

IN THE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61289-Civ-Altonaga/O'Sullivan

BROWARD BULLDOG, INC., a Florida )  
corporation not for profit, and DAN )  
CHRISTENSEN, founder, operator and editor )  
of the FloridaBulldog.com website, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
U.S. DEPARTMENT OF JUSTICE, 950 )  
Pennsylvania Avenue, NW, Washington, )  
DC 20530, and FEDERAL BUREAU OF )  
INVESTIGATION, 935 Pennsylvania Avenue, )  
NW, Washington, DC 20535, )  
 )  
Defendants. )  
\_\_\_\_\_ )

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Plaintiffs' Opposition to Defendants'  
Motion for Summary Judgment on Counts 2 and 3

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ORAL ARGUMENT REQUESTED

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### REQUEST FOR HEARING

Plaintiffs, Broward Bulldog, Inc., publisher of the FloridaBulldog.com website, and Dan Christensen (collectively “the Bulldog”), respectfully request a hearing on motion of the U.S. Department of Justice and the Federal Bureau of Investigation (collectively “the FBI”) for summary judgment on counts 2 and 3. DE-27. The complexity and importance of the issues raised by the case warrant the holding of a hearing.

This is Freedom of Information Act (“FOIA”) enforcement action in which the Bulldog seeks records regarding the FBI’s investigation of the events of September 11, 2001, to inform the American public about evidence the FBI found in Sarasota, Florida of possible support for the 9/11 hijackers. The Bulldog would use the hearing to help the Court identify the conflicts that exist in the evidence bearing on whether records withheld by the FBI have been properly classified, are required to be withheld to protect national security or foreign policy interests, or are allowed to be withheld prevent a clearly unwarranted invasion of privacy or other harm,

### ARGUMENT

Not all FOIA cases may be resolved on summary judgment. “[S]ome FOIA cases require resolution of disputed facts.”<sup>1</sup> Summary judgment cannot be granted if dueling affidavits create a genuine dispute over issues of material fact.<sup>2</sup> In cases that are not resolved by summary judgment, the district court’s decision will be given great deference and reviewed solely to determine whether the Court had an adequate factual basis for its decision, and whether the decision was clearly erroneous.<sup>3</sup> Cases resolved by summary judgment will be reviewed *de*

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<sup>1</sup> *Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2010) (citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1110 (9th Cir. 1994)).

<sup>2</sup> *See Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 326 (D.C. Cir. 1989); *Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 553 F.2d 1378, 1382 (D.C. Cir. 1977); *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 953 F. Supp. 400, 403 (D.D.C. 1996).

<sup>3</sup> *News-Press v. U.S. Department of Homeland Security*, 489 F.3d 1173, 1187 (11<sup>th</sup> Cir. 2007).

*novo*.<sup>4</sup> Because this motion involves redactions to just four short memos and a set of contracts, which consist largely of forms, the Court should conduct an *in camera* review of each of the redactions to ensure that it has an adequate record basis to address each of the redactions.<sup>5</sup>

### RESPONSE

The evidence upon which this response based is set forth in the Bulldog’s Response to the FBI’s Statement of Undisputed Facts (“RUSF”) and the declarations attached thereto.

#### I.

#### The FBI has not Shown that it is Entitled to Summary Judgment With Respect to Any of the Redactions that are the Subject of Count 2

The FBI sets forth boilerplate descriptions of 11 different exemptions that it has asserted to justify redactions within 79 pages of 220 pages produced.<sup>6</sup> The FBI makes no attempt to explain why the particular redacted information falls within any of the asserted exemptions. Summary judgment should be denied on that basis alone. “The movant’s initial burden on a motion for summary judgment ‘consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.’”<sup>7</sup>

The FBI has not done this. Instead, as Judge Zloch held in *Broward Bulldog, Inc. v. U.S. Department of Justice*, No. 12-61735, 24 Fed. L.W. Fed. D361a (S.D. Fla. Apr. 4, 2014), the

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<sup>4</sup> *Id.* at 1188.

<sup>5</sup> *See Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993) (in a case that involved only 50 responsive documents “in camera inspection of the documents might be the preferred procedure”).

<sup>6</sup> Notably, the FBI has not invoked Exemption 7(F) to justify any of its exemptions, so the Court can feel confident that if it rejects any of the redactions, disclosure material cannot “reasonably be expected to endanger the life or physical safety of any individual.” 5 U.S.C. § 552(b)(7)(F).

<sup>7</sup> *Micosukee Tribe of Indians of Florida v. Dep’t of Justice*, 103 F. Supp. 3d 1314, 1323 (S.D. Fla. 2015) (citing *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir.1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (alterations and internal quotation marks omitted)).

FBI's "eagerness to assert exemptions and wooden method of interpreting Plaintiffs' FOIA requests essentially deprives the Court of its role in examining any relevant documents and independently determining whether any exemptions may apply." Judge Zloch, denying after denying the FBI's summary judgment motion, and ordering a more thorough search, relied in large measure on *Ely v. FBI*, 781 F.2d 1481, 1492 (11<sup>th</sup> Cir. 1986), in which the Eleventh Circuit held "the statute [FOIA] envisions an activist role for the trial court," and also cautioned that "Failure of a trial court to undertake this probing and exacting review constitutes an erroneous default of its obligations under the statute." *Id.* (citing *Stephenson v. IRS*, 629 F.2d 1140, 1146 (5th Cir. 1980)).<sup>8</sup> *Broward Bulldog*, No. 12-61735 (DE-60 at 5-6).

A rational analysis of each redaction made and each FOIA exemption asserted can be done solely by reviewing the redactions and exemptions in the context of the documents redacted and the circumstances giving rise to the Bulldog's request for the documents. The Bulldog requested the Meese Commission documents primarily because the Commission specifically and virulently criticized the reliability of an FBI Memorandum dated April 16, 2002. RSUF ¶¶ 10-15. The Bulldog compelled the FBI to produce that document, and others, by bringing a prior FOIA enforcement action in 2012 which fell before Judge Zloch. RSUF ¶¶ 16, 23-26.

That document included findings that members of a wealthy Saudi family with connections to the Saudi royal family had fled their home Sarasota, Florida two weeks before the September 11, 2001, attacks on the United States. RSUF ¶ 24. The document stated that the family had "many connections" to the hijackers who carried out those attacks, and noted specifically that one of the family members had engaged in flight training at the same nearby flight school where the hijackers trained. RSUF ¶ 24. Although the FBI redacted the name of the agent who wrote the report, the Bulldog and other media reported that Special Agent Gregory J. Sheffield was the author. RSUF ¶ 24.

This document confirmed earlier reporting by the Bulldog from September 8, 2011, that

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<sup>8</sup> In *Bonner v. City of Pritchard*, 661 F. 2d 1206, 1209 (11th Cir. 1981) 2 (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

Abdulaziz al-Hijji and his wife Anoud Ghazzawi al-Hijji, whose father, Esam Ghazzawi, and grandfather had ties to the Saudi royal family, had suddenly departed from their Sarasota home at 4224 Escondito Circle just two weeks before the 9/11 attacks. RSUF ¶ 21. This suggested that the al-Hijji family may have received a prior warning that the 9/11 attack was coming and should leave the country to avoid being charged as accomplices. Residents of Sarasota who knew the al-Hijjis had told the Bulldog that soon after 9/11, the FBI investigated the family and found, from Prestancia gatehouse records and phone records, that several of the 9/11 hijackers, including ringleader Mohamad Atta, had visited the al-Hijjis' Sarasota home. RSUF ¶ 18. The Bulldog's first article about this quoted former Sen. D. Robert Graham, who had co-chaired the 2002 Congressional Joint Inquiry into 9/11, as saying that the FBI should have but did not disclose its Sarasota investigation to Congress. RSUF ¶ 19.

On the day after this first Bulldog's report, the FBI publicly disputed it, saying that although it had investigated the family, it found no connections between the family and the 9/11 hijackers, and that it had reported these findings to Congress, irrespective of Sen. Graham's contrary assertion. RSUF ¶ 20.

This public contradiction of the Bulldog's sources inspired the Bulldog to ask the FBI and the Florida Department of Law Enforcement ("FDLE") for records of their Sarasota investigations. The FBI refused to produce its records. RSUF ¶ 22. But the FDLE, on December 21, 2011, produced records showing that that on April 7, 2004, the FBI had interviewed a witness who told the FBI that Abdulaziz al-Hijji was "a heavy drinker and smoker of cannabis, however very well schooled in Islam." The report further stated that the witness said he had visited al-Hijji at his home in Sarasota prior to September 11, 2001, that al-Hijji spoke about taking flight training at the Venice Airport at that time, that Osama Bin Laden was a hero of al-Hijji, and that al-Hijji would speak of going to Afghanistan and becoming a freedom fighter or Mujahedin and wanted Hammoud to join him. RSUF ¶ 21.

Sen. Graham also investigated the matter, asking the FBI why it had claimed to have disclosed its Sarasota investigation to Congress when in fact it had not. In response, the FBI showed Sen. Graham some of its Sarasota investigative files. They seemed to contradict the

FBI's public statements that the investigation found nothing, but the FBI refused to explain this inconsistency or to show Sen. Graham its full Sarasota file. Sen. Graham reported to the Bulldog that something seemed to be terribly amiss. RSUF ¶ 22.

Armed with the FDLE records and Sen. Graham's testimony, the Bulldog sued the FBI for violating FOIA by failing to produce its Sarasota records which it still claimed had found nothing. RSUF ¶ 23. The FBI's initial response was that it could not find no responsive records. RSUF ¶ 23. After being confronted with the FDLE disclosures and the possibility that Sen. Graham would testify he had seen some of the FBI's Sarasota records, the FBI admitted that it had 35 pages of responsive records, including the April 16, 2002, "many connections" report and produced redacted versions to the Bulldog. They squarely contradicted the FBI's public position that its Sarasota investigation found nothing. RSUF ¶¶ 24-25.

This April 16, 2002, report and testimony from Sen. Graham then persuaded Judge Zloch to order the FBI to conduct a more thorough search for Sarasota investigation records. RSUF ¶ 26. The FBI then found and produced more records confirming that it found connections between the al-Hijjis and the 9/11 hijackers, and it also found 80,166 pages of additional records which it claimed were classified. Judge Zloch ordered the classified records produced to him for *in camera* review. RSUF ¶ 27. His review is ongoing now. RSUF ¶ 28.

The instant lawsuit focuses on records of the Meese Commission. It received its initial funding from Congress on March 26, 2013, two days before the FBI released of the April 16, 2002, report to the Bulldog. RSUF ¶ 24. The Commission, a three-man body selected and paid by the FBI to assess all new evidence of what happened during 9/11, conducted not a single public hearing over its one-year lifespan and then produced on March 25, 2015, a report which criticized the April 16, 2002, FBI report as sloppily written, wholly unsubstantiated, and inaccurate. RSUF ¶¶ 10, 11 & 28.

But that Meese Commission Report relied for its criticism on secret hearing and records, including, supposedly a secret interview of the agent who wrote the April 16, 2002, report, and who, according to the Meese Commission Report said he was unable to provide any basis for the contents of the document or explain why he wrote it. RSUF ¶¶ 28-29.

As a consequence, the Bulldog made the FOIA requests for the Meese Commission records that are the subject of this lawsuit. The Bulldog wanted to see whether the Commission had any legitimate basis to attack the April 16, 2002, report; or whether it had attacked the report as part of a continuing effort to conceal what it actually had discovered about Saudi government support for the 9/11 hijackers. RSUF ¶ 30.

The FBI's response to those requests initially was to ignore them, in violation of FOIA deadlines. RSUF ¶¶ 30-332. That forced the Bulldog to file this lawsuit and only thereafter did the FBI make any effort to produce responsive records. RSUF ¶ 34. But before producing any of the records, the FBI shot them full of redactions supposedly justified by almost every known FOIA exemptions. DE-27-2 Ex. K. That position simply does not stand up to scrutiny, and certainly does not warrant the granting of summary judgment with respect to any of the exemptions asserted. The records produced, DE-27-2 Ex. K, can be divided into five categories. Although space limitations preclude discussion of each redaction separately, these arguments are designed to provide the Court a framework with which to consider each redaction.

A. 04-30-2014 Briefer  
Broward Bulldog 1-4 (DE-27-2 at 37-40)

This is a memorandum reflecting the briefing of the Meese Commission regarding the April 16, 2002, FBI report. The first line of the document is "Briefing Title [Redaction] Family." DE-27-2 at 37. The FBI contends that the redaction is required by FOIA Exemptions 1 and 7(C).<sup>9</sup> Exemption 1 applies to records "(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 pursuant to such Executive order." Exemption 7(C) applies to records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information "could reasonably be expected to constitute an unwarranted invasion of personal privacy,"

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<sup>9</sup> FOIA exemptions are set forth in seven subsections of 5 U.S.C. § 552(b). To simplify their citation, this memorandum will refer to each exemption solely by its subsection. For example, 5 U.S.C. § 552(b)(7)(C), will be called Exemption 7(C).

The assertion of either of these exemptions is without merit. The Bulldog learned that the Abdulaziz and Anoud al-Hijji family lived at 4224 Escondido Circle in Sarasota from their neighbors and the manager of the al-Hijjis' homeowners association. Those same people identified the al-Hijjis as the subject of the FBI investigation. RSUF ¶ 18. FDLE records released to the Bulldog also showed that the al-Hijji and Ghazzawi families were the subject of the FBI investigation. RSUF ¶ 21. The Bulldog and other media widely reported that the al-Hijji/Ghazzawi family was the subject of the Sarasota FBI investigation even before any FOIA requests had been made or litigation commenced. RSUF ¶ 19.

The Bulldog's FOIA request that is before Judge Zloch asked for records relating to the FBI's investigation of matters at 4224 Escondido Circle. RSUF ¶ 21. Judge Zloch required a search not only for documents reflecting that address but only for records with the names of the al-Hijjis and the Ghazzawis because the record before him established that these were the individuals who were the targets of the investigation. Judge Zloch ruled that the "names have already been made a part of the public record by Plaintiffs' filings. Additionally, some of the names are matters of Sarasota County public record as the owners of the property in question. Defendants have never requested the Court redact or seal the names published by Plaintiffs." RSUF ¶ 26 & DC Dec. ¶ 24 & Ex. G-2 at 21. The FBI then released documents to the Bulldog in the suit before Judge Zloch, identifying Esam Ghazzawi, as a subject of the investigation, Case No. 0:12-cv-61735, DE-68-1 at 1, although it subsequently claimed that it released Ghazzawi's name inadvertently. *Id.* at DE-69-1 at 3 n.2.

As this Court has held, "Under FOIA's 'public domain' exception, an agency may not rely on an otherwise valid [FOIA] exemption to justify withholding information that is already in the public domain."<sup>10</sup> "One can have no privacy interest in information that is already in the

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<sup>10</sup> *Miccosukee Tribe of Indians*, 103 F. Supp. 3d at 1327 (citing *Marino v. Drug Enforcement Admin.*, 685 F.3d 1076, 1080 (D.C. Cir. 2012) (internal quotation marks and citations omitted; alteration in original)).

public domain,”<sup>11</sup> In addition, where an agency mistakenly discloses a document, it cannot expect to be able to withhold it in response to a FOIA request. *See Dresser Industrial Value Operations, Inc. v. EEOC*, 2 Gov. Disclosure Serv. (PH) ¶ 82,197 at 82,575 (W.D. La. 1982).

The FBI redacted the name of the person who briefed the Meese Commission regarding the April 16, 2002, document, claiming that Exemptions 6 and 7(C) apply. DE-27-2 at 37. Exemption 6 covers “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The fact that one is briefing the Meese Commission is not a recognizable privacy interest. In explaining how Exemption 6 should be interpreted, the Eleventh Circuit held FOIA’s “limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.” . . . Because the net effect of the FOIA, with its exemptions, is to “place[] emphasis on the fullest responsible disclosure,” . . . , the Supreme Court has “repeatedly stated that the policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.” *News Press*, 489 F.3d at 1191 (citations omitted).

Exemption 6 does not protect the names of all government employees.<sup>12</sup> To fall within the scope of Exemption 6, a record must “first satisfy the threshold requirement of being a ‘similar file’” to medical and personnel files.<sup>13</sup> This threshold requirement supports the primary purpose in drafting Exemption 6 — “to provide for the confidentiality of personal matters.”<sup>14</sup>

Moreover, while Exemption 7(C) often sometimes can justify redaction of the names of

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<sup>11</sup> *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 840 F.Supp.2d 226, 230-31 (D.D.C.2012); *see also Gawker Media, LLC v. FBI*, 145 F. Supp. 3d 1100, 1107 (M.D. Fla. 2015).

<sup>12</sup> *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 257 (D.D.C. 2005) (names of Justice Department employees do not meet the threshold for Exemption 6); *Gordon v. FBI*, 390 F. Supp. 2d 897, 902 (N.D. Cal. 2004) (names of agency employees are not personal information that meets Exemption 6 threshold), *summary judgment granted*, 388 F. Supp. 2d 1028, 1040-42 (N.D. Cal. 2005) (Exemption 6 does not apply to names of agency's employees).

<sup>13</sup> *N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1004 (D.C.Cir.1990) (en banc).

<sup>14</sup> *United States Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 600, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982) (internal quotation marks admitted).

law enforcement personnel from records, it does not permit redaction where there is a significant public interest in the identification of the names.<sup>15</sup> The privacy interest of those protected by this exemption also must be balanced against the public interest, if any, that would be served by disclosure.<sup>16</sup> The relevant public interest is that interest central to FOIA — shedding light on an agency's performance of its statutory duties. *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989). When an agency is given “awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility.” *News-Press*, 489 F.3d at 1178. Here, that significant public interest is an understanding whether the Meese Commission was briefed by persons other than the FBI agents who themselves were involved in concealment from Congress and the public of evidence that the Saudi government supported the hijackers. Notably, the FBI did not delete the names of many of the employees who attended the April 30, 2014, Meese Commission briefing. Instead, it selectively redacted just some names and provided the Court with no basis for distinguishing one from another. DE-27-2 at 37. This admits disclosure of briefing does not invade personal privacy.

The FBI also redacted a part of the name of two slides presented to the Meese Commission so that they read “FBI [redacted] White Paper” and “Tampa Case File [redacted] interviews,” in reliance on Exemptions 6 and 7(C) with no explanation for why disclosure of those slide names would result in an unwarranted invasion of personal privacy.

The FBI also redacted in reliance on Exemptions 6 and 7(C) a portion of questions asked by Commission members Roemer and Grewe what happened to three individuals and how long the agent who wrote the April 16, 2002, FBI report had been an agent when he wrote the report. Yet, the FBI provided no explanation for why the exemptions allow those redactions. The *Bulldog*, the *Tampa Bay Times*, the *Sarasota Herald Tribune*, *Sarasota Magazine*, and other media all have identified Gregory J. Sheffield as author of the report. RSUF ¶ 24. In any event, the Commission

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<sup>15</sup> *E.g., Butler v. Department of Justice*, No. 86-2255, 1994 WL 55621, at \*13 (D.D.C. Feb. 3, 1994) (releasing identities of supervisory FBI personnel upon finding of “significant” public interest).

<sup>16</sup> *Albuquerque Publ'g Co. v. U.S. Dep't of Justice*, 726 F. Supp. 851, 855 (D.D.C.1989).

was highly critical of the agent, finding his report was poorly written, wholly unsubstantiated, and inaccurate. Identification of the identity of the agent is expected may reveal that the agent is a very experienced, highly-respected agent who has not made previous errors. This would provide the public a means of evaluating whether the Meese Commission's attacks on the agent's reports were correct. Courts also have held that "a relevant public interest could exist where 'the names of current workers might provide leads for an investigative reporter seeking to ferret out what government is up to.'" <sup>17</sup> "[T]he core purpose of the FOIA . . . is contributing significantly to public understanding of the operations or activities of the government." <sup>18</sup> This is precisely the objective of the Bulldog here – to ascertain whether, as the FBI has maintained for more than five years that it found nothing when it undertook an investigation of the al-Hijjis (in which case there could be no national security, law enforcement or personal privacy interests to justify continued secrecy) or that the FBI has been maintaining an elaborate ruse to prevent Congress and the public from discovering that the Saudi government did provide support for the hijackers.

Four FBI redactions under the subtitle "Overview of Article and FBI Actions" are clearly references to the al-Hijjis, DE-27-2 at 37, so those redactions serve no purpose. On the following page, the FBI redacted on Exemption 6 and 7(C) grounds the name of a person who "met the Senate Select Committee on Intelligence staff members to explain the steps the FCI went through and its findings." DE-27-2 at 38. The document states: "She assumes everything is resolved since she has not heard back; however Graham continues to question the FBI." DE-27-2 at 38. The redacted name must be that of FBI Special Agent Jacqueline McGuire. This is ascertainable because the Meese Commission Report itself identifies her at pages 4 and 5. The FBI's assertion of Exemptions 6 and 7(C) to protect her identity serves no purpose.

The following paragraph of the report is redacted in Exemption 6, 7(C), 7(D), and 7(E)

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<sup>17</sup> *Painting & Drywall Work Preservation Fund, Inc. v. Dep't of Housing and Urban Dev.*, 936 F.2d 1300, 1303 (D.C. Cir. 1991) (citing *FLRA v. Dep't of the Treasury*, 884 F.2d 1446 (D.C. Cir. 1989) (citing *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1988))).

<sup>18</sup> *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 325 (1994) (quotation marks and emphasis omitted).

grounds with the exception of the words “in April 2002.” Exemptions 7(D) applies to law enforcement records that could reasonably be expected to disclose the identity of a confidential source or information furnished by a confidential source. Exemption 7(E) applies to law enforcement records that 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.

The FBI does not, however, claim that it has any confidential sources for the redaction information. Its sole claim in this case is that “the FBI protected the names, identifying information about, and information provided by third parties under circumstances in which confidentiality can be inferred.” DE-27-1 at 31 ¶ 67. The FBI does not contend that it promised anyone confidentiality or that any one requested confidentiality. At the same time, the FBI publicly has stated that its investigation found no connections between the al-Hijjis and the hijackers. If that is true, then it is very difficult to understand how Exemptions 7(D) or 7(E) would apply to the redacted material.

The third page of the April 30, 2014, DE-27-2 at 39, briefing contains 25 redactions. The first redaction on Exemption 6, 7(C), and 7(D) grounds is obviously the name of Larry Berberich because the report identifies the person as a resident of the gated community quoted in the Sept. 8, 2011, Bulldog article as saying he had a gut feeling that the al-Hijjis had something to do with the article. Berberich is the only person identified in the article in that way. Other redactions on this page similarly seem to serve none of the interests protected by cited exemptions. Instead, the redactions perpetuate the appearance that the FBI cannot explain why on April 16, 2002, an agent found many connections between the al-Hijjis and the hijackers – a conclusion the Bulldog itself had found on Sept. 8, 2011 – but the FBI is now claiming there were no connections.

From the fourth page the FBI redacted, on Exemption 5 grounds, a final paragraph under the heading “Gaps/Possible Issues/Recommendations:” DE-27-2 at 40. Exemption 5 applies to “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.” This “incorporates into FOIA the statutory and common law privileges normally available to a party in civil discovery,” such as

the attorney-client and work product privileges.<sup>19</sup> In reviewing Exemption 5 claims, the Court can conduct an *in camera* inspection of the redacted materials. The Court should do that with respect to this redaction, particularly since the FBI has provided no explanation for why Exemption 5 would apply and this paragraph might shed significant light on the issues that have been raised by the contradiction between the FBI's public statements and its internal documents. "This Circuit has held that in FOIA litigation, an agency has the burden of proving that it properly invoked any FOIA exemptions when it decided to withhold information." *Id.* at 1258.

The Hardy Declaration (DE-27-1) discusses how Exemption 5 operates but does not show why that exemption applies to any redactions. It offers speculation that release of the information would result in "public confusion generated by draft or unadopted rationales/decisions, and to maintain the integrity of the agency decision-making process by encouraging open, candid discussions." DE-27-1 at 24. This sort of boilerplate language says nothing about the specific redactions. It also ignores the fact that in this case the FBI itself has created widespread public confusion through its public statements attacking the Bulldog, Sen. Graham, and its own internal documentation which the Bulldog and Judge Zloch compelled it to release.

B. 10-24-2014 Briefer  
Broward Bulldog-5-6 (DE-27-2 at 41-42)

This is a two-page memorandum regarding a briefing of one member of the Meese Commission, Bruce Hoffman, regarding "9/11 Additional Evidence." The FBI redacts the name of all three FBI agents on Exemption 6 and 7(C) grounds without explanation of why these names should be redacted. The Meese Commission's report itself does not redact the name of Special Agent Jacqueline Maguire (pages 4 and 5), as noted, FBI Liaison Officer Elizabeth Callahan pages 4 and 5), FBI Special Agent Steven McCraw (page 21), former Special Agent Bassem Youseff (page 121), or 33 other current or former federal government employees interviewed by the Commission (page 121). Such selective redaction of the names of only certain agents from the redacted documents responsive to the Bulldog's FOIA request should be

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<sup>19</sup> *Miccosukee Tribe of Indians v. United States*, 516 F.3d 1235, 1257 (11<sup>th</sup> Cir. 2008).

explained by the FBI.

Most of the other redactions on this document rely on Exemption 1 regarding matter (A) authorized by Executive order to be kept secret for national defense or foreign policy reasons and (B) are in fact properly so classified. Redactions to this document also rely on Exemption 3 which applies to matters exempted by other statutes that (A) requires the matters to be withheld, or (B) establish criteria which allow the matters to be withheld.

The FBI contends Exemption 1 applies because David Hardy has attested that the information was properly classified under Executive Order 13,526 as “intelligence activities (including covert action), intelligence sources or methods, or cryptology.” Dec-27-1 at ¶ 38. The FBI contends Exemption 3 applies because Hardy determined that the redacted information would reveal “intelligence sources and methods” and the National Security Act of 1947 prohibits such disclosures. Dec-27-1 at ¶ 48.

The Bulldog might not have any basis to challenge these assertions had the FBI, in response to the Bulldog’s Spt. 8, 2011, reporting about the al-Hijji family, not publicly claimed that it had investigated the family and found no connection between the family and the 9/11 terrorist attacks. RSUF ¶¶ 19 & 20. The Bulldog also might have no basis to question these determinations had the FBI not stood by its findings of April 16, 2002, that the al-Hijji family had “many connections” to the 9/11 attacks, instead of publicly contending through the Meese Commission Report claiming that its April 16, 2002, findings were poorly written, wholly unsubstantiated, and inaccurate. RSUF ¶ 27. But because the FBI has so frequently and vociferously asserted that there is *no* connection between the al-Hijjis and the 9/11 attacks, the FBI, at a minimum, has created a serious factual dispute about whether redacted information has been properly classified or is required to be withheld by the National Security Act.

The Court must resolve these factual inconsistencies through a trial which examines whether the FBI was lying to the public when it said it found nothing through its Sarasota investigation or is lying to the Court now when it says the records of its Sarasota investigation contain extensive information which must be kept secret due to the harm it would inflict on national security, foreign policy, and confidential sources and methods of the intelligence

community. This is why the Bulldog is pursuing this litigation. The FBI cannot continue to withhold records under FOIA Exemptions 1 and 3 while also maintaining these highly inconsistent positions or, at a minimum, the FBI should be required by the Court to reconcile these inconsistent positions in some meaningful, evidence-based way. This Court has “the obligation to determine independently the legitimacy of a claim of privilege based upon the government's proffer of evidence.” *Ely*, 781 F.2d at 1491 n.4.

Not only is the FBI's assertion of Exemptions 1 and 3 called into question by its own inconsistent positions and records, it also is called into questioned by Sen. Graham's testimony that the FBI improperly withheld evidence of its Sarasota investigation from Congress, RSUF ¶ 19-20, and the recent actions of President Obama overruling the FBI's refusal to declassify 28 pages of the 2002 Congressional Joint Inquiry co-chaired by Sen. Graham which examined whether the Saudi government had provided support for the 9/11 hijackers. RSUF ¶¶ 38. The President and the Director of National Intelligence, in announcing the declassification, stated that “the harm to national security by releasing” the report was “outweighed by the public interest in additional transparency concerning the Committees' findings.” RSUF ¶ 38. Moreover, the recent action of Congress in passing the Justice Against Sponsors of Terrorism Act of 2016, Public Law No. 114-222, so that the families of the victims of the 9/11 attacks can pursue claims that the Kingdom of Saudi Arabia aided the hijackers, also is evidence that national security and foreign policy is harmed, not helped, by the continued concealment of evidence regarding what happened on September 11, 2001, and that public interest in truth and justice override personal privacy and other concerns in this area. RSUF ¶¶ 41-46.

The Court must weigh all of this, including the live testimony of the FBI's witnesses who asserting that exemptions have been properly claimed, and the Bulldog's witnesses, including Sen. Graham, the former chair of the U.S. Senate Intelligence Committee and the Congressional Joint Inquiry into 9/11, at trial. The conflicting evidence now in the records cannot be resolved by motion for summary judgment.

The FBI asserts Exemption 7(E) for redactions to this document as well, suggesting that disclosures “could reasonably be expected to risk circumvention of the law.” While this might

have been true in the first two or three, or five, or ten years after September 11, 2001, it is no longer true. Now, because no formal or informal criminal charges have been filed against any person, institution, or foreign sovereign in any article III U.S. criminal court for assisting the hijackers in their attacks on the United States, the Court should give this assertion no credibility.

In another unsolved murder case, law enforcement agencies argued as does the FBI apparently does here, that disclosure of evidence might impede its ability to bring criminals to justice. In that case, *The Mobile Press Register, Inc. v. Witt*, No. 95-06324 CACE (13), 4 Fla. L. Weekly Supp. 159a, 24 Media L. Rep. (BNA) 2336 (Fla. 17<sup>th</sup> Cir. Ct. 1996), arising from the horrific murder in 1981 of five-year-old Adam Walsh, the judge rejected those claims and ordered the entire investigative file released to the public and the press. Interpreting Florida's Public Record Law, the state analog to FOIA, the judge explained: "The longer an investigation goes on, the less likely it seems that the investigation ever could result in an arrest or prosecution. Witnesses lose their memories. Suspects die. Evidence decays or disappears. As the investigation goes on and on, it becomes less, not more, likely" that a prosecution will result. *Id.* at 2338. "The time clearly had come to allow the public and the press to review this file. Public access to an investigative file holds out the hope that widespread dissemination of information about the case will turn up new leads that could not be found in any other manner." *Id.*

Although the judge was interpreting a state law, the rationale applies here and counsels rejection of claims that release of information redacted on Exemption 7(E) grounds will interfere with whatever investigation may be ongoing at this time. In the Adam Walsh case, 15 years had elapsed from the commission of the crime to the date that the files were ordered released. In the instant case, more than 15 years have elapsed from the commission of the crime to this date and, in sharp contrast to the Adam Walsh case, all of the resources of the United States Government presumably have been brought to bear on finding and prosecuting anyone who may have responsibility for the crime and who did not die in its commission. It is now too late to attempt to justify keeping the public in the dark with the empty promise or hope that criminals may be brought to justice if only law enforcement agents are allowed to continue their work in secret.

One other aspect of the Adam Walsh case warrants mention. When the Hollywood

Police Department files were released, the *Sun-Sentinel* concluded the “best shot at solving the case . . . may have been lost forever” due to police mishandling of evidence that could have identified the murderer.<sup>20</sup>

C. 11-10-2014 Briefer  
Broward Bulldog 7-8 (DE-27-2 at 43-44)

This document is a memorandum regarding a briefing of two Meese Commissioners by Bassem Yousef, a retired FBI agent who “came to the Commission’s offices to discuss allegations that he had a source in the early 1990s who was in direct contact with Usama Bin Laden.” DE-27-2 at 43. The FBI redacted portions of the memorandum on Exemption 6, 7(C), 7(D), and 7(E) grounds, apparently contending that disclosure of the redacted materials would constitute an unwarranted invasion of personal privacy, could identify a confidential source, or could reasonably be expected to risk circumvention of the law. The document itself, however, states that the “source was killed by an RPG in Chechnya in 1995.” DE-27-2 at 44.

David Hardy makes no specific mention of this memo, DE-27-1, and provides the Court no explanation of how the redactions serve the purposes of any of the cited exemptions.

D. Updates and Initiatives as of 5 October 2012  
Broward Bulldog 9-12 (DE-27-2 at 45-48)

This four-page document may be the most important of the five documents at issue with respect to Count 2 and Request 2. The Bulldog requests that the Court review the unredacted version of this document *in camera* because that is the only way that the Court can properly assess the dozens of redactions that the FBI has made to this document.

The document shows that the FBI found in San Diego a Saudi support network for two of the 9/11 suicide hijackers, Nawaf al-Hazmi and Khalid al-Mihdhar, who with three other terrorists crashed American Airlines Flight 77 into the Pentagon. DC Dec. ¶ 54. The document is emblazoned with a logo depicting the Twin Towers and the Pentagon. DC Dec. ¶ 55.

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<sup>20</sup> See Scott Glover & Evelyn Larrubia, *Key Walsh Evidence Missing*, *Sun-Sentinel* (Feb. 17, 1996) ([http://articles.sun-sentinel.com/1996-02-17/news/9602170032\\_1\\_adam-walsh-ottis-elwood-toole-adam-s-killer](http://articles.sun-sentinel.com/1996-02-17/news/9602170032_1_adam-walsh-ottis-elwood-toole-adam-s-killer)).

Unredacted information in the document states Fahad-al-Thumairy, a Saudi diplomat and imam at the King Fahd Mosque in Los Angeles “immediately assigned an individual to take care of [two soon-to-be-hijackers] during their time in Los Angeles.” DE-27-2 at 47-48. DC Dec. ¶ 56. It also states Omar al-Bayoumi was a salaried employee of the Kingdom of Saudi Arabia who befriended the two hijackers in San Diego. DE-27-2 at 48. DC Dec. ¶ 57. The FBI redacted the name of a third subject, but stated that person “tasked al-Thumairy and al-Bayoumi with assisting the hijackers.” DE-27-2 at 48. DC Dec. ¶ 58.

The 4-page report states the trio “provided (or directed others to provide) the hijackers with assistance in daily activities, including procuring living quarters, financial assistance, and assistance in obtaining flight lessons and driver’s licenses. [Redacted] seeks to prove these subjects provided such assistance with the knowledge that [the hijackers] were here to commit an act of terrorism.” DE-27-2 at 48. DC Dec. ¶ 59. These records show that the FBI had evidence of Saudi government complicity in the 9/11 attacks, but did nothing about it. DC Dec. ¶ 60.

The FBI made extensive redactions to this report in reliance on Exemptions 1, 3, 5, 6, 7(A), 7(C), 7(D), 7(E). The one exemption cited for these redactions which was not cited for redactions in the other previously discussed documents is Exemption 7(A) which applies to law enforcement records that “could reasonably be expected to interfere with enforcement proceedings.” David Hardy states in his declaration that this exemption has been asserted “in a limited fashion.” DE-27-1 at 29 ¶62. He explains it was asserted “to protect specific case information from a pending FBI investigations [sic].” DE-27-1 at 29 ¶63.

In other recent FOIA litigation in this District, Mr. Hardy has asserted Exemption 7(A) and then, when ordered to explain his basis for asserting the exemption, he withdrew it. *Gawker Media, LLC*, 145 F. Supp. at 1106. This Court also should require Mr. Hardy to provide the Court, *in camera* if necessary, to explain why this exemption applies to the redacted material on Broward Bulldog page 10, DE-27-2 at 46. Specifically, the Court should direct Mr. Hardy to identify the specific enforcement action which has been brought by case number, parties, and subject matter so that the Court can make a meaningful determination of whether disclosure of the redacted information could reasonably be expected to harm the enforcement action.

All other exemptions asserted for this document should be rejected for the same reasons that they should be rejected with respect to other redactions or the Court should conclude, at a minimum, that factual issues exist with respect to the application of the exemptions.

E. Personal Service Contracts  
Broward Bulldog 13-220 (DE-27-2 at 49-257)

The Bulldog sought the personal service contracts of the three Meese Commissioner and 12 staff members in order to evaluate the independence of the Commissioners and staff from the FBI. The FBI produced the contracts of two commissioners; Bruce Hoffman and Timothy Roemer, but only two pages of the 12-page contract of Edwin Meese. It also produced contracts of five staff members, John Gannon, Louise Christine Healy, Jamison Pirko, William E. Richardson, and Caryn Wagner, but not seven others. Counsel for the Bulldog called these omissions to the attention of the FBI and he indicated a supplemental production would be made.

From all of the contracts produced, the FBI redacted the amount of payments made, in reliance on Exemption 4 which applies to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” The amount the government paid these individuals is not information obtained from any of them. Information generated by the federal government itself is not “obtained from a person.” *See, e.g., In Defense of Animals v. National Institutes of Health*, 543 F. Supp. 2d 83, 102-03 (D.D.C. 2008) (payments negotiated by the parties were not “obtained from a person,” because agency “nowhere demonstrated that the contractor was the source of information in the first instance and not the agency”).

In addition, “in order to demonstrate that the commercial information is confidential for purposes of Exemption 4, [the agency] must demonstrate that disclosure of this information is likely to (1) impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”<sup>21</sup> The FBI contends this standard has been met because “[r]elease of this

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<sup>21</sup> *Sun-Sentinel Co. v. United States Dep't of Homeland Sec.*, 431 F. Supp. 2d 1258, 1274 (S.D. Fla. 2006) (quoting *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)).

information would enable potential government contractors the opportunity to judge how they might underbid their those that served on the 9/11 Reports Commission board, when bidding for similar contracts in the future. This would provide them with an unfair advantage and harm the past board members' competitive position." The FBI offers no evidence, however, that any of the Commissioners did bid on this work, that any of them regarded their pay as confidential, or that any of them claim disclosure would cause them competitive harm. An agency relying on Exemption 4 "must provide affidavits that contain more than mere conclusory statements of competitive harm."<sup>22</sup> The FBI also cites no authority supporting its contention that Exemption 4 applies to contract information of this sort. The concept that taxpayers should be precluded from knowing how much their government is paying for this work is anathema to FOIA. The contention that the government might be able to obtain lower bids for the same work from others in the future is not a recognized basis for withholding any information.

The Court should reject the FBI's assertion that redaction of the DUNS (Data Universal Number System) number on the first page of each contract is protected by Exemptions 6 and 7(C). A DUNS number is a unique nine-digit identifier assigned by Dun & Bradstreet.<sup>23</sup>

## II.

### The FBI Has Not Shown that it has Conducted a Good Faith Search for the Disciplinary Records

Count 3 and Request 3 seek records of any disciplinary action against the agent who prepared the April 16, 2002, memorandum. The purpose of this request was to attempt to establish that no disciplinary action was taken, so the FBI's conclusion that the report was poorly written and wholly unsubstantiated should not be believed. The FBI initially claimed that a response to Request 3 would be a clearly unwarranted invasion of the privacy of the agent even through the agent's name had been redacted. It then withdrew this position and asserted that it

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<sup>22</sup> *Gilda Indus., Inc. v. U.S. Customs & Border Prot. Bureau*, 457 F. Supp. 2d 6, 10 (D.D.C. 2006) (citation omitted).

<sup>23</sup> *Optimization Consulting, Inc. v. United States*, No. 13-103-C (Ct. Claims Feb. 28, 2014).

had searched its Central Records System index and found no records. This response avoided making a direct admission that it took no disciplinary action against the agent by leaving open the possibility that discipline was taken but the records had not been indexed.

The FBI can determine whether any records of discipline exist through the simple expedient of asking the agent. The FBI knows who the agent is and the agent if disciplined knows whether he was disciplined or not. The Court should direct the FBI to ask the agent whether he was disciplined and, if so, if records of the discipline exists. If the agent responds that he was never disciplined, the Bulldog and the Court can be assured that no records responsive to the request exist and, as well, that the agent was not disciplined. If the agent advises the FBI that he was disciplined, then records of the discipline should be found and produced. In an FOIA enforcement action ““the agency must show beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents,”” *Ray v. U.S. Dep’t of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990) (citations omitted), *rev’d on other grounds*, 502 U.S. 164 (1991). The agency “may meet this burden by producing affidavits of responsible officials ‘so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.’” *Id.* (citation omitted); *see also Miccosukee Tribe of Indians*, 516 F.3d at 1248. The FBI has not met its burden on count 3.

#### CONCLUSION

The FBI has maintained for more than five years now that the Bulldog has been barking up the wrong tree, that its investigation of the Sarasota Saudis found nothing, and that it properly disclosed all of the records of its investigation to Congressional investigators. If that is the case, neither national security interests, law enforcement interests, nor personal privacy interests possibly can warrant continued secrecy regarding the records of that investigation. If that is not the case, then the FBI has hidden the truth from Congress and has lied to the American public, precisely the sort of wrongdoing that the Freedom of Information Act was adopted to prevent. There are no other possibilities. The FBI’s motion for summary judgment on counts 2 and 3 should be denied.

