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12 **UNITED STATES DISTRICT COURT**
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 **HABEAS CORPUS RESOURCE**
15 **CENTER,**
16 **Plaintiff,**

17 **v.**

18 **FEDERAL BUREAU OF**
19 **INVESTIGATION; AND U.S.**
20 **DEPARTMENT OF JUSTICE,**
21 **Defendants.**

22 Case No.

23 **COMPLAINT FOR INJUNCTIVE**
24 **RELIEF FOR VIOLATION OF THE**
25 **FREEDOM OF INFORMATION ACT**

26 Freedom of Information Act,
27 5 U.S.C. § 552

28 **PRELIMINARY STATEMENT**

1. Plaintiff, the Habeas Corpus Resource Center (HCRC), brings this action under the Freedom of Information Act (FOIA), 5 U.S.C. section 552, against Defendants, the Federal Bureau of Investigation (FBI) and the United States Department of Justice (DOJ), to compel production of records responsive to Plaintiff’s October 1, 2019 FOIA request. In particular, Plaintiff requested FBI files pertaining to the investigation and arrest of Mr. Jesse Allen Morrison. Plaintiff is presently appointed as counsel for Mr. Morrison in habeas corpus proceedings related to his California death sentence. Plaintiff provided the FBI with a release completed by Mr. Morrison authorizing the HCRC to obtain personal information pertaining to him in the course of its

1 representation.

2 2. After identifying 1,109 pages of responsive records, the FBI disclosed materials in
3 three installments, but withheld non-duplicated pages and applied feature redactions with
4 unexplained citation to various FOIA exemptions. Without citation or explanation, the FBI
5 additionally withheld twenty pages from those records it identified as potentially responsive.

6 **JURISDICTION AND VENUE**

7 3. This Court has subject matter jurisdiction over this action and personal jurisdiction
8 over the parties pursuant to 5 U.S.C. section 552(a)(4)(B) and 28 U.S.C. section 1331. Venue is in
9 this district in accordance with 5 U.S.C. section 552(a)(4)(B) and 28 U.S.C. section 1391(e)(1)(C).

10 **INTRADISTRICT ASSIGNMENT**

11 4. Assignment to the San Francisco Division is proper because a substantial portion of
12 the events or omissions giving rise to this action occurred in San Francisco County. *See* N.D. Cal.
13 R. 3-6(b) & (c).

14 **PARTIES**

15 5. Plaintiff, the HCRC, is an entity within the Judicial Branch of the State of California.
16 The HCRC provides legal representation to indigent individuals under sentence of death in state
17 and federal habeas corpus and executive clemency proceedings. Cal. Gov't Code § 68661(a).

18 6. Defendant FBI is an “agency” within the meaning of 5 U.S.C. sections 551(1) and
19 552(f)(1). The FBI is headquartered in Washington, D.C., and has field offices throughout the
20 country, including in San Francisco, California.

21 7. Defendant DOJ is a Department of the Executive Branch of the U.S. government and
22 an agency within the meaning of 5 U.S.C. § 552(f)(1). The DOJ is headquartered in Washington,
23 D.C., with offices all over the country, including in San Francisco, California.

24 **LEGAL FRAMEWORK**

25 8. FOIA requires federal government agencies to release records to any person, provided
26 that person makes a request which: (1) reasonably describes the records sought and (2) complies
27 with any applicable agency rules for making such a request, unless a statutory exemption applies.
28 5 U.S.C. § 552(a)(3)(A). The objective of FOIA is “to pierce the veil of administrative secrecy and

1 to open agency action to the light of public scrutiny.” *Dep’t of Air Force v. Rose*, 425 U.S. 352,
2 360 (1976).

3 9. FOIA carries a strong presumption in favor of disclosure, and the exemptions are to
4 be “narrowly construed.” 5 U.S.C. § 552(8)(b); *United States Dep’t of State v. Ray*, 502 U.S. 164,
5 173 (1991). An agency seeking to withhold or redact any requested information has the burden to
6 demonstrate that an exemption applies. *Ray*, 502 U.S. at 173 (citing 5 U.S.C. § 552(a)(4)(B)).

7 10. An agency seeking to withhold information must “provide enough information,
8 presented with sufficient detail, clarity, and verification, so that the requester can fairly determine
9 what has not been produced and why.” *Fiduccia v. U.S. Dep’t of Justice*, 185 F.3d 1035, 1043 (9th
10 Cir. 1999). In whatever form the agency chooses to provide such information, it must be adequate
11 to enable a reviewing court to “decide whether the exemptions claimed justify the nondisclosure.”
12 *Fiduccia*, 185 F.3d at 1043.

13 11. In withholding information from Plaintiff, Defendants relied on four exemptions: 5
14 U.S.C. section 552, subdivisions (b)(6) and (b)(7)(C), (D), and (E) (hereafter subdivisions (b)(6),
15 (b)(7)(C), (b)(7)(D), and (b)(7)(E) respectively). Defendants additionally asserted 5 U.S.C. section
16 552a, subdivision (j)(2), but did not invoke this exemption in delineating the basis for any of its
17 redactions or deletions.

18 12. The exemption contained in subdivision (b)(6) permits an agency to withhold
19 information only where it constitutes “personnel and medical files and similar files the disclosure
20 of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. §
21 552(b)(6).

22 13. Subdivision (b)(7)(C) exempts portions of law enforcement records only to the extent
23 that disclosure could reasonably be expected to constitute an unwarranted personal privacy
24 invasion. 5 U.S.C. § 552(b)(7)(C). The exemption solely applies when the privacy interest at stake
25 outweighs the public interest “in government openness” that would be advanced by disclosure.
26 *Lahr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964, 973 (9th Cir. 2009).

27 14. Subdivision (b)(7)(D) authorizes the withholding of law enforcement records only
28 where such information could reasonably be expected to disclose the identity of a confidential

1 source. 5 U.S.C. § 552(b)(7)(D). In invoking this exemption, the agency must show that there has
2 been an express or implied promise of confidentiality to the source. *Dep't of Justice v. Landano*
3 (1993) 508 U.S. 165, 172.

4 15. Subdivision (b)(7)(E) exempts information which would disclose techniques and
5 procedures for law enforcement investigations or prosecutions, as well as that which would
6 disclose guidelines for law enforcement investigations or prosecutions where such disclosure could
7 reasonably be expected to risk circumvention of the law. 5 U.S.C. § 552(b)(7)(E). The techniques,
8 procedures, or guidelines an agency withholds need to be "generally unknown" to the public.
9 *Rosenfeld v. U.S. Dep't of Just.*, 57 F.3d 803, 815 (9th Cir. 1995).

10 16. Under 5 U.S.C. section 552, subdivision (a)(4)(B), this Court has the authority to
11 enjoin Defendants from withholding responsive records and to order production of records that
12 have been improperly withheld.

13 **FACTUAL ALLEGATIONS**

14 **A. Background**

15 17. Plaintiff, the Habeas Corpus Resource Center (HCRC), is an entity in the Judicial
16 Branch of the State of California which represents death-sentenced individuals in their habeas
17 corpus proceedings and petitions for executive clemency. Cal. Gov't Code § 68661.

18 18. Plaintiff, pursuant to an order from the California Supreme Court, presently represents
19 Mr. Jesse Allen Morrison, an incarcerated person under sentence of death in the State of California.

20 19. Upon information and belief, the FBI is in possession and/or control of the records
21 Plaintiff seeks, which pertain to the FBI's assistance in the arrest and prosecution of Mr. Morrison
22 in the capital case to which Plaintiff has been appointed.

23 20. Plaintiff requested from the FBI all records in its possession and/or control which
24 pertain to Mr. Morrison, and has provided the FBI a release signed by Mr. Morrison authorizing
25 release of the records to Plaintiff. These records pertain to the FBI's role in the arrest and
26 prosecution of Mr. Morrison for the capital case in which Plaintiff has been appointed to represent
27 Mr. Morrison by the California Supreme Court. Therefore, the records are germane to Plaintiff's
28 representation of Mr. Morrison.

B. Plaintiff's FOIA Request and Resulting Communications

21. On October 1, 2019, Brittani Weston, on behalf of Plaintiff, submitted a FOIA request to the FBI, seeking any and all information related to Mr. Jesse Allen Morrison. Ms. Weston included a completed FBI Certification of Identity form (identified as Form DOJ-361) and a general release signed by Mr. Morrison, which authorized the FBI to release the requested information to Plaintiff.

22. The FBI acknowledged receipt of Plaintiff's request by letter dated October 30, 2019. This letter informed Plaintiff that it would be charged applicable search and duplication fees as a "general requester" in accordance with 5 U.S.C. section 552, subdivision (a)(4)(A)(ii)(III). The letter further invited Plaintiff to check the status of its request by visiting a designated portion of the FBI's website. Finally, this letter outlined the process by which Plaintiff could choose to appeal the FBI's future determinations as to record disclosures. The FBI assigned Plaintiff's request a number (FOIPA Request No. 1450634-000) for tracking purposes.

23. In a letter dated February 6, 2020, the FBI stated that it had located approximately 1,109 pages of records potentially responsive to Plaintiff's request and provided an estimate of anticipated fees (approximately \$40 for release on compact disc or \$50.45 for paper copies). The letter sought a response from Plaintiff as to its willingness to pay these anticipated fees. The letter also requested that Plaintiff consider reducing the scope of its request in order to expedite processing and provided further instructions for conveying the desire to or rejection of this request to reduce the scope.

24. By facsimile on February 18, 2020, Plaintiff, through Ms. Weston, declined to reduce the scope of its request. Plaintiff agreed to pay the estimated fee for release of all 1,109 responsive pages.

25. By email dated March 5, 2020, the FBI again asked Plaintiff to narrow the scope of its request in order to expedite processing time. The FBI's correspondence detailed four scales of requests: simple (less than 50 pages), complex-medium (51-950 pages), complex-large (951-8000 pages), complex-extra-large (more than 8000 pages). The FBI's letter quoted approximate timelines for completion of each request based upon its scale and quoted an estimated 53-month

1 processing time for Plaintiff's request.

2 26. Plaintiff again declined by to reduce the scope of its FOIA request in a letter dated
3 March 12, 2020. In the same letter, Plaintiff also requested expedited processing pursuant to 28
4 C.F.R. section 16.5, subdivision (e)(1), sections (i) ("imminent threat to life . . . of an individual")
5 and (iii) ("loss of substantial due process rights"). In support of this request, Plaintiff detailed that
6 the sought materials were in furtherance of its role as appointed counsel for a death-sentenced
7 person and that delays in providing the sought materials would render Plaintiff unable to timely
8 examine and use such documents in initial state habeas proceedings on behalf of its client.

9 27. The FBI confirmed receipt of this request via email on March 13, 2020, and informed
10 Plaintiff by letter dated March 17, 2020, that it had approved the request for expedited processing.

11 **B. Records Defendant Provided**

12 28. The FBI released three set of records on July 9, 2020; August 7, 2020; and September
13 3, 2020, respectively:

14 a. In its first production, the FBI indicated that it had reviewed 516 pages and
15 released 171 pages. It identified 265 of the withheld pages as duplicates of material
16 already released. the FBI invoked FOIA exemptions pursuant to subdivisions (b)(6) and
17 (b)(7)(C) as to each of the eighty non-duplicative pages withheld. Within the pages
18 released, the FBI redacted certain information, repeatedly invoking the exemptions
19 contained in subdivisions (b)(6) and (b)(7)(C), (D), and (E). Although the FBI listed the
20 exemption contained in 5 U.S.C. section 552a, subdivision (j)(2) in its cover letter, it did
21 not cite this exemption in its delineation of those exemptions actually applied.¹

22 b. The second production contained 191 pages that the FBI produced from the
23 499 pages it reviewed. The FBI identified 208 of the withheld pages as duplicates of
24 those already released. the FBI again invoked subdivisions (b)(6) and (b)(7)(C) as to the
25

26 ¹ Each cover letter states that the responsive records "are exempt from disclosure in their
27 entirety pursuant to the Privacy Act, Title 5, United States Code, Section 552a, subsection (j)(2)." But, the FBI details that "these records have been processed pursuant to the Freedom of
28 Information Act, Title 5, United States Code, Section 552."

1 100 pages withheld and cited subdivisions (b)(6) and (b)(7)(C), (D), and (E) as rationales
2 for the redactions applied to those pages released. As before, the FBI cited 5 U.S.C.
3 section 552a, subdivision (j)(2) in its correspondence, but it did not apply it to those
4 records withheld or redacted.

5 c. The FBI produced twenty-five pages in its final release after reviewing
6 seventy-four pages. It identified all forty-nine withheld pages as duplicates of
7 documents released. Within the pages released, the FBI applied redactions with citation
8 to subdivisions (b)(6) and (b)(7)(C) and (D). Again the FBI cited to 5 U.S.C. section
9 552a, subdivision (j)(2) in its cover letter, but did not invoke it in applying the redactions
10 contained therein.

11 29. In total, the FBI's correspondence indicates the agency reviewed 1,089 pages of
12 responsive records and ultimately produced 387 therefrom. It withheld in entirety an additional
13 653 pages, 473 of which it claimed to be "duplicates." The FBI withheld 180 pages on the basis
14 of exemptions delineated in subdivisions (b)(6) and (b)(7)(C).

15 30. With each production, the FBI included a document entitled "FBI FOIPA Addendum."
16 This document delineates "standard responses that apply to all requests" and further includes an
17 additional document entitled "Explanation of Exemptions." The Explanation document recounts
18 verbatim those exemptions contained in 5 U.S.C. section 552.

19 31. The FBI withheld an additional twenty pages of the 1,109 originally identified without
20 further explanation.

21 32. Of the 387 pages produced, the FBI made approximately 536 feature redactions,
22 citing exemptions (b)(6) and (b)(7)(C), (D), and (E). The feature redactions contained several
23 inconsistencies, including but not limited to:

24 a. In some instances, the FBI redacted phone numbers belonging to various
25 businesses. On multiple occasions, the FBI redacted this information on one page but did
26 not redact the same information pertaining to the same business on the following page.

27 b. Similarly, the FBI in some instances redacted the last name of a source. But
28 in other instances, the FBI declined to redact the last name of the same sources.

1 c. The FBI withheld the last name of some local law enforcement officers, yet,
2 without explanation for the disparity, disclosed them in others.

3 **C. Plaintiff's Appeal**

4 33. On September 18, 2020, Plaintiff timely appealed the FBI's decision to withhold and
5 redact responsive pages with Defendant DOJ's Office of Information Policy. Plaintiff detailed that
6 the FBI had thus far reviewed only 1,015 pages of the identified 1,109 pages of responsive records,
7 but presumed that the outstanding ninety-four pages would be produced in the FBI's third and final
8 release.²

9 34. Plaintiff's appeal noted the facially inconsistent manner in which the FBI had applied
10 its redactions. Plaintiff detailed that the FBI had on multiple occasions throughout redacted
11 information on one page while failing to redact the same information on the following page. The
12 appeal also recounted that Plaintiff had provided signed releases permitting disclosure of
13 information pertaining to Mr. Morrison, thus undermining any claim that disclosure of such
14 information would constitute a privacy invasion.

15 35. The DOJ denied Plaintiff's appeal via its online portal on March 30, 2021, stating that
16 the FBI "properly withheld information . . . because it is protected from disclosure under the
17 FOIA." The DOJ expressly cited and summarized those exemptions invoked by the FBI, namely
18 those contained in subdivisions (b)(6) and (b)(7)(C), (D), and (E). The DOJ summarized, without
19 further explanation, that it found "that for each of these exemptions, it is reasonably foreseeable
20 that disclosure of the information withheld would harm the interests protected by these
21 exemptions."

22 **I. FIRST CAUSE OF ACTION**

23 **Failure to Promptly Furnish Disclosable Information Pursuant to 5 U.S.C. § 24 552(a)(3)(A)**

25 36. Plaintiff realleges and incorporates by reference paragraphs 1-33.

26 37. Defendants withheld approximately 180 non-duplicate pages citing to subdivisions
27 (b)(6) and (b)(7)(C). Without explanation, Defendants also withheld approximately twenty

28 ² The FBI's final release of records accounted for only an additional seventy-four pages, thus leaving twenty pages which remain unaccounted for.

1 additional pages.

2 38. In the 383 pages released, the FBI applied approximately 536 redactions. In support
3 of these redactions, Defendants asserted the exemptions contained in subdivisions (b)(6) and
4 (b)(7)(C), (D), and (E).

5 39. Defendants have not provided, beyond conclusory statements, any legally sufficient
6 detailed explanation of how the permissible exemptions apply to justify the withholding or
7 redactions. *See Fiduccia*, 185 F.3d at 1043.

8 40. Accordingly, Defendants have violated 5 U.S.C. section 552, subdivision (a)(3)(A)
9 by failing to promptly release agency records in response to a FOIA request.

10 41. Defendants' failure to furnish this disclosable information has also denied Plaintiff's
11 right to this information as provided by law under FOIA.

12 42. Plaintiff has exhausted applicable administrative remedies with respect to
13 Defendants' wrongful withholding of the requested records.

14 II. SECOND CAUSE OF ACTION

15 Failure to Segregate and Release Nonexempt Information Pursuant to 5 U.S.C. § 16 552(a)(8)(A)(ii)

17 43. Plaintiff realleges and incorporates by reference paragraphs 1-40.

18 44. Of the 1,089 pages reportedly reviewed by the FBI, it withheld in entirety 653 pages.
19 It claimed that 473 of those pages were "duplicate[s]." In support of its withholding the remaining
20 180 pages, the FBI asserted exemptions contained in subdivisions (b)(6) and (b)(7)(C).

21 45. Defendants have not demonstrated that either exemption applies to justify its
22 wholesale withholding of any of the 180 pages.

23 46. Defendants withheld twenty pages without explanation.

24 47. Additionally, Defendants have not provided Plaintiff with legally required sufficient
25 information to allow Plaintiff to fairly determine what is being withheld.

26 48. Accordingly, Defendants have violated 5 U.S.C. section 552, subdivision (a)(8)(A)(ii)
27 by neglecting to take reasonable steps necessary to segregate and release nonexempt information.

28 49. By failing to take reasonable steps necessary to segregate and release nonexempt

1 information, Defendants have denied Plaintiff's right to this information as provided by law under
2 FOIA.

3 50. Plaintiff has exhausted applicable administrative remedies with respect to
4 Defendants' wrongful withholding of the requested records.

5
6 **III. REQUEST FOR RELIEF**

7 WHEREFORE, Plaintiff respectfully requests that the Court:

- 8 1. Declare that Defendants' withholding of portions of the requested records is unlawful;
 - 9 2. Order Defendants to disclose the requested records in their entirety and make copies
10 available to Plaintiff;
 - 11 3. To the extent Defendants continue to assert that exemptions apply, order Defendants
12 to provide sufficiently detailed information such that Plaintiff and the Court can reliably determine
13 whether the claimed exemptions justify nondisclosure;
 - 14 4. Enjoin Defendants from charging Plaintiff further search, review, or duplication fees
15 for the processing of Plaintiff's request;
 - 16 5. Order Defendants to expeditiously process the requested records;
 - 17 6. Award Plaintiff its costs and reasonable attorney's fees incurred in this action;
 - 18 7. Grant such other relief as the Court may deem just and proper.
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1 Dated: September 30, 2021

Respectfully submitted,

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3 H A B E A S C O R P U S R E S O U R C E C E N T E R

4 By: /s/ *Jessica Salyers*

5 _____
Michael Hersek

6 Rachel Schaefer

7 Whitney Tipton

8 Jessica Salyers

9 Attorneys for Plaintiff

10 Habeas Corpus Resource Center

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