

IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61289-Civ-Altonaga/O'Sullivan

BROWARD BULLDOG, INC., a Florida)
corporation not for profit, and DAN)
CHRISTENSEN, founder, operator and editor)
of the FloridaBulldog.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' Opposition to
Motion for Summary Judgment on Count I

ORAL ARGUMENT REQUESTED

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REQUEST FOR HEARING & INTRODUCTION

Not all Freedom of Information Act cases may be resolved on summary judgment. “[S]ome FOIA cases require resolution of disputed facts.”¹ Of course, summary judgment cannot be granted in any case if a dispute remains on genuine issues of material fact.² And, although, FOIA cases often can and should be resolved by summary judgment³ (conserving government resources and expediting production of records that should be public), a short bench trial, in some instances, will be the more expedient way to proceed. A bench trial reduces the risk of reversal and provides an opportunity to resolve factual anomalies that complex and contradictory witness declarations have created. This is that type of a case.

The Court already has denied summary judgment, partially with respect to Count 2, requiring a trial with respect to some of the redactions made to a small group of documents. DE-58. It now also should deny summary judgment on Count 1. To facilitate final resolution of this case, the plaintiffs, Broward Bulldog, Inc. and Dan Christensen (collectively, “the Bulldog”), will not challenge many of the FBI’s decisions to redact and withhold responsive records. Instead, the Bulldog challenges only those FBI redactions and withholding decisions reflected on the 22 documents identified in Exhibit 1 to this Memorandum,⁴ and Court’s consideration of whether summary judgment may be granted with respect to any redaction or withholding of responsive records the FBI identified for the first time in a letter received by counsel for the

¹ *Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2010) (citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1110 (9th Cir. 1994)).

² *See Wash. Post Co. v. U.S. Dep’t of Health & Human Servs.*, 865 F.2d 320, 326 (D.C. Cir. 1989); *Sears, Roebuck & Co. v. Gen. Servs. Admin.*, 553 F.2d 1378, 1382 (D.C. Cir. 1977); *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 953 F. Supp. 400, 403 (D.D.C. 1996).

³ *See, e.g., News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1187 (11th Cir. 2007).

⁴ To aid the Court’s review of Exhibit 1, the Bulldog placed some explanatory notes on the documents it contains. The documents were Bates numbered by the FBI in the format “Broward Bulldog ____.” These pages are referenced herein as “BB ____.”

Bulldog yesterday, March 27, 2017.⁵ Due process and Federal Rule of Civil Procedure 56 preclude summary judgment with respect to these recently produced records. The Bulldog's willingness to narrow the issues with respect to records redacted or withheld prior to March 24, 2017, should not be construed as its agreement that any of the FBI's decisions regarding its requests are consistent with FOIA. The FBI repeatedly has violated FOIA in the handling of this request, has imposed unreasonable and inexplicable delays, and has redacted information without statutory or sensible basis for doing so. The Bulldog is narrowing the matters in dispute solely because it appears that many of the withheld records are not critical to the Bulldog's central concern: Whether the FBI is concealing evidence of Saudi government support for the 9/11 attacks on the United States but failed to conduct a proper investigation of it – either in a misguided effort to allow the Saudi government to get away with murder or due to negligence.

That concern intensified on March 20, 2017, when the families of 850 people killed in the 9/11 attacks and 1,500 people injured in those attacks filed a new complaint against the Kingdom of Saudi Arabia in New York. *See Ashton v. Kingdom of Saudi Arabia*, No. 1:17-cv-02003 (03-MDL-1570 (GBD)(SN)) (S.D.N.Y.). The complaint is attached as Exhibit 2.⁶ It contends, among other things, that "Saudi Arabia's tortious acts were a proximate cause of the September 11th Attacks," that Saudi Arabia directly funded and supported al Qaeda, and that Saudi Arabia supported indoctrination and training of the 9/11 hijackers. Ex. 2 at 146, 153, & 160.

The Bulldog's concern intensified even further yesterday, March 27, 2017, when counsel for the Bulldog received from the FBI notification, Exhibit 3, that the FBI had just reviewed an additional 302 pages of responsive documents, that 282 of those pages were being withheld in their entirety on national security and numerous other grounds, and that the other 20 pages were being partially released. The FBI provided no *Vaughn* index. But one of the partially released

⁵ The FBI claimed on March 13, 2017, that it found additional responsive records and then clarified in a March 24, 2017, letter that it was claiming 282 pages of the records are exempt from production and produced 20 pages of partially redacted records never previously produced.

⁶ The first 134 pages of the complaint list the named plaintiffs. Pages 2 – 134 have been omitted from the exhibit.

(and apparently partially destroyed) documents show that a source told the FBI Abdulaziz al-Hijji⁷ “had known some of the terrorists from the September 11th 2001 attacks, who had been taking flight training at Venice Airport during that time,” that al-Hijji showed the source a website about Osama Bin Laden, and that al-Hijji spoke of going to Afghanistan and becoming a freedom fighter or Mujahedin, Ex. 3 at BB 1577. Another document shows that as of August 31, 2004, the FBI had not interviewed al-Hijji. Ex. 3 at BB 1578. The Bulldog is continuing to review these records.

The summary issues that can be adjudicated now can be grouped into three categories: (I) whether the FBI must produce the Sarasota family case file obtained by the Meese Commission; (II) whether the FBI has shown that it made an adequate search for the requested records; and (III) whether specific exemptions relied upon by the FBI to redact or withhold responsive Meese Commission records do, in fact, allow the redactions and exemptions. Oral argument will assist in the Court’s review of each of these points.

ARGUMENT

The facts on which this argument is based are set forth in an accompany Statement of Disputed Material Fact and Additional Material Facts. Citations are to the declarations cited in and filed in support of that Statement.

I.

The FBI has Not Shown that Summary Judgment Should be Entered Regarding the Sarasota Family Case File

The Meese Commission Report lists the Sarasota Family “case file” as a distinct group of records that it was provided and also as a distinct group of records from the “reports of interviews.” DE-1-2 at 23. When the Bulldog obtained the Meese Commission Report shortly after March 25, 2015, it immediately focused on the fact that the Commission had requested the

⁷ The FBI inexplicably redacted al-Hijji’s name from the records in all but four places. Those references to the al-Hijji family and the other content of the documents, which refers to Escondido Circle, the Prestancia subdivision, and other identifying facts, leave no doubt, however, regarding who the person referenced is.

“case file” for the Sarasota Family. DE-28-1 ¶¶ 28-36. Once the FBI rebuffed informal requests for that case file, the Bulldog formalized the request through the two-page April 8, 2015, FOIA request subject of this lawsuit, specifically identifying “the ‘Sarasota family’ case file” as one of the documents sought. DE-1-4. After the FBI had not responded to the request for more than a year, the Bulldog filed this suit, seeking, among other Meese Commission records, “The ‘Sarasota family’ case file” identified in the Meese Commission Report. DE-1 ¶ 43.

Now, after almost a full year of litigation, addressing that specific request for the first time, the FBI refused to produce the Sarasota case file obtained by the Meese Commission claiming:

Non-exempt portions of the FBI’s case file concerning the Sarasota family were produced to plaintiffs pursuant to FOIA Request No. 1176403. The FBI “has deemed that this portion of plaintiffs’ request is duplicative of the FOIA request now at issue in a separate FOIA litigation before Judge Zloch . . .; and therefore, did not produce these records to plaintiffs in this present litigation.

DE-66-1 n.7; *see also* DE-66 at 11.

This response is flawed in several important respects.

First, the FBI offered no declaration or other evidentiary support that the Sarasota family case file obtained by the Meese Commission actually consists of the same records that are under review in the case before Judge Zloch. One would reasonably expect that the particular file referred to by the Meese Commission Report is a discrete file capable of ready identification, yet the FBI offers not even that minimum level of support for its position. Accordingly, summary judgment as to Bulldog request number 1 must be denied for that reason alone. But there is more.

Chapter V of the Meese Commission Report is titled “New Information Related To The 9/11 Attacks.” DE-1-2 at 17 & DE-28-1 ¶ 3. A subsection called “The Sarasota Family,” stated that the Bulldog published an article about an FBI investigation of a Saudi family that abruptly left their luxury home in the Prestancia subdivision of Sarasota two weeks before the 9/11 attacks on the United States, that Mohamed Atta and other hijackers had visited the subdivision, but that the FBI never reported this investigation to Congress. DE-1-2 at 22. The Report also

stated that an FBI memo from April 16, 2002 (DE-1-3), had confirmed that the family had “many connections” to “individuals associated with the terrorist attacks on 9/11/2001.” DE-1-2 at 22.

In that litigation, the Bulldog requested:

[A] search of the FBI’s indices to the Central Records System and the filings system of the bureau’s Tampa field office for information pertaining to an anti-terrorism investigation regarding activities at the residence at 4224 Escondito Circle, in the Prestancia development near Sarasota, Florida prior to 9/11/2001. The activities involve apparent visits to that address by some of the deceased 9/11 hijackers.

The FBI investigation began in the fall of 2001 and continued into at least 2003. Local FBI officials have said the investigation is closed.

I request copies of all FBI 302 reports about the matter, as well as all related investigative reports or FBI memos or correspondence – including the FBI’s findings and conclusions as to what happened at that address. Likewise, I request copies of reports, information or summaries obtained about the matter from any foreign law enforcement organization or intelligence service, to include Saudi intelligence.

Broward Bulldog, Inc. v. U.S. Department of Justice, No. 0:12-cv-61735 (DE-1-17 at 2-3).

By contrast, the request at issue in this case seeks the Sarasota family “case file” that had been “obtained” by the Meese Commission. DE-1-2 at 23. An agency cannot under FOIA avoid its disclosure obligation simply by “deeming” the requested records to be the same as records that are the subject of a prior request.

The Meese Report attacked the significance of the April 16, 2002, memo. DE-1-2 at 23. It said: “The FBI told the [Meese] Commission that the FBI Electronic Communication (EC) on which the [*Miami Herald*] news article was based [the April 16, 2002, FBI memo] was ‘poorly written’ and wholly unsubstantiated. When questioned later by others in the FBI, the special agent who wrote the EC was unable to provide any basis for the content of the document or explain why he wrote it as he did.” DE-1-2 at 23

Given the gravity of the April, 2002 memo, it seems likely that refutation of its conclusions would include back up and not just conclusory rejection. Given the Meese Commission’s conclusion about the April 2002 memo quoted above, the Sarasota case file

described in the Report is highly impactful. It is exactly the type of material the Bulldog's request sought and that FOIA is meant to make available.

The April 16, 2002, FBI memo reached the same conclusions that the Bulldog had reached by interviewing individuals in Sarasota with first hand-knowledge of the FBI investigation and first-hand-knowledge of the Saudi family that had been the subject of the investigation – Abdulaziz and Anoud al-Hijji, and the parents of Anoud, Esam Ghazzawi and Debra Browning. DE-28-1 ¶¶ 5-7 & DE-27 Ex. A ¶¶ 27-36. The Bulldog's interviews had shown that the al-Hijjis did, indeed, have many connections to the 9/11 hijackers, exactly as the April 16, 2002, FBI memo found. DE-28-1 Ex. A ¶ 29. The April 16, 2002, FBI memo also provided additional, highly-specific information regarding the nature of the connections – that one of the al-Hijji family members “was a flight student at Huffman Aviation” which was where several of the terrorist had trained to fly the plane they would use to destroy the World Trade Center. DE-1-3 at 2-3. In short, the April 16, 2002, memo was well written and well substantiated, not poorly written and wholly unsubstantiated, as the Meese Commission was told.

In addition, Florida Department of Law Enforcement records (DE-28-1 Ex. A) released to the Bulldog substantiate that Abdulaziz al-Hijji claimed that Osama bin Laden was his hero and that he planned to become a freedom fighter for the Mujahedin in Afghanistan.

That would support the Bulldog's strong suspicion and former Sen. Bob Graham's strong suspicion, DE-28-1 & Ex. C, that the Saudi government had a network of agents in the United States which supported the 9/11 attacks and also that the U.S. government decided not to investigate this network or prosecute the individuals who were a part of that network.

Equally important, this response by the FBI prevents both the Court and the Bulldog from determining whether the records obtained by the Meese Commission are the same records as those that are the subject of the case before Judge Zloch. The Meese Commission may have been provided 10, 100, 1000, or 10,000 pages of material as the Sarasota case file. The FBI, so far, has not even identified the volume of the Sarasota case file obtained by the Meese Commission. In the case before Judge Zloch, the FBI initially claimed that it had been unable to find any responsive records. DE-28-1 ¶ 18. Then, months later, under pressure from Sen. Bob

Graham, who the FBI had shown responsive records, the FBI “found” 35 pages of responsive records, including the April 16, 2002, memo. DE-28-1 ¶ 21-22. That memo then persuaded Judge Zloch to order the FBI on April 4, 2014, to conduct a more thorough search for additional responsive records, DE-28-1 ¶¶ 23-24, and, more than a year later, the FBI found another 46 pages of records responsive to the Bulldog’s request. DE-28-1 ¶¶ 25. The FBI’s further search also yielded 80,266 pages of classified records in its Tampa Field Office, bearing the PENTTBOMB case number, DE-28-1 ¶ 80,266, which Judge Zloch has been reviewing since May 1, 2014. DE-28-1 ¶ 27. Did the Meese Commission obtain the 35 pages, the additional 46 pages, or the 80,266 pages, or a file which is altogether different from these records? The FBI provides the Court with no indication and that defeats the operation of FOIA.

In addition, no determination has been by Judge Zloch yet regarding which records are responsive to the Bulldog’s request that he is reviewing, the FBI’s summary judgment motion in that case has been denied, that case is not set for trial, and no pretrial deadlines are now in place.⁸

The Bulldog is entitled to see the records that the Meese Commission obtained whether the records are the same as the records produced in the prior lawsuit or not. FOIA contains no exemption to its disclosure requirements for records previously produced in a different context and federal record-keeping law makes clear that agencies may not treat their records as exempt merely because they are copies of records maintained elsewhere. Agencies are not allowed to limit the records on the basis of their own non-statutory decisions.⁹ The Bulldog is entitled to the records the Meese Commission obtained with respect to the FBI’s Sarasota investigation. The FBI’s assertion that it “deems” the Sarasota case file to be the same records as those that are the subject of the prior litigation does not mean that they are, in fact, the same records.

⁸ The Bulldog asked Judge Zloch to hold a status conference in that case on April 23, 2015, DE-73, the FBI opposed the request, DE-74, and Judge Zloch denied the request on March 22, 2016, DE-76, more than a year ago.

⁹ See, e.g., *Miccosukee Tribe of Indians v. United States*, 516 F.3d 1235, 1253–55 (11th Cir. 2008) (reversing summary judgment) (reversing summary judgment) (agency could not refuse to produce documents requested on grounds that the requestor “already had them”).

Significantly, the FBI's March 24, 2017, production of document shows that the Meese Commission apparently obtained parts of the FBI's Sarasota case file that had not previously been produced in the case before Judge Zloch. Those documents make reference to the al-Hijji family and the FBI's investigation in Sarasota, but were not produced to the Bulldog in response to the FOIA request that is the subject of that litigation.

Finally, production of the Sarasota case file obtained by the Meese Commission would impose no burden on the FBI to produce it if, in fact, those records previously have been reviewed, redacted for exempt material, and produced to the Bulldog. Indeed, if those documents had been previously produced, the FBI simply could have identified them by production number. The Bureau is attempting to further obfuscate and delay, and there is no logical or statutory support for its position.

For all these reasons, the FBI has failed to show that it is entitled to an order allowing it to withhold any of the Sarasota case file that the Meese Commission obtained.

II.

The FBI has Failed to Show that it has Made an Adequate Search

The FBI bears the burden of showing "beyond a material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents."¹⁰ It must show that it "made a 'good faith effort to conduct a search using methods which can be reasonably expected to produce the information requested.'"¹¹ To meet this burden, the FBI must "demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'"¹² Reasonableness depends on the circumstances of the case.¹³

¹⁰ *Miccouskee Tribe of Indians*, 516 F.3d at 1248 (citing *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir. 1990), *rev'd on other grounds*, *U.S. Dep't of State v. Ray*, 502 U.S. 164 (1991)).

¹¹ *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30 (D.D.C. 2016) (quoting *DiBacco*, 795 F.3d at 188 (internal alterations omitted))

¹² *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990))

¹³ *Truitt*, 897 F.2d at 542.

An agency can prove adequacy of its search by providing a “reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched” as is necessary to afford a FOIA requester the opportunity to challenge the adequacy of the search and to allow the court to determine if the search was adequate in order to grant summary judgment.¹⁴

However, where “a review of the record raises substantial doubt, particularly in view of ‘well defined requests and positive indications of overlooked materials,’” summary judgment should be denied on the basis of the agency’s failure to conduct an adequate search.¹⁵ “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.”¹⁶

The FBI undertook processing of the FOIA requests in this case with a black cloud already hanging over its handling of FOIA requests. The agency just one year earlier had been severely sanctioned for misleading federal courts through declarations filed by David M. Hardy, the section chief of the FBI’s offensively-named Record Information Dissemination Section (referred to by the FBI by its acronym “RIDS”). In *Islamic Shura Council v. FBI*, 278 F.R.D. 538 (C.D. Cal. 2011) (Order Granting Plaintiffs’ Motion for Sanctions) (DE-134), *vacated*, 757 F.3d 870 (9th Cir. 2014), a FOIA case, Judge Cormac J. Carney, after reviewing declarations by Hardy, wrote:

The Government’s in camera submission revealed a very disturbing issue: the Government had provided blatantly false and misleading information to the Court. The Government represented in pleadings, declarations, and briefs — most notably, in its summary judgment papers — that it found only a limited number of

¹⁴ *Miccosukee Tribe*, 516 F.3d at 1247.

¹⁵ *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (quoting *Valencia–Lucena*, 180 F.3d at 326 (internal quotation marks omitted)); *see also Miccosukee Tribe*, 516 F.3d at 1251–52 (finding that inconsistencies in testimony from agency employees regarding records search issues rendered the district court’s summary judgment ruling inappropriate).

¹⁶ *Ray*, 908 F.2d at 1558.

responsive documents to Plaintiffs' FOIA request. However, Hardy's second declaration stated, for the first time, that the Government withheld "responsive information" from the Plaintiffs. (Decl. of David M. Hardy, May 1, 2009 ("Second Hardy Decl.") ¶¶ 1, 15.) Contrary to its previous representations, the Government revealed that it located a significant number of responsive documents, which the Government asserted it withheld to avoid compromising national security.

Id. at 540-41. The FBI's false representations in that case were based on an initial declaration submitted by Hardy, which later was admitted to be false in a his second declaration. *Id.* at 545. Judge Cormac ruled "the objective facts" showed that the "Government presented false information to the Court — not negligently or without reasonable inquiry — but with the Government's full knowledge, over the course of two years in litigating this action." *Id.* He added: "The fact that the Government knowingly and deliberately provided misinformation to the Court cannot be recast simply as a 'misunderstanding' or a legal disagreement." *Id.* "The Government's deception" was "legally untenable" and, Judge Cormac noted that "presenting false information to the Court is antithetical to the very structure of FOIA." *Id.* at 546. The Ninth Circuit vacated the sanctions imposed, but not because it disagreed with these rulings. It held sanctions could not be imposed on the Government for its actions solely because the sanctions motion had been presented after the district court had ruled on the merits of the FOIA matter, thus preventing the FBI from exercising Rule 11's safe harbor provisions.¹⁷ *Islamic Shura Council*, 757 F.3d at 873.

Having narrowly escaped sanctions in that case just a year before it received the FOIA request that initiated this case, it is surprising that the FBI has taken a similar approach to this case. The same David Hardy from the *Islamic Shura Council* has filed four declarations in this case, DE-17-1, 27-1, 34-1, 66-1, and an assistant, Michael G. Seidel, has filed two, DE-19-1 &

¹⁷ This is not the only time that the FBI has been sharply criticized for its handling of FOIA requests. See *Trentadue v. FBI*, 572 F.3d 794 (10th Cir. 2009) (reciting multiple orders requiring a more thorough search); *Schoenman v. FBI*, 604 F. Supp. 2d 174, 195 (D.D.C. 2009) (*Vaughn* index was "utterly inadequate"); *Jett v. FBI*, 139 F. Supp. 3d 352, 368 (D.D.C. 2015) ("FBI could not put its head in the sand"), *reconsideration denied*, 14-CV-00276 (APM), 2016 WL 107912 (D.D.C. Jan. 8, 2016); *Negley v. FBI*, 658 F. Supp. 2d 50, 60-61 (D.D.C. 2009) ("the search was not reasonably calculated to turn up all responsive files").

DE-52-1. The declarations also contain blatantly misleading statements and raise numerous factual issues with respect to whether the FBI has conducted an adequate search for and review of records responsive to the Bulldog's requests.

Hardy filed his first declaration on November 21, 2016, in support of a motion to extend the time for dispositive motions by 30 days, through December 30, 2016. DE-17-1. Hardy attested that 1,166 pages of potentially responsive records had been found, DE-17-1 ¶ 19, and stated that if "the Court grants the extension, the FBI anticipates making a final release of documents on December 13, 2016 and will provide the Court with its pretrial motion on or before December 29, 2016." DE-17-1 ¶ 4. In reliance on this representation, the Bulldog did not oppose the extension and the Court granted it. DE-18.

But just 29 days later, on December 20, Hardy's assistant, Seidel, filed his first declaration explaining that Hardy was sadly mistaken both in anticipating that the FBI would make a final release of documents on December 13, 2016 and in promising that the FBI would file a dispositive motion on December 29, 2016. DE-19-1. Although as of December 20, 2016, the FBI had had more than one year and nine months to process the Bulldog's first FOIA request, Seidel now asserted that an additional 90 days beyond the original 30-day extension was necessary. DE-19-1. Seidel offered no explanation as to why his boss could not have anticipated that this amount of time would be required. It suggested to the Bulldog that someone within the FBI or some other governmental agency had stepped in front of the orderly process being carried out by the FBI's FOIA professionals about to release the requested records. In fact, Seidel now was asserting, for the first time, that the FBI had to consult with approximately 20 other governmental agencies before the records could be released. This raised a red flag regarding how the FBI's search and review was being conducted. The Bulldog objected to the requested extension, DE-21, and at a hearing on December 22, 2016, DE-22, the Court denied the extension. DE-23.

The FBI then filed on December 30, 2016, a partial summary judgment motion seeking to justify its redaction of information from the initial 220 pages it had produced on October 28, 2016, in response to the Bulldog's second FOIA request. DE-27. In support of that motion,

Hardy's second declaration, dated December 30, 2016, DE-27-1, recited extensive boilerplate descriptions of the FBI's records systems, but then, remarkably, said these systems were not searched because the records requested by the Bulldog "would not reasonably be expected to be located in the [Central Records System] via the index search methodology." DE-27-1 ¶ 28. Hardy offered no explanation for why this would be true. This raised another red flag.

Hardy stated that, rather than search the FBI's Central Records System, "RIDS contacted the FBI Director's Office ("DO") as it reasonably judged the DO to be the entity within the FBI most likely to posses[s] the records sought by Plaintiffs." DE-17-1 ¶28. This raised a red flag regarding how the FBI was conducting its search for requested records. RIDS, the FBI's specialized section for maintaining and handling FBI records, apparently elected to defer to, and rely exclusively on, the FBI Director's Office to respond to the Bulldog's request. This raised a red flag.

It also appeared that the Director of the FBI elected to keep the Meese Commission records out of the FBI's Central Records System. Another red flag. Hardy provided no explanation for why these records would not be maintained within the FBI's elaborate, searchable databases. Hardy's second declaration next stated: "DO was able to locate the responsive records pertaining to the 9/11 Commission Report and provided them to RIDS for processing." DE-27-1 ¶ 28. Hardy's second declaration attested that records responsive to the Bulldog's second FOIA request "were processed to achieve maximum disclosure consistent with the access provisions of the FOIA" and that "[n]o reasonably segregable, nonexempt portions have been withheld from the plaintiffs." DE-27-1 ¶ 29.

But Hardy then filed a third declaration on January 31, 2017, DE-34-1, advising the Court that it unredacted, on January 27, 2017, the names of two FBI agents who briefed the Meese Commission; that it unredacted the salaries of the Meese Commissioners and staff, as well as certain other information; and that it had produced additional records that it had not previously found. DE-34 & 35. In essence, Hardy retracted his second declaration and confessed that it was wrong. Hardy, through this third declaration, admitted that the FBI failed to produce responsive, non-exempt records, explaining that the "records were not initially

identified because the Director's Office had inadvertently mistaken these records as duplicates and did not forward the records to Record/Information Dissemination Section ("RIDS") for processing." DE-34-1 at 8. That Hardy now was blaming the Director's Office for his error sent up yet a further red flag. This gave every indication that the Director's Office, not the FOIA bureaucratic professionals, had taken charge of this case.

On February 22, 2016, Seidel filed his second declaration, stating the FBI finally released records responsive to the Bulldog's first FOIA request. He stated: "This release will conclude its processing of the final remaining FOIA request." DE-52-1 ¶ 7. He explained that the FBI completed a review of 745 responsive pages on February 13, 2017 (releasing 190 pages partially redacted), DE-68-1 Ex. E, and of 61 responsive pages on February 22, 2017 (releasing 52 partially redacted pages), DE-68-1 Ex. F. With these releases, the FBI provided lists of documents which had been withheld in their entirety and cited the FOIA exemptions on which it relied for each document. The lists did not, however, identify the documents by Bates number. The FBI also provided what it described as a *Vaughn* index on February 23, 2017. It provided Bates numbers assigned to each document, but did not cross-index the Bates numbers to page numbers assigned to each record withheld in its entirety, making it impossible to determine which exemptions were being relied on to withhold hundreds of pages of records which the FBI conceded were responsive to the Bulldog's first request.

Trial remained set for March 6, 2017, and the Calendar Call was set for February 28, 2017 – just six days following the Bulldog's receipt of the confusing production of records and claims of exemptions. But the Bulldog had no wish to delay this matter further, particularly in light of the fact that the 9/11 families' lawsuit against the Kingdom of Saudi Arabia would be proceeding soon New York. The Bulldog's need for records of the FBI's investigation of apparent Saudi conspirators with the 9/11 hijackers was at a zenith.

So, the Bulldog proceeded with a rapid review of documents produced and the confusing assertion of exemptions and quickly found that many records had not been identified on the *Vaughn* index the FBI provided. For example, the FBI failed to produce the Sarasota case file or claim it to be exempt. It had not produced staff and draft copies of the Meese Commission's

report or claimed them to be exempt. It failed to produce any Meese Commission records during the period from December 2, 2014 through March 25, 2015. It failed to produce or failed to exemption for records relating to trips to Beijing, Manila, Singapore and Madrid. The Bulldog's counsel alerted the FBI to these and other obvious errors and omissions in the document production and asked counsel for the FBI for an explanation. DE-61 at 2.

The FBI then used its own errors and delay and confusion it had created to ask at the February 28, 2017, Calendar Call for an indefinite postponement of the trial and an opportunity to file a further summary judgment motion on March 24, 2017, both of which the Court granted, DE-60, but also observed that it is "distressing to see the lengths to which a private litigant must go in order to obtain documents under FOIA from the Government. It's distressing to see the length of time that has elapsed, from the time these requests were presented to the time the agency turned over anything. It's shocking, quite frankly." Exhibit 4 (2/28/2017 Hearing Tr.) at 13. Further, the Court found that the FBI did not "need years to produce these records. It's shameful." Exhibit 4 (2/28/2017 Hearing Tr.) at 14.

Nevertheless, on March 13, 2017, the FBI filed a motion to extend its time for its already very late summary judgment motion beyond March 24, 2017, contending now that:

[O]n March 7, 2017, the Records and Information Dissemination Section, with additional information received from the FBI Director's Office, located four additional Memoranda for the Record it had not previously found. These records are currently being processed by the FBI for release to Plaintiffs as soon as possible.

DE-65 at 4. More disturbing than that, the FBI stated on the same day it filed this motion, one day prior to its March 14, 2017, deadline to move for summary judgment, that "the FBI Directors' Office identified certain hard copy records held in storage, which had not previously been identified or searched, and which it believes may include material responsive to Plaintiffs' requests." DE-65 at 4. This red flag suggested that FBI Director James Comey intentionally concealed responsive records. The Bulldog also opposed this request, pointing out that the FBI advised it that it believed the recently retrieved documents had been destroyed. DE-62. The Court denied the request. DE-63.

The FBI filed its summary judgment motion regarding Count 1 the following day, but it conceded therein that the FBI's search for, and production of, documents remained incomplete even then. DE-66 at 11-12. Recently, the FBI announced that it searched its Central Records System using its "Sentinel" system and, notwithstanding its earlier representations that it was unlikely that Meese Commission records would be found through that system, the FBI ultimately found four responsive "Memoranda for the Record" as well as a number of records claimed to be transitory but which had been held in storage.¹⁸ DE-66 at 12.

Hardy then filed his fourth declaration in support of this motion. DE-66-1. This one, 31 pages in length, again provides extensive boilerplate and points an accusatory finger at the Director's Office. It states that on "March 7, 2017, DO provided RIDS with additional leads for possible responsive records. Through these leads, RIDS located 4 additional responsive MFRs (totaling 11 pages) within the FBI's Sentinel case management system." DE-66-1 at 7. The declaration provided no explanation regarding why RIDS needed "leads" from the FBI Director to search the system that RIDS earlier had concluded would not have the responsive records. It also does not explain how any of the searching by the Director or of the Sentinel system was done (no search terms are provided), or why it has taken so long to find responsive records.

To cap all of this off, when the FBI produced its last batch of documents, they turned out to be documents of the greatest relevance to the Bulldog's concerns. As noted, one of the documents showed that a source told the FBI in 2004 that Abdulaziz al-Hijji knew some of the

¹⁸ The fact that the records have been stored for more than a year strongly suggests that they are not transitory records at all. Federal records are broadly denied by 44 U.S.C. § 3301 to include all paper "made or received by an agency . . . and preserved . . . because of the informational value of the data in them." Pursuant to 36 CFR § 1220.30, each agency head can "facilitate the segregation and destruction of records of temporary value," and 36 CFR § 1224.10 directs agencies to schedule documents of temporary value for destruction in accordance with set schedules. The National Archives Records Administrations provides in its General Records Schedule 23/7 that "transitory files" are: "Records of short-term (180 days or less) interest, including in electronic form (e.g., email messages), which have minimal or no documentary or evidential value." Hardy's fourth declaration states records he identifies as transitory were to be kept through April 2016, DE-66-1 at 7 n. 8, a full year after the Meese Commission completed its work, and that they, in fact, have been maintained in storage for two years at this point.

9/11 hijackers and planned to become a Mujahedin fighter in Afghanistan himself. Ex. 3 at BB 1576-77. Adding insult to the injury of this very late production, the FBI heavily redacted this document notwithstanding that the Florida Department of Law Enforcement released to the Bulldog on December 21, 2011, its own largely *unredacted* record of this source's statement to the FBI, showing that the source was Wissam Hammoud and that Abdulaziz al-Hijji was the target of the investigation. DE-28-1 Ex. A. Another of the documents produced yesterday, March 27, 2016, shows that the FBI still had not interviewed al-Hijji three years after he fled the country, but the FBI also redacted al-Hijji's name in a feeble attempt to conceal its own failing. Ex. 3 at BB 1576-78. It hardly seems a coincidence that these critical document had been withheld until after the trial had been scheduled to proceed and just one day before the Bulldog's deadline came for opposing the FBI's summary judgment motion.

Based on the bizarre and highly unusual facts in this case over the production of records regarding the FBI's activities of the highest national importance, the Court should deny the FBI's motion because it simply has not shown that it has conducted an adequate search.

The facts here create an appearance that the Director of the FBI maintained the Meese Commission records in his office; that he did not provide those records to the FBI personnel responsible for processing FOIA requests in a timely fashion; and that when he finally did start to produce them, he made numerous mistakes and omitted critical documents, significantly slowing the production of the documents and creating serious questions regarding the completeness of the production. Many records still appear to be missing.

No declaration has been filed by the FBI Director's office to explain these disturbing facts, creating the specter that the Bulldog's requests – which specifically were designed to determine whether the FBI found evidence of Saudi government complicity in the 9/11 attacks but failed to investigate it by choice or negligence – have been thwarted by the Director's delay and creation of extensive confusion. The Director's actions appear, in fact, to have been designed either to punish the Bulldog for shining a light on the FBI's work through its initial FOIA action, which exposed the FBI's public statements concerning its Sarasota investigation as outright falsehoods, or to interfere with its continuing investigation, or both.

III.

Disputed Facts Remain with Respect to
Redaction and Withholding of Specific Responsive Records

The FBI bears the burden of justifying its exemption assertions, whether it withholds entire records or portions of records.¹⁹ For many of the exemptions asserted in this case, the public's interest in obtaining the documents is an appropriate consideration. An agency should submit a sufficiently detailed affidavit "to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding."²⁰ "[A]n affidavit that contains merely a 'categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."²¹ Or, as another court stated, "the affidavits must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping."²² These requirements are consistent with the agency's obligation to create "as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure."²³ The documents the Bulldog contests as unlawfully redacted or entirely withheld are as follows:

A. Document 1: The Sarasota Family Case File (No Bates Numbers)

For the reasons stated in Point I, summary judgment should be denied with respect to records of the Sarasota family case file that the Meese Commission obtained.

¹⁹ See *News-Press*, 489 F.3d at 1191 (citing *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)).

²⁰ *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 29 (D.C. Cir. 1998) (quoting *King*, 830 F.2d at 218).

²¹ *Id.* at 30 (citations omitted).

²² *Hayden v. National Sec. Agency*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)

²³ *Id.* at 1384; *Campbell*, 164 F.3d at 30 (finding a government affidavit insufficient where "the declaration fail[ed] to draw any connection between the documents at issue and the general standards that govern the national security exemption.").

B. Document 2: The Sarasota Briefing (BB 1-4)

On February 27, 2017, the Court denied the FBI's requests for summary judgment on many of the exemptions asserted in the April 30, 2014 Sarasota briefing memorandum (DE-27-2) ("Sarasota Briefing") and specifically noted the FBI's selective redaction of names for alleged privacy purposes. DE-36 at 36. However, in the FBI's rereleased document filed on March 15, 2017, it refuses to remove certain redactions – only releasing a few. DE-68-1 at 22-25. The balancing test applicable to privacy related exemptions characteristically tips in favor of disclosure when information the government withholds is already in the public domain and the requester demonstrates public interest served by disclosure.²⁴

The FBI's latest release of Document 2 reveals an entirely inconsistent redaction theme that completely undercuts the FBI's purported justifications for asserting privacy exemptions, based on 5 U.S.C. § 552(b)(6)²⁵ and (b)(7)(c).²⁶ Despite the FBI releasing the al-Hijji name in one place, the FBI claims that, through careful adherence to its "stringent" requirements, it cannot release it elsewhere even though it is obvious where the al-Hijji name is used. The FBI now says that it "only protected information that is not currently publically available and would

²⁴ See *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082 (D.C. Cir. 2014); see also *Gawker Media, LLC v. FBI*, 145 F. Supp. 3d 1100, 1107 (M.D. Fla. 2015); *Miccosukee Tribe of Indians v. U.S. Dep't of Justice*, 103 F. Supp. 3d 1314, 1327 (S.D. Fla. 2015) (Altonaga, J.) ("Under FOIA's "public domain" exception, an agency may not rely on an otherwise valid [FOIA] exemption to justify withholding information that is already in the public domain") (citations omitted).

²⁵ Rather than a blanket exemption for personnel files, Exemption 6 aims to "protect individuals from injury and embarrassment that can result from the unnecessary disclosure of personal information." *News-Press*, 489 F.3d at 1196. The Government's burden under exemption 6 is considered an "onerous one." *Id.* Additionally, courts have recognized that the balance tilts "emphatically in favor of disclosure." *Id.*

²⁶ *Id.* at 1187 (because agencies are given "awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility."); *Campbell*, 164 F.3d at 33 ("The record suggests that the FBI made an abstract attempt to identify possible public interests in disclosure and accorded these interests surprisingly little weight. This attitude is troubling given the presumption of openness inherent in FOIA"); *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79 (D.D.C. 2015) (government should explain why disclosure of agent's name would cause embarrassment, undue harassment).

seriously infringe on individuals' personal privacy. While appearing inconsistent, it is consistent with the FBI's adherence to its Exemption 6/7C balancing test." DE-66-1 at 22. This ignores that the FBI itself published press releases in response to the Bulldog's story about the al-Hijji and Ghazzawi investigation, DE-51-2 & 51-3; that the Florida Department of Law Enforcement released records in 2011 showing the al-Hijjis were the target of an FBI investigation, DE-28-1 Ex. A; that Judge Zloch used the al-Hijji name throughout his ruling, DE-58 at 4; and, that the FBI's release of records yesterday also names al-Hijji. Ex. 3 BB 1577. As the Court noted in its prior summary judgment ruling, "[o]ne can have no privacy interest in information that is already in the public domain."²⁷

The FBI argues that release of names in some contexts would be harmless (i.e., the title of the report and the outline of Sen. Graham's inquiries) but that, in others, release would result in "defamation," among other meritless contentions. Specifically, Hardy states that

[u]pon further review, the FBI determined that it had *inadvertently*²⁸ protected the Briefing title ("Al-Hijji Family") and the discussion of the "Al-Hijji family" in the FBI's review of Dan Christensen's article on Bates page Broward Bulldog- [1 – 4]. This information is being discussed in the context of a public article outside the FBI's control. There is not additional personal privacy instructions that can feasibly occur by releasing this information.

DE 66-1 (emphasis added). Not only is the assertion factually dubious, but the question of whether the inquiries concerning the al-Hijjis were "outside the FBI's control" is legally irrelevant to this analysis. First, the FBI – through Agent Sheffield – instigated the original investigation of the al-Hijjis, which ultimately prompted the inquiries from Sen. Graham, the Bulldog and various others. Second, Document 2 centers around the al-Hijji family investigation after 9/11. Despite the scattered redactions, it is plainly obvious to anyone reading the document for the first time that the al-Hijjis were once the subject of an FBI investigation due to allegations of their affiliations with the 9/11 hijackers. The FBI's references to the al-Hijjis in the context of

²⁷ DE-58 at 15, quoting *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 230–31 (D.D.C. 2012).

²⁸ See *infra* § III.B.

exonerating them of wrongdoing would logically help them, rather than harm them – that is, unless the redactions conceal the FBI’s lackluster efforts to follow up on the investigative lead, leaving the investigation unresolved. Even in this scenario, the agency cannot hide behind an inapplicable exemption to conceal its own incompetence and failure to follow leads.

Furthermore, Hardy contradicts himself where he states the following:

Judge Altonaga calls into question the FBI’s redaction of two investigators on Bates page Broward Bulldog-5 when the FBI has decided to release a third. Again, while seemingly inconsistent, this is additional evidence of the FBI’s adherence to a stringent 6/7C balancing test. The FBI Supervisory Special Agent (“SSA”) released on this page, SSA Jackie Maguire, was acknowledged as being involved in the 9/11 Commission Report within the FBI’s public report. Protecting her name here would not comport with what the FBI found to already be in the public realm.

DE- 66-1 ¶ 43 n. 32. Here, despite his assertions that the release of identities by third parties has no bearing on what the FBI releases, Hardy considered what information appears in the “public realm” when he eventually released the names of Agents Jacqueline Maguire and Elizabeth Callahan. By the FBI’s own tacit admission, information that is already in the “public realm” cannot be withheld under the guise of a privacy based FOIA exemption.

Another redaction of Document 2, BB 3, under exemptions 6, 7(C) and 7(D) is the name of Larry Berberich – a neighbor of the al-Hijjis in the Prestancia subdivision. Though his name is redacted, Berberich is described in Document 2 as a resident of the gated community quoted in the Sept. 8, 2011 Bulldog article as saying he had a “gut feeling” that the al-Hijjis had something to do with the attacks. Berberich is the only person identified that way in the article.

For this redaction, the Court granted the FBI’s request for summary judgment to protect Berberich’s name on the basis of exemption 7(D), which protects confidential source information under an implied assurance of confidentiality. DE-58 at 19. Hardy’s boilerplate affidavits erroneously claim that sources – including Berberich – were given assurances of confidentiality. In fact, the opposite is true. Berberich, like many of the witnesses who have talked with Dan Christensen, wants the public to know the truth.

On January 20, 2013, Berberich executed an affidavit detailing his knowledge regarding

the al-Hijji's mysterious exit from 4224 Escondito Circle and the resulting investigation. DE-29-2. Berberich's name is also publicly displayed throughout 2004 FDLE documents outlining "suspicious activity in Sarasota County." Finally, and perhaps most significantly, approximately one month before this filing, counsel for the Bulldog confirmed with Berberich that he was ready, willing and able to testify at trial for this case, regarding his personal observations and knowledge of the al-Hijji investigation.

An agency is not afforded a presumption that all sources supplying information to the FBI are confidential sources.²⁹ The FBI can only deem a source confidential "if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes."³⁰

The FBI also stands by its redactions to BB 2, at the fifth paragraph, beginning: "In April 2004, FBI agents" DE-68-1. The FBI asserts the same exemptions as did for Berberich – 6, 7(C), and 7(D). However, the FDLE has already released the information that this redaction likely conceals through two 2004 reports that outline information regarding Abdul al-Hijji's ties to Adnan El Shukrijumah, as well as interviews with Wissam Hammoud and Larry Berberich concerning Abdul al-Hijji. FBI Special Agent Martinez and detective Michael (a.k.a. "Mike") Otis are referenced throughout these documents, and detective Otis is noted as the author of one of the reports. It is a mystery why the FBI has withheld this information – some of which solely discusses Detective Otis, or the FDLE's efforts – while the FDLE was perfectly fine releasing most of the interview report content. DE-28-1 Ex. A.

Exemption 7(E) is the only other prominently cited exemption in Document 2 besides the privacy exemptions. The FBI invokes it seven times. DE-58 at 21. The *Vaughn* index and Hardy affidavits merely include conclusory, boilerplate summaries of the exemption and fail to discuss the application of the exemption in these particular circumstances. Other than accepting the agency's summary conclusion on its face or reviewing the document itself, the Court has no

²⁹ *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 180–81 (1993).

³⁰ *Id.* at 174.

basis to determine, as it must under Exemption 7(E), whether (1) the information was compiled for law enforcement purposes, and (2) release of the information could reasonably be expected to risk circumvention of the law.³¹

Other redactions in the Sarasota Briefing similarly seem to serve none of the interests protected by cited exemptions. For these reasons, the FBI's paltry new arguments in support of the privacy exemptions are insufficient when weighed against the overwhelming importance of ensuring our federal government adequately conducts investigations into credible allegations of suspicious affiliations with 9/11 terrorists.

C. Document 3: Additional Evidence – Guantanamo Bay (BB 5-6)

Document 3 concerns a briefing of Commissioner Hoffman discussing the agency's investigative efforts in preparation for trials in Guantanamo Bay, Cuba. In this two-page document, the FBI invokes Exemptions 1, 3, 6, 7(C) and 7(E). DE-68-1 at 26. In its re-released set of Count II documents, the FBI released Agent Maguire's name – which was previously redacted – but inexplicably left the other FBI briefers names redacted.

Regarding Exemptions 6, 7(C), and 7(E), the Bulldog maintains that (1) the fact that one is briefing the Meese Commission does not invoke a recognizable privacy interest; (2) there is significant public interest in understanding" who briefed the Meese Commission; and (3) the Meese Commission report does not redact the names of the FBI agents or 33 other current and former federal government employees. The FBI's selective redaction of the names of only certain agents has not been adequately explained.

As the Court noted in the February 27 Order, the FBI claims asserted "Exemptions 6 and 7(C) to redact the names of a third party who was of investigative interest to the FBI," claiming that the release of the name would cause those third parties embarrassment and harassment. DE-58 at 25. However, "the sentence immediately following the redacted material states: "None of this identifies new participants in the 9/11 attacks but hardens the existing known connections to the plot." (DE-66-1 Exs., Ex. K, 42). Thus, it is unclear why the FBI believes the name should

³¹ *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 90 (D.D.C. 2009).

receive protection on the basis being identified with the investigation could cause embarrassment or harassment to the individual investigated.” DE-58 at 25.

The FBI’s attempt to offer justification for the redaction also eludes logic. In the text boxes of the re-released document, the FBI asserts the following: “Individuals maintain a substantial public interest in not being publically disclosed as being FBI investigative subjects Providing this information is akin to providing access to this third party’s law enforcement records.” DE-68-1 at 26. First, most “law enforcement records” constitute public records largely available for inspection by the public so the FBI’s analogy fails. Second, the privacy interests at stake cannot possibly outweigh the public’s interest in learning about the participants of the attacks and how the FBI conducted its investigation.

D. Document 4: Bassem Youssef Interview (BB 7-8)

Document 4 is a two-page briefing by Bassem Youssef (“Youssef Briefing”) – a retired FBI agent. DE-68-1 at 28-29. The document concerns “a source who was in direct contact with Usama Bin Laden (UBL).” DE-68-1 at 28. few pieces of information could be more significant.

The FBI invokes Exemptions 6, 7(C), 7(D), and 7(E), arguing that release of the information would constitute an unwarranted invasion of privacy, disclose techniques and procedures of law enforcement investigations that could reasonably be expected to risk circumvention of the law and disclose the identity of a confidential source. As the Bulldog previously argued, the document does note that the confidential source was died in 1995. In its February 27 Order, the Court correctly notes that death does not extinguish the source’s expectation of confidentiality, where such expectation could extend to reputational and surviving family interests.³² The Bulldog recognizes that, without the benefit of viewing the redacted materials, it cannot judge the applicability of the exemption.

Though, depending on the circumstances of the case and the substantial public interest at play, the death of a confidential source can also bolster the requestor’s argument that the balancing test favors production “as the deceased by definition cannot personally suffer the

³² DE-58 at 29; *Campbell*, 164 F.3d at 33.

privacy-related injuries that may plague the living. A court balancing public interests in disclosure against privacy interests must therefore make a reasonable effort to account for the death of a person on whose behalf the FBI invokes exemption 7(C).”³³

The FBI also stated in its notes on the re-released Youssef Briefing that “[s]uch a release, without express permission from such an individual, or *proof that they are deceased* and no longer maintain a privacy interest, would constitute a serious violation of this individual’s personal privacy.” DE-68-1 at 26 (emphasis added). Furthermore, in other newly re-released documents, the FBI oddly explains that certain 9/11 hijackers, whose names were obviously released, were not redacted “because they died in the attacks.” DE-68-1 at 30-31. It appears that the FBI also considers the death of individuals when evaluating potential privacy concerns – even those of the 9/11 hijackers.

E. Document 5: PENTTBOMB Summary Report (BB 9-12)

Document 5 titled “Updates and Initiatives” and dated October 5, 2012, shows that the FBI found in San Diego a Saudi support network for two of the 9/11 suicide hijackers, Nawaf al-Hazmi and Khalid al-Mihdhar, who with three other terrorists crashed American Airlines Flight 77 into the Pentagon (the “San Diego Briefing”). DC Dec. ¶ 54, DE-68-1 at 30-33. The document is emblazoned with a logo depicting the Twin Towers and the Pentagon.

The unredacted information in the document states that Fahad-al-Thumairy, a Saudi diplomat and imam at the King Fahd Mosque in Los Angeles “immediately assigned an individual to take care of [two soon-to-be-hijackers] during their time in Los Angeles.” DE-27-2 at 47-48. DC Dec. ¶ 56. It also states Omar al-Bayoumi was a salaried employee of the Kingdom of Saudi Arabia who befriended the two hijackers in San Diego. DE-27-2 at 48. DC Dec. ¶ 57. The FBI redacted the name of a third subject, but stated that person “tasked al-Thumairy and al-Bayoumi with assisting the hijackers.” DE-27-2 at 48. DC Dec. ¶ 58.

The 4-page report states the trio:

provided (or directed others to provide) the hijackers with assistance in daily

³³ *Id.*

activities, including procuring living quarters, financial assistance, and assistance in obtaining flight lessons and driver's licenses. [Redacted] seeks to prove these subjects provided such assistance with the knowledge that [the hijackers] were here to commit an act of terrorism." DE-27-2 at 48. DC Dec. ¶ 59. These records show that the FBI had evidence of Saudi government complicity in the 9/11 attacks, but did nothing about it.

DC Dec. ¶ 60. The FBI made extensive redactions to this report in reliance on Exemptions 1, 3, 5, 6, 7(A), 7(C), 7(D), 7(E). In light of this Court's previous summary judgment ruling, the Bulldog focuses primarily on the privacy exemptions asserted – 6 and 7(C). In its notes applied to the re-released drafts of the San Diego Briefing, the FBI simply asserts its conclusory, boilerplate privacy interest language, and notes that deceased individuals and people who have been publicly acknowledged in the "FBI's public report" were not redacted. DE-68-1 at 9-12. The FBI has failed to explain the distinctions between redacted and unredacted names.

The Bulldog incorporates its privacy interest arguments stated in Point III.A. – C. of the Memorandum. The Court should conclude, at a minimum, that factual issues exist with respect to the application of the exemptions and the lack of any detailed affidavits or *Vaughn* indices, depriving the Bulldog of a meaningful opportunity to contest the exemptions.

F. Document 6: Duplicate of BB 1-4 (BB 221-224)

Document 6 purportedly is a duplicate of Document 2. BB 225 -230 includes a Broward Bulldog news article from September 8, 2011, titled "FBI found direct ties between 9/11 hijackers and Saudis living in Florida; Congress kept in dark"; an undated, "UNCLASSIFIED" FBI report, titled "ALLEGED SARASOTA LINK TO 9/11 HIJACKERS" with unredacted portions that claim there was no connection found between the Sarasota family and the 9/11 hijackers; and what the FBI purports are duplicates of the Sarasota Briefing from April 30, 2014. The Bulldog is requesting the complete document, including the purported duplicates to inspect and confirm that they are, in fact, copies. The FBI is not permitted to impose limitations on production of responsive, nonexempt documents that the Bulldog has not expressed.³⁴

³⁴ *Miccosukee Tribe*, 516 F.3d at 1255 (finding that the FOIA obligations do not allow an agency to self-impose limitations as to what responsive documents should be produced).

G. Document 7: FBI – Alleged Sarasota Link (BB 229-230)

Document 7 is an undated FBI report is titled “ALLEGED SARASOTA LINK TO 9/11 HIJACKERS” (the “Link Briefing”). DE-68-1 at 37. The FBI asserts Exemptions 6, 7(C) and 7(D) to support its redactions. The FBI previously produced this document to the Bulldog on March 28, 2013, but did not redact much of the information that it has now required to be redacted, and it also has altered the document in ways that are not shown on the document produced. See Plaintiff’s Response to Defendants’ Statement of Undisputed Facts ¶ 58 & Ex. 1 ¶13 & Exs. B & C. This demonstrates that the manner in which the FBI is producing responsive records in this case is in violation of FOIA. FOIA does not allow the FBI to alter and withhold portions of documents without indicating its basis for doing that, and it does not allow the withholding of documents that already have been publicly released.

This document is of particular significance because it purports to show that the FBI made an attempt to determine shortly after the Bulldog published its first article regarding the FBI’s Sarasota investigation on September 8, 2011, that it asked its Guantanamo Bay team prosecuting persons who were believed to have conspired in the 9/11 attacks in the United States whether they had any evidence that the al-Hijji family also conspired in the 9/11 attacks. The manufacture and production of Exhibits B and C appears to me to be an attempt by the FBI to conceal that the FBI did find evidence in Sarasota of Saudi government support for the 9/11 attacks on the United States, but did not further investigation that evidence either due to negligence or wrongdoing.

H. Document 8: Overview (BB 612-614)

The FBI titled this April 23, 2014 briefing report, “911 Investigation.” Ex. “A.” Agent Maguire and two other agents with redacted names briefed the Meese Commission on general background facts pertaining to September 11, 2001 and Al Qaeda’s “Holy War” against the United States. The FBI asserts Exemptions 1, 3, 5, 6, 7(C), and 7(D). The Bulldog seeks the redacted information due to the extraordinary public interest in 9/11. Now that after more than 15 years have passed since the terrorist attacks, any purported privacy or security exemptions asserted cannot outweigh the importance of informing the public of the truth.

I. Document 9: Counterterrorism Division (BB 657-658)

This March 11, 2014 briefing report is titled “Overview of the Counterterrorism Division (March 11th 2:15—4:00 pm). It includes more of the FBI briefer’s unredacted names than other reports produced. This further underscores the FBI’s lack of consistent redactions throughout this case. The FBI asserts Exemptions 5, 6, 7(C) and 7(E), while the NSA asserts Exemption 3 to redact information in the “Briefers” line at the top of the page. The Bulldog contests the redactions and hereby incorporates by reference arguments presented in Points III.A.- C.

J. Document 10: PENTTBOMB Investigation (BB 672-674)

The Bulldog stresses the importance of this March 31, 2014 briefing report and its direct relevance to the Bulldog’s investigative journalism. It is noted near the top of the heavily redacted³⁵ document that briefing slides were presented and unredacted headers are titled, “Requests for Information” and “Penttbomb Investigation.” The FBI asserts the following exemptions to support its redactions: 1, 3, 6, 7(C), (D), and (E). BB 673 is of particular importance because it discusses an individual with suspected ties to the hijackers, the lack of a funding connection to the terrorists, and “a lot of poor reporting surrounding 911 in the beginning” Document 10 also discusses a Joint Terrorism Task Force “San Diego memo” and something that was based on “early, bad FBI reporting” that “alleged a connection to Saudi Arabia.” The Bulldog contests the redactions and incorporates by reference arguments presented in Points III.A.- C.

K. Document 11: 4/23/2014 Briefing (BB 692-696)

Document 11 is a duplicate of Document 8, titled “911 Investigation.” The Bulldog is requesting this document to ensure that it is identical to the produced report.

L. Document 12: 4/30/2014 Overview (BB 702-705)

Document 12 is a duplicate of Document 2. The Bulldog is requesting this document to ensure that it is identical to the produced report.

³⁵ Even the official title of the report has been redacted under the national security related exemptions, b(1) and b(3).

M. Document 13: Anwar al-Aulaqi Briefing (706-709):

Document 13 is about the FBI's investigation of Anwar al-Aulaqi. The FBI asserts several exemptions throughout this document which have no basis in law or fact. For example, the FBI asserts Exemptions 6 and 7(C) for one name in the Briefer section of the document. The FBI, leaves every other name un-redacted. This sort of cherry picking which names to redact, while leaving others un-redacted, is inconsistent and unexplained. Moreover, for at least the first four documents, this Court has already ruled that exemptions such as this one are not applicable.

Exemption 7(E) is also cited repeatedly throughout this document. Exemption 7(E) pertains to information that "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." 5 U.S.C. § 522(b)(7)(E). The Department of Homeland Security itself has expressed that the types of records designed to be protected by Exemption 7(E) include "law enforcement manuals, records pertaining to Watch list,"³⁶ etc. Importantly, techniques or procedures that are generally known to the public, such as wiretapping, are not protected by exemption 7(E).³⁷

Here, exemption 7(E) is used to redact information such as what evidence existed at the time (BB-707) on Aulaqi. However, what evidence the FBI had is not indicative of the technique or procedure used to obtain that evidence; as such, it is evident the FBI is improperly using this exemption.

The FBI also invoked Exemptions 1 and 3. 5 U.S.C. §§ 552(b)(1) & (3). These exemptions are designed to protect information properly classified under an executive order or pursuant to statute. The FBI uses this exemption to redact the name of who alerted Aulaqi that the FBI was on to him and also to redact what it was they were aware of as to Aulaqi. While the Bulldog does not dispute that how they became aware of the information itself is properly

³⁶ See FOIA EXEMPTIONS, available at <https://www.dhs.gov/foia-exemptions>.

³⁷ *Pub. Employees for Env'tl. Responsibility (Peer), Rocky Mountain Chapter v. U.S. E.P.A.*, 978 F. Supp. 955, 962 (D. Colo. 1997).

correctly redacted, it does dispute that what information the FBI had, particularly over 15 years ago, is still protected by any of the exemptions.

Exemption 7(D), which allows for withholding information “that could reasonably be expected to disclose the identity of a confidential source,” is also used to justify redactions. 5 U.S.C. § 522(b)(7)(D). Both times Exemption 7(D) is utilized the FBI asserts the confidentiality was implied (once for an individual and once for a foreign government agency—BB707-708). Courts have rejected “the view that all sources who supply information to the FBI in the course of a criminal investigation are presumed confidential.” *Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995). When determining the circumstances under which the source spoke, courts focus on whether the “particular source spoke with an understanding that the communication would remain confidential.” *U.S. Dep’t of Justice v. Landano*, 508 U.S. 165, 172 (1993). If the person or agency spoke with no understanding that the communication would remain confidential, then Exemption 7(D) should not be asserted. The Court has already determined that the FBI has improperly redacted documents pursuant to Exemption 7(D). Because the FBI is engaging in a redacting names of persons not shown to have believed their communications would remain private, the FBI should be denied summary judgment upholding these redactions.

Last, the FBI asserts Exemption 5, which excludes from disclosure “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5). To successfully invoke this privilege, “the agency must establish ‘what deliberative process is involved, and the role played by the documents in issue in the course of that process.’”³⁸ Moreover, vague and general descriptions of why the redaction is proper as a deliberative process redaction, like the descriptions provided by the FBI to date, without more are insufficient to justify redactions pursuant to Exemption 5. *Id.* Likewise, identification of a very general subject matter covering the exemption, without more, is insufficient. *Id.* In order to uphold a claim of Exemption 5, “a

³⁸ *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79, 90 (D.D.C. 2015) (internal citations omitted).

court must be able to pinpoint an agency decision or policy to which the document contributed.”

Here, the FBI has provided no description of why Exemption 5 was asserted. Broward Bulldog 708, containing Exemption 5, is not on the *Vaughn* index. Without the ability to establish what deliberative process is involved and the role played by the document in the course of that process, summary judgment is improper.

N. Document 14: Draft Summary of 10/24/2014 Briefing (BB 757-758):

The FBI cannot claim that the “9/11 Additional Evidence Briefing” was already produced as BB 5-6 and, therefore, should not be produced in this instance. The Bulldog is allowed to see and determine for itself if the documents are exact replicas of each other, if there are different headings or annotations in one version of the document versus the other, etc. As the Eleventh Circuit has stated, FOIA obligations do not allow an agency to self-impose limitations as to what responsive documents should be produced regardless of whether the documents are voluminous, public, or already in the possession of the requestor.³⁹ If an agency does impose self-limitations, then issues of material fact are raised and summary judgment is precluded.

O. Document 15: Economist Article (BB 759-760):

Document 15 reflects a briefing of the Meese Commission on February 18, 2014. The only un-redacted portion of which makes reference to an Article in the Economist on July 10, 2003 co-authored by John MacGaffin and six others. The FBI appears to claim two exemptions for withholding the majority of BB-759 and all of BB-760.⁴⁰ Exemption is asserted for withholding sections of BB-759 and all of BB-760. Exemption 5 “must be construed as narrowly as is consistent with the efficient operation of the agency. The deliberative process privilege, therefore, protects only those documents that are both predecisional and

³⁹ *Miccosukee Tribe of Indians*, 516 F.3d at 1255.

⁴⁰ The Bulldog is not entirely sure which exemption is being asserted over page BB-650 since the FBI only provided a cover sheet referring to the pages by their internal page numbers and not by the Bates Numbers assigned to them. Nevertheless, the Bulldog is basing its argument under the assumption that BB-650 has been withheld in its entirety according to Exemption 5 as represented by the Fourth Hardy Affidavit, DE-66-1 n13. Of note, the FBI also failed to include these Bates Numbers on the *Vaughn* Index.

deliberative.”⁴¹ To successfully invoke this privilege, “the agency must establish ‘what deliberative process is involved, and the role played by the documents in issue in the course of that process.’”⁴² “The agency must provide sufficient information about its decisionmaking process to establish that the document withheld was actually part of that process.”⁴³ As a general guiding principle, the deliberative nature of a document is frequently determined through the “simple test that factual material must be disclosed but advice and recommendations may be withheld.”⁴⁴ “Thus, while opinions and recommendations contained in a memorandum or other document are protected, ‘a report does not become part of the deliberative process merely because it contains only those facts which the person making the report thinks material. If this were not so, every factual report would be protected as part of the deliberative process.’” *Id.*

Moreover, vague and general descriptions of why the redaction is proper as a deliberative process redaction, like the descriptions provided by the FBI to date, which solely tracks the language of the statute, without more are insufficient to justify redactions pursuant to Exemption 5.⁴⁵ Based on the generic and vague explanations of the assertion of Exemption 5 provided in the present case,⁴⁶ it is nearly impossible to pinpoint with agency decisions or policies were contributed to by this document.

Exemption 7(E) is also cited as a reason for exemption. However, since no description is provided in the Vaughn index as to what is contained in this document and since there are no context sentences surrounding the assertion of exemption 7(E), the Bulldog is left in the dark as contextualizing the applicability (or lack thereof) of the assertion.

⁴¹ See *Lurie v. Dep't of Army*, 970 F. Supp. 19, 33 (D.D.C. 1997).

⁴² *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79, 90 (D.D.C. 2015) (internal citations omitted).

⁴³ *Lurie*, 970 F. Supp. at 33.

⁴⁴ *Id.*

⁴⁵ *Kleinert*, 132 F. Supp. 3d at 90 (internal citations omitted).

⁴⁶ See DE-66-1 n. 13 and DE-27-1 ¶ 53.

P. Document 16: Briefing (BB 859-861):

Document 16 relates to one of the fee Meese Commission meetings at which all three commissioners were present. Yet, no date or even a topic is provided. Instead, Exemptions 6, 7C and 5-1. The document does not appear on the *Vaughn* index, no description is given, not even a general one, of the information contained in these pages is provided for and only boilerplate assertions of exemptions are given. As the federal courts have made clear, an agency should submit a sufficiently detailed affidavit “to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.”⁴⁷ Without so much as minimum context, the Bulldog is left without a meaningful opportunity to contest the FBI’s redactions. Consequently, summary judgment is inappropriate.

Q. Document 17: Legat Ottawa (BB 1015-1017):

Document 17 memorialize a meeting at the Ottawa, Canada Legal Attache by FBI attendees. The document shows that no commissioners attended this meeting. The date of this meeting was on September 08, 2014, after a movement in Ottawa, Rethink911, had begun asking the Canadian government to investigate the 9/11 attacks.⁴⁸ The FBI fails to provide any description of the redacted information. Despite the FBI’s lack of context for its asserted exemptions, it is easy to tell that at least some of the claimed exemptions are not proper. For example, the FBI asserts Exemptions 6 and 7C to withhold both the name of the meeting and the name of only one “other FBI attendees.” On the other hand, the FBI discloses the names of every other staff/FBI Attendee present at this meeting.

The FBI also asserts Exemption 5 here; however, the document clearly states that no recommendations were made. Exemptions 1 and 3 are also asserted. However, with no description of how these exemptions apply, the Bulldog is left without a meaningful opportunity to contest the applicability of the redactions. For this reason, summary judgment is improper.

⁴⁷ *Campbell v. U.S. Dep’t of Justice*, 164 F.3d at 29 (quoting *King*, 830 F.2d at 218).

⁴⁸ See <http://www1.ae911truth.org/en/affiliate-marketing-program/825-video-911-truth-movement-fights-for-freedom-of-speech-in-canada-rethink911-ads-controversy-in-ottawa.html>.

R. Document 18: New York Field Office Investigation (BB 1263-1270):

Document 11 shows that the FBI was still conducting investigations into 9/11 as of 2014. The exemptions applied and the explanations for same are conclusory at best. There is no date reference as to when this document is created or by whom. The document is withheld in its entirety. As the federal courts have made clear, an agency should submit a sufficiently detailed affidavit “to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding.”⁴⁹

S. Document 19: 9/11 Conspirators (BB 1271-1279); and

T. Document 20: Intel Briefing re Counterterrorism (BB 1356-1379)

These documents are sought because the Bulldog believes that either the FBI did, in fact, consider the al-Hijji’s to be co-conspirators and has covered up this connection, or failed in performing its duty to actively pursue credible leads and has failed the victims of 9/11. In light or the FBI’s repeated assertions that it found no connections between the attacks and the al-Hijji’s it would be very telling if the family was discussed in this context. The same reasons articulated in the previous documents regarding why the exemptions asserted do not apply are incorporated into the assertion of exemptions in this document.

U. Document 21: Meese/Maguire Meeting (BB 1435-1439):

Document 21 relates to a meeting of FBI Agent Jacqueline Maguire and Commissioner Meese. Agent Maguire is the agent responsible for asserting that the April 16, 2002 memorandum was a “bad statement.” Moreover, some of the exemptions claimed within this document, such as Exemptions 6 and 7C have been overruled by this Court before. The FBI also has failed to provide any context showing why Exemptions 5 and 7(E) apply. Document 21 is not on the *Vaughn* index, and is not mentioned in Hardy’s Fourth declaration. DE-66-1.

V. Document 22: Meese Commission Slide Show (BB 1496-1556):

Document 22, a PowerPoint presentation, provides an overview of the 9/11 investigation. It covers the hijackers, where they attended flight school, how they adapted to Western life and

⁴⁹ *Campbell*, 164 F.3d at 29 (quoting *King*, 830 F.2d at 218).

blended in, and known co-conspirators. Of particular importance to the Bulldog's concern—that the 9/11 attacks were funded by the Saudi government and the FBI is covering it up—the document discusses funding, but most of that information has been redacted.

At BB-1540, Document 22 states that “[i]n early August 2001, an al Qaeda conspirator using the alias of “Ahad Sabet,” wire transferred money from Germany to Moussaoui [a known co-conspirator of the 9/11 attacks] so Moussaoui could receive additional flight training” and at BB-1546 it states “[t]o effect this attack, al Qaeda associates entered the United States, *received funding from abroad*, engaged in . . .” Inconsistently, other pages with Funding headers are redacted (BB-1514 and 1524-1525). The FBI relies on Exemption 7(E), which protects investigative techniques and procedures. Numerous other slides also are redacted pursuant to Exemption 7(E). BB 1508, 1515, 1519, 1524-1530, 1531-1532, 1542, 1551-1555.

The Department of Homeland Security itself has expressed that the types of records designed to be protected by exemption 7(E) include “law enforcement manuals, records pertaining to Watch list,”⁵⁰ etc. As previously stated, techniques or procedures that are generally known to the public, such as wiretapping, are not protected by exemption 7(E).⁵¹ Here, exemption 7(E) is used to redact information such as what evidence actually existed as to terrorist funding. However, evidence the FBI had is not indicative of the technique or procedure used to obtain that evidence. The FBI may be improperly using this exemption to continue to conceal the Saudi government's financing of the 9/11 attacks. If conclusory statements “that disclosure of the withheld information would reveal guidelines for law enforcement investigations that could reasonably be expected to risk circumvention of the law and/or would disclose techniques and procedures not generally known to the public”⁵² are not enough, then the

⁵⁰ See FOIA EXEMPTIONS, available at <https://www.dhs.gov/foia-exemptions>.

⁵¹ *Pub. Employees for Envtl. Responsibility (Peer), Rocky Mountain Chapter v. U.S. E.P.A.*, 978 F. Supp. 955, 962 (D. Colo. 1997).

⁵² *Id.* at 961 (D. Colo. 1997) (finding that the government failed to provide the court with an adequate factual basis to determine that the documents at issue were properly withheld pursuant to Exemption 7(E) when the government merely used conclusory language that tracked the language of the statute and nothing more).

wholesale lack of an explanation cannot justify the claimed exemption.

The FBI improperly dismisses the public interest in these documents as *de minimus*. DE 66-1 at 21. A massive civil case is pending in New York by the families of the 9/11 victims against the Saudi government. Those victims, and the public at large, deserve to know the truth about the FBI's investigations of 9/11. The asserted privacy interest in matters involving the government's investigations of individuals in the public domain, is itself *de minimus*.

The FBI's failure to acknowledge the public interest in understanding where the FBI's investigation went wrong is disturbing. Something went wrong somewhere along the line – from Agent Sheffield opening an investigation on April 16, 2002 into the possibility of the al-Hijji family's ties to the 9/11 hijackers, to the FBI vigorously and publicly denying the existence of any connections between the al-Hijji's and the hijackers more than 10 years later. This what the Bulldog wants to know. FOIA entitles it to that much.

CONCLUSION

The Court should deny the FBI's motion for summary judgment (1) with respect to the Sarasota case file obtained by the Meese Commission, (2) because the FBI has not shown that it has conducted an adequate search for responsive records, and (3) with respect to the redaction or withholding of the 22 documents identified in Point III. In addition, the Court should deny summary judgment with respect to the records redacted and withheld on March 24, 2017, because the Bulldog has not had time to evaluate the FBI's production.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and through that filing served:

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