

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' OPPOSITION TO PLAINTIFFS' MOTION TO MODIFY
PROTECTIVE ORDER TO ALLOW DISCOVERY PRIOR TO RULING
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Justice and Federal Bureau of Investigation, by and through their undersigned counsel, file their Opposition to Plaintiffs' Motion to Modify Protective Order to Allow Discovery Prior to Ruling on Defendants' Motion for Summary Judgment, and state:

I. PLAINTIFFS HAVE PROVIDED NO SOUND REASON FOR THE COURT TO MODIFY ITS PROTECTIVE ORDER

On March 31, 2014, this Court granted defendants' motion for protective order, noting that "while discovery is not prohibited in FOIA cases, it is often unnecessary and generally limited." D.E. 58 at 2 (citations omitted). Plaintiffs have provided no sound reasons to justify the Court modifying its order prohibiting discovery.

Defendants filed their renewed motion for summary judgment on November 27, 2017. D.E. 96. The issues for this Court to resolve are: (1) the adequacy of the search conducted by

the FBI in response to plaintiffs' FOIA request; and (2) whether the FBI has provided an adequate factual basis for its invocation of various FOIA exemptions under 5 U.S.C. § 552(b).

In support of its claim that the FBI's search was adequate under the FOIA, the FBI submitted the Fifth Declaration of David M. Hardy, D.E. 97-1, and Declaration of Michael G. Seidel, D.E. 97-4. These two declarations describe in detail the searches conducted to locate any responsive documents. Further, as to the exemptions claimed under 5 U.S.C. § 552(b), Mr. Hardy's declaration provides the factual justification for the invocation of those exemptions. D.E. 97-1 at 9-32,

The Eleventh Circuit has recognized that, "[g]enerally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified." Miccosukee Tribe of Indians of Fla. v. United States, 516 F.3d 1235, 1243 (11th Cir. 2008), citing Miscavige v. I.R.S., 2 F.3d 366, 369 (11th Cir. 1993). The responsive documents have been identified, D.E. 97-2. Insofar as the availability of discovery, [w]hile ordinarily the discovery process grants each party access to evidence, in FOIA and Privacy Act cases discovery is limited because the underlying case revolves around the propriety of revealing certain documents." Lane v. Dept. of Interior, 523 F.3d 1128, 1135 (9th Cir. 2008)(citation omitted). Moreover, in these cases, the courts may allow the government to move for summary judgment before the plaintiff conducts discovery. Id., citing Miscavige, 2 F.3d at 369.

In a summary judgment motion, "[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search and giving reasonably detailed explanations why any withheld documents fall within an exemption are sufficient to sustain the agency's burden." Carney v. U.S. Dept. of Justice, 19 F.3d 807, 812 (2d Cir. 1994)(footnote omitted). Further, affidavits submitted by an agency are "accorded a presumption of good faith." Safecard

Servs., Inc. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

This Court has an adequate factual basis to resolve the issues of the adequacy of the FBI's search for responsive documents, and the exemptions to disclosure claimed by the FBI. Plaintiffs' rationale for conducting discovery is what they term an "unresolved mystery." D.E. 101 at 4-5. The so-called mystery is the purported conflict between two FBI public statements made on September 9 and 15, 2011, where the FBI stated that its investigation into the residents of a home in Sarasota, Florida, had found no connections between those occupants and the 9/11 plot, and the assertions of the author of Bulldog 5-6, which stated there were "many connections" between the persons at the Sarasota residence and individuals associated with the terrorist attacks on 9/11/2001.

Neither responding to plaintiffs' interrogatories, nor allowing the depositions of FBI Special Agent Gregory J. Sheffield, FBI Special Agent Jacqueline Maguire, David M. Hardy; and Michael G. Seidel, is necessary for this Court to determine if the FBI engaged in an adequate search for documents responsive to plaintiffs' FOIA request.¹ Defendants have provided detailed declarations explaining the search methodology; the terms it used to conduct the search; and the manner in which the manual search of the entire Tampa PENTTBOM sub-file occurred.. More importantly, this Court directed the FBI to produce the entire Tampa PENTTBOM sub-file for in camera review. D.E. 60. In its Order directing the production of the Tampa PENTTBOM sub-file, the Court, after reviewing Eleventh Circuit authority on FOIA observed, "the Court cannot plausibly take an active role in determining whether specific exemptions apply until the Court has knowledge of the existence or non-existence of and access to the materials Plaintiffs

¹ Defendants neither confirm nor deny that Gregory J. Sheffield's name appears in any of the responsive documents. The government invoked exemption (b)(7)(C) as to third party names appearing in responsive documents because disclosure of such information could reasonably be expected to constitute an unwarranted invasion of personal privacy. Fifth Hardy Decl., D.E. 97-1 at 21-27.

are actually seeking, that is, until the Court is confident that a reasonable search has been performed.” D.E. 60 at 6.

This Court has had the opportunity to examine the 80,266 pages that comprise the Tampa PENTTBOM sub-file, to determine if additional responsive documents exist, other than those produced by the FBI. It can determine for itself whether there are any other documents reflecting “many connections,” or “any connection,” between the occupants of 4224 Escondido Circle and the 9/11 hijackers.

II. DEPOSITIONS ARE UNNECESSARY FOR THIS COURT TO RESOLVE THE GOVERNMENT’S MOTION FOR SUMMARY JUDGMENT

Plaintiffs seek to depose four individuals: (1) FBI Special Agent Gregory J. Sheffield; (2) FBI Special Agent Jacqueline Maguire; (3) David M. Hardy, FBI Records Information and Dissemination Section; and (4) Michael G. Seidel, FBI Unit Chief, Litigation Support Unit. None of these depositions are necessary for this Court to resolve the defendants’ renewed motion for summary judgment.

As a threshold matter, discovery is generally unavailable in FOIA actions. Wheeler v. CIA, 271 F.Supp.2d 132, 139 (D.D.C. 2003)(citation omitted). In those limited instances where discovery is permitted, the discovery is limited “to investigating the scope of the agency’s search for responsive documents, the agency’s indexing procedures, and the like.” Schiller v. INS, 205 F.Supp.2d 648, 653 (W.D. Tex. 2002).

Both David Hardy and Michael Seidel have submitted detailed declarations describing the search process undertaken by the FBI in response to the Court’s Order compelling additional searches. The FBI conducted automated searches using the search terms provided by the Court, and the results were provided in the Seidel Declaration. D.E. 97-4 at 8-12. The search terms used in the manual search were also detailed by Mr. Seidel. D.E. 97-4 at 6-7, ¶ 9. Mr. Hardy

described the timeline of the production of the documents disclosed to plaintiffs, the ambiguities related to the defendants' filing system, and the results of the Court-ordered searches. Fifth Hardy Decl., D.E. 97-1 at 4-9. These declarations provide detailed descriptions of the methodology used to search for responsive documents, how the actual manual search was conducted, to include the assignment of sections of the sub-file to RIDS employees, providing search slips to each RIDS employee, and instructing each employee to write down the serial number of any document reviewed which contained the search terms. Seidel Decl., D.E. 97-4 at 7, ¶ 10. There is no reason to permit depositions of either Hardy or Seidel since their declarations provide sufficient details to allow the Court to determine if an adequate search was conducted. More importantly, the Court has had the opportunity to examine the Tampa PENTTBOM sub-file, to determine for itself whether the FBI's search was adequate.

Plaintiffs do not contend that either Special Agents Maguire or Sheffield participated in the search for responsive documents. Plaintiffs allege that S/A Sheffield is the author of Bulldog 5-6.² Doubtless plaintiffs intend to question him about the preparation of Bulldog 5-6, and why he concluded that "many connections" existed. Plaintiffs intend to probe his mental processes in the preparation of Bulldog 5-6, which is more than the FOIA permits. The FOIA is an access and disclosure statute, which allows requesters access to government documents, to determine "what their government is up to." Nat'l. Archives & Records Admin. v. Favish, 541 U.S. 147, 171-72 (2003). The FOIA allows access to the documents, not the authors of the documents.

Plaintiffs contend S/A Maguire told the Meese Commission that the April 16, 2002 memo (Bulldog 5-6) was "badly written," "a bad statement," "overly speculative," and "wholly

² The FBI neither confirms nor denies that S/A Sheffield wrote the April 16, 2002 memo. In this case, as well as in Broward Bulldog v. U.S. Dep't of Justice, Case No. 16-61238-CIV-ALTONAGA (S.D. Fla.), the FBI withheld the names of the persons preparing the document pursuant to 5 U.S.C. § 552(b)(7)(C).

unsubstantiated.” D.E. 101 at 11. Plainly, plaintiffs intend to probe S/A Maguire’s mental processes to determine the basis for her statements.

Similarly, plaintiffs intend to probe the mental processes of the author of Bulldog 5-6, to determine what led the author to believe there were “many connections.” This is not permissible discovery in a FOIA case since it does not relate to the adequacy of the FBI’s search. Instead, plaintiffs want to delve into what type of investigation was conducted on the occupants of 4224 Escondido Circle, and what information was gleaned. The FOIA allows a requester to obtain such information, if it is not subject to an exemption, if it exists in an agency document. Access to the author of a document is not a part of the disclosure contemplated by the FOIA. Accordingly, plaintiffs’ motion to modify protective order to allow discovery prior to ruling on defendants’ motion for summary judgment should be denied.

DATED: January 25, 2018

Respectfully submitted,

BENJAMIN G. GREENBERG
UNITED STATES ATTORNEY

By: s/ Dexter A. Lee
DEXTER A. LEE
Assistant U.S. Attorney
Fla. Bar No. 0936693
99 N.E. 4th Street, Suite 300
Miami, Florida 33132
(305) 961-9320
Fax: (305) 530-7139
E-mail: dexter.lee@usdoj.gov

ATTORNEY FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 25, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/ Dexter A. Lee
DEXTER A. LEE
Assistant U.S. Attorney

SERVICE LIST

Broward Bulldog, Inc. v. U.S. Department of Justice, FBI,
Case No. 12-61735-CIV-ZLOCH
United States District Court, Southern District of Florida

Thomas R. Julin, Esq.
Gunster Yoakley & Stewart, PA
600 Brickell Avenue – Suite 3500
Miami, Florida 33131
(305) 376-6007
Fax: (786) 425-4097
E-mail: tjulin@gunster.com

ATTORNEY FOR BROWARD BULLDOG, INC.,
AND DAN CHRISTENSEN