IN THE
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,

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.

Plaintiffs' Memorandum in Opposition to Defendants' Motion for Final Summary Judgment

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INTRODUCTION

Through this Freedom of Information Act ("FOIA") enforcement action, plaintiffs, Broward Bulldog, Inc. and Dan Christensen, seek FBI records of an investigation of Saudi nationals who lived in Sarasota, but who fled their home shortly before terrorists attacked the United States on September 11, 2001. Filed with this memo is a detailed declaration of former U.S. Sen. D. Robert Graham. He chaired the U.S. Senate Select Committee on Intelligence and served as co-chair of the joint congressional committees charged with evaluating how U.S. law enforcement agencies responded to the terrorist attacks ("the Joint Inquiry"). Sen. Graham explains that the FBI concealed the records of its Sarasota investigation from the Joint Inquiry and thereby impeded its investigation. He identifies a critical document responsive to plaintiffs' request that the FBI has not produced to the plaintiffs, and explains why the agencies should have hundreds or thousands of additional pages of responsive documents that have not been produced or identified. He shows why disclosure of the documents at issue would serve national security interests and would be fully consistent with the openness requirements of the Freedom of Information Act. Summary judgment on this record should be denied because: (I) the defendants have not conducted a good faith search for responsive documents, and (II) they have not shown that FOIA exemptions allow withholding of any of the records sought. These arguments are supported by a separate statement of facts referred to by the notation "SOF __."

ARGUMENT

I.

The Defendant Agencies Have Not Met Their Burden to Show a Good Faith Search

The Eleventh Circuit has made clear that in a Freedom of Information Act ("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 of Fla. v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008) . "If the government agency meets its burden of proving that its search was reasonable, then the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith." *Ray*, 908 F.2d at 1558.

The Eleventh Circuit and this Court often have provided explicit directions regarding how district courts should evaluate agency assertions that exemptions allow withholding of requested documents.[1] All of the decisions approve the procedures first adopted in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). There, the D.C. Circuit discussed the various practical problems of procedure and proof under Freedom of Information Act ("FOIA") cases, taking into consideration the intention of FOIA to permit access to most forms of government records. The fact that only one side of the controversy has access to the records, the need to maintain the confidentiality of records that are in fact exempt, the difficulty that plaintiffs have arguing for access without information about the records, and the needs of both trial and appellate courts for a meaningful way to review the matter. The D.C. Circuit concluded that (1) agencies should provide a relatively detailed analysis of the documents requested that would not contain factual description that if made public would compromise the secret nature of the information, (2)

[1] *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235 (11th Cir. 2008); *Office of the Capital Collateral Counsel v. Dep't of Justice*, 331 F.3d 799 (11th Cir. 2003); *Miscavige v. IRS.*, 2 F.3d 366, 367-68 (11th Cir. 1993); *Ely v. FBI*, 781 F.2d 1487 (11th Cir. 1986); *Currie v. IRS*, 704 F.2d 523 (11th Cir. 1983); *Chilivis v. SEC*, 673 F.2d 1205, 1210 (11th Cir. 1982). *Stephenson v. IRS*, 629 F.2d 1140, 1144 (5th Cir.1980); *St. Andrew Park, Inc. v. U.S. Dep't of Army Corps*, 299 F. Supp. 2d 1264 (S.D. Fla. 2003).

agencies should formulate a system of itemizing and indexing that would correlate statements made in the Government's refusal justification with the actual portions of the document, and (3) courts should consider designation of special masters to examine documents and evaluate an agency's contention of exemption. *Id.* at 827-28. A *Vaughn* index generally "identifies documents that are responsive to a FOIA request, including who wrote the document, to whom it was addressed, and the date." *Office of Capital Collateral Counsel, v. Dep't of Justice***,** 331 F.3d 799, 801 n.1 (11th Cir. 2003).

A *Vaughn* index should be required in all but the "rare" case where the court easily could conduct a review of all of documents. *Currie v. IRS*, 704 F.2d 523, 532 (11th Cir. 1983) (Kravitch, J., specially concurring). Failure to require either preparation of a *Vaughn* index or to conduct an *in camera* review "was simply and completely inadequate as a matter of law." *Ely v. FBI*, 781 F.2d at 1492. When a case involved only 50 responsive documents "in camera inspection of the documents might be the preferred procedure." *Miscavige v. IRS*, 2 F.3d 366, 368 (11th Cir. 1993). These principles establish that the Court has a critical role to play in ensuring that an agency has conducted an adequate search and in determining the propriety of asserted exemptions, keeping in mind at all times that Congress enacted FOIA "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 351-52 (1979). The "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," and that each exemption "must be narrowly construed." *Dept. of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

In this case, the detailed factual record reflects that Saudi nationals who owned or resided at 4224 Escondito Circle, Sarasota, Florida, Esam Ghazzawi and his wife, and Abdulaziz al-Hijji

and his wife, fled their home shortly before the terrorist attacks on September 11, 2011; that citizens reported this to the FBI; and that the FBI launched a substantial investigation of those individuals in fall 2001. SOF ¶ 14-16. Law enforcement officers raided the home, SOF ¶ 14, and citizens turned over to the FBI at its request records of payments made for homeowners' association dues. SOF ¶¶ 15-16.

The aftermath of the September 11 attacks resulted in an intense Congressional review of the actions taken by law enforcement agencies. The Joint Inquiry co-chaired by Sen. Graham undertook the initial review. SOF ¶17. It called on agencies, including the FBI, to give it records of the work they had done. SOF ¶17. The FBI did not advise the Joint inquiry of its Sarasota investigation or its results and, consequently, the Joint Inquiry report at the end of 2002 made no mention of it. SOF ¶¶ 17-18. The FBI also did not call its Sarasota investigation to the attention of the subsequently empanelled National Commission on Terrorist Attacks Upon the United States ("the 9/11 Commission"). SOF ¶ 18 & 20. Before the 9/11 Commission completed its work, a witness told the FBI that Abdulaziz al-Hijji was well schooled in Islam, talked about taking flight training in Florida, had Osama Bin Laden as his hero, and spoke of going to Afghanistan as a freedom fighter or Mujahedin. SOF ¶19. But the 9/11 Commission report in 2004 contained no mention of this assertion or the FBI's investigation of it. SOF ¶ 20.

Seven years later, the plaintiffs obtained extensive evidence that the Ghazzawis and al-Hijjis claimed connections to the Saudi royal family, that they had abandoned their Sarasota home before September 11, 2001, that records showed Mohamed Atta and other terrorists had visited the gated subdivision where the home was located, and that the FBI had investigated these highly suspicious matters, but had not disclosed the investigation to either the Joint Inquiry or the 9/11 Commission. SOF ¶ 21-22. The plaintiffs reported what they learned on the

BrowardBulldog.com website and in *The Miami Herald.* SOF ¶ 22.

The FBI publicly reacted by denying that it had found any evidence that the Ghazzawis or al-Hijjis had connections to the terrorists, and claiming that it had made the records of its investigation available both the Joint Inquiry and the 9/11 Commission. SOF ¶¶ 24-27). Sen. Graham was surprised by this and claimed the FBI's assertion that it had disclosed its investigation to the Joint Inquiry was untrue. SOF ¶ 28. The co-chair of the 9/11 Commission, Rep. Lee Hamilton, also claimed he was unaware of the FBI's Sarasota investigation. SOF ¶28.

Sen. Graham then attempted to ascertain himself what records the FBI claimed it had made available to the Joint Inquiry and in the course of that investigation induced the FBI to show him two classified files never provided to the Joint Inquiry which contradicted the FBI's public statement that its Sarasota investigation had found nothing. SOF ¶ 31-32. Graham confronted FBI Deputy Director Sean Joyce about this contradiction and was told other documents would explain it, but the FBI refused to provide those documents. SOF ¶ 33.

In light of contradictions between the evidence they had gathered, the FBI's public statements, the assertions of Sen. Graham and Rep. Hamilton, and Sen. Graham's claim to have been shown classified FBI documents that contradicted the FBI's public statements, plaintiffs submitted their FOIA request on October 27, 2011, seeking all FBI records of the investigation it had conducted relating to 4224 Escondito Circle, Sarasota, Florida. SOF ¶ 34.

In response, the defendants produced no records and asserted only that Exemptions 6 and 7(C), 5 U.S.C. §§ 552(b)(6) & (7), relating to privacy, allowed withholding of any responsive records. The Department of Justice also denied an appeal of this decision, necessitating the filing of this lawsuit on Sept. 5, 2012. SOF ¶ 34. Seven months after the suit was filed, the defendants spontaneously produced 31 pages of documents, identified 4 more as withheld, and

asserted for the first time that Exemptions 1, 3, 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (3), (7)(D), and (7)(E) applied to requested documents. SOF ¶ 35-36. The (b)(1) and (b)(3) exemptions allow the withholding of documents classified as "Secret" and those required to be kept confidential by the National Security Act.

The documents produced did not include the documents that Weist had delivered to the FBI, the Prestancia gatehouse records that showed that the terrorists had visited the subdivision, any inventory that law enforcement agents had taken of items found at the home, or the interview the FBI conducted of Wissam Hammoud regarding Abdulaziz al-Hijjis allegiance to Osama bin Laden. SOF ¶36. Sen. Graham reviewed the documents produced and found that they also did not include the key FBI document dated September 16, 2002, he had been shown. SOF ¶ 37.

The documents did include one of the two FBI files Graham had seen, labeled SARASOTA 5-6 and dated April 16, 2002, SOF ¶ 37, and that file contradicted, as Sen. Graham said earlier it did, the FBI's denial that its Sarasota probe found evidence of connections to the terrorists. The newly released document stated the FBI found "many connections" to persons associated with the September 11 terrorists.[2] SOF ¶ 38. Sen. Graham concluded from this that the FBI should have hundreds or thousands of pages of additional documents since the records showed that the found evidence of a network supporting the 9/11 terrorists. SOF ¶ 38.

This record strongly supports a conclusion that the FBI has not conducted a good faith search for all responsive documents.

The defendants have submitted in support of their the summary judgment motion a single declaration. In it, David M. Hardy purports to describe the search the FBI conducted for

[2] Although the FBI redacted the names of the persons investigated, the fact that the persons under investigation was the Ghazzawis and the al-Hijjis was evident from the fact that the report related to an investigation of 4224 Escondito Circle, the address of the home owned by the Ghazzawis and resided in by the al-Hijjis.

responsive documents. Mr. Hardy's declaration is not based exclusively on his personal knowledge. He states: "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*." (DE 25-1 ¶ 2) (emphasis added). The Court therefore cannot determine whether any facts in Mr. Hardy's declaration are inadmissible hearsay or facts within Mr. Hardy's personal knowledge.[3] In summary judgment proceedings, all affidavits must be based on personal knowledge and must set forth facts that would be admissible under the Federal Rules of Evidence.[4] "[I]nadmissible hearsay cannot be considered on a motion for summary judgment." *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) (internal quotations and citations omitted). The Hardy declaration does not state who conducted the search, or when the search was conducted. In prior litigation, Mr. Hardy's effort to show searches conducted in FBI field offices has been rejected for lack of personal knowledge.[5] His declaration in this case also tries to describe searches conducted in an FBI field office even though he claims no personal knowledge of that search. His affidavit should be rejected as establishing that a good faith search was made.

Hardy's declaration also does not provide the sort of specificity required for establishing the adequacy of a search and the applicability of exemptions. It neither provides the Court with

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[3] *See Pace v. Capobianco*, 283 F. 3d 1275, 1278-79 (11th Cir. 2002) (holding affidavit based on information and belief is insufficient to create an issue of fact).

[4] *Josendis v. Wall to Wall Residence Repairs, Inc.*, 606 F. Supp. 2d 1376 (S.D. Fla. 2009) (Zloch, J.), *aff'd* 662 F. 3d 1292, 1315 11th Cir. 2011).

[5] *See Rosenfeld v. U.S. Dep't of Justice*, No. C 07-03240 MHP, 2008 WL 3925633 at *12 (N.D. Cal. Aug. 22, 2008) ("there is no evidence that Hardy directly supervises the field offices. And if he does, there is no evidence of the level of contact he has with those offices. Consequently, his declaration with respect to searches conducted at the field offices are inadmissible").

unredacted documents for in camera review, as is appropriate when only, as here, a small number of responsive documents is claimed to be found, or a *Vaughn* index of documents that are being withheld as exempt. As discussed above, a *Vaughn* index requires an itemization of an inventory of the documents withheld. Showing the date of a document, the author of the document, the person to who the document was sent, a description of the type of document, and other relevant information that would allow the plaintiffs a meaningful opportunity to contest the exemption claim. At least four pages of withheld documents are not indexed in any meaningful manner. The Court should require *in camera* inspection of those documents.

Hardy's declaration also does nothing to explain why the defendants initially produced no documents, then produced a smattering of isolated documents, but failed to produce documents shown to Sen. Graham or documents witnesses delivered to the FBI, or statements taken by the FBI. It also does not address Sen. Graham's observation that the FBI should have hundreds or thousands of pages of additional documents responsive to the plaintiffs' request if they conducted the sort of investigation that the FBI would be expected to make after discovering suspects with many connections to the 9/11 terrorists.

Hardy's declaration concedes that the initial search undertaken in response to plaintiffs' request was inadequate because it produced only 6 of the 14 documents ultimately found. (DE 25-1 ¶ 23). It also concedes that the defendants improperly withheld the entirety of the 6 found documents by virtue of the defendants' subsequent production of portions of those documents. Hardy also purports to describe the search that was undertaken in the Tampa Field Office only after the defendants were forced to file this lawsuit, but he does not say who conducted the search. Instead he passively states "the Tampa Field Office ("TPPO") was contacted regarding the matter." (DE 25-1 ¶ 24). He says nothing about any search conducted within the FBI's

Counterterrorism - Osama Bin Laden Unit/Radical Fundamentalist Unit even though the document Bates numbered SARASOTA-23 reflects that the Tampa Field Office sent its information there. Regarding the Tampa investigation, he states "TPFO canvassed personnel who were directly involved in the 2001 investigation," but does not identify either who did the canvassing or who was canvassed. He references the FBI's production of documents to Sen. Graham and claims "TPFO also canvassed" those persons, but again does not identify who did the canvassing or who was canvassed. Specifically, he does not indicate whether Sean Joyce, the FBI official who reviewed documents with Sen. Graham was asked for responsive records.

He also asserts that "persons familiar with the investigation into 4224 Escondito Circle and/or the prior request from Senator Graham conducted additional searches of FBI files"(DE 25-1 ¶24), but he does not say who "persons familiar with the investigation" are, how they are familiar with the investigation, or what specifically they did. He states that the search conducted by these unidentified "persons" "related to the 9/11 investigation to determine whether any additional documents existed" and that their searches "also consisted of "additional text searches of the ECF and searches of known telephone numbers." He does not disclose the meaning of "related to the 9/11 investigation" or the words or telephone numbers that were searched.

In response to multiple similar vague Hardy declarations regarding a search, a federal court in New York recently held the declarations failed to show an adequate search had been conducted. "Summary judgment," the court held, "is inappropriate 'where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory.'" *National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012) (citation omitted). The court held

"custodians cannot 'be trusted to run effective searches,' without providing a detailed description of those searches," *id.* (citation omitted), and noted that for 20 years courts have required agencies to specify the search terms and the type of search performed, but that "the FBI [has] not gotten the message. So it bears repetition that the government will not be able to establish the adequacy of its FOIA searches if it does not record and report the search terms that it used, how it combined them, and whether it searched the full text of documents." *Id.* at 108.

Plaintiffs separately have moved to strike the Hardy declaration and for an opportunity to take his deposition. They also have separately moved for production of a proper *Vaughn* index and *in camera* review of withheld document. The plaintiffs propounded interrogatories and a request for production of documents to the defendants on May 20, 2013, just seven days after the plaintiffs moved for summary judgment and within the time allowed by the Court's pretrial order for such discovery. (Christensen Dec. ¶80). The discovery is designed to provide the Court with additional relevant information concerning the nature of the search the defendants conducted. Federal Rule of Civil Procedure 56(d) provides that if the nonmovant shows by declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may defer considering the motion or deny it, or allow time to take discovery. Although the evidence the plaintiffs have submitted already shows that the defendants have not conducted a good faith investigation, if the Court concludes otherwise, it should defer ruling on the summary judgment motion until the record is further developed.

II.

The Defendants Have Not Met Their Burden to Show that Asserted Exemptions Apply

The following arguments show why the defendants have not met their burden to show documents responsive to plaintiffs' request are exempt from the disclosure requirements of the

Freedom of Information Act.

A. Exemptions Have Not Been Appropriately Asserted

For the four pages that have been identified as responsive to the request but withheld in their entirety Bates numbered SARASOTA 29-32, the Department contends four exemptions apply to those documents, but it is not clear whether the Department contends that all four exemptions require the withholding of all aspects of those pages or why any one of the pages must be withheld entirely to satisfy the requirements of one or more exemptions. .

Regarding those pages that have been released, redactions occur on most of the pages, but only some of the redactions have been identified as allowed or required by an exemption to the Freedom of Information Act. For example, on SARASOTA-1, 17 redactions have been made, but Exemptions 6 and 7, 5 U.S.C. §§ 552(b)(6) & (b)(7), have been placed beside only one of the exemptions. No explanation has been provided for the remaining 16 redactions. On SARASOTA-5 and 15 redactions have been made, three exemptions have been cited with respect to one of the redactions and two exemptions have been cited with respect to three other redactions, but no exemptions have been cited with respect to the remaining redactions. On SARASOTA-9 and 12 redactions appear, but an exemption is cited for only one of the redactions.

It also is not clear from the manner of redaction whether any of the cited exemptions are intended to apply to the redaction nearest to the citation or to other redactions on a page as well. Many of the pages produced suffer from this technical problem. The Freedom of Information Act, 5 U.S.C. §552(b), provides: "If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made." The defendants not complied with this requirement.

B. Exemption 1 Does Not Apply

Exemption 1, 5 U.S.C. §552(b)(1), protects from disclosure only those records that are (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. Executive Order 13526, signed December 29, 2009, now governs classification. "If there is significant doubt about the need to classify information, *it shall not be classified*." *Id.* at §1.1(b) (emphasis added). The classification "'Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe." E.O. 13526 §1.2(a)(2). The defendants have not shown that any of the documents were properly classified in accordance with these procedures.

1. The Classification is Inconsistent with the FBI's Public Statements

The FBI publicly denied its Sarasota investigation produced any credible evidence connecting the persons at 4224 Escondito Circle to the terrorist attacks on September 11, 2001. Consistently, when the requesters sought the FBI files regarding this investigation, the defendants did not claim disclosure of the records would harm national security interests. Only after this lawsuit was filed, did the defendants assert Exemption 1. The FBI's prior public statements and the defendants' original response to the FOIA request is squarely inconsistent with their assertion now that the requested documents contained classified material that must be withheld. These inconsistent positions create genuine factual issues for trial.

2. The Information Has Been Unclassified for More Than a Decade

The stamps on SARASOTA 5-6 and SARASOTA 33-35 reflect an original classification date of 03-14-2013, yet the former shows that it was created on April 16, 2002, and the latter

copies that information. It therefore appears that the information in these documents was not classified until well after the requesters made their request on October 27, 2011, and filed their lawsuit on September 5, 2012.

If in fact the documents were not classified until March 14, 2013, and the information has been in FBI files for more than a decade, disclosure of the redacted information in the cannot reasonably be expected to cause identifiable or describable damage to the national security as is required by E.O. 13526 § 1.1(a)(4) and, further, disclosure could not reasonably be expected to cause "serious damage" to the national security as is required to warrant "Secret" classification.

Although section 1.4(c) of Executive Order 13526 allows classification of information that pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology," it does not permit classification of such information where disclosure of the information cannot reasonably be expected to cause identifiable or describable damage to the national security. The classification was not therefore appropriate. The defendants' assertion to the contrary is directly contradicted by Sen. Graham's declaration that "disclosures should serve our national security interests." (Graham ¶ 57).

3. Exemption 1 Has Not Been Consistently or Clearly Asserted

SARASOTA 33-35 appears to be a report created on or about February 6, 2013, that quotes information found in SARASOTA 5-6. At the bottom of SARASOTA-34, an analyst's note is claimed to fall within Exemptions 6, 7(C), and 7)(E), but not Exemption 1. That same analyst's note appears at the end of the text on SARASOTA-6. If the information on SARASOTA-34 is not within Exemption 1, neither should the same information on SARASOTA-6.

Further, the March 28, 2013, supplemental response does not clearly identify the

information in the documents for which exemption 1 classification is claimed. The Exemption 1 designation appears beside a redaction box on SARASOTA-6 and several redaction boxes on SARASOTA-35, but no explanation is provided of whether the classification actually relates to the redacted information.

C. Exemption 3 Does Not Apply

Exemption 3, 5 U.S.C. §552(b)(3), applies to records specifically exempted from disclosure by statute if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The section of the National Security Act of 1947 relied upon to withhold portions of the requested documents, 50 U.S.C. §403-1(i)(1), provides, as noted above, "The Director of National Intelligence shall protect sources and methods from unauthorized disclosure."

The assertion of Exemption 3 is deficient for all of the same reasons that assertion of Exemption 1 is deficient. The assertion is inconsistent with the prior public statements disclaiming that the investigation at issue developed any credible evidence of connections to the terrorists, the information at issue has not been previously withheld, and the exemption has not been clearly or consistently directed to specific information.

D. Exemption 6 Does Not Apply

Exemption 6, 5 U.S.C. § 552(b)(6), applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As a preliminary matter, it seems clear that none of the responsive documents are either personnel or medical files. The statutory term "similar files" means those containing information of a "personal quality and nature." *Dep't of Air Force v. Rose*, 425 U.S. 352, 374

(1976); *see also Alley v. U.S. Dep't of Health & Human Servs.*, 590 F. 3d 1195, 1199 (11th Cir. 2009). To determine whether files are of a personal quality and nature, the agency must "examine the competing public and private interests. *Alley*, 590 F.3d at 1199. If the agency concludes the files are of a personal quality and nature, it then must decide whether disclosure of the files would constitute a clearly unwarranted invasion of the privacy interest.

The records at issue here are of the most public nature in that they relate to an investigation of connections to the most heinous act of terrorist activity in modern United States history. The records are not believed to reflect anything "personal" about the subjects of the investigation other than that they either had such connections or they did not.

Even, however, if the files do reflect any personal information about the individuals under investigation, the public interest in the records would make it impossible to show that disclosure of the files would constitute an unwarranted invasion of privacy. The public has an intense interest in understanding whether the FBI uncovered evidence of a significant threat to the country and, if so, what steps it took to alleviate that threat.

In *News-Press v. US Dept. of Homeland Sec.*, 489 F. 3d 1173, 1192 (11th Cir. 2007), the Eleventh Circuit ordered disclosure of records relating to the funds paid by the Federal Emergency Management Administration to hurricane victims. The Court held. "We easily conclude, as did both district courts, that the asserted interest in learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars in the wake of natural and other disasters is one which goes to 'the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.'" (Citation omitted). The Eleventh Circuit also held that the government had not met its heavy burden to show that disclosure of the files would constitute a clearly unwarranted invasion of privacy.

Here, the public interest in evaluating the investigation that the FBI conducted of the Ghazzawis and the al-Hijjis in the aftermath of September 11 easily outweighs the very limited privacy interests the Ghazzawis and the al-Hijjis may have. The terrorist attacks on September 11 obviously were an event of profound national importance and a full evaluation of the response of law enforcement to those attacks is vital to attempting to ensure that such attacks do not occur again. Public interest in the records is magnified by the fact that the FBI failed to disclose its investigation to the Joint Inquiry and the 9/11 Commission. The privacy interest is diminished by the fact that the identities of the Ghazzawis and the al-Hijjis and the fact of their investigation already is known, they have fled the United States, and the FBI has publicly announced that the investigation that it conducted found no credible evidence of connections to the terrorists.

E. Exemption 7 Does Not Apply

The Department also has asserted three Exemption 7, 5 U.S.C. §552(b)(7), categories for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, or (E) 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.

1. Exemption 7(C)

Exemption 7(C) has no application here because disclosure would not result in an unwarranted invasion of an individual's personal privacy. The Supreme Court and the Eleventh Circuit have explained that "an invasion is unwarranted where (1) the information sought implicates someone's personal privacy, (2) no legitimate public interest outweighs infringing the individual's personal privacy interest, and (3) disclosing the information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'" *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502 (11th Cir. 2011).

The records sought by the request are not of a sufficiently personal nature. "The disclosures with which [Exemption 7(C)] is concerned are those of 'an intimate personal nature' such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation. Information relating to business judgments and relationships does not qualify for exemption. This is so even if disclosure might tarnish someone's professional reputation." *Washington Post Co. v. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (internal citations omitted).

Although "individuals have a substantial privacy interest in their criminal histories," *O'Kane v. United States Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999), materials must "carry a clear implication of criminal activity" in order to implicate a personal privacy interest. *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992). The FBI's public announcements that it did not develop credible evidence of connections between the Ghazzawis and al-Hijjis and the terrorist attacks would seem to preclude the government from demonstrating that the records requested do implicate the Ghazzawis and al-Hijjis in any criminal activity. If that is the case,

release of the records would serve rather than harm the interests of the Ghazzawis and al-Hijjis.

On the other hand, if the requested records implicate the Ghazzawis and al-Hijjis, their privacy interests must be harmed but the disclosure would be warranted because it "certainly would "further[] the public's statutorily created 'right to be informed about what their government is up to.'" *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1489 (11th Cir. 1992) (citation omitted). The requesters have a "legitimate public interest" in learning why the FBI conducted an investigation, found many connections between the Ghazzawis and al-Hijjis and terrorist activities, and then not only did nothing to apprehend or initiate prosecution of them, but also did not inform the Joint Inquiry or the 9/11 Commission of these events. In this circumstance, disclosure would "contribute significantly to public understanding of the operations or activities of the government." *Karantsalis*, 635 F.3d at 504 (quoting *Reporters Comm.*, 489 U.S. at 775).

As Representative Kathy Castor has said, "One of the great criticisms of the pre-9/11 intelligence operations was the lack of cooperation and information sharing among agencies." Dan Christensen, *U.S. Rep. Castor Calls for Investigation of 9/11 Sarasota Connection; Graham Prods White House*, Broward Bulldog, Sept. 13, 2011. The Joint Inquiry never heard from the FBI about the Sarasota home. Only after the requesters begin reporting on this issue did the FBI "correct the public record." *Id.* In correcting the public record, the FBI released just a brief statement, providing no details and stating that the investigation uncovered no relation between the Sarasota home and 9/11. *Id.* If the FBI is still withholding information about 9/11, then the FBI has failed to learn from the lessons of 9/11 and has put this country at risk. In this circumstance, disclosure is required. *See, e.g., Roth ex rel. Bower v. Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).

The fact that the cat is already out of the bag also counsels that Exemption 7(C) cannot be applied here. *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180, 192 (D.D.C. 2010) (regarding third parties who "were publicly charged in an indictment with violations of the Lacey Act"); *see also Am. Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011) (requested information would "disclose only information concerning a conviction or plea; it would not disclose mere charges or arrests").

2. Exemption 7(D)

Exemption 7(D) 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 disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source." This exemption has been invoked solely to withhold the pages marked SARASOTA 29-32. The Court should review these documents *in camera* to ascertain whether this exemption applies.

3. Exemption 7(E)

Exemption 7(E) 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 "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*." (Emphasis

added). Exemption 7(E) has been invoked indiscriminately to mask the identities of every FBI agent named in the records. This exemption was not intended to protect the public from knowing the identities of law enforcement officers who participated in an investigation. It also is not to be used simply to prevent reporters, as it appears to have been done here, from contacting agents who had involvement with a significant investigation. It is intended to allow withholding only of information that would disclose techniques and procedures of law enforcement authorities when the disclosures could reasonably be expected to risk circumvention of the law. The names of agents do not disclose techniques or procedures.

CONCLUSION

The Court should deny the defendants' motion for summary judgment and set the case for trial. The defendants have not shown, without dispute, that they conducted a good faith search for responsive documents and have not shown, without dispute, that the asserted exemptions allow them to withhold responsive documents.

In advance of trial, the Court should direct the defendants to respond to the plaintiffs' pending interrogatories and request for production of documents, to produce a *Vaughn* index of all withheld documents that have not been produced, and to produce all documents withheld for *in camera* inspection.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on May 31, 2013, by filing with the CM/ECF system on all counsel or parties of record on the Service List below.

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