

Exhibit D



Sorenson Law Office
FOIA LAW

December 30, 2019

Director, Office of Information Policy (OIP)
United States Department of Justice, Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Submitted via Certified Mail Return Receipt Requested

FOIA APPEAL

Re: FREEDOM OF INFORMATION ACT APPEAL – FOIA Request No. 1450216-000

Dear FOIA Officer,

On behalf of Heriberto Latigo, Jr. (CLIENT), I appeal the response of the Federal Bureau of Investigation (FBI) to the CLIENT's request for records pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"). The FBI assigned the request FOIA Request 1450216-000. The FBI improperly responded to the FOIA Request, failed to conduct an adequate search for responsive records, and failed to release records responsive to the request.

You have 20 working days to respond to this appeal. You are advised that our CLIENT reserves his right to pursue legal action in the United States District Court for the District of Columbia if the FBI does not search for and disclose all responsive records immediately, in accordance with FOIA's disclosure mandate, Federal policies, and law.

I. FACTUAL BACKGROUND ABOUT THE FOIA REQUEST AND FBI RESPONSE

On October 14, 2019, the undersigned law firm, on behalf of the CLIENT, made a Freedom of Information Act (FOIA) Request to Federal Bureau of Investigation (FBI). The request was submitted via certified mail, return receipt requested. The request is attached as Exhibit A.

The request sought records in possession of the FBI:

A) Communications between the Special Agent Christopher Petrowski and:

- 1) Monica Malgorzata Latigo;
- 2) Assistant United States Attorney Sherri Lynn Zack;
- 3) Special Agent Glenn Gregory;
- 4) Special Agent Kevin Cohn;
- 5) Catherine Giang Do;
- 6) Kate Birenbaum;
- 7) Renato Uribe;
- 8) Joseph Mathew;
- 9) Jacqueline Taylor;
- 10) Giselle Aboud;
- 11) United States Attorney Kenneth Madison;
- 12) Ruben Alcantara;
- 13) Honorable Kenneth M. Hoyt;
- 14) Andino Reynal;
- 15) directors, officers, employees or representatives of ENI Petroleum;
- 16) directors, officers, employees or representatives of the Securities and Exchange Commission; and,
- 17) directors, officers, employees or representatives of the Occupational Safety and Health Administration.

B) All records the FBI has in their possession referencing Heriberto Latigo, Jr.

The request was given the number 70181830000137158153 by the postal service. See Exhibit B.

On October 21, 2019, the FBI received the request. See postal receipt for number 70181830000137158153 attached as Exhibit C.

On October 24, 2019 the FBI issued its response to the request. The response is attached as Exhibit D. The FBI response acknowledged receipt of the request and the FBI assigned the request a number, FOIA Request 1450216-000.

The letter provided the CLIENT with appeal rights. The letter stated, "You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001..."

On November 6, 2019 the FBI issued its final response to the request. The response is attached as Exhibit E. The FBI invoked one of the major law enforcement exemptions, Section 552(b)(7)(A).

The final response letter stated, "The FBI has completed its search for records responsive to your request. The material you requested is located in an investigative file which is exempt from disclosure pursuant to 5 U.S.C. Section 552(b)(7)(A)(5). 5 U.S.C. 552(b)((7)(A) exempts from disclosure records or information compiled for law enforcement purposes but only to the extent that the production of such law enforcement records or information...could reasonably be expected to interfere with enforcement proceedings.

“...The records responsive to your request to our law enforcement records; there is a pending or prospective law enforcement proceeding relevant to these response records, and release of the information could reasonably be expected to interfere with enforcement proceedings. Therefore, your request has been administratively closed...”

In addition, the letter provided CLIENT with appeal rights. The letter stated, “You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001. ..”

On this date, indicated above, CLIENT administratively appeals the FBI's decision to not search for responsive records and failing to release records responsive to CLIENT'S request. CLIENT challenges the search as being not adequate and challenges the withholdings and, thus, violates the Freedom of Information Act.

II. THE FREEDOM OF INFORMATION ACT

The purpose of FOIA is to “open agency action to the light of public scrutiny.” Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976). Former President Obama reinforced FOIA's strong presumption of disclosure with regard to all FOIA decisions. See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (directing agencies to administer FOIA under a presumption that, “[i]n the face of doubt, openness prevails”).

Former Attorney General Eric Holder issued FOIA guidelines that reinforce a commitment to open government, encouraging federal agencies to both “make discretionary releases of information” and to “make partial disclosures” when an agency determines full disclosure is not possible. See Former Attorney General Eric Holder's Memorandum for Heads of Executive Departments and Agencies (Mar. 19, 2009).

In his memo, the Former Attorney General also announced a “foreseeable harm” standard for defending agency decisions to withhold information under FOIA. *Id.* Thus, the DOJ will defend an agency's denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” See *id.* These authorities have not been changed by the current Administration and remain in effect.

FOIA “mandates a policy of broad disclosure of government documents” and carries a strict disclosure mandate that requires federal agencies to expeditiously disclose requested records to requesters. See 5 U.S.C. § 552, Church of Scientology v. Dep't of the Army, 611 F.2d 738, 741 (9th Cir. 1980). Consequently, any inquiry under FOIA brings with it a “strong presumption in favor of disclosure.” U.S. Dep't of State v. Ray, 502 U.S. 164, 173 (1991). To that end, nothing in FOIA should be read to “authorize withholding of information or limit the availability of records to the public, except as specifically stated.” See 5 U.S.C. § 552 (c).

Congress recognized that in certain limited instances, records may be exempt from FOIA's broad disclosure mandate, and thus created nine categories of exemptions. *Id.* §552, (b). These exemptions, however, "must be narrowly construed in light of FOIA's dominant objective of disclosure, not secrecy." Maricopa Audubon Soc'y. v. U.S. Forest Serv., 108 F.3d 1082, 1085 (9th Cir. 1996).

Accordingly, because FOIA carries a presumption in favor of disclosure, and indeed, because, "FOIA requesters face an information asymmetry given that the agency possesses the requested information and decides whether it should be withheld or disclosed," COMPTTEL v. U.S. Federal Comm'n., 910 F. Supp. 2d 100, 111 (D.D.C. 2012) (internal citations omitted), agencies bear the burden of justifying the withholding of any records that are responsive to a FOIA request. 5 U.S.C. §552 (a) (4). An agency must provide "a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply." See King v. Dept. of Justice, 830 F.2d 210, 219 (D.C. Cir. 1987) (agency must provide); see also Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980) (holding an agency's disclosure of "who wrote the [document], to whom it was addressed, its date, and a brief description" was "patently inadequate" to establish exemption under FOIA).

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. See FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

III. THE FBI DID NOT CONDUCT AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

The final response letter stated, "The FBI has completed its search for records responsive to your request." The FBI has failed to conduct an adequate search.

To achieve FOIA's core purpose of disclosure, an agency must perform an adequate search for responsive records. Founding Church of Scientology v. NSA, 610 F.2d 824, 837 (D.C. Cir. 1979). Upon receiving a FOIA request, federal agencies are "required to perform more than a perfunctory search" to identify records that are responsive to the request. Ancient Coin Collectors Guild v. U.S. Dep't of State, 641 F. 3d 504, 514 (D.C. Cir. 2011).

An agency must demonstrate "a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'" DiBacco v. U.S. Army, 795 F.3d 178, 188 (D.C. Cir. 2014) (quoting Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990)) (internal alterations omitted); Valencia-Lucena v. U.S. Coast Guard, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting Truitt v. U.S. Dep't of State, 897 F.2d 540, 542 (D.C. Cir. 1990)) (to meet this burden, the agency must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents'").

In addition, “agency affidavits must explain in reasonable detail the scope and method of the search conducted by the agency” for the agency to “satisfy its burden of establishing the adequacy of its search.” Nat’l Sec. Counselors II, 960 F. Supp. 2d 101, 152 (internal quotations omitted); Ancient Coin Collectors Guild, 641 F.3d at 514 (internal quotation omitted) (agency may meet its burden by submitting “[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched”).

A court will apply “a ‘reasonableness’ test” to assess whether an agency’s search for responsive records was adequate. Campbell v. U.S. Dep’t. of Justice, 164 F. 3d 20, 27(D.C. Cir. 1998). This reasonableness test is “consistent with congressional intent tilting the scale in favor of disclosure.” *Id.* Here, the evidence suggests that the FBI failed to conduct an adequate search for responsive records.

The FBI did not establish that it made a good faith effort to conduct a search for the requested records, nor did it prove that it used methods that can be reasonably expected to produce the requested records. See Oglesby at 920 F.2d at 68.

Furthermore, the FBI has failed to provide the CLIENT with an affidavit explaining in reasonable detail the scope and method of its search, and therefore did not satisfy its burden to prove the adequacy of its search. Nat’l Sec. Counselors II, 960 F. Supp. 2d at 152.

Hence, it is simply not reasonable to conclude that the FBI conducted an adequate search that was reasonably calculated to find all records that are responsive to CLIENT’S FOIA Request – including emails, attachments, memoranda, correspondence, meeting notes, draft documents, etc.

Without a description of the search methods that were used in response to the CLIENT’S request, or any description that the FBI attempted a search at all, the FBI has failed to make it apparent to the CLIENT that it conducted an adequate search for records.

To remedy this, the FBI must conduct an adequate search for responsive records, release responsive records immediately, and provide adequate detail about the search methods that it utilized.

Additionally, because the CLIENT believes there may be further evidence of the FBI’s inadequate search, he reserves the right to pursue any such additional records once he receives additional records from the FBI and has an opportunity to review them.

Furthermore, the Affidavit in Exhibit G provides further evidence of the FBI’s inadequate records search. The Affidavit of FBI Special Agent, Christopher Petrowski, was filed with the United States District Court for the Southern District of Texas, and includes detailed information regarding emails and circumstances related to a search warrant made against the CLIENT and undertaken by the FBI. The Court approved the search warrant on July 9, 2015.

Thus, based on available information, the FBI failed to conduct a search that is reasonably expected to produce all of the requested responsive records.

IV. THE AGENCY DID NOT SEGREGATE RESPONSIVE RECORDS

The agency said it completed a search and that the records are in an "investigative file." The agency has not released any records, despite the request being specific on the records sought.

The agency has not segregated or separated records or portions of records that must be released.

The Freedom of Information Act provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under" the subsection setting forth the exemption. 5 U.S.C. § 552(b). Indeed, "[t]he focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 260 (D.C.Cir.1977). Otherwise put, "an entire document is not exempt merely because an isolated portion need not be disclosed.... [T]he agency may not sweep a document under a general allegation of exemption ... [i]t is quite possible that part of a document should be kept secret while part should be disclosed." See Vaughn v. Rosen, 484 F.2d 820, 825 (1973).

The DC Circuit has approved this perspective on (7)(A) as recently as 2008. See Stolt-Nielsen Transportation v. United States, 534 F.3d 728 (2008).

V. THERE ARE NO PENDING LAW ENFORCEMENT PROCEEDINGS

Title 5 U.S.C. 552(b)((7)(A) exempts from disclosure records or information compiled for law enforcement purposes but only to the extent that the production of such law enforcement records or information... could reasonably be expected to interfere with enforcement proceedings. . . "

The FBI investigated the CLIENT'S conduct, the FBI testified at a grand jury proceeding and the FBI testified at a jury trial. After that, the CLIENT was convicted at a jury trial.

In addition, the FBI provided records to the CLIENT. The CLIENT'S case was affirmed by the United States Court of Appeals for the Fifth Circuit on October 21, 2019 (See Exhibit F). There are no confidential informants at this point and there are no pending enforcement proceedings.

During the underlying criminal proceeding, certain documents were provided to the CLIENT. These documents included:

- a. Lead FBI Agent Christopher Petrowski's Affidavit supporting search warrant (ROA.17-20700.3779-3794). See Exhibit G.
- b. Lead FBI Agent Christopher Petrowski's grand jury testimony
- c. Lead FBI Agent Christopher Petrowski's detention hearing testimony (ROA.17-20700.558-630)
- d. Lead FBI Agent Christopher Petrowski's trial testimony (ROA.17-20700.1544-1573)
- e. Monika Latigo and Jacqueline Taylor's FBI Statement
- f. Catherine Giang Do's FBI Statement
- g. Catherine Giang Do's trial testimony (ROA.17-20700.997 – 1411).
- h. FBI Agent Kevin Cohn's trial testimony (ROA.17-20700.1500 – 1544).
- i. Kate Birenbaum's trial testimony (ROA.17-20700.874-927).
- j. FBI Agent David Hendrix trial testimony (ROA.17-20700.953 – 984).
- k. Subpoena return; Emails between ENI Petroleum and Sherri L. Zack (ROA.17-20700.3620 - 3663)
- l. DOL's report related to Sherri Lynn Zack (ROA.17-20700.3715-3719)
- m. Duces Tecum Subpoena results on Jacqueline Taylor Email log (ROA.17-20700.4356)
- n. Subpoena return; mobile records between Monika Latigo, Christopher Petrowski and Sherri Lynn Zack (ROA.17-20700.4596 – 4691)
- o. Government Exhibits: ENI Petroleum's Investigation and release of attorney-client privilege.

*Note - ROA means the Record on Appeal

In Mopather v. Department of Justice, 3 F.3d 1533, 1540 (DC Cir 1993) the DC Circuit stated:

"Based on our examination of the statutory language, its purpose, and the relevant case law, we conclude that to withhold documents pursuant to Exemption 7(A), an agency must show that they were compiled for law enforcement purposes and that their disclosure (1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or *reasonably anticipated*. As to the first two of these requirements, the statutory language speaks for itself. Cf. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 224-25, 98 S. Ct. 2311, 2318, 57 L.ED.2d 159 (1978), ((purpose of exemption is to "prevent [harm] to the Government's case in court' by not allowing litigants 'early or greater access' to agency investigatory files than they would otherwise have" (citations omitted)). As to the last requirement, we have held that the exemption is available where enforcement proceedings are "pending or contemplated." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 870 (D.C.Cir.1980). The word "contemplated," as used in Coastal States, speaks to the enforcing agency's intentions. For this, we have substituted "reasonably anticipated," a phrase that may be applied equally to cases in which the agency has the initiative in bringing an enforcement action and those, such as this one, in which it must be prepared to respond to a third party's challenge."

VI. THE AGENCY VIOLATED ITS DUTY TO PROVIDE RECORDS WITHIN STATUTORY TIME FRAME

The FBI received the request on October 21, 2019. The FBI failed to appropriately respond to the request within 20 days, as required by statute. See 5 U.S.C. § 552(a)(6)(A)(i)

VII. CONCLUSION

As described above, the FBI violated FOIA by failing to provide the CLIENT with the requested records.

The FBI has not searched for nor released the responsive records. Accordingly, the FBI must conduct an adequate search for responsive records and produce all responsive records immediately. In so doing, the FBI must also provide an estimated date of completion of its release of the records. 5 U.S.C. § 552 (a)(7)(B).

I expect your timely resolution of this matter. Do not hesitate to contact me with any questions regarding this appeal. Please contact me at 541-606-9173 or at petesorenson@gmail.com. All records and any related correspondence should be sent to my attention at the address below.

Very truly yours,



C. Peter Sorenson
Sorenson Law Office
PO Box 10836
Eugene, Oregon 97440

Attachments:

- Exhibit A: October 14, 2019 – Request Submitted to FBI
- Exhibit B: October 14, 2019 – Postal Receipt Showing Mailing Receipt
- Exhibit C: October 21, 2019 – Postal Receipt Showing FBI Receipt of Request
- Exhibit D: October 24, 2019 – FBI response to request
- Exhibit E: November 9, 2019 – FBI final response to request
- Exhibit F: October 21, 2019 – Opinion of the United States Court of Appeals for the Fifth Circuit in United States of America v. Heriberto Latigo, Case Number 17-20700
- Exhibit G: July 9, 2015 – Affidavit of Christopher Petrowski, In Support of a Search Warrant

c: client