

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

BROWARD BULLDOG, INC.,
and DAN CHRISTENSEN,

Plaintiffs,

vs.

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

Defendants.

DEFENDANTS' MOTION FOR ENLARGEMENT OF TIME TO MAKE
IN CAMERA SUBMISSION, AND FOR PARTIAL RECONSIDERATION

Defendants, by and through their undersigned counsel, file their Motion for Enlargement of Time to Make In Camera Submission, and for Partial Reconsideration, and state:

I. FACTUAL BACKGROUND

On April 4, 2014, this Court entered its Order on plaintiffs' motion for order compelling additional search. The Court directed defendants, in part, to conduct additional searches for responsive documents (D.E. 60 at 20-21), and to provide, for in camera inspection, photocopies of all documents containing the universal case file number 265D-NY-280350-TP, by 12:00 noon, April 18, 2014. D.E. 60 at 22, ¶ 3.

Upon receipt of the Court's Order on April 4, 2014, the FBI's Record/Information Dissemination Section (RIDS), Records Management Division, contacted the FBI Tampa Field Office where the physical file is located. Exhibit A, Second Declaration of David M. Hardy, ¶ 6. RIDS was told that case file number 265D-NY-280350-TP, which is the Tampa sub file of the FBI's PENTTBOM investigation is comprised of twenty-three (23) boxes of records, and also

includes some amount of material classified at the Secret level. Hardy Decl., ¶ 6. These boxes contain the over 15,000 documents cited in the defendants' response. Assuming each box contained 4,000 pages of records, the FBI would be producing approximately 92,000 pages of documents to the Court for in camera review.

The logistical effort to produce the Tampa sub file for in camera inspection includes the following actions. Hardy Decl., ¶ 8. First, photocopying the entire 23 boxes of documents, which are approximately 92,000 pages. Further, photocopying would only allow for manual searches of each document to determine if each document was responsive to the additional search criteria set out by the Court in its April 4, 2014 Order.

An alternative is to scan the documents into FBI electronic applications, which would produce digitized records in a searchable format. Id., ¶ 8. The records could then be burned onto CDs in a searchable format.

On April 10, 2014, the Tampa Field Office shipped the 23 boxes to the FBI Document Laboratory, located in Winchester, Virginia. Id., ¶¶ 8, 9. The scanning for digital conversion began on the weekend of April 12-13, 2014. Id., ¶ 9. The FBI believes it can complete the scanning, digitizing; converting to CD, and proper marking of classified material by May 2, 2014. Id., ¶ 9.

II. DEFENDANTS REQUEST A TWO-WEEK ENLARGEMENT OF TIME, UP TO AND INCLUDING MAY 2, 2014, TO MAKE ITS IN CAMERA SUBMISSION

Defendants respectfully request an enlargement of time of two weeks, up to and including May 2, 2014, at 12:00 noon, to make its in camera submission of case file number 265D-NY-280350-TP. The request is based upon the volume of records, 23 boxes, approximately 92,000 pages, which need to be copied or scanned, and properly marked, before it can be delivered to

the Court.

Defendants also seek leave of the Court to deliver the Tampa sub file to the Court in a searchable CD format, in lieu of photocopies. This will reduce the amount of labor required for photocopying, boxing, and transportation of the documents, as well as providing the documents in a format which will permit the Court to have an automated search capability.

A manual search of approximately 92,000 pages of documents, to determine if any responsive documents exist, would require a large expenditure of man hours. Hardy Decl., ¶ 10. Once the Tampa sub file is converted to a digital format, defendants will be able to use the optical character reader (OCR) capability to search for specific terms within the text of the documents. Defendants seek leave of the Court to permit it to conduct the searches through the use of the OCR.

III. DEFENDANTS SEEK PARTIAL RECONSIDERATION OF THE APRIL 4, 2014 ORDER PERTAINING TO ADDITIONAL TEXT SEARCHES

Defendants seek partial reconsideration on some of the additional text searches ordered by the Court.

A. The Court directed additional searches using specific names of individuals, D.E. 60 at 20, paragraph 2(a) – (l). The federal courts have recognized that “the very retention of an individual’s name in a law enforcement file will engender comment and speculation, and carries a stigmatizing connotation.” Ray v. United States Dept. of Justice, Immigration and Naturalization Service, 778 F.Supp. 1212, 1215 (S.D.Fla. 1991), citing Baez v. U.S. Dept. of Justice, 647 F.2d 1328, 1338 (D.C. Cir. 1980); Branch v. F.B.I., 658 F.Supp. 204, 209 (D.D.C. 1987); and Dunkelberger v. Department of Justice, 906 F.2d 779 (D.C. Cir. 1990).

The FBI would normally, prior to conducting a search, require a requester to either submit a Privacy Act waiver or proof of death of the named third party, or provide evidence of

significant public interest in disclosure. Hardy Decl. at 11-13. The significant public interest claimed would be weighed against the third party's privacy interest. Only if the public interest in disclosure is significant, and would not constitute a clearly unwarranted invasion of the third party's personal privacy, would a search be conducted and disclosure made, if records were found. Id. Plaintiffs have not made the showing normally required of a FOIA requester seeking records on third parties.

The Court noted that some of the names are matters of Sarasota County public record, or been made a part of the public record by plaintiffs' filings. D.E. 60 at 21. Defendants respectfully submit that the presence of a third party's name in the Sarasota County real property records, or in a FOIA requester's court filing, does not extinguish the privacy interests recognized in the Privacy Act and FOIA exemptions in 5 U.S.C. § 552(b)(6) and (7)(C). A public record showing that a person owns real property in Sarasota County is not stigmatizing, but the acknowledgement that the FBI has a file on a third party is stigmatizing, since it suggests the third party is or was being investigated by the FBI, or was associated with some form of criminal activity. Similarly, the citation of a third party's name in a FOIA requester's court filing only shows that the requester believes the third party's name may be in an FBI file. Once the FBI confirms that a file on the third party does exist, that does carry a stigma that the third party was engaged in some type of unlawful activity.

The Court's April 4, 2014 Order did not expressly weigh any significant public interest in disclosure of a third party's FBI file against that third party's privacy interest, nor did it make a finding that the public interest in disclosure outweighed the privacy interests of the third parties named. Consequently, defendants seek reconsideration of that portion of the Court's Order. Alternatively, if the Court does make such a finding, defendants stand ready to proceed in

accordance with the Court's Order.

B. The Court directed two text searches in paragraph 2(aa) and (bb), for "Sarasota and PENTTBOMB," and "Sarasota and PENTTBOM," respectively. D.E. 60 at 21. A preliminary search for "Sarasota and PENTTBOMB" shows 543 hits in ACS and 640 hits in Sentinel. Hardy Decl., ¶ 19. For "Sarasota and PENTTBOM," there are 103 hits in ACS and 98 in Sentinel. Id. A manual search will have to be conducted of each of these documents to determine if it is responsive to plaintiffs' FOIA request. Since the search terms are very broad, large numbers of documents will have to be retrieved, and individually analyzed. Defendants believe the other searches directed by the Court will adequately ensure that responsive documents are located.

Defendants respectfully request an enlargement of time of two weeks, up to and including Friday, May 2, 2014, at 12:00 noon, to submit in camera the Tampa sub file. Additionally, defendants seek leave of the Court to provide the Tampa sub file in a CD format, with a search capability, and to conduct searches of the Tampa sub file using automated methods, once the conversion to a digital format is completed. Finally, defendants seek partial reconsideration of the Court's Order directing additional searches using third-parties' names, and the search terms "Sarasota and PENTTBOMB," and "Sarasota and PENTTBOM."

CERTIFICATE OF CONFERENCE

On April 16, 2014, the undersigned contacted plaintiffs' counsel, Thomas R. Julin, Esq., regarding the plaintiffs' position on the enlargement of time, until May 2, 2014, for defendant to make its in camera submission. Mr. Julin stated that, while plaintiffs did not agree to the

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