

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

MARVIN LEON HOLT,)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 09-01515 (RBW)
UNITED STATES DEPARTMENT OF)	
JUSTICE and EXECUTIVE OFFICE OF)	
UNITED STATES ATTORNEYS,)	
)	
Defendants.)	
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DECLARATION OF DAVID LUCZYNSKI

I, David Luczynski, declare the following to be a true and correct statement of facts:

1. I am an Attorney Advisor with the Executive Office for United States Attorneys ("EOUSA"), United States Department of Justice. In that capacity, my responsibilities include acting as liaison with other divisions and offices of the Department of Justice ("DOJ") in responding to requests and the litigation filed under both the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 (1988), and the Privacy Act of 1974, 5 U.S.C. §552a (1988) ("PA"), the reviewing of FOIA/PA requests for access to records located in this office and ninety-four United States Attorney offices ("USAOs") and the case files arising therefrom, reviewing of correspondence related to requests, reviewing of searches conducted in response to requests, locating of responsive records, preparing of responses thereto by the EOUSA to assure that determinations to withhold (or to release) such responsive records are in accordance with the provisions of both the FOIA and the PA, as well as the Department of Justice regulations. See 28 C.F.R. §§16.3 et seq. and §16.40 et seq.

2. As an Attorney Advisor of the FOIA/PA Unit, EOUSA, I have the authority to release

or withhold records requested under the FOIA/PA. The statements I make in this Declaration are made on the basis of my review of the official files and records of EOUSA, on my own personal knowledge, and on the basis of information acquired by me through the performance of my official duties.

3. Due to the nature of my official duties, I am familiar with the procedures followed by this office in responding to the FOIA/PA request(s) made to EOUSA by the above-captioned Plaintiff, Marvin Holt. I have reviewed the Complaint which this Declaration addresses.

CHRONOLOGY

4. On March 14, 2002, EOUSA received a FOIA request from Plaintiff for:

“...any and all materials from the entire central file that your agency and any other agency(s) under your supervision, as may be referred to below, has compiled to date, relating to me, and a list of whatever information your agency(s) or other branches thereof, under your supervision may have designated in this file or any portion thereof, and the reason for each designation, and the name of the person and his or her title requesting same.

Plaintiff specified that he was also seeking access to “the files of Mark Williams, Robert Smith and notes and summaries of Det’s Vivian Colman, James F. Johnson, & Michael Baylor.” Plaintiff also submitted a certificate of identity with his request. (**See Exhibit A.**)

5. On April 15, 2002, EOUSA acknowledged receipt of Plaintiff’s request and advised that request number 02-856 had been assigned to it. At that time, EOUSA notified Plaintiff that it had interpreted his request as seeking information on third party individuals, and that without a consent of the third party or proof that the individual was deceased, it would be an unwarranted invasion of personal privacy to release any responsive records. Accordingly, EOUSA advised Plaintiff that his request would be closed, and provided him with his administrative appeal rights.

(See Exhibit B.) EOUSA has no record of receiving an administrative appeal from plaintiff.

6. At that time EOUSA decided to split Plaintiff's request into two files--one dealing with his request for third party records (02-856) and another relating to records pertaining to himself. Accordingly, and by letter dated April 9, 2002, EOUSA advised Plaintiff that it had assigned request number 02-857 to that portion of his request seeking access to his own records.

(See Exhibit C.)

7. By letter dated April 18, 2008, EOUSA advised Plaintiff that a search for records in the United States Attorney's Office for the District of Columbia ("USAO DDC") had revealed no records pertaining to himself. In this letter EOUSA also advised plaintiff of his administrative appeal rights. (See Exhibit D.) EOUSA has no record of receiving an administrative appeal from plaintiff.

8. For reasons unknown to the declarant at this time, a year earlier, on April 11, 2007, EOUSA sent Plaintiff a letter explaining that two boxes of potentially responsive records had been located in the USAO DDC and that the requester must agree to pay anticipated fees before any further processing of his request would be performed. (See Exhibit E.)

9. In response to EOUSA's fee letter, and on May 2, 2007, EOUSA received a modified request from Plaintiff, which sought the testimony of various third party individuals as well as "every thing pertaining to this case [F-8825-92], with the exception of the trial transcript, Michael Baylor and Carolyn grand jury statements." Plaintiff also requested access to the "investigators notes of Michael Baylor, Jame[s] F. Johnson, Vivan Coleman and Charles Culver." (See Exhibit F.)

10. Upon receipt of Plaintiff's modified request, and by letter dated April 2, 2008, EOUSA informed him that it had opened a new request dealing strictly with his own records and

that it had assigned number 08-869 to it.. In this letter, EOUSA also advised that it had split the request into two files as it had done previously—one file covered that portion of his request for access to his own records (08-869) and the other file covered the portion of his request for access to third party records (08-870). (See Exhibit G.)

11. By letter dated April 17, 2009, EOUSA made a partial release of 26 pages of material. In this letter EOUSA explained that 6 pages were released in full (“RIF”), 20 pages were partially redacted and released in part (“RIP”), and that FOIA exemptions 5 U.S.C. §§ (b)(7)(C), (b)(7)(D), (b)(7)(F), and Privacy Act exemption (j)(2) were applied to withhold certain information. EOUSA advised Plaintiff that it had referred material that originated with D.C. Pre-Trial Services there for review and direct response to him. Finally, EOUSA advised Plaintiff of his administrative appeal rights. (See Exhibit H.)

12. By letter dated May 4, 2009, Plaintiff sent an appeal to the Office of Information Policy (“OIP”). (See Exhibit I.)

13. On May 27, 2009, the OIP acknowledged receipt of Plaintiff’s appeal and assigned it number 09-1828. (See Exhibit J.)

14. By letter dated August 8, 2009, the OIP informed Plaintiff that it was affirming EOUSA’s action on his request. (See Exhibit K.)

15. In a letter dated February 4, 2009, EOUSA denied Plaintiff’s request for access to third party records in request number 08-870. The letter informed Plaintiff that EOUSA had denied his request because without an express agreement and consent form from the third party, proof of death, or a showing of how the information benefits the public interest, to disclose the information would be an unwarranted invasion of the individual’s privacy interest. EOUSA also provided Plaintiff with his administrative appeal rights. (See Exhibit L.) EOUSA has no record

of receiving an administrative appeal from plaintiff.

16. By letter dated May 7, 2009, the USAO DDC forwarded Plaintiff's new request to EOUSA for processing. **(See Exhibit M & N.)**

17. EOUSA acknowledged receipt of Plaintiff's new request by letter dated May 18, 2009, and that it had assigned number 09-1701 to it. EOUSA also asked Plaintiff to submit a certificate of identity, and advised that upon receipt of this form it would open a new request for processing. EOUSA also advised plaintiff of his administrative appeal rights in this letter. **(See Exhibit O.)**

18. Upon receipt of a new certificate of identity form from Plaintiff, and by letter dated July 16, 2009. EOUSA advised him that it had opened a new request and had assigned it number 09-2392. **(See Exhibit P.)**

19. Upon further review of Plaintiff's request number 09-2392, EOUSA determined that it was a duplicate request; therefore, EOUSA administratively closed this request.

ADEQUACY OF THE SEARCH

20. After receiving Plaintiff's FOIA request EOUSA undertook the search for documents responsive to Plaintiff's FOIA request. To accomplish this EOUSA forwarded Plaintiff's FOIA request to the FOIA Contact for the USAO DDC. Each United States Attorney's Office maintains the case files for criminal matters prosecuted by that office. In order to provide the clearest explanation of the search for responsive records, I have requested that the FOIA Contact for the USAO DDC, Annette L. Dennis, prepare a declaration describing in detail steps taken to locate records responsive to Plaintiff's request. The declaration describing the search is attached. **(See Exhibit Q.)**

EOUSA'S DISCLOSURE DETERMINATION

Identification of Responsive Records

21. All documents responsive to Plaintiff's FOIA request are located in the USAO DDC, and are maintained in the Criminal Case File System (Justice/USA-007) in a file captioned United States v. Marvin Holt, No. F-8825-92.

22. There are no other records systems or locations within the USAO DDC in which other files pertaining to Plaintiff's criminal case are maintained.

JUSTIFICATION FOR NON-DISCLOSURE UNDER THE PRIVACY ACT

23. The USAO's Criminal Case Files (Justice/USA-007) are contained in a Privacy Act System of Records. The Attorney General has promulgated rules exempting these records from the Privacy Act's access provisions as authorized by 5 U.S.C. § 552a(j)(2), which appear at 28 C.F.R. § 16.81. Subsection (j)(2) exempts from mandatory disclosure all records maintained by an agency or component performing as its principal function any activity pertaining to the enforcement of criminal laws. The mission of the USAO is to enforce criminal and civil laws and defend the interests of the United States, to provide Federal leadership in preventing and controlling crime, and to seek just punishment for those found guilty of unlawful behavior.

24. The entire responsive criminal case file pertains to the criminal investigation of Mr. Holt for violation of federal controlled substance laws, for felony murder, and for various firearms violations. These records were compiled for criminal law enforcement purposes by the USAO DDC, which performs as its principal function activities related to the enforcement of criminal laws. Accordingly, this file is exempt from the access provisions of the Privacy Act pursuant to 5 U.S.C. § 552a(j)(2).

JUSTIFICATION FOR NON-DISCLOSURE UNDER THE FOIA

EXEMPTION 5 U.S.C. §552 (b)(7)(C)

25. The pages withheld were deemed exempt under FOIA Exemption (b)(7)(C), which protects from public disclosure information compiled for law enforcement purposes, if such disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. All the information at issue was compiled for law enforcement purposes – namely, to facilitate the investigation and criminal prosecution of the requester.

26. Exemption (b)(7)(C) was applied to the withheld records in an effort to protect the identity of third-party individuals, such as eye witnesses, local law enforcement personnel, third parties of investigative interest to the government, third parties merely mentioned in the records, and third parties who provided information to the government the release of which could subject such persons to an unwarranted invasion of their personal privacy. Release of their names and identifying information could result in unwanted efforts to gain further access to such persons or to personal information about them or subject them to harassment, harm, or exposure to unwanted and/or derogatory publicity and inferences– all to their detriment.

27. Consequently, EOUSA determined that such information is exempt from disclosure under Exemption (b)(7)(C), and that there was no countervailing public interest in the release of this privacy-protected information, because its dissemination would not help explain government activities and operations or outweigh third-party individuals' privacy rights in the information withheld under this exemption. Moreover, no third-party individual provided authorization or consent to disclose such information. *Cf.* 5 U.S.C. § 552a(b) (“No agency shall disclose any record . . . contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains” unless otherwise

authorized by law).

Names of Local Law Enforcement Personnel

28. Exemption (b)(7)(C) has been asserted to protect the names, signatures and badge numbers of local law enforcement officers and support employees who were responsible for conducting, supervising, and/or maintaining the investigative activities reported in this investigation. Publicity, adverse or otherwise, regarding any particular investigation conducted by a state or federal law enforcement agent may seriously impair their effectiveness in conducting future investigations. This privacy consideration also protects these law enforcement officials from unnecessary, unofficial questioning as to the conduct of an investigation, whether or not they are currently employed by the state or federal government. State and federal law enforcement agents conduct official inquiries into violations of various criminal statutes and come into contact with all strata of society and conduct searches and make arrests, both of which result in reasonable, but nonetheless serious disruptions in the lives of individuals. It is possible for a person targeted by such law enforcement action to carry a grudge which may last for years, and to seek revenge on the agents involved in the investigation. The publicity associated with the release of the identity of a law enforcement officer in connection with a particular investigation could trigger hostility towards the officer by such persons. Balancing this substantial privacy interest against the public interest in disclosure, EOUSA could find no legitimate public interest to be served in the disclosure of the identities of these law enforcement officers connected to this investigation to the public because it will not shed light on the operations and activities of the federal government.

29. The names of support employees have also been withheld pursuant to Exemption

(b)(7)(C). Support personnel are assigned to handle tasks relating to criminal investigations. These individuals are in positions to access information concerning official law enforcement investigations. They could therefore become targets of harassing inquiries for unauthorized access to the details of a criminal investigation if their identities were released. The rationale for protecting the identities of federal law enforcement officers, as discussed in Paragraph 28, supra, also pertains to the identities of support employees. EOUSA also balanced this substantial privacy interest against the public interest and determined that the privacy interest outweighs the public interest in disclosure because this information will not shed light on the operations and activities of the federal government.

**Names and/or Identifying Information Pertaining to Third Parties
Who Provided Information to the Government**

30. Exemption (b)(7)(C) has been asserted to protect the name and/or identifying information pertaining to individuals who assisted the government in its investigation and prosecution of Mr. Holt by providing information concerning the murder investigation. The identifying information pertaining to these individuals that EOUSA withheld under Exemption (b)(7)(C) in conjunction with Exemption (b)(6) consists of their dates of birth, home and work telephone numbers, license plate number, and relationship to Mr. Holt..

31. Information provided by individuals during an interview reflects some of the most productive investigative tools utilized by law enforcement agencies. The largest roadblock in successfully obtaining the desired information through an interview is the fear by the interviewee of his or her identity possibly being exposed and, consequently, being harassed, intimidated or threatened with legal or economic reprisal, or possibly physical harm. In order to surmount these

obstacles, persons interviewed and who provide information must be assured that their identities will be held in the strictest confidence. EOUSA has attempted to release all segregable portions of the information provided by these individuals without revealing their identities. The continued access to persons willing to provide pertinent facts bearing on a particular investigation outweighs any benefits derived from releasing the identities of these individuals. Furthermore, there is no legitimate public interest to be served by releasing the identities of persons who provided information to the government because it will not shed light on the operations and activities of the government.

32. In certain instances certain information was inextricably intertwined with references to Mr. Holt. However, EOUSA was able to segregate certain references and disclose them without creating the risk of revealing privacy-protected information concerning the other third party individuals discussed within. In other instances, EOUSA withheld references in their entirety because they were not reasonably segregable and Mr. Holt provided EOUSA with no authorization or consent to release otherwise privacy-protected information from any of the third party individuals named in these records.

**Names and/or Identifying Information Pertaining
To Third Parties Merely Mentioned**

33. Exemption (b)(7)(C) has also been asserted to protect the names, home telephone numbers of those who are only incidentally mentioned in these records. To release the identities of third parties who are merely mentioned in investigatory records would not shed any light on the government's performance of its statutory duties with respect to this investigation. However, the disclosure of their identities could cause unsolicited and unnecessary attention to be focused

on them and/or their family members. The mention of their names in the context of a murder investigation could cast them in an unfavorable or negative light if released to the public. Thus, these individuals have a strong privacy interest in the protection of such personal information. Furthermore, there is no legitimate public interest to be served by releasing the identities of persons who were merely mentioned in this investigation because it will not shed light on the operations and activities of the federal government.

**Names and/or Identifying Information Pertaining
To Third Parties of Investigative Interest**

34. Exemption (b)(7)(C) has been asserted to protect the identities and/or personal and non-public information concerning third-party individuals in whom federal and/or local law enforcement agencies had an investigative interest during the course of this investigation. EOUSA is withholding the photographs of third-party individuals who were of investigative interest to the government. Being linked with any law enforcement investigation carries a strong negative connotation. To release the identities of these individuals to the public as subjects or suspects in a criminal investigation could subject them to harassment or embarrassment, as well as undue public attention. In balancing the privacy interest in this information against the public interest in disclosure, EOUSA found no legitimate public interest in the release of personal, non-public information concerning these individuals who were of investigative interest to the police department because it will not shed light on the operations and activities of these federal law enforcement agencies.

35. This exemption was applied to Documents 1-7.

EXEMPTION 5 U.S.C. §552(b)(7)(D)

36. Exemption (b)(7)(D) of the FOIA exempts from mandatory release information compiled for law enforcement purposes if its release “could reasonably be expected to disclose the identity of a confidential source, including a state or local agency or authority or any private institution that furnished material on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or any agency conducting a lawful national security intelligence investigation, and information furnished by a confidential source.”

37. This exemption is applied to protect individuals who provided information as confidential sources during a criminal investigation (both their identity and the information provided), disclosure of which would likely produce a disastrous impact upon the ability to ever obtain such investigative information again, as it would create a chilling effect upon the free-flow of information essential to resolve criminal prosecutions. Further, if this information were released, individual informants would likely become targets of harassment or other forms of reprisal. To avoid these harmful consequences and promote continued cooperation, such information is withheld.

38. The United States Supreme Court decision, Department of Justice v. Landano, 113 S.Ct. 2014 (1993), held that the Government bears the burden of establishing that Exemption (b)(7)(D) applies to the documents claimed. The critical element to be established is whether a “particular source spoke with an understanding that the communication would remain confidential.” (Id., p. 2019) This can be proven by either an express assurance of confidentiality or circumstances from which the assurance could reasonably be inferred. (Id., p. 2021) Where

not found to have been expressly assured, certain circumstances characteristically may support an inference of confidentiality. Among these are the fact that an individual was a paid informant, the character of the crime being investigated, and the source's relation to the nature of the crime. (Id.)

39. In this case, the records withheld by EOUSA contain information provided by eye-witnesses to the murder for which Mr. Holt was prosecuted. This information, withheld pursuant to Exemption (b)(7)(D), includes information from which the assurance of confidentiality could be reasonably inferred.

40. As stated above, confidentiality can be based on an express assurance of confidentiality or circumstances from which the assurance could reasonably be inferred. Express promises of confidentiality can be supported by notations made on the face of documents indicating that the information in them is to be kept confidential pursuant to an express promise, by statements from the agents or sources involved in which they attest to their personal knowledge of an express promise, by specific agency practices or procedures regarding the routine treatment of confidential sources, including those for "symbol-numbered" sources, or by some combination thereof. Confidentiality can be implied from the nature of the crime and the source's relation to it. A key consideration here is the potential for retaliation by defendants or requesters and the violent or intimidating nature of the crime itself.

41. In this case, the confidential sources are not named, but instead, are referred to as a "W-1" and "W-2." These sources provided detailed information pertaining to the murder for which plaintiff was convicted. These sources had direct contact with the subject of the criminal investigation and provided details as to their criminal conduct. Accordingly, EOUSA has

inferred confidentiality from the fact that the confidential sources provided information in a murder investigation, that these confidential sources were not named in the investigatory material, but were referred to by the designation "W-1" etc., and that these confidential sources were closely connected to the criminal activity being investigated.

42. This exemption was applied to Documents 4 and 6.

EXEMPTION 5 U.S.C. §552(b)(7)(F)

43. Exemption (b)(7)(F) permits withholding records or information compiled for law enforcement purposes if the release could reasonably be expected to endanger the life or physical safety of an individual. This exemption protects the safety of any individual and there is no balancing of interests is required for application of this exemption. Courts have applied Exemption 7(F) in order to protect persons from possible harm from a requester who has a violent past.

44. EOUSA applied this exemption to portions of specific documents in this case in conjunction with other exemptions, particularly (b)(7)(C) and (b)(7)(D), due to indications that there was a reasonable likelihood that a threat of harm could be posed to certain individuals who either work for the government or who provided information in the course of an investigation, should the withheld material be released. A reasonable likelihood that there was a threat of harm to individuals could be inferred from the fact that the underlying investigation involved a shooting death and that some of the individuals named in the records were eye-witnesses to the violence.

45. This exemption was applied to Documents 4 and 6.

VAUGHN INDEX

46. In order to explain the withholdings made by EOUSA, I submit a Vaughn Index, which is attached to this declaration. The Vaughn Index was developed pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.D.C. 1973). As shown by the Vaughn Index, EOUSA redacted portions of twenty pages of documents. The Vaughn Index attached to this declaration describes each document and sets forth the reasons for EOUSA's decisions regarding withholding certain information and releasing in part other information ("RIP" documents).

SEGREGABILITY OF NON-EXEMPT INFORMATION

47. In this matter, the responsive information has been provided to Plaintiff with minimal redactions. The only time that information other than individuals' names was withheld occurred in instances where the information given to the investigating officers could be used to identify the individual providing the information.

DISCRETIONARY DISCLOSURES

48. The EOUSA has reviewed all records for discretionary release under the terms of the Attorney General's March 19, 2009 Memorandum on the FOIA. The EOUSA has reviewed the records to determine if it is reasonably foreseeable that disclosure would harm an interest protected by one of the FOIA's statutory exemptions or the disclosure is prohibited by law, and has determined that the withheld information is not appropriate for discretionary disclosure.

CONCLUSION

49. Each step in the handling of Plaintiff's request has been entirely consistent with the EOUSA and the United States Attorney's Office procedures which were adopted to insure an equitable response to all persons seeking access to records under the FOIA/PA.

I declare under penalty of perjury that the foregoing is true and correct and that Exhibits
A through Q are true and correct copies.

Executed on November 23 2009.



David Luczynski
Attorney Advisor
EOUSA, FOIA/PA Unit