UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

BROWARD BULLDOG, INC., a Florida corporation not for profit, and DAN CHRISTENSEN, founder, operator and editor of the BrowardBulldog.com website,

Plaintiffs,

vs.

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

Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants respectfully reply to plaintiffs' memorandum in opposition to defendants' motion for summary judgment as follows:

There is an adequate factual basis for the Court's decision.

Citing *Ely v. F.B.I.*, 781 F.2d 1487 (11th Cir. 1986), plaintiffs argue that defendants' showing in support of their motion is "inadequate as a matter of law" because defendants did not provide a *Vaughn* index or documents for *in camera* review. The *Ely* decision is no longer binding authority that affidavits alone are insufficient to support a motion for summary judgment in a FOIA action. *Miscavige v. I.R.S.*, 2 F.3d 366, 368 (11th Cir. 1993). What will constitute a sufficient basis in any given FOIA case depends upon the circumstances. *See Id.*; *Miccosukee Tribe of Indians of Florida v. United States,* 516 F.3d 1235, 1258 (11th Cir. 2008). There is no requirement that an agency provide a *Vaughn* index – only that the agency provide an adequate factual basis for the Court's decision. *See Miscavige*, 2 F.3d at 368. Plaintiffs have filed a motion for *Vaughn* index and *in camera* review [D.E. 27], in response to which defendants will address more specifically why a *Vaughn* index should not be required in this case.

Whether or not to conduct *in camera* review is a decision for the Court to make in the exercise of its discretion. *See Miscavige*, 2 F.3d at 368 (indicating that *in camera* review is "discretionary" but "not required, absent an abuse of discretion."). As indicated in defendants' motion, defendants will provide the Court upon its request with copies of the withheld records and information for *in camera* review.

The cases cited by plaintiffs in which courts found the agency's declaration inadequate involved factual circumstances different from those in this case. For example, in *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. U.S. Dep't of Justice*, 503 F. Supp.2d 373 (D.D.C. 2007), in which the court found that the declaration did "not provide particularized information about the exact nature of the documents," approximately 832 pages were withheld. *Akin*, 503 F. Supp.2d at 377, 381-83. This case, by contrast, concerns 35 pages, only four of which were withheld in their entirety, and the portions of the redacted pages released indicate the nature and dates of the documents. The deleted page sheets (Sarasota 29-32) identify, by coded categories, the nature of the information contained in the four pages withheld in full. See Hardy ¶¶ 27-29.

If the Court should find that additional information is required, the Court may, in its discretion, allow defendants the opportunity to address the insufficiency or issue through a supplemental declaration and/or conduct *in camera* review. *See Miscavige*, 2 F.3d at 367-68; *Tamayo v. U.S. Dep't of Justice*, 544 F. Supp.2d 1341, 1344 (S.D. Fla. 2008); *Edmonds v. F.B.I.*, 272 F. Supp.2d 35, 46 (D.D.C. 2003); *Ajluni v. F.B.I.*, 947 F. Supp. 599, 608 (N.D.N.Y. 1996).[1]

Plaintiffs have failed to present evidence sufficient to raise an issue of fact as to the reasonableness of the FBI's search.

Plaintiffs argue that the Hardy declaration cannot show that a reasonable search was conducted for records responsive to their request because it is not based exclusively on personal knowledge. This position is contrary to FOIA caselaw. See *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993)(finding that affidavits of officials responsible for supervising or coordinating search

[1] While plaintiffs have served written discovery in this case, discovery is not allowed in a FOIA action as a general rule. *See Tamayo v. U.S. Dep't of Justice*, 544 F. Supp.2d 1341, 1343 (S.D. Fla. 2008); *Wheeler v. C.I.A.*, 271 F. Supp.2d 132, 139 (D.D.C. 2003). Discovery would be particularly inappropriate in this case because of the nature of the information withhheld.

efforts are sufficient to fulfill the personal knowledge requirement of FED. R. CIV. P. 56(e)); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *Patterson v. I.R.S.*, 56 F.3d 832, 840-41 (7th Cir. 1995); *Exxon Corp. v. F.T.C.*, 384 F. Supp. 755, 757-61 (D.D.C. 1974). Plaintiffs have filed a motion to strike the Hardy declaration or to allow Hardy's deposition [D.E. 26], in response to which defendants will specifically address this issue.

Plaintiffs also argue that the Hardy declaration should be rejected because it addresses searches conducted in the FBI's Tampa Field office. Plaintiffs rely on a Northern District of California decision which is not precedent and is inconsistent with other decisions in which Hardy has been accepted as the FBI's declarant regarding FOIA searches, including searches encompassing FBI field offices. *See*, *e.g.*, *Moore v. F.B.I.*, 366 Fed. Appx. 659 (7th Cir. 2010); *Trentadue v. F.B.I.*, 572 F.3d 794 (10th Cir. 2009); *see also Del Rio v. Miami Field Office of Federal Bureau of Investigations*, No. 08–21103–CIV, 2009 WL 2762698 (S.D. Fla. Aug. 27, 2009)(misspelled as "David M. Harvey").

David M. Hardy is the proper declarant in this case because he is responsible for directing and managing responses to FOIA requests for FBI's records and information maintained in field offices as well as headquarters, including the FOIA request in this case. See Hardy decl. ¶¶ 2-3, 17.

Moreover, contrary to plaintiffs' assertion, the Hardy declaration does not lack specificity and is sufficient to establish that the FBI conducted a reasonable search. The declaration establishes that the FBI initially searched for records using the methods generally used by the agency to locate records. Hardy decl. ¶ 23. The declaration details how the FBI conducted its search of main and cross-reference files and then took the additional step of conducting a text search of the Electronic Case File ("ECF"), although it is not the FBI's current policy to conduct text searches to locate responsive records. Hardy decl. ¶ 23 and n. 3. The declaration specifies the search terms used in conducting each of these searches. Hardy decl. ¶ 23.

After litigation was filed, the FBI took the additional step of contacting its Tampa Field Office ("TPFO"), which canvassed personnel who had been directly involved in the 2001 investigation into 4224 Escondito Circle, as well as personnel responsible for assisting in the FBI's response to a prior Congressional request from former Senator Graham. Hardy decl. ¶ 24. These personnel conducted additional searches of FBI files, including additional text searches of the ECF

and searches of known telephone numbers. Hardy decl. ¶ 24. A total of fourteen documents (35 pages) were located, including the six previously located through the initial administrative search. Hardy decl. ¶¶ 23-24.

The FBI's initial search efforts exceeded those generally employed by the FBI to locate records responsive to FOIA requests in that the FBI searched not only for "main" files but also cross-reference material and also conducted text searches, which provide a more comprehensive search of the FBI's Central Records System ("CRS"). Hardy decl. ¶¶ 25, 23 n. 3. These types of searches are used to locate CRS files in FBI field offices as well as Headquarters. See Hardy decl. ¶¶ 19, 17.

The fact that additional documents were located after litigation was filed does not indicate that the FBI did not initially conduct a reasonable search but that after litigation was filed the FBI took further, extraordinary steps to locate any responsive records.

As indicated at page 7 of defendants' motion, FOIA only requires that an agency conduct a reasonable search. There is ample evidence in this case that the FBI conducted a reasonable search.

The declarations which plaintiffs have submitted do not raise an issue of fact as to the reasonableness of the FBI's search. The declarations of plaintiff Christensen and former Senator Graham are not sufficient pursuant to FED. R. CIV. P. 56(c)(4) to oppose defendants' motion. They are replete with hearsay, self-serving statements, and speculative opinions which are not made based on personal knowledge and/or would not be admissible in evidence. Further, many of the statements contained in the declarations are immaterial.

Former Senator Graham indicates that he previously reviewed two documents (each five pages or less); that one of these, dated April 16, 2002, is the two-page document Sarasota 5-6; but that the other document, which he describes as dated September 16, 2002, was not produced to plaintiffs. See D.E. 29-5, ¶¶ 35- 36, 50. However, defendants did produce a redacted two-page document dated September 16, 2002. See Sarasota 7-8. Graham has not reviewed this document in unredacted form or other pages or information withheld. Thus, his statement does not dispute that a reasonable search was conducted.

Similarly, the declarations of Patrick Gallagher, Larry Berberich, and Jone Barlow Wiest do not raise an issue of fact as to the reasonableness of the FBI's search. According to Berberich, he and Sarasota County Sheriff's Office employees, not the FBI, entered the residence at 4224

Escondito Circle and the Sheriff's Office, not the FBI, removed property. See D.E. 29-2, ¶¶ 8-9. Ms. Weist indicates that, in or around April 2002, she provided the FBI with copies of checks used to pay homeowners' association dues on the property at 4224 Escondito Circle. D.E. 29-3, ¶ 11. However, the fact that these documents were provided to the FBI more than 10 years ago (see also Sarasota-23) but the FBI failed to produce them does not necessarily mean that the FBI's search was unreasonable. *See Piper v. U.S. Dept. of Justice*, 294 F. Supp.2d 16, 23-24 (D.D.C. 2003), *amended*, 428 F. Supp.2d 1 (D.D.C. 2006), *aff'd*, 222 Fed. Appx. 1 (D.C. Cir. 2007); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003)("The adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search."); *see also Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1246 (4th Cir. 1994); *Miller v. U.S. Dept. of State*, 779 F.2d 1378, 1385 (8th Cir. 1985). "The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it." *Maynard v. C.I.A.*, 986 F.2d 547, 564 (1st Cir. 1993)(quoting *Miller*, 779 F.2d at 1385).

Finally, while plaintiffs have reported that Prestancia gatehouse records showed terrorists visiting the subdivision (See plaintiffs' SOF ¶ 22), the declarations of Berberich, Prestancia's Senior Administrator and Security Officer, and Weist, president of the property management corporation for Prestancia, make no reference to any gatehouse records showing such connections; nor do they indicate that any gatehouse records were provided to the FBI. See D.E. 29-2, ¶ 5; D.E. 29-3. Plaintiffs have produced no admissible evidence that any Prestancia gatehouse records were ever provided to, or in the possession of, the FBI.[2]

Opinions and speculation by plaintiffs and former Senator Graham that the FBI "should have" hundreds or thousands of pages of additional documents "if they conducted the sort of investigation that the FBI would be expected to make" (see plaintiffs' response p. 8, plaintiffs' SOF ¶ 38) are not sufficient to raise an issue of fact as to the adequacy of the FBI's search.

Affidavits submitted by an agency are accorded a presumption of good faith which "cannot

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[2] A notation in Sarasota-1 indicates that "the FBI appears not to have obtained the vehicle entry records of the gated community, given the lack of connection to the hijackers."

be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 489 (2nd Cir. 1999); *SafeCard Services, Inc. v. S.E.C.*, 926 F.2d 1197, 1200 (D.C.Cir. 1991); *Flowers v. I.R.S.*, 307 F. Supp.2d 60, 67 (D.D.C. 2004); *see also Accuracy in Media, Inc. v. National Park Service*, 194 F.3d 120, 124 (D.C. Cir. 1999)(finding "speculative criticism" of the agency's search insufficient to support plaintiff's request for discovery).

Plaintiffs have failed to show that any information or records are being improperly withheld pursuant to FOIA exemptions.

FOIA Exemption 1

Plaintiffs challenge defendants' FOIA Exemption 1 and Exemption 3 withholdings by asserting that the FBI only raised Exemptions 1 and 3 until after suit was filed. Plaintiffs have cited no authority to support this argument as a basis for challenging defendants' withholding.[3]

Further, plaintiffs' argument that documents were previously unclassified and only originally classified on March 14, 2013, is incorrect. The documents to which plaintiffs refer, Sarasota-5-6 and Sarasota 33-35, were originally marked "Secret" at the top and bottom and "(s)" and "Secret" within the text. The March 14, 2013, date on Sarasota-5 is the date when the document was reviewed and unclassified in part, as indicated by the X's marked through the classification markings on the copy released. All of the information in the responsive documents previously classified "Secret" has been declassified with the exception of two small portions of information on Sarasota-6 and Sarasota-35.

Plaintiff's reliance on former Senator Graham's opinion that "disclosures should serve our national security interests" is misplaced. Graham is not a classification authority or declassification authority under E.O. 13,526, §§ 1.3 and 3.1; nor has he conducted a classification review of the

[3] Courts have not applied a rigid "press it at the threshold, or lose it for all times" approach to raising FOIA exemptions. *See August v. F.B.I.*, 328 F.3d 697, 699-700, 702 (D.C. Cir. 2003)(remanding FOIA action for consideration of exemptions not raised at the district court level); *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106 (D.C. Cir. 2007); *Judicial Watch, Inc. v. D.O.J.*, 102 F. Supp.2d 6, 12 and n. 4 (D.D.C. 2000); *see also Lawrence v. U.S. I.R.S.,* 355 F. Supp.2d 1307 (M.D. Fla. 2004)(allowing untimely assertion of FOIA exemptions). In *Ray v. United States Dep't of Justice*, 908 F.2d 1549, 1557 (11th Cir. 1990), *rev'd on other grounds* 502 U.S. 164 (1991), the Eleventh Circuit declined to allow assertion of new FOIA exemptions after the district court ruled in the plaintiff's favor. However, that is not the situation in this case.

material being withheld. His opinion, based upon speculation as to the content of the classified information withheld, does not provide a basis upon which the Court can conclude that the information withheld under FOIA Exemption 1 is not properly classified.[4]

FOIA Exemption 3

Similarly, plaintiffs' argument regarding the applicability of FOIA Exemption 3, that the information withheld is inconsistent with the FBI's statements, is based upon speculation as to the content of the information withheld and does not provide a basis for disputing the withholding.

Plaintiffs' assertion that Exemption 3 is not "clearly or consistently directed to specific information" is meritless. The only information withheld under Exemption 3 is that portion of Sarasota-6 which was also withheld under Exemption 1. See Hardy decl. p. 19, n. 7. Exemption 3 is clearly indicated on Sarasota-6. See also Hardy decl. ¶¶ 45-47.

Exemption 6

Plaintiffs argue that Exemption 6 does not apply because the responsive documents are not "personnel and medical files and similar files," citing *Dep't of Air Force v. Rose*, 425 U.S. 352 (1976). The *Rose* decision does not support plaintiffs' position. Moreover, it pre-dates the Supreme Court's decision in *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599-602 (1982), which rejected the position that Exemption 6 should be limited to files containing "intimate details" and "highly personal" information and broadly defined "similar files" to include all information which "applies to a particular individual"; *see also Office of the Capital Collateral Counsel, N. Region of Fla. v. Dep't of Justice*, 331 F.3d 799, 802 (11th Cir. 2003). Further, plaintiffs are misconstruing *Alley v. U.S. Dept. of Health and Human Services*, 590 F.3d 1195, 1199 (11th Cir. 2009). *Alley* does not hold that an agency must examine competing public and private interest in order to determine whether files are of a personal quality and nature.

Plaintiffs also cannot rely on *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173 (11th Cir. 2007) to support their argument that the FBI has not met its burden in this case of showing

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[4] Plaintiffs speculate that the information withheld pursuant to FOIA Exemption 1 might dispute the FBI's statements regarding the FBI's investigative findings as to activities at 4224 Escondito Circle and that an analyst's note withheld under exemptions other than Exemption 1 may contain the same information withheld under Exemption 1 on Sarasota-6. See Hardy decl., p. 12, n. 4. Such speculation is unsupported and irrelevant to the applicability of Exemption 1.

that information was properly withheld under Exemption 6. Plaintiffs have not fully and accurately characterized the Eleventh Circuit's decision in *News-Press*. The court ruled in that case that disclosure of addresses of Individuals and Households Program ("IHP") applicants and National Flood Insurance Program ("NFIP") claimants would not constitute a clearly unwarranted invasion of personal privacy under Exemption 6 given the substantial public interest that the plaintiffs had demonstrated would be served by the disclosure. *News-Press*, 489 F.3d at 1208. However, the court also ruled that disclosure of the names of IHP recipients would constitute a clearly unwarranted invasion of personal privacy. *Id.* at 1205.

The FBI is withholding names and identifying information in this case pertaining to a limited number of individuals, disclosure of which would associate these particular individuals with an FBI investigation. In the *News-Press* case, the release of addresses could have identified some recipients of a government benefit, but the information at issue pertained to more than 600,000 individuals. *Id.* at 1179, 1202. Disclosure in this case would have a much more focused and substantial impact on the privacy of the individuals concerned. Further, unlike in the *News-Press* case, plaintiffs here have not shown that a substantial public interest cognizable under FOIA would be served by disclosure of this particular information.

The fact that plaintiffs may be aware of the identities of some individuals who may be named in the records through other sources or may speculate as to the identities which have been redacted is not a basis for finding that names and identifying information were improperly withheld. It is well established that the fact that information may previously have been made public or may be available from another source is not a basis for disclosure under FOIA. *See U.S. Dep't of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 762-763, 767-68 (1989)(recognizing that, under some circumstances, even information about an individual which is, or has been, in the public record may be protected); *see also U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487, 500 (1994)(finding employees' interest in nondisclosure of their addresses "not insubstantial" even though home addresses often are publicly available through sources such as telephone directories and voter registration lists).

Defendants have properly withheld names and identifying information pursuant to FOIA Exemption 6, as well as Exemption 7(C) as discussed below.

Exemption 7(C)

Plaintiffs contend that Exemption 7 (C) is inapplicable because the records sought are not of a sufficiently personal nature, citing *Washington Post Co. v. U.S. Department of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988). The *Washington Post* case involved a report of an investigation and assessment of the business decisions of Lilly employees during the development and marketing of a commercial product. *Id.* Whereas, here, the information at issue is information contained in FBI investigative files. According to the Supreme Court, the privacy interest is at its "apex" when the information at issue concerns private individuals who are the subject of law enforcement documents.[5] *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 166 (2003); *Reporters Committee*, 489 U.S. at 780.

Plaintiffs also argue that material must carry a clear implication of criminal activity to implicate a personal privacy interest, citing *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992). The *Hines* decision addresses a challenge to a criminal conviction; it does not concern the privacy interest protected under FOIA. The privacy interest protected under FOIA is a statutory creation that extends beyond common law and Constitutional protections. *Favish*, 541 U.S. at 170 (recognizing "surviving family members' right to personal privacy with respect to their close relative's death-scene images" under FOIA)*; see also Capital Collateral Counsel,* 331 F.3d at 803-04 (under Exemption 6)(finding an "important privacy interest" in DOJ attorney discipline records in a publicized misconduct case).

The individuals who are named or otherwise identified in the records at issue in this case clearly have a significant privacy interest under FOIA Exemption 7(C).

The general interest which plaintiffs assert that the public has in knowing what the FBI uncovered pertaining to individuals who may be named in these records is not the type of public interest which weighs in favor of disclosure under FOIA. FOIA was not intended to allow the public access to the information or evidence that the FBI obtains regarding private individuals which will not substantially contribute to the public's understanding of agency actions. *See Reporters Committee*, 489 U.S. at 763-64.

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[5] Although the *Favish* decision refers to a private "citizen," FOIA's privacy exemptions draw no distinction between the privacy interests of citizens and non-citizens.

Plaintiffs' speculation that release of the names and identifying information withheld under Exemption 6 and 7(C) will dispute the FBI's statement that the FBI found no credible evidence of connections to the 9/11 hijackers does not constitute the evidentiary showing required to outweigh the privacy interests in this case. *See Favish*, 541 U.S. at 175 (noting that allegations of government misconduct are easy to allege and that courts "must insist on a meaningful evidentiary showing" by the FOIA requester). Similarly, plaintiffs' disagreement with the FBI's actions and conclusions does not constitute evidence of agency misconduct. *See Favish*, 541 U.S. at 161-63, 173-75

Moreover, plaintiffs' contention that the FBI did not provide these records to the Joint Inquiry and the 9/11 Commission is not sufficient to outweigh the privacy interest in this case. Releasing names and identifying information contained in the records will not show what records the FBI made available, or did not make available to, the Joint Inquiry and the 9/11 Commission.

Even if plaintiffs were to present evidence of agency misconduct, such evidence would not necessarily negate the privacy interest or shift the balance in favor of disclosure. *See Office of the Capital Collateral Counsel*, 331 F.3d at 801, 803. The Court would still have to consider the "nexus required" between the withheld records or information and the purported public interest to be served by disclosure, whether disclosure of the particular withheld information would serve to inform the public as to "what their government is up to." *See Reporters Committee*, 489 U.S. at 772-75; *Favish*, 541 U.S. at 175; *see also Capital Collateral Counsel*, 331 F.3d at 804 ("[T]he public interest at stake must be evaluated in light of all that is already known about [the government conduct].").

The FBI has released redacted records which show what actions the FBI took and did not take with regard to activities at 4224 Escondito Circle. Releasing names and identifying information will not significantly add to the public's knowledge of the FBI's activities related to the investigation. Therefore, this information was properly withheld under Exemption 7(C).

Exemption 7(D)

With regard to defendants' withholdings pursuant to Exemption 7(D), plaintiffs merely request that the Court review the documents *in camera*, a request that defendants do not oppose.

Exemption 7(E)

With regard to defendants' withholdings pursuant to Exemption 7(E), plaintiffs claim that Exemption 7(E) is being invoked to protect the identities of FBI agents rather than to protect law

enforcement techniques and procedures. To the contrary, Exemption 7(E) has not been invoked to withhold the names of any FBI agents. As indicated in the Hardy declaration, the information withheld pursuant to Exemption 7(E) consists of case file numbers, dates and types of investigations, internal non-public FBI facsimile numbers, FBI investigative techniques and procedures, analytical techniques and procedures, and database and database Information. See Hardy declaration, at ¶¶ 66-72. Plaintiffs' assertion that defendants are improperly withholding information pursuant to Exemption 7(E) is incorrect and unsupported.

Dated: June 10, 2013
Miami, Florida

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that, on June 10, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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