UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-61289-CIV-ALTONAGA/O'Sullivan

BROWARD BULLDOG, INC., *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE, *et al.*,

Defendants.
_____/

ORDER

THIS CAUSE came before the Court on Defendants, United States Department of Justice and the Federal Bureau of Investigation's Motion for Reconsideration [ECF No. 102], filed June 2, 2017. Defendants request the Court reconsider its May 16, 2017 Order [ECF No. 99], granting in part Defendants' Motion for Summary Judgment on Count I ("Second MSJ") [ECF No. 66], and Motion for Partial Summary Judgment on Count I ("Third MSJ") [ECF No. 83], stating the Court erred in not granting summary judgment permitting redactions to Document 22 [ECF No. 97-2] on the basis of Freedom of Information Act Exemption 7(E). (*See* Mot. 2); 5 U.S.C. § 552(b)(7)(E). Plaintiffs, Broward Bulldog, Inc. and Dan Christensen filed a Response [ECF No. 106], to which Defendants filed a Reply [ECF No. 107]. The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. BACKGROUND

The Court summarized the factual background underlying this case in a February 27 Order and declines to do so again here. (*See* February 27 Order [ECF No. 58] 2–6). Defendants request reconsideration of the May 16 Order to correct a perceived error of law and prevent

manifest injustice. (*See* Mot. 3). Defendants assert the Court "applied an incorrect standard in assessing the FBI's application of Exemption 7(E) to portions of Document 22." (*Id.* 5). Defendants further contend they did not have an opportunity to brief the Court on why FOIA Exemption 7(E) applies to the redactions on Document 22, because Plaintiffs misled them into believing Document 22 was not in dispute. (*See id.* 3–4). As a result, Defendants argue the Court denied summary judgment on the issue "[o]n the basis of an incomplete record." (*Id.* 4 (alteration added)). In support of their Motion, Defendants attach a Sixth Declaration of David M. Hardy [ECF No. 105-1][1] setting forth the factual basis for the Exemption 7(E) claim.

For their part, Plaintiffs maintain they made no agreement not to challenge the redactions in Document 22 and, in any event, Defendants had an opportunity to brief their position regarding Document 22 before the May 16 Order was issued. (*See* Resp. 6). Plaintiffs further contend the Sixth Hardy Declaration "does not provide the Court with any basis to allow the redactions at issue." (*Id.* 9).

II. LEGAL STANDARD

"A motion for reconsideration is not an opportunity for the moving party and [its] counsel to instruct the court on how the court 'could have done it better' the first time. *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995) (alteration added). A motion for reconsideration is also not a vehicle to revisit prior arguments, present issues that should have been presented previously, or induce the Court to "rethink 'what it already thought through — rightly or wrongly.'" *Pines Props., Inc. v. Am. Marine Bank*, No. 00-8041-CIV, 2004 WL 5562664, at *1 (S.D. Fla. Jan. 15, 2004) (quoting *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla.1992)). Consequently,

[1] The Declaration was initially filed as Exhibit B [ECF No. 102-2] to the Motion, but Defendants re-filed it separately as the original uploaded file "appears to have been corrupted and is inaccessible on CM/ECF." (Defendants' Notice of Second Re-Filing [ECF No. 105] 1).

courts recognize "three major grounds which justify reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002) (alteration added; citations omitted).

III. ANALYSIS

"[T]he records at issue . . . are presumed to be subject to disclosure unless" Defendants "affirmatively establish[] . . . the requested records fall into one of FOIA's exemptions." *Office of Capital Collateral Counsel, N. Region of Fla.* ex rel. *Mordenti v. U.S. Dep't of Justice*, 331 F.3d 799, 802 (11th Cir. 2003) (alterations added; citation omitted). Exemption 7(E) applies 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. § 552(b)(7)(E). "While Exemption 7(E)'s protection is generally limited to techniques or procedures that are not well-known to the public, even commonly known procedures may be protected from disclosure if the disclosure could reduce or nullify their effectiveness." *Am. Immigration Lawyers Ass'n v. U.S. Dep't of Homeland Sec.*, 852 F. Supp. 2d 66, 78 (D.D.C. 2012) (citations omitted).

In the May 16 Order, the Court held "the FBI . . . failed to meet its burden in establishing Exemption 7(E) applies to the redacted information" in Document 22 because much of the redacted material "does not discuss any FBI investigative techniques and procedures; instead the material often encompasses facts and information about FBI suspects." (May 16 Order 38 (alteration added)). Defendants argue this is error because although Document 22 does not *discuss* techniques and procedures, the information contained in the document could still *reveal*

techniques and procedures. (*See* Mot. 5). For example, Document 22 contains a photo taken by a security camera, which itself does not discuss FBI techniques, but from which a careful viewer could deduce the location of the security camera at the site the photo was taken. (*See* Hardy Decl. ¶ 13; Doc. 22 at 13).

Exemption 7(E) applies to "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . (E) *would disclose* techniques and procedures for law enforcement investigations . . . ." 5 U.S.C. §§ 552(b)(7), (b)(7)(E) (alterations and emphasis added). The latest Hardy Declaration lays out how the redactions in Document 22 prevent the disclosure of law enforcement techniques and procedures, even though the redacted content does not directly discuss techniques and procedures. (*See* Hardy Decl. ¶¶ 13–27). Upon reviewing Document 22, the Court agrees the proposed redactions are necessary to prevent disclosure of FBI techniques or procedures.

Defendants assert the analysis ends there. They argue the Court erred in requiring them to show disclosure "could reasonably be expected to risk circumvention of the law" for Exemption 7(E) to apply. (Mot. 5). Defendants contend this requirement only applies to "guidelines for law enforcement investigations or prosecutions," and does not apply to disclosures of "techniques or procedures." (*Id.* 6).

Circuits are split as to whether disclosures revealing "techniques or procedures" are categorically protected or whether they are only exempted upon a showing of a risk of circumvention of the law. *Compare Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 204 n.4 (D.C. Cir. 2014) (information may only be withheld for disclosing "techniques or procedures" if disclosure "could reasonably be expected to risk circumvention of the law"), *with Hamdan v. U.S. Dep't of Justice*, 797 F.3d

759, 778 (9th Cir. 2015) (documents disclosing "techniques or procedures" receive categorical protection), *and Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010) (same). Although the Eleventh Circuit has not addressed the issue in a published opinion, lower courts within this Circuit appear to follow the D.C. Circuit in requiring a showing of a risk of circumvention of the law for a 7(E) Exemption to apply to documents disclosing "techniques or procedures." *See Jeanty v. F.B.I.*, No. 13-20776-CIV, 2014 WL 4206700, at *7 (S.D. Fla. Aug. 25, 2014); *Ajamu v. U.S. Marshals Serv.*, No. 8:14-CV-01609, 2015 WL 10844161, at *4 (M.D. Fla. May 12, 2015).

Even if the requirement applies, "[a] highly specific burden of showing how the law will be circumvented is not required; instead, exemption 7(E) only requires that the agency demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Gawker Media, LLC v. F.B.I.*, 145 F. Supp. 3d 1100, 1112 (M.D. Fla. 2015) (alteration added; quotation marks omitted) (quoting *Touarsi v. U.S. Dep't of Justice*, 78 F. Supp. 3d 332, 348 (D.D.C. 2015)). Thus, "given the low bar posed by the 'risk circumvention of the law' requirement, it is not clear that the difference matters much in practice." *Pub. Emps.*, 740 F.3d at 204 n.4. The Court is satisfied Defendants have met this low bar, as the Hardy Declaration sets forth how disclosure of the redacted contents would aid a criminal in violating the law or escaping legal consequences. *See Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Exemption 7(E) thus applies to the redactions in Document 22.

Plaintiffs contend reconsideration cannot be premised on arguments in the Hardy Declaration because these points could have been made before the May 16 Order was issued. (*See* Resp. 4–7). To this, Defendants respond they did not have "an opportunity to provide a

justification . . . in support of the redactions" (Mot. 4 (alteration added)), because Plaintiffs in their correspondence with Defendants "limited the records remaining in dispute to those identified on their chart and Document 22 was not identified among them" (*id.* 3–4).

Plaintiffs' counsel stated in a February 24, 2017 email to Defendants' counsel "[w]e have completed a preliminary review of the records that have been produced and believe that we can narrow the records redacted or withheld which remain in dispute to those in the chart below." (Mot., Ex. 1 [ECF No. 102-1] 1 (alteration added)). Document 22 was not included in the chart. While Plaintiffs contend this "proposal" was not binding because it "was never accepted by the FBI" (Resp. 2), the FBI acted reasonably in assuming Document 22 was no longer in dispute after receiving this email, which was sent after the FBI had produced Document 22 to Plaintiffs (*see id.*).

Plaintiffs are correct in stating Defendants could have certainly addressed the applicability of Exemption 7(E) to Document 22 in their Reply in Support of their Second MSJ [ECF No. 79], which was filed after Plaintiffs clarified to Defendants their intention of challenging the redactions in the Document. (*See* Resp. 3–4). Notwithstanding this failure by Defendants, because the May 16 Order rests on a misapplication of the 7(E) standard, the Court will grant reconsideration. Given the ambiguity over whether Document 22 was at issue when Defendants filed their Second MSJ, the Court exercises its inherent discretion to take notice of the points made in the Hardy Declaration. Defendants' failure to make the arguments in their Second MSJ does not preclude entry of summary judgment for Defendants with respect to Document 22.

Finally, Plaintiffs argue summary judgment is not appropriate at this stage in the litigation and Plaintiffs should be able to "cross-examine[]" Hardy at trial. (Resp. 9 (alteration

added)). Generally, FOIA cases should be resolved at the summary judgment stage. *See Miccosukee Tribe of Indians of Fl. v. U.S.*, 516 F.3d 1235, 1243 (11th Cir. 2008). This is particularly the case here, as only the lawfulness of an exemption claim, rather than the adequacy of a search, remains in controversy; "the law, rather than the facts, is the only matter in dispute." *Raytheon Aircraft Co. v. U.S. Army Corps of Eng'rs*, 183 F. Supp. 2d 1280, 1283 (D. Kan. 2001) (citation omitted). The Court sees no need for further facts to be elicited at trial.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. The Defendants' Motion **[ECF No. 102]** is **GRANTED**.
2. Summary judgment is **GRANTED** for Defendants with respect to Document 22.
3. Defendants shall furnish Plaintiffs a proposed final summary judgment by July 6, 2017, and supply the proposed judgment for consideration by the Court by July 11, 2017 in Word format via email.
4. The Clerk is instructed to mark this case as **CLOSED**.

DONE AND ORDERED in Miami, Florida this 29th day of June, 2017.

Cecilia M. Altonaga

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record