

February 21, 2020

Director, Office of Information Policy  
United States Department of Justice  
1425 New York Avenue, NW  
Suite 11050  
Washington, D.C. 20530-0001

**Louisiana  
Capital  
Assistance  
Center**

*A Non-Profit Law Office*

**Re: Freedom of Information Act Appeal  
Expedited Processing Requested  
FOIPA Request No. 1272013-001 (second interim release)  
Gabriel Nathaniel Rhones**

Dear Director:

Through this letter, the Louisiana Capital Assistance Center (“LCAC”) administratively appeals the second interim response of the Federal Bureau of Investigation (“FBI”) to a request we submitted on October 22, 2018 for records pertaining to Gabriel Nathaniel Rhones under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

I. Request History

On June 11, 2014, the Louisiana Capital Assistance Center (“LCAC”) submitted a FOIA request to the FBI, seeking records pertaining to Mr. Rhones and another subject. Ex. A.<sup>1</sup> As the request states, Mr. Rhones died at USP Beaumont on November 28, 2007. The LCAC, a non-profit law office, requested these records in connection with our representation of Edgar García, an indigent defendant. Mr. García and co-defendant Mark Snarr were convicted and sentenced to die for Mr. Rhones’s murder.

In a letter dated June 17, 2014, the FBI acknowledged receipt of the request and assigned it tracking number 1272013-000. Ex. B. In a letter dated July 29, 2014, the FBI stated that it “located approximately 1318 pages of records potentially responsive to the subject of [the] request.” Ex. C. In a letter dated March 31, 2015, the FBI stated that “29 pages were reviewed and 29 pages are being released.” Ex. D. The FBI enclosed records, which contain redactions.

On October 22, 2018, the LCAC again requested records pertaining to Mr. Rhones, among other subjects, from the FBI. Ex. E. We specifically stated that the request includes reference files as well as main files.

The FBI acknowledged receipt of the second request for Mr. Rhones’s records, assigned it tracking number 1272013-001, and granted our request for expedited processing. Exs. F, G. In a letter dated February 22, 2019, the FBI stated that it “located approximately 1,241 pages of records potentially responsive to the subject of [the] request.” Ex. H. In an April 22, 2019 email, the FBI stated that it “located approximately 1,582 pages that are potentially responsive to [the] request.” Ex. I.

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<sup>1</sup> The Bates numbering on the attached exhibits is the LCAC’s internal labeling of our records.

The FBI provided the first interim release of records with a letter dated October 31, 2019. Ex. J. The LCAC administratively appealed the FBI's first interim response on November 20, 2019. The administrative appeal was assigned tracking number DOJ-AP-2020-000859. Ex. K. Our request for expedited processing was granted. Ex. L.

The FBI's second interim response was dated November 25, 2019. In its letter, the FBI stated that "430 pages were reviewed and 210 pages are being released." Ex. M. The FBI indicated that 213 pages of responsive records were deleted because they were duplicates. Ex. N. For the seven additional pages of records the agency withheld in their entirety, the FBI cited FOIA exemptions 5 U.S.C. § 552(b)(6) and (b)(7)(C) in its letter and a "deleted page information sheet." Ex. O. The FBI enclosed records on CD-ROM. 207 pages are black and white photographs.

An addendum to the letter states, under the heading "General Information," that:

The Record/Information Dissemination Section (RIDS) searches for reasonably described records by searching those systems or locations where responsive records would reasonably be found. A reasonable search normally consists of a search for main files in the Central Records System (CRS), an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling law enforcement, intelligence, and administrative functions. The CRS spans the entire FBI organization and encompasses the records of FBI Headquarters (FBIHQ), FBI Field Offices, and FBI Legal Attaché Offices (Legats) worldwide and includes Electronic Surveillance (ELSUR) records. For additional information about our record searches visit [www.fbi.gov/services/information-management/foipa/requesting-fbi-records](http://www.fbi.gov/services/information-management/foipa/requesting-fbi-records).

The FBI invited the LCAC to appeal its determination within ninety days.

## II. Grounds for Appeal

- A. That the FBI withheld seven non-duplicative pages of responsive records in their entirety suggests the agency failed to narrowly construe FOIA's exemptions.

FOIA strongly favors "broad disclosure," which is the statute's primary objective. *Milner v. Dep't of the Navy*, 562 U.S. 562, 571 (2011); *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976). Agencies may not withhold documents or portions thereof unless they fall within a statutory exemption. *Milner*, 562 U.S. at 562; *Elliott v. USDA*, 596 F.3d 842, 845 (D.C. Cir. 2010). These exemptions must be "narrowly construed." *FBI v. Abramson*, 456 U.S. 615, 630 (1982). If any information contained in a record is exempt from disclosure, the reasonably segregable, non-exempt portion of the record must be released. 5 U.S.C. § 552(a)(8)(A)(ii); *Arieff v. Dep't of the Navy*, 712 F.2d 1462, 1466 (D.C. Cir. 1983); *Ctr. for Int'l Env'tl. Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007). It is ultimately the agency's burden to

support any claim of a right to withhold information. 5 U.S.C. § 552(a)(4)(B); *King v. Dep't of Justice*, No. 15-1445, 2018 U.S. Dist. LEXIS 162273, \*2 (D.D.C. Sept. 23, 2018).

The FBI withheld seven non-duplicative pages of responsive records in their entirety, rather than redact any information to which 5 U.S.C. § 552(b)(6) or (b)(7)(C) apply. This suggests the agency has not discharged its obligations under FOIA to disclose all non-exempt information that is properly requested. Additionally, the FBI has made only bare assertions that the exemptions it cited apply.

B. The records the FBI disclosed are difficult and in some instances impossible to decipher.

Federal agencies “should handle requests for information in a consumer-friendly manner.” President’s Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993), *reprinted in FOIA Update*, Summer/Fall 1993, at 3. The Office of Information Policy (“OIP”) website provides that to apply this principle, an agency should do the following three things:

First, it should make reasonable efforts to check for any better copy of a record that could be used to make a better photocopy for the FOIA requester. Second, when necessary, it should make sure that the requester knows that what is being provided is in fact the best copy that is available. This can be accomplished by a specific reference to that fact in a cover letter or by the use of a “Best Copy Available” stamp on each individual page, preferably both. Third, in any case in which the photocopy provided to a requester is not entirely legible but the illegible information is nonetheless known to the agency, the agency should try to provide that information to the requester in the best way reasonably possible. *Accord FOIA Update*, Spring 1994, at 1 (emphasizing Attorney General’s “customer-service objectives” in communications with FOIA requesters).

Contrary to these directives, the 207 black and white photographs the FBI disclosed are difficult and in some instances impossible to decipher. *See, e.g., Ex. P.* The FBI has not averred that it searched for better copies or that the copies it provided are the best available, nor could the agency. It is inconceivable that the FBI does not possess higher quality, color copies of these photographs and/ or image files, which it could have provided to the LCAC on the disc it sent us. As the records indicate, the photographs were taken by an FBI employee. *Ex. Q.* The FBI has not complied with the standards for providing legible material that are published by OIP. As a consequence, some of the information that the FBI is obligated to disclose is obscured.

C. The search the FBI conducted for records was inadequate and unreasonable.

Under FOIA, it is ultimately the agency’s burden to establish that it made a good faith effort to conduct a search for records using methods reasonably calculated to uncover all relevant documents. *Campbell v. Dep't of Justice*, 164 F.3d 20, 27 (D.C. Cir. 1998); *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). If a FOIA dispute between an agency and a requester proceeds to litigation, the agency must describe its search with detail sufficient for the

reviewing court to determine whether the search was reasonable. *Nation Magazine v. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). This burden is “consistent with congressional intent tilting the scale in favor of disclosure.” *Campbell*, 164 F.3d at 27.

For an agency’s search methodology to be sufficient, the agency must “aver[] that all files likely to contain responsive materials . . . were searched.” *American Immigration Council v. Dep’t of Homeland Security*, 950 F. Supp. 2d 221, 231 (D.D.C. 2013) (quoting *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990)). An agency “cannot limit its search to only one record system if there are others that are likely to turn up the information requested.” *Oglesby*, 920 F.2d at 68. “At the very least,” the agency is “required to explain . . . that no other record system was likely to produce responsive documents.” *Id.* Additionally, the search terms an agency uses must be “reasonably tailored to uncover documents responsive to the FOIA request.” *Bigwood v. Dep’t of Defense*, 132 F. Supp. 3d 124, 140 (D.D.C. 2015).

The FBI has not provided any information about the search it conducted pursuant to this request. In an addendum to its November 25, 2019 letter, the agency stated: “[a] reasonable search normally consists of a search for main files in the Central Records System (CRS).” Ex. M. The FBI did not indicate which records system or systems it actually did search or whether the search included reference files. The generic information the FBI provided is not sufficient to permit the conclusion that its search was reasonable.

Additionally, on July 29, 2014, February 22, 2019, and April 22, 2019, the FBI stated that it located varying numbers of pages potentially responsive to our request for Mr. Rhones’s records. Exs. C, H, I. This discrepancy further warrants explanation by the agency of its search. As Mr. Rhones died in 2007, it is unclear why, between February and April of 2019, the number of pages the FBI maintains that potentially relate to him would have increased by 341.

Finally, if the FBI searched only for main files in the CRS, as its letter suggests is the agency’s practice, then that search was inadequate, and also ignored the terms of our request. The LCAC specifically stated, in our October 22, 2018 request, that the request includes reference files as well as main files.

### III. Relief Requested

We request that OIP review the seven pages of records the FBI withheld in their entirety under exemptions 5 U.S.C. § 552(b)(6) and (b)(7)(C) to determine whether all the information withheld falls within those exemptions. If any records or portions thereof were improperly withheld, we request the disclosure of the non-exempt information.

Additionally, we request that the FBI provide the LCAC the best available copy of the 207 photographs it disclosed. At minimum, we request that the FBI provide legible, color copies of the photographs.

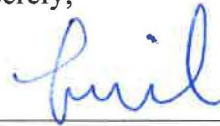
We also request that the FBI specify which record system or systems were searched pursuant to our request and whether reference files were searched, and that it undertake a supplemental search that is reasonable and adequate. If the agency has not done so already, we request that it search all records systems that may contain records pertaining to Mr. Rhones, in both main files and reference files. We request that the FBI search the Electronic Case File using a full text search

methodology, in addition to conducting index searches. We request that the FBI use as search terms Mr. Rhones's name – including alternate spelling Gabriel Rhone, Social Security Number, and Bureau of Prisons Register Number, which we provided in our October 22, 2018 request, as well as any other search terms necessary to fulfill the request. Should the FBI locate additional responsive records, we request that they be released to us.

Please expedite processing of this appeal pursuant to 5 U.S.C. § 552(a)(6)(E)(v). We are seeking these records in connection with our representation of Mr. García, who is facing the death penalty. Pending litigation alleges that the death sentence he received in 2010 was wrongfully imposed. His death sentence was affirmed on direct appeal. In 2014, the United States Supreme Court denied his petition for certiorari. We submitted a petition for post-conviction relief in 2015. The petition is currently under review, and we have a limited period of time in which to amend it with records from the FBI. Because Mr. García faces criminal prosecution that could result in the loss of his freedom or life, an exceptional and urgent need exists justifying expedition. *Cleaver v. Kelly*, 427 F. Supp. 80, 81 (D.D.C. 1976). In accordance with 5 U.S.C. § 552(a)(6)(E)(ii)(I), please make a determination regarding expedited processing within ten days.

If you have any questions or require further information, you may reach me by phone at (504) 558-9867 or by email at lkissel@thejusticecenter.org. Thank you for your attention to this matter.

Sincerely,



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Lucy Kissel  
Attorney Fellow  
Louisiana Capital Assistance Center

**EXHIBIT N**

FEDERAL BUREAU OF INVESTIGATION  
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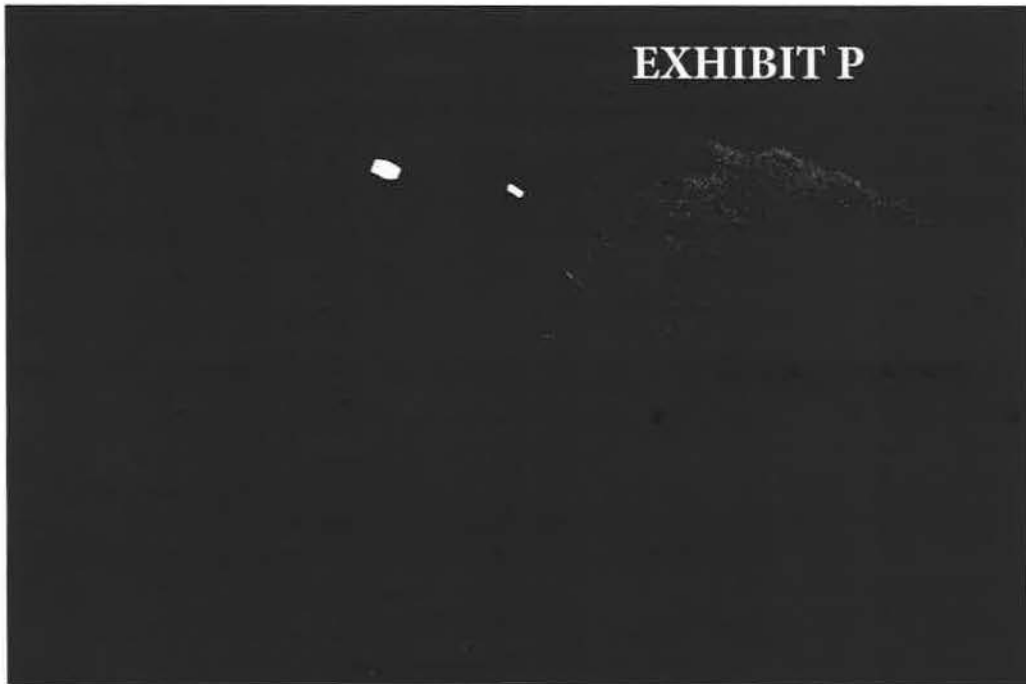
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**EXHIBIT P**



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PHOTOGRAPHER

DATE 11/28/07

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BEAUMONT FEDERAL CORRECTION CENTER

CASE FILE 281 - 40 - NEW

AGENCY FBI

