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**FREEDOM OF INFORMATION ACT REQUEST – APPEAL**

**FOIA REQUEST No. 2006-02289**

Saturday, March 25, 2006

**VIA USPS FIRST-CLASS CERTIFIED MAIL ONLY**

Office of Information and Privacy  
United States Department of Justice  
Flag Building, Suite 570  
Washington, D.C. 20530-0001

Dear FOIA Appeals Administrator:

This Requestor respectfully appeals decisions rendered by Federal Bureau of Prisons (“BOP”) South-Central Regional Counsel Michael D. Hood in Request No. 2006-02289. These decisions were postmarked on Tuesday, February 10, 2006 – nearly sixty days after BOP received electronic service of the Request, and in breach of 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(a)(6)(E)(ii)(I), and 28 C.F.R. § 16.5(d)(4). This Appeal, however, is filed timely. In accordance with 28 C.F.R. § 16.10, the Requestor expects all records related to this and other active requests of FCI La Tuna are being preserved exactly by the Justice Department.

This appeal challenges Counsel Hood’s conclusions: (1) that expedited process is not merited under 5 U.S.C. §§ 552(a)(6)(E) and 28 C.F.R. § 16.5(d); and (2) that full fee waiver is not merited under 5 U.S.C. § 552(a)(4)(A)(iii) and 28 C.F.R. § 16.11(k). Counsel Hood gave no grounds for his conclusory tracking of statute and regulation language, nor did Counsel Hood offer any rebuttal to several substantial arguments made in the 12/14 Request. The Requestor therefore also challenges that Counsel Hood and his agents further violated the terms of 5 U.S.C. § 552(a)(6)(E).

In support of this appeal, the Requestor adopts and incorporates by reference, as if fully set forth herein, the original Request No. 2006-02289, dated Thursday, December 14, 2005 (true copy enclosed hereafter). He also adopts and incorporates by reference, as if fully set forth herein, all documents, hyperlinks, rolling counters, the Guestbook, and other items published at <http://www.victorvillefoia.org/>, and particularly <http://www.victorvillefoia.org/La%20Tuna.html/>, in support of this request.

### Expedited Process

Under 28 C.F.R. § 16.5(d), a request can be expedited if:

- (1) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;*
- (2) An urgent need to inform the public about an actual or alleged federal government activity exists;*
- (3) A loss of substantial due process exists;*
- (4) The matter is of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects public confidence;*

The instant Request meets each of these grounds for expedited process.

The 12/14 Request (and its corollary Request, No. 2006-02285) addresses records that relate to (a) serial inmate-on-inmate violence, allegedly related to the Mexican Mafia seizing control over FCI La Tuna, its staff, and about two score New Mexican prisoners, where (b) inadequate staffing levels apparently allowed – and continue to allow – (c) gang-member inmates to dictate to Justice Department agents which New Mexican inmates can survive a return to mainline housing. These records directly relate to whether the BOP has appropriately and safely staffed FCI La Tuna, and what ongoing security measures against future gang control exist. All La Tuna denizens, inmates and staff alike, face this constant and ongoing threat of violence.

New Mexican inmates, those allowed back in mainline housing by alien-inmate gangsters after a 200-on-2-dozen ambush last Thanksgiving, are not allowed to even acknowledge one another, under threat of new violence or death. La Tuna staff also reports to inmates that “contracts” – gang orders to kill – hang over the head of several New Mexican inmates still in the Hole. The threats to health and safety are constant companions to the approximately 46 New Mexican inmates directly benefiting from this FOIA Request, as well as to La Tuna’s alien inmates conscripted into gang service and the under-supported Correctional Officers who are trying to keep the peace. Rumors of additional alien-on-citizen inmate violence abound at La Tuna, and these records will demonstrate the steps La Tuna’s administration has taken to avert refreshed violence.

The Instant Request also addresses credible allegations of La Tuna staff being deliberately indifferent to inmate medical needs, many of which medical needs remain unaddressed even today. The requested records will prove or refute these independent claims of constitutional and public policy violations.



Request No. 2006-02289 also pursues records to confirm or deny multiple, independent reports of La Tuna staff unlawfully retaliating against some or all New Mexican prisoners through (a) extended detention in the Special Housing Unit ("SHU," or "the Hole"); (b) unjustified restrictions on inmate communications and family relationships, through restrictions on mails, telephone use, and visitation; and (c) credible allegations of La Tuna staff using unnecessary – and so excessive – force against compliant New Mexican inmates. Staff Retaliation is also alleged to include the false swearing of BOP/DOJ disciplinary complaints against inmates.

Since the day of submission of the corollary 12/1 Request – nearly four months – at least one inmate has been removed by La Tuna staff to the Hole and left there without mandatory administrative notice or hearings. Credible allegations have since arisen of worms in the food presented to La Tuna SHU inmates; of cockroach infestations; of excessive mold and sporing without appropriate ventilation; of filth throughout the Hole, but; absence of adequate cleaning supplies; and, failure of BOP staff to even offer SHU inmates clean clothes or bedding. In the confined space of the SHU, inmates commonly sit three and four-deep in a 9'-x-6' cement rectangle. The filth, infestation, malnourishment, and lack of essential medical and psychological care credibly alleged against BOP/DOJ Staff present an entirely separate health and safety ground for expedited process.

Three truckloads of La Tuna staffers watched KFOX-TV 14 film roughly one hour of interviews with concerned family members after inmate visits last week. The BOP's concern about News Media filming, as well as the report that La Tuna staff thereafter demanded of KFOX-TV the ability to "refute" opposing information after La Tuna staff had already waived express requests for information, this BOP conduct amplifies the media concern here addressed. It also testifies to certain Staff concern about media attention, and thus underscores the exceptional need – in both the media and the criminal justice community – for expedited records production. In part to satisfy these criteria and the separate requirements for public interest fee waiver, true copies of this Appeal will also be forwarded directly to KFOX-TV journalists Benn Swann and Andrea Troll, whose News Media outlet aired a story on FCI La Tuna on or about last Friday evening, March 17, 2006.

Just as Congress debates new and expanded Mandatory Minimum sentences to Federal prison, allegations here lie that corruption and gangs control the administration of a Federal prison. FOIA Request No. 2006-02289 seeks Federal agency records to confirm or deny credible reports of unconstitutional and abusive Justice Department practices within and surrounding FCI La Tuna, New Mexico/Texas. These abusive practices resemble those practices committed by United States military abroad, including National Guard and Reserve citizen-activations, and which may have been returned to the BOP from overseas Defense Department service.

For all these reasons, we respectfully submit every regulatory reason to offer expedited processing here exists.



### **Public Interest Fee Waiver**

The Requestor has been in regular contact with the Office of Senator Jeff Bingaman (D-NM) regarding the allegations (from over a half-dozen inmates) that drove the instant Request. Through Aide Jorge Silva, Senator Bingaman's Office has directly addressed some concerns of numerous New Mexico citizens with family members imprisoned at La Tuna. Mr. Silva has further authorized the Requestor to report the Senator's Office will personally review this Appeal. Given Mr. Silva's interactions, conduct, and consideration of all prior submissions, the Requestor believes that Senatorial review will also extend to all documents subsequently filed regarding La Tuna. In as much as Request No. 2006-02289 now directly affects particular business before a Member of the United States Senate, this matter seems entitled to public interest fee waiver as a matter of right.

A fee waiver or reduction is justified where "public interest" is identified, and public interest in disclosure is greater in magnitude than any identified commercial interest; commercial interests themselves do not proscribe public interest fee waivers, but rather must be weighed against the public's interests. The public interest benefits flowing from disclosure of the requested public records, which BOP keeps in the regular course of its government activities, are directly and clearly connected to understanding how DOJ-BOP operates FCI La Tuna. See 28 C.F.R. § 16.11(k)(2)(i)-(iv); *Brown v. Federal Bureau of Investigation*, 658 F.2d 71, 73 (2d Cir. 1981) ("The Freedom of Information Act, and the judicial decisions which interpret and apply it, evidence a strong public policy in favor of public access to information in the possession of federal agencies").

This matter alleges that FCI La Tuna is understaffed; that alien inmates control important aspects of La Tuna's operations; that inmates are being denied critical medical care; and that the BOP is willfully disregarding the disease-bearing Petri dish that is its SHU. Free professional services offered to document or deny these allegations seem the antithesis of "commercial use," and also the very reason Congress enacted the Freedom of Information Act in the first place – to protect the People from its Executive's un-republican secrecy. See *U.S. Dep't of State v. Ray*, 502 U.S. 164, 177 (1991) ("FOIA's basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . focuses on the citizens' right to be informed about what their government is up to [internal quotations omitted]."); accord *Brown v. FBI*, 658 F.2d at 73.

Despite black-letter duties to justify his decisions, Counsel Hood concluded simply, without anything further, that "Your request does not meet these criteria."

The Justice Department, at 28 C.F.R. § 16.11(k), allows reduction or full waiver of fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." Under 28 C.F.R. § 16.11(k)(2), your Office will determine whether Request No. 2006-02289 "is



likely to contribute significantly to the public understanding of the operations or activities of the government" by considering the following factors:

*(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government." . . .*

*(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute" to an understanding of government operations or activities. . . .*

*(iii) The contribution to an understanding of the subject by the public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding."*

*(iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.*

Request No. 2006-02289 concerns identifiable operations and activities of the Federal Government's Executive agencies and agents. The connection between FCI La Tuna's activities and operations and the requested records is direct and clear, not remote or attenuated. Request No. 2006-02289 seeks records created by and involving BOP staff during their activities in operation of FCI La Tuna, as regards, *inter alia*: (1) Staff's non-classified identities and law enforcement qualifications; (2) its official and extra-official conduct in operating FCI La Tuna; (3) how BOP staff actually operates FCI La Tuna, such as (a) the level of medical care BOP provides La Tuna inmates, (b) the food quality offered to inmates, (c) the numbers, training, and experience of staffing provided by the BOP, compared to levels demanded for safe correctional operations, and (d) the sanitation and hygiene allowed by BOP/DOJ; and (4) whether members of BOP's La Tuna staff are currently engaged in a criminal conspiracy regarding unlawful use of violence and intimidation, false swearing, and other civil rights felonies.

The disclosable portions of these requested records, which information is not currently in the public domain, will be meaningfully informative about Bureau of Prisons and other DOJ operations and activities, and stand certain to significantly contribute to an increased public understanding of FCI La Tuna's operations and activities. Request No. 2006-02289 seeks records that show who is operating FCI La Tuna, and how those daily operations have been recorded in the BOP's mandatory paperwork. That is, laypersons and criminal justice professionals alike will be able to see for themselves what activities and operations La Tuna's staff has engaged throughout targeted time periods.

The Requestor appreciates a limited number of specific inmate records will require segregation or an inmate's release authorization. The remaining, disclosable portion of those records will still provide a reasonably broad audience of laypersons interested in Federal corrections a glimpse of (a) what BOP records look like; (b) what substance those records contain; (c) what offices hold records that might be relevant to their own or their



loved ones' cases; and (d) whether loved ones at La Tuna are suffering constitutional and physical abuses. Such records will also allow criminal justice professionals to analyze the records themselves – as made available through <http://www.victorvillefoia.org/> – and compare their professional conclusions to the series of analyses the Requestor will offer.

A requestor's expertise in the subject area, and his ability and intention to effectively convey information to the public, shall be considered. This Requestor holds a Bachelor of Arts degree in Political Science, a social science devoted to statistical, empirical, historical, and anecdotal analyses of, among other things, U.S. Government records and operations. He also earned a *Juris Doctor* and authority from the State of Maryland to practice law. The Requestor is an experienced Federal criminal sentence mitigator with particular representational experience on behalf of BOP inmates – such inmate representation indeed led to the instant Request. As a result of these professional activities, the Requestor regularly disseminates news and other information to criminal justice professionals and inmate families through the online Yahoo.com groups BOP Watch (<http://groups.yahoo.com/group/BOPWatch/>) and FedCURE (<http://groups.yahoo.com/group/FedCURE-org/>).

The Requestor is thus shown competent to interpret the data here sought, and capable of reducing it to a format usable by relevant, interested communities. As noted, those communities will include Members of all three constitutional branches of National Government; State and Federal attorneys, both Government and defense; and BOP inmates and their loved ones.

All administrative processes and all records produced regarding La Tuna are, and will remain, published in full at a website established specifically to illustrate these matters' public interest, <http://www.victorvillefoia.org/>. As of this writing, over 4,250 unique internet addresses (URLs) have accessed <http://www.victorvillefoia.org/>. Over 120 persons have registered their support for full fee waiver, regarding records from FCC Victorville, California as well as FCI La Tuna, in <http://www.victorvillefoia.org/>'s Guestbook. Those signers include California Federal defenders and other criminal defense attorneys; retired Justice Department attorneys now engaged in private law practice; a barrister in Manchester, England; post-secondary academicians; and an assortment of interested citizens (generally, inmates' family members) demonstrably spanning the globe.

The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, will be enhanced to a significant extent by instant FOIA disclosures. Your Office shall not make value judgments about whether the information here sought is important enough to be made public. Your Office should consider, however, that these records are particularly relevant to immediate public discourse on several grounds.

First, as military actions abroad include an increasing number of citizen-soldiers (National Guard and Reservists) activated to multiple combat tours, we are now left to ask what effects are now returned to the U.S. workplace – particularly including law



enforcement officers ("LEOs"), and a subset of LEOs employed by the Federal Bureau of Prisons. The Requestor hypothesizes a disparate number of military activations have come from law enforcement ranks, rather than other American industries, and that the already stressed law enforcement workforce is now also struggling to readjust from war service where, apparently, conduct similar to that here alleged was authorized by senior Defense Department field officers.

If this hypothesis is correct, then (a) the BOP may be suffering from staff shortages caused by military activation and retention policies; and (b) BOP staff returning from overseas tours – all presumptively combat tours in a front-less war on terror, where most casualties arise from booby traps – those veterans may be returning with diminished capacities like Post-Traumatic Stress Disorder ("PTSD"). We know from media accounts that USP Leavenworth has experienced recent protests related to staff shortages, and the dangers short-staffing entails.

Mainstream U.S. news media and other public interest attorneys also currently scrutinize maltreatment of prisoners by another Executive administrator, the Department of Defense ("DOD"), based largely on documents produced under the FOIA. See <http://www.aclu.org/torturefoia/>. The documents requested under Request No. 2006-02289 will show or refute credible allegations of similar maltreatment of domestic prisoners by BOP/DOJ agents. Congress and the public deserve open proof, through public records, that BOP officers are not responsible for credible allegations of similar crimes against United States citizens at FCI La Tuna. If these allegations are true, then justice demands the BOP cull the corrupt from its ranks. In either case, the public interest demands these records' publication.

Additionally, the landmark case of *United States v. Booker*, 543 U.S. \_\_\_, 125 S.Ct. 738 (2005) has led some members of Congress to introduce – and Attorney General Alberto Gonzalez to support – additional mandatory minimum sentences to Federal imprisonment. See, e.g., H.R. 1528, "Defending America's Most Vulnerable: Safe Access to Drug Treatment and Child Protection Act of 2005." If the seachange in Federal criminal justice policy is to include additional, mandatory BOP custody, then the documents showing how BOP and the Justice Department operate FCI La Tuna with Mexican Mafia duress take on unique public policy relevance. FOIA Request No. 2006-02289 bears directly on public discussions about an imminent series of Congressional decisions on criminal justice policies.

If a subordinate to AG Gonzalez is to deny records clearly relevant to legislative discussions and imminent Congressional policy decisions, then such subordinate also stands required to detail every ground for withholding and to refute these arguments favoring expedited public interest release. Conclusory denials, on the other hand, are unlawful, and they would lend credence to a claim that Central Justice is covering data that potentially opposes its policy positions – even when to withhold such data means possible complicity to Federal felonies committed under color of law.



All these specific facts demonstrate that Request No. 2006-02289 "is likely to contribute significantly to the public understanding of the operations or activities of the government" under the analysis required of your Office.

Under 28 C.F.R. § 16.11(k)(3), your Office will determine whether Request No. 2006-02289 "is . . . primarily in the commercial interest of the requestor" by considering the following factors:

*(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.*

*(ii) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is 'primarily in the commercial interest of the requester.'*

The Requestor has now offered over 70 *pro bono* hours expressly to these FOIA Requests of FCI La Tuna, exclusive of time offered his primary client and a group of similarly-situated inmates and their families in consideration of civil rights litigation. He has personally paid all photocopying, postage, and other expenses, and has declined other, paying clients to devote time to this free professional service. He has received no compensation for any professional services related to La Tuna and, outside the pipe dream of attorneys' fees some hypothetical court might later award and an appellate court affirm, the Requestor will receive no compensation or recompense for these efforts.

The Requestor acknowledges his commercial interests of goodwill and publicity associated with this denied *pro bono* FOIA efforts. As often attributed, though, to then-future Supreme Court Justice Louis D. Brandeis:

Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.

Louis D. Brandeis, "What Publicity Can Do," *Other People's Money*, chapter 5, p. 92 (1932) (first published in *Harper's Weekly*, December 20, 1913). While personal benefits might derive from the publicity following free service, that same publicity is the very panacea for Executive abuses our Congress passed with the FOIA.

Similarly, Mr. Brandeis spoke to the public interest service each citizen owes, according to their means:

Loyalty demands of every citizen active participation in government. Of him who has most in ability and intelligence, most is required, as the rich should contribute most in money to the expense of government.



Louis D. Brandeis, "An address delivered before the New Century Club on the occasion of the 250<sup>th</sup> Anniversary of the settlement of the Jews in the United States," November 28, 1905. Justice Brandeis there spoke to the public service owed by America's most privileged, including attorneys. The goodwill that comes from fulfilling these lofty suggestions, *see* Maryland Rule of Professional Conduct 6.1, should not work against a lawyer's ability to serve as Private Attorney General under the FOIA.

The Requestor further acknowledges legal representation of one La Tuna inmate who will pursue civil rights claims, though we do not yet know whether the Requestor will be counsel to that action. These records will figure into that client's future legal interests, though, and so impact the Requestor's separate (also uncompensated) professional duties.

The Requestor further acknowledges a separate, emergency representation of La Tuna's remaining, undefended New Mexican inmates. A separate or joined civil suit on these inmates' behalves also seems imminent. To the extent the Requestor would seek separate attorneys' fees if he accepts and then successfully prosecutes those prospective prisoner rights actions, BOP/DOJ can weigh the enumerated and other public needs against these attenuated, unrealized, and potentially fictional commercial interests.

Conversely, these regularly kept Federal records will allow open public inspection of otherwise secreted BOP activities and operations within FCI La Tuna, and will allow over 1,300 inmates and guards directly affected by La Tuna's operations to understand their actual health and safety status. BOP activities at FCI La Tuna are credibly alleged to involve BOP medical negligence, and perhaps even felonious malfeasance by Staff members.

The private attorney general seeking these records does so without compensation or any promise of reward, as a legally-trained citizen who has refused other, income-producing professional activities and diverted needed commercial resources to pursue FOIA Request No. 2006-02289. *See Crooker v. U. S. Dep't of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980) ("we do not believe that Congress intended to permit an award of attorney's fees to *pro se* litigants like Crooker who have made no showing that prosecuting their lawsuits caused them to divert any of their time from income-producing activity."). He has done so because, after a due diligence investigation, he affirms credible evidence of civil rights abuses by DOJ employees. These requested records will, in part, confirm or refute preliminary evidence.

A controlling public interest exists when a trained professional rejects paying cases to work without compensation in matters where no similar professional offers free services to inmates alleging imminent physical and constitutional harms. To argue otherwise defeats the public policy of asking attorneys to give services for free, *for the public's good*. To say the many public interests here at play are outweighed by the "maybe" of future court fee-awards, after an unknown number of assured appellate challenges and award reductions, would go beyond disingenuous. It would suggest complicity to whatever these records show is happening today, and for months, inside La Tuna's wires.



## Conclusion

"The mandate of the FOIA calls for broad disclosure of Government records." *Central Intelligence Agency v. Sims*, 471 U.S. 159, 166 (1985). As Justice Stevens wrote for seven members of the U.S. Supreme Court (with Justices Blackmun and Brennan concurring in the unanimous judgment):

[W]e note that Congress has provided that the standard fees for production of documents under the FOIA shall be waived or reduced 'if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.' 5 U.S.C. § 552(a)(4)(A)(iii) (1982 ed., Supp. V). Although such a provision obviously implies that there will be requests that do not meet such a 'public interest' standard, we think it relevant to today's inquiry regarding the public interest in release of rap sheets on private citizens that Congress once again expressed the core purpose of the FOIA as 'contribut[ing] significantly to public understanding of the operations or activities of the government.' [emphasis in original].

*U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 775 (1989).

Moreover, records documenting whether La Tuna Staff abused its authority stand an "obvious public interest" that require "a full and thorough airing . . . in the hope that such abuses will not occur in the future." *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 418 (D.D.C. 1976). Where a lawful FOIA request is based upon demonstrations of *per se* Federal abuse of discretion, including willful medical neglect and Due Process abuses, the public interest in requested, demonstrative Executive records is accorded great weight. See "Factoring in the 'Public Interest,'" FOIA Update Vol. III, No. 4 (September 1982) (available at [http://www.usdoj.gov/oip/foia\\_updates/Vol\\_III\\_4/page8.htm](http://www.usdoj.gov/oip/foia_updates/Vol_III_4/page8.htm)) ("Some public interest factors are properly taken into consideration and accorded great weight. For example, the courts have found the public interest in disclosure to be strong when requested information would inform the public about proven violations of public trust [citations omitted, emphasis added].").

The Requestor made a preliminary showing for expedited process and public interest fee waiver in his 12/14 Request. This Appeal develops multiple, independent grounds for both rights under the FOIA. The burdens of rebutting the Requestor's specific support for expedited process and public interest fee waiver are the Government's, and these many, legally-supported justifications represent a heavy Government burden that cannot be met by regurgitating text. The Requestor respectfully submits the Justice Department cannot show the requestor's out-of-pocket service *pro bono publico*, to his financial detriment, is an active commercial use outweighing these many, enumerated

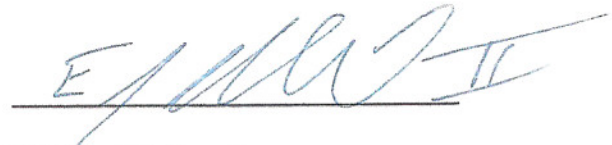


public interests. Expedited Processing and Full Public Interest Fee Waiver are therefore justified in FOIA Request No. 2006-02289.

We respectfully further request BOP's immediate production of all records here requested or, in the case of withheld records, immediate production of an index of such records prepared in accordance with *Vaughn v. Rosen* (I), 484 F.2d 820, 826-28 (D.C. Cir. 1973). A *Vaughn* Index will facilitate this lawful FOIA request already delayed by unsupported conclusions, as we exhaust the administrative FOIA process. See *Ettlinger v. FBI*, 596 F.Supp. at 879. Preparing this lawfully requested *Vaughn* Index will not excuse BOP from timely response to this Appeal, though BOP's timely response will presumptively include some statement regarding the *Vaughn* Index.

The Requestor looks forward to a response within the statutory and regulatory mandates, and thanks the DOJ/OIP for its time.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "EJ Hurst II", is written over a horizontal line.

EJ Hurst II, Esquire

enc.

cc: Sen. Jeff Bingaman, c/o J. Silva (via Fax No. 202-224-2852)  
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