

EXHIBIT O



FEDERAL DEFENDER

Middle District of Florida

EXPEDITED, URGENT FREEDOM OF INFORMATION APPEAL

May 15, 2018

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FREEDOM OF INFORMATION APPEAL

Re: **FOIPA No: 2017-1023**
Federal Case No: 9:06-080171-003, United States District Court,
Southern District of Florida

Director:

I write to appeal the recent decision of your office in connection with the disclosure of documents and information in the above-referenced matter. I am the attorney representing Mr. Daniel Troya. Mr. Troya is presently a federal death row inmate at the U.S. Penitentiary in Terre Haute, Indiana.

This is an urgent appeal by our client pursuant to sub-section (a)(6) of the Freedom of Information Act, U.S.C. § 552 (FOIA) and the Department of Justice implementing regulations codified at 28 C.F.R. § 16.8 (1994 ed.). Mr. Troya's capital case is on stringent time deadlines.

This appeal is directed to all applicable agencies and sub-agencies including, but not limited to, the Department of Justice and the Bureau of Alcohol, Tobacco, Firearms and Explosives, hereinafter ATF). This appeal is a general one, as I seek to have disclosure of every document and piece of information within the files or control of the ATF, without limitations, and without redactions. In addition, I set forth below various specific issues with the response we have thus far received in this matter. By doing so, however, I in no way mean to suggest that these are the only reasons why the disclosure to date is appealable and otherwise contrary to governing law. In this appeal my intent is to preserve my right to have disclosed, without limitation or redaction of any kind, every document and every piece of information in the possession or control of the DEA concerning my client.

In the May 4, 2018, response provided by the ATF through Peter J. Chisholm, Acting Chief, Disclosure Division, we received a disclosure of records on Mr. Troya. This response concerned our latest request dated August 17, 2017, wherein we requested all files, records, documents and files pertaining to any investigation, arrest, indictment, conviction, sentencing, incarceration, and/or parole of our client Daniel Troya and his co-defendants, Danny Varela, Ricardo Sanchez, Liana Lopez, Juan Gutierrez, and Kevin Vetere. Of the 467 pages that the agency stated it "reviewed" pursuant to this request, 194 pages were withheld in their entirety and the remaining pages were heavily redacted. Thus, in addition to the numerous textual redactions in the few documents that were released, *over 41.5%* of that portion of Mr. Troya's file which has been reviewed to date was withheld. The withheld information includes seemingly known, innocuous information such as co-defendant names and names of law enforcement agents, officers, and forensic personnel that participated in the investigation and trial of Mr. Troya and his co-defendants.

Furthermore, ATF advanced the implausible assertion that privacy concerns prevented release of documents and redaction of names related to the co-defendants, Danny Varela, Ricardo Sanchez, Lianna Lopez, and Juan Gutierrez. As reflected in the minimal documentation released to Mr. Troya, four of the co-defendants were tried together. At the trial co-defendant, Kevin Vetere, testified. It is apparent within the release that these names are redacted. It is disingenuous to assert privacy concerns still exist that prevent even searching for records responsive to Mr. Troya's request.

We also request that ATF reference which database(s) were searched, the method of search, and the search terms used. Relative to Mr. Troya's co-defendants, Danny Varela, Ricardo Sanchez, Juan Gutierrez, Liana Lee Lopez, and Kevin Vetere, we provided their names, listed aliases, and dates of birth. If further identifiers are necessary, we can possibly provide or locate that information.

Mr. Troya's Capital Case Deadline

Access to all records pertaining to Mr. Troya is crucial. Beginning on June 22, 2015, through our latest request of August 17, 2017, our office has diligently pursued this information pursuant to the Freedom of Information and Privacy Acts. The request was made for all information in the possession or control of the DEA on Mr. Troya. Since June 15, 2015, member(s) of our office have been in contact with personnel in your office on numerous occasions in an effort to expedite the disclosure of information to which Mr. Troya is entitled under federal law. I again urge you and your office to expedite this appeal as quickly as possible.

ATF Was Wrong to Redact Whole Pages

The wholesale withholding of entire pages of Mr. Troya's, and the substantial redaction of the documents that were disclosed, is a deficient response and just plain wrong. This decision should be reversed immediately.

The outright withholding of over 41.5% of the reviewed file renders it impossible for us to determine the applicability of any of the exemptions claimed since we have no idea of what is contained on those pages. Bald recitation of exemption sections (b)(7)(C), (b)(7)(D), (b)(7)(E), (b)(7)(F) and exemption section 552 (a)(j)(2) is wholly insufficient to sustain the government's burden. 5.U.S.C. § 552 (a)(4)(b). Such a cursory response is inapposite to, and inadequate under, the express purpose of the FOIA, which is to:

[e]nsure an informed citizenry, vital to the functioning of a democratic society . . . (the) limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act . . . Accordingly these exemptions must be narrowly construed.

John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (citations omitted). See Executive Memorandum to Heads of Departments and Agencies (October 4, 1993) (President ordered "a presumption of disclosure" applicable to override routine withholding of requested documents.). Particularly because an "asymmetrical distribution of knowledge . . . characterizes FOIA litigation," a detailed response, rather than the mere listing of numerical exemptions such as that received by Mr. Troya, is necessary. *McDonnell v. United States*, 4 F.3d 1227, 1241 (3d Cir. 1993). See *Ferri v. Bell*, 645 F.2d 1213, 1223 (1981) (detailed substantiation required where criminal inmate sought potential *Brady* material; "self-serving, conclusionary statements in an affidavit does not satisfy the government's verdict.").

Moreover, withholding of entire pages violates the statutory requirement that "any reasonable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this sub-section." 5 U.S.C. § 552 (b). This segregability requirement is applicable to all exemptions. *Id.*; FOIA and the Amendments of 1974 (PL-902) Source Book: Legislative History Texts and Other Documents, 336 (1975). (Joint Explanatory Statement of Committee of Conference) [hereinafter "Source Book"]. The requisite specificity to substantiate a claimed exemption is equally applicable to claims of non-segregability. Thus, in determining segregability, the exemptions must be construed narrowly and an agency may withhold non-exempt information only if it "is so interspersed with the exempt material that separation by the agency, and policing of this by the courts would impose an inordinate burden." *Church of Scientology v. U.S. Department of Justice*, 30 F.3d 224, (1st Cir. 1994) (citations omitted); *Meed Central Data*

Inc. v. Department of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). In the present case, the aggressive redaction approach taken with respect to the documents that *were* disclosed belies the notion that over 41.5% of the documents reviewed were so sensitive that they could not be disclosed *at all*. In short, the complete dearth of any support or explanation, coupled with the simple numerical listings provided in the May 4, 2018 release, vitiates satisfaction of the claimed specific exemptions.

As to the documents that were provided, the disclosure received contained many substantial redactions, making significant portions of the disclosed material virtually worthless from a substantive point of view. Those redactions summarily cite to exemptions with FOIA which are either invalid or inapplicable in this matter.

(b)(7)(c)¹

For example, exemption (b)(7)(C) only allows the government to withhold law enforcement records or information, production of which “could reasonably be expected to constitute *unwarranted* invasion of personal privacy.” *Department of Justice v. Reporter’s Comm.*, 489 U.S. 749, 771 (1989) (emphasis original). The majority of the information requested by Mr. Troya pertains directly to him. This is not a third party request. *United States Department of Justice v. Julian*, 486 U.S. 1, 13-14 (1988).

Whatever “invasion of privacy” could conceivably exist is obviated by the need for public disclosures. The interest of legislators, the judiciary and the voting public in the constitutionality of governmental execution of an accused is overwhelming. The admonition of the United State Supreme Court, that “the basic purpose of the FOIA is to open agency action to the light of public scrutiny” is especially compelling in such a request.

Reporter’s Comm. at 774, *quoting Dept. of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Additionally, from the minimal information provided, it is clear that many of the redactions pertain to the identities and/or statements of persons *who were co-defendants or testimonial witnesses* at Mr. Troya’s trial; there can be no suggestion that such witnesses have viable privacy interests at stake given the fact that they provided record testimony at a public trial. This is especially true with respect to the withholding of the names, identities, and other information regarding the law enforcement agents and officers who were involved in the investigation of this case, including many who also provided testimony at Mr. Troya’s trial. It undermines the whole notion of FOIA for the government to utilize its resources, in the

¹ This argument also applies to the assertion of an exemption under 5 U.S.C. 552(b)(6).

form of government law enforcement employees, to prosecute a citizen and then later refuse to reveal information regarding how those government funds were spent and which government employees were involved and/or their actual role in the case. Therefore, the agency should immediately turn over every document and every part of every document in the possession or control of the ATF which relates to persons and/or the information provided thereby who testified against Mr. Troya at his trial or were otherwise directly involved in the investigation of his case. *Cf. Lissner v. United State Coast Guard*, No. 98-7438 (C.D. Cal. June 15, 1999).

(b)(7)(d)

Another example of a blatant violation of the spirit and letter of FOIA in this case is that of the agency's reliance upon the (b)(7)(D) exemption, the assertion of which here is demonstrably infirm. On a general level, it is important to note at the outset that the United States Supreme Court has held conclusively that this is not a *per se* exemption and that it is unreasonable "to infer that all criminal investigative resources are confidential". *United States Department of Justice v. Landano*, 113 S. Ct. 2014, 2023 (1993). The Landano Court expressly held that:

[T]he Government is not entitled to a presumption that a source is confidential within the meaning of exemption 7(d) whenever the source provides information to the FBI in the course of a criminal investigation.

Id. at 2024. Here then, extensively more detailed and factual support would be required to argue the applicability of this claimed exemption. The response provided is completely devoid of such specificity and thus cannot stand.

For the same reasons cited below concerning the government's constitutional duty to disclose information in a criminal matter, this exemption too cannot be interpreted or utilized in a manner that obstructs justice by allowing the agency to hide information it otherwise has a constitutional duty to disclose to a criminal defendant such as Mr. Troya.

(b)(7)(e)

The alleged exemption (b)(7)(E) is also insufficient in this case. In addition to the constitutional restrictions noted below, mere numerical listing of the exemption gives no indicia how the production of law enforcement records or information "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." *See* "Source Book". "This provision, however, only protects techniques and procedures not already well-known to the

public.” *Rugiero v. United States Department of Justice*, 257 F.3d 534, 551 (6th Cir. 2001) (citations omitted). Furthermore, “[t]his exemption is limited to information revealing secret or obscure investigative techniques or procedures . . . [T]o properly invoke Exemption 7E, the government bears the burden of establishing that the requested record was compiled for ‘law enforcement purposes’ and that disclosure of the record will result in the harm Exemption 7(E) seeks to avoid.” *Manchester v. Drug Enforcement Administration*, 823 F.Supp. 1259, 1272 (E.D. PA. 1993) (citations omitted). A “near-verbatim recitation of the statutory standard is inadequate.” *Citizens for Responsibility and Ethics in Washington v. United States Department of Justice*, 746 F.3d 1082, 1102 (DC Cir. 2014). [T]he agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed.” *Id.*

Indeed, certain investigatory techniques have specifically been found not protectable. *See e.g.; Dunaway v. Webster*, 519 F.Supp. 1059, 1082-1083 (N.D. Cal. 1981) (tagging of fingerprints and security flashes); *Ferguson v. Kelley*, 448 F.Supp. 919, 926 (N.D. Cal. 1979). Further information must be provided to enable Mr. Troya to assess whether there is in fact a valid exemption or, more likely, whether this claimed exemption, like so many of the others, is just another excuse for refusing to provide information to Mr. Troya about his case. Finally, if any document or parts thereof contain information regarding purported law enforcement “techniques” which otherwise show or tend to show that the constitution may have been violated in Mr. Troya’s case, then such exemption must give way to the overriding constitutional requirements as set forth below.

The asserted Privacy Act exemption 5 U.S.C. § 552 (j)(2) is inapposite to the countervailing interests in disclosure as discussed *supra*. The public interest in the constitutional moral validity of a death qualifying conviction and sentence of death is indisputable. Moreover, federal courts have underscored that a detailed index and support by the agency claiming exemption is requisite for this claimed exemption. *Coleman v. F.B.I.*, Civil No. 1991 WL 333709 (D.D.C. 1991). No showing has been made to support the exemptions. Reversal therefore is appropriate.

§§§

Finally, again, without waiving any appellate claims as to other issues, we would point out that some of the documents withheld may relate to the payment of federal government money to persons, including witnesses, after the trial. Mr. Troya is clearly entitled under the U.S. Constitution to full disclosure of all such information, and such entitlement existed not only prior to and during trial, but continues after trial. *See Brady v. Maryland*, 373 U.S. 220 (1963); *Kyles v. Whitley*, 115 S. Ct. 1555 (1995); *Freeman v. Georgia*, 599 F.2d 65 (5th Cir. 1979); *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1977); *Smith v. Florida*, 410 F.2d 349, 1351 (5th Cir. 1969); *Royal v. Dutton*, 392 F.2d 544 (5th Cir. 1968); *Jackson v. Wainwright*, 390 F.2d 288, 296 (5th Cir. 1968); *Calley v. Callaway*, 519 F.2d 184, 223

(5th Cir. 1975)(*en banc*); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992); *High v. Head*, 209 F.3d 1257 n.8 (11th Cir. 2000); *see also Ferri v. Bell, supra*.

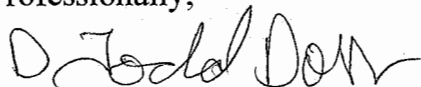
The federal constitution requires full disclosure to a criminal defendant of any information concerning a witness or potential witness who stands to benefit for their cooperation and/or testimony provided for the prosecution, *see supra*. In this case, it appears the federal government may have contacted and/or cooperated with other law enforcement agencies as an incentive to securing favorable testimony from various prosecution witnesses. By law that information must be disclosed, whether or not there exists an otherwise applicable FOIA exemption.

In conclusion, Mr. Troya is under an obligation imposed by federal law to investigate all possible meritorious claims and present them in his first habeas corpus petition. *McCleskey v. Zant*, 499 U.S. 467 (1991). The United States Supreme Court has made it abundantly clear that this identification and delineation of all significant facts is so crucial that even a presumptively innocent death row inmate can be executed without exacting attention to this rule. *Herrera v. Collins*, 506 U.S. 390 (1993).

Based on the foregoing, we request that you overrule the initial exemption redaction and withholding of documents requested pursuant to FOIPA No. 2017-1023, regarding federal death row inmate Daniel Troya.

Mr. Troya request this appeal be processed expeditiously.

Professionally,



D. Todd Doss
Attorney for Daniel Troya
Requester/Petitioner/Appellant



U.S. Department of Justice

Bureau of Alcohol, Tobacco,
Firearms and Explosives

www.atf.gov

May 4, 2018

REFER TO: 2017-1023

Ms. Barbara Kowal
Paralegal Specialist
Office of the Federal Public Defender
Middle District of Florida
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801

Dear Ms. Kowal:

This responds to your Freedom of Information Act (FOIA)/Privacy Act request dated August 17, 2017, and received by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) on the same day, in which you requested records concerning Daniel Troya. We apologize for the delay in our response as we are currently working through a backlog of requests.

In response to your request, we have processed a total of 467 pages of responsive material. We are releasing 61 pages in full, and we are releasing 212 pages in part. We are withholding 194 pages in full. Each page of this production indicates whether it is being released in full (RIF) or released in part (RIP). Individual redactions identify the exemption pursuant to which the redacted material has been withheld. If pages were withheld in their entirety, a deletion sheet is included noting the reason for the withholding.

You have requested tax return information that is not related to you. This information is exempt from disclosure pursuant to Exemption (b)(3) of the FOIA and 26 U.S.C. § 6103 of the Internal Revenue Code.

Exemption (b)(3) of the FOIA permits the withholding of information prohibited from disclosure by another statute only if one of two disjunctive requirements are met: the statute either (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Thus, a statute falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.

26 U.S.C. § 6103 governs the disclosure of tax returns and tax return information collected under the Internal Revenue Code. Under the Internal Revenue Code, information qualifying as tax

Ms. Barbara Kowal

return information, which includes but is not limited to a Taxpayer's identity, the nature, source or amount of his income, and deductions/exemptions, is prohibited from disclosure to any party not entitled to receive it under the permissible disclosures outlined in § 6103. Since the 26 U.S.C. § 6103 restrictions satisfy all the requirements of FOIA Exemption (b)(3), I am withholding the tax return data pursuant to 5 U.S.C. § 552 (b)(3) and 26 U.S.C. § 6103 of the Internal Revenue Code.

We are withholding third party information, including the names of ATF employees, under FOIA Exemption (b)(6). To disclose personal information about a living individual to a member of the public, we need the written consent from the persons whose information you requested. Without written consent, proof of death, or an overriding public interest, personal information is exempt from disclosure under the FOIA. The FOIA does not require agencies to disclose information that would be a clearly unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(6)).

We are withholding third party information, including the names of ATF employees, under Exemption (b)(7)(C). Exemption (b)(7)(C) permits the withholding of information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The public interest in disclosure is limited to the FOIA's core purpose of shedding light on an agency's performance of its statutory duties. The public interest under Exemption (b)(7)(C) must be both significant and compelling in order to overcome the legitimate personal privacy interests of a third party. In this matter, the disclosure would not serve the core purpose of the FOIA, but rather, would serve as an unwarranted invasion of personal privacy (5 U.S.C. § 552(b)(7)(C)).

We are withholding the specific law enforcement codes, techniques, and procedures used in our investigation pursuant to Exemption (b)(7)(E) of the FOIA. Exemption (b)(7)(E) exempts from mandatory disclosure records or information compiled for law enforcement purposes when production of such records or information "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" (5 U.S.C. § 552(b)(7)(E)). The information withheld reveals various law enforcement file numbers and codes, which are primarily used to store and retrieve law enforcement information. Disclosure of such numbers and codes could allow individuals outside the agency to circumvent agency functions and gain access to sensitive investigative information. The information withheld also reveals specific law enforcement procedures and techniques used in this investigation. Disclosure of such information could enable individuals outside of the agency to circumvent agency functions and gain access to sensitive investigative information.

Please note that some of the enclosed documents contain deletions made in consultation with the U.S. Customs and Border Protection (CBP), the system owners of the TECS database. Those deletions are pursuant to FOIA Exemptions (b)(7)(E) for law enforcement file numbers and codes. If you disagree with CBP's determination, you have a right to appeal their withholding determination. Should you wish to do so, you must send your appeal and a copy of this letter,

Ms. Barbara Kowal


within 60 days of the date of this letter, to: FOIA Appeals, Policy and Litigation Branch, U.S. Customs and Border Protection, 90 K Street, NE, 10th Floor, Washington, DC 20229-1177, following the procedures outlined in the DHS regulations at Title 6 C.F.R. §5.9. Your envelope and letter should be marked "FOIA Appeal." Copies of the FOIA and the Department of Homeland Security regulations are available at www.dhs.gov/foia.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

You may contact our FOIA Public Liaisons, Darryl Webb or Johnny Rosner, at (202) 648-7390, for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following web site: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within 90 days of the date of my response to your request. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,



Peter J. Chisholm
Acting Chief, Disclosure Division

Enclosure

DEPARTMENT OF JUSTICE
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FEDERAL PUBLIC DEFENDER
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MAY 08 2018

FILED _____

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