



June 15, 2023

By E-mail

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001
Phone: (202) 616-3837
E-mail: MRUFOIA.Requests@usdoj.gov

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, for records discussing the use of Non-Disclosure Orders (“NDOs”). These orders are frequently used by federal agencies to prohibit targets of searches (*e.g.*, a telecommunication company) from informing the true underlying target (*e.g.*, a customer) that the government is searching that customer’s records. In particular, this request seeks information about the circumstances and frequency of the Department of Justice’s (“DOJ”) use of NDOs. It also seeks information about what privacy safeguards are in place, such as guidelines, policies, and training requirements.

This request is filed on behalf of the Project for Privacy and Surveillance Accountability, Inc. (“PPSA”). As an organization concerned with government surveillance overreach, PPSA is troubled by the extent to which U.S. law enforcement and intelligence agencies may be collecting Americans’ private data without their knowledge, aided by outdated precedent regarding the expectation of privacy in this data, and keeping valuable information from the public through the misuse of NDOs.

To better understand the ways in which DOJ relies on NDOs, this request is directed to any DOJ component that may have responsive records, including, at a minimum, the Executive Office for United States Attorneys, the Federal Bureau of Investigation, DOJ’s Criminal Division, the Drug Enforcement Administration, and the Bureau of Alcohol, Tobacco, Firearms and Explosives.

PPSA thus seeks the following records:¹

- (1) Records reflecting the volume of NDOs and circumstances surrounding use of NDOs, especially those related to searches under the Stored Communications Act.
- (2) Records reflecting internal policies or guidance regarding the use of NDOs, including the process for seeking NDOs and the internal approval process required before seeking an NDO.
- (3) All training documents discussing NDOs.
- (4) Records discussing any privacy safeguards and legal compliance requirements regarding NDOs.

Definitions. For purposes of this request, the term “record” shall mean: (1) typed material of any kind, including but not limited to all correspondence, memoranda, notes, messages, letters, facsimiles, papers, forms, telephone messages, schedules, calendars, minutes, books, reports, lists, ledgers, invoices, receipts, computer printouts, contracts, agreements, and transcripts; (2) any electronically stored material of any kind, including all emails and also including material stored on any personal electronic devices; (3) any audio or visual recordings of any kind; and (4) any materials using other means of preserving information.

Additionally, the term NDO shall include the acronym “NDO,” the phrase “Non-Disclosure Order,” any foreseeable permutations thereof,² and well as common synonyms for NDOs, such as “gag orders” and “secrecy orders.”

Exemptions. To the extent DOJ concludes that any record, or portion thereof, is exempt from release, DOJ shall redact the exempt information while still producing any other portions of those pages. For instance, such redactions should foreclose any need to issue a *Glomar* response, as anonymized and redacted production would neither (1) reveal intelligence sources or methods, nor (2) disclose any agency interest (or lack thereof) in any particular individual. Additionally, DOJ should provide PPSA a *Vaughn* Index explaining the basis for any such withholdings.

Fee Waiver. PPSA requests a waiver of both search fees and duplication fees under 5 U.S.C. §§ 552(a)(4)(A)(i), 552(a)(4)(A)(ii)(II), and 552(a)(4)(A)(iii). First, PPSA

¹ For all requested records, PPSA limits its request to documents created from January 1, 2008 to the date of the search.

² For instance, “Non-Disclosure Order” or “Non Disclosure Order.”

is entitled to the waiver of such fees because it is a member of the news media as that term is defined in FOIA and construed by the courts, disclosing information that is in the public interest and educating the public about government operations. *See Nat'l Sec. Archive v. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989). As the D.C. Circuit has said: “[I]f an entity ... issues substantive press releases concerning the documents it uncovers, or even if it simply provides editorial comments on those documents in interviews with newspapers, such a gloss on the underlying materials could satisfy this element of the definition.” *Cause of Action v. FTC*, 799 F.3d 1108, 1122 (D.C. Cir. 2015). PPSA does just that—it obtains information on the activities of the federal government, uses editorial skill to translate this information into discrete informational products and policy briefs, and disseminates that information to the public to educate the citizenry of the United States. PPSA intends to do so with the information received through this request.

Second, we request a full fee waiver for this request as “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The subject of the requested records concerns government operations, including the collection of Americans’ data that the majority of them would consider private. The public deserves to know how the U.S. Government ensures their civil liberties and constitutionally protected rights are safeguarded. Few matters are of such substantial public interest. *See id.* § 552(a)(4)(A)(iii). This concern is particularly important here, because NDOs can be used to intentionally keep information away from the public. Accordingly, we request a full fee waiver for this request.

Please contact me at foia@schaerr-jaffe.com if you have any other questions about this request.

Thank you in advance for your speedy attention and assistance.

Sincerely,

Gene C. Schaerr
PPSA, Inc.
General Counsel