

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 17-13787 & 17-14264
Dist. Ct. 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/Appellants/Cross-Appellees,

v.

U.S. DEPARTMENT OF JUSTICE,
and FEDERAL BUREAU OF INVESTIGATION,
Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

Reply and Cross-Answer Brief of
Plaintiffs/Appellants/Cross-Appellees
Broward Bulldog, Inc., and Dan Christensen

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

The following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, and corporations that have an interest in the outcome of this particular case and appeal, including subsidiaries, conglomerates, affiliates, parent corporations, publicly held corporations that own ten percent or more of a party's stock, and other identifiable legal entities related to a party:

Altonaga, The Hon. Cecilia

Broward Bulldog, Inc.

Byron, H. Thomas, III

Christensen, Dan

Cure, Anaili M.

Federal Bureau of Investigation

Greenberg, Benjamin G.

Gunster, Yoakley & Stewart, P.A.

Hardy, David M.

Julin, Thomas R.

Kaersvang, Dana L.

Lee, Dexter

McGinn, Timothy J.

Miller, Raymond V.

Raurell, Carlos J.

Readler, Chad A.

Seidel, Michael G.

Smachetti, Emily M.

Teal, Kyle B.

United States Department of Justice

Broward Bulldog, Inc., is a not-for-profit Florida corporation. It has no parent corporation and no stock. I certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

s/ Thomas R. Julin

Thomas R. Julin

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENTC-1

TABLE OF CITATIONS iii

STATEMENT OF THE ISSUES..... 1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT 11

ARGUMENT 12

 I. Reversal is Required on the Grounds Set Forth in the Bulldog’s Appeal.... 12

 A. The District Court Erred in Concluding the FBI
 Established the Adequacy of its Search as a Matter of Law..... 12

 B. The FBI Has Not Established that the Exemptions it
 Has Invoked Apply to the Documents it Has Withheld
 and Redacted. 16

 1. The FBI Has Not Proved that FOIA
 Exemptions 5 and 7E Apply to Document 22. 16

 a. The FBI has not proved that
 Exemption 7E applies to Document 22..... 17

 b. The FBI has not Proved that
 Exemption 5 Applies to Document 22. 23

 2. The FBI Did Not Identify a FOIA Exemption that
 Applies to Document 1 and Therefore Must Produce It..... 25

 3. The FBI Has Not Proved That Exemptions 5,
 7D, and 7E Apply to Document 2..... 27

a.	The FBI has not Proved that Exemption 7D Applies to Document 2.	27
b.	The FBI has not Proved that Exemption 5 Applies to Document 2.	29
c.	The FBI has not Proved that Exemption 7E Applies to Document 2.	29
4.	The District Court Did Not Apply The Correct Standard of Review to Document 3.....	39
5.	The District Court’s Grant of Summary Judgment as to Document 5 was Incorrect.	42
6.	Remand is Required Because the District Court did not Make an Express Finding Concerning Segregability.	43
C.	The District Court Erred in Denying the Bulldog’s Motion to Depose FBI Special Agent Jacqueline Maguire	45
II.	The Rulings Attacked by the FBI’s Cross-Appeal Should be Affirmed.....	46
A.	The District Court Properly Rejected the FBI’s Redaction of Information Pursuant to Exemptions 6 and 7(C).....	47
B.	The District Court Properly Rejected the FBI’s Redaction of Information Pursuant to Exemption 7(D).....	52
	CONCLUSION	54
	CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS.....	vii
	CERTIFICATE OF SERVICE	vii

TABLE OF CITATIONS

Cases

ACLU of Mich. v. FBI,
734 F.3d 460 (6th Cir. 2013) 17, 18, 19

Allard K. Lowenstein Int’l Human Rights Project v. Dep’t of Homeland Sec.,
626 F.3d 678 (2d Cir. 2010)20

Blackwell v. FBI,
646 F.3d 37 (D.C. Cir. 2011)..... 18, 20

Campbell v. U.S. Dep’t of Justice,
164 F.3d 20 (D.C. Cir. 1998)..... 28, 42, 53

CIA v. Sims,
471 U.S. 159 (1985) 40, 41

Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice,
840 F. Supp. 2d 226 (D.D.C. 2012)51

Davin v. U.S. Dep’t of Justice,
60 F.3d 1043 (3d Cir. 1995)20

Dep’t of Air Force v. Rose,
425 U.S. 352 (1976)22

Dep’t of State v. Ray,
502 U.S. 164 (1991)22

Dow Jones & Co. v. Dep’t of Justice,
917 F.2d 571 (D.C. Cir. 1990).....24

Elec. Privacy Info. Ctr. v. U.S. Drug Enf’t Agency,
192 F. Supp. 3d 92 (D.D.C. 2016)..... 28, 53

EPA v. Mink,
410 U.S. 73 (1973)22

Feshbach v. SEC,
5 F. Supp. 2d 774 (N.D. Cal. 1997).....17

Founding Church of Scientology v. NSA,
610 F.2d 824 (D.C. Cir. 1979).....12

Frontier Found. v. Office of the Dir. of Nat’l Intelligence,
No. C 08-01023 JSW, 2009 WL 3061975 (N.D. Cal. Sept. 24, 2009)25

Hamdan v. U.S. Dep’t of Justice,
797 F.3d 759 (9th Cir. 2015)20

Hawthorn Mgmt. Servs., Inc. v. Dep’t of Housing & Urban Dev.,
No. Civ. 3:96CV2435(AHN), 1997 WL 821767 (D. Conn. 1997).....45

Hennessey v. Agency for Int’l Dev.,
121 F.3d 698 (4th Cir. 1997)24

Hussain v. DHS,
674 F. Supp. 2d 260 (D.D.C. 2009)17

Jones v. FBI,
41 F.3d 238 (6th Cir. 1994).....46

Justice v. IRS,
798 F. Supp. 2d 43 (D.D.C. 2011).....46

King v. U.S. Dep’t of Justice,
830 F.2d 210 (D.C. Cir. 1987).....42

Long v. U.S. Dep’t of Justice,
10 F. Supp. 2d 205 (N.D.N.Y. 1998)46

Miccosukee Tribe of Indians v. United States,
516 F.3d 1235 (11th Cir. 2008)31

Morley v. CIA,
508 F.3d 1108 (D.C. Cir. 2007).....44

N.Y. Times Co. v. United States,
403 U.S. 713 (1971)22

Pacesetter Sys., Inc. v. Medtronic, Inc.,
678 F.2d 93 (9th Cir. 1982)26

<i>Paisley v. CIA</i> , 712 F.2d 686 (D.C. Cir. 1983).....	25
<i>PHE, Inc. v. U.S. Dep’t of Justice</i> , 983 F.2d 248 (D.C. Cir. 1993).....	17
<i>Porter v. U.S. Dep’t of Justice</i> , 717 F.2d 787 (3d Cir. 1983)	46
<i>Reporters Comm. for Freedom of the Press v. FBI</i> , 877 F.3d 399 (D.C. Cir. 2017).....	12, 13
<i>Rockwell Int’l Corp. v. Dep’t of Justice</i> , 235 F.3d 598 (D.C. Cir. 2001).....	24
<i>Roth v. U.S. Dep’t of Justice</i> , 642 F.3d 1161 (D.C. Cir. 2011).....	28, 53
<i>Schaffer v. Kissinger</i> , 505 F.2d 389 (D.C. Cir. 1974).....	46
<i>Texas v. Interstate Commerce Comm’n</i> , 889 F.2d 59 (5th Cir. 1989)	25
<i>U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press</i> , 489 U.S. 749 (1989)	39
<i>Valencia-Lucena v. U.S. Coast Guard</i> , 180 F.3d 321 (D.C. Cir. 1999).....	12
<u>Statutes</u>	
5 U.S.C. App. 2 § 11(a)	15
5 U.S.C. § 552(a)(4)(B)	40, 43
5 U.S.C. § 552(a)(6).....	3, 37
5 U.S.C. § 552(b)(7)(E)	18
<u>Rules</u>	
Eleventh Circuit Rule 32-4	56

Federal Rule of Appellate Procedure 28.1(e)(2)(A)(i)56

Federal Rule of Appellate Procedure 32(a)(5).....56

Federal Rule of Appellate Procedure 32(a)(6).....56

Federal Rule of Appellate Procedure 32(f).....56

Other Authorities

Pub.L. 92-46315

STATEMENT OF THE ISSUES

Regarding their cross-appeal, the defendants, the U.S. Department of Justice and the Federal Bureau of Investigation (collectively “the FBI”), assert the issue is whether the District Court erred in ordering certain records disclosed. This incorrectly suggests that the cross-appeal should have one of only two outcomes: (1) the District Court’s decision is upheld and the records must be released or (2) the District Court’s decision is reversed and the records may be withheld.

This overlooks the procedural posture of the case and a third possible outcome if this Court concludes that the summary judgment is not appropriate. In the District Court, the plaintiffs, Broward Bulldog, Inc., and Dan Christensen (collectively, “the Bulldog”), opposed all of the FBI’s motions for summary judgment on the grounds that facts remained in dispute. Consistent with that position, the Bulldog did not file a cross-motion for summary judgment. Instead, it argued that the District Court should hear and weigh the conflicting evidence bearing on the validity of the FBI’s asserted exemptions. The Bulldog said that it would offer the testimony of former U.S. Senator D. Robert Graham, journalist Dan Christensen, and others who were familiar with the investigation of 9/11 conducted by Congress, the information which journalists unearthed regarding the FBI’s investigation of 9/11 in Sarasota and elsewhere, and the potential relevance

of the information sought in this case to litigation in the U.S. District Court for the Southern District of New York against the Kingdom of Saudi Arabia.

Notwithstanding the Bulldog's argument, the District Court held that the declarations submitted in opposition to and in support of the FBI's summary judgment motions showed that the Bulldog was entitled to summary judgment with respect to the records and redactions that are the subject of the FBI's cross-appeal. The Bulldog does not oppose the affirmance of the rulings in its favor. But if this Court concludes the District Court's rulings should not be affirmed, it should not automatically hold that the records may be withheld. It also must consider whether the District Court should have denied the FBI's summary judgment motions and set the case for trial on the issues that are the subject of the cross-appeal.

STATEMENT OF THE CASE

The FBI contends in its Statement of the Case, which makes no reference to even a single date, that it "processed plaintiffs' requests and reviewed responsive documents promptly." Answer Brief at 4. That is not true. The Meese Commission completed its work on March 25, 2015, when it released its one and only report. DE-35-5. The report sought to discredit an April 16, 2002, FBI memorandum that the Bulldog had forced the FBI to release through an earlier FOIA suit and which had exposed the FBI's public attacks on the Bulldog's reporting about the FBI's investigation of a Sarasota family as false.

In light of this, the Bulldog promptly requested Meese Commission records on April 8, 2015, DE-1-4, in order to expose that the Meese Commission had no basis for discrediting what the Bulldog had uncovered. It followed up with a more pointed request on July 4, 2015. DE-1-7. Nearly a year later on June 15, 2016, the FBI still had provided *no* substantive response to either FOIA request.¹ The Bulldog filed suit that day, DE-1, but the FBI did not produce any documents until October 31, 2016. DE-28-1 ¶45. That production contained just 220 pages, including 208 pages of incomplete contracts of Meese Commission members and personnel. Only 12 heavily-redacted pages of substantive records (consisting of four documents) were included.

This timeline establishes the FBI's response was far from prompt. In fact, the handling of the Bulldog's FOIA requests was regarded by the District Court as "shameful," DE 73-6 at 14, even after taking into consideration the large number of FOIA requests the FBI receives. DE-73-6 at 16. The mishandling of the Bulldog's requests indicated that the FBI was dragging its feet to prevent the Bulldog from obtaining records. The Bulldog later would discover that unredacted portions of those records, which were subsequently produced in piecemeal fashion, further confirmed that the Meese Commission lacked any basis for telling the

¹ FOIA requires a response within 20 business days absent unusual circumstances. 5 U.S.C. § 552(a)(6).

public that the report the Bulldog forced the FBI to release – finding “many connections” between the Sarasota Saudis and the 9/11 hijackers – was “wholly unsubstantiated.”

The FBI offered no evidence showing either the average time it takes to respond to a FOIA request in general or a specific request similar to the Bulldog’s, which targeted a narrow set of recently compiled documents produced or reviewed by the Meese Commission during the one year of its existence. Instead, the FBI offered that it reviewed “documents in the Commission’s storage site,” located 896 pages that were released “to the extent possible,” but then realized that the “previously released material actually had slight differences” and released the additional pages. FBI Brief at 4-5. The FBI then found more documents and “reconsidered” some. *Id.* at 5. It later found “working files . . . that had been created in the course of the Commission’s work” and had been sent to be purged, but found some of those documents were responsive and non-exempt and released some of them. *Id.* Not only are these statements inaccurate, the FBI ignores the dates on which these productions took place, which disrupted the Court’s scheduling efforts and made it impossible to prepare an effective opposition to the FBI’s asserted exemptions. The timeline also suggests the FBI made the tactical decision to produce documents only as deadlines approached and a deliberate

effort to undermine the trial court's efforts to address the redaction and withholding of records on a meaningful summary judgment record.

Below is a summary of the litigation and document production dates (boldfaced items show the number of pages reviewed, released, and withheld in connection with a release of records on the given date):

<u>Date</u>	<u>Reviewed</u>	<u>Released</u>	<u>Withheld</u>	<u>Record Cite</u>
03-25-15				Meese Commission Report Released DE-1-2 at 5
04-08-15				FOIA Request 1 for Meese Commission Records DE-1-4 at 2
07-05-15				FOIA Requests 2 & 3 DE-1-7 & 1-9
06-15-16				FOIA Complaint Filed DE-1
08-03-16				Scheduling Order Entered DE-14
10-31-16	220	220	0	DE-27-2 at 7
11-07-16				Original Discovery Cutoff DE-14 at 1
11-21-16				Summary Judgment Motion Deadline DE-14 at 2
11-23-16				Summary Judgment Motion Ext. to 12-30-2017 DE-18
12-27-17				Original Pre-Trial Stipulation Deadline DE-18
12-30-17				FBI's 1st Summary Judgment Motion DE-26 & 28
12-30-16	90	86	4	DE-28-1 ¶ 47
01-27-17	313	170	143	DE-34-1 at 7
01-27-17				FBI Discloses Special Agent Jacqueline Maguire DE-51-7
02-03-17				Pre-Trial Disclosures Due (30 days before trial) Rule 26(a)(3)(B)
02-09-17	Documents Re-Released (147 duplicates)			
	599	452	0	DE-42
02-13-17	745	190	555	DE-66-1 ¶ 12
02-14-17				New Pre-Trial Stipulation Deadline (Per 11-23-2017 Order)

<u>Date</u>	<u>Reviewed</u>	<u>Released</u>	<u>Withheld</u>	<u>Record Cite</u>
02-22-17	61	52	9	DE-66-1 ¶ 13
02-28-17	Calendar Call			DE-27
03-06-17	Two-Week Trial Period Starts			DE-27
03-14-17	FBI's Second Summary Judgment Motion			DE-166
03-24-17	302	20	282	DE-83-1 ¶ 7
03-31-17	FBI's Third Summary Judgment Motion			DE-75-1
04-06-17	Documents Re-Released			
	1	1	0	DE-83-1 at 33
05-16-17	Order on 2d & 3d Summary Judgment Motions			DE-99
06-02-17	FBI's Motion for Reconsideration			DE-102
06-29-17	Order on Reconsideration			DE-108
07-28-17	Final Judgment			DE-112
TOTAL	1731	738	993	

As noted in the chart, the Bulldog made its initial FOIA request two weeks after the Meese Commission completed its work, so locating the records should have been simple. The FBI also could have anticipated the requests being made because the Meese Commission Report specifically criticized the Bulldog's work regarding the FBI's Sarasota investigation without any basis. The FBI failed to produce *any* of the records in the first year after the Bulldog's requests were made.

The chart also reflects that the FBI actually located 1,731 pages of responsive documents – not 896. Of those 1,731 pages, it produced to the Bulldog just 738 heavily redacted pages and withheld 993 pages of those documents entirely.

More than four months after litigation commenced, and one week before the discovery cutoff, the FBI finally produced 220 pages and a mere four memoranda reflecting a tiny amount of the actual work the Meese Commission performed. This delay effectively precluded the Bulldog from using the produced documents to structure discovery relating to the reasonableness or adequacy of the FBI's search or the propriety of the FBI's redactions.

The FBI produced 90 additional pages of records on December 30, 2016 – the deadline for all pretrial motions. Those records consisted of 80 pages of a transcript of the Meese Commission's press conference announcing the release of its final report on March 25, 2016; eight pages of articles published by the Bulldog, and a heavily redacted, two-page document entitled "Alleged Sarasota Links to 9/11 Hijackers." DE-73-1 at 24. That document, apparently drafted by FBI Special Agent Jacqueline Maguire in connection with the FBI's September 2011 efforts to discredit the Bulldog's reporting, claimed the "FBI found no evidence that connected the family members mentioned in the Miami Herald article to any of the 9/11 hijackers, nor was any connection found between the family and the 9/11 plot." This memorandum, a version of which had been produced to the Bulldog in its prior litigation, DE-72-1 at 24—without many of the redactions made by the FBI in this case, DE-72-1 at 27—made no effort to explain why, 10 years earlier, the FBI had reached exactly the opposite conclusion. It also did not

address the Bulldog's findings, reported on September 8, 2011, that the al-Hijjis, a wealthy Saudi family connected to the Saudi royal family, abruptly left their Sarasota home two weeks before September 11, 2001. DE-28-1 ¶11. It did not deny the Bulldog's reporting that, after the 9/11 attacks, the FBI searched the al-Hijjis' home and found abandoned property, including a new car, and that sign-in logs and photographs of license plates from the gatehouse for the subdivision in which the al-Hijjis lived confirmed that cars driven by 9/11 ringleader Mohamed Atta and other hijackers were driven to the al-Hijjis' home. DE-28-1 ¶12.

Maguire's memorandum also did not reconcile its assertion that there was "no evidence" to connect the al-Hijji family to the 9/11 hijackers with the fact that, in 2002, the FBI had learned that a member of the al-Hijji family was enrolled in flight training at Huffman Aviation in Venice, Florida, where the 9/11 hijackers trained. DE-72-1 at 27-28 ("family member . . . was a flight student at Huffman Aviation in Venice, Florida"). It also failed to address that, in 2004, Wissam Taysir Hammoud had told the FBI and the Florida Department of Law Enforcement that Abdulaziz al-Hijji had told him that Osama Bin Laden was his hero and that al-Hijji had attempted to recruit Hammoud for a jihad in Afghanistan. Maguire's memo also said nothing about the fact, later reported by the Bulldog, that Esam Ghazzawi, al-Hijji's father-in-law and the owner of the Sarasota house, was well connected to many government leaders and the Saudi royal family, DE-86-2 ¶¶ 11-

17, and that Ghazzawi's father was Abbas Faiq Ghazzawi, a Saudi ambassador. DE-86-2 ¶¶ 22.

As the chart above shows, the FBI waited until after summary judgment deadlines and the scheduled trial date had passed on April 6, 2017, to produce the last three documents released. *See* DE-83-1 at 32-34. Redacted to conceal the names of FBI sources, the documents are three FBI memoranda dated September 15, 2001, consisting of FBI Tampa field agents' notes from interviews conducted on September 12, 13, and 15, 2001. Those interviews related to, among other things, the flight training of hijackers Mohamed Atta and Marwan al-Shehhi at Huffman Aviation. DE-83-1 at 33-34.

The tardy disclosure of these documents and Maguire's memo and the incomplete production of other Meese Commission records late in the litigation – as well as the absence of any documents contradicting the FBI's original finding of “many connections” between the 9/11 hijackers and the al-Hijji family – evidence the FBI's strategy to thwart the Bulldog's FOIA litigation.

The chart also reflects “errors” made by the FBI in its initial three document productions, which required it to re-process 600 pages of the documents that it had previously released and to remove redactions from 50 pages of those re-processed documents on February 9, 2017 – five days ahead of the pre-trial stipulation deadline.

The FBI's basis for claiming that it produced 896 pages of documents to the Bulldog is explained by the record cites it provides for that assertion – DE-75-2 at 6 and DE-66-1 at 4-5. The records are the Third and Fourth Declarations of David M. Hardy in which he describes the document releases on December 30, 2016; February 13, 2017; and February 22, 2017. The FBI ignores the 835 pages that were reviewed and partially released on October 31, 2016; January 27, 2017; and March 24, 2017. The FBI's convoluted production method interfered with the orderly flow of litigation, a factor that is relevant to whether the District Court erred in disposing of all issues by summary judgment rather than a trial on the merits. A trial or evidentiary hearing would have required the FBI to establish, through the presentation of live witnesses, the adequacy of its search and the propriety of its asserted exemptions. Given the numerous inconsistencies and fragmentary nature of production, a hearing and cross-examination of witnesses were necessary.

SUMMARY OF ARGUMENT

Point I. The three arguments raised by the Bulldog's appeal have not been rebutted by the FBI's answer brief: the District Court erred in finding, as a matter of law, that (1) the FBI conducted a reasonable and adequate search, (2) the FBI properly asserted FOIA exemptions, and (3) the deposition of FBI Special Agent Jacqueline Maguire was not warranted. A summary of these arguments is set forth in the Bulldog's Initial Brief at 23.

Regarding the Cross-Appeal, the Bulldog asserts:

Point II. The FBI's arguments for reversal of the orders requiring it to disclose information redacted under privacy-based FOIA Exemptions 6 and 7C should be rejected because:

A. The District Court correctly concluded that, because public interest in the information about persons identified in the records outweighs the very limited privacy interests that would be protected by non-disclosure, the FBI improperly redacted that information in reliance on Exemptions 6 and 7C.

B. The District Court also properly ordered the FBI to lift redactions that relied on Exemption 7D because the redacted information does not disclose the identity of a confidential source or information provided by a confidential source.

ARGUMENT

I.

Reversal is Required on the
Grounds Set Forth in the Bulldog’s Appeal

The FBI has not shown that it was entitled to summary judgment concerning (A) the propriety of its search or (B) its redactions and withholding of responsive records, and (C) the Bulldog should have been permitted to depose FBI Special Agent Jacqueline Maguire.

A. The District Court Erred in Concluding the FBI
Established the Adequacy of its Search as a Matter of Law.

It is well established in FOIA cases that “summary judgment is inappropriate” if “a review of the record raises substantial doubt” as to the adequacy of the government’s search, “particularly in view of ‘well defined requests and positive indications of overlooked materials.’” *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999) (quoting *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979)). In *Reporters Committee for Freedom of the Press v. Federal Bureau of Investigation*, 877 F.3d 399 (D.C. Cir. 2017), the D.C. Circuit overturned a district court order which held, in reliance on two declarations by David M. Hardy, that the FBI had conducted an adequate search for records. *Id.* at 400. The D.C. Circuit found conspicuous defects in Hardy’s affidavits – namely, they failed to set forth search terms or the

type of search performed. *Id.* Hardy said he had provided search directions to targeted FBI divisions but failed to describe “how those divisions in fact” completed the searches. *Id.* at 403. The D.C. Circuit observed that the declarations were “utterly silent as to which files or records systems were examined in connection with the targeted searches and how any searches were conducted, including, where relevant, which search terms were used to hunt within electronically stored materials.” *Id.* at 404.

Here, Hardy submitted *six* declarations, not two, because each successive declaration was filled with gaps, conclusory statements, and defects. The declarations reflected the FBI’s intent to stall, delay, confuse, and punitively increase the burden the Bulldog had to bear in the prosecution of this litigation. Unlike many broad FOIA requests, the Bulldog’s focused on a narrow set of documents that should have been easily and inexpensively retrieved, given that the first request was made just two weeks after the Meese Commission completed its work. The two-page request asked only for:

- Transcripts of Commission Proceedings and Interviews;
- Memoranda for the Record;
- Personal Services Contracts with Commissioners and Staff;
- Draft Copies of the Final Report;
- The FBI Briefing, “Overview of the 9/11 Investigation,” provided to the Commissioners on April 25, 2014;

- The 2012 FBI Summary Report regarding Fahad al-Thumairy referenced in an Undated FBI HQ Briefing on the “Sarasota Family”; and
- The “Sarasota family” case file, including reports of interviews reviewed by the Commission.

DE-1-4. None of the Hardy declarations adequately set forth search terms or the search methodology used. Bulldog Brief at 25-26, 30-32. The FBI makes no attempt to refute this argument and says only that the “FBI performed a document-by-document search of all of the records in the electronic storage site where the documents relating to the Commission are maintained.” FBI Brief at 14. What was this “electronic storage site”? How was it maintained? Who conducted the search? What search instructions were provided? These questions remain unanswered.

The incomplete results of the initial search were immediately apparent to the Bulldog without even having the required details of how the search was conducted. But instead of then engaging in an appropriate search and properly describing how it had been conducted, the FBI produced dribs and drabs of additional documents and admittedly overlooked storage sites, such as the FBI Director’s Office, where a batch of documents produced late in the litigation had been kept. FBI Brief at 15 n4. Indeed, the FBI acknowledges that after the Bulldog complained it “located additional repositories of documents” FBI Brief at 16.

The FBI also concedes that it failed to use search terms to comb electronic

databases, claiming that “there was no need” to do so. FBI Brief at 17. Why was there no need for search terms? Were the documents indexed or otherwise organized? Where were they kept? Electronically, in paper form, or both? The declarations fail to explain. The FBI admits that it initially elected not to search its Sentinel database because it did not believe it would yield responsive records; lo and behold, when the FBI searched Sentinel, it found responsive records. FBI Brief at 17.

The FBI’s failure to locate the requested transcripts of the Commission’s proceedings might be the most damning evidence of its inadequate search. Bulldog Brief at 30. In response, the FBI claims the Bulldog is simply speculating in its belief that additional notes or transcripts exist. FBI Brief at 18. This is contradicted by the Federal Advisory Committee Act, Pub.L. 92–463, 86 Stat. 770, (codified in 5 U.S.C. Appendix 2), which specifies that commissions that have been established to advise officers and agencies in the executive branch are required, except where prohibited by contractual agreements, “to make available to any person . . . copies of transcripts of . . . advisory committee meetings.” 5 U.S.C. App. 2 § 11(a). Yet, no transcripts of any Meese Commission meetings were located, nor were any transcripts of interviews, including one conducted of the FBI agent who authored the April 16, 2002, “many connections” memo.

As a remedy, the Bulldog proposes that this Court reverse and remand with

directions to the District Court to allow limited discovery, including a deposition of David M. Hardy or other officials who have maintained the Meese Commission records, so the Bulldog can ascertain what records were kept, where they were kept, how they were indexed or stored electronically, and how they were searched. The unusual record facts in this case require no less.

B. The FBI has Not Established that the Exemptions it has Invoked Apply to the Documents it Has Withheld and Redacted.

The manner in which the FBI has presented its arguments regarding its FOIA Exemptions is revealing. Rather than addressing each of the documents at issue – Documents 1, 2, 3, 5, and 22 – the FBI provides the Court with a highly abstract discussion of each of the exemptions it has relied upon – 1, 3, 5, 6, 7C, and 7E. This manner of argument obscures the significance of each challenged FOIA exemption. Accordingly, the Bulldog will keep its focus on the documents at issue as it did in its Initial Brief.

1. The FBI Has Not Proved that FOIA Exemptions 5 and 7E Apply to Document 22.

Document 22 is a slideshow titled “Overview of 9/11 Investigation,” which the FBI showed to the Meese Commission as a high-level report on the FBI’s work from September 11, 2001, to the beginning of the Commission’s work in early 2014. DE-73-3. The FBI redacted portions of that presentation in reliance on FOIA Exemptions 5 and 7E.

a. The FBI has Not Proved that
Exemption 7E Applies to Document 22.

Regarding Exemption 7E, the FBI relies on the Sixth Hardy Declaration, which asserts in the most conclusory terms possible that the document “discloses ‘sensitive investigatory techniques and procedures authorized for use by the FBI.’” FBI Brief at 32. Courts have disapproved similar agency declarations invoking Exemption 7E where, as here, they provide only conclusory or otherwise insufficient justifications for the withholdings.²

The FBI now cites *ACLU of Michigan v. FBI*, 734 F.3d 460, 466 (6th Cir. 2013), as supporting the District Court’s decision that Exemption 7E applies. In that case, the Sixth Circuit explained that, while telephone numbers might be publicly available in a phone book, release of the FBI’s compilation of only certain phone numbers would reveal the identities of persons or networks under FBI investigation. *Id.* at 466. No similar argument is advanced by the FBI in this case.

Furthermore, in that case, the ACLU sought information about the FBI’s use of community-level racial and ethnic demographic data, and the FBI withheld records in reliance on Exemption 7A (regarding law enforcement information that

² See, e.g., *PHE, Inc. v. U.S. Dep’t of Justice*, 983 F.2d 248, 252-53 (D.C. Cir. 1993) (describing FBI’s affidavit as “too vague and conclusory” and requiring “more precise descriptions of the nature of the redacted material”); *Hussain v. DHS*, 674 F. Supp. 2d 260, 271 (D.D.C. 2009) (condemning *Vaughn* indexes that merely recite statutory language); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 786-87 & n.11 (N.D. Cal. 1997).

if released “could reasonably be expected to interfere with enforcement proceedings”), not Exemption 7E (which exempts “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . 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)). *ACLU of Mich.*, 734 F.3d at 462. The FBI has not claimed that Exemption 7A justifies the redaction of any information in Document 22. Thus, *ACLU of Michigan* is inapposite, as it addressed a different exemption than the exemption asserted by the FBI and, accordingly, invoked an entirely different analysis with a burden of proof more deferential to the agency.

Specifically, under Exemption 7A, the FBI is permitted to show a “risk of interference generically” and “document-by-document discussion is unnecessary.” *Id.* at 466. Under Exemption 7E, an agency must “demonstrate logically how the release of *the requested information* might create a risk of circumvention of the law.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (emphasis added). It is not enough for the agency to make a generic showing that information of the type requested reasonably could risk circumvention of the law.

The *ACLU of Michigan* case is also distinct in that the parties cross-moved for summary judgment. Here, the Bulldog did not claim that all material facts were undisputed and it *opposed* summary judgment rulings on the grounds that facts concerning Exemption 7E-based redactions in Document 22 remained in dispute. *See* DE-86 (Bulldog’s Statement of Facts in Dispute). Those facts showed that the FBI had improperly used exemption claims to deny and delay the release of records concerning its Sarasota investigation. DE-86 ¶¶ 73-74. The Bulldog demonstrated that “the FBI has a history of improperly and contrary to law withholding records relating to possible Saudi support for the 9/11 attacks on the United States.” DE-86 ¶ 75. The FBI’s inconsistent statements and lack of explanation regarding the al-Hijjis’ purported connections to the 9/11 hijackers and its repeated FOIA violations created serious factual disputes. *See* DE-86 ¶ 92. The Bulldog demonstrated such disputes could properly be resolved only through a trial at which the FBI is required to meet its burden under FOIA. DE-86 ¶ 93. From this evidence, a reasonable factfinder could conclude that the FBI made redactions to conceal from the public evidence of Saudi support for the 9/11 attacks, rather than to prevent evasion of vaguely described law enforcement techniques used a decade and a half ago that failed to stop the 9/11 attacks.

The FBI contends that its redactions to Document 22 are warranted because they would reveal the FBI’s “choice to focus on a particular slice” of data

“revealing a targeting priority.” FBI Brief at 33. Yet, nothing in the record reflects that this is what Document 22 actually shows. As the title of the Document reflects, it is only an *overview*, summarizing work done over the course of more than a decade and, based on the unredacted portions and slide headings, it likely resembles a watered down version of the information that already appears in public documents and published works, such as the 9/11 Commission Report. Bulldog Brief at 39. Furthermore, adopting the FBI’s argument that its “choice” to focus on certain information constitutes a technique or procedure for law enforcement investigations or procedures would dramatically broaden the scope of Exemption 7E and violate the rule that FOIA exemptions must be construed narrowly. Bulldog Br. at 39-42.

The FBI also asserts that the *Blackwell* case and the Third Circuit’s decision in *Davin v. U.S. Department of Justice*, 60 F.3d 1043, 1064 (3d Cir. 1995), were incorrectly decided and asks this Court to align itself instead with the Second Circuit’s decision in *Allard K. Lowenstein International Human Rights Project v. Department of Homeland Security*, 626 F.3d 678, 681 (2d Cir. 2010), and the Ninth Circuit’s decision in *Hamdan v. U.S. Department of Justice*, 797 F.3d 759 (9th Cir. 2015), which held that a showing of risk of circumvention is required only when the records are guidelines for law enforcement investigations or prosecutions, and not when they are law enforcement techniques and procedures.

FBI Brief at 33-34. In advancing this point, the FBI ignores both the grammatical problems and the rules of statutory construction that the Bulldog presented in its Initial Brief. Bulldog Brief at 37-38.

The District Court followed the D.C. Circuit and the Third Circuit's interpretation of Exemption 7E but, as the Bulldog indicated, it misapplied these interpretations by concluding that the FBI made a sufficient showing that disclosure reasonably could result in evasion of the law. What was the foundation of that conclusion? The FBI points again to the Sixth Hardy Declaration, which contends as an example that "a particular photo 'would allow future subjects to know where to find [a] security camera' so they could 'circumvent[] detection,'" FBI Brief at 35. Hardy's Declaration refers to the page within Document 22 that is Bates-stamped Broward Bulldog-1508. DE-73-3. One need look no further than pages 9 and 11 of that Document, DE-73-3 at 9 & 11 (Broward Bulldog-1501 & 1503) to find other photographs captured by security cameras at airports that the FBI *did* release. Yet, Hardy provided no explanation as to why Broward Bulldog-1508 should be treated any differently under Exemption 7E. He does not contend in his declaration that the camera at issue was hidden from view or that it remains in place and operational today. It also is evident that the security camera(s) did nothing to prevent the 9/11 attacks, so it hardly seems likely that, if the cameras are operational today, continued concealment of their location will prevent any other

criminal activity. Nor does Hardy provide any support for the suggestion that those who would commit crimes today would first study the FBI's 9/11 investigation records from 2001 to learn how to avoid security cameras.

This sort of arbitrary and capricious assertion of FOIA exemptions to records relating to one of the most significant law enforcement investigations in U.S. history does nothing other than violate FOIA and create rampant speculation. It needlessly undermines the credibility of the FBI, the Justice Department and, indeed, the results of the investigation itself in contravention of the express purpose of FOIA, which is to instill confidence in the government through transparency.³ Indeed, “[s]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors.”⁴

The FBI's meritless assertion that disclosure of analysis regarding the hijackers' weapons, immigration, and finances would create a risk of circumvention of the law, FBI Brief at 35, also runs counter to the purpose of FOIA. Detailed information on these subjects has appeared in voluminous

³ *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991) (“The statute was designed ‘to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.’”) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (citing legislative history)); *EPA v. Mink*, 410 U.S. 73, 80 (1973).

⁴ *N.Y. Times Co. v. United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

governmental and non-governmental studies and public discussions.⁵ It is far more likely that release of this information will lead to valid and necessary public criticism of the FBI's oversight and investigative blunders than to any evasion of future law enforcement efforts. That this point is debatable further supports the Bulldog's position that a factual determination based on the evidence presented is required, rather than summary judgment.

b. The FBI has not Proved that
Exemption 5 Applies to Document 22.

The District Court also allowed the FBI to withhold four pages of Document 22 in reliance on Exemption 5, which creates the functional equivalent of a work product privilege for internal executive agency deliberations. Bulldog Brief at 43. The FBI contends it properly asserted this exemption to redact pages of Document 22 simply by contending that the withheld pages included information “containing or prepared in connection with the formulation of policies” by the Meese Commission. FBI Brief at 26. If such reasoning was sufficient to justify the

⁵ See, e.g., U.S. Government Accountability Office, *Department of Homeland Security: Progress Made and Work Remaining in Implementing Homeland Security Missions 10 Years After 9/11* (Aug 15, 2017); Anthony Summers & Robbyn Swann, *The Eleventh Day: The Full Story of 9/11* (Ballantine 2012); *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004); House Permanent Select Committee On Intelligence and the Senate Select Committee On Intelligence, *Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001* (Oct. 2002).

withholding of government records, the FBI could have withheld Document 22 entirely. Instead, the FBI released many pages in the document, even though it was a document prepared to assist the Meese Commission in its work.

Exemption 5 does not apply because Document 22 communicated the FBI's overview of its investigation to a Congressionally-created Commission that was not, itself, an agency.⁶ The Meese Commission was a body created by Congress for the special purpose of advising Congress. The Commission was not a part of the Department of Justice or the FBI, and the Commissioners and its staff were not employees of either agency.⁷ Its purpose was to conduct “a comprehensive *external review* of the implementation of the recommendations related to the FBI that were proposed by” the 9/11 Commission. DE-1-2 (Meese Commission Report at 3) (emphasis added). The enabling legislation required a report “to the

⁶ *Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 604 (D.C. Cir. 2001) (“communications between an agency and Congress [may] receive protection as intra-agency memoranda if they [a]re ‘part and parcel of the agency’s deliberative process,’” but may not receive this protection if “created specifically to assist Congress” and shared “for the sole purpose of assisting [a] Committee with its deliberations”); *Dow Jones & Co. v. Department of Justice*, 917 F.2d 571, 574-75 (D.C. Cir. 1990) (documents conveying advice from an agency to Congress are not “inter-agency” records); *see also Hennessey v. Agency for Int'l Dev.*, 121 F.3d 698 at *3 (4th Cir. 1997) (unpublished) (rejecting use of deliberative process privilege because agency intended deliberations for outside parties).

⁷ Members of the Meese Commission and its staff worked as independent contractors pursuant to personal service contracts awarded by the FBI. DE-27-2 at 51-271.

Congressional committees of jurisdiction on the findings and recommendations resulting from this review.” DE-1-2. Such communications with an *external* body do not fall within Exemption 5.⁸

2. The FBI did Not Identify a FOIA Exemption that Applies to Document 1 and Therefore Must Produce It.

Document 1, DE-73-1 at 2-3, is the Sarasota family case file the Meese Commission reviewed and referenced in its Report. DE-1-2 at 23. The FBI makes no claim that these documents obtained by the Meese Commission fall within any statutory exemptions. Production of this file would show the materials the Commission reviewed and would shed light on the basis, or lack of basis, for its conclusion that the April 16, 2002, FBI memo finding “many connections” between the al-Hijji family and the 9/11 hijackers was “wholly unsubstantiated.” The FBI maintains that the case file can be withheld on “principles of comity and judicial efficiency” and claims the same documents are “already at issue in a separate, previously filed FOIA suit.” FBI Brief at 39. But it cites no authority for the proposition that these principles trump the FBI’s FOIA compliance

⁸ *Paisley v. CIA*, 712 F.2d 686, 699 n.54 (D.C. Cir. 1983) (agency responses to congressional requests for information may not constitute protectible “inter-agency” communications), *vacated in part on other grounds*, 724 F.2d 201 (D.C. Cir. 1984); *Texas v. Interstate Commerce Comm’n*, 889 F.2d 59, 61 (5th Cir. 1989); *Elec. Frontier Found. v. Office of the Dir. of Nat’l Intelligence*, No. C 08-01023 JSW, 2009 WL 3061975, at *5 (N.D. Cal. Sept. 24, 2009), *amended and superseded on other grounds*, 639 F.3d 876 (9th Cir. 2010).

requirements. Instead, it cites *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982), and other cases for the proposition that a matter in a previously filed action should not be adjudicated in a subsequent action. None of these cases are interpreting FOIA, however, and they do not otherwise apply here.

The Bulldog filed a prior FOIA case in 2012, based on the FBI's refusal to produce documents relating to its investigation of the Sarasota Saudi family. DE-28-1 ¶ 17-18. After initially denying that it had any responsive documents and being ordered to conduct a better search, DE-28-1 ¶19, the FBI ultimately identified 83 pages of responsive records and produced many of them to the Bulldog in redacted form, including the critical April 16, 2002, FBI memo finding "many connections" between the al-Hijjis and the hijackers. DE-28-1 ¶¶ 20-25. The search ordered by Judge William J. Zloch in that case also located 80,266 pages of records in the FBI's Tampa Field Office. DE-28-1 ¶ 26. At issue in that case is whether redactions to the 83 pages were proper and whether the 80,266 pages are responsive and classified.

Here, the issue is whether the FBI is required by FOIA to produce the "case file" referenced in the Meese Commission Report. The redactions and withholdings in the Bulldog's first FOIA suit were not at issue before the District Court below and the FBI does not claim that the "case file" in this case constitutes either batch of documents. It states only that "the documents at issue in both cases

are documents relating to the Sarasota family that are stored in the 9/11 investigation file from the Tampa field office.” FBI Brief at 40. That leaves in question what exactly the Meese Commission obtained. However the first case is resolved, it will not disclose which records the Meese Commission reviewed.

Only by requiring the FBI to identify the requested documents can the Bulldog evaluate whether the FBI provided the Meese Commission with the documents necessary to perform its task. The Bulldog suspects that the FBI did not, in fact, provide the most significant portions of its Sarasota case file to the Meese Commission and thereby affirmatively misled the Commission into concluding that the FBI had found no connections between the al-Hijji family and the 9/11 hijackers when, in fact, the FBI had found “many connections” that were inexplicably concealed from Congress and the public.

3. The FBI has Not Proved that
Exemptions 5, 7D, and 7E Apply to Document 2.

Document 2, DE-27-2 at 40 & DE-68-1 at 22, is a four-page memorandum summarizing the April 30, 2014, briefing which Agent Maguire gave to the FBI.

a. The FBI has not Proved that
Exemption 7D Applies to Document 2.

Exemption 7D protects confidential sources but there is nothing confidential about the sources identified in Document 2. The first redaction made on Exemption 7D grounds is a paragraph relaying information obtained from postal

inspectors concerning the hurried disappearance of the al-Hijji family two weeks before the 9/11 attacks. This was reported in Special Agent Gregory J. Sheffield's April 16, 2002, memorandum. DE-1-2. Another Document 2 redaction obviously relates to the FBI's interview of Wissam Taysir Hammoud. The FDLE released its unredacted account of this interview to the Bulldog on December 21, 2011, more than six years ago. DE-28-1 ¶17.

Remarkably, another FBI redaction hides the identity of al-Hijjis' neighbor, Larry Berberich. Not only was Berberich a quoted source in the Bulldog's initial reporting, DE-28-1 at 41, but he provided the Bulldog with a declaration detailing what he knew about the al-Hijjis' disappearance and the FBI's related investigation. DE-28-1 at 69. He was even prepared to testify as a witness for the Bulldog at trial. Significantly, for all of these Exemption 7D redactions, the FBI has failed to offer evidence that the "confidential sources" were ever given assurances of confidentiality.⁹ Without this evidence, the FBI's claims under Exemption 7D fail.

⁹ See *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 34 (D.C. Cir. 1998); *Elec. Privacy Info. Ctr. v. U.S. Drug Enf't Agency*, 192 F. Supp. 3d 92, 111 (D.D.C. 2016) (citing *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1184 (D.C. Cir. 2011)).

b. The FBI has not Proved that
Exemption 5 Applies to Document 2.

The FBI contends that it appropriately asserted Exemption 5 to redact portions of Document 2 because the redactions consisted of “deliberative process” recommendations made to the Meese Commission. FBI Brief at 26. As discussed above, the Meese Commission is not a government agency. Section I.B.1.b, *supra*. It was created by Congress to conduct an external review of the FBI’s implementation of the recommendations of the 9/11 Commission. Exemption 5 therefore does not apply to communications that the FBI sent to the Meese Commission, whether they were final or deliberative.

c. The FBI has not Proved that
Exemption 7E Applies to Document 2.

Regarding redactions to Document 2 made pursuant to Exemption 7E, the FBI again simply relies on the speculation provided by David M. Hardy in his Sixth Declaration. It fails to establish how production of Document 2 would disclose qualifying techniques and procedures or create a risk of circumvention of the law. This Court can determine from its own *in camera* review of Document 2 that the redactions made under Exemption 7E fall far short of disclosing “the FBI’s ‘playbook’ for apprehending criminals,” as Hardy contends. FBI Brief at 32. The Document is four pages in length and the redactions made on Exemption 7E

grounds consist of bits and pieces of information gathered concerning Sarasota.

For example, one paragraph containing Exemption 7E redactions states:

Within 2 weeks after 9/11, the FBI received 2 leads from a local postal inspector about the _____ (redacted) mail piling up, 1 lead from a neighbor stating that _____ (redacted) was unfriendly and suddenly left the area and 1 lead stating no movement in the house. The FBI _____ (redacted) in April 2002.

DE-68-1 at 23. The FBI comment regarding these redactions says that “[r]evealing these names shows the nature and extent of the FBI’s investigative interest in these subjects. Release here would result in negative inferences, defamation, possibly harrasing [sic] inquiries, and possible disruption of these individuals’ lives.” DE-68-1 at 23. The FBI is not concerned that Document 2 contains secret techniques and procedures that, if disclosed, would allow criminals to circumvent the law. Its true concern is that the Bulldog or other media would learn the names of people interviewed by the FBI and would obtain information that could be used to criticize the FBI for failing to follow investigative leads.¹⁰

¹⁰ The FBI originally redacted the bulk of this particular paragraph when it first produced Document 2 to the Bulldog. DE-73-1 at 6. The FBI conceded the inapplicability of Exemption 7D and removed most of the redactions when it re-produced the document on March 15, 2017. DE-68-1 at 23. The District Court noted in its May 16, 2017, summary judgment order that, although the FBI had lifted these redactions in part, it was redacting similar information elsewhere without explaining its inconsistent invocation of FOIA’s exemptions. DE-99 at 21, 28, 33. The FBI also initially redacted the identities of Agents Elizabeth Callahan and Maguire but later provided those names when it re-released documents on January 27, 2017. These inconsistencies, along with others the Bulldog has raised, throw the FBI’s redactions into doubt and, at the very least, present genuine issues

Another paragraph partially redacted from Document 2 on Exemption 7E grounds states:

There is no actual documentation of searches and work done to rule out connections. Jackie [Maguire] wrote the white paper provided. She also personally _____ (redacted) _____ (redacted) _____.

Opening EC 4/16/2002

On 4/16/2002 FBI agent _____ (redacted) _____ requested a _____ (redacted) _____ be opened on the _____ (redacted) _____ His opening EC stated that investigation revealed many connections between the _____ and the hijackers. Jackie stated this was a bad statement. It was overly speculative and there was no basis for the statement. The EC stated the family fled unexpectedly. It also stated _____ (redacted) _____ had connections with the (redacted) _____ however there was no connection with the _____ (redacted) _____

The EC stated the family left suddenly; however further investigation from Florida Department of Law Enforcement indicated all clothing had been removed from the residence. Although suspicious, no evidence of foul play was found.

The opening EC concluded _____ (redacted) _____

DE-68-1 at 24. The FBI's primary justification for these redactions is identical to its privacy focused explanation regarding the prior Exemption 7E redactions, which is not relevant to Exemption 7D and, in any event, is trumped by public interest in this investigation. Furthermore, the FBI made no claim in its comments

_____ of material fact that require reversal of the summary judgment rulings. *See Miccosukee Tribe of Indians v. United States*, 516 F.3d 1235, 1255 (11th Cir. 2008). The inconsistencies also invalidate the District Court's finding that the FBI performed a reasonable search. *Id.* at 1251-52.

that the redactions would unveil techniques and procedures that could result in circumvention of the law. Plainly, it could not.

Instead, the redactions appear to conceal either intentional wrongdoing or significant malfeasance by the FBI. The relevant background corroborates this assertion: The Bulldog published its initial news report revealing the FBI's Sarasota investigation on September 8, 2011, which included strong statements from former U.S. Senator Bob Graham criticizing the FBI for failing to disclose its Sarasota investigation to the Joint Intelligence Committee Inquiry (JICI) regarding 9/11, which he chaired in 2002. DE-28-1 ¶13. On September 9, 2011, one day after the Bulldog's report was published, the FBI sent an email to Jay Weaver, a reporter for *The Miami Herald*, bashing the Bulldog's report as inaccurate. DE-28-1 ¶14. It stated that many investigative tips and leads after 9/11, "including this one, were resolved and determined not to be related to any threat nor connected to the 9/11 plot. All of the documentation pertaining to the 9/11 investigation was made available to the 9/11 Commission and the JICI." DE-51-2.

This immediate reaction, which contradicted the Bulldog's sources in Sarasota and Senator Graham's assertion that the Sarasota investigation had not been disclosed to Congress, strongly suggested that the FBI was attempting to conceal either its failure to follow up on an important investigation or the results of an investigation revealing a Saudi support network for the 9/11 hijackers. The

Bulldog knew of no reason that its sources, including Senator Graham, would lie about any of this information. In fact, Graham has testified that the FBI had continually lied to him about the Sarasota investigation. DE-28-1 ¶¶ 15-16.

On September 15, 2011,¹¹ six days after its email to *The Miami Herald*, the FBI, unbeknownst to the Bulldog, wrote an internal white paper, DE-72-1 at 26-27 that attempted to corroborate the statements in its press release to *The Miami Herald*¹² (and, consequently, the world). It stated:

The FBI's PENTTBOM investigation found no evidence of any contact between the hijackers and the (redacted) family, to include telephone, email, or financial contact. The FBI also found no evidence of hijacker vehicles having visited the (redacted) residence (note: the FBI appears not to have obtained the vehicle entry records of the gated community, given the lack of connection to the hijackers).

DE-72-1 at 27. The parenthetical note strangely suggested that the FBI did not check the gatehouse records that, according to the Bulldog's sources, confirmed that 9/11 hijackers visited the al-Hijjis because the FBI already knew what those records would show, namely, no connection. The FBI then transformed this internal white paper into a further public attack on the Bulldog's reporting when it

¹¹ Although the document is dated September 15, 2010, the year must have been a typographical error because the memo refers to the Bulldog report published on September 8, 2011. Judge Zloch noted this in the Bulldog's initial lawsuit. DE-28-1 at 100 n.5.

¹² The Bulldog's September 8, 2011, article had been republished in *The Miami Herald*.

sent an email to *St. Petersburg Times* Reporter Susan Martin. DE-51-3 at 2. This second email doubled down on the FBI's unlikely narrative that it found no connection between the al-Hijjis and the 9/11 hijackers and claimed that the "FBI did follow up on the information about suspicions surrounding the referenced Sarasota home and family. Family members were subsequently located and interviewed." DE-51-3 at 2. The FBI again denied finding any connections to the hijackers or any nexus to the "9/11 plot" and repeated that the documents regarding the investigation were made available to the 9/11 Commission and the JICI, which had been co-chaired by Graham.

By then, the FBI had twice publicly denied finding any connections between the al-Hijjis and the 9/11 hijackers and twice falsely claimed that it reported its Sarasota investigation to the JICI, a fact that Graham disputed under oath. DE-28-1 at 58 ¶20. The Bulldog demanded that the FBI produce the records of its Sarasota investigation in an effort to resolve this conundrum. DE-28-1 ¶17.

In the first lawsuit before Judge Zloch, the FBI eventually produced on March 28, 2013, both the white paper described above, DE-72-1 at 27, and the FBI's April 16, 2002, memo, DE-1-3, which contradicted both the white paper and the FBI emails to *The Miami Herald* and the *St. Petersburg Times*. Indeed, the April 16, 2002, memo had found "many connections," including that an al-Hijji

family member had trained at the same flight school as the hijackers.¹³ DE-1-3.

It was this contradiction in the FBI's own records that led Judge Zloch to force the FBI to conduct a far more extensive search for records relating to the Sarasota investigation. DE-28-1 at 52 ¶76. It seemed logical to both Graham, DE-28-1 at 55-68, and to Judge Zloch, DE-28-1 at 83-110, that once an FBI agent had found "many connections" – whether correctly or incorrectly – the FBI must have created many more investigative records as it chased and that these records must not have been found because of the inadequacy of the FBI's search or the FBI's deliberate concealment of its Sarasota investigative file. Judge Zloch's conclusions prompted the FBI to admit it had found 80,266 pages of "Secret" materials in its Tampa Field Office, which Judge Zloch undertook to review *in camera* on May 1, 2014. DE-28-1 ¶¶26-27

While that review was taking place, the Meese Commission weighed in on the matter with its report of March 25, 2015, attacking the credibility of the FBI's "many connections" memo. DE-1-2 at 23 & DE-28-1 ¶28. In deliberately cryptic terms, the Commission Report stated:

The FBI told the Review Commission that the FBI Electronic Communication (EC) on which the news article was based was "poorly written" and wholly unsubstantiated. When questioned later

¹³ The FBI redacted the name "al-Hijji" from the memorandum, but the context of the redaction left no doubt that the memorandum was referencing the al-Hijji family.

by others in the FBI, the special agent who wrote the EC was unable to provide any basis for the contents of the document or explain why he wrote it as he did.

DE-1-2 at 23 (emphasis added). This bizarre observation – that an FBI special agent was unable to explain his report – ultimately led to this litigation. The Report did not identify the special agent who wrote the memo. It did not state whether the Commission itself had interviewed the special agent or identify who had conducted that interview. The Commission’s Report also did not state whether the interview took place in 2002, when the memorandum was written, or in 2014, when the Meese Commission was reviewing the matter.

Without setting forth any credible basis, the Report effectively reiterated and embellished the FBI’s press releases that were published immediately after the Bulldog’s article. DE-28-1 ¶34. The Report’s omissions fueled the Bulldog’s concern that the FBI was deliberately concealing what it found in Sarasota – possibly serious evidence of Saudi government collusion with the 9/11 hijackers. It also appeared that the FBI may have misled the Meese Commission that Congress created to review the FBI’s implementation of reforms advocated by the 9/11 Commission in 2004. DE-28-1 ¶35. The Bulldog, therefore, demanded production of the FBI’s records relating to its work for the Meese Commission. DE-28-1 ¶36.

The FBI simply ignored the Bulldog’s requests for more than a year, in

violation of 5 U.S.C. § 552(a)(6), forcing the Bulldog to file this lawsuit, DE-28-1 ¶¶37-38, an enormously onerous undertaking given the complex interrelationship it would have with the case still pending before Judge Zloch. After much delay, even after the suit was filed, the FBI finally produced records that included Document 2, DE-27-2 at 37-40, a summary of a briefing to to persuade the Meese Commission to dismiss as inaccurate the Bulldog's reports regarding Senator Graham's insistence that the FBI had withheld records from Congress; the FBI's April 16, 2002, memo finding "many connections" between the al-Hijjis and the 9/11 hijackers; and Wissam Hammoud's statement that al-Hijji was an aspiring jihadist who venerated Osama bin Laden.

In its first production of Document 2, the FBI redacted the title "Al-Hiiijii [sic] Family" before later claiming inadvertence and releasing the title and the family name in select paragraphs, despite the District Court's orders finding the exemptions inapplicable.¹⁴ DE-99 at 21, 25-26. It also initially redacted from Document 2 the identity of Agent Jacqueline Maguire, who had briefed the Commission on the FBI's Sarasota investigation and prepared the FBI white paper

¹⁴ The name "al-Hijji" has sometimes been spelled in FBI documents with four "i's" instead of two. The FBI ultimately conceded in the litigation that it had no basis to redact either the title of the memorandum or the name of the author of the memorandum but maintained its redaction of the al-Hijji name in other contexts, despite the District Court's rulings requiring removal of those privacy based redactions. DE-99 at 21.

on September 15, 2011,¹⁵ which was based the Bulldog's September 8, 2011, reporting, which elicited the FBI's emails to *The Miami Herald* and *St. Petersburg Times*. It redacted from Document 2 the name of the white paper that Maguire had prepared, and also the name of Wissam Hammoud, the source who had informed the FBI in 2004 that he believed al-Hijji knew the 9/11 hijackers and that al-Hijji's hero was Osama bin Laden. It redacted the name of Gregory J. Sheffield, the FBI Special Agent who had written the "many connections" memo, and also portions of questions the Meese Commissioners asked the FBI about the Sarasota investigation, including al-Hijji's whereabouts and whether he was ever interviewed. The FBI deleted key portions of Document 2 which likely would provide further evidence that the Bulldog, Graham, and the families of the victims of the 9/11 attacks would use to criticize the FBI for negligently or purposely failing to investigate wealthy Saudi citizens residing in the United States for possible complicity in the most devastating terrorist attack in our nation's history.

Summary judgment regarding the FBI's redactions to Document 2 in reliance on Exemption 7E or on any other grounds should have been denied. The FBI's inconsistent positions and the contradictory evidence in this record required a factual determination, not a summary judgment determination, that the redactions

¹⁵ Document 2 states that "Jackie wrote the white paper provided." DE-68-1 at 24.

to Document 2 were made for lawful purposes, authorized by Congress through FOIA, and not to conceal the FBI's mishandling of its Sarasota investigation.

4. The District Court Did Not Apply
The Correct Standard of Review to Document 3.

Document 3 is a two-page memorandum for the record dated October 24, 2014, titled "9/11 Additional Evidence." Just two paragraphs of Document 3 were not redacted:

It was explained that in preparation for trials of individuals held at Guantanamo Bay, Cuba, the FBI has gone back to review evidence/information already in hand to see if additional evidence can be found for the prosecution of these individuals

* * *

None of this identifies new participants in the 9/11 attacks but hardens the existing known connections to the plot.

DE-73-1 at 10-11.

The FBI redacted most of this document in reliance on Exemptions 1 and 3. The Bulldog asserts, in reliance on *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 755 (1989), that the District Court failed to conduct a *de novo* review to ensure that these exemptions in fact allowed the redactions. The FBI acknowledges that "courts have a role in ensuring that withholdings under Exemptions 1 and 3 are proper," and further that courts must ascertain that assertion of these exemptions are both "logical" and "plausible." FBI Brief at 24. Yet, the FBI advanced no argument that the District Court

determined that the undisputed material facts showed the FBI had either a logical or plausible basis to redact Document 3 on the grounds stated. Instead, the District Court held, contrary to FOIA and *Reporters Committee*, that it must “defer to” the FBI’s “decision to withhold information under Exemptions 1 and 3.” DE-58 at 27. This was incorrect and should be reversed for review of the FBI’s assertions under the correct standard. *See* 5 U.S.C. § 552(a)(4)(B).

The FBI’s arguments do not show either logic or plausibility. For example, a Hardy declaration states that material redacted from Document 3 would reveal information that was ““very specific in nature, provided during a specific time period, and known to very few individuals.”” FBI Brief at 24-25 (citing DE-27-1 at 17-18). This statement conveys nothing of substance. The declaration contains boilerplate justifications for withholding information, pursuant to Exemptions 1 and 3, but makes no attempt to apply those reasons to the redaction of Document 3. In fact, that part of the declaration makes no reference to Document 3 at all.

Decisions cited by the FBI, such as *CIA v. Sims*, 471 U.S. 159, 179 (1985), are not to the contrary. In *Sims*, the Supreme Court held the Director of Central Intelligence properly invoked Exemption 3 to withhold the identities and institutional affiliations of researchers involved with the development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior. *Id.* at 161, 181. The Court acknowledged

that the Director's decision to invoke Exemption 3 was "worthy of great deference given the magnitude of the national security interests and potential risks at stake," *id.* at 170, but it did not blindly defer to the Director. Instead, it reviewed the evidence and found Exemption 3 had been properly invoked "in light of the record that disclosure would lead to an unacceptable risk of disclosing the sources' identities." *Id.* at 181.

The redacted information here at issue is hardly analogous to the identities of researchers developing sensitive military weapons. It is only information which would show whether information reported by the Bulldog concerning the FBI's Sarasota investigation could be used in the prosecution of individuals being held at Guantanamo Bay in connection with their involvement with the 9/11 attacks. The FBI elected to release its *conclusion* that "[n]one of this identifies new participants in the 9/11 attacks but hardens the existing known connections to the plot," DE-73-1 at 11, but not the basis for its conclusion, just as the FBI claimed publicly that it had found "no connections" between the al-Hijjis and the 9/11 hijackers, but released no documents addressing the contrary evidence. By redacting material in Document 3 that shows the FBI failed to perform an adequate investigation (or covered up its findings), the FBI has created the appearance that the al-Hijjis had no connections to the 9/11 hijackers.

Under these highly unusual circumstances, the District Court should not have simply deferred to the FBI's exemptions. It should have examined them more closely at a trial to ascertain whether Exemptions 1 and 3 were being invoked for purposes other than national security.

5. The District Court's Grant of Summary Judgment as to Document 5 was Incorrect.

Document 5 is a memo that sets forth "Updates and Initiatives (as of 5 October 2012)" and describes the Saudi network that supported hijackers Nawaf al-Hazmi and Khalid al-Mihdhar when they arrived in San Diego. DE-27-2 at 45-48. As elsewhere, the FBI failed to carry its burden because it failed to offer an explanation for why each exemption invoked applies to each specific redaction. *E.g.*, Bulldog Brief at 55 (Exemptions 7A and 7D.)

The FBI argues that redactions grounded on Exemption 7E were warranted because they "would reveal law enforcement techniques or procedures," FBI Brief at 32, but does not point to any evidence other than boilerplate assertions by David M. Hardy to make the required showing that disclosure could create a reasonable risk of circumvention of the law. Hardy's assertions did not provide the Bulldog the requisite "meaningful opportunity to contest" the FBI's redactions and the FBI has not met its burden. *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 29 (D.C. Cir. 1998) (quoting *King v. U.S. Dep't of Justice*, 830 F.2d 210, 218 (D.C. Cir. 1987)).

The FBI argues redactions pursuant to Exemption 1 and 3 must be upheld because it has an absolute right to redact on these grounds without judicial oversight as long as it claims it has redacted classified national security information. FBI Brief at 24-25. This is wrong. Courts must independently ensure exemptions are properly invoked, 5 U.S.C. §552(a)(4)(B), and this role is particularly important where, as here, the record shows that the FBI's public and internal positions regarding an investigation of national and international importance are in conflict, that a U.S. Senator the former chair of the CIJI has accused the FBI of engaging in outright deception concerning its investigation, and the facts reported by media, such as the Bulldog, call the motives of the FBI seriously into question. In these extraordinary circumstances, blind, wholesale deference to redactions made under Exemptions 1 and 3 defeats the very purpose of FOIA and allows agencies to play the national security card as an absolute defense to production whenever it suits the government's purposes, regardless of whether such risks are truly at issue.

6. Remand is Required Because the District Court did not Make an Express Finding Concerning Segregability.

The FBI acknowledges that FOIA requires release of information reasonably segregable from material properly withheld and insists that it has fulfilled its obligation to do this, citing the Fifth Declaration of David M. Hardy in which he

conclusorily asserts as much. FBI Brief at 41. The facts in this record provided multiple reasons to doubt the correctness Hardy's statement.

Furthermore, regardless of the steps taken by the FBI, the District Court failed to make its own express findings concerning segregability, which are required by FOIA. *See Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007). It declined to adopt a color-coded appendix prepared by the parties that showed in detail which portions of the documents the FBI intended to withhold pursuant to the court's orders and which would be produced.¹⁶ Instead, the District Court erroneously approved redactions in the form of large block paragraphs without assessing whether the redactions were broader than any FOIA exemption warranted.

Furthermore, the District Court's orders are too vague to enforce. As evidence of this unenforceability, the parties conferred and were unable to agree on precisely which parts of each redaction the District Court had approved. For example, the District Court ordered parts of one paragraph to be released, while other parts of the same paragraph were to remain redacted. It was not clearly

¹⁶ The parties jointly submitted the appendix to the District Court in an attempt to avoid the confusion likely to be caused by the vagueness of the rulings below. The Bulldog also filed its objections to certain portions of the FBI's proposed appendix, given the parties' difference in interpretation. DE-113.

specified exactly which words, phrases, and sentences fell under which ruling within those redacted paragraphs.

C. The District Court Erred in Denying the Bulldog's Motion to Depose FBI Special Agent Jacqueline Maguire.

As the apparent author of the FBI “white paper” which first challenged the accuracy of the Bulldog’s September 8, 2011, article concerning the Sarasota investigation, Agent Jacqueline Maguire’s deposition was essential to affording the Bulldog a “meaningful opportunity” to contest the FBI’s redactions. After her white paper and the ensuing FBI press statements were contradicted by the FBI’s “many connections” memo, Maguire told the Meese Commission that the memo had no basis in fact. DE-73-1 at 6. She also told the Meese Commission, which faithfully adopted her narrative, that the special agent who wrote the “many connections” memo “was unable to provide any basis for the contents of the document or explain why he wrote it as he did.” DE-1-2 at 23.

The Bulldog was entitled to discovery in this case because discovery likely would have produced evidence that the FBI’s exemptions should not apply and that summary judgment was therefore inappropriate.¹⁷ The FBI claims that discovery was inappropriate because “FOIA provides access to documents, not

¹⁷ See *Hawthorn Mgmt. Servs., Inc. v. Dep’t of Housing & Urban Dev.*, No. Civ. 3:96CV2435(AHN), 1997 WL 821767 (D. Conn. 1997) (internal citations omitted) (published news reports and the government’s submission of declarations lacking full explanations warrant depositions in FOIA cases).

explanations.” FBI Brief at 37. But the need for discovery can be shown by calling into question the FBI’s use of exemptions¹⁸ and it is undeniable that such analysis requires *explanations* as to why material is exempt from production. Given her consistent involvement in this matter, Maguire was the best witness to provide those explanations.

The FBI argues that discovery is “not generally available in FOIA litigation.” FBI Brief at 19. The unusual circumstances of this case provided sufficient evidence that the FBI improperly asserted FOIA exemptions to conceal its own malfeasance or misfeasance. Accordingly, the deposition was absolutely necessary to the Bulldog’s case. This Court should find the District Court abused its discretion in preventing the requested discovery.

II.

The Rulings Attacked by the FBI’s Cross-Appeal Should be Affirmed

The FBI has not shown any basis for reversing those portions of the District Court’s order that require the FBI to remove various privacy related redactions.

¹⁸ *E.g.*, *Schaffer v. Kissinger*, 505 F.2d 389, 391 (D.C. Cir. 1974) (holding that plaintiff “should be allowed to undertake discovery for the purpose of uncovering facts which might prove his right of access to the documents which he seeks”); *see also Long v. U.S. Dep’t of Justice*, 10 F. Supp. 2d 205, 210 (N.D.N.Y. 1998); *Jones v. FBI*, 41 F.3d 238, 242 (6th Cir. 1994); *Justice v. IRS*, 798 F. Supp. 2d 43, 46 (D.D.C. 2011); *Porter v. U.S. Dep’t of Justice*, 717 F.2d 787, 793 (3d Cir. 1983) (discovery in FOIA case appropriate when “affidavit, and the redacted documents, demonstrate the need for further inquiry”).

A. The District Court Properly Rejected the FBI's Redaction of Information Pursuant to Exemptions 6 and 7(C).

The FBI does not attempt to defend its invocations of Exemption 6, and this Court should affirm all of the District Court's rulings that the FBI improperly invoked Exemption 6. The District Court correctly ruled that the FBI's Exemption 7C arguments fail, and this Court should affirm those rulings, too.

The FBI's arguments with respect to the names of FBI agents are overbroad. If they were correct, every law enforcement officer's name could be redacted from every report about every criminal investigation. FOIA has no such exemption.

Regarding other individuals whose names would be revealed pursuant to the District Court's order, the FBI sets forth generic arguments which ignore the specific facts of this case. The FBI first argues that the name of any person that has "any association or presumed association with the 9/11 attacks" should not be revealed. Of course, the FBI itself has not adhered to this principle. The documents released in this case disclose the names of FBI agents, such as Jacqueline Maguire, DE-51-7 at 1, who has played a central role in the 9/11 PENTTBOM investigation from the beginning, and many others.

The FBI also has released the names of persons who have been the targets of its investigation, including the names of the al-Hijji family, "after Judge Altonaga state[d] that some of the names are already released publicly so release here would not constitute a significant invasion of these individuals' personal privacy." DE-

66-1 ¶88. The Fourth Declaration of David M. Hardy, explaining the FBI's release of the al-Hijji name, claimed "the FBI had inadvertently protected the [4-30-2014] Briefing title ('Al-Hijji Family') and the discussion of the 'Al-Hijji' family in the FBI's review of Dan Christensen's article There is no additional personal privacy intrusions that can feasibly occur by releasing this information."¹⁹ DE-66-1 ¶30. The statement from Hardy directly contradicts the FBI's assertion that a "strong privacy interest in controlling personal information in FBI records is not diminished merely because similar information may be available from another source." FBI Brief at 50. While that might be true in some instances, it is far from a universal principle and clearly could not be applied here because the FBI's own public statements, while not naming the al-Hijji family, unquestionably related to them because those statements were responding to the Bulldog's reporting about the family and attempting to refute the accuracy of the reporting.

The FBI, contrary to its alleged concerns for the privacy rights of anyone associated with 9/11, also released the names of many others such as Bassam Youssef, DE-27-2 at 43, a retired FBI agent who provided a lead to the Meese Commission; Omar Ahmad al Bayoumi, DE-27-2 at 44, a man who reportedly met with the San Diego hijackers; Mohdar Abdullah, a man who, according to FBI

¹⁹ The FBI's claim of inadvertence was belied by the fact that Judge Zloch already made a determination in the Bulldog's initial lawsuit that the FBI must search for documents using the al-Hijji name. DE-28-1 at 107.

documents, “played a key role facilitating the daily lives and assisting” the hijackers; and Fahad al-Thumairy, DE-27-2 at 47-48, the Imam at the King Fahad Mosque near Los Angeles who met with hijackers.

The FBI notes that facts such as home addresses of individuals may be redacted, FBI Brief at 50, but does not contend that any of the redacted information ordered disclosed is anyone’s home address. It also asserts, in boilerplate fashion, that “[i]ndividuals acquitted of crimes have a clear privacy interest,” FBI Brief at 51, but then fails to assert that any of the information here at issue involves a person who has been acquitted of any crime, let alone whether any crimes are even under investigation here. Assuming arguendo this issue is in play, if the acquitted individual has been publicly suspected of crimes he did not commit in dozens of media reports, then it stands to reason that the individual would welcome the release of exculpatory FBI documents confirming his innocence. For example, the release of materials confirming that the FBI did in fact follow up on the al-Hijji investigation and obtained exculpatory evidence as a result would serve well to correct the existing public record.

The FBI also asserts that the “privacy interest persists even if the individual discloses his own involvement in the investigation” by testifying in court. FBI Brief at 51. But here too, the FBI does not contend that the names at issue are of individuals who had participated in its investigation and then testified in court.

These generic, inapplicable arguments provide no basis for reversal of the District Court's rulings which were based on the facts before it.

The District Court's rejection of the FBI's invocations of Exemption 7C rested heavily on its observation that the FBI "has not addressed whether the invasion would be severe and whether the public's interest in disclosure outweighs any potential invasion of privacy." DE-58 at 18. The District Court, rejecting the FBI's initial summary judgment motion, held: "There are questions of material fact whether disclosing the names would constitute an unwarranted invasion of privacy and whether the public interest in knowing the information is paramount. Indeed, based on the record, it seems the name should be unredacted because Exemptions 6 and 7(C) are not applicable." The District Court properly found the FBI's arguments for its application of Exemptions 6 and 7C "conclusory," contrary to the Supreme Court's "instruction to construe the exemptions narrowly," and so generic that they "could effectively swallow the general rule favoring disclosure." DE-58 at 14 (citation omitted).

The FBI argues that the information ordered disclosed would not promote any public interest, FBI Brief at 54-58, but this ignores that the FBI invited public interest in the details of its Sarasota investigation when it very publicly undertook to refute the accuracy of the Bulldog's reports which disclosed the existence of the investigation, that the al-Hijji family had contact with the 9/11 hijackers, that they

fled the country two weeks before the 9/11 attacks, and that the FBI did not disclose these findings to Graham and the JICI or to the 9/11 Commission. The FBI's own public statements, first to *The Miami Herald* and then to the *St. Petersburg Times*, created grave public doubts about whether the FBI was concealing information of vital national interest. The FBI merely wants to protect itself from embarrassment, which is not supported under Exemption 7C. Indeed, “[o]ne can have no privacy interest in information that is already in the public domain, especially when the person asserting his privacy is himself responsible for placing that information into the public domain.” *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep’t of Justice*, 840 F. Supp. 2d 226, 233 (D.D.C. 2012); *see also* DE-99 at 25.

The fact that Graham publicly accused the FBI of lying when it claimed to have disclosed the results of its investigation to Congress fueled additional public interest in knowing who conducted the FBI's Sarasota investigation, who were the subjects of the investigation, and who was interviewed by the FBI.

The Bulldog's premise in making its initial FOIA requests was simply that if the investigation found no connections between the al-Hijjis and the 9/11 hijackers, the FBI easily should be able to produce documentation indicating that it had conducted at least minimal investigatory diligence to dispel any allegations of terrorist connections. Instead, the FBI initially claimed it had no documentation,

then admitted that this was not true, and then produced documents showing that its public statements were inconsistent with its internal documents. Finally, the FBI fanned the flames of public interest through its attempt to discredit its own internal memo by telling the Meese Commission that the memo was wholly unsubstantiated and that the undisclosed agent who had written it could not explain why he wrote it as he did.

All of these facts, completely ignored in the FBI's arguments, require affirmance of the District Court's Exemption 6 and 7C rulings.

B. The District Court Properly Rejected the FBI's Redaction of Information Pursuant to Exemption 7D

The FBI contends that the District Court ordered disclosure of the name of a confidential source and specific information that he provided the FBI. FBI Brief at 60. The redacted document at issue, referred to as Document 27 below, DE-87-1 at 25-30 (released originally as Broward Bulldog 1572-77), was not released by the FBI until March 24, 2017. It consists of notes from an April 2004 interview by FBI Special Agent Leo Martinez and Sarasota County Sheriff's Office Detective Michael Otis of inmate Wissam Taysir Hammoud in a Hillsborough County prison. The FBI's redactions were futile because the Bulldog first obtained the redacted details on December 21, 2011, when the Florida Department of Law

Enforcement disclosed its notes from this same interview of Hammoud.²⁰ DE-28-1 at 19-33.

Nothing in the FDLE's unredacted report suggests that Hammoud was given an express or implied assurance of confidentiality. More importantly, the FBI has failed to satisfy its burden that Hammoud was given any such assurance, which is fatal to its argument. Specifically, the FBI failed to explain "the sources' relation to the crime, whether the source received payment, and whether the source has an ongoing relationship with the law enforcement agency." *Elec. Privacy Info. Ctr.*, 192 F. Supp. 3d at 111 (citing *Roth*, 642 F.3d at 1184²¹); *Campbell*, 164 F.3d at 34. Accordingly, the FBI's claims fail.

The Bulldog filed these FDLE documents with the District Court below on January 12, 2017, in support of its opposition to the FBI's initial summary judgment motion and to show the inadequacy and bad faith of the FBI's search, the implausibility of its public assertions that al-Hijji had no connections to the 9/11 hijackers, and the impropriety of the FBI's assertions of exemptions to hide important records related to the Meese Commission's work. DE-28-1 at 19-33.

²⁰ The notes in red text on DE-83-1 at 25-30 include information that the Bulldog gathered from the FDLE documents.

²¹ "Even when the FBI contends that a source received an express assurance of confidentiality, it must, in order to 'permit meaningful judicial review,' present sufficient evidence that such an assurance was in fact given." *Roth*, 642 F.3d at 1184 (citations omitted).

The FDLE documents showed that not only had the FBI found in 2002 that Abdulaziz al-Hijji had many connections to the 9/11 hijackers, but that it also had obtained evidence in 2004 that, before al-Hijji fled, he was a friend of a prime 9/11 suspect, Adnan el Shukrijumah, and that he idolized Osama bin Laden. *See* DE-87-1 at 28-29.

Confronted with these undisputed facts, as well as the unredacted version of the FBI's notes, the District Court denied the FBI's motion for summary judgment and stated that it could not determine which, if any, parts of Document 27 could be legitimately redacted on Exemption 7D grounds.²² DE-99 at 43-44. This result should be affirmed because, in addition to the public nature of Document 27, the FBI failed to provide a shred of evidence – or even to allege – that it gave Hammoud an express or implied assurance of confidentiality.

CONCLUSION

The District Court's decision should be reversed in part and remanded for trial to determine the reasonableness and adequacy of the defendants' search, the propriety of the FBI's asserted exemptions, and to allow the deposition of Agent Jacqueline Maguire. The District Court's rulings that require the FBI to disclose material should be affirmed.

²² The District Court later cured this error by entering a final judgment directing the FBI to disclose all portions of Document 27 withheld on Exemption 7(D) grounds. DE-112 ¶4.

Respectfully submitted,

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I hereby certify that on January 12, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel for the Appellant via transmission of Notices of Electronic Filing generated by CM/ECF.

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