

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 12-cv-61735-WJZ

BROWARD BULLDOG, and)
DAN CHRISTENSEN,)
)
Plaintiffs,)
)
v.)
)
U.S. DEPARTMENT OF JUSTICE, and)
FEDERAL BUREAU OF INVESTIGATION,)
)
Defendants.)

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), located in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 226 employees who staff a total of ten (10) FBIHQ units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to Federal Bureau of Investigation (“FBI”) records and information pursuant to

the FOIA, amended by the OPEN Government ACT of 2007; Privacy Act; Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. This declaration supplements and hereby incorporates by reference my previous declaration dated May 9, 2013 (hereinafter the "First Hardy Declaration"). The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith. This includes information provided to me in my official capacity from the FBI's Tampa Field Office and the RMD Document Laboratory.

(3) I am familiar with the FBI's responses to Plaintiffs' FOIA request in litigation before this Court seeking access to records of a purported investigation pertaining to the address 4224 Escondito Circle, near Sarasota, Florida. I am also familiar with Plaintiffs' Motion to Compel Additional Searches (DE 46), Defendants' Response thereto (DE 47), and this Court's recent Order of April 4, 2014 (DE 60) (hereinafter, the "Order").

(4) This supplemental declaration is provided in support of the Defendant's Motion for Enlargement of Time to Make In Camera Filing and its purpose is three-fold: to provide more detailed information regarding certain aspects of the Order for the Court's information and clarification, seek the Court's extension and reconsideration on certain aspects of the Order, and report on the FBI's compliance with other aspects of the Order. Specifically, the FBI provides more information and seeks reconsideration and clarity where indicated concerning the Order to (1) produce the voluminous case file number 265D-NY-280350-TP by noon, April 18, 2014 for *in camera* inspection; (2) the manual review of this massive file; (3) production of non-265D-NY-280350-TP material for *in camera* inspection and (4) issues associated with the

conduct of the 28 identified text searches.

265D-NY-280350-TP

(5) The Court's Order requires the FBI to "provide photocopies of all documents containing the universal case file number 265D-NY-280350-TP" by "noon on Friday, April 18, 2014." Order, pg. 22. As provided in Defendant's Response, this file designation represents the Tampa Field Office sub file of the FBI's global investigation into the 9-11 attacks (known as "PENTTBOM"), and this sub file alone contains over 15,000 documents potentially containing "hundreds of thousands of pages" of records. Defendant's Response, pg. 7. As such, the Order essentially requires the FBI to produce the entire Tampa sub file as all records either carry the "265D-NY-280350-TP" file designation or are part of the physical Tampa sub file of the PENTTBOM investigation. Consistent with other investigative records in the FBI, the PENTTBOM investigation originated in the FBI New York Field Office in 2001 (hence the "NY" identifier in the file number) with a file classification number (the first three numbers) of "265."¹ The Tampa Field Office sub file of PENTTBOM, carries the suffix "TP" following the assigned investigative file number, 280350. Moreover, the Court also noted that "Defendants alone know where any like documents in the Tampa Field Office relating to the 9/11 investigation would be located." Order at pg. 22. Accordingly, the complete Tampa Field Office "PENTTBOM" sub file of FBI's investigation of the 9-11 attacks—which carries prefix 265 is where such "like documents" would reasonably reside. To fully comply with the letter and spirit of the Court's Order for *in camera* inspection of this entire file, the FBI seeks an enlargement of time, until 12:00 noon, May 2, 2014, to submit the subject file for *in camera* review.

(6) Upon receipt of this Order on April 4, 2014, RIDS immediately conferred with the

¹ As the PENTTBOM investigation progressed, the file classification number was administratively changed over time from "265" to "315" to "415." As such, there may be some documents located within the Tampa sub file that use any of these three file classification prefixes.

FBI Tampa Field Office, where the physical file was located. I learned that the entire Tampa sub file is comprised of 23 boxes of records and includes a substantial, but undetermined amount of material classified at the “Secret” level. This would include the over 15,000 documents cited in Defendant’s Response. Applying an approximate estimate of 4,000 pages of records per box to the Court’s Order equates to producing approximately 92,000 pages of “photocopies” stored at the Tampa Field Office in under two weeks time. As reported to FBI RIDS, the Tampa Field Office possesses only one large capacity copier rated at the “Secret” level capable of performing such an industrial-scale copying task. An around the clock effort by FBI Tampa Field Office personnel of organizing, copying, and properly marking classified material would still not accomplish this task by the appointed date of 12:00 noon, April 18, 2014.

(7) Given the amount of time and resources the production of the entire Tampa sub file for *in camera* inspection and subsequent manual review by FBI personnel will entail, there are two main points offered for the Court’s consideration and clarification: (a) the actual time and resources required to provide a suitable version of the Tampa sub file for *in camera* inspection including the practical impacts on the FBI associated with this task, and (b) the burdensome nature of a manual review of the Tampa sub file given available technology.

Production of the Tampa PENTTBOM Sub File for *In Camera* Inspection.

(8) The logistics, time, and resources required to produce the entire Tampa sub file for *in camera* inspection include the following actions. First, photocopying the entire 23 box paper sub-file is not a viable option for the FBI given its voluminous nature and lack of inherent search capability.² In cases where the FBI must organize, search, and produce large amounts of information for its global investigations and prosecutions, it relies on the RMD Document

² A mere photocopying of these voluminous records would only be searchable via manual review by hand of each physical page by an analyst, would create substantial storage and security issues, and would not have the permanence of digital format.

Laboratory (“Doc Lab”) collocated with FBI RIDS in Winchester, Virginia. The FBI Doc Lab is a state of the art document conversion operation that high-speed scans and digitizes paper records and other forms of media for upload into FBI electronic applications as well as output of digitized records on CDs in a searchable format. As relevant here, the massive sub file can be scanned by Doc Lab, digitized and burned on CDs in a searchable .pdf format for the Court’s inspection while at the same time the information can be imported into the RIDS FOIA Document Processing System (“FDPS”) which has an internal Optical Character Reader (“OCR”) search capability for RIDS personnel. Even with this capability, this process would not be a routine endeavor and requires a significant investment of time and resources as detailed below; however, compared to photocopying the entire 23 box hardcopy file page by page, the Doc Lab conversion is the most efficient and productive alternative to meeting the Court’s Order in the least amount of time.

(9) Upon receipt of the Order, FBI Tampa immediately began organizing and conducting a pre-shipment inventory of the 23 boxes of material that comprise the Tampa sub file for shipment to Doc Lab. The Tampa Field Office shipped the 23 boxes of material to Doc Lab on April 10, 2014. Upon receipt, Doc Lab began its pre-scanning inventory and preparation which continued over the weekend of April 12-13. The files are now undergoing scanning for digital conversion at Doc Lab. To date, this operation has involved over 20 hours of labor by 3 Tampa Field Office personnel and over 258 hours of labor (including over 157 hours of Overtime Compensation) by a team of about 20 RMD Doc Lab personnel.³ In addition to this project, Doc Lab is also working on scanning projects to be completed by May 2, 2014 for seven different ongoing criminal investigations, including securities/commodities fraud, corporate fraud, public corruption, criminal enterprise, human rights offenses/international terrorism, and mortgage fraud. In terms of overall remaining time to complete this project, the FBI respectfully asks for 16

³ The overall Doc Lab estimate to complete this project is approximately 440 hours of labor.

calendar days, or by May 2, 2014, to complete the scanning, digitizing, converting to CD, and properly marking of classified material for dissemination to the Court. The material will be placed on CDs in searchable .pdf format for the Court's internal use, if the Court approves of this procedure. As noted, these CDs will contain classified material and other highly sensitive investigative material not intended for public dissemination, portions of which remain relevant to ongoing international terrorism investigations.

Manual Review of the Tampa PENTTBOM Sub File

(10) As provided in Defendant's Response, manual review of this massive sub file will require a large expenditure of man hours to manually review over 92,000 pages of documents. As the Tampa sub file is a broad compendium of any and all 9-11 related reports, matters, or leads of any kind that has already been searched via automated indexing, text search, and targeted efforts; a manual search would not be reasonably calculated to locate additional responsive records, especially given Plaintiffs' narrowly focused request for information pertaining to former residents of 4224 Escondito Circle, Sarasota, Florida whom Plaintiffs' speculate had some connection to the 9-11 attacks. Accordingly, a manual search of these approximate 92,000 pages of material will be extremely demanding and would divert hundreds of FOIA analyst hours from an already drastically depleted staff⁴ from daily FOIA and Privacy Act review and disclosure operations to meet the demands of the American public. The task of a manual review of this massive file will have an adverse impact on the FBI's ability to respond to the thousands of requests from the public it receives every year⁵ and the hundreds of litigation releases and

⁴ With the recent drawdown of FBI personnel in the wake of federal government sequestration, the FBI RIDS personnel level has dropped 14% in this fiscal year alone (since October 2013) to a level of 226 personnel. This is the lowest level of personnel assigned to FBI RIDS in my over 11 years as the Section Chief.

⁵ In FY 12, the FBI received 20,602 FOIA and Privacy Act Requests; In FY 13, the FBI received 20,754 FOIA and Privacy Act Requests.

deadlines that it meets every week.⁶ Instead of pursuing this manual review approach, the FBI respectfully requests that the Court reconsider this aspect of its Order and allow the FBI to leverage the OCR search capability that will be available to RIDS once the Tampa sub file digital conversion process is complete. Unless the Court reconsiders or directs otherwise, and subject to the additional information provided below about the 28 text searches, the text search terms identified by the Court could be applied to the digitized Tampa sub file, thereby mooting the need for a burdensome manual review.

Redacted File Number

(11) Per the Court's Order, and submitted under separate cover for the Court's *in camera* inspection is a copy of the case file number known to Defendants and to the Court, but redacted from documents produced to Plaintiffs. Due to the small size of this file, photocopying of this file within the Court ordered deadline of April 18, 2014 was feasible. The subject of this particular file is a third party individual for which Plaintiffs' have not submitted either a privacy waiver or proof of death or provided evidence of significant public interest in disclosure of this file. While the existence of the file and the file number (redacted under Exemption 7E) itself are not classified, the file is classified at the "Secret" level as it is replete with information classified at the "Secret" level.

Records With No Case File Number

(12) Insofar as the Court's Order to submit for *in camera* inspection other "like documents," extends to the Tampa sub file, those "like records" are identified as the portion of the Tampa PENTTBOM sub file carrying other numerical prefixes, but are part of the same physical hardcopy file, that are now undergoing digital conversion. To the extent the Court's Order

⁶ The FBI currently has 142 open FOIA litigations nationwide. Four of these cases require regular release of material.

extends to those records in the 35 previously produced pages that contained no file reference, this is to inform the Court that the previous records were derived from a specific targeted search conducted by the Tampa Field Office as described in my previous declaration. First Hardy Declaration, ¶ 24. There are four documents that contain no file reference (SARASOTA-1-4, and 28-35). The document with Bates-stamp SARASOTA-1-2 is an informational report that Tampa wrote for then-FBI Director Robert Mueller. This report was not uploaded into any case file via ACS or Sentinel. The document with Bates-stamp SARASOTA-3-4 is a copy of a letter that Tampa received from the FBI's Office of Congressional Affairs that was sent to Patrick Leahy. It is not known to be uploaded into any FBI case file. The third and fourth documents that do not contain a file reference (SARASOTA-28-35) consist of emails, along with a copy of a Florida Department of Law Enforcement Investigative Report attached to one email. These emails, and attachment, are also not known to have been uploaded into any FBI case file. All four of these documents were located during Tampa's search for records, as described in my previous declaration, ¶ 24.

The FBI Central Records System, ACS, and Sentinel

(13) The Order mandates that the FBI perform 28 specific text searches using the "Sentinel case management system" to include "any system which contain information that has not been migrated into the Sentinel system, or which are in any other way not contained in or subsumed by the Sentinel system." Order, pg. 20.

(14) First, relevant background information about the FBI's Central Records System ("CRS"), how it is searched, FBI search protocols and how such were applied here, as well as the function of the "Sentinel" system vis-a-vis the CRS, is in order to address the Court's concern over perceived "ambiguities in Defendants' system." Order, pg. 19. As its name suggests, the CRS is

a comprehensive system of records consisting of investigative, intelligence, personnel, administrative, and general files compiled by the FBI in the performance of its broad law enforcement duties and pursuant to its many functions, duties, and missions as a federal law enforcement agency. In response to requests for records of an investigative nature--as here--the CRS is the FBI system of records where any such records would reasonably reside, and generally speaking, is the only system of records where information is located in response to FOIA/PA requests for information pertaining to FBI investigative records. In instances where there is a bona fide factual basis to conclude that responsive records would reside outside the CRS, then the FBI takes appropriate, additional steps to locate information where such information would reasonably reside in the FBI, including tasking particular offices or personnel who may possess responsive records to conduct searches. These extra measures were taken in the FBI's overlapping search for material responsive to Plaintiffs' request as the FBI previously tasked the Tampa Field Office and the FBI official who was personally responsible for responding to the Senator Graham inquiry to search for responsive records. First Hardy Declaration, ¶ 24.

(15) In terms of CRS search mechanics, after FBI records are generated, they are indexed into the CRS by agents, who exercise their own professional judgment and discretion to determine what terms are indexed for future retrieval of records by name, subject, event, topic or other relevant terms they so designate. Until the Sentinel system went live on July 1, 2012--well before the Plaintiffs' request in litigation was searched in November 2011⁷--the only practical means of searching the massive CRS for records in the 2001-2002 time period was via ACS, the automated index of the CRS. See First Hardy Declaration, ¶¶ 17-22. In FOIA cases, an ACS index search is accomplished by entering names or other search terms utilizing the Universal Index ("UNI") application of ACS to locate records as indexed into the CRS by agents. As relevant

⁷ Defendant's Response, pg. 5 and f.n.3

here, ACS searches employing key terms were already conducted. First Hardy Declaration, ¶ 8. Moreover, and atypical in a search for investigative records in the CRS, the FBI has already taken the extraordinary step of conducting text searches of the CRS using the Electronic Case File (“ECF”) application of ACS. These text searches included the terms “Escondito Circle,” “Escondito AND Sarasota,” First Hardy, ¶ 23-24. An “ECF text search” is a term-based search of the text of official FBI electronic documents (serials) that are uploaded into the ECF. An ECF text search only extends to records that the FBI generates in the course of its investigations, such as Electronic Communications (e.g., SARASOTA-15-17), and FD-302s (e.g., SARASOTA-18). An ECF text search; therefore, does not generally include non-generated FBI records, such as records generated by state and local law enforcement or evidentiary records.

(16) The Court has ordered 28 text searches of the “Sentinel” system and those systems which may have information not migrated into Sentinel. Order at 20. As noted in Defendant’s Response, Sentinel did not replace ACS and the same search applications in ACS are duplicated in the Sentinel. Defendant’s Response pg. 5. Sentinel is the FBI’s next generation case management system that enables the FBI to move from a primarily paper based case management system to an electronic records system. After July 1, 2012, all FBI generated records are done so electronically within the Sentinel system; however, the post-July 1, 2012 information is backfilled into ACS. Sentinel provides a web-based interface for analysts to access CRS information. Again, Sentinel did not replace ACS and Sentinel is not a new “system of records”; it is a technology platform where the FBI creates records electronically after July 1, 2012 which become records within the CRS—in essence, Sentinel can be described as another portal into the CRS.

(17) As relevant here, given that the records sought pre-date the deployment of Sentinel, such additional searches are redundant and wholly depend on the same information that existed

and was searched pre-Sentinel deployment via the ACS. For clarity, the relevant “records system” where the records Plaintiffs’ seek would reasonably reside was, is, and remains the CRS; the issue presented by Sentinel is which automated application “system” is used to search for and retrieve the records in the CRS. Hence, “the system” the Court has directed to be searched which contains information that has not been migrated into “the Sentinel system” is ACS. In other words, the same “legacy” documents (serials) that Plaintiffs’ seek--those that existed before July 1, 2012—are the same information maintained in ACS before, now, and after the upload of any such documents into the Sentinel platform. Nevertheless, and in good faith compliance with the Court’s Order, and subject to any reconsideration, the FBI will proceed with the additional duplicative text searches for the specified terms using the ECF application in both the Sentinel and ACS systems to further search the CRS for records of the alleged investigation concerning former residents of 4224 Escondito Circle.

28 Additional Text Searches

(18) These 28 text searches fall within three distinct categories: (1) those that the search alone pierces individual privacy interests, (2) those that the search alone does not pierce individual privacy interests, and (3) those that trigger redundant and unduly burdensome searches. The FBI asks the Court to reconsider its Order to perform these additional searches for the searches in the first and third categories as articulated below. Moreover, even though not required until June 6th, 2014, the FBI herein provides the Court with the results of the additional ordered searches for those text searches in the second category.

Category 1 text searches:

(19) These text searches (numbers 2a -2l.) comprise searches by the names of third-party individuals identified by Plaintiffs’ whereby the conduct of the search alone would

pierce the veil of individual privacy. Although the Court notes that “some of the names” are identified in Sarasota County Records, the FBI asks the Court to reconsider its directive to conduct a search for these individuals in light of long established FBI practice. It is the general practice of the FBI to require that requesters submit either a privacy waiver or proof of death or that they provide evidence of significant public interest in disclosure prior to the FBI conducting any search for responsive third-party law enforcement records. This routine practice is grounded on the principle that the mere association of a person’s name within an FBI file is in and of itself an invasion of individual privacy that carries an inherent stigma. As such, the mere confirmation of whether or not the FBI maintains records on an individual is itself a significant privacy interest the revelation of which constitutes a clearly unwarranted and unwarranted invasion of their personal privacy per FOIA Exemptions 6 and 7C. If the requester provides evidence of a significant public interest in disclosure, the FBI will then balance the identified public interest against any countervailing privacy interests of the third party. This balancing is done on a case-by-case basis. In many cases, there is no discernible interest in any such disclosure because the names of third parties do not shed light on the activities of the FBI, and as a result, disclosure of this type of information would constitute a clearly unwarranted invasion of an individual’s personal privacy. A requester, therefore, must make a clear demonstration that the public interest in disclosure outweighs the third party’s personal privacy interest and that a significant public benefit would result from the disclosure of the requested third party records. Only if, after balancing these interests, the FBI concludes that the privacy interests of the individual are outweighed by the public interest, will the FBI then pierce the veil of privacy and search for responsive records. Despite the fact Plaintiffs’ have now modified their request in litigation to seek searches by individual names,⁸ they have not presented evidence to show how these additional name searches

⁸ See Defendant’s Response, pg 8, ¶ f.-q. See also First Hardy Declaration, Exhibit C (Plaintiffs’

will advance a significant public interest--especially in light of the searches already done before and herein conducted by event, location, investigative type, and the specific address of the alleged perpetrators. Moreover, searches of these third-party names would extend to and retrieve any records about them, if any exist, regardless of connection to the subject of Plaintiffs' request. Accordingly, the FBI respectfully seeks the Court's reconsideration of the need to conduct these names searches in ACS and Sentinel, but stands ready to proceed on the Court's direction.

Category 2 text searches: These text searches (numbers 2m -2z), given their nature, comprise searches that alone do not pierce the veil of individual privacy; therefore, the FBI has already proceeded with these searches even though the Court has not required such until June 6th, 2014. Searches by the name of the deceased terrorist Mohamed Atta pose no threat to individual privacy as articulated above. As a result of these text searches of ACS and Sentinel, the FBI has located no additional responsive material. The only responsive document (265D-NY-280350-TP, serial 4959) that was located through this search was previously provided to Plaintiffs (Bates-stamped pages SARASOTA-23-25).

Category 3 text searches: These text searches (numbers 2aa and 2bb) are overbroad, redundant and unduly burdensome in light of the other searches conducted and the production of the entire, unabridged Tampa sub file where any record sought by Plaintiff could possibly exist. A preliminary search of "Sarasota AND PENTTBOMB" shows 543 hits in ACS and 640 hits in Sentinel. A preliminary search of "Sarasota AND PENTTBOM" shows 103 hits in ACS and 98 hits in Sentinel. This means that for each hit, a manual review of the document will need to occur to determine whether or not the document is responsive to Plaintiffs' request. This type of search will include any document within FBI files that contain the specific search terms used. For example, a text search using the term "Sarasota AND PENTTBOMB" will pull up any document modified request letter to remove any third party names); and Exhibit G (Plaintiffs' appeal letter to OIP).

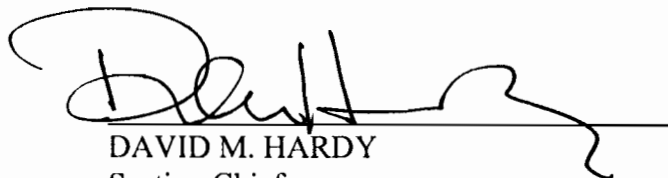
that has the words "Sarasota" and "PENTTBOMB" anywhere on the document. As such, and in view of all the other searches and measures the FBI has thus performed and are currently underway, the FBI respectfully asks the Court to reconsider the need for these additional resource and time burdening searches.

CONCLUSION

(20) The FBI has retrieved file 265-NY-280350-TP from the Tampa Field Office and is currently scanning the material and will provide a .pdf searchable CD of the over 15,000 serials that comprise the file to the Court by May 2, 2014. The FBI has photocopied the material located in the redacted case file and is providing that copy to the Court under separate cover. The FBI has explained the source of the material that was not connected to a specific file number. Finally, the FBI asks the Court to reconsider ordering the FBI to conduct the text searches in the first and third categories as identified above.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of April, 2014.



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