



April 28, 2017

**VIA FOIAONLINE.COM AND FIRST CLASS MAIL**

Melanie Ann Pustay  
Director  
Office of Information Privacy  
U.S. Department of Justice, Suite 11050  
1425 New York Avenue, NW  
Washington, DC 20530-0001

**RE: Freedom of Information Act Appeal from FBI FOIPA  
Request/Referral No. 1367178-000**

Dear Ms. Pustay:

This letter constitutes a timely administrative appeal under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and applicable regulations, 28 C.F.R. § 16.8, for records requested by the Electronic Frontier Foundation (EFF) from the Federal Bureau of Investigation (FBI)—FOIPA Request No. 1367178-000.

At the outset, it appears that the FBI’s response is based on a mistaken understanding of the documents EFF sought.<sup>1</sup> EFF’s request sought records disclosing the FBI’s *cooperation* with certain employees of the electronics retailer Best Buy in conducting investigations, including designating those employees as cooperating human sources (CHSs). EFF did not seek, as the FBI apparently believed, documents related to any investigation of Best Buy itself. Thus, to the extent the FBI’s response was premised on that mistaken belief, it should be reversed and the agency should conduct a new search for responsive records.

Assuming that the FBI properly understood EFF’s request, the FBI’s “Glomar response” is improper because the agency has officially acknowledged—in a federal criminal proceeding—that records responsive to EFF’s request exist.<sup>2</sup> The FBI also erred in claiming Exemption 7(E) as a basis for withholding records and by refusing to grant EFF a news media fee benefit and public interest fee waiver.

**Glomar is Inapplicable to EFF’s Request Because the FBI Has Publicly  
Acknowledged that Responsive Records Exist**

The FBI has already publicly acknowledged in federal court that it has cooperated with Best Buy employees during investigations and that it has designated some of them as

---

<sup>1</sup> A copy of EFF’s request is attached as Exhibit A.

<sup>2</sup> A copy of the FBI’s final determination is attached as Exhibit B.

CHSs. When previous public disclosures establish the existence of records responsive to a FOIA request, an agency cannot invoke a Glomar response,<sup>3</sup> regardless of whether the specific records have been publicly disclosed. *ACLU v. CIA*, 710 F.3d 422, 427 (D.D.C. 2013).

Record evidence in *United States v. Rettenmair*, SACR 14-00188-CJC (C.D. Cal.) confirms the FBI's relationship with Best Buy and a court opinion relies on that evidence. As the D.C. Circuit held, because the FBI has already publicly acknowledged the existence of its relationship with Best Buy employees in open court, "it beggars belief that it does not also have documents relating to the subject." *ACLU*, 710 F.3d at 431. The FBI thus cannot rely on a Glomar response here.

### **Acknowledging Records that Document the FBI's Relationship with Best Buy Employees Does Not Pose a Circumvention Risk Under Exemption 7(E)**

The FBI has failed to justify withholding records under Exemption 7(E) because acknowledging that records exist, much less disclosing them, would not create a circumvention risk. Exemption 7(E) permits law enforcement agencies to withhold records that would "disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). To withhold records under Exemption 7(E), an agency must demonstrate that specific techniques, procedures, or guidelines in disputed records are (1) not publicly known and (2) that their disclosure could create a risk of circumvention of the law. *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995); *Mayer Brown LLP v. IRS*, 562 F.3d 1190 (D.C. Cir. 2009).

The FBI's generalized claim of Exemption 7(E) over any documents responsive to EFF's request is far too vague to meet its burden under FOIA. *PHE, Inc. v. DOJ*, 983 F.2d 248, 251-52 (D.C. Cir. 1993). FOIA requires agencies to demonstrate that disclosure of *specific* records could create a circumvention risk of the law. *Id.* Moreover, the FBI has failed to provide any facts or argument as to why disclosure of any particular records responsive to EFF's request could, if disclosed, create a circumvention risk. The FBI thus cannot sustain its claim to withhold records under Exemption 7(E).

///  
///  
///  
///

---

<sup>3</sup> A Glomar response is when an agency refuses to confirm or deny the existence of records. The term comes from *Phillipi v. CIA*, 546 F.2d 1009 (D.D.C. 1976), in which the CIA refused to confirm or deny whether it had records indicating that Howard Hughes' ship Glomar Explorer was part of an effort to exhume a shipwrecked Soviet submarine from the bottom of the ocean.

**The FBI Failed to Grant EFF a Media Fee Benefit and Public Interest Fee Waiver**

The FBI constructively denied EFF's request for a media fee benefit and public interest fee waiver. For the reasons stated in EFF's FOIA request, the FBI erred in refusing to grant EFF news media fee status and a public interest fee waiver.

\* \* \*

Finally, EFF preserves all other arguments related to further processing of this request, including, but not limited to, challenging the adequacy of the FBI's search and application of any other FOIA exemptions to responsive records. EFF's appeal is timely because it was filed within 90 days of receiving the FBI's final determination. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa); 28 C.F.R. § 16.8.

FOIA requires a determination of this appeal within twenty (20) working days. 5 U.S.C. § 552(a)(6)(A)(ii). Should you have any questions, please call me at (415) 436-9333 x167.

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,

\_\_\_\_\_  
/s/

David Greene  
David Sobel  
Aaron Mackey

Enclosures

# **EXHIBIT A**



**ELECTRONIC FRONTIER FOUNDATION**

Protecting Rights and Promoting Freedom on the Electronic Frontier

February 2, 2017

**VIA EMAIL, FAX AND POSTAL SERVICE**

Federal Bureau of Investigation  
Attn: FOI/PA Request  
Record/Information Dissemination Section  
170 Marcel Drive  
Winchester, VA 22602-4843  
Email: foiparequest@ic.fbi.gov  
Fax: (540) 868-4391/4997

RE: Freedom of Information Act Request and Requests for News Media Fee Status, and Public Interest Fee Waiver

Dear Ms. Day:

This letter constitutes a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and is submitted to the Federal Bureau of Investigation (FBI) on behalf of the Electronic Frontier Foundation (EFF).

In an order issued on December 19, 2016, U.S. District Judge Cormac J. Carney of the U.S. District Court for the Central District of California, Southern District, cited record evidence concerning the FBI's relationship with the electronics retailer Best Buy. *United States v. Rettenmaier*, SACR 14-00188-CJC (C.D. Cal.). Specifically, the Court stated that the Bureau cooperates with certain Best Buy employees in the conduct of investigations and designates them as "cooperating human sources" ("CHSs").

Through this request, EFF seeks the disclosure of the following agency records from the FBI:

- 1) All internal memoranda or other documentation regarding the use of informants and/or CHSs at any Best Buy facility;
- 2) All internal memoranda or other documentation regarding FBI training of Best Buy personnel in the detection and location of child pornography, or other material, on computers brought to Best Buy for repair;
- 3) All recruiting material from the FBI directed to Best Buy personnel; and
- 4) All memoranda, guidance, directives, or policy statements concerning the use of informants and/or CHSs at any computer repair facilities in the United States.

815 Eddy Street • San Francisco, CA 94109 USA

voice +1 415 436 9333

fax +1 415 436 9993

web [www.eff.org](http://www.eff.org)

email [information@eff.org](mailto:information@eff.org)

EFF requests that, where appropriate, FBI provide the requested records in the native electronic format in which they were created or received. FOIA provides that agency records include records “maintained by an agency in any format, including electronic format.” 5 USC § 552(f)(2)(A). FOIA also provides that “an agency shall make reasonable efforts to search for the records in electronic form or format,” 5 USC § 552(a)(3)(C), and “shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.” 5 USC § 552(a)(3)(B).

Additionally, although FOIA has always presumed that government records are open to public inspection, the recently enacted FOIA Improvement Act of 2016, Pub. L. 114-185, prohibits agencies from withholding records unless (1) “disclosure is prohibited by law” or (2) “the agency reasonably foresees that disclosure would harm an interest protected by” one of FOIA’s exemptions. Codified at 5 U.S.C. § 552(a)(8)(A). Thus, in addition to FOIA favoring disclosure and requiring its exemptions to be narrowly construed, Section 552(a)(8)(A) prohibits agencies from using their discretion to broadly withhold records merely because they believe an exemption could technically apply.

### **Request for News Media Fee Status**

EFF asks that it not be charged search or review fees for this request because EFF qualifies as a representative of the news media pursuant to the FOIA and 28 C.F.R. § 16.10(b)(6). A “[r]epresentative of the news media is any person or entity that actively 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.” *Id.*

EFF is primarily engaged in disseminating the information it receives via FOIA to the general public. At the outset, we note that the Department of Homeland Security, as well as the National Security Agency, State Department and other agencies, have previously recognized that EFF qualifies as a “news media” requester, based upon the publication activities set forth below. Further, the U.S. Court of Appeals for the D.C. Circuit has stressed that different agencies must not “adopt inconsistent interpretations of the FOIA.” *Al-Fayed v. CIA*, 254 F.3d 300, 307 (D.C. Cir. 2001) (quoting *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1287 (D.C. Cir. 1983)).

EFF is a nonprofit public interest organization dedicated to defending civil liberties in the digital world.<sup>1</sup> One of EFF’s primary missions is to “educat[e] the press and the public through comprehensive analysis, educational guides, activist workshops,

---

<sup>1</sup> <https://www.eff.org/about>

and more.”<sup>2</sup> To accomplish this goal, EFF routinely and systematically disseminates information in several ways.

EFF maintains a frequently visited web site, which reports the latest developments and contains in-depth information about a variety of civil liberties and intellectual property issues.<sup>3</sup> Also, EFF has regularly published an online newsletter, the EFFector, since 1990. The EFFector currently has more than 272,000 subscribers.<sup>4</sup> Furthermore, EFF publishes a popular blog, Deeplinks, which highlights the latest news related to law, policy and technology.<sup>5</sup>

EFF staff members have presented research and in-depth analysis on technology issues in roughly 40 in-depth reports published since 2002.<sup>6</sup> These reports provide information and commentary on such diverse issues as free speech, privacy, and intellectual property. EFF has specifically published reports related to searches of digital devices, including *Defending Privacy at the U.S. Border: A Guide for Travelers Carrying Digital Devices* (December 2011)<sup>7</sup> and *Know Your Rights!* (October 2014).<sup>8</sup>

As described above, multiple government agencies have repeatedly recognized EFF as a member of the news media. Further, this request is intended only to inform the public and is not for commercial use. EFF is therefore eligible for a waiver of search, processing, and duplication for the first 100 pages.

### **Request for a Public Interest Fee Waiver**

EFF is also entitled to a waiver of all fees related to this request because disclosure of the requested information is in the public interest within the meaning of 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.10(k)(2). EFF should be granted a public interest fee waiver of all fees because disclosure of the records “would shed light on the operations or activities of the government,” “would be likely to contribute significantly to public understanding of those operations or activities,” and disclosure is not “primarily in the commercial interest of the requester. *Id.* at (k)(2)(i)-(iii).

First, the subject matter of this request—FBI cooperation with Best Buy and other electronics retailers—will shed light on how the Bureau obtains the private and personal information of citizens.

---

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.eff.org>

<sup>4</sup> A complete archive of past EFFectors is available at <https://www.eff.org/effector>.

<sup>5</sup> <https://www.eff.org/deeplinks>

<sup>6</sup> <https://www.eff.org/wp>

<sup>7</sup> <https://www.eff.org/wp/defending-privacy-us-border-guide-travelers-carrying-digital-devices>

<sup>8</sup> <https://www.eff.org/issues/know-your-rights>

Second, disclosure is likely to contribute to significant public understanding of these operations in both ways contemplated by 28 C.F.R. § 16.10(k)(2)(ii)(A)-(B). To EFF's knowledge, there has not been prior public disclosure of the FBI's relationship with Best Buy and other similar retailers. The public is thus likely to learn new things about those relationships. Moreover, disclosure will contribute to a meaningfully broad audience because, as a member of the news media, EFF plans to report on and publish the requested information.

Third, EFF does not have a primarily commercial interest in the disclosure of the requested records. EFF is a 501(c)(3) nonprofit organization, and will derive no commercial benefit from the information requested here.

Because EFF is requesting that all records be provided in their native electronic format and are seeking fee waivers, we do not anticipate that there should be any significant fees generated by this request. Should FBI choose not to waive fees for this request, EFF agrees to incur legally assessable processing fees not to exceed \$100. If you anticipate that processing fees may exceed \$100, please promptly notify EFF.

In the event that you determine that some responsive material might be exempt from disclosure under FOIA, please indicate the specific exemption(s) and/or statutory or regulatory provisions upon which the agency relies.

Thank you for your consideration of this request. If you have any questions or concerns, please do not hesitate to contact me. As the statute requires, we anticipate a response to this request within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i).

I certify that, to the best of my knowledge and belief, all information within this request is true and correct.

Sincerely,

\_\_\_\_\_/s/

David Greene  
Electronic Frontier Foundation  
(415) 436-9333 ext. 143  
davidg@eff.org



# **EXHIBIT B**



Federal Bureau of Investigation

Washington, D.C. 20535

April 18, 2017

MR. DAVID GREENE  
ELECTRONIC FRONTIER FOUNDATION  
815 EDDY STREET  
SAN FRANCISCO, CA 94109

FOIPA Request No.: 1367178-000  
Subject: Confidential Human Sources at  
Best Buy

Dear Mr. Greene:

This is in response to your Freedom of Information Act (FOIA) request.

Please be advised that it is the FBI's policy to neither confirm nor deny the existence of any records which would tend to indicate or reveal whether an individual or organization is of investigatory interest to the FBI. Acknowledging the FBI's interest invites the risk of circumvention of federal law enforcement efforts. Thus, pursuant to FOIA exemption (b) (7) (E) [5 U.S.C. §552 (b)(7)(E)], the FBI neither confirms nor denies the existence of records which would indicate whether an individual or organization is or has ever been of investigatory interest.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing [ogis@nara.gov](mailto:ogis@nara.gov). Alternatively, you may contact the FBI's FOIA Public Liaison by emailing [foipaquestions@ic.fbi.gov](mailto:foipaquestions@ic.fbi.gov). If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so that it may be easily identified.

Enclosed for your information is a copy of the FBI Fact Sheet and Explanation of Exemptions.

Sincerely,

David M. Hardy  
Section Chief,  
Record/Information  
Dissemination Section  
Records Management Division

Enclosure(s)