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Federal Bureau of Investigation  
Washington, D.C. 20535

September 18, 2017

MR. JOHN GREENEWALD JR.  
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FOIPA Request No.: 1379108-000  
Subject: Hypnosis (Policy Document)

Dear Mr. Greenewald:

The enclosed documents were reviewed under the Freedom of Information Act (FOIA), Title 5, United States Code, Section 552. Deletions have been made to protect information which is exempt from disclosure, with the appropriate exemptions noted on the page next to the excision. In addition, a deleted page information sheet was inserted in the file to indicate where pages were withheld entirely. The exemptions used to withhold information are marked below and explained on the enclosed Explanation of Exemptions:

<b>Section 552</b>	<b>Section 552a</b>
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(7)(A)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(7)(B)
<input type="checkbox"/> (b)(3)	<input type="checkbox"/> (b)(7)(C)
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<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(8)
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<input type="checkbox"/> (b)(6)	<input type="checkbox"/> (d)(5)
	<input type="checkbox"/> (j)(2)
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	<input type="checkbox"/> (k)(6)
	<input type="checkbox"/> (k)(7)

10 pages were reviewed and 10 pages are being released.

- Document(s) were located which originated with, or contained information concerning, other Government Agency (ies) [OGA].
  - This information has been referred to the OGA(s) for review and direct response to you.
  - We are consulting with another agency. The FBI will correspond with you regarding this information when the consultation is completed.
- In accordance with standard FBI practice and pursuant to FOIA exemption (b)(7)(E) and Privacy Act exemption (j)(2) [5 U.S.C. § 552/552a (b)(7)(E)/(j)(2)], this response neither confirms nor denies the existence of your subject's name on any watch lists.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist. Enclosed for your information is a copy of the Explanation of Exemptions.

For questions regarding our determinations, visit the [www.fbi.gov/foia](http://www.fbi.gov/foia) website under "Contact Us." The FOIPA Request Number listed above has been assigned to your request. Please use this number in all correspondence concerning your request. Your patience is appreciated.

You may file an appeal by writing to the Director, Office of Information Policy (OIP), United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, D.C. 20530-0001, or you may submit an appeal through OIP's FOIAonline portal by creating an account on the following website: <https://foiaonline.regulations.gov/foia/action/public/home>. Your appeal must be postmarked or electronically transmitted within ninety (90) days from the date of this letter in order to be considered timely. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal." Please cite the FOIPA Request Number assigned to your request so that it may be easily identified.

You may seek dispute resolution services by contacting the Office of Government Information Services (OGIS) at 877-684-6448, or by emailing [ogis@nara.gov](mailto:ogis@nara.gov). Alternatively, you may contact the FBI's FOIA Public Liaison by emailing [foipaquestions@fbi.gov](mailto:foipaquestions@fbi.gov). If you submit your dispute resolution correspondence by email, the subject heading should clearly state "Dispute Resolution Services." Please also cite the FOIPA Request Number assigned to your request so that it may be easily identified.

- The enclosed material is from the main investigative file(s) in which the subject(s) of your request was the focus of the investigation. Our search located additional references, in files relating to other individuals, or matters, which may or may not be about your subject(s). Our experience has shown when ident, references usually contain information similar to the information processed in the main file(s). Because of our significant backlog, we have given priority to processing only the main investigative file(s). If you want the references, you must submit a separate request for them in writing, and they will be reviewed at a later date, as time and resources permit.
- See additional information which follows.

Sincerely,



David M. Hardy  
Section Chief  
Record/Information  
Dissemination Section  
Records Management Division

Enclosures

The enclosed documents represent the final release of information responsive to your Freedom of Information Act (FOIA) request. This material is being provided to you at no charge.

## EXPLANATION OF EXEMPTIONS

### **SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552**

- (b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ( A ) could reasonably be expected to interfere with enforcement proceedings, ( B ) would deprive a person of a right to a fair trial or an impartial adjudication, ( C ) could reasonably be expected to constitute an unwarranted invasion of personal privacy, ( D ) could reasonably be expected to disclose the identity of confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, ( E ) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or ( F ) could reasonably be expected to endanger the life or physical safety of any individual;
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

### **SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a**

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to an Executive order in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his/her identity would be held in confidence.

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## 287 Use of Hypnosis -- Purpose

In certain limited cases, the use of forensic hypnosis can be an aid in the investigative process. Witnesses to crimes have been able to recall certain facets of the crime while in a hypnotic state that they had not remembered without hypnosis. The use of hypnosis, however, is subject to serious objections and thus should be used only on rare occasions. The information obtained from a person while in a hypnotic trance cannot be assumed to be accurate. Therefore, any information obtained by the use of hypnosis must be thoroughly checked as to its ultimate accuracy and corroborated. It would therefore be advisable to first consult with a board-certified forensic psychologist/ psychiatrist to ascertain if the matter in question is appropriate for the application of forensic hypnosis. Because of the question of admissibility with regard to information retrieved within a hypnosis session, Assistant United States Attorneys should also consider the appropriateness and potential application of the cognitive interview before using hypnosis. The cognitive interview is a non-hypnotic structured interview that is used to enhance the witness's ability to remember an event by engaging in a reconstruction of the context in which the event took place. In this type of interview, the witness is asked to:

- (1) reconstruct the circumstances of the event; (2) provide a non-guided report of the event; (3) recall the circumstances of the event in a different order; and (4) change his/her perspective of the event. See additional references in this [Manual at 294](#) for information on the cognitive interview.

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## 288 Admissibility at Trial

The question whether hypnotically refreshed evidence is admissible at trial is still an open one in many jurisdictions, and is regulated by statute in a number of States. In those jurisdictions in which the question of admissibility is unsettled, a foundation concerning the reliability of hypnosis is necessary. *See, e.g., Harding v. State*, 5 Md.App. 230, 246 A.2d 302 (1968), *cert. denied*, 395 U.S. 949 (1969). In jurisdictions where such evidence is clearly admissible, there is no need for a foundation concerning the nature and effects of hypnosis. *See United States v. Awkard*, 597 F.2d 667 (9th Cir.), *cert. denied*, 444 U.S. 885 (1979). The question of a witness's competency to testify following questioning under hypnosis is guided in the Federal courts by Rule 601 of the Federal Rules of Evidence, which provides:

Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

The Federal courts addressing the issue of hypnotically induced testimony of a prosecution witness have generally permitted the use of such testimony, holding that the fact of the hypnosis affects only the credibility of the witness and not the witness's competence or the admissibility of his or her testimony. *See, e.g., Beck v. Norris*, 801 F.2d 242 (6th Cir. 1986) (on habeas, Tennessee law read as allowing witness's testimony and composite drawing prepared after hypnosis; opportunity to cross examine witness and hypnotist defeats claim of inability to confront witnesses); *United States v. Awkard, supra*; *United States v. Adams*, 581 F.2d 193 (9th Cir.), *cert. denied*, 439 U.S. 1006 (1978); *Kline v. Ford Motor Company, Inc.*, 523 F.2d 1067 (9th Cir. 1975); *Harding v. State, supra*.

In *Adams, supra*, the Ninth Circuit upheld the admissibility of hypnotically refreshed testimony, but the court expressed concern "that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse. Great care must be exercised to insure that statements after hypnosis are the production of the subject's own recollection, rather than of recall tainted by suggestions received while under hypnosis." *Id.* at 198-199. The court said that, "at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful." *Id.* at 199 n.12. In *Adams*, the hypnotist was not board certified and no records were kept of the persons present during the hypnosis, the questions asked, or the responses given. *Id.* at 199 n.13.

**CAVEAT:** In the late 1980s and 1990s, the question of the admissibility, *vel non*, of hypnotically refreshed or enhanced testimony went into a state of "flux," largely caused by cases involving uncorroborated allegations of child sexual abuse following "regressive therapy" or other forms of hypnosis-related therapy to bring out "repressed" memories of childhood incidents. This series of cases saw many convictions later reversed on appeal based upon a rethinking of the admissibility issue, and eventually resulted in the adoption in the Federal courts of a "case-by-case approach" in which the court has "discretion to balance all of the factors to determine the reliability of the evidence and the probative versus prejudicial effect of the testimony." *Borawick v. Shay*, 68 F.3d 597, 305 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 1869 (1996). In the Second Circuit's lengthy

analysis of the admissibility case law leading up to *Borawick*, the court noted that sometimes the safeguards that may be required by the trial court, *supra*, may not be enough to ensure the reliability of the testimony, and the defense "may still be able to demonstrate by expert testimony that a witness'[s] memory has been irreparably distorted by hypnosis." 68 F.3d at 606, *citing McQueen v. Garrison*, 818 F.2d 951, 958 (4th Cir.), *cert. denied*, 484 U.S. 944 (1987). The Second Circuit concluded that the district court was correct in issuing a pre-trial *in limine* order that barred the admissibility of the plaintiff's hypnotically refreshed memories - revealed during "regression therapy" - of her aunt's alleged child abuse from over 20 years earlier. 68 F.3d at 609. While the court had indicated that hypnosis conducted as part of therapy might be more inherently reliable than refreshing a witness's memory under the pressure of a criminal investigation, still, the plaintiff's "far-fetched, uncorroborated accusation" against a number of people, which included "fanciful" allegations of ritual rape and abuse - without strong corroboration - weighed against admissibility. *Id.*

Other cases addressing the general issue of admissibility include: *White v. Ieyoub*, 25 F.3d 245 (5th Cir. 1994) (on *habeas*, court accepts factors that support admissibility); *United States v. Gatto*, 924 F.2d 491 (3rd Cir. 1991); *Bundy v. Dugger*, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 488 U.S. 1034 (1989). See also *Armstrong v. Young*, 34 F.3d 421 (7th Cir. 1994) (right to confrontation), *cert. denied*, 115 S.Ct. 1369 (1995).

The question of the admissibility at trial of testimony refreshed or unlocked by pre-trial hypnosis is to be contrasted with the generally accepted inadmissibility at trial of out-of-court statements made while under hypnosis. See *State v. Harris*, 241 Ore. 244, 405 P.2d 492 (1965).

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## 289 Hypnosis of a Prosecution Witness

Hypnosis of a witness should not be employed unless there is a clear need for additional information, and it appears that hypnosis can be useful in aiding the witness to recall such information. A witness should never be hypnotized unless the witness gives written consent, and the witness should always be given an explanation of the nature of hypnosis before being hypnotized.

Only a psychologist/psychiatrist trained in forensic hypnosis should be allowed to hypnotize a witness. *See Adams, supra.* During the interrogation, leading questions should be avoided to ensure against the possibility of the improper suggestion of answers to the subject.

Interrogation made when the witness is subject to hypnosis should be videotaped, and a transcript should be prepared in addition to any sound recording. A copy of the videotape should be made to guard against the loss of or damage to the original tape.

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## 290 Hypnosis of a Defendant

In *Rock v. Arkansas*, 483 U.S. 44 (1987), the U.S. Supreme Court found unconstitutional as violative of the Fifth, Sixth, and Fourteenth Amendments Arkansas's *per se* rule excluding a criminal defendant's hypnotically refreshed testimony. While the Court was not prepared to endorse the use of hypnosis as an investigative tool, it did conclude that a State's legitimate interest in excluding unreliable evidence did not justify a mandatory rule barring a defendant's hypnotically refreshed testimony "in the absence of clear evidence by the State repudiating the validity of all posthypnosis recollections."

The Court continued, "Despite the unreliability that hypnosis concededly may introduce," procedural safeguards (*e.g.*, required levels of training for the hypnotist, questioning in a neutral setting, and the tape or video recording of the interrogations [before, during, and after hypnosis]), "reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist." 483 U.S. at 60-61.

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## 291 Disclosure of the Use of Hypnosis

If a witness has been hypnotized prior to trial, this fact should be disclosed to the court and the defendant. In many cases the government will be required under 18 U.S.C. 3500 to produce all of the witness's prior statements as *Jencks* material. See *United States v. Miller*, 411 F.2d 825 (2d Cir. 1969), and *United States v. Adams, supra*, at 198. But see *United States v. Awkard, supra* (raising fact of hypnosis, and expert witness's testimony bolstering accurateness of hypnotically refreshed testimony, prior to testimony or defense challenge).

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## 292 Expert Witness

The prosecution should be prepared to put on the stand an expert witness knowledgeable about forensic hypnosis who can explain to the jury the nature of hypnosis and how it works in the interrogation process. The testimony of such an expert witness may be important in dispelling from the jurors' minds any misconceptions and doubts they may have concerning hypnosis. Still, the witness's testimony -- and a defense challenge to the credibility of the witness's hypnotically refreshed testimony - should normally precede any expert testimony in this area. See, e.g., *Awkard, supra*.

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## 293 Factors to Consider Prior to the Use of Hypnosis

Prior to using hypnosis on any witness, an Assistant U.S. Attorney should consider and document the following:

- A. The names of the person to be hypnotized;
- B. The reasons why the use of hypnosis is desired, and whether it appears that hypnosis can be useful in aiding the witness to recall such additional information;
- C. The fact that the person to be hypnotized is not a suspect or potential defendant in this or any related (Federal or State) criminal investigation;
- D. Whether the person to be hypnotized is a minor;
- E. The fact that the person to be hypnotized has consented to undergo hypnosis, and - if the person is a minor - the fact that the parent(s) or legal guardian(s) has/have also consented for the minor to undergo hypnosis;
- F. The name of the individual who will induce hypnosis; and
- G. The hypnotist's qualifications to induce hypnosis (*viz.*, whether the hypnotist is licensed/certified as a psychologist and is a member of the American Society of Clinical Hypnosis; attach resume; etc.).

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## 294 Additional References

The following sources were obtained through a data-base search or were provided by the Federal Bureau of Investigation. While these references are not exhaustive, and many could not even be directly reviewed, their inclusion here is hoped to prove helpful:

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- Hammond, D. Corydon, *et al.*; "Clinical Hypnosis and Memory Guidelines for Clinicians and Forensic Hypnosis"; American Society of Clinical Hypnosis Press (February 1995, pamphlet).
- Bennett, M. and Hess, J.; "Cognitive Interviewing"; *FBI Law Enforcement Bulletin* (March 1991).
- Binge, A.; "The Cognitive Interview Technique: An Effective Investigative Tool"; *Law and Order* (November 1994).
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- Ault, Richard L.; "FBI Guidelines For Use of Hypnosis"; *The International Journal of Clinical and Experimental Hypnosis*; Vol. 27, #4; pp. 449 to 451 (1979).
- Spanos, Nicholas P., *et al.*; "Hypnotic Interrogation, Pretrial Preparation, and Witness Testimony During Direct and Cross-Examination"; *Law and Human Behavior*; Vol. 15, pp. 639-53 (December 1991).
- Hypnosis-related A.L.R. articles: 92 A.L.R. 3d 442 (1979); 50 A.L.R. Fed. 602 (1980); 75 A.L.R. Fed. 461 (1985); 77 A.L.R. 4th 927 (1990); and 16 A.L.R. 5th 841 (1993).
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- Diamond; "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witnesses"; 68 Cal.L.Rev. 313 (1980).
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- Colwick, Elizabeth; "Hypnotically Recalled Testimony: Issues Facing Courts in Their Determination of its Admissibility in Civil Sexual Abuse Cases"; 19 Law and Psychology Review 183-201 (Spring 1995).
- Eisenberg, Matthew J.; "Recovered Memories of Childhood Sexual Abuse: The Admissibility Question"; 68 Temple L.Rev. 249-80 (Spring 1995).
- Garcia-Duer, Jovita; "The Admissibility of Hypnotically Retrieved Evidence"; 5 San Fran. L.Rev. 155-69 (1995).
- Kroger, William S. [the hypnotist/expert witness in *Awkard, supra*], and Douce, Richard; "Hypnosis in Criminal Investigations"; 24 U. West L.A. L.Rev. 23-42 (1993).

- "The Court's Reaction to *Rock v. Arkansas* [107 S.Ct. 2704]: The Admissibility of a Witness's Testimony after He Has Been Hypnotized"; 15 American Journal of Trial Advocacy 559-84 (Spring '92).
- Shaw, Gary M.; "The Admissibility of Hypnotically Enhanced Testimony in Criminal Trials"; 75 Marquette L.Rev. 1-77 (Fall 1991).
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- "Growing Disenchantment with Hypnotic Means of Refreshing Witness Recall"; 41 Vanderbilt L.Rev. 379-410 (March 1988).

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