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 to Dismiss the Complaint

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INTRODUCTION

This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended by the OPEN Government Act of 2007, and the Declaratory Judgment Act, 28 U.S.C. § 2201. The single-count 25-page complaint seeks the disclosure and release of agency records concerning an investigation of persons who may have provided aid and assistance to the terrorists in the days and years leading to the September 11, 2001 ("9/11") attacks. The complaint alleges that the records sought are subject to public disclosure under FOIA, but the defendants have nevertheless improperly withheld the documents from plaintiffs. The complaint identifies the plaintiffs as the publishers of a widely-read and respected website operated by an award-winning investigative journalist and overseen by a board of directors with years of experience in investigative reporting and editing. It also provides the Court with detailed factual allegations from which the Court can assess whether, if the allegations are proven, the public interest in the requested records would outweigh the privacy that the subject of the records reasonably might expect.

In reliance on *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), and *Magluta v. Samples*, 256 F.3d 1282, 1284 & n.3 (11th Cir. 2001), the defendants seek dismissal on the theory that the complaint is not sufficiently simple, concise, or direct. They also attempt to equate detailed factual allegations to requests for discovery and argue dismissal without prejudice solely so that the complaint may be shortened. These arguments have no merit. *Iqbal* and *Magluta* both require pleading in sufficient factual detail to allow the Court to assess the plausibility of the plaintiffs' contention that public interest in the records outweighs the privacy interests of the subjects of the records. The defendants' denial of the plaintiffs' request in reliance on FOIA Exemptions 6 and 7C, 5 USC §§552(b)(6) & (b)(7)(C) requires the Court to make such an

assessment of the complaint. Requiring the defendants to respond does not require disclosure of the contents of the records or impose any discovery obligations on the defendants. Dismissal would result only in improper delay.

The defendants also seek dismissal of the FBI as a defendant. Because the defendants do not contest that the Department of Justice is a proper defendant, this issue is largely academic, but it also is clear that the FBI is an agency that may be sued when, as here, it has been asked to produce records in its possession and it improperly refuses to produce those records.

ALLEGATIONS OF THE COMPLAINT

The factual detail set forth in the complaint is necessitated by the nature of the FOIA allegations asserted by the defendants.

Paragraphs 1 through 3 provide a summary of the nature of the action and the reasons that the plaintiffs contend that the records should be ordered released. These allegations serve as a useful guide to the relevance of the allegations that follow. Paragraphs 4 and 5 establish the jurisdiction and venue of the Court.

Paragraphs 6 through 9 show that the plaintiffs are a corporation that publishes a website operated by a well-known and well-respected south Florida journalist. These allegations are important in this lawsuit to show that this suit is distinct from a suit brought by a company or individual solely for personal interests. Allegations regarding the corporate governance of the corporate plaintiff are made to underscore that the website is not the product of one person, but rather represents the vision of a variety of individuals who have served in positions such as editor of the *South Florida Sun-Sentinel*, associate managing editor of the *Chicago Tribune,* editor of the *St. Louis Post Dispatch,* general counsel of *The Palm Beach Post,* and senior editor of the *South Florida Business Journal,* and who regard investigative reporting as critical to the

operation of democratic institutions.

Paragraphs 10 and 11 merely identify the defendant agencies.

Paragraphs 12 through 22 explain how the *Broward Bulldog* website first became involved in reporting about the Saudis in Sarasota, Florida who are believed to be the subject of the requested records. These paragraphs show that the reporting grew out of the in-depth work of journalists Anthony Summers and Robbyn Swan on their prize-winning book, THE ELEVENTH DAY: THE FULL STORY OF 9/11 AND OSAMA BIN LADEN ("THE ELEVENTH DAY"), published by Ballantine Books in 2011. These allegations also show that the plaintiffs conducted extensive research and have published ten articles showing the results of their own investigation of the Sarasota Saudis and the FBI's investigation of their possible involvement in the events of 9/11. They also reflect the interest of former U.S. Senator Robert Graham in the reporting by the plaintiffs and the requested records due to his service as co-chair of a joint Congressional committee that investigated the events before and after 9/11.

The facts alleged in Paragraphs 23 through 31 show connections between a home in Sarasota County, Florida and the Saudi royal family while paragraphs 32 through 45 allege facts showing a connection between the September 11 terrorists and the residents of the home. Paragraphs 46 through 54 provide facts regarding specific events leading up to the 9/11 terrorist attacks and news reports concerning those events. Paragraphs 55 and 56 allege that after September 11, 2011, the FBI conducted a raid at the Sarasota County home, and that the owners and residents had abruptly abandoned personal effects there.

Paragraphs 57 through 67 allege facts showing that although a Congressional committee and an independent commission scrupulously reviewed facts and circumstances relating to the terrorist attacks of 9/11, including those relating to intelligence and law enforcement agencies,

that their published reports made no reference to the Saudis residing in Sarasota County or any FBI investigation of them.

Paragraphs 68 through 76 summarize the reporting that the plaintiffs have done regarding those connections, that the FBI has acknowledged that it conducted an investigation of those connections, and that former Senator Robert Graham, co-chair of the Congressional Joint Inquiry Committee, has expressed serious concern that the FBI may have concealed from Congress important information regarding possible participants in the 9/11 attacks in order to avoid implicating high-ranking leaders of Saudi Arabia, a critical ally of the United States.

Paragraphs 77 through 88 and Exhibit 2 allege the facts relating to the plaintiffs' requests for the records that are the subject of the complaint and the FBI's responses to those requests.

The complaint also contains a single count in paragraphs 89 through 93 alleging that the defendants have failed to produce the requested records as required by FOIA. The complaint concludes with a demand for relief specifying that the Court should require the defendants to produce the records for in camera inspection, provide the plaintiffs with an index of the records; and to produce the records to the plaintiffs; enter an order expediting the proceedings; enter an order awarding costs and fees; and make a determination of whether the personnel of the defendants acted arbitrarily or capriciously with respect to the withholding. The complaint is 25 pages in length.

ARGUMENT

I.

Defendants Fail to Demonstrate Any Basis for Dismissal

Defendants have moved for dismissal of the complaint without specifying the rule under which they seek dismissal. They contend that dismissal should be granted for non-compliance

with the requirement of Federal Rule of Civil Procedure 8(a)(2) that a pleading should contain a "short and plain statement of the claim showing that the pleader is entitled to relief" and the requirement of Federal Rule of Civil Procedure 8(d)(1) that "each allegation must be simple, concise, and direct." They do not assert pursuant to Federal Rule of Civil Procedure 12(b)(6) that the complaint fails to state a claim upon which relief may be granted. Instead, they contend only that the complaint is "not a short and plain statement of plaintiffs' claim." DE-5 at 2. Defendants' motion therefore must be regarded as solely seeking involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b)[1].

That rule provides that "If the plaintiff fails to . . . comply with these rules or a court order, a defendant may move dismiss the action or any claim against it." Under this rule, "dismissal is an extraordinary remedy."[2] It generally is employed where the plaintiff has engaged in "shotgun" pleadings,[3] in which the plaintiff "incorporate[s] every antecedent allegation by reference into each subsequent claim for relief or affirmative defense,"[4] making it "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief."[5] It also has been used to pare down complaints of excessive length.[6] Rule 41 never

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[1] The defendants reliance on Rule 41(b) is made clear by their citation, DE-5 at 4, of *Pelletier v. Zweifel*, 921 F.2d 1465, 1518-19, 1522 n. 103 (11th Cir. 1991); which states that Rule 41(b) is the basis for dismissal of a complaint that does not comply with Rule 8(a).

[2] *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989).

[3] *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 979 & n.54 (11th Cir. 2008); *Ambrosia Coal & Constr. Co. v. Morales,* 368 F.3d 1320, 1330 n.22 (11th Cir.2004).

[4] *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006).

[5] *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996).

[6] *See, e.g., Kermanj v. Goldstein,* 401 F. App'x 458, 460 (11th Cir. 2010) (35-page single-spaced complaint without paragraph numbering or delineated counts); *Magluta v.*

has been used to dismiss for violation of Rule 8 a 25-page, single-count complaint or any complaint that is even remotely comparable.

Detail regarding of the circumstances giving rise to the plaintiffs' claim have been included for both procedural and substantive reasons. The procedural reasons relate to the Supreme Court's recent rulings on the standard for evaluating whether a complaint state a claim under Rule 12(b)(6). The substantive reasons flow from the operation of the exemptions to the disclosure requirements of FOIA upon which the defendants rely.

The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the `grounds' of his `entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quotations and citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "This is a stricter standard than the Supreme Court described in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), which held that a complaint should not be dismissed for failure to state a claim `unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Mukamal v. Bakes,* 378 F. App'x 890, 896 (11th Cir. 2010) (quoting *Twombly*, 550 U.S. at 577).

Samples, 256 F.3d 1282, 1284 (11th Cir.2001) (58-page complaint); *Pominansky v. JARJ Construction Corp.,* No. 07-21530-Civ, 2007 WL 290275 (S.D. Fla. Oct. 2, 2007) (50-count, 159-page complaint); *Feldman v. Jackson Mem'l Hosp.,* 509 F. Supp. 815 (S.D. Fla. 1981) (54-page complaint).

The detail included in the complaint apparently has deterred the defendants from seeking dismissal pursuant to Rule 12(b)(6), but defendants should not now be allowed to use the plaintiffs' compliance with the pleading specificity requirements to contend that the allegations transcend the brevity requirements of Rule 8, because the substantive requirements for alleging a violation of FOIA are substantial.

The defendants asserted in their responses to the plaintiffs' requests for documents that the documents are exempt from the disclosure requirements of FOIA pursuant to Exemptions 6 and 7C, 5 USC §§552(b)(6) & (b)(7)(C). Those exemptions apply to:

> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) 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,

The Eleventh Circuit recently examined the operation of Exemption 6 in *News-Press v. United States Department of Homeland security,* 489 F.3d 1173, 1190 (11th Cir. 2007). It began with the observation that Congress created the Act itself as "'a broad disclosure statute which evidences a strong public policy in favor of public access to information in the possession of federal agencies.'" *Id.* (*quoting Cochran v. United States*, 770 F.2d 949, 954 (11th Cir.1985)). It described the Act as designed to permit "'access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.'" *News-Press,* 489 F.3d at 1190 (*quoting Envt'l. Prot. Agency v. Mink*, 410 U.S. 73, 80 (1973)). It noted also that "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 1190 (*quoting Dep't of the Air Force v. Rose,* 425 U.S. 352, 366 (1976)), but also made clear that "the requester must indicate how disclosing the withheld information 'would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.'" *News-Press,* 489 F.3d at 1191 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994)). The *News-Press* decision itself demonstrates the need for specificity in setting forth those facts which show a public interest in the documents requested. Judge Marcus, writing for the Eleventh Circuit, recited the facts constituting the public interest in that case in considerable detail, *see News-Press,* 489 F.3d at 1191-96, before holding the plaintiffs had met that requirement in that case.

Exemption 6 requires an assessment not only of whether a public interest exists in disclosure of the documents, but also whether countervailing privacy interests "are so weighty that despite the substantial public interest involved, disclosing" the records "'would constitute a clearly unwarranted invasion of person privacy.'" *News-Press,* 489 F.3d at 1196.

Exemption 7(C) also similarly requires the Court to decide whether "(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.' *Karantsalis v. US Dept. of Justice*, 635 F. 3d 497, 502 (11th Cir. 2011) (*quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 762 (1989)). In *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Justice,* 840 F. Supp. 2d 226 (D.D.C. 2012), the court made clear that news articles relating to the events that are the subject of requested records are relevant in this balancing to show whether a public interest in disclosure

exists as well as whether disclosure of the records would harm the privacy interests of persons identified in the records. *Id.* at 231-32. This case also shows that privacy interests in investigatory records are less when "the fact that DoJ conducted an investigation . . . is already a matter of public record." *Id.* at 233. "One can have no privacy interest in information that is already in the public domain . . . " *Id.*

The specific allegations of the complaint in this case were designed to show that the records at issue were not required to be withheld pursuant either to Exemption 6 or Exemption 7(C). They show that the plaintiffs are not merely private entities seeking information for their private uses, but rather a corporation formed in order to report news of wide public interest, overseen by a board of directors that consists of highly respected journalists and lawyers, and operated by one of the most respected investigative reporters in south Florida. The allegations show that the public has an extraordinary interest in understanding how the 9/11 terrorist attacks were organized and supported; that the terrorists that conducted the attacks regularly visited the home of the Saudi nationals residing in Sarasota; that those Saudi nationals left the country hastily immediately before the attacks; that those Saudi nationals have connections to the Saudi royal family; that the FBI investigated those Saudi nationals after 9/11; and that the FBI apparently did not disclosure the results of the investigation to Congress notwithstanding that Congress expected all such investigative efforts to be disclosed. The known facts create an appearance that the FBI concealed its investigation in order to thwart a Congressional investigation.

Defendants contend that the specificity of the allegations of the complaint require them to provide discovery concerning the contents of the requested records notwithstanding that such discovery is not generally allowed. They do not, however, point the Court to any specific

allegations that would require such disclosures and there are none. The allegations of the complaint do not purport to set forth the contents of the records because the contents of those records are unknown to the plaintiffs. They do not ask the defendants to admit what the results of the FBI investigation at issue was, who the FBI interviewed, what witnesses told the FBI, or what the FBI communicated, if anything, to Congress about the investigation. The plaintiffs are aware of the existence of the investigation and they believe that records of the investigation exist because, as alleged in the complaint, the FBI itself publicly acknowledged that it conducted an investigation of the Saudi nationals after the plaintiffs reported about the unusual facts that suggested those persons may have provided aid or comfort to the 9/11 terrorists.

The defendants have not cited any cases that hold that a complaint should be dismissed because it makes allegations that requires the defendant to admit or deny facts that are relevant to a determination of the issues raised by the complaint. All of the cases on which the defendants rely are cases arising from discovery disputes, not motions addressed to the sufficiency of the pleadings.[7] In none of the defendants' authorities were the courts asked, as here, to dismiss a complaint that merely advanced factual allegations that are relevant to a determination of the issues that it raises.

[7] In *Tamayo v. U.S. Department of Justice,* 544 F. Supp. 2d 1341 (S.D. Fla. 2008), the plaintiff served 13 requests for admission. The defendant objected and the Court sustained the objection because the requests "if answered," would "shed very little light on how [the issues raised by the complaint] should be resolved." *Id.* at 1345. In *Wheeler v. CIA,* 271 F. Supp. 2d 132 (D.D.C. 2003), the court declined a request for discovery regarding whether the CIA in fact had destroyed requested records as the CIA contended in a publicly filed affidavit. In *Schiller v. INS,* 205 F. Supp. 2d 648 (W.D. Tex. 2002), the plaintiff opposed the defendant's summary judgment motion, arguing that it should be entitled to conduct broad ranging discovery into the defendant's policies and procedures. The court rejected that argument, noting that discovery in FOIA cases ordinarily is limited to facts relating to the adequacy of the defendant's search for responsive records.

II.

The FBI is a Proper Defendant

In this Circuit, the FBI commonly has been a named as a defendant in Freedom of Information Act cases and the propriety of its role as a defendant has not been questioned. *See, e.g., Nadler v. US Dept. of Justice & FBI,* 955 F. 2d 1479 (11th Cir. 1992); *Ely v. FBI*, 781 F. 2d 1487 (11th Cir. 1986); *Cohen v. FBI*, 831 F. Supp. 850 (S.D. Fla. 1993).

Relying on cases within the District of Columbia Circuit, defendants contend that the action should be dismissed as to defendant FBI because the FBI "is not a proper party defendant." DE-5 at 4. There is disagreement in that Circuit about whether the FBI, and similar agency components, are subject to FOIA in their own names. *See, e.g., Jean-Pierre v. Federal Bureau of Prisons*, No. 12-00078 (ESH), 2012 WL 3065377 (D.D.C., July 30, 2012) (noting disagreement within the D.C. Circuit); *Mingo v. U.S. Dep't of Justice*, 793 F. Supp. 2d 447, 451 (D.D.C. 2011) (collecting cases). Such disagreement stems from the fact that only federal agencies are subject to the FOIA requirements and the FBI might properly be characterized as a subcomponent of the Department of Justice, itself a federal agency. *See, e.g.,* 5 U.S.C. § 552(a)(4)(b). The most recent case to address the issue in that Circuit was asked to dismiss the Bureau of Prisons (BOP), a subcomponent of the Department of Justice, as a party to a FOIA action. *Jean-Pierre v. Federal Bureau of Prisons,* 2012 WL 3065377, at *3. Like the defendants here, the defendant in that case argued that the BOP is "not a proper party defendant" to the action because only the Department of Justice is a federal agency subject to FOIA, and Department of Justice subcomponents, such as the BOP, are not subject to suit in their own name. *Id.* The court acknowledged the existing disagreement within the D.C. Circuit on that issue, but noted "the weight of authority is that subcomponents of federal executive departments

may, at least in some cases, be properly named as FOIA defendants." *Id.* at *5. Thus, the court declined to dismiss the FOIA claim against the BOP on the grounds that it is not a proper party defendant. *Id.* This Court should do the same here.

Moreover, maintaining the FBI as a party defendant in the action would not be contrary to or inconsistent with the language in FOIA. Section 552(1) of FOIA defines "agency" as including "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(1). This section goes on to list eight types of governmental entities, such as the courts of the United States, that ought *not* be included as an "agency" covered by FOIA. *See* 5 U.S.C. § 552(1)(A)-(H). Subcomponents of the Department of Justice, such as the FBI, are not among the entities that are excluded from the definition of "agency." As such, since Congress could have, but did not exclude the FBI or other similar subcomponents of the Department of Justice from the definition of "agency" under section 552(1), this Court should conclude that the FBI is a proper party subject to suit under FOIA.

In *Iqbal v. FBI*, No. 3:11-cv-369-J-37JBT, 2012 WL 236634 (M.D. Fla. June 12, 2012), the District Court discussed the debate taking place in the D.C. Circuit and concluded that the FBI should be treated as an agency that may be sued under the Privacy Act, but it also allowed the defendant to amend his complaint to add the U.S. Department of Justice so that there would be "no question that the claim has been brought against the proper government defendant." *Id.* at *4. Plaintiffs here brought their action against both the Justice Department and the FBI in order to avoid any issue concerning whether they had sued the proper defendant.

CONCLUSION

The Court should deny the defendants' motion to dismiss the complaint.

Dated: December 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on December 3, 2012, by filing with the CM/ECF system on all counsel or parties of record on the Service List below.

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