



U.S. Department of Justice
Federal Bureau of Investigation

Office of Congressional Affairs

Office of the Assistant Director

935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

May 10, 2023

The Honorable James Comer
Chairman
Committee on Oversight and Accountability
U.S. House of Representatives
2157 Rayburn House Building
Washington, DC 20515

Dear Chairman Comer:

This letter responds to your subpoena, authorized on May 3, 2023, demanding the production of documents within one week.¹ As this was your first communication with the FBI seeking this information, please know that the FBI is committed to beginning the constitutionally mandated accommodation process. The FBI is committed to working to provide the Committee information necessary for your legitimate oversight interests, while also protecting executive branch confidentiality interests and law enforcement responsibilities.² The FBI appreciates this opportunity to inform you of our confidentiality interests so that we can “seek optimal accommodation through a realistic evaluation of” each other’s needs and “avoid the polarization of disputes.”³ We are committed to working together through this process.

¹ See Letter from Hon. Charles Grassley and Hon. James Comer to Attorney General Merrick Garland and FBI Director Christopher Wray (May 3, 2023), available at <https://oversight.house.gov/release/grassley-comer-demand-fbi-record-alleging-criminal-scheme-involving-then-vp-biden/> (enclosing subpoena from Hon. James Comer to FBI Director Christopher Wray (May 3, 2023)).

² Although your recent correspondence and subpoena include limited reference to specific investigative topics or bases for why the requested material is necessary to inform them, contemporaneous public materials cite prior letters and public releases that suggest a significant amount of information is already available. See Hon. Charles Grassley and Hon. James Comer, Joint Press Release Regarding Letter and Subpoena (May 3, 2023) (publishing May 3, 2023, letter and subpoena) (citing Letter from Hon. Charles Grassley and Hon. Ron Johnson to U.S. Attorney David Weiss (Oct. 26, 2022), and Hon. Ron Johnson and Hon. Charles Grassley, Joint Press Release Regarding Report of the Homeland Security and Government Affairs and Senate Finance Committees (Sept. 23, 2020)). See also *Senate Select Comm. on Presidential Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (discussing whether “immediate oversight need” was “merely cumulative” of information already obtained).

³ *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). See also Letter from Carlos Uriarte, Assistant Attorney General, Office of Legislative Affairs, Department of Justice to Hon. Jim Jordan, Chairman, House Committee on the Judiciary (Jan. 20, 2023).

Confidential Human Source Reporting

Your letters and accompanying subpoena seek “an unclassified FD-1023 form” documenting certain allegations. By way of background, sensitive law enforcement materials, like FD-1023 Confidential Human Source Reporting forms (FD-1023) in which you have expressed interest, are critical to FBI’s faithful execution of federal law and protection of U.S. national security. An FD-1023 is one of many forms the FBI uses to collect and catalog information for its law enforcement and national security work. This form is used by FBI agents to record unverified reporting from a confidential human source. Reporting by confidential human sources is one important form of highly sensitive law enforcement information upon which the FBI relies to develop leads, assess the credibility of potential evidence and sources, build investigations, and take action to enforce the criminal law or protect national security. Confidential human sources are therefore critical to the work of FBI as well as other members of the U.S. intelligence and law enforcement communities.⁴ FBI’s work with confidential human sources and the handling of information they provide is governed by detailed policies and procedures, including multiple forms of existing oversight.⁵

Protecting Confidential Human Sources and Information

As is clear from the name itself, confidentiality is definitional to the FBI’s Confidential Human Source program.⁶ Confidential human sources often provide information to the FBI at great risk to themselves and their loved ones. The information they provide also can create significant risks to others who may be referenced in their reporting. Protecting the identities and information provided by confidential human sources from unnecessary disclosure or undue influence is therefore critical not only because of safety concerns but also to avoid chilling their candor or willingness to continue reporting to the FBI.⁷

Moreover, some of the most valuable confidential human sources maintain this protected relationship with FBI for years or even decades, and it can be hard to predict when a previously developed confidential human source might become essential to an ongoing or future investigation. Confidential human source information—especially information from ongoing sources—is therefore categorically highly sensitive, regardless of whether it is part of an ongoing

⁴ See FBI Confidential Human Source Policy Guide § 1.1 (2019) (“CHS Policy Guide”). A version of the 2019 edition, which was in use during the period referenced in your subpoena, is available on the FBI website: <https://vault.fbi.gov/confidential-human-source-policy-guide-1018pg/confidential-human-source-policy-guide-1018pg-part-01-of-01/view>. The CHS Policy Guide provisions referenced in this letter have not changed materially from the 2019 edition.

⁵ See, e.g., Attorney General’s Guidelines regarding the Use of FBI Confidential Human Sources; CHS Policy Guide. The Department of Justice’s Office of Inspector General also provides valuable oversight of the FBI’s investigative work, including with confidential human sources.

⁶ Indeed, an individual cannot be included in the program if “there is no logical need for confidentiality” of the source. See CHS Policy Guide § 4.1.

⁷ See Letter from Attorney General Robert Jackson to Chairman Carl Vinson, 40 Opp. Att’y Gen. 45, at *3-*4 (1941) (“[D]isclosure of the reports would be of serious prejudice to the future usefulness of the Federal Bureau of Investigation. As you probably know, much of this information is given in confidence and can only be obtained upon pledge not to disclose its sources. A disclosure of the sources would embarrass informants --sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives. We regard the keeping of faith with confidential informants as an indispensable condition of future efficiency.”).

investigation at the moment. Significant harm to investigative work—and to the program as a whole—could result from dissemination of FD-1023s or other similar documents. It is also critical to keep confidential the FBI’s methods for identifying, recruiting, retaining, and receiving information from confidential human sources. These methods, which facilitate FBI having confidential human sources embedded in groups like organized crime families, terrorist cells, and violent gangs, could be significantly chilled and compromised by the revelation of confidential human sources or the information they provide.

For these good reasons, among others, Department of Justice (Department) policy strictly limits when and how confidential human source information can be provided outside of the FBI. The Attorney General’s Guidelines regarding the Use of FBI Confidential Human Sources (AGG-CHS) are clear that “DOJ personnel shall not disclose the identity of a Confidential Human Source or information that a Source has provided that would have a tendency to identify the source.”⁸ This obligation continues even after employees leave the Bureau.⁹

Information provided by confidential human sources also implicates other longstanding Department confidentiality interests, in no small part because of the role it plays in our investigative processes. The Department’s law enforcement and intelligence authorities enable us to collect significant amounts of information, but only subject to strict constitutional, statutory, and policy limits essential to the rule of law. These constraints have been in place for decades. They address the reality that the reputations of individuals mentioned in materials gathered or developed during an investigation could be severely damaged if investigative materials are released publicly.¹⁰ Investigative reports include leads and suspicions, not the conclusions of investigators based on fuller context, including information that may not be available to the confidential source. Later and more complete reports might exonerate

⁸ AGG-CHS at 7; *see also* CHS Policy Guide § 15.1 (“Protecting a CHS’s identity and relationship with the FBI is vital to the success of that relationship and to the integrity of the FBI’s Confidential Human Source Program.”). Courts have also long recognized the importance of maintaining the protection of the identities of confidential human sources. *See, e.g., Roviario v. United States*, 353 U.S. 52, 60 (1957) (“What is usually referred to as the informer’s privilege is in reality the Government’s privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The purpose of the [informer’s] privilege is the furtherance and protection of the public interest in effective law enforcement” (citations omitted)).

⁹ AGG-CHS at 7.

¹⁰ Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, Department of Justice, to Rep. John Linder, Chairman, Subcommittee on Rules and Organization, House Committee on Rules, at 3 (Jan. 27, 2000) (“[T]he reputations of individuals mentioned in internal law enforcement and litigation documents could be severely damaged by the public release of information about them, even though the case might ultimately not warrant prosecution or other legal action. The Department takes very seriously its responsibility to respect the privacy interests of individuals about whom information is developed during the law enforcement process or litigation.”). Robert Jackson, *supra* n.7 (“Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.”); Letter from Deputy Attorney General Rod Rosenstein to Hon. Charles Grassley, at 6 (June 27, 2018) (“We cannot fulfill requests that would compromise the independence and integrity of investigations, jeopardize intelligence sources and methods, or create the appearance of political interference. We need to follow the rules.... It is important for the Department of Justice to follow established policies and procedures, especially when the stakes are high.”).

individuals cast in a negative light by reports from earlier in an investigation. These principles are fundamental to the work the Department executes every day.¹¹ They are essential to upholding the rule of law and to protecting individual liberty.

Information from a confidential human source, including as reported in an FD-1023, certainly warrants such protections. Information from confidential human sources is unverified and, by definition, incomplete. An FD-1023 form documents information as told to a line FBI agent. Recording the information does not validate the information, establish its credibility, or weigh it against other information known or developed by the FBI. The mere existence of such a document would establish little beyond the fact that a confidential human source provided information and the FBI recorded it. Indeed, the FBI regularly receives information from sources with significant potential biases, motivations, and knowledge, including drug traffickers, members of organized crime, or even terrorists.

The FBI's Interests in Confidentiality Are Strong

You have asked for what you say is a “precise description” of an “alleged criminal scheme” contained in a single FD-1023 report. You express concern that the FBI has inappropriately “failed to disclose” such a report “to the American people.”¹² It is critical to the integrity of the entire criminal justice process and to the fulfillment of our law enforcement duties that FBI avoid revealing information—including unverified or incomplete information—that could harm investigations, prejudice prosecutions or judicial proceedings, unfairly violate privacy or reputational interests, or create misimpressions in the public. Often, even confirming the fact of the existence (or nonexistence) of an investigation or a particular piece of investigative information can risk these serious harms. That is why it is—and has long been—standard practice for law enforcement agencies to decline to confirm or deny such a fact. Thus, your request for a single FD-1023 report that you say includes a “precise description” of an “alleged criminal scheme” risks the harms that our confidentiality rules protect against. As noted above, effective and responsible law enforcement inherently requires confidentiality, particularly regarding raw information, sources, and ongoing investigations.

To be clear, the FBI recognizes Congress’s authority to secure the information needed to perform its constitutional role of legislating on behalf of the American people.¹³ Even so, the Department of Justice has long taken the position that Congress’s authority to seek information “does not lead inexorably to the conclusion that the Executive must supply the fruits of its own investigation efforts to Congress.”¹⁴ The integrity of our work often requires us to preserve a

¹¹ See also Congressional Subpoenas of Department of Justice Investigative Files, 8 Op. O.L.C. 252, 263-64 (1984) (“[P]otential targets of enforcement actions are entitled to protection from widespread premature disclosure of investigative information.”).

¹² See Letter from Hon. Charles Grassley and Hon. James Comer to Attorney General Merrick Garland and FBI Director Christopher Wray (May 3, 2023)

¹³ See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2032 (2020) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 161 (1927)).

¹⁴ Memorandum from Thomas Kauper, Office of Legal Counsel, to Edward L. Morgan, Deputy White House Counsel, at 2 (1969). See also Letter from Deputy Attorney General Rod Rosenstein to Hon. Charles Grassley, at 6 (June 27, 2018) (“We cannot fulfill requests that would compromise the independence and integrity of

separation between legislative investigations and law enforcement investigations, as “the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation.”¹⁵ It also would not be appropriate for Congress, in seeking to secure information necessary to legislate, to usurp the investigative functions of law enforcement.¹⁶ Indeed, there are many kinds of law enforcement sensitive information—not just FD-1023s—that are created for law enforcement investigations or national security activities, and which must be protected from both the actuality and appearance of political, publicity, or other considerations—even when those considerations may be appropriate in legislative work.

We hope this overview of the FBI’s confidential human source program and FD-1023 reports helps explain why the FBI, the Department, and our law enforcement and intelligence partners have particularly strong interests in protecting the integrity and confidentiality of such law enforcement sensitive information, how this information is currently subject to rigorous oversight and high standards, and why reviewing unverified FD-1023 information out of context and without these protections could undermine these interests. We also hope this helps you understand that keeping this kind of source information free from the perception or reality of improper influence—and preventing the redirection of this information for non-law enforcement or non-intelligence uses—is necessary for the FBI’s effective execution of our law enforcement and national security responsibilities.

We have provided you with this background to facilitate moving forward in the accommodation process.¹⁷ Consistent with that process, we anticipate the Committee may wish to discuss its need for the specific information you requested and we would be pleased to coordinate with your staff to discuss whether and how we can accommodate your request without violating our law enforcement and national security obligations.

investigations, jeopardize intelligence sources and methods, or create the appearance of political interference. We need to follow the rules. . . . It is important for the Department of Justice to follow established policies and procedures, especially when the stakes are high.”).

¹⁵ *Id.*

¹⁶ *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2022 (2020) (“Congress may not issue a subpoena for the purpose of ‘law enforcement,’ because that power is assigned to the Executive and the Judiciary.”); *Barenblatt v. United States*, 360 U.S. 109, 111-12 (1959) (“Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive.”); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (Congress’s authority to seek information “is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely . . . to ‘punish’ those investigated are indefensible.”). See also *Bowsher v. Synar*, 478 U.S. 714, 726-27 (1986); *United States v. Brown*, 381 U.S. 437, 442-43 (1965). Cf. *Morrison v. Olson*, 487 U.S. 654, 695 (1988).

¹⁷ See *AT&T Co.*, 567 F.2d at 127.

The Honorable James Comer
Page 6

Sincerely,

A handwritten signature in black ink, appearing to read 'CD', with a long horizontal flourish extending to the right.

Christopher Dunham
Acting Assistant Director
Office of Congressional Affairs

cc: The Honorable Jamie B. Raskin
Ranking Member