**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

BROWARD BULLDOG, INC. and
DAN CHRISTENSEN,

Plaintiffs,

v. Case No. 16-61289-CIV-ALTONAGA

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

Defendants.
_____/

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendants, United States Department of Justice and its component, the Federal Bureau of Investigation, pursuant to Rule 56, Federal Rules of Civil Procedure, file this Reply to Plaintiffs' Response to their Motion for Summary Judgment on Counts II and III of Plaintiffs' Complaint under the Freedom of Information Act.[1]

Plaintiffs' Response to Defendants' Motion for Summary Judgment reflects an inappropriate effort to convert this action from one ostensibly seeking disclosure of government records under the Freedom of Information Act into a wide ranging exploration of their theory that the FBI is involved in a government cover up of Saudi support for the 9/11 terrorists. Plaintiffs devote much, if not most, of their Response to a discussion of their own investigation and reporting of a Sarasota family that left South Florida two weeks prior to 9/11 and which Plaintiffs' allege had ties to the hijackers. Plaintiffs' Response expresses their desire for the

[1] This Reply exceeds the page limit provided in Local Rule 7.1(c) by approximately 8 pages. Defendants have filed an unopposed Motion for leave to file the excess pages. See DE 31. As of this filing, however, the Court has not ruled on the Motion for Leave to File Excess Pages.

Court to conduct "a trial which examines whether the FBI was lying to the public when it said it found nothing through its Sarasota investigation," an issue that is irrelevant to the proper scope of the Court's inquiry under FOIA.

There are generally two issues for a Court to determine in an action under FOIA: (1) whether an agency conducted an adequate search for records responsive to a request, and (2) whether the agency has properly invoked exemptions provided in the Act to withhold information. *See, e.g., Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235 (11th Cir. 2008). The Eleventh Circuit has repeatedly indicated that, "FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified." *Id*. (quoting *Miscavige v. I.R.S.*, 2 F.3d 366, 369 (11th Cir.1993)).[2] Here, "the documents in

[2] Plaintiffs cite the Ninth Circuit case of *Animal Legal Defense Fund v. U.S. Food & Drug Admin*., 836 F.3d 987, 989 (9th Cir. 2010) for the proposition that not all FOIA cases may be resolved on summary judgment and that "some FOIA cases require resolution of disputed facts." *Id*. (citing *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1110 (9th Cir. 1994). Plaintiffs appear to suggest that, if the Court does not grant summary judgment, a trial of any and all issues is necessary. The Ninth Circuit's *Animal Legal Defense Fund* decision, however, does not stand for that principal. Instead, the opinion discusses the appropriate standard of review to be applied by the Circuit Court in an appeal of a FOIA case where the district Court has had to resolve a material fact in dispute through a trial or evidentiary hearing. *See Id*. Defendants respectfully submit that there are no disputed issues of material fact requiring trial in this case. The material facts are limited to those identified in Defendants' Statement of Undisputed Material Facts (DE 16). Defendants deny that the any of the additional "facts" presented Plaintiff's Response to Defendants Statement of Facts (DE 28), particularly those regarding Plaintiffs' motivation for making the FOIA requests (¶ 13) and their belief regarding the accuracy of the 9/11 Review Commission's findings and purpose (¶¶ 14, 15), are material in this action under FOIA. Nevertheless, if the Court should find that there does exist a genuine dispute as to a material fact, the Court may, as an alternative to trial or an evidentiary hearing on the disputed fact, order Defendants to file a supplemental declaration regarding the disputed fact, as courts routinely do. See, *e.g., Al-Turki v. Department of Justice*, 175 F.Supp.3d 1153, 1186 (D. Colo. 2016) ("I deny without prejudice Defendant's Motion for Summary Judgment . . .and order that Defendant file a supplemental declaration addressing [the issue of segregability]"); *El Badrawi v. Department of Homeland Sec*., et al., 583 F.Supp.2d 285, 322 (D. Conn. 2008) ("Following in camera review, the court will order disclosure of information improperly withheld by the agencies, if any, and order the agencies to make supplemental submissions for information properly withheld but currently lacking sufficiently detailed explanations, if any"); *Schoenman v. F.B.I.*, 575 F.Supp.2d 136 (D.D.C. 2008) ("the Court shall HOLD–IN–

issue" have been identified and produced to the Court, and Defendants have submitted a Declaration regarding their search for the records and the reasons for withholding certain information contained therein.

To establish that it conducted a search for records that satisfies FOIA, an agency must "show beyond a material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *Miccosukee Tribe*, 516 F.3d at 1248 (quoting *Ray v. U.S. Dep't of Justice*, 908 F.2d 1549, 1558 (11th Cir.1990). "The government agency may meet this burden by producing affidavits of responsible officials 'so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.'" *Ray* 908 F.2d at 1558 (quoting *Miller v. United States Dept. of State*, 779 F.2d 1378, 1383). "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." *Id*.

To justify its withholding of responsive information pursuant to a FOIA exemption, an agency must provide the Court an adequate factual basis supporting its claimed exemption. *Id*. at 1258. In the Eleventh Circuit, "an adequate factual basis may be established, depending on the circumstances of the case, through affidavits, a *Vaughn* Index,[3] *in camera* review, or through a

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ABEYANCE both the [cross motions for summary judgment . . .] and shall order the Navy to provide additional factual support for its invocation of FOIA Exemption 7(C)"); *Oglesby v. Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) ("Because [State Department's] affidavit did not adequately describe the agency's search, summary judgment on the adequacy of the search was improper. Accordingly, we vacate the district court's order dismissing appellant's claim against State and remand to the district court. On remand, the district court may order State to submit a reasonably detailed affidavit upon which the reasonableness of its search can be judged").

[3] A *Vaughn* Index "usually consists of a listing of each withheld document, or portion thereof, indicating the specific FOIA exemption applicable and the specific agency justification for the non-disclosure." *Miccosukee Tribe*, 516 F.3d at 1260 (citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973)).

combination of these methods." To this end, the FBI has filed the Declaration of David M. Hardy, Chief of FBI's Records and Information Dissemination Section (Mot. For Sum. Judg. Ex. A), which provides a coded index of redactions made to the records responsive to Plaintiff's request, the specific FOIA Exemption claimed for each piece or category of redacted information, and the FBI's factual basis for the claimed exemption -- thus satisfying the requirements of a *Vaughn* index. In addition, Defendants have submitted to the Court, *ex parte*, the unredacted records themselves for *in camera* inspection. The Hardy Declaration, together with the unredacted records, provide the necessary factual basis in support of the FBI's decision to protect certain information within the records from disclosure.

Beginning on page 6 of their Response (DE 29 at 11), Plaintiffs take issue with the justification provided by the FBI for particular redactions made to the responsive records. Defendants reply to Plaintiffs' arguments, in turn, as follows:

**A. 04-30-2014 Briefer (DE-27-2 at 37-40)**

First, Plaintiffs challenge the FBI's redaction of the name of the family from the "Briefing" dated April 30, 2014. Plaintiffs' Response incorrectly indicates that the FBI invoked FOIA Exemption (b)(1) to justify this redaction. *See* Resp. at p. 6 (DE 29 at 11). As indicated by the Hardy Declaration, the FBI instead invoked Exemptions (b)(6) and (b)(7)(C). *See* Hardy Decl. (DE 27-1) at ¶ 58 and Ex. K (DE 27-2 at 37). These exemptions were claimed to protect the name of a third party who was the subject of investigative interest to the FBI. *See Id*. As explained in Mr. Hardy's Declaration, the public identification of a subject of a criminal investigation carries a negative connotation and stigma, and runs the risk of subjecting the person to harassment, embarresment and undue public attention. *Id*. The FBI therefore concluded that disclosure of the information would constitute an unwarranted invasion of privacy. *Id*.

Plaintiffs argue that the FBI improperly invoked the privacy exemptions because they already know and have reported the name of the family they believe to be the subject of the Briefing. *See* Resp. at 7 (DE 29 at 12). Plaintiffs also argue that the name of the family has been disclosed in the litigation of a separate FOIA request made by Plaintiffs, which concerns records different than those at issue here. For these reasons, Plaintiffs argue that the information redacted is already in the public domain and, therefore, its disclosure cannot constitute an invasion of privacy. As explained below, the particular records at issue in this litigation, however, have not previously been disclosed by the government and are, therefore, not within the public domain.

Under the public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 199) (citations omitted). With regard to material disclosed in litigation, evidence admitted into evidence, a court reporter's transcript, the parties' briefs, and the judge's orders and opinions are, absent destruction or placement under seal, part of the public domain. *See Id*. Where a FOIA requestor is seeking disclosure of information he claims to be in the public domain, he bears the burden of producing specific information in the public domain that appears to duplicate what is being withheld. *See Id*. at 555. For the public domain doctrine to apply, the specific information sought must have already been disclosed and preserved in a permanent public record. *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C.Cir.2001). The Court must "be confident that the information sought is truly public and that the requester receives no more than what is publicly available before [it finds] a waiver." *Cottone*, 19 F.3d at 555 (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C.Cir.1990);

*Afshar v. Department of State*, 702 F.2d 1125, 1130–34 (D.C.Cir.1983)1130–32; *Military Audit Project v. Casey*, 656 F.2d 724, 752 (D.C.Cir.1981).

While Plaintiffs may have ascertained the names of the family at issue through their litigation before Judge Zloch, that case regards different records than those involved here. The particular records at issue here have not been previously disclosed and do not duplicate those at issue in the case before Judge Zloch. There has been no disclosure by the government of the Briefing to the FBI's 9/11 Review Commission dated April 30, 2014, or of the names contained therein. Thus, Plaintiffs' reference to information they obtained in another case, involving different records fails to meet their "burden of pointing to specific information in the public domain that appears to duplicate that being withheld." *Afshar*, 702 F.2d at 1130; *see also Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1280 (D.C.Cir.1992) ("[T]o obtain portions of tapes alleged to be in the public domain, [the FOIA applicant] has the burden of showing that there is a permanent public record of the exact portions he wishes"). As such, the name redacted from the Briefing at issue here are not within the public domain and does not lose its protection under FOIA on that basis.

Plaintiffs next take issue with the FBI's redaction of the name of the person identified in the document as the "Briefer." The FBI redacted the names of FBI Special Agents and support personnel who were responsible for conducting, supervising, and/or maintaining the investigative activities reflected in the responsive documents for a number of reasons, which are provided in paragraph 59 the Hardy Declaration (DE 27-1). Plaintiffs, however, argue that the Briefing is not contained in a file similar to medical or personnel files and, therefore, the name of the Briefer cannot be protected by Exemption (b)(6). Plaintiffs further argue that the public interest in

knowing the name of the Briefer is so great that it trumps any protection of the individual's privacy provided by Exemption (b)(7)(C). *See* Resp. at 8-9 (DE 29 at 13-14).

The Supreme Court has given the term "similar files" in FOIA Exemption (b)(6) a broad meaning; all information which "applies to a particular individual" may fall within FOIA Exemption 6. *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595, 599-603 (1982). The protection of privacy is not dependent "upon the label of the file" which contains the information. *Id*. at 601. Because the Briefing at issue identifies the individual "Briefer" by name, the record "applies to a particular individual" and qualifies under the broad class of records subject to protection under FOIA Exemption (b)(6). Regardless, Plaintiff does not dispute that the Briefing is a record compiled for law enforcement subject to FOIA Exemption (b)(7)(C). Thus, the question of whether the information is lawfully protected as exempt under FOIA depends upon the balancing of the Briefer's privacy relative to the public's interest in disclosure.

The government disagrees with Plaintiff's assessment that the public's interest in knowing the Briefer's name is so great that it trumps that individual's privacy. Plaintiffs' theory that the Briefer may be "involved in concealment from Congress and the public of evidence that the Saudi government supported the hijackers" (Resp. at 9 (DE 29 at 14)) is pure speculation. The Supreme Court has held that the privacy interests protected by FOIA Exemption 7(C) cannot be overcome simply by a requester's bare suspicion of malfeasance. *National Archives and Records Administration v. Favish*, 541 U.S. 157, 173-74 (2004). Doing so, the Court observed, would leave Exemption 7(C) with "little force or content." *Id*. at 173. Accordingly, the Court held that "where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in

the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure[;] [r]ather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred. *Id*. at 174. Plaintiffs have made no such showing in this case.

While Plaintiff's allegation of government malfeasance is speculative, the danger created by the public disclosure of the names of law enforcement personnel involved in anti-terrorism activities is not. This danger is among the several reasons provided in the Hardy Declaration to justify the FBI's redaction of the Briefer's name. *See* Hardy Decl. at ¶ 59.

Courts have recognized that there is a substantial privacy interest in information regarding individuals contained in law enforcement investigative records, not only information about the subjects of investigation but also agents and employees, the disclosure of which might subject these individuals or their families to embarrassment, harassment, or reprisal.[4] *See Cappabianca v. Commissioner, U.S. Customs Service*, 847 F. Supp. 1558, 1564-66 (M.D. Fla. 1994); *L & C Marine*, 740 F.2d at 923; *Cleary v. F.B.I.*, 811 F.2d 421, 424 (8th Cir. 1987); *Fitzgibbon v. C.I.A.*, 911 F.2d 755, 767 (D.C. Cir. 1990). The public interest, on the other hand, is strictly limited to the public's interest in being informed about "what their government is up to." *Reporters Committee*, 489 U.S. at 772-75. Disclosure of the name of the individual who delivered the Briefing does nothing to inform the public about "what their government is up to." Disclosure would not "contribute significantly to public understanding of the operations or activities of the government." *Reporters Committee*, 489 U.S. at 775 (emphasis added); *see also*

[4] Any assessment of the extent of the privacy invasion must consider the ramifications of release not just to the requester but to the public at large, since any member of the public "must have the same access under FOIA as the [requester]" to the information sought in a given case. *U.S. Dept. of Defense v. F.L.R.A.*, 510 U.S. at 501; *see also Favish*, 541 U.S. at 174 ("once there is disclosure, the information belongs to the general public").

*Office of the Capital Collateral Counsel*, 331 F.3d at 803. As such, the balance of the public's interest against this individual's right to privacy weighs heavily in favor of preserving the individual's privacy.

Plaintiffs next challenge the FBI's redaction of the names of two slides presented to the FBI 9/11 Review Commission. (Resp. at 9 (DE 29 at 14)). Plaintiffs claim that the FBI provided "no explanation for why disclosure of th[e] nslide names would result in an unwarranted invasion of personal privacy." *Id*. To the contrary, the Hardy Declaration indicates that the redaction of slide names was made pursuant to FOIA Exemption (b)(6) to protect the name of third party who was of investigative interest to the FBI. *See* Hardy Decl. at ¶ 58. The Hardy Declaration explains why disclosure of the information would constitute an unwarranted invasion of the individual(s)' privacy. *Id*. The material was redacted to protect the individuals from the strong negative connotation and stigma of being identified as the subjects of a criminal investigation, and the potential for harassment or embarrassment it might cause. *Id*.

Next, Plaintiffs' take issue with the redaction made to a portion of questions asked by Commission members about three individuals and about the agent who wrote the April 16, 2002 report. Plaintiffs suggest that "the FBI provided no explanation for why the exemptions allow those redactions." (Resp. at 9 (DE 29 at 14)). To the contrary, the Hardy Declaration (viewed together with the unredacted records submitted for in camera inspection) demonstrate that the FBI redacted the names of the three individuals who were the subject of Commissioner Roemer's question pursuant to FOIA Exemption (b)(6) because they were the subjects of a criminal investigation, and that the name of the agent who authored the April 16, 2002 report was redacted pursuant to FOIA Exemptions (b)(6) and (b)(7)(C). The Hardy Declaration provides the reasons justifying the claimed exemptions. *See* Hardy Decl. at 58 and 59.

With regard to the name of the agent who authored the April 16, 2002 report, Plaintiffs state that their newspaper and others have already identified the individual by name. (Resp. at 10 (DE 29 at 14)). The fact, however, that a requestor may know information that has been redacted from a responsive record, or that the information has been the subject of media reports, is not a basis for overcoming the privacy interest protected by FOIA Exemptions (b)(6) or (b)(7)(C). The government has not previously disclosed the Briefing now at issue or the identity of the individual in question. The individual's name in this context is not within the public domain and is, therefore, still subject to FOIA's protections. Again, Plaintiffs' speculation that "the FBI has been maintaining an elaborate ruse to prevent Congress and the public from discovering that the Saudi government did provide support for the hijackers" is insufficient to overcome the agent's right to privacy. *See Favish*, 541 U.S. at173-74.

Next, Plaintiffs challenge redactions they believe are "clearly references to the al-Hajis" and of the name of an FBI agent, the identity of whom Plaintiffs assert they already know. Defendants hereby repeat and incorporate by reference the arguments above supporting similar redactions made elsewhere in the responsive records.

Plaintiffs next challenge FBI's redactions to the second paragraph on the second page of the Briefing (DE 27-2 at 38). As indicated in the Hardy Declaration, the information in this paragraph was redacted pursuant to Exemptions (b)(6) and (b)(7)(C) to protect the privacy of third parties and FBI personnel; pursuant to Exemptions (b)(7)(D) to protect the names, identifying information about, and information provided by third parties under circumstances in which confidentiality can be inferred; and (b)(7)(E) to protect information containing sensitive investigatory techniques and procedures used by the FBI and dates and types of investigations. The Hardy Declaration at ¶¶ 55-58, 64-68, 74-77, considered together with the unredacted

records submitted for *in camera* review, demonstrate why the withholding information pursuant to the foregoing exemptions was justified.

Plaintiffs, nevertheless, contend that Exemptions (b)(7)(D) and (b)(7)(E) cannot apply because the FBI has publicly "stated that its investigation found no connections between the al-Hijjis and the hijackers." "If that is true," Plaintiffs argue, "then it is very difficult to understand how Exemptions [(b)(7)(D)] or [(b)(7)(E)] would apply to the redacted material." Resp. at 11 (DE 29 at 16). This argument, however, incorrectly presumes that these Exemptions, which serve to protect the identities and information provided by confidential sources, and sensitive law enforcement techniques used by the FBI, are only protected when such sources or techniques result in the discovery of criminal activity. That, of course, is not the law. Confidential sources and sensitive investigative methods and techniques remain protected by these FOIA Exemptions regardless of the conclusions made by the FBI on the basis thereof.

Plaintiffs next take issue with the FBI's redaction of what they believe is "obviously" the name of a certain individual who was also named in one of Plaintiff's newspaper articles about the al Hajii family. *See* Resp. at 11 (DE 29 at 16). Defendants hereby repeat and incorporate by reference the arguments above supporting similar redactions made elsewhere in the responsive records.

Finally, with regard to the section of the Briefing titled "Gaps/ Possible Issues/ Recommendations:", Plaintiffs urge the Court to inspect the paragraph appearing (DE 27-2 at 38) *in camera* to assess whether the FBI properly redacted the same. The Hardy Declaration indicates that the FBI invoked FOIA Exemption (b)(5) to withhold the information within this paragraph because it is subject to the government's deliberative process privilege. The deliberative process privilege protects the internal decision-making processes of the executive

branch in order to safeguard the quality of agency decisions. *N.L.R.B. v. Sears, Roebuck & Co*., 41 U.S. 132, 150-51 (1975). Two prerequisites must be met before the Government properly may withhold a document from production pursuant to the deliberative process privilege. First, the document must be "predecisional," i.e., "prepared in order to assist an agency decision maker in arriving at his decision." *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp*., 421 U.S. 168, 184, 95 S. Ct. 1491, 1500, 44 L. Ed.2d 57 (1975). Second, it must be "deliberative," that is, "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C.Cir.1975). Defendants respectfully submit that the Court's review will find that the information is, in fact, deliberative process material subject to the privilege and was, therefore, appropriately withheld as Exempt under FOIA Exemption 5.

**B. 10-24-2014 Briefer (DE 27-2 at 41-42)**

Plaintiffs next turn to a two-page memorandum regarding a briefing provided to Commissioner Bruce Hoffman titled, "9/11 Additional Evidence." Plaintiffs first challenge the FBI's redaction of the names of the "Briefer[s]". Defendants hereby repeat and incorporate by reference the arguments above supporting similar redactions made elsewhere in the responsive records.

Plaintiffs additionally challenge the redactions made to the document pursuant to FOIA Exemptions (b)(1), (b)(3) and (b)(7)(E). Again, Plaintiffs argue that these assertions by the FBI are inappropriate based on their speculation that the FBI is involved in a conspiracy to protect the Saudi government from the disclosure of evidence linking it to the 9/11 hijackers. The Hardy Declaration, considered together with the unredacted documents submitted to the Court for *in camera* review demonstrate that the material was properly withheld as classified (FOIA

Exemption (b)(1)), protected from disclosure by statute (Exemption (b)(3)), and/or because disclosure would reveal sensitive investigative techniques, procedures or methods the FBI uses to collect and analyze the information that it obtains for investigative purposes. (Exemption (b)(7)(E)).

Plaintiff's suggestion that the Court must conduct

> a trial which examines whether the FBI was lying to the public when it said it found nothing through its Sarasota investigation or is lying to the Court now when it says the records of its Sarasota investigation contain extensive information which must be kept secret due to the harm it would inflict on national security, foreign policy, and confidential sources and methods of the intelligence

(Resp. at 13 (DE 29 at 18)) would be an extraordinary and inappropriate expansion of the scope of the Court's limited review under FOIA. The government absolutely denies the wrongful conduct Plaintiffs allege. Regardless, the propriety of the FOIA exemptions claimed by the FBI in this case has nothing to do with the matters raised by Plaintiffs' conspiracy theories. The Court should not allow Plaintiffs to convert this action into an exploration of those theories.

As in any FOIA litigation, the lawfulness of exemptions claimed by the FBI to protect information from disclosure may be established through reasonably detailed affidavits from the responsible agency official and/or through the Court's *in camera* examination of the responsive material. "Affidavits submitted by an agency are 'accorded a presumption of good faith,'" *Florida Immigrant Advocacy Center v. National Security Agency*, 380 F. Supp.2d 1332, 1343 (11 th Cir. 2005)( quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C.Cir.1991). And in cases concerning national security, such as this one, district courts are required to give "substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record."

Id. at 1337 (quoting *Salisbury v. United States*, 690 F.2d 966, 970 (D.C.Cir.1982) and citing *Taylor v. Dep't of the Army*, 684 F.2d 99, 109 (D.C.Cir.1982) (requiring "utmost deference" to affidavits by military intelligence officers). "Summary judgment for the federal agency is proper '[i]f the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith.'" *Id*. (quoting *Hayden v. Nat'l Security Agency*, 608 F.2d 1381, 1384 (D.C.Cir.1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980). Beyond their speculation of wrongdoing, Plaintiffs have failed demonstrate agency bad faith by the FBI in processing and satisfying their FOIA request. Nor do the underlying records themselves reflect any government wrongdoing or substantiate any of Plaintiffs' claims. Accordingly, Mr. Hardy's declaration should be given substantial weight and the FBI's assertions of FOIA Exemptions should be upheld.

**C. 11-10-2014 Briefer (DE 27-2 at 43-44)**

Plaintiffs next take issue with redactions made to the memorandum regarding an interview with Bassem Youssef, a retired FBI agent who discussed allegations concerning a source who was in direct contact with Usama Bin Laden. Information was redacted from the memo not only pursuant to FOIA's privacy exemptions ((b)(6) and (b)(7)(C)), but also exemptions applicable to FBI's confidential sources and methods (Exemptions (b)(7)(D) and (E)). Mr. Hardy justifies these redactions of information revealing the FBI's sources and methods in paragraphs 64-68 and 74-76 of his Declaration. Defendants respectfully submit that Mr. Hardy's Declaration and the Court's *in camera* review of the underlying, unredacted material establish that

FBI's redactions were lawful and appropriate.

**D. Updates and Initiatives as of 5 October 2012 (DE 27-2 at 45-48)**

Plaintiffs next urge the Court to reject the FBI's redactions to the section of the memorandum contained in DE 27-2 at 45-48 under the heading "Updates and Initiatives as of 5 October 2012. The FBI redacted parts of the document pursuant to FOIA Exemptions (b)(1), which applies to classified information, (b)(3), which applies to information the disclosure of which is prohibited by statute, (b)(5), which protects material protected from disclosure in litigation, (b)(6) and (b)(7)(C), which protect the privacy of individuals, 7(A), which protects information the disclosure of which could interfere with a law enforcement proceeding, and 7(D) and (E), which protect the FBI's confidential sources and methods. Defendants hereby repeat and incorporate by reference the arguments made above concerning the weight to be given to a responsible official's affidavit in cases concerning national security information. Mr. Hardy's explanation of why these Exemptions were invoked, together with the Court's examination of the unredacted records *in camera* will establish that the redactions were lawful and appropriate.

**E. Personal Service Contracts (DE 27-2 at 49-257)**

Plaintiffs' next challenge the FBI's redaction of the amounts paid to individuals under the Personal Service Contracts produced in response to Plaintiffs' FOIA request. As explained in the Hardy Declaration, these amounts were redacted pursuant to FOIA Exemption (b)(4), as confidential financial information pertaining to an individual. Mr. Hardy explained that the amounts paid to the individuals under the contracts was redacted because public disclosure of these payments would cause substantial harm to the competitive negotiation process. Specifically, Mr. Hardy explained that release of the information would enable potential

government contractors the opportunity to judge how they might underbid [] those that served on the 9/11 Reports Commission board[] when bidding for similar contracts in the future." Hardy Decl. at ¶ 50.

Plaintiffs, however, demand evidence that the 9/11 Review Commissioners "bid on this work, that any of them regarded their pay as confidential, or that any of them claim disclosure would cause them competitive harm." Plaintiff provides no authority, however, for the proposition that an agency asserting Exemption (b)(4) must provide such specific proof in support of its assertion of the exemption. An agency is required to "provide affidavits that contain more than mere conclusory statements of competitive harm." *See Pac. Architects and Eng's, Inc. v. Renegotiation Bd.*, 505 F.2d 383, 384 (D.C.Cir.1974) (requiring agencies to provide more than generalized assertions and conclusory allegations). Mr. Hardy's Declaration here does not simply state a conclusion that competitive harm would result from disclosure. Instead, it identifies the precise risk of harm posed by disclosure of the financial information at issue: if the negotiated rates paid to the individuals who worked on the 9/11 Review Commission were disclosed to the public, other individuals or entities who do the kind of work that these individuals did could use the information from these contracts to anticipate the rate for which the affected individuals would be willing to undertake and underbid them in future government solicitations for such services. This is not a generalized or conclusory assertion, it is a reasonably detailed explanation of why the FBI's assertion of Exemption (b)(4) was lawful and appropriate.

Plaintiffs' statement that the FBI has asserted of Exemption (b)(4) to keep taxpayers from knowing how much their government is paying for this work is unfounded, as the budget for the 9/11 Review Commission's work was itself a matter of public record, even if the specific

amounts paid to commissioners was not.

**Adequacy of Search for Disciplinary Records**

Finally, Plaintiffs take issue with the FBI's response to their request for "all documents regarding any disciplinary action taken against the agent [who had authored an earlier report indicating the existence of connections between the Sarasota Family and the 9/11 hijackers] as a result of this matter." Defendants' Motion for Summary Judgment and the Hardy Declaration establish the FBI performed a search which could reasonably be expected to uncover any documents regarding any disciplinary action taken against the agent. As explained in the Motion and in the Declaration, the FBI searched its Central Records System, which houses the FBI's applicant, investigative, intelligence, personnel, administrative, and general files, by the agent's name and, more generally, by the term, "Disciplinary Action Taken Against an FBI Agent who Wrote an EC." *See* Hardy Decl. at ¶ 18-28. The FBI's Record/Information Dissemination Section also contacted the Office of Professional Responsibility ("OPR") via email to verify if any records exist concerning disciplinary actions taken against the FBI Special Agent at issue. *Id*. Neither the search of FBI's Central Records System nor the consultation with OPR yielded any responsive records. *Id*. Plaintiffs, however, argue that the Court should additionally order the FBI to "ask the agent whether he was disciplined and, if so, if records of the discipline exists." Resp. at 20 (DE 29 at 25). FOIA, however, does not require a search performed in the manner preferred by a requestor, only that an agency conduct a search that could reasonably be expected to find responsive records.

The Hardy Declaration adequately establishes why the search performed was reasonably calculated to find any documents responsive to Plaintiff's request. "Given its comprehensive nature and scope, the [FBI's Central Records System] is the principal records system searched . .

. to locate information responsive to most [FOIA] requests, because [it is] where the FBI indexes information about individuals, organizations, events and other subjects . . . for future retrieval." Hardy Decl. at ¶ 28. As indicated above, the FBI not only searched its Central Record System, but also contacted OPR to ask whether it had record of any discipline taken against the agent. OPR's mission is the body that adjudicates allegations of employee misconduct. *See* Hardy Decl. at fn. 6. The FBI's Records and Information Dissemination Section, therefore, reasonably believed that a search of the Central Records System and consultation with OPR could reasonably be expected to yield any responsive records. *See Id.*

Plaintiffs are essentially asking Defendants to certify that, in fact, no records responsive to their request exist, i.e., to certify that the Special Agent at issue was not, in fact, disciplined. Such a request, however, is inappropriate under FOIA. "FOIA imposes no duty on [an] agency to create records." *Forsham v. Harris*, 445 U.S. 169, 186, 100 S.Ct. 977, 63 L.Ed.2d 293 (1980) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 161–62, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)); accord *Yeager v. DEA*, 678 F.2d 315, 321 (D.C.Cir.1982) ("It is well settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request."). Instead, FOIA requires an agency to conduct a search "reasonably calculated to uncover all relevant documents." *Miccosukee Tribe of Indians*, 516 F.3d at 1248. As demonstrated in the Motion for Summary Judgment and by the Hardy Declaration, the FBI conducted an adequate search for responsive records, but found none. The fact that Plaintiffs would have preferred for the FBI to check with the agent, in addition to searching its records and consulting OPR, does not establish that the FBI failed to make a good faith effort, using methods which could reasonably be expected to uncover the requested information or documents. An agency "need not show that its search was exhaustive." *Ray v. U.S. Dep't of Justice*, 908 F.2d

1549, 1558 (11th Cir.1990), *rev'd on other grounds sub nom. U.S. Dep't of State v. Ray*, 502 U.S. 164, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991)).

## CONCLUSION

For the reasons provided in Defendants' Motion for Summary Judgment and in the foregoing Reply to Plaintiffs' Response to the Motion, Defendants respectfully submit that judgment in their favor as to Counts II and III of Plaintiffs' Complaint is appropriate.

Dated: January 19, 2017
Miami, Florida

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2017, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system.

/s/ Carlos Raurell
CARLOS RAURELL
Assistant United States Attorney