Nos. 17-13787, 17-14264

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BROWARD BULLDOG, INC. and DAN CHRISTENSEN,

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 BRIEF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, and 11th Cir. R. 26.1-2(a), the undersigned hereby certifies that the following persons and entities may have an interest in the outcome of the case.

Altonaga, The Hon, Cecilia

Broward Bulldog, Inc.

Byron, H. Thomas

Christensen, Dan

Cure, Anaili M.

Federal Bureau of Investigation

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McGinn, Timothy J.

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Smachetti, Emily M.

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United States Department of Justice

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DANA KAERSVANG

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INTRODUCTION AND SUMMARY

As the government explained in its opening/response brief, the district court erred in ordering disclosure of the identities and other personal information of individuals swept up in the Federal Bureau of Investigation's (FBI's) 9/11 investigation and of the low-level government employees engaged in that investigation. *See* Gov't Br. 42-60. FOIA Exemptions 6 and 7(C) require balancing the privacy interest that would be harmed by disclosure against the value of disclosure to "public understanding *of the operations or activities of the government*." *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994) (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773, 775 (1989) (emphasis in original).

As the government explained in its opening brief, there is no public interest in the disclosure of the personal information at stake in this case. The district court erroneously relied on interests that cannot be the basis for ordering disclosure under FOIA and did not identify any way in which disclosure would improve the public's understanding of government activities. Gov't Br. 55-56. Plaintiffs do not attempt to defend this basis for the district court's decision. Resp./Reply Br. 46-52. Nor do they demonstrate how the public interest in learning what the government is up to would be advanced by the disclosure of the names and other personal information at issue here. *Id*. at 50-52.

Instead, plaintiffs attempt to minimize the privacy interests at stake. They suggest that an individual would suffer no harm from being named in FBI files relating to the 9/11 investigation. Resp./Reply Br. 47-50. But this privacy interest cannot seriously be questioned. As the government explained in its opening brief, courts have repeatedly recognized that individuals named in investigative records have a protected privacy interest in their records. *See* Gov't Br. 44-49. The record in this case demonstrates that FBI records associating individuals with the 9/11 terrorist attacks would "cast[] these individuals in an extremely negative light," regardless of whether they were actually involved in the attacks. DE-66-1 at 20. And FBI officials could be subject to danger and harassment if their identities were disclosed or confirmed by the FBI. DE-27-1 at 27-28.

Plaintiffs' arguments to the contrary misunderstand both the government's argument and the relevant case law. They assert that no one can have a privacy interest in material that is already in the public domain. But the information here has not been publicly disclosed by the government. Media speculation does not vitiate privacy interests under FOIA. Exemptions 6 and 7(C) protect individual privacy, and it is for the individual to determine whether his or her information should be released. In any event, the media has not named all of the individuals whose identities are at stake in this case, and the FBI has not publicly disclosed any of their identities or personal information.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS TREATMENT OF PERSONAL INFORMATION.

The "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 765 (1989). The "core purpose" of FOIA is to require disclosure of agency records that can "contribut[e] significantly to public understanding *of the operations or activities of the government*" and thereby "inform[] [citizens] about what their government is up to." *U.S. Dep't of Def. v. FLRA*, 510 U.S. 487, 495 (1994) (*DoD*) (quoting *Reporters Comm.*, 489 U.S. at 773, 775). FOIA's purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Id*. at 496 (quoting *Reporters Comm.*, 489 U.S. at 773). To that end, Exemption 7(C) protects records or information "compiled for law enforcement purposes" if their public disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).[1] That

[1] As the government explained in its initial brief, the redactions at issue in this case are justified under both Exemptions 6 and 7(C). *See* Gov't Br. 44 n.12. Plaintiffs err in asserting that the government does not challenge the district court's ruling on Exemption 6. *See* Resp./Reply Br. 47. However, both Exemption 6 and Exemption 7(C) apply to all of the personal privacy information at issue in the

statutory standard requires courts to "balance the competing interests in privacy and disclosure." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004).

1. As the government explained in its opening brief, and plaintiffs do not dispute, the district court erroneously relied on interests that are not protected by FOIA when ordering disclosure. Resp./Reply Br. 50-52. The district court based its order on an asserted interest in learning about "suspects and subjects of interest in the September 11 attacks" and on the value of the information in a separate tort suit against Saudi Arabia pending in the Second Circuit. DE-99 at 24, 37-38. Plaintiffs do not claim that these interests are protected by FOIA. *See* Resp./Reply Br. 50-52. The Supreme Court has emphasized that, while "there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency," that interest "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Comm*, 489 U.S. at 774-75*; see also, e.g., L & C Marine Transp., Ltd. v. United States*, 740 F.2d 919, 923 (11th Cir. 1984) ("private needs"

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government's cross-appeal, and the standard under Exemption 7(C) is more protective, so the government appropriately focuses on that standard. *See* Gov't Br. 44 n.12; *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 165-66 (2004).

for documents in connection with litigation "play no part in whether disclosure is warranted").

Rather than rely on the district court's stated basis for its decision, plaintiffs assert that there is reason to question whether the FBI turned over information regarding its investigation of the Sarasota family to Congress or to the Commission.[2] Resp./Reply Br. 32, 50-52. Plaintiffs also assert that the FBI created a public interest in this issue by responding to the Broward article. *Id.* at 50-51. But plaintiffs cannot demonstrate a public interest in uncovering government malfeasance by pointing to the government's denials of their accusations. In any event, plaintiffs make no attempt to demonstrate how the particular information ordered disclosed by the district court—the names and other personal information of individuals in FBI files—would shed light on what information the FBI disclosed to Congress or to the Commission. This is fatal to their argument. There is a public interest in release only if the particular information at issue would "add significantly to the already available information concerning the manner in which [the agency] has performed its statutory duties." *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1094 (9th Cir. 2017). This

[2] Plaintiffs also raise a number of other allegations of government wrongdoing in the course of the search. While the government disputes these allegations, *see, e.g.*, Gov't Br. 16, it does not respond to them here because they do not relate to any asserted public interest in the personal information at issue in this cross-appeal and so are not properly within the scope of this reply brief.

requires a link between the information and the FOIA-cognizable public interest at stake. *Favish*, 541 U.S. at 172 (holding that requester "must show the information is likely to advance [the FOIA-protected public] interest."); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 504 (11th Cir. 2011) (per curiam). Plaintiffs have not shown that the personal information at issue has any "marginal additional usefulness" to the public understanding of the agency's performance of its statutory duties. *Cameranesi v. U.S. Dep't of Def.*, 856 F.3d 626, 640 (9th Cir. 2017).

It is no surprise that plaintiffs fail to carry this burden, because names and identifying information in FBI files are "simply not very probative of an agency's behavior or performance." *Schrecker v. U.S. Dep't of Justice*, 349 F.3d 657, 666 (D.C. Cir. 2003) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991)); *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 193 (2d Cir. 2012) ("In many contexts, federal courts have observed that disclosure of individual employee names tells nothing about 'what the government is up to.'").

Having failed to carry their burden, plaintiffs fall back on the district court's statement that FOIA's statutory exemptions should be read narrowly. Resp./Reply Br. 50. But this rule of interpretation is no basis to disregard settled principles established by Supreme Court precedent. The interpretive canon cannot be applied "'to subvert' the plain meaning of the statute." *Public Inv'rs Arbitration Bar Ass'n*

v. SEC, 771 F.3d 1, 5 (D.C. Cir. 2014). Congress crafted Exemptions 6 and 7(C) to protect the "equally important" right of personal privacy. *See* S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *see also DoD*, 510 U.S. at 497 n.6. Thus, "[t]he privacy interests protected by the exemptions to FOIA are broadly construed." *Associated Press v. U.S. Dep't of Justice*, 549 F.3d 62, 65 (2d Cir. 2008).

2. In its initial brief, the government explained that people involved in an investigation—whether witnesses, suspects, persons of interest, or government agents—have a protected privacy interest in their connection to the investigation. Gov't Br. 45-47. This interest applies to subjects of an investigation, persons of interest in the investigation, and others named in FBI reports, regardless of whether the individuals are innocent or guilty. *Id.*; *see, e.g.*, *Reporters Comm.*, 489 U.S. at 749, 757-58, 766 n.18; *Favish*, 541 U.S. at 166; *Rimmer v. Holder*, 700 F.3d 246, 257 (6th Cir. 2012) (subjects of investigation); *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 975 (9th Cir. 2009) (witnesses); *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam) (law breakers). It also applies to FBI agents and other lower-level government employees, who have a well-established privacy interest in their connection to a high-profile investigation. Gov't Br. 47; *see, e.g.*, *Favish*, 541 U.S. at 166; *Maynard v. CIA*, 986 F.2d 547, 566 (1st Cir. 1993).

The government further explained that this privacy interest persists even if the information is available from another source. Gov't Br. 50; *see, e.g.*, *DoD*, 510 U.S. at 497 (union employees' names and home addresses); *Reporters Comm.*, 489 U.S. at 780 (information contained in FBI rap sheets); *Associated Press*, 549 F.3d at 65 ("This protection extends even to information previously made public." (citing *Reporters Comm.*, 489 U.S. at 763-64)). In the context of Exemptions 6 and 7(C), because the interest being protected is the individual's interest in "control[ling] . . . information concerning his or her person," *Reporters Comm.*, 489 U.S. at 763; *Associated Press*, 549 F.3d at 65, the government "cannot waive individual . . . privacy interests—whatever it does or fails to do," *Lakin Law Firm, P.C. v. FTC*, 352 F.3d 1122, 1124 (7th Cir. 2003); Gov't Br. 52-53; *Prison Legal News v. Executive Office for U.S. Attorneys*, 628 F.3d 1243, 1249 (10th Cir. 2011); *August v. FBI*, 328 F.3d 697, 701-02 (D.C. Cir. 2003); *Halpern v. FBI*, 181 F.3d 279, 297 (2d Cir. 1999). Certainly, putative disclosure by a source outside of the federal government does not waive the application of FOIA exemptions. *Edwards v. Executive Office for U.S. Attorneys*, 436 F. App'x 922, 924 (11th Cir. 2011).

Plaintiffs attempt to reduce a few of the cases cited by the government to their facts. *See* Resp./Reply Br. 49 (distinguishing cases barring disclosure after an individual was acquitted of a crime or testified in open court). But these are just a few of the many examples cited by the government to make clear that the

individual's privacy interest continues even if the information can be discerned from other sources. Thus, for example, an individual retains a privacy interest in his address, even though "home addresses often are publicly available through sources such as telephone directories and voter registration lists." *DoD*, 510 U.S. at 500. Plaintiffs miss the import of these cases in responding—incorrectly—that the district court did not order disclosure of home addresses. Resp./Reply Br. 49.[3]

Plaintiffs assert generally that the government's argument is "overbroad" and "generic," but do not cite any court of appeals case ordering disclosure of identifying information in FBI investigative files. Resp./Reply Br. 47, 50. Indeed, the only case plaintiffs cite in this section of their brief is an out-of-circuit district court case in which the court recognized a privacy interest in records of an investigation. *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Justice*, 840 F. Supp. 2d 226, 234 (D.D.C. 2012). The court in that case held that a congressman "ha[d] a substantial—although much diminished—privacy interest" in records of an investigation into his conduct, even though Congress had passed a

[3] A brief perusal of the document memorializing the April 2004 jailhouse interview (Document 27) makes clear that it includes addresses, as well as home and cell phone numbers, bank account numbers, dates of birth, driver's license numbers, booking numbers, and other personal details. *See* DE-73-5 at 16-19, 21, 23-24. In turning over a similar document, the Florida Department of Law Enforcement redacted some, although not all, of this information. *See* DE-28-1 at 24-30 (Ex. A). Plaintiffs have not demonstrated any public interest in the disclosure of these details.

statute calling for the Department of Justice to investigate his actions and the congressman had discussed the investigation in his own statements to the press. *Id.* at 232, 234. The court held that the government could not entirely refuse to search for documents based on the privacy interest, but should instead search for the investigative records and prepare a *Vaughn* index. *Id.* at 233, 236 & n.9. That was the procedure followed by the FBI in this case.

Plaintiffs also improperly attempt to minimize the privacy interest at stake in these documents. Resp./Reply Br. 47-49. Indeed, this case demonstrates why an individual's interest in controlling personal information in FBI files is so important and broadly recognized. The private individuals named in the documents would—correctly or not—be associated with the 9/11 terrorist attacks, and this would "cast[] these individuals in an extremely negative light." DE-66-1 at 20. Some of the individuals named have not previously been linked to this investigation. But even where individuals have already been the subject of press reports, release of FBI records "would constitute an official acknowledgment by the FBI" and "absolutely has a negative connotation, whether or not these individuals ever actually committed crimes." *Id*. at 21. As to the government employees involved in the investigation, the record demonstrates that release could subject them to harassment and publicity that would "seriously prejudice their effectiveness in conducting other investigations," and could make them "potential targets for [the

perpetrators'] violent activities." DE-27-1 at 27-28; DE-66-1 at 14. Plaintiffs provide no basis for questioning the FBI declarations describing these risks.

Plaintiffs fundamentally misunderstand the privacy interest in arguing that individuals investigated and cleared by the FBI "would welcome the release of exculpatory FBI documents confirming his innocence." Resp./Reply Br. 49. As the government explained in its initial brief, Gov't Br. 52, the privacy interest at stake is the individual's interest in "control[ling] . . . information concerning his or her person." *Reporters Comm.*, 489 U.S. at 763; *Ingle v. U.S. Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983). Accordingly, "Exemption 7(C) leaves the decision about publicity—whether and how much to reveal about herself—in the power of the individual whose privacy is at stake." *Jones v. FBI*, 41 F.3d 238, 247 (6th Cir. 1994) (citing *Reporters Comm.*, 489 U.S. at 763)). Even if an individual chooses to make some information about his or her involvement in an investigation public, this does not amount to consent to disclose all information in the FBI's files. *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1047 (9th Cir. 1999) (although an individual spoke to the press about the FBI's search of her home, she "might not be indifferent to whether the FBI disclosed what was in its files"). If the individuals named in these files wished their information to be disclosed, they could sign waivers, Gov't Br. 54, but none have done so.

Plaintiffs argue that, because the government released other information, it is precluded from protecting the privacy interests of these individuals. Resp./Reply Br. 48. But that is not the law, and plaintiffs' argument mischaracterizes what occurred. The government disclosed an FBI summary of a Broward Bulldog article that included a Sarasota family's name because the article itself was about that family. The government also released names that had already been published in the 9/11 Commission Report. Resp./Reply Br. 48-49. Neither release minimizes the privacy interest in other information, not previously released by the federal government, that was gathered in the course of the FBI's own investigation.[4]

Plaintiffs also assert that, by releasing the names of some FBI officials associated with the investigation, the government conceded that those associated with the 9/11 attacks in FBI records would not be harmed by the disclosure. Resp./Reply Br. 47. Plaintiffs confuse concerns of private individuals named in the files with those of FBI agents. *See* Gov't Br. 46-49 (discussing DE-66-1 at 20-21 and DE-27-1 at 27-28 (private parties); DE-66-1 at 13-14 (regarding government employees)). Government employees may face danger or harassment

[4] Plaintiffs also suggest that the government is withholding information already released by the FBI, Resp./Reply Br. at 51 (citing DE-99 at 25), but their only support for that assertion is an error in the redactions to one page that was corrected in the course of the district court litigation. DE-79 at 10.

because of their involvement in the investigation. Gov't Br. 47-49 (citing DE-27-1 at 27-28; DE-66-1 at 13-14). Of course, high-level government officials' involvement with certain matters is often made public in spite of this risk, and other agents may choose to make their involvement public. But, should they choose not to do so, the law "recognize[s] that agents retain an interest in keeping private their involvement in investigations of especially controversial events." *Lahr*, 569 F.3d at 977; *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487-88 (D.C. Cir. 1980); *Maynard*, 986 F.2d at 566; *Wood v. FBI*, 432 F.3d 78, 88-89 (2d Cir. 2005); *Cleary v. FBI*, 811 F.2d 421, 424 (8th Cir. 1987).

II. REDACTIONS FROM THE APRIL 2004 INTERVIEW SHOULD BE UPHELD UNDER EXEMPTION 7(D).

The district court also improperly ordered disclosure of information concerning a confidential source protected under Exemption 7(D), that was included in a report describing an April 2004 jailhouse interview (Document 27). As the government explained in its opening brief, the district court apparently overlooked the government's extremely detailed sealed, *ex parte* submission, DE-76-18 at 20-27, when the court concluded that it was "unable to determine what specific information the Government seeks to protect under Exemption 7(D)." DE-99 at 43-44.

Plaintiffs assert that redactions to this document are "futile" because they already have the same information in unredacted form from the Florida

Department of Law Enforcement. Resp./Reply Br. 52-53. This is incorrect. The document plaintiffs received from Florida is also redacted. *See* DE-28-1 at 18-33 (Ex. A). Although Florida did not redact all of the information that the FBI withheld, it did redact information that the confidential informant provided regarding a gang member's involvement in unsolved homicides, *id*. at 25, as well as personal information protected under Exemptions 6 and 7(C), which is discussed above. In any event, as the government explained in its initial brief, FOIA Exemption 7(D) protection "'does not disappear if the identity of the confidential source later becomes known through other means.'" Gov't Br. 60-61 (quoting *See L & C Marine Transp.*, 740 F.2d at 925); *see also Edwards*, 436 F. App'x at 923-24 (holding that disclosure of a record by local law enforcement does not waive Exemption 7(D)).

Plaintiffs misunderstand the law in asserting that, in order for Exemption 7(D) to apply, the government must disclose "the sources' relation to the crime, whether the source received payment, and whether the source has an ongoing relationship with the law enforcement agency." Resp./Reply Br. 53 (quoting *Electronic Privacy Info. Ctr. v. U.S. Drug Enf't Agency*, 192 F. Supp. 3d 92, 110-11 (D.D.C. 2016)).[5] While these factors can be useful in some circumstances, they

[5] Plaintiffs' error may stem from a misunderstanding of *Electronic Privacy Info. Ctr.*, 192 F. Supp. 3d at 111, on which they rely. That case recognized that

are not always relevant or necessary to the Exemption 7(D) analysis. The statute requires a determination whether the source "provided information . . . in circumstances from which such an assurance [of confidentiality] could be reasonably inferred." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 172 (1993). Assurances of confidentiality can be inferred from circumstances in which violence and a risk of retaliation are present, such as gang murders or drug trafficking. *Id.* at 179 ("Most people would think that witnesses to a gang-related murder likely would be unwilling to speak to the Bureau except on the condition of confidentiality."); *Mays v. Drug Enf't Admin.*, 234 F.3d 1324, 1329 (D.C. Cir. 2000); *Hodge v. FBI*, 703 F.3d 575, 581 (D.C. Cir. 2013) (finding implicit assurances of confidentiality in light of the "vicious nature of the crimes"); *Electronic Privacy Info. Ctr.*, 192 F. Supp. 3d at 111. This is because, "whatever his 'relation to the crime,' an informant is at risk to the extent the criminal enterprise he exposes is of a type inclined toward violent retaliation." *Mays*, 234 F.3d at 1330. Express guarantees of confidentiality are not required. *Landano*, 508 U.S. at 172.

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confidentiality can be implied "where individuals cooperated with the government under dangerous circumstances," but reasoned that additional information was required to establish that private companies would face retaliation in that circumstance. *Id.* This case, however, presents a traditional and well-understood situation involving an individual jailhouse informant.

As the government explained in its initial brief, the violence and risks of retaliation associated with gang murders and with terrorism are both severe, and assurances of confidentiality should be inferred as such information. Gov't Br. 61 (quoting *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 929 (D.C. Cir. 2003)). Thus, in light of the particularly violent nature of the crimes at issue, it should be presumed that a jailhouse informant was willing to discuss the 9/11 terrorist attacks and gang murders only under an implied assurance of confidentiality. The district court recognized this when it upheld the government's redactions of related information in the April 30th Commission briefing (Document 2), DE-58 at 18, but reached the incorrect result as to this document, apparently because it overlooked the government's submission detailing which redactions were justified under 7(D), DE-76-18 at 20-27.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed as to Exemptions 6 and 7(C), and as to Exemption 7(D) on Document 27.

Respectfully submitted,

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FEBRUARY 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 28.1(e)(2)(C) because it contains 3,854 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Dana Kaersvang
Dana Kaersvang

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Dana Kaersvang
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