

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' MOTION TO DISMISS COMPLAINT
(With Incorporated Memorandum of Law)

Defendants, U.S. Department of Justice (DOJ), and its component, Federal Bureau of Investigation (FBI), respectfully request that this Court dismiss plaintiffs' Complaint without prejudice for failure to comply with FED. R. CIV. P. 8. Defendants further request that the Complaint be dismissed based upon lack of subject matter jurisdiction as to defendant FBI because FBI is not a proper defendant in this action.

FED. R. CIV. P. 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Magluta v. Samples*, 256 F.3d 1282, 1284 & n.3 (11th Cir. 2001). Pursuant to FED. R. CIV. P. 8(d)(1) "[e]ach allegation must be simple, concise, and direct."

The purpose of Rule 8's short and plain statement requirement is to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)(quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

In this action plaintiffs are alleging that defendants are improperly withholding records requested by plaintiffs pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. See Complaint ¶¶ 2, 77-78, 83-85, 91.

Plaintiffs' Complaint, which is 25 pages long and consists of 93 numbered paragraphs, is not a short and plain statement of plaintiffs' claim.

Approximately two pages of the Complaint, including about a page of single-spaced paragraphs, is devoted to describing plaintiffs and eight other members of the board of directors of Broward Bulldog, Inc. See Complaint ¶¶ 6-9. These allegations are unnecessary since the identity of a FOIA requester, as well as the requester's personal reasons for requesting the records at issue, have no bearing on the requester's entitlement to the records under FOIA. See *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 771 (1989).¹

In addition, the Complaint contains another approximately 16 pages of allegations which are largely unnecessary to state a FOIA claim. See Complaint pp. 4-10. Many of the paragraphs in these pages recount selected portions of alleged content of books, articles, reports, internet publications, and other publications or public records. See, for example, Complaint ¶¶ 14-15, 17, 23-31, 33-34, 36, 39-43, 48-52, 54, 61-62, 66, 76. Some paragraphs contain selected material allegedly published on Broward Bulldog's own website. See, for example, Complaint ¶¶ 69-73. Other paragraphs

¹ The identity of a FOIA requester is only relevant when an objection to disclosure is based on a claim of privilege and the FOIA requester is the party protected by the privilege. See *Reporters Committee*, 489 U.S. at 771. No such situation exists here.

contain alleged comments or opinions by former Senator Bob Graham or alleged facts regarding the Senator's history. See Complaint ¶¶ 20-22, 58-59, 70, 73, 76.

These paragraphs comprise a lengthy narrative which is the antithesis of a short and plain statement of a claim. Plaintiffs' Complaint is not the kind of notice pleading that Rule 8 requires but more closely resembles an overly broad request for admissions. Such pleading is particularly inappropriate in a FOIA case since discovery is normally not permitted in a FOIA action or, when deemed necessary, is allowed only on a limited basis. See *Tamayo v. U.S. Dept. of Justice*, 544 F. Supp.2d 1341, 1343 (S.D. Fla. 2008); *Wheeler v. C.I.A.*, 271 F. Supp.2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); *Schiller v. I.N.S.*, 205 F. Supp.2d 648, 654 (W.D. Tex. 2002) ("Typically, discovery is not part of a FOIA case, and the decision whether to allow discovery rests within the discretion of the district court judge... When discovery is permitted it is to be "sparingly granted.") Discovery certainly is not allowed to obtain information the disclosure of which may be at issue in a case or to merely fish for information the plaintiff may find useful. See *Tamayo*, 544 F. Supp.2d at 1344-45.

Many of the paragraphs of plaintiffs' Complaint would require defendants to respond to media reports, speculation, and opinion. Further, a large number of paragraphs in the Complaint would have defendants admit or deny alleged information pertaining to named individuals about whom plaintiffs are seeking information through their FOIA request or others allegedly associated with these individuals. See Complaint ¶¶ 23-25, 32-38, 43-49, 53-56, 63-65.

Defendants should not be required to respond to pages of allegations which are not necessary to plead a FOIA claim including, particularly, allegations concerning information pertaining to private individuals which may be exempt from disclosure under FOIA's privacy-based provisions,

Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6) and (b)(7)(C).

It is not the purpose of FOIA to provide the public with information about private individuals if that information “reveals little or nothing about an agency's own conduct.” *Reporters Committee*, 489 U.S. at 773. While plaintiffs argue in their Complaint that the public interest will be furthered by disclosure of the information they are requesting (See Complaint ¶¶ 92-93), a general public interest in the subject matter of the request is not the type of public interest which is considered in determining whether information about private individuals should be disclosed. *See Reporters Committee*, 489 U.S. at 775; *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004); *Schrecker v. Department of Justice*, 349 F.3d 657, 661 (D.C. Cir. 2003).

Courts have the power to enforce the "short and plain statement" pleading requirement by dismissing unduly lengthy or repetitive complaints without prejudice. *See Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19, 1522 n. 103 (11th Cir. 1991)(indicating that a court may dismiss a lengthy, verbose complaint for failure to comply with Rule 8), *cert. denied*, 502 U.S. 855 (1991); *Kermanj v. Goldstein*, 401 F. App'x 458, 460 (11th Cir. 2010)(affirming the district court's dismissal of plaintiff's complaint for failure to comply with Rule 8); *see also Pominansky v. Jarj Constr. Corp.*, No. 07-21530-CIV, 2007 WL 2900275, at *1 (S.D. Fla. Oct. 2, 2007) ("redundant and long-winded complaints 'impede the due administration of justice and, in a very real sense, amount to the obstruction of justice'").

Plaintiffs' Complaint should be dismissed with leave to amend so that plaintiffs may comply with FED. R. CIV. P. 8 by simply and concisely stating a claim and avoiding unnecessary narrative.

Further, this action should be dismissed as to defendant FBI since FBI is not a proper defendant in this action. Pursuant to 5 U.S.C. § 552(a)(4)(B), FOIA actions should properly be

brought against an “agency,” which, as defined at 5 U.S.C. § 552(f)(1), includes the “executive departments.” *See also* 5 U.S.C. § 551(1)(defining “agency”). The only proper defendant in this action is the Department of Justice. *See Trupej v. Drug Enforcement Agency*, No. 06-1162, 2007 WL 1238867, at *1 n.1 (D.D.C. Apr. 27, 2007); *Pri-Har v. Dep’t of Justice*, No. 04-1448, 2005 WL 3273550, at *1 n.1 (D.D.C. Sept. 27, 2005); *Brooks v. Bureau of Prisons*, No. 04-0055, 2005 WL 623229, at *2 (D.D.C. Mar. 17, 2005).

Defendants’ counsel certifies that she conferred with plaintiffs’ counsel prior to filing this motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

Therefore, defendants respectfully request that this motion to dismiss be granted.

Dated: November 19, 2012
Miami, Florida

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: s/ Carole M. Fernandez

CAROLE M. FERNANDEZ
Assistant U.S. Attorney
Assigned No. A5500016
E-mail: Carole.Fernandez@usdoj.gov
99 N.E. 4th Street, Suite 300
Miami, Florida 33132
Tel: (305) 961-9333
Fax: (305) 530-7139
*Counsel for Defendants, U.S. Department of Justice
and Federal Bureau of Investigation*

Certificate of Service

I HEREBY CERTIFY that, on November 19, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Carole M. Fernandez
CAROLE M. FERNANDEZ
Assistant U.S. Attorney

SERVICE LIST

Thomas R. Julin, Esq.
Patricia Acosta, Esq.
Hunton & Williams LLP
1111 Brickell Avenue, Suite 2500
Miami, Florida 33131
Tel: (305) 810-2516
E-mail: tjulin@hunton.com
*Counsel for Plaintiffs, Broward Bulldog, Inc.,
and Dan Christensen*
service by notice generated by CM/ECF

Carole M. Fernandez
Assistant U.S. Attorney
E-mail: Carole.Fernandez@usdoj.gov
99 N.E. 4th St., Suite 300
Miami, Florida 33132
Tel: (305) 961-9333
Fax: (305) 530-7139
*Counsel for Defendants, U.S. Department of Justice
and Federal Bureau of Investigation*
service by notice generated by CM/ECF