

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

BROWARD BULLDOG, INC. and
DAN CHRISTENSEN,

Plaintiffs,

v.

Case No. 16-61289-CIV-ALTONAGA

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

Defendants.

**MOTION FOR RECONSIDERATION OF COURT'S ORDER DENYING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH REGARD TO
DOCUMENT 22**

Defendants, United States Department of Justice and its component, the Federal Bureau of Investigation, respectfully move for reconsideration of the portion of the Court's Order (DE 99) on Defendants' Motions for Summary Judgment on Count I of Plaintiffs' Complaint relating to Document 22, Bates Numbered "Broward Bulldog 1496-1556." In support of this Motion, Defendants submit this memorandum of law.

INTRODUCTION

On May 16, 2017, the Court entered its Order (DE 99) on Defendants' Motions for Summary Judgment on Count I of Plaintiffs' Complaint under the Freedom of Information Act. The Court granted Defendants summary judgment with regard to the adequacy of the FBI's search for records responsive to the FOIA request underlying Count I and on the FBI's decision to withhold records previously produced to Plaintiffs in the lawsuit pending before United States District Judge Zloch, but denied summary judgment with regard to several redactions of

information made by the FBI pursuant to Exemptions available under FOIA. This Motion seeks reconsideration of the Court's ruling with respect to the FBI's claim of FOIA exemption in one document.

“Document 22” (Bates Numbered Broward Bulldog 1496-1556) is a Power Point Presentation titled “Overview of 9/11 Investigation.” (*See Ex Parte* . . . Documents [ECF No. 97-2] 1–61. The government redacted information from the version of this document that was provided to Plaintiffs on the basis of FOIA Exemptions 3, 5, 6, 7(C), and 7(E). This Motion concerns only the Court's ruling with regard to information redacted on the basis of Exemption 7(E). As explained below, Plaintiffs had withdrawn their challenge to the redactions made by the FBI to Document 22 prior to Defendants' filing of their Motion for Summary Judgment on Count I. Accordingly, Defendants did not present the Court with any justification or factual basis in support of the redactions made to the document, or submit a copy of the document for in camera review. Plaintiffs' Response to Defendants' Motion for Summary Judgment contradicted their earlier position with regard to Document 22, but the timing deprived Defendants of the opportunity to properly present the matter to the Court.

The Court ultimately considered Document 22 and found that Defendants had not adequately justified the FBI's redactions to the document. Defendants respectfully seek the Court's reconsideration of its ruling with regard to the redactions made to Document 22 on the basis of FOIA Exemption 7(E).

STANDARD ON A MOTION FOR RECONSIDERATION

“Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear

error or manifest injustice.” *Instituto de Prevision Militar v. Lehman Bros., Inc.*, 485 F. Supp. 2d 1340, 1343 (S.D. Fla. 2007) (quoting *Cover v. Wal-Mart Stores, Inc.*, 148 F.R.D. 294, 295 (M.D. Fla. 1993)) (internal quotation marks omitted).

ARGUMENT

Defendants respectfully submit that reconsideration of the portion of the Court’s Order regarding Document 22 (Broward Bulldog 1496-1556) is warranted in this case, to correct what is otherwise a clear error and a manifest injustice. At the time of their Motion of Summary Judgment on Count I, Defendants made no effort to justify any of their claims of FOIA exemption over the contents of Document 22 because Plaintiffs had led Defendants to believe that Document 22 was not in dispute. *See* Defendant’s Statement of Undisputed Facts (DE 64) at ¶ 8. Specifically, Plaintiffs’ counsel, Mr. Julin, *after* having received and reviewed records at issue under Count I, including Document 22, indicated in an email that Plaintiffs “can narrow the records redacted or withheld which remain in dispute” to those identified in the chart contained in his email. Mr. Julin did not include Document 22 on Plaintiffs’ chart, thus indicating that Plaintiffs were not challenging the FBI’s redaction of information from the document. A copy of Plaintiffs’ counsel’s February 24, 2017, email to the undersigned is attached hereto as Exhibit A.

Contradicting their counsel’s email of February 24, 2017, Plaintiff’s Response to Defendant’s Statement of Undisputed Facts (DE 72) and Plaintiffs’ Response to Defendants’ Motion for Summary Judgment (DE 73) indicated that Plaintiffs did not, in fact, agree to limit their challenge as indicated above because “the FBI did not agree to this proposal.” As Mr. Julin’s email reflects, however, there was no “proposal” for the FBI to accept or reject. Plaintiffs had unequivocally limited the records remaining in dispute to those identified on their chart and

Document 22 was not identified among them. Defendants, therefore, reasonably deemed the FBI's redactions of information from Document 22 as no longer in dispute, and did not address the document in Defendants' Motion for Summary Judgment, *Vaughn* index or Declarations. Nor did Defendants submit the document to the Court for *in camera* review. Only *after* the Motions for Summary Judgment on Count I were fully briefed, did the Court request, and Defendants submit, *ex parte* and under seal, a copy of Document 22 for the Court to review. Defendants had not, however, had an opportunity to provide a justification, i.e., a factual basis, in support of the redactions reflected on the document for the Court to consider. On the basis of an incomplete record, the Court denied Defendants' Motion for Summary Judgment with respect to the FBI's redactions to Document 22 based on Exemption 7(E).

Accordingly, Defendants seek the Court's reconsideration of its ruling with regard to Document 22, taking into consideration the arguments submitted herein and the factual basis for the FBI's Exemption 7(E) claim as set forth in the Sixth Declaration of David M. Hardy. A copy of Mr. Hardy's Sixth Declaration is attached hereto as Exhibit B.

FOIA EXEMPTION (b)(7)(E)

Based on the Court's review of Document 22, unaided by any additional explanation from the FBI, the Court denied summary judgment. *See* Order (DE 99) at p. 38. Specifically, the Court observed as follows:

[t]he majority of the redactions in the PowerPoint are made under Exemption 7(E) to protect FBI investigative techniques and procedures. (*See generally Ex Parte* . . . Documents [ECF No. 97-2] 1–61). After reviewing the material redacted under Exemption 7(E), the Court notes much of it does not discuss any FBI investigative techniques and procedures; instead the material often encompasses facts and information gathered about FBI suspects. (*See, e.g., Ex Parte* . . . Documents [ECF No. 97-2] 19, 24). The FBI explains it is protecting methods it uses to collect and analyze data. (*See* Second Hardy Decl. ¶ 78). Yet, there is no

discussion of FBI investigative techniques or methods used to collect data; instead there is a summary of information and facts about FBI suspects. Accordingly, the FBI has failed to meet its burden in establishing Exemption 7(E) applies to the redacted information.

Order (DE 99) at p. 38.

Thus, the Court found that the information redacted from Document 22 is not protected under FOIA Exemption 7(E), because the information largely does not include discussion of any investigative techniques or procedures, but instead “encompasses facts and information gathered about FBI suspects. FOIA exemption (b)(7)(E), however, is not limited to information that, itself, reflects the FBI’s techniques or procedures, but to any and all “information compiled for law enforcement purposes [*that*] would disclose techniques and procedures for law enforcement investigations or prosecutions.” (emphasis added). Defendants respectfully submit that they were denied an opportunity to explain and justify the FBI’s assertion of FOIA Exemption 7(E) over portions of Document 22, i.e., to explain how disclosure of the information redacted from Document 22 on the basis of Exemption 7(E), albeit factual in nature, would nonetheless disclose techniques and procedures used by the FBI for law enforcement investigations. The Sixth Hardy Declaration provides such an explanation.

Defendants further submit that the Court applied an incorrect standard in assessing the FBI’s application of Exemption 7(E) to portions of Document 22. On page 12 of its Order (DE 99), the Court indicated that application of Exemption (b)(7)(E) requires an agency to show that disclosure could reasonably be expected to risk circumvention of the law, but such a showing is not required with regard to disclosures that would disclose “techniques and procedures” used in law enforcement investigations.

FOIA Exemption 7(E) includes two distinct clauses: the first refers to law enforcement “techniques or procedures,” and the second to “guidelines for law enforcement investigations or prosecutions.” 5 U.S.C. § 552(b)(7)(E). Although the latter category (“guidelines for law enforcement investigations or prosecutions”) may be withheld only if “disclosure could reasonably be expected to risk circumvention of the law” (5 U.S.C. § 552(b)(7)(E), no such showing is required for the withholding of law enforcement “techniques or procedures.” *Hamdan v. U.S. Dep’t of Justice*, 797 F.3d 759, 778 (9th Cir. 2015); *Allard K. Lowenstein Intern. Human Rights Project v. DHS*, 626 F.3d 678, 681-682 (2d Cir. 2010). Instead, information that would disclose law enforcement “techniques or procedures” receives categorical protection from disclosure. *See Hamdan v. U.S. Dep’t of Justice*, 797 F.3d at 778.

Even if a showing of the risk of circumvention *were* required, Mr. Hardy’s Sixth Declaration demonstrates such a risk here. *See Pub. Employees for Envtl. Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n, U.S.-Mexico*, 740 F.3d 195, 204 n.4 (D.C. Cir. 2014) (explaining that the D.C. Circuit has applied the circumvention requirement to techniques and procedures, but, in light of “the low bar posed by the ‘risk circumvention of the law’ requirement, it is not clear that the difference matters much in practice”). Exemption 7(E) “is written in broad and general terms.” *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009); *see also id.* at 1194 (“Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [government] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.”) (quotation marks and brackets omitted); *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (“Exemption 7(E) sets a relatively low bar for the agency to justify withholding”). The Government thus need not show that circumvention of the law as the result of the disclosure is

certain or even likely. *Mayer Brown*, 562 F.3d at 1193. Rather, information is exempt if disclosure “could increase the risks that a law will be violated or that past violators will escape legal consequences.” *Ibid*. Even the risk that such information will “embolden[]” a person to attempt to break the law is sufficient to justify withholding. *Id.* at 1194.

The undersigned has conferred with counsel for the Plaintiffs. Plaintiffs oppose the relief sought in this motion.

WHEREFORE, Defendants respectfully seek reconsideration of the Court’s denial of summary judgment with respect to the FBI’s claim of FOIA Exemption 7(E) in Document 22, Bates Numbered “Broward Bulldog 1496-1556.”

Miami, Florida

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell
Assistant United States Attorney