

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

BROWARD BULLDOG, INC.,
and DAN CHRISTENSEN,

Plaintiffs,

vs.

U.S. DEPARTMENT OF JUSTICE, and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR STATUS CONFERENCE

Defendants, by and through their undersigned counsel, file their Opposition to Plaintiffs' Request for Status Conference, and state:

Plaintiffs request a Status Conference to determine whether plaintiffs or a special master could assist with the Court's review of documents produced by the defendants for in camera review; to address whether recent public statements by the FBI regarding the subject of the case warrant limited discovery; and to establish a schedule for the case. Defendants oppose the request because none of these three reasons justifies the holding of a Status Conference for resolution of the three issues.

The Court's in camera review of the Tampa subfile is underway. If the Court needs assistance from the parties, it can certainly ask for it.

As to the limited discovery plaintiffs seek, this Court granted defendants' motion for protective order on March 31, 2014, and directed that "no discovery shall take place at this time except as otherwise ordered by the Court." D.E. 58 at 2-3. The Court observed that "while

discovery is not prohibited in FOIA cases, it is often unnecessary and generally limited.” D.E. at 2(citations omitted). Nothing has occurred in this case since the Court’s order which should cause it to revisit the issue of discovery.

“Normally, when discovery is allowed in a FOIA action, it is deemed appropriate only after the agency has moved for summary judgment and submitted supporting affidavits or declarations.” Tamayo v. U.S. Dept. of Justice, 544 F.Supp.2d 1341, 1343 (S.D.Fla. 2008). The Court denied defendants’ motion for summary judgment without prejudice, so the defendants could comply with the additional search the Court ordered. D.E. 58 at 2. Thus, there is no summary judgment motion pending. Further, the limited discovery permitted in a FOIA case “generally is limited to the scope of agency’s search and its indexing and classification procedures.” Heily v. Department of Commerce, 69 Fed.Appx. 171, 174 (4th Cir. 2003).

Since the Court is conducting its own review of the Tampa subfile, it can determine for itself whether the FBI engaged in a reasonably adequate search for documents responsive to plaintiffs’ FOIA requests. The Court stated in its April 4, 2014 Order that it “cannot plausibly take an active role in determining whether specific exemptions apply until the Court has knowledge of the existence or non-existence of and access to the materials Plaintiffs are actually seeking, that is, until the Court is confident that a reasonable search has been performed.” D.E. 60 at 6. Indeed, some courts have held that the “curtailment of discovery” to be “particularly appropriate where the court makes an in camera inspection.” Ajluni v. Federal Bureau of Investigation, 947 F.Supp. 599, 608 (N.D.N.Y. 1996), and Katzman v. Freeh, 926 F.Supp. 316, 320 (E.D.N.Y. 1996). Therefore, no discovery is needed on the adequacy of the FBI’s search for documents.

Plaintiffs’ request to depose the agent or agents who authored SarasotaTrdPty-5 & 6

SARASOTA-5 & 6, goes well beyond the very limited discovery permitted in a FOIA case.

“The FOIA is ‘primarily an access and disclosure statute.’ 1984 U.S. Code Cong. & Ad. News at 3789. It provides for wide-ranging citizen access to government documents and presumes them subject to disclosure absent a clear showing to the contrary.” Ely v. Federal Bureau of Investigation, 781 F.2d 1487, 1489 (11th Cir. 1986)(citations omitted). While the FOIA grants access to government documents which are not exempt from disclosure, it does not grant access to the author of a particular document, which is what plaintiffs seek.

Plaintiffs also seek discovery related to the 9/11 Review Commission Report. D.E. 73 at 13-19. In addition to deposing the author of SarasotaTrdPty-5 & 6 SARASOTA-5 & 6, plaintiffs request production of the Memorandum for Record, dated April 30, 2014, referenced in the 9/11 Review Commission Report; production of other 9/11 Review Commission Records regarding the Sarasota family; and identification and deposition of those in the FBI who told the Review Commission that SARASOTA-5 & 6 was “poorly written” and wholly unsubstantiated, and who were told by the special agent who wrote the document that he was unable to provide any basis for the contents of the document or explain why he wrote it as he did. D.E. 73 at 19-20.

Plaintiffs’ discovery requests should be denied. This FOIA action cannot be used as a free-standing platform for plaintiffs to probe the mental processes of the authors of various government documents, or to invade the deliberative processes of the officials who conducted the 9/11 Review Commission’s inquiry, and prepared the Commission’s findings and conclusions. In its April 4, 2014 Order directing the defendants to conduct additional searches, this Court noted that

the Court’s inquiry as to the reasonableness of the search is merely about the existence of an investigation and about whether such an investigation, if it did exist, produced documents which may be relevant to Plaintiffs’ FOIA request. The only conceivable

pertinence of the results of any investigation would be to a later stage, when the Court is required to balance various interests in determining the application of particular exemptions.

D.E. 60 at 7 n.3 (emphasis in original).

This FOIA action cannot be used as a vehicle for judicially-sanctioned discovery to probe into the manner in which the FBI conducted its investigation, or how the 9/11 Review Commission came to its conclusions. The FOIA grants access to government documents, not government officials. If plaintiffs want documents referenced in the 9/11 Review Commission Report, they can file a FOIA request.

As to the third topic referenced in plaintiffs' request for status conference, defendants believe it is premature to enter an order setting a trial date and other pretrial deadlines. At issue now is whether the Court has an adequate factual foundation to determine if defendants have conducted a reasonably adequate search for documents responsive to the FOIA requests. That issue should be resolved when the Court completes its in camera review. At that point, defendants can submit another declaration detailing its search methodology, if that would assist the Court in making its decision. The next issue would be litigating the exemptions invoked by defendants, to either withhold entire documents, or to redact portions of documents responsive to plaintiffs' FOIA requests. In defendants' view, this can be accomplished through declarations and a summary judgment motion, as it is in nearly all FOIA cases. If plaintiffs dispute the assertions made by defendants, they are free to oppose the summary judgment motion, as in any case.

Plaintiffs' Request for Status Conference should be denied.

DATED: May 11, 2015

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 11, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Dexter A. Lee
DEXTER A. LEE
Assistant U.S. Attorney

SERVICE LIST

Broward Bulldog, Inc. v. U.S. Department of Justice, FBI,
Case No. 12-61735-CIV-ZLOCH
United States District Court, Southern District of Florida

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