

August 13, 2010

FREEDOM OF INFORMATION ACT APPEAL

Office of Information Policy
United States Department of Justice
1425 New York Avenue NW
Suite 11050

Washington, D.C. 20530-0001

RE: Appeal of Request No. 1148692-000;
Request for FBI Highway Serial Killings Initiative Data

Dear Sir or Madam:

This is an appeal of the Federal Bureau of Investigation's decision to withhold records responsive to Freedom of Information Act Request No. 1148692-000. The request was dated May 3, 2010, and was filed by Blake Morrison, a reporter for USA TODAY. Mr. Morrison requested access to six categories of information contained in the FBI's Highway Serial Killings database: 1) victims' names; 2) victims' birth dates; 3) locations where victims were found, expressed in latitude and longitude; 4) dates the victims were killed; 5) dates the victims' remains were found; and 6) contact information for any law enforcement entity investigating each case. A copy of Mr. Morrison's request is attached as Exhibit A.

By letter dated July 26, 2010, which was signed by David M. Hardy, the FBI denied Mr. Morrison's request in its entirety. A copy of the denial letter is attached as Exhibit B. The denial letter purports that information responsive to Mr. Morrison's request is exempt from disclosure under FOIA Exemptions 2, 7(D), and 7(E).

The letter did not explain why Exemptions 2 and 7(E) were relevant to the FBI's decision to withhold the requested information, and USA TODAY sees no reason why these exemptions are applicable to its request. The requested information is not related solely to the internal personnel rules and practices of an agency – instead, it is information supplied to the FBI by outside law enforcement sources. Furthermore, the information would not disclose secret investigative techniques or procedures, and disclosure of the information cannot reasonably be expected to risk circumvention of the law. The FBI has already announced publicly on its website that it uses a computer database to track and investigate suspected serial killings along the nation's highways. USA TODAY is not requesting information that would reveal how the FBI analyzes the information – it is merely asking for access to limited categories of information

that are routinely provided to the press by local, state, and federal law enforcement during murder investigations.

The FBI claims Exemption 7(D) is applicable because local and state law enforcement agencies provided the requested information to the FBI under an express condition of confidentiality. In its denial letter, the FBI did not offer evidence of an express guarantee of confidentiality. To the extent that any materials are withheld after this appeal, USA TODAY requests probative evidence that such express confidentiality was guaranteed as required by *Dipietro v. Executive Office for U.S. Attorneys*, 357 F. Supp. 2d 177 (D.D.C. 2004). If the FBI cannot show an express promise of confidentiality to each participating local law enforcement agency, it is not entitled to claim Exemption 7(D) unless it can show circumstantial evidence that the local law enforcement sources provided the information on an implied confidential basis. *See, e.g., Zavala v. Drug Enforcement Admin.*, 667 F.Supp.2d 85 (D.D.C. 2009). In this case, the FBI will not be able to show implied confidentiality because no local law enforcement agency could reasonably expect the requested information to be kept confidential since it is the type of information that is routinely made public in murder investigations.

Even if the FBI is able to show it gave an express assurance of confidentiality, this does not prohibit disclosure. In a 2009 order, President Obama urged agencies to adopt a presumption in favor of disclosure when responding to FOIA requests. Attorney General Eric Holder further advised in a 2009 memorandum to agency heads that “an agency should not withhold information simply because it may do so legally” – but it appears that the FBI is doing just that in its denial of USA TODAY’s request. Exemption 7(D) has traditionally been invoked to protect confidential sources from retaliation and to ensure that such confidential sources will continue cooperating with law enforcement in the future. In almost all of these cases the requesters were criminal suspects seeking to obtain their own law enforcement files, and courts have feared that such disclosures would allow the requesters to identify and retaliate against confidential sources who supplied authorities with incriminating information about them. *See, e.g., Church of Scientology of California v. U.S. Dept. of Justice*, 612 F.2d 417 (9th Cir. 1979) (FBI properly withheld documents related to its criminal investigation of the plaintiff); *Fiumara v. Higgins*, 572 F. Supp. 1093 (D.N.H. 1983) (Bureau of Alcohol, Tobacco, Firearms and Explosives properly withheld documents related to an investigation into the requester’s possible role in an arson). However, USA TODAY’s request is simply not analogous to those that have historically been denied on the basis of Exemption 7(D).

First, there is no risk of a criminal actor retaliating against the confidential sources in this case because the sources are all law enforcement agencies as opposed to informants whose lives would be at risk if their identities were known. Second, there is no risk of local law enforcement agencies refusing to cooperate with the FBI in the future because release of the requested information would in no way impair any ongoing investigations. USA TODAY is requesting only information that is routinely made public by local law enforcement agencies when they are investigating murders – it is not requesting information about possible suspects or details about how the victims were killed, which some agencies may wish to keep secret. In fact, most of the specific information requested by USA TODAY has already been made public by the FBI and by the local law enforcement agencies themselves. The FBI has published a map on its website detailing the exact locations where each victim was found, and detailed information about the

crimes has appeared in several news reports. A copy of the map and a sampling of news articles are attached as Exhibits C and D, respectively. The fact that so much of the requested information has already been publicized should weigh heavily in favor of disclosure.

Finally, the legislative history of FOIA also weighs in favor of disclosure. At the time the statute was amended in 1986 to expand the definition of "confidential source" to include state and local law enforcement agencies, Congress was addressing the specific problem of FOIA misuse by criminal elements. In a report to Congress in the 1980s, the Drug Enforcement Administration stated that more than 60 percent of the FOIA requests it received were from within the criminal element. The Attorney General's 1981 Task Force on Violent Crime found the FOIA should be amended because it was being used by lawmakers to evade criminal investigation and retaliate against informants. *See* 132 Cong. Rec. S14038 (daily ed. Sept. 27, 1986). These were the problems Congress set out to solve with its 1986 FOIA amendment – it did not intend to limit the news media's access. As Senator Patrick Leahy explained, the amendment "addresses the problem which was the concern of the original proposal, the use of FOIA by sophisticated criminal enterprises to learn about ongoing criminal investigations. But it is narrower and more acceptable to legitimate users of FOIA, especially the news media." 132 Cong. Rec. S14033 (daily ed. Sept. 27, 1986). USA TODAY's request does not implicate the legislature's concerns in amending the FOIA, and disclosure of these limited records would be in line with Congressional intent.

As Mr. Morrison explained to those handling the Highway Serial Killings program, USA TODAY's interest in the initiative melds nicely with that of the FBI and the local law enforcement agencies that have contributed information. By writing about the killings, many of them "cold cases" that happened years or even decades ago, and by directing USA TODAY's millions of readers to law enforcement agencies handling the investigations, perhaps those responsible for these crimes might be brought to justice. Without the information Mr. Morrison has requested, USA TODAY is left to explain to its readers that the FBI is unwilling to tell the public where and when the victims were found, when they were killed, and who they are, even though the FBI believes there are one or more serial killers using the nation's highways to find and dispose of their victims.

USA TODAY hopes the unjustified denial of its request was a mistake that will soon be corrected. As the requested information is of timely value, please expedite the consideration of this appeal. In any event, USA TODAY will expect to receive a decision within 20 business days as required by statute. Thank you for your assistance.

Very truly yours,

Barbara W. Wall

cc: Blake Morrison
Courtney French