

EXHIBIT 4



Director
Office of Information Policy
Department of Justice
Sixth Floor
441 G Street, NW Washington, D.C. 20001

Sent via U.S. Mail

Re: Request No. 1449861-000

December 23, 2019

FREEDOM OF INFORMATION ACT APPEAL

To Whom it May Concern:

I write on behalf of the First Amendment Coalition (FAC) and journalist Bryan Carmody to appeal an adverse determination issued in response to a request made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). The FOIA request was dated October 9, 2019 and the FBI responded by letter dated November 15, 2019, having assigned the request no. 1449861-000. A copy of the October 9 request (the "Oct. 9 Request") and the FBI's November 15 response (the "Nov. 15 FBI Response") are attached as Exhibits A and B to this appeal.

The Oct. 9 Request was for records regarding Mr. Carmody and Jeff Adachi, the former Public Defender for the City and County of San Francisco. The FBI is processing the Oct. 9 Request under two separate request numbers divided between records regarding Mr. Carmody (request no. 1449847-001) and records regarding Jeff Adachi (request no. 1449861-000). The Nov. 15 FBI Response concerns the Adachi request no. 1449861-000, and that response is the focus of this appeal.

Background

Bryan Carmody is a freelance journalist based in San Francisco and operates a news organization under the trade name “North Bay Television.” Jeff Adachi was the Public Defender for the City and County of San Francisco, an elected office, until his death on February 22, 2019. It has been widely reported that the SFPD conducted investigations into Mr. Adachi’s death as well as the alleged leak of a police report to Mr. Carmody regarding that death. The FBI has confirmed that two of its agents were present, and attempted to interview Bryan Carmody, during a SFPD search of Mr. Carmody’s residence and office on May 10, 2019.¹ The *New York Times* reported on May 13, 2019 that “A spokeswoman in the F.B.I.’s San Francisco office confirmed the agents’ presence but declined to say how they were involved.”² An FBI form 302 dated May 10, 2019 regarding that search has been released in response to other FOIA requests and is attached as Exhibit C to this appeal.

Records Requested

In the Oct. 9 Request, FAC and Mr. Carmody requested the following records regarding Mr. Adachi:

- (1) All documents evidencing or referencing any investigation or inquiry into the alleged leak to the press of a SFPD police report regarding the death of former San Francisco Public Defender Jeff Adachi;**
- (2) All documents evidencing or referencing any investigation of, or inquiries into, the death of former San Francisco Public Defender Jeff Adachi;**
- (3) All records referring to or regarding Mr. Adachi.**

FOIA Exemption 7(A) Does Not Justify Refusing to Release Any Records

The Nov. 15 FBI Response acknowledges that responsive records exist but cites a single FOIA exemption, 5 U.S.C. § 552(b)(7)(A), as justification for refusing to release any records and administratively closing the Oct. 9 Request. As you well know, exemption 7(A) involves a two-part test. There must be a “reasonable likelihood” of a law enforcement proceeding and the release of the requested documents “could reasonably be expected” to harm that proceeding. The FBI has the burden of proof through the use of admissible evidence in justifying the use of

¹<https://www.washingtonpost.com/nation/2019/05/11/reporter-declined-reveal-his-source-then-police-showed-up-his-front-door-with-guns/>

² <https://www.nytimes.com/2019/05/13/us/bryan-carmody-journalist-raid-source.html>

exemption 7(A). Citizens for Responsibility & Ethics in Wash. v. DOJ, 746 F. 3d 1082, 1098 (D.C.Cir. 2014). Under the facts relevant to this appeal, that burden of proof cannot be satisfied.

The medical examiner has ruled that Mr. Adachi's death was accidental and caused by pre-existing medical conditions, and that there was no criminality worth pursuing. Relevant pages from that report are attached as Exhibit D. According to the SFPD Chief of Police, there are no remaining criminal investigations into the death or the purported leak of a police report regarding the death. See SFPD Press Release, Exhibit E. The Form 302 regarding the FBI's questioning of Mr. Carmody (Exhibit C) is evidence of an investigation that went absolutely nowhere. In fact, the Hon. Christopher C. Hite, judge of the San Francisco Superior Court, has ruled in a motion to unseal one of the search warrants targeting Mr. Camody that, "There have been no charges filed in this matter and there does not appear to be an ongoing criminal investigation by any governmental agency at this time." See pg. 10, lines 8-10 of the August 2, 2019 Order of the Court, attached as Exhibit F.

A conclusionary and generic assertion that some investigation, somewhere, may somehow be compromised is insufficient to justify withholding records under Exemption 7(A). See, Scheer v. US DOJ, 35 F. Supp. 2d 9, 13 (D. C. 1999) ["The government may not, however, be conclusory or vague in stating how the release of the information would interfere with the prospective law enforcement proceeding"]. Again, the FBI will need to meet its burden of proof with admissible evidence. Dow Jones v. FERC, 219 F.R.D. 167, 174 (C.D. Cal. 2002) [Exemption 7(A) inapplicable given failure to submit evidence of how disclosure of the records would harm an ongoing investigation].

Thank you for your prompt attention to this important matter. I am happy to discuss FAC's and Mr. Carmody's appeal by phone or email if you wish clarification or expansion on any of the matters set forth above. We look forward to receiving your decision with twenty business days as required by 5 U.S.C. § 552(a)(6)(A)(ii).

Sincerely,

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