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July 22, 2022

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

Re: Freedom of Information Act Appeal, Case Number 20-00008-AP

Via electronic communication

Dear Mr. Talebian:

This letter serves as an appeal under the Freedom of Information Act for case number 20-00008-AP.

In a letter dated September 13, 2019 ("First Decision Letter"), part 2 of our initial request was denied as an "unwarranted invasion of personal privacy" pursuant to 5 U.S.C. § 552(b)(7)(C) ("Exemption 7(C)"). DEA did not cite any other exemption at that time. Part 2 of our request included 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.

We appealed the decision to deny our initial request ("First Appeal"). In our First Appeal, we clarified our request by providing examples of specific types of information being requested. Consistent with our original request, this information included:

- 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.

In a letter dated April 15, 2020 ("Remand Letter"), the Acting Chief of Administrative Appeals Staff notified us that his office was remanding our request to DEA for a search for responsive records. In other words, the Acting Chief agreed that Exemption 7(C) should not be used to deny our request.

Then, in a letter dated April 26, 2022 ("Second Decision Letter")—more than 30 months after our initial request—DEA's FOIA and Privacy Act Unit notified us that it identified a spreadsheet responsive to our request; however, it again decided to withhold the spreadsheet in full based on Exemption 7(C), as well as 5 U.S.C. §§ 522(b)(6) ("Exemption 6") and (b)(7)(E) ("Exemption 7(E)"). DEA did not provide any details describing the nature of the information in the spreadsheet.

Further, DEA did not explain whether it searched for or located any other records that we requested. It simply stated that it will not produce DEA-104 forms because such forms are held at individual field offices in their investigative files. As such, DEA's position is that the request for DEA-104 forms is overly broad and burdensome for its field offices.

However, for the reasons set forth in more detail herein, the spreadsheet withheld by DEA must be disclosed under FOIA. In short:

- Application of neither Exemption 7(C) nor Exemption 6 is justified because (1) the privacy interest associated with the information is de minimis, and (2) the public interest in disclosure of the requested information outweighs any privacy interest associated with it.
- Application of Exemption 7(E) is not justified because disclosure would not interfere with enforcement proceedings.
- Any protected information may be segregated in the record.

Additionally, our request for DEA-104 forms is not overly broad or burdensome, and DEA has not provided any evidence that it is.

Finally, the information withheld should be disclosed because failure to do so would be inconsistent with the Attorney General's March 2022 updated FOIA guidelines.

Therefore, we ask DEA to reconsider its decision and disclose the spreadsheet, DEA-104 forms, and any other records responsive to our request.

To facilitate disclosure, we are willing to accept an 18-month shorter, three-year date range for the records. Specifically, we would accept records covering the date range of 6/30/2016 to 6/30/2019.

Given that DEA has not provided any specificity about the information in the spreadsheet, we assume that the spreadsheet includes aggregate data on one or more types of information that we have requested. If the spreadsheet includes data covering *all* of the following elements in full, and DEA discloses the spreadsheet, then our request for information will be satisfied:

1. Registration surrenders and revocations, including the date of each surrender and revocation;
2. Reapplications after such losses of registrations, including dates; and
3. The status or outcome of such reapplications, including dates.

If the spreadsheet does not fully include all of the elements described immediately above, then our request remains the same as stated in our First Appeal, other than the 18-month narrowing set forth herein.

I. Exemption 7(C)

In the First Decision Letter, DEA used Exemption 7(C) to deny our initial request for information. As demonstrated by the Remand Letter, we overcame that assertion after our First Appeal.[1] However, now DEA once again claims that Exemption 7(C) applies here to the responsive records it located. As FOIA makes clear, the "burden is on the agency to sustain" a decision to withhold records under an exemption; further, agencies may not withhold information based merely on speculative or abstract fears or fears of embarrassment.[2] However, in the nearly three years since our initial request, at no point has DEA provided any rationale or other information to support its assertion that Exemption 7(C) applies. As such, our position on Exemption 7(C) from our First Appeal is largely restated below.

Under 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.[3] 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.[4]

A. Privacy interests are de minimis

Disclosure of the spreadsheet is required under FOIA because the privacy interests are de minimis.[5] 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

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[1] *See* Remand Letter.
[2] 5 U.S.C. § 552(a)(4)(B); Memorandum from Merrick Garland, Att'y Gen. to Heads of Executive Departments and Agencies, Freedom of Information Act Guidelines, (Mar, 15, 2022) https://www.justice.gov/ag/page/file/1483516/download.
[3] 5 U.S.C. § 552(b)(7).
[4] *Citizens for Resp. & Ethics in Wash. v. U.S. Dep't of Just.*, 840 F. Supp. 2d 226, 231 (D.D.C. 2012).
[5] *Id.;* 5 U.S.C. § 552(b)(7)(C).

made while the registrant is under investigation, or in return for not conducting an investigation.[6] 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.[7] 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.[8] 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.[9]

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.[10]

Finally, it is notable that DEA has disclosed nearly the exact type of information to another FOIA requestor that we request here. Specifically, DEA reached an agreement with Public Citizen several years ago whereby DEA was required to provide the organization with data on voluntary registration surrenders.[11] 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 our request are de minimis, and DEA cannot use Exemption 7(C) to avoid disclosing the requested records, including the spreadsheet.

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[6] National Practitioner Data Bank, *Reporting Federal Licensure and Certification Actions,* The NPDB Guidebook, https://www.npdb hrsa.gov/guidebook/EFederalLicensureandCertificationActions.jsp (last visited July 21, 2022).
[7] National Practitioner Data Bank, *What is an Eligible Entity,* The NPDB Guidebook, https://www.npdb hrsa.gov/guidebook/BWhatIsAnEligibleEntity.jsp (last visited July 21, 2022).
[8] June Gibbs Brown, *Drug Enforcement Administration Reporting to the National Practitioner Data Bank,* Dept. Of Health and Human Services Office of the Inspector General, (March 1997) https://oig hhs.gov/oei/reports/oei-12-96-00160.pdf.
[9] *See, e.g.*, Virginia Dept. Of Health Professions, *Medicine Case Decisions in the Last 90 Days (4/22/2022-*7/21/2022) https://www.dhp.virginia.gov/enforcement/cdecision/boardresults.asp?board=1 (last accessed 7/21/22).
[10] Becky Jacobs, *Defense presents praising letters for Munster doctor who is accused of 'recklessly' prescribing opioids,* Chicago Tribune (Apr. 3, 2019 at 5:33pm), https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-joshi-doctor-hearing-st-0404-story html ; AllOnGeorgia, *Jury finds podiatrist guilty of operating pill mill, (June 16, 2019)* https://allongeorgia.com/georgia-state-news/jury-finds-podiatrist-guilty-of-operating-pill-mill /; Gabrielle Monte, *Lubbock doctor placed on probation for fraudulently obtaining painkillers,* Lubbock Avalanche Journal (May 29, 2019 at 8:33 pm) https://www.lubbockonline.com/news/20190529/lubbock-doctor-placed-on-probation-for-fraudulently-obtaining-painkillers.
[11] Sidney M. Wolfe, *Letter Concerning the DEA's Failure to Provide Information to the National Practitioner Data Bank,* Public Citizen (June 6, 2001) https://www.citizen.org/article/letter-concerning-the-deas-failure-to-provide-information-to-the-national-practitioner-data-bank/.

B. Any privacy interest is outweighed by the public interest

Disclosure of the spreadsheet is required under FOIA because the public interest outweighs any privacy interest discussed above. Exemption 7(C) "does not prohibit all disclosures which invade personal privacy, but only disclosures which entail unwarranted invasion of personal privacy."[12] An "unwarranted invasion of personal privacy" under Exemption 7(C) requires a balancing of the privacy interest against the public interest in disclosure.[13] 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.'"[14] As the Supreme Court pointed out early in FOIA's history, and often reiterates, "[o]fficial information that sheds light on the agency's performance of its statutory duties falls squarely within [FOIA's] statutory purpose."[15]

Our nation is in the midst of drug poisoning and suicide epidemics. The drug poisoning crisis, in particular, has only grown worse since the COVID pandemic began. More than 107,000 overdose deaths were reported between December 2020 and December 2021, a new record in the United States.[16] 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 targeted addiction treatment providers and other controlled medication prescribers for investigation and prosecution. 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 illicit substance use, 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 and reinstatements that outweighs any privacy interest at issue in our request.

Finally, to the extent that privacy interests are deemed a basis for denying access to the information we have requested, we ask that such private information be redacted so that the information may be disclosed.

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[12] *Lame v. U.S. Dep't of Just*., 654 F.2d 917, 922 (3d Cir. 1981).
[13] *Citizens*, 840 F. Supp. 2d at 234.
[14] *Dep't of the Air Force v. Rose*, 425 U.S. 352, 372 (1976); *See also*, *Lesar v. Dep't of Just.*, 636 F.2d 472, 486 & n.80 (D.C. Cir. 1980).
[15] *Citizens*, 840 F. Supp. 2d at 234; *U.S. Dep't of Just. v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 773 (1989).
[16] American Medical Association, *Issue brief: Nation's drug-related overdose and death epidemic continues to worsen*, Advocacy Resource Center (May 12, 2022), https://www.ama-assn.org/system/files/issue-brief-increases-in-opioid-related-overdose.pdf.

II. Exemption 6

The purpose of Exemption 6 is to protect individuals from injury or embarrassment resulting from the unnecessary disclosure of private information.[17] For information to be withheld pursuant to Exemption 6, the information must: (1) be contained in "personnel and medical files and similar files," and (2) the individual's privacy interest must outweigh the public interest such that disclosure would constitute an unwarranted invasion of personal privacy.[18]

A. It is unclear what types of information DEA has construed as personnel and medical and similar files

As an initial matter, we have strong doubts that the spreadsheet maintained by DEA contains personnel or medical files, as those terms are commonly used.[19] However, given that federal courts have broadly construed the term "similar files" with respect to information about particular individuals,[20] we can only assume DEA is referring to names or other personally identifiable information about the subject dispensers or about specific law enforcement officers.

As explained in Section I, 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 related to 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.

B. Any privacy interest is de minimis and outweighed by the public interest

If information is deemed to be personnel, medical, or similar files, then an Exemption 6 inquiry shifts to whether the disclosure of the information at issue would constitute an invasion of personal privacy. When an agency has identified an individual's privacy interest, that privacy interest should be weighed against the extent to which the disclosure would "contribute significantly to public understanding of the operations or activities of the government."[21] While

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[17] *U. S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 595-599 (1982).

[18] *Wood v. F.B.I.*, 432 F.3d 78, 86 (2d Cir. 2005).

[19] Merriam-Webster defines "personnel" to mean "a body of persons usually employed (as in a factory or organization)."[19] As such, personnel files typically consist of information about a particular employee that are created *by or for an employer*, such as performance reports, job applications, training records, and disciplinary actions. Further, given the privacy concerns underlying Exemption 6, protected medical files are those that would pertain to a specific patient.

[20] *See U. S. Dep't of State v. Washington Post Co.*, 456 U.S. at 599-603 (citing H.R. Rep. No. 89-1497, at 11 (1966); S. Rep. No. 89-813, at 9 (1965); S. Rep. No. 88-1219, at 14 (1964)); *Johnston v. Wray*, No. 20-00520, 2022 U.S. Dist. LEXIS 94346 (D. Ariz. May 24, 2022); *Citizens,* 840 F. Supp. 2d at 230.

[21] *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 974 (9th Cir. 2009) ("Once the government has identified a cognizable privacy interest, 'the *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to.'") (quoting *Bibles v. Oregon Nat. Desert Ass'n,* 519 U.S. 355, 355-56 (1997). *Nat'l Transp. Safety Bd.*, 569 F.3d 964, 974 (9th Cir. 2009) ("Once the government has identified a cognizable privacy interest, 'the *only* relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise

this analysis is similar to an Exemption 7(C) evaluation, an agency's "burden in establishing the requisite invasion of privacy to support an Exemption 6 claim is heavier than the standard applicable to Exemption 7(C)."[22] Specifically, "[a]n invasion of more than a de minimis privacy interest…must be shown to be 'clearly unwarranted' in order to prevail over the public interest in disclosure."[23]

As explained in Section I above, dispensers' diminished privacy interests are both de minimis and are outweighed by the public interest. We incorporate that analysis here. Further, as demonstrated by the Remand Letter, DEA could not show that Exemption 7(C) applied to our initial request. As such, given that the burden of establishing Exemption 6 is heavier than that of Exemption 7(C), DEA's claim that Exemption 6 now applies cannot stand.

Once again, to the extent that privacy interests are deemed a basis for denying access to the information we have requested, we ask that such private information be redacted so that the information may be disclosed.

III. Exemption 7(E)

Under Exemption 7(E), an agency may withhold records if their release "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."[24] To invoke the exemption, agencies must "demonstrate logically how the release of the requested information might create a risk of circumvention of the law."[25]

In *Kowal v. United States Department of Justice*, the DEA invoked Exemption 7(E) to withhold "material that would reveal sensitive, non-public references to the DEA's Agents' Manual" and "certain information that would reveal sensitive, non-public references to the DEA's Agents' Manual."[26] Given the brevity and vagueness of these statements, the court found that DEA had not provided sufficient detail for the court to determine whether such records were properly withheld under 7(E).[27] Similarly, the DEA has provided no information in the Second Decision Letter to support withholding the spreadsheet pursuant to Exemption 7(E).

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let citizens know what their government is up to.'") (quoting *Bibles v. Oregon Nat. Desert Ass'n,* 519 U.S. 355, 355-56 (1997)).

[22] *Ray*, 502 U.S. at 172.

[23] *Fed. Lab. Rels. Auth. v U.S. Dept. of Veterans Affs.*, 958 F.2d 503, 510, (1992); *See also Lepelletier v. F.D.I.C.*, 164 F.3d 37, 48, (D.C. Cir. 1999) (Holding that the F.D.I.C. wrongly invoked Exemption 6 when the agency denied a request to release the names of individuals with unclaimed deposits. While the court recognized that release of these names "constitute an unwarranted invasion of personal privacy", the court ultimately held that privacy interests must be balanced against the interests an individual may have in the release of the information. The Court opined, "it is overly paternalistic to insist upon protecting an individual's privacy interest when there is good reason to believe that he or she would rather have both the publicity and the money than have neither.").

[24] 5 U.S.C. § 552(b)(7)(E).

[25] *Kowal v. United States Dep't of Just.*, No. CV 18-938 (TJK), 2021 WL 3363445, at *6 (D.D.C. Aug. 3, 2021).

[26] *Id.*

[27] *Id.*

Additionally, we are not seeking information regarding law enforcement techniques, procedures, or guidelines. In fact, we are not requesting law enforcement information at all. We are requesting administrative information documenting surrenders, revocations, reapplications, and reinstatements of DEA administrative registrations. At the core of our request, we are seeking volume and timeline information—we have asked for information related to the number of registration surrenders and revocations, how many individuals reapplied to have their registrations reinstated, how many of those applications were approved or denied, and dates related to those events. Outside of the spreadsheet located by DEA, we have provided several examples of documents that would allow us to determine this information (e.g., voluntary surrender forms and registration applications by dispensers who voluntarily surrendered their registrations). To the best of our knowledge, these types of documents do not directly or indirectly contain law enforcement techniques, procedures, or guidelines.

Further, it is difficult to understand how any of the information we have requested could reasonably be expected to risk circumvention of the law. If anything, the opposite is true. With respect to dispensers, DEA is concerned with certain types of activities, such as failing to prescribe controlled medications solely for a legitimate medical purpose in the usual course of professional practice; engaging in unlawful distribution or diversion of controlled substances; and failing to maintain required controlled substances records. During an administrative inspection or criminal investigation, DEA may ask dispensers alleged to have engaged in these types of activities to voluntarily surrender their registrations. Anecdotally, we have learned that dispensers whose registrations are surrendered or revoked are very unlikely to have their registrations reinstated in the future. To the extent that the requested information would support this notion, dispensers would be *discouraged* from circumventing the law—or acting in a way that could even remotely be construed as unlawful—knowing that doing so would create a strong risk of permanently losing their professional livelihoods.

Therefore, in light of the foregoing, DEA cannot use Exemption 7(E) to avoid disclosing the requested records, including the spreadsheet.

If the information we have requested would disclose techniques or procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions and such disclosure could reasonably be expected to risk circumvention of the law, then we request that such disclosures be redacted so that we may receive the remainder of the record.

IV. FOIA requires the disclosure of "segregable portion" of the record

The First Decision Letter denying our initial request for information stated that our request was "categorically" exempt from disclosure under exemption 7(C). Similarly, as stated in the Second Decision Letter, the DEA has decided to withhold the responsive spreadsheet in full pursuant to the three exemptions discussed herein. 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."[28] Therefore, even if DEA concludes that part of a record contains sensitive information, DEA shall redact such information and disclose the remainder of the

[28] 5 U.S.C. § 552(b).

record. The responsive spreadsheet and certain other records requested (*e.g.*, DEA Form 104, reapplications, decisions on reapplication) can reasonably be segregated by, for example, hiding a column in a spreadsheet or redacting a line on a form. Therefore, if the bases of DEA's denials are upheld, DEA shall nevertheless provide the spreadsheet and other records related to registration surrenders, revocations, reapplications, and reissuances with sensitive information redacted (e.g., names of law enforcement officers and dispensers, law enforcement techniques).

V. Form DEA-104

Requesting DEA-104 forms across all field offices during the requested date range is not overly broad or burdensome. First, in *Prop. of the People, Inc. vs. Department of Justice,* the District Court for the District of Columbia stated, "The Court certainly cannot conclude, on the record before it, that it would be unduly burdensome for the [defendant agency] to do more than it already has … Defendants have not produced any explanation, much less a detailed one, of the time and expense of the proposed searches … Instead, they rely solely on conclusory statements … that full-text searches and searches of specific offices would be highly burdensome to the [agency]."[29] In the Second Decision Letter, DEA similarly has not provided sufficient information to support its claim that the search would be overly broad or burdensome.

Second, DEA states in the Second Decision Letter that FOIA does not require an agency "to research a topic, create records or engage in a far reaching search for every record system to satisfy a FOIA request." However, DEA is not required to research a topic or create records—we have asked for a specific form used by DEA. DEA also is not required to "engage in a far reaching search of every record system to satisfy" our request. Rather, DEA knows where the forms are stored, and the requested date range is limited to a reasonable period. Further, we have offered to accept fewer records by narrowing the date range by 18 months. As such, the request for DEA-104 forms is not overly broad or burdensome.

VI. Office of the Attorney General's Updated Freedom of Information Act Guidelines

On March 15, 2022, the Attorney General issued a memorandum to executive agencies regarding FOIA guidelines. The DEA's refusal to disclose the information requested, as well as its handling of our request, are wholly inconsistent with the guidelines.

The guidelines are intended to "update and strengthen the federal government's commitment to the fair and effective administration of FOIA," establish a presumption of openness, encourage proactive disclosures, remove barriers to access and reduce FOIA request backlogs, and ensure fair and effective FOIA administration.[30]

Of note, the guidelines state "Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail."[31]

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[29] *Prop. of the People, Inc. v. U.S. Dept. of Just*., 530 F. Supp. 3d 57, 64 (D.D.C. 2021).
[30] Memorandum from Merrick Garland, Att'y Gen. to Heads of Executive Departments and Agencies, *Freedom of Information Act Guidelines*, (Mar, 15, 2022) https://www.justice.gov/ag/page/file/1483516/download.
[31] *Id.*

For the reasons set forth in this appeal, DEA does not have a clear and strong case for asserting the exemptions it claims. At most, this is a case of doubt about whether any of the claimed exemptions apply. The only foreseeable harm is that DEA's actions with respect to registration reinstatement may be viewed unfavorably by some. But its actions would be viewed favorably by others. And the guidelines make clear that agencies may not "withhold information based merely on speculative or abstract fears or fears of embarrassment." In this case, openness should prevail.

The guidelines also reiterate that FOIA requires agencies to proactively disclose certain categories of records, including previously released records that have been requested three or more times or that "have become or are likely to become the subject of subsequent requests."[32] To our knowledge, this is not the first time DEA has fielded a request for records of the type we seek, and it has disclosed records on voluntary surrenders at least once. Given DEA's continuing enforcement actions against controlled medication prescribers, it is reasonable to expect that these records will be the subject of future requests. At this point, therefore, DEA is already required by statute to publicly disclose records responsive to our request, and the guidelines encourage DEA to proactively disclose them.

Further, the guidelines state that "Timely disclosure of records is also essential to the core purpose of FOIA…Each agency should actively work with requesters to remove barriers to access and to help requesters understand the FOIA process and the nature and scope of the records the agency maintains. Agencies should also ensure that they promptly communicate with requesters about their FOIA requests." This is consistent with the statute, which requires an agency to respond to a FOIA request within 20 business days, unless there are "unusual circumstances."[33] Yet, it has been nearly three years since we first submitted our request for records. While we acknowledge that the early stages of the pandemic made communication more difficult, we have had few responses from DEA outside of the First Decision Letter, Remand Letter, and Second Decision Letter, despite our attempts to contact DEA by phone and email for more information on this matter. Most of the responses that we have received have not been prompt. Moreover, the information we have received has not helped us "understand…the nature and scope of the records the agency maintains."

Finally, the guidelines conclude with the following statement: "Transparency in government operations is a priority of this Administration and this Department. We stand ready to…make real the Freedom of Information Act's promise of a government that is open and accountable to the American people." We urge DEA to heed these words, reasonably disclose the spreadsheet and other information responsive to our request, and finally resolve this matter.

VII. Conclusion

For the foregoing reasons, we appeal DEA's refusal to disclose the spreadsheet responsive to our request, DEA-104 forms, and related documents. We ask that DEA disclose the information after making any redactions required by law.

[32] *See* 5 U.S.C. § 552(a)(2)(D)(ii).
[33] 5 U.S.C. § 552(a)(6)(B).

Given that DEA has not provided any specificity about the information in the spreadsheet, we assume that the spreadsheet includes aggregate data on one or more types of information that we have requested. If the spreadsheet includes data covering *all* of the following elements in full, and DEA discloses the spreadsheet, then our request for information will be satisfied:

1. Registration surrenders and revocations, including the date of each surrender and revocation;
2. Reapplications after such losses of registrations, including dates; and
3. The status or outcome of such reapplications, including dates.

However, if the spreadsheet does not include all of the elements described immediately above, then our request remains the same as stated in our First Appeal, other than the 18-month narrowing of our request set forth above.

Sincerely,

Michael C. Barnes
Managing Attorney

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