;
6. all records to or from the relevant Justice Department Ethics Officials, including Michael Nannes or Cynthia Shaw, regarding Ms. Hennessey;
7. Ms. Hennessey’s calendar entries from the first day of her employment at the Department to the present;
8. all records sent or received by Ms. Hennessey that include the terms “Durham,” “Special Counsel,” “Steele,” “dossier,” “Clinesmith,” or “Danchenko”; [and]
9. all records relating to Ms. Hennessey’s previous employer, Lawfare, and leaks regarding Special Counsel [Robert] Mueller’s investigation.

In addition, Empower Oversight requested: 1) a waiver of search and duplication fees associated with the DOJ’s processing of its FOIA request, and 2) expedited processing.

In support of its FOIA request, Empower Oversight explained that on June 29, 2021, Senators Charles Grassley and Ron Johnson wrote to Attorney General Merrick Garland and raised a number of serious questions about Ms. Hennessey’s work in the DOJ’s National Security Division.³ The Senators noted that Ms. Hennessey has a history of expressing partisan views

³ Letter from Senators Charles E. Grassley and Ron Johnson to the Honorable Merrick Garland (June 29, 2021), available at https://www.judiciary.senate.gov/imo/media/doc/grassley_johnson_to_justice_dept_hennesseyconflicts.pdf.

concerning the Steele Dossier, the Federal Bureau of Investigation's ("FBI") Crossfire Hurricane investigation, the DOJ Office of Inspector General's review of the Crossfire Hurricane investigation, and Special Counsel Durham's investigation of intelligence, counterintelligence, and law enforcement activities directed at the 2016 presidential campaigns.⁴

Immediately following the 2020 presidential election Ms. Hennessey reportedly deleted *en masse* tens of thousands of her postings from her Twitter account.⁵ In May 2021, *Fox News* reported that between November 16, 2020, and November 29, 2020, the number of tweets on her Twitter account dropped by more than 33,000.⁶ By June 2021, *The Hill* reported, "Hennessey's account currently shows 242 tweets[.]"⁷ By scrubbing her social media, Hennessey obstructed a thorough examination of the nature and scope of her promotion of the Steele Dossier, defense of the Crossfire Hurricane investigation, and criticism of the Office of Inspector General's review and Special Counsel Durham's investigation.

In light of her prejudicial comments reported by the Senators and news media, along with Ms. Hennessey's effort to frustrate additional research regarding her prior partisan rants on Twitter, her ability to appear objective and impartial in any official duties related to Special Counsel Durham's investigation raises legitimate questions. Thus, there is an acute public interest in the transparency of the DOJ's hiring of Ms. Hennessey, and what steps, if any, it has taken to mitigate the appearance—or reality—that Ms. Hennessey's biases could undermine Special Counsel Durham's independent work.

By letter dated July 22, 2021, the DOJ acknowledged receipt of Empower Oversight's July 12th FOIA request; designated its request as FOIA-2021-01701; denied Empower Oversight's request for expedited processing; postponed a decision on its request for a fee waiver pending a determination "whether fees will be implicated" by the same; identified the analyst assigned to Empower Oversight's request; identified the FOIA liaison assigned to its request; and informed Empower Oversight of the availability of mediation services offered by the National Archives and Records Administration ("NARA"). Additionally, the DOJ advised:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within "unusual circumstances." See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can

⁴ *Id.*

⁵ Keene, Houston, *New Biden DOJ Staffer Deleted over 39K tweets, Including Russia Collusion Accusations* (May 10, 2021), available at <https://www.foxnews.com/politics/biden-doj-susan-hennessey-deleted-tweets-russia-collusion>.

⁶ *Id.*

⁷ Beitsch, Rebecca, *Republicans Target Trump Critic's Role at DOJ* (June 3, 2021), available at <https://thehill.com/policy/national-security/556676-republicans-target-trump-critics-role-at-doj>.

also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

To date, Empower Oversight has not received any further correspondence concerning its July 12th FOIA request, FOIA-2021-01701.

FOIA Request FOIA-2021-02003

On August 19, 2021, Empower Oversight filed with the DOJ a FOIA request for records relating to:

1. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Attorney General regarding the Special Counsel's budget for fiscal year 2022.
2. All records of communications from January 21, 2021 to the present between any personnel in the Special Counsel's Office and personnel in the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022.
3. All records of communications from January 21, 2021 to the present among personnel within the Office of the Attorney General and the Office of the Deputy Attorney General regarding the Special Counsel's budget for fiscal year 2022.

Empower Oversight also requested: 1) a waiver of search and duplication fees associated with the DOJ's processing of its FOIA request, and 2) expedited processing.

In support of its FOIA request, Empower Oversight explained that on October 19, 2020, then Attorney General William Barr appointed Mr. Durham, then U.S. Attorney for the District of Connecticut, to serve as Special Counsel to investigate violations of law in connection with intelligence, counterintelligence, or law enforcement activities directed at the 2016 presidential campaigns. As Attorney General Barr stated in a letter to the House and Senate Judiciary Committees, the purpose of the appointment was "to provide [Special Counsel Durham] and his team with the assurance that they could complete their work, without regard to the outcome of the [2020 presidential] election."⁸ The eventual findings and outcome of Special Counsel Durham's investigation are of extreme importance to the public, and one former FBI attorney has already been convicted for his misconduct.⁹

The Special Counsel regulations state that the Special Counsel shall have "the full power and independent authority to exercise all investigative and prosecutorial functions of any United States attorney" and, subject to a few exceptions, "shall determine whether and to what extent to inform or consult with the Attorney General" about the conduct of his investigation.¹⁰

⁸ Available at <https://www.judiciary.senate.gov/imo/media/doc/Letter%20re%20Durham%20to%20Hill.pdf>.

⁹ Phillips, Kristine; Johnson, Kevin, *Ex-FBI Lawyer Clinesmith Pleads Guilty to Falsifying Email in Russia Probe in Durham's First Case* (August 19, 2020), available at <https://www.usatoday.com/story/news/politics/2020/08/19/ex-fbi-lawyer-kevin-clinesmith-court-1st-durham-case-russia/3393941001/>.

¹⁰ 28 C.F.R. § 600.6.

Despite the independence envisioned by the DOJ's regulations, there is a means by which the Attorney General can prematurely end a Special Counsel's investigation. The Special Counsel regulations state that "90 days before the beginning of each fiscal year, the Special Counsel shall report to the Attorney General the status of the investigation, and provide a budget request for the following year. The Attorney General shall determine whether the investigation should continue and, if so, establish the budget for the next year."¹¹

When asked during his confirmation hearing whether he would "commit to providing Special Counsel Durham with the staff, resources, funds, and time needed to thoroughly complete the investigation," Attorney General Garland failed to do so.¹²

As of August 19, 2021 (*i.e.*, the date Empower Oversight filed its FOIA request), the DOJ had not informed the public as to whether Attorney General Garland intended to end prematurely Special Counsel Durham's investigation.¹³ As reported by *The Wall Street Journal*:

The special counsel regulations required Mr. Durham to have reported on the status of the investigation and submitted a proposed budget by July 1 for the next fiscal year that begins in October. Attorney General Merrick Garland could then determine whether the investigation would continue and establish the budget. A Justice Department spokeswoman declined to say whether Mr. Garland has decided to allow Mr. Durham's probe to continue beyond September or approved a budget for the next fiscal year[.]¹⁴

Further, *The Washington Post* reported that some of the witnesses in Special Counsel Durham's investigation have stated "that Attorney General Merrick Garland should push the special counsel to conclude his work."¹⁵

It is vitally important that the public get answers about Attorney General Garland's decision making concerning Special Counsel Durham's budget. Transparency from the DOJ is the only way to ensure public that political appointees in the administration do not improperly interfere with Special Counsel Durham's investigation.

By letter dated August 27, 2021, the DOJ acknowledged receipt of Empower Oversight's August 19th FOIA request; designated its request as FOIA-2021-02003; denied Empower Oversight's request for expedited processing pursuant to the DOJ's regulation at 28 C.F.R. § 16.5(e)(1)(ii), and advised that consideration of the request under 28 C.F.R. § 16.5(e)(1)(iv) remained pending with the Director of Public Affairs; postponed a decision on its request for a

¹¹ 28 C.F.R. § 600.8(a)(1).

¹² Dunleavy, Jerry, *Merrick Garland Doesn't Promise to Protect Durham Investigation or Release Report* (February 22, 2021), available at <https://www.washingtonexaminer.com/news/grassley-garland-durham-investigation>.

¹³ Later, on October 21, 2021, during "his first oversight hearing as attorney general, Mr. Garland told the House Judiciary Committee that the special counsel . . . had his budget approved for another year . . ." See, Benner, Katie, *Garland Parries Pressure from Both Sides in Congressional Testimony* (Updated October 27, 2021), available at <https://www.nytimes.com/2021/10/21/us/politics/garland-testimony-jan-6.html>.

¹⁴ Viswanatha, Aruna; Gurman, Sadie, *Durham Probe of What Sparked Russia Investigation Examines FBI Tipsters* (August 13, 2021), available at <https://www.wsi.com/articles/durham-probe-of-what-sparked-russia-investigation-examines-fbi-tipsters-11628857851>.

¹⁵ Zapotosky, Matt; Hamburger, Tom, *Durham Grand Jury Explores Theory Someone Presented FBI with Fabricated Evidence in 2016 Russia Probe* (August 17, 2021), available at https://www.washingtonpost.com/national-security/john-durham-investigation/2021/08/17/9131b1f4-fecd-11eb-a664-4f6de3e17ff0_story.html; see, Chaitin, Daniel, *Witnesses Grouse About Garland's Handling of Durham Inquiry: Report* (August 18, 2021), available at <https://www.washingtonexaminer.com/news/merrick-garland-john-durham-inquiry-witnesses>.

fee waiver pending a determination “whether fees will be implicated” by the same; identified the analyst assigned to Empower Oversight’s request; identified the FOIA liaison assigned to its request; and informed Empower Oversight of the availability of mediation services offered by the NARA. Additionally, the DOJ advised:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. For your information, we use multiple tracks to process requests, but within those tracks we work in an agile manner, and the time needed to complete our work on your request will necessarily depend on a variety of factors, including the complexity of our records search, the volume and complexity of any material located, and the order of receipt of your request. At this time we have assigned your request to the complex track. In an effort to speed up our process, you may wish to narrow the scope of your request to limit the number of potentially responsive records so that it can be placed in a different processing track. You can also agree to an alternative time frame for processing, should records be located, or you may wish to await the completion of our records search to discuss either of these options.

By letter dated September 2, 2021, the DOJ denied Empower Oversight’s request for expedited processing pursuant to the DOJ’s regulation at 28 C.F.R. § 16.5(e)(1)(iv).¹⁶ To date, Empower Oversight has not received any further correspondence concerning its August 19th FOIA request, FOIA-2021-02003.

Analysis

During his confirmation hearing, on February 22, 2021, Attorney General Garland stated that he is “very much committed to transparency and to explaining Justice Department decision making.”¹⁷ However, it is now clear that the DOJ will not promptly complete its response to Empower Oversight’s request, and the ambiguous—intentional or otherwise—form letters that the DOJ sent to it on July 22nd and August 27th raise serious questions concerning the DOJ’s commitment to being transparent¹⁸ and satisfying its obligations under the FOIA.

¹⁶ Interestingly, the DOJ’s September 2nd letter repeated the information conveyed in its August 27th letter concerning “unusual circumstances;” the assignment of an analyst and a FOIA liaison; the DOJ’s multitrack processing; the placement of Empower Oversight’s request in the “complex”—slow—track; the postponement of a decision on Empower Oversight’s request for a fee waiver; and the availability of mediation services offered by the NARA. Indeed, the above-quoted “unusual circumstances” text that appears in both the July 22nd and August 27th letters from the DOJ also appears verbatim in the September 2nd letter.

¹⁷ United States Senate, *Committee on the Judiciary: The Nomination of the Honorable Merrick Brian Garland to be the Attorney General of the United States: Day 1*, at approximately 1:21:45, (February 22, 2021), available at <https://www.judiciary.senate.gov/meetings/the-nomination-of-the-honorablemerrick-brian-garland-to-be-attorney-general-of-the-united-states-day-1>.

¹⁸ Timeliness is an important aspect of transparency. As David T. Barstow—winner of four Pulitzer Prizes—has noted, Federal government officials sometimes misuse the FOIA to buy “themselves months if not years of delay and obstruction. It doesn’t matter that what [is sought] is completely and obviously a public record and that someday a judge will ultimately order them to release the documents. . . .” They calculate that the requester will get the message and just go away, which puts a premium on “elevating the importance of access, of authorized leaks, of journalists currying favor with the right government officials to get information and to get information quickly. . . .” “Simply put, if journalists cannot rely on being able to go to source documents in a reasonably fast way, they are in a terribly weakened position when it comes to actually dealing day-in and day-out with high government officials.” Barstow, David T., *The Freedom of Information Act and the Press*:

The Controlling Provisions of the FOIA

In relevant part, Subsection a(6) of the FOIA requires agencies to make determinations on FOIA requests, and to notify the requesters of such determinations, within 20 business days, unless “unusual circumstances” exist (*i.e.*, “[i]n unusual circumstances”) and the agencies provide the requesters with written notice “setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched,” as follows:

(6)

(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of—

(I) such determination and the reasons therefor;

(II) the right of such person to seek assistance from the FOIA Public Liaison of the agency; and

(III) in the case of an adverse determination—

(aa) the right of such person to appeal to the head of the agency, within a period determined by the head of the agency that is not less than 90 days after the date of such adverse determination; and

(bb) the right of such person to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services; and

* * *

(B)

(i) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched....¹⁹

Obstruction or Transparency?, Social Research, An International Quarterly, pp. 805 – 806 (Fall of 2010), available at https://www.jstor.org/stable/40972290?read-now=1&seq=1#page_scan_tab_contents.

¹⁹ 5 U.S.C. § 552(a)(6).

For purposes of the FOIA, “unusual circumstances” are limited to the need to search for and collect the records from facilities or establishments that are separate from the office processing the request; to search for, collect, and appropriately examine a voluminous amount of records; or to consult with another agency, or two or more components of the same agency, that has a substantial interest in the determination on the records request.²⁰

The extension of the 20 business day deadline because of “unusual circumstances” is confined to no more than 10 additional business days, unless the agency notifies the requester that it cannot process the FOIA request within 30 business days and provides the requester with the an opportunity to narrow the scope of his/her/its request so that it may be processed within the deadline, or arrange an alternative time period for processing, as follows:

(B)

(i) ...No such notice shall specify a date that would result in an extension for more than ten working days, except as provided in clause (ii) of this subparagraph.

(ii) With respect to a request for which a written notice under clause (i) extends the time limits prescribed under clause (i) of subparagraph (A), the agency shall notify the person making the request if the request cannot be processed within the time limit specified in that clause and shall provide the person an opportunity to limit the scope of the request so that it may be processed within that time limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency, and notify the requester of the right of the requester to seek dispute resolution services from the Office of Government Information Services. Refusal by the person to reasonably modify the request or arrange such an alternative time frame shall be considered as a factor in determining whether exceptional circumstances exist for purposes of subparagraph (C)....²¹

If an agency fails to comply with the applicable FOIA deadlines, then the requester “shall be deemed to have exhausted his administrative remedies” and may seek judicial review.²²

The DOJ’s July 22nd and August 27th Letters Do Not Explicitly State the Existence of “Unusual Circumstances” that Prevent It from Complying with the FOIA’s 20 Business Day Deadline for Rendering a Determination

The DOJ’s July 22nd and August 27th letters (and its September 2nd letter, for that matter) appear to be form letters. More importantly, they do not expressly state that “unusual circumstances” exist. Rather, in keeping with nature of form letters and their frequent

²⁰ 5 U.S.C. § 552(a)(6)(B)(iii).

²¹ 5 U.S.C. § 552(a)(6); *see also*, 28 C.F.R. § 16.5(c).

²² 5 U.S.C. § 552(a)(6)(C)(i).

unsuitability for differing factual scenarios, the operative language of the letters is strikingly ambiguous—perhaps intentionally so.

Citing and paraphrasing the definition of “unusual circumstances” under the FOIA, the acknowledgement letters that the DOJ transmitted to Empower Oversight on July 22nd and August 27th state:

To the extent that your request requires a search in another Office, consultations with other Department components or another agency, **and/or** involves a voluminous amount of material, your request falls within “unusual circumstances.” See 5 U.S.C. 552 § (a)(6)(B)(i)-(iii) (2018). Accordingly, we will need to extend the time limit to respond to your request beyond the ten additional days provided by the statute. (Emphasis added.)

One reasonable interpretation of the operative language of the acknowledgement letters is that **if** either of Empower Oversight’s FOIA requests implicate either of the three actions that qualify as “unusual circumstances” under the FOIA, **then** such request “falls within ‘unusual circumstances,’” and “[a]ccordingly” the DOJ will avail itself of the benefits of identifying an extant “unusual circumstance.” In other words—without actually finding the existence of “unusual circumstances,” which would allow the DOJ to extend the 20 business day deadline for rendering a “determination” on an Empower Oversight FOIA request to 30 business days—the DOJ appropriates the benefits of such a finding. And then, DOJ effectively renders FOIA’s deadline for making a “determination” null and void, pending Empower Oversight’s agreement to narrow its FOIA request to the DOJ’s satisfaction or acceptance of an alternative timeframe for processing.

An alternative interpretation of the operative language of the acknowledgement letters is that **because** Empower Oversight’s FOIA requests implicate one or more of the three actions that qualify as “unusual circumstances,” such circumstances exist, and “[a]ccordingly” the DOJ will avail itself of the benefits of identifying an extant “unusual circumstance.”

One problem with the latter interpretation is that the DOJ does not expressly identify which of the three actions that qualify as “unusual circumstances” that it claims exist(s) in this case. And this deficiency is accentuated by the DOJ’s use of “and/or,” as opposed to “and,” in its paraphrasing of the three activities that qualify as “unusual circumstances” under the FOIA (*i.e.*, “search in another Office, consultations with other Department components or another agency, and/or involves a voluminous amount of material”). This verbiage supports a reasonable inference that the DOJ had not actually identified existing “unusual circumstances” when it transmitted its letters. Otherwise, it would have chosen “and” as the appropriate conjunction for the operative text, if more than one of the three activities existed. It is unlikely that the conjunction “or” would ever be appropriate. No conjunction is necessary if only one activity is present, and the conjunction “and” is appropriate if multiple activities exist. Whereas, the use of the conjunction “or” communicates that the DOJ is uncertain about the existence of one or more activities to which it alludes.

As the DOJ points out in its guidance for itself and other Federal agencies that respond to FOIA requests, responders must process such requests within 20 business days unless they issue a “written notice to the requester ‘setting forth the unusual circumstances for such extension and

the date on which a determination is expected to be dispatched.”²³ In other words, the DOJ was obligated to have identified an existing “unusual circumstance” before it transmitted its acknowledgement letters, and it should have informed Empower Oversight of the same. Empower Oversight should not have to speculate on the correct interpretation of the DOJ’s letters.

It appears that the DOJ may not have met its burden with respect to FOIA Requests FOIA-2021-01701 and FOIA-2021-02003. Accordingly, Empower Oversight respectfully requests that the DOJ expressly advise which “unusual circumstances,” if any, were applicable to FOIA Requests FOIA-2021-01701 and FOIA-2021-02003, when the existence of such circumstances were identified by the DOJ, and why the DOJ did not explicitly reference such circumstances in its letters of July 22nd, August 27th, and September 2nd. Alternatively, if the DOJ had not actually identified existing “unusual circumstances” on or before the dates of its July 22nd and August 27th letters, then please remedy the deficiency by immediately rendering the determination(s) required by Subsection a(6)(A)(i) of the FOIA.²⁴

Thank you for your time and consideration. Please don’t hesitate to contact me with any questions.

Cordially,

/Jason Foster/

Jason Foster
Founder & President

²³ DOJ, *Procedural Requirements, Department of Justice Guide to the Freedom of Information Act*, p. 35 (Posted August 20, 2021), available at <https://www.iustice.gov/oip/page/file/1199421/download#page=34>; see also, 28 C.F.R. § 16.5(c) (describing the DOJ’s rights and responsibilities whenever the FOIA’s 20 business day deadline cannot be satisfied “because of ‘unusual circumstances’”) (emphasis added); DOJ, *The Importance of Quality Requester Services: Roles and Responsibilities of FOIA Requester Service Centers and FOIA Public Liaisons* (Updated July 22, 2021) (discussing the importance of FOIA Requester Service Centers and FOIA Public Liaisons generally, and the two responsibilities of FOIA Public Liaisons specifically, “[w]hen ‘unusual circumstances’ exist”), available at <https://www.iustice.gov/oip/importance-quality-requester-services-roles-and-responsibilities-foia-requester-service-centers>.

²³ 5 U.S.C. § 552(a)(6).

²⁴ In *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm’n*, the U.S. Court of Appeals for the District of Columbia Circuit instructed that:

in order to make a “determination” within the statutory time periods and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the “determination” is adverse.

Citizens for Responsibility & Ethics in Washington, 711 F.3d 180, 188 (D.C. Cir. 2013).

EXHIBIT G



Bryan Saddler [redacted] empowr.us>

Your FOIA Requests FOIA-2021-01701 and FOIA-2021-02003

Villanueva, Valeree A (OIP) <Valeree.A.Villanueva@usdoj.gov>

Wed, Dec 15, 2021 at 7:16 PM

To: [redacted] empowr.us>, [redacted]@empowr.us>

Jason Foster and Bryan Saddler,

Thank you for speaking with me earlier today and allowing me to further explain why this Office has invoked “unusual circumstances” and the status of your requests FOIA-2021-01701 and FOIA-2021-02003. As I stated on the phone call, due to the need to search out inside our Office for potentially responsive records your two requests fall into “unusual circumstances” and have been placed in the complex track.

Pursuant to my explanation on our searching, we are utilizing our ediscovery search platform, Clearwell, which allows for more dynamic processing of the records once they are located. The queue for such ediscovery searches is extensive and can cause a delay in our ability to respond to you. Outside of certain specific matters (such as requests that have become the subject of litigation), the number of records currently being searched, is a leading factor on how long the ediscovery search will take to be completed. Per our agreement, I am providing a list of the officials we are currently searching in the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Associate Attorney General (OASG) via our ediscovery system. Please note, the number of officials I estimated on the phone for FOIA-2021-01701 was incorrect, the number below is correct. I have denoted the tracking number associated with the office search I also provided some title but did not track down all titles. Should you want to remove officials, please advise this Office; however, you are not required to do so.

OAG (Searching FOIA-2021-01701 and FOIA-2021-02003):

- 1. Attorney General Merrick Garland
- 2. Matthew Klapper – Chief of Staff to the Attorney General
- 3. Kate Heinzelman – Chief Counselor to the Attorney General
- 4. Margaret Goodlander
- 5. Tamarra Matthews Johnson
- 6. Tim Visser
- 7. Marcia Davidson
- 8. Brian Fletcher
- 9. Giovanni Sanchez
- 10. Theresa Watson-Walker

ODAG (Searching FOIA-2021-01701):

- 1. Deputy Attorney General Lisa Monaco
- 2. John Carlin – Principal Associate Deputy Attorney General
- 3. Anita Singh – Chief of Staff & Associated Deputy Attorney General
- 4. Frank Lin – Deputy Chief of Staff
- 5. Matthew Axelrod
- 6. Karl Thompson
- 7. Stacie Harris
- 8. Andrew Goldsmith
- 9. Myesha Braden
- 10. Kevin Chambers
- 11. Iris Lan
- 12. Emily Loeb
- 13. David Newman
- 14. Bradley Weinsheimer
- 15. Lawrence Atkinson
- 16. Eun Young Choi

- 17. Margy O’Herron
- 18. Eric Nguyen
- 19. Adam Braverman
- 20. Sara Solow
- 21. Julie Dickerson
- 22. Ashley Robertson
- 23. Apiyo Oloya
- 24. Mark Masling
- 25. Maya Suero
- 26. Jordan Shub
- 27. Shomari Figures
- 28. Robyn Thiemann
- 29. SeLena Powell

OASG (Searching FOIA-2021-01701):

- 1. Associate Attorney General Vanita Gupta
- 2. Matthew Colangelo Principal Deputy Associate Attorney General
- 3. Peter Hyun – Chief of Staff
- 4. Ashley Wilson – Deputy Chief of Staff for Operations
- 5. Theron Pride
- 6. Rachel Rossi
- 7. Ricki Seidman
- 8. Sparkle Sooknanan
- 9. Patty Brink
- 10. Adam Grogg
- 11. Diane Kelleher
- 12. Gene Kimmelman
- 13. Alberto Ruisanchez
- 14. Burden Walker
- 15. Emma West Rasmus

While we await the completion of the searches, I wanted to restate the option for this Office to work on interim response by searching the Departmental Executive Secretariat, which is the official record repository for the Office of the Attorney General, Deputy Attorney General, and Associate Attorney General. Should you seek a search in of the Departmental Executive Secretariat, we will provide an estimate on an interim response.

Please review what I have provided above and let me know how you want this Office to proceed.

Thank you,

Valeree Villanueva

Valeree Villanueva

Supervisory Government Information Specialist &

FOIA Public Liaison

Office of Information Policy

U.S. Department of Justice

