

December 11, 2019

Bobak Talebian  
Acting Director  
Office of Information Policy  
U.S. Department of Justice

Re: Freedom of Information Act Appeal, Case Number 19-00798-F

*Via electronic communication*

Dear Mr. Talebian:

This letter serves as an appeal under the Freedom of Information Act for case number 19-00798-F.

In a letter dated September 13, 2019, part 2 of our request was denied as an “unwarranted invasion of personal privacy” pursuant to 5 U.S.C. § 552(b)(7)(C). Part 2 of our request includes documents and data related to the following:

- Instances in which a dispenser voluntarily surrendered a registration to dispense controlled substances under 21 U.S.C § 823.
- The names of dispensers who reapplied for registrations following a revocation or voluntary surrender, and the date of each reapplication.
- The names of dispensers who were granted a new registration under 21 U.S.C. § 823 following a revocation or voluntary surrender, and the date that each new registration was granted by DEA.

The information that has been withheld by DEA must be disclosed under FOIA because (1) the privacy interest associated with the information is de minimis; (2) the public interest in disclosure of the requested information outweighs any privacy interest associated with it; and (3) any protected information may be segregated in the record.

Therefore, we ask DEA to reconsider our request or, alternatively, consider our request as amended below.

#### I. Exemption 7(C)

Under 5 U.S.C. § 552(b)(7)(C) (“Exemption 7(C)”), information is only exempt from disclosure if it is compiled for law enforcement purposes and its disclosure would constitute an unwarranted invasion of privacy.<sup>1</sup> Disclosure under Exemption 7(C) does not constitute an unwarranted invasion of privacy if (1) the privacy interest implicated is merely de minimis, or (2) the public interest in the disclosure of the requested information outweighs the privacy interest implicated.<sup>2</sup>

---

<sup>1</sup> 5 U.S.C. § 552(b)(7).

<sup>2</sup> *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 231 (D.D.C. 2012).

A. Privacy interests are de minimis

Disclosure of the requested information is required under FOIA because the privacy interests are de minimis.<sup>3</sup> We are not requesting information about specific law enforcement agents, witnesses, or others who may be involved in an investigation of a particular dispenser. Rather, we are seeking information on the dispensers who voluntarily surrendered their registrations or had their registrations revoked and were subsequently granted a new registration under 21 U.S.C. § 823, and the date that each new registration was granted by DEA.

Information about registered dispensers, including the fact that they may be subject to an investigation by DEA, is often known outside of the agency. First, DEA is obligated to report to the National Practitioner Data Bank registration revocations, as well as voluntary surrenders made while the registrant is under investigation, or in return for not conducting an investigation.<sup>4</sup> Several types of entities are eligible to query this database, including but not limited to hospitals and certain other health care entities, certain professional societies, state licensing boards, and health plans.<sup>5</sup> Additionally, a 1997 report from the Health and Human Services Office of Inspector General entitled *Drug Enforcement Administration Reporting to the National Practitioner Data Bank*, the Inspector General concluded that “[c]learly, congressional intent seems to warrant DEA reporting of ‘voluntary withdrawals’” to the Data Bank.<sup>6</sup> As such, given that Congress intended such information to be disclosed by DEA, it certainly considered any privacy interest at issue to be de minimis.

Second, dispensers generally must report to their state boards of pharmacy any revocations or surrenders of their DEA registrations. Reporting could trigger disciplinary action by a state medical or pharmacy board. The details of such disciplinary actions, including the practitioner’s name and license number and nature of the action, typically are made publicly available by such licensing boards.<sup>7</sup>

Third, journalists and news outlets commonly report on DEA investigations and raids resulting in voluntary surrenders and revocations, whereby they report the identity of the subject dispenser.<sup>8</sup>

Finally, it is notable that DEA has disclosed nearly the exact type of information to another FOIA requestor that CUSP requests here. Specifically, DEA reached an agreement with Public Citizen several years ago whereby DEA was required to provide the organization with

---

<sup>3</sup> 5 U.S.C. § 552(b)(7)(C); *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Justice*, 840 F. Supp. 2d 226, 231 (D.D.C. 2012).

<sup>4</sup> <https://www.npdb.hrsa.gov/guidebook/EFederalLicensureandCertificationActions.jsp>

<sup>5</sup> <https://www.npdb.hrsa.gov/guidebook/BWhatIsAnEligibleEntity.jsp>

<sup>6</sup> <https://oig.hhs.gov/oei/reports/oei-12-96-00160.pdf>

<sup>7</sup> See, e.g., <https://www.dhp.virginia.gov/enforcement/cdecision/boardresults.asp?board=1>

<sup>8</sup> <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-joshi-doctor-hearing-st-0404-story.html>;

<https://allongeorgia.com/georgia-state-news/jury-finds-podiatrist-guilty-of-operating-pill-mill/>;

<https://www.lubbockonline.com/news/20190529/lubbock-doctor-placed-on-probation-for-fraudulently-obtaining-painkillers>;

data on voluntary registration surrenders.<sup>9</sup> Given that DEA has disclosed such information before, disclosing it again would not be considered an unwarranted invasion of privacy.

Therefore, in light of the foregoing, any privacy interests related to CUSP's request are de minimis, and DEA must disclose the requested records.

B. Any privacy interest is outweighed by the public interest

Disclosure of the information requested is required under FOIA because the public interest outweighs the diminished privacy interest. Exemption 7(C) “does not prohibit all disclosures which invade personal privacy, but only disclosures which entail unwarranted invasion of personal privacy.”<sup>10</sup> An “unwarranted invasion of personal privacy” under Exemption 7(C) requires a balancing of the privacy interest against the public interest in disclosure.<sup>11</sup> The public interest that is weighed in this balancing test is “the extent to which disclosure advances ‘the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.’”<sup>12</sup> As the Supreme Court pointed out early in FOIA's history, and constantly reiterates, “[o]fficial information that sheds light on the agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose.”<sup>13</sup>

Our nation is in the midst of drug overdose and suicide epidemics. The impacts of these public health crises touch every corner of the country, including patients, their families, caregivers, communities, insurers, and the entire health care system. Patients with legitimate medical needs who may require controlled medications to treat their conditions (*e.g.*, individuals with opioid use disorder) need access to appropriate treatment resources, including registered prescribers. Yet, some patients currently cannot obtain such care, especially in rural areas.

The Department of Justice and DEA have aggressively targeted addiction treatment providers and other controlled medication prescribers. As such, once a practitioner surrenders his or her license, patients are put in a difficult position to find a different provider, which can often be an arduous and lengthy process leaving vulnerable individuals without access to medication and at risk of relapse, disease progression, or death. Therefore, there is a need for transparency from DEA to ensure that these surrenders are conducted in an appropriate manner and do not unduly impede access to addiction treatment providers and other controlled medication prescribers. As such, there is a strong public interest in the disclosure of information related to voluntary surrenders, registration revocations, and registration reapplications that outweighs any privacy interest at issue in our request.

---

<sup>9</sup> <https://www.citizen.org/article/letter-concerning-the-deas-failure-to-provide-information-to-the-national-practitioner-data-bank/>

<sup>10</sup> *Lame v. United States Dept. of Justice* (1981, CA3) 654 F.2d 917.

<sup>11</sup> *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 234 (D.D.C. 2012).

<sup>12</sup> *Department of the Air Force v. Rose*, 425 U.S. 352, 372 (1976). *See also*, *Lesar v. Department of Justice*, 636 F.2d 472, 486 & n.80 (D.C. Cir. 1980).

<sup>13</sup> *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 234 (D.D.C. 2012); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989).

## II. FOIA requires the disclosure of “segregable portion” of the record

The letter denying our request for information states that the request is “categorically” exempt from disclosure under exemption 7(C). Yet, FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt under this subsection.”<sup>14</sup> Therefore, even if DEA concludes that part of a record contains sensitive information, DEA may redact such information and disclose the remainder of the record. Records that may be provided pursuant to our request likely can be segregated easily (e.g., DEA Form 104, reapplications, decisions on reapplication). Therefore, DEA may provide records related to voluntary surrenders and registration reapplications and reissuance with sensitive information redacted (e.g., names of dispensers).

## III. Conclusion

For the foregoing reasons, we appeal the denial of our request and ask that DEA provide the following information, consistent with our original request:

- Any documents, including but not limited to DEA Form 104, indicating that a dispenser has agreed to voluntarily surrender his or her registration.
- For dispensers who have voluntarily surrendered a registration, any application for a new registration, as well as any document indicating approval or denial by DEA of such application, including dates.
- For dispensers who have had their registration revoked, any application for a new registration, as well as any document indicating approval or denial by DEA of such application, including dates.
- Any document that shows aggregate data on (1) voluntary surrenders or registration revocations, or both; (2) reapplications after such losses of registrations; or (3) the status or outcome of such reapplications.

Sincerely,



Michael C. Barnes  
Managing Partner  
DCBA Law & Policy  
3000 K Street, NW, Suite 270  
Washington, DC 20007  
United States  
(202) 644-8525  
mshelton@dcbalaw.com

---

<sup>14</sup> 5 U.S.C. § 552(b).