PPSA
PROJECT FOR PRIVACY &
SURVEILLANCE ACCOUNTABILITY

August 17, 2023

By E-mail

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

RE: Freedom of Information Act Appeal – FOIAPA Cases #1596187-000 and #NFP-151205

To Whom It May Concern:

I write on behalf of the Project for Privacy and Surveillance Accountability, Inc. ("PPSA") to appeal the FBI's two-part denial of the above-captioned FOIA request (the "Request"). In that Request, PPSA sought various records reflecting the FBI's use of administrative subpoenas. *See* Ex. A. In particular, the Request sought records that would shed light on the FBI's use of administrative subpoenas without probable cause.

The Request had six subparts, and the FBI responded separately to various of those subparts. For subparts 2 and 3 of the Request, the FBI stated that "FOIA does not require federal agencies to answer inquiries, create records, conduct research, or draw conclusions concerning queried data." Ex. B (FBI response to subparts 2 and 3). And the FBI stated that these subparts thus did not "reasonably describe[]" the requested records. *Id.* For the remaining subparts, the FBI did not even attempt to conduct a search for responsive records before closing the Request. *See* Ex. C (FBI Response to Subparts 1, 4, 5, and 6). Rather, the FBI blindly pointed PPSA to its "Search Vault," and suggested that there may be responsive records somewhere in that database. In both instances, the FBI refused to comply with its obligations under FOIA to search for and produce responsive records.

Subparts 2 and 3. In these subparts, PPSA requested records reflecting the FBI's use of administrative subpoenas with and without probable cause. *See* Ex. A at 2. In both instances, the Request did not require the FBI to do anything other than search for records reflecting the use of administrative subpoenas where those subpoenas addressed the presence or absence of probable cause. Thus, the FBI's willful refusal to search is legally erroneous. Indeed, while the FBI may wish to misread the Request to avoid the work FOIA requires of it, the D.C. Circuit confirms that the FBI is "bound to read [the Request] as drafted, not as [] agency officials ... might wish it was drafted." *Miller v. Casey*, 730 F.2d 773, 777 (D.C. Cir. 1984).

Indeed, the same argument the FBI makes here has been rejected previously. *See Charles v. Off. of Armed Forces Med. Exam'r*, 730 F. Supp. 2d 205 (D.D.C. 2010). In that case, the requester sought "autopsy reports 'commenting [on], discussing or indicating' fatal bullet wounds in a service member's torso area and/or body armor failures." *Id.* at 215. The agency refused to conduct a search, arguing that it could not "draw 'scientifically valid conclusions' regarding whether or not a given autopsy file is responsive." *Id.* The court rejected that argument, holding that the agency failed in its "duty to construe a FOIA request liberally" by attempting to draw conclusions from the records, *id.* at 216, rather than focusing on the "comments, discussions or indications," that were the subject of the plaintiff's request, *id.* at 216.

Here, just as in *Charles*, the FBI failed to construe the Request liberally, opting instead to rely on a mischaracterization of the Request to support its refusal to respond. The FBI's delinquent response finds no support in FOIA, and the Request should be returned to the FBI for processing.

Subparts 1 and 4–6. Here again, the FBI failed to comply with FOIA when it refused to conduct a search for responsive records. Rather, the FBI simply pointed PPSA to an online database that might have some responsive records. This response is legally deficient for at least two reasons: (1) the FBI failed to search for any records; and (2) the FBI failed to identify responsive records with any specificity.

While an agency "may direct a FOIA requester to materials that have been previously published or made available by the agency instead of producing them again[,]" it may not "send the FOIA requester on a 'scavenger hunt.'" *Shurtleff v. U.S. Env't Prot. Agency*, 991 F. Supp. 2d 1, 19 (D.D.C. 2013). Yet that is exactly what the FBI did here. Beyond pointing to one section of the Vault, the FBI provided no indication whether that section includes responsive records, which portion of records in that location are responsive, or any other information to allow efficient review of the records. This alone renders the response inadequate. *Pinson v. U.S. Dep't of Just.*, 245 F. Supp. 3d 225, 243 (D.D.C. 2017) (response inadequate where the "FBI never explains whether there are other responsive documents not on the vault, how those documents were chosen, or whether the vault was up-to-date at the time of [requester's] request").

Similarly, this response clearly shows that the FBI did not conduct any search for responsive records, let alone one that was "reasonably calculated to uncover all relevant documents." *Weisberg v. U.S. Dep't of Just.*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). When "the FBI point[s] [requesters] towards records freely available on its online portal instead of conducting a specific search[,]" the response is inadequate where the FBI "has done nothing more than assert, in conclusory terms, that the documents available on its vault are responsive." *Pinson*, 245 F. Supp. 3d at 243. In its response here, the "FBI never explains" whether it searched for records not on the vault, "or whether the vault was up-to-date at the time of [PPSA's] request," and thus the FBI "has not met its burden of

showing that it conducted a search reasonably calculated to uncover all responsive material[.]" *Id.*

For these reasons, this appeal should be granted, and the Request should be sent back to the FBI for immediate processing. Thank you for your prompt attention to this important matter.

Sincerely,

Gene C. Schaerr
PPSA, Inc.
General Counsel