

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

BROWARD BULLDOG, INC., a Florida
corporation not for profit, and DAN
CHRISTENSEN, founder, operator and editor
of the BrowardBulldog.com website,

Plaintiffs,

vs.

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

Defendants.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION
FOR ORDER COMPELLING ADDITIONAL SEARCH**

Defendants, U.S. Department of Justice (“DOJ”), and its component, Federal Bureau of Investigation (“FBI”), respectfully reply as follows to plaintiffs’ motion for an order compelling additional search [D.E. 46]:

Plaintiffs’ FOIA request sought “information pertaining to an anti-terrorism investigation regarding activities at the residence at 4224 Escondito Circle, in the Prestancia development near Sarasota, Florida prior to 9/11/2001.” See Hardy decl. exhibit C [D.E. 25-2].

Plaintiffs argue that the FBI should have discerned from the terminology of this request that they were seeking documents to substantiate or disprove public statements by the FBI that it had conducted an investigation of the Saudi family that had resided at the residence in Sarasota, Florida.

The FBI did not make such statements. The FBI has not publicly stated that it investigated any individual or family member who had resided at the residence, and no individual is named in the FBI's statements. The FBI indicated that it "followed up" on information about "suspicions surrounding the referenced Sarasota home and family" and neither found, nor developed, any evidence connecting the family members to any of the 9/11 hijackers or the 9/11 plot.

The reason that the FBI did not interpret plaintiffs' request as seeking information as to any findings regarding family members who resided at the Sarasota address was because plaintiffs modified their request to clarify that they were seeking "no information about any specific individuals." See Hardy decl. exhibit C [D.E. 25-2]. They reiterated this in their administrative appeal letter: "In fact, I sought no information about any specific individual—and none are named in my request." See Hardy decl. exhibit G [D.E. 25-2].

Also, there is no basis for plaintiffs' alleged assumption that the FBI would have no objection to release of documents because of the public statements made by the FBI and the FBI's statement that the records they were requesting had been made available to Congressional committees. Plaintiffs' assumption ignores the FBI's response to plaintiffs' previous FOIA request which informed them that the FBI would not produce records requested concerning a third party or parties. See Hardy decl. exhibit B [D.E. 25-2] .

Plaintiffs argue that the FBI's search of the Central Records System ("CRS") and the Electronic Case file ("ECF") was inadequate because the Hardy declaration doesn't claim that these are the sole repositories of FBI records. They propose that the FBI be directed to conduct text searches not only in the CRS/ACS/ECF systems but also in ELSUR (electronic surveillance) and

FISUR (physical surveillance),¹ any shared drives in the FBI headquarters and the Tampa field office, the e-mail system in the FBI's headquarters and the Tampa field office, the FBI intranet, Infragard, and Law Enforcement Online.

Records created as a result of a FISUR are indexed in CRS, and, therefore, any FISUR records responsive to plaintiffs' request would have been located through the FBI's search of the CRS. It is not standard practice for the FBI to search for ELSUR records unless specifically mentioned or requested. Plaintiffs did not request a search of the ELSUR database, and there is no reason to believe that the FBI would have any ELSUR or FISUR records responsive to plaintiffs' request since the FBI only received reports of alleged suspicious activity at 4224 Escondito Circle after the residents had left the premises. Similarly, the FBI did not search shared drives and the e-mail system because it had no reason to believe responsive records would be located on these systems.

The Intranet would only be searched if there was reason to believe material exists that was not located through a search of CRS. In this case, existing records were located in CRS. Infragard and Law Enforcement Online are information sharing sites, not FBI systems of records. Therefore, they are not agency records systems to be searched in order to respond to FOIA requests.

Finally, and significantly, plaintiffs requested " a search of the FBI's indices to the Central Records System and the filing systems of the bureau's Tampa field office..." See Hardy decl. exhibit C [D.E. 25-2]. The Tampa field office's filing system is the CRS.² The FBI conducted its

¹ Plaintiffs' motion incorrectly identifies FISUR as "Financial Surveillance."

² CRS is the system used by the FBI to maintain the records and information which it compiles for law enforcement purposes, including records maintained at FBI headquarters and in FBI field offices. Hardy decl. ¶ 17 [D.E. 25-1].

search according to the specifications of plaintiffs' request and had no reason to believe responsive records were located in other records systems. Plaintiffs should not be allowed to now rewrite their FOIA request to expand its parameters.

The case law does not require an agency responding to a FOIA request to conduct an exhaustive search for responsive records, only that the agency make a reasonable search effort in light of the specific request. See defendant's motion for summary judgment [D.E. 25] p. 7. A search of every agency database, regardless of how unlikely the prospect that the database would contain responsive records, would not be reasonable.

Moreover, as indicated in the Hardy declaration, the FBI did not rely only on its initial index searches of the CRS and text searches. It also canvassed personnel familiar with the FBI's investigation of reports regarding the activities at 4224 Escondito Circle and personnel responsible for gathering the records which were provided to former Senator Graham. These individuals also conducted their own searches for responsive records.

Plaintiffs complain that the FBI did not identify the search terms used by individual personnel who conducted their own searches and that the FBI did not identify the known telephone numbers used in the telephone number searches. However, these searches were conducted in addition to those which generally are conducted to respond to FOIA requests, and plaintiffs have presented no evidence to dispute that these additional searches were conducted or that they were conducted in good faith. The telephone numbers searched would not be identified. The phone numbers contained in responsive records were withheld pursuant to FOIA exemptions.

Plaintiffs contend that the FBI's initial searches were not reasonable for two reasons:

First, they assert that the FBI did not use “technologies that could find the responsive documents” and point to a statement by a DOJ Inspector General in or around 2005 and a 2010 report that ACS, the Automated Case Support System used to search the CRS, is an antiquated case management system. Plaintiffs argue that FBI has not explained why the newer “Sentinel” was not used, instead of ACS, to conduct its search for records. The FBI did not use Sentinel to conduct its search for records responsive to plaintiffs’ request because its electronic search was completed in November 2011, before the deployment of Sentinel.³ ACS was used because it was the search system available at the time of the search.

Moreover, Sentinel did not completely replace ACS. All new material is now placed in Sentinel, but ACS remains available, and the information applications that are part of ACS – ICM, ECF, and UNI – remain in Sentinel. Records from the timeframe before Sentinel was deployed are now located in both Sentinel, through migration, and ACS. Sentinel provides a web-based, user-friendly interface to access the same CRS information electronically stored and retrieved by the ACS system; information is made available to users through hyperlinks. The deployment of Sentinel, despite its benefits, did not render the FBI’s initial search, using ACS, inadequate.

As a second basis for asserting that the FBI’s initial search was not reasonable plaintiffs argue that the search terms used by the FBI were not “reasonably formulated to locate the responsive records.” At pages 13-15 of their motion plaintiffs propose that the Court order the defendants to conduct eight additional searches (which include, but are not limited to, using additional search terms) and manual reviews of documentation. These proposals should be rejected for the reasons

³ Plaintiffs’ statement that Sentinel was deployed in January 2012 is incorrect. Sentinel was not deployed until July 1, 2012. See press release at <http://www.fbi.gov/news/pressrel/press-releases/fbi-announces-deployment-of-sentinel>.

discussed below.

1. Plaintiffs' first proposal is that the FBI be required to conduct a search using the newer "Sentinel." This is unnecessary because the FBI has already conducted a Sentinel search using the same search terms as were used for the ACS search. Although not required, a Sentinel search was conducted, prior to the filing of defendants' motion for summary judgment, merely as added verification that any records responsive to plaintiffs' request had been located. No additional records were identified through Sentinel.

2. Plaintiffs' second proposal is that the FBI be required to manually review all documents in the "gap" between case ID nos. 265D-NY-280350-TP-2409 and 265D-NY-280350-TP-4959. Plaintiffs' proposal, and their reference to a "gap" between case ID numbers, is based on a misconception of the FBI's document numbering system. Plaintiffs incorrectly assume that the last four serial numbers of a document indicate some relationship between documents or the subject matter of documents. Documents are assigned the next available serial number at the time of the assignment, regardless of their subject matter. There is no reason to believe that documents whose numbers end within a range between two numbers are any more related than documents with numbers outside the range.

3. Plaintiffs also are proposing that the FBI be required to manually review all documents contained in file no. 265D-NY-280350-TP. This number identifies the Tampa sub-file to the FBI's New York main file of the PENTBOMB investigation, the FBI's investigation of the 9/11 attacks.⁴ It references all records in the FBI's Tampa field office which pertain to the

⁴ Documents related to the PENTBOMB investigation, which originated in New York but extends nationwide and world-wide, are identified by the number 265D-NY-280350.

PENTBOMB investigation or leads related to the investigation. The FBI's Tampa office alone has more than 15,352 documents (serials), which together contain, potentially, hundreds of thousands of pages of records related to the 9/11 investigation. The manual review which plaintiffs are requesting is not reasonable; nor is it warranted. Plaintiffs are proposing that the FBI be required to expend extraordinary effort, time, and resources to conduct a manual search of thousands of documents based solely on speculation that other documents responsive to their request might exist.

4. Plaintiffs also propose that the Court require the FBI to manually review all documents contained in the case file number prefix assigned to documents SARASOTA 5-6 and 7-10. These case file numbers were redacted from the records released to plaintiffs because they pertain to an individual(s). Using these redacted numbers to conduct a search would result in locating any records regarding the unidentified individual(s), beyond the records responsive to plaintiffs' request which have been produced. As indicated above, plaintiffs have repeatedly asserted that they do not want records regarding individuals. Therefore, this proposal should be rejected.

5. Plaintiffs are proposing that the FBI be required to conduct automated text searches of all data bases for 30 additional terms or connected terms and then to manually review all documents located by the searches. The terms and connected terms plaintiffs are proposing are not reasonable choices for locating records responsive to plaintiffs' request. Overall, the proposals are a blatant attempt by plaintiffs to expand the scope of their request. The FBI should not be required to search using terms which are overly broad, would not be effective, and/or would locate records regarding individuals or subjects which are not the subject of plaintiffs' request.

Specifically, defendants should not be required to conduct text searches using the search terms which plaintiffs are proposing for the following reasons:

a. As discussed above, a search using the term “265D-NY-280350-TP” would identify 15,352 documents (serials). This term is too broad to be an effective and reasonable search term for locating records pertaining to the limited subject matter of plaintiffs’ request.

b. - e. The FBI does not generally use control numbers as search terms to locate records responsive to FOIA requests because documents are not usually indexed by their control numbers. Also, using control numbers as search terms is not an effective method of locating records regarding a particular subject matter because a control number usually identifies only one document. Therefore, a search by the control numbers of documents which the FBI has already produced would likely identify only the same documents that have been produced.

f. - q. The FBI should not be required to search for records using the names of individuals who are not the subject of plaintiffs’ request as search terms. The terms plaintiffs are proposing are designed to locate records pertaining to specific individuals rather than activities at the particular location which is the subject of plaintiff’s request. Plaintiffs are being disingenuous in suggesting that the Court should require the FBI to search for records identified by individual names despite the fact that they purposefully modified their request, explicitly stating that they were not interested in any records regarding individuals.

r. - w. The additional proposed search terms include the term “Prestancia” “AND” six other terms. “Prestancia” is the name of the development in which 4224 Escondito Circle is located. The FBI has already searched using the Escondito address which was the subject of the request. It is unlikely that FBI records concerning activities at this particular address would be indexed by the name of the development but not indexed, and identifiable, by the address. Further, adding the additional connecting terms plaintiffs have proposed with “Prestancia” would only narrow the scope

of the search rather than make it more effective than the FBI's use of the Escondito address, or forms or portions of the address, as search terms.⁵

x. - cc. Plaintiffs further propose that the FBI conduct searches using the term "Escondito" "AND" six other terms. The FBI conducted a text search using the terms "Escondito Circle" and "Escondito AND Sarasota." The terms used by the FBI are more reasonably likely than those proposed by plaintiffs to identify documents pertaining to the address which is the subject of plaintiffs' request.⁶

dd. The final connecting search terms proposed by plaintiffs, "Sarasota AND PENTTBOMB" are not reasonable terms. These terms would not be effective in locating records responsive to plaintiffs' request because they would cast too broad a net – identifying records entirely unrelated to the address which is the subject of plaintiffs' request.

6. Sheffield Documents In addition to proposing additional search terms, plaintiffs are proposing that the FBI be required to contact Special Agent Gregory Sheffield "to determine the existence and location of any documents responsive to the plaintiffs' request" and whether any responsive records are located in FBI offices other than the FBI's Tampa field office. This is unnecessary since Special Agent Sheffield is one of the individuals who is referred to in the Hardy declaration as having already been contacted regarding records pertaining to the subject matter of

⁵ The only connecting search term used by the FBI was "Sarasota," used in conjunction with "Escondito" for the text search.

⁶ The term "Escondito" alone could identify records pertaining to individuals, businesses, and other entities with names including "Escondito," in addition to locations and addresses other than 4224 Escondito Circle. Adding the proposed connecting terms to "Escondito" would not serve to focus the search on addresses or on the subject address, 4224 Escondito Circle.

the request. To Sheffield's knowledge, any records regarding allegedly suspicious activities at 4224 Escondito Circle are contained in the Tampa field office file.

Moreover, there is no reason to believe that any investigatory records regarding the subject matter of plaintiffs' request would be located in the other offices mentioned in plaintiffs' motion since FBI investigative files remain with the field office in which they originated, which, in this case, is the Tampa field office. If an agent is transferred to another field office, the investigation and the investigative records do not transfer with the agent.

7. Maguire documents It is not necessary for the Court to order the FBI to contact Field Supervisor Jacqueline Maguire, as plaintiffs propose, to determine the existence of and location of all documents shown to former Senator Graham and all documents that Maguire was asked to show to him. Maguire is one of the individuals who was contacted, as indicated in the Hardy declaration. As part of the search for records responsive to plaintiffs' request, Maguire provided copies of all responsive documents which were included in the package prepared for the briefing of former Senator Graham. Maguire's search to locate the records to include in the package was prior to and independent of the search later conducted in order to respond to plaintiffs' FOIA request.

8. Finally, plaintiffs are requesting that defendants be required to produce any additional responsive documents located by any additional search or to provide a *Vaughn* index containing particular information regarding any withheld portions. The request for a *Vaughn* index as to any further withholdings should be denied for the reasons stated in defendants' response [D.E. 32] to plaintiffs' motion for a *Vaughn* index and *in camera* review.

In conclusion, the FBI has conducted searches using the same methods that it would employ to locate records for its own investigative purposes. Because of its familiarity with its own record

keeping systems and indexing, the FBI is far more likely than plaintiffs to be able to identify those search terms which would be likely to locate records responsive to plaintiffs' request. The search terms which the FBI has already used are more reasonably tailored to locate records responsive to plaintiffs' request than the terms plaintiffs are proposing.

The FBI already has conducted multiple searches on more than one occasion for records pertaining to the subject matter of plaintiffs' request and has contacted individuals who would know what records the FBI would, or would not, have and the locations where those records would be located. There is no reason to believe that additional searches would locate additional responsive records.

FOIA only requires an agency to make a reasonable, good faith effort to locate records responsive to a FOIA request. See defendants' motion for summary judgment [D.E. 25] p. 7. The FBI has met this requirements. Plaintiffs' additional search proposals would require the FBI to conduct an exhaustive fishing expedition, which is entirely unwarranted given the specific request made by plaintiffs and the search efforts that the FBI has already made. The FBI should not be required to expand its search to locate records pertaining to subject matters other than the subject matter of plaintiffs' request or to manually review voluminous documentation on the remote and speculative chance of uncovering additional records responsive to the request.

For the reasons stated above, plaintiffs' motion should be denied.

Dated: August 7, 2013
Miami, Florida

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that, on August 7, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Carole M. Fernandez

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