IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 17-13787
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

Initial 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.

Christensen, Dan

Cure, Anaili M.

Federal Bureau of Investigation

Gunster, Yoakley & Stewart, P.A.

Julin, Thomas R.

Kaersvang, Dana L.

McGinn, Timothy J.

Miller, Raymond V.

Raurell, Carlos J.

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

STATEMENT REGARDING ORAL ARGUMENT

Appellants Broward Bulldog, Inc., and Dan Christensen (collectively "the Bulldog") respectfully request oral argument.

This case presents a question of enormous public interest: How much information concerning its investigation of the 9/11 attacks must the FBI share with the public? The answer, according to the District Court, is very little. Backing the FBI's expansive assertion of FOIA exemptions, the District Court allowed the FBI to withhold information that may explain why it concluded, in 2002, that a Saudi family living in Sarasota, Florida, had "many connections" to the 9/11 hijackers; why, a decade later, the FBI falsely claimed that it had never concluded the family had any connections to the hijackers; why, in 2015, the FBI dismissed its 2002 memorandum regarding the family's "many connections" to the hijackers as poorly written and unsubstantiated; why the FBI failed to tell the Congressional committees investigating the terrorist attacks about this family; and why the FBI later falsely claimed that it had, in fact, notified Congress.

The Bulldog first reported about the al-Hijjis—a wealthy Saudi family that fled the United States two weeks before the 9/11 attacks—in September 2011. Through other FOIA litigation, the Bulldog forced the FBI to release an April 2002 memorandum in which an agent concluded that the al-Hijjis had "many connections" to the hijackers. The Bulldog's reporting attracted considerable

attention. When Congress authorized and funded a three-person commission (the "Meese Commission") to review the FBI's progress in implementing the reforms proposed by the 9/11 Commission and evidence concerning 9/11 uncovered after 2004, the FBI's investigation of the al-Hijjis was among the developments the Commission examined.

The Meese Commission issued its final report in March 2015. The report said that the FBI told the Commission the "many connections" memorandum was "poorly written" and "wholly unsubstantiated." The Bulldog requested Meese Commission records through FOIA to ascertain the basis for this claim.

The FBI engaged in extraordinary delay tactics which the District Court found both "shocking" and "shameful." It nevertheless granted the FBI's motions for summary judgment in part and (1) declared the FBI's search for records adequate and reasonable, (2) upheld the withholding or redaction of a significant number of the records the Bulldog requested, and (3) refused to allow the deposition of the FBI agent who briefed the Meese Commission. This appeal challenges each of these aspects of the District Court's final judgment.

This appeal warrants oral argument because the records at issue are of paramount importance to the nation's right to know how the FBI handled the investigation of 9/11 and because the FBI's broad assertions of FOIA exemptions

are fundamentally inconsistent with FOIA's strong presumption in favor of record disclosure.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This case arises under, and concerns the proper interpretation and application of, the Freedom of Information Act, 5 U.S.C. § 552. Therefore, the District Court below had subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. The District Court entered a final judgment on July 26, 2017. DE-112. Plaintiffs-Appellants timely filed their Notice of Appeal on August 18, 2017. DE-114. This Court has jurisdiction over Plaintiffs-Appellants' appeal from the District Court's final judgment pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

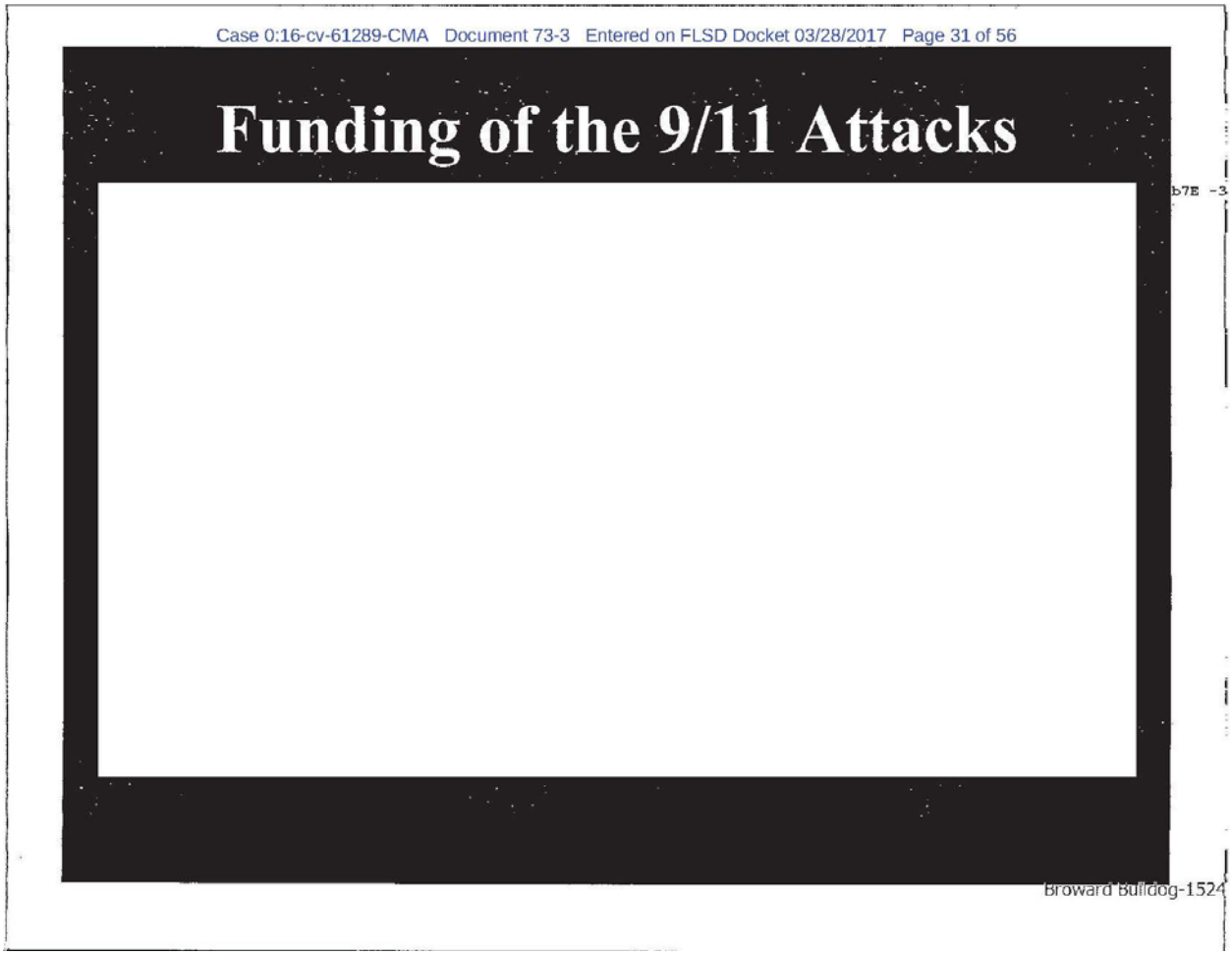
I. The FBI did not respond to the Bulldog's FOIA requests, produced documents in a haphazard and piecemeal manner, failed to locate other documents entirely, and did not disclose its search parameters. Did the District Court err in granting the FBI summary judgment as to the reasonableness and adequacy of its search for documents?

II. The FBI filed conclusory declarations in support of its withholding and redaction of documents responsive to the Bulldog's FOIA requests. It also submitted documents for *in camera* review by the District Court, which did not create a public record beyond the FBI's declarations. To the extent it granted the FBI summary judgment, did the District Court err in holding that the FBI had met its burden of establishing that each piece of information it withheld satisfied the elements of each asserted FOIA exemption?

III. The Bulldog sought leave to depose FBI Special Agent Jacqueline Maguire. Maguire told the Meese Commission that the FBI's April 2002 memorandum noting the "many connections" between the al-Hijjis and the 9/11 hijackers was "poorly written" and "wholly unsubstantiated" and that the FBI agent who wrote the report "was unable to provide any basis for the contents of the document or explain why he wrote it." Did the District Court err in denying the Bulldog leave to depose Maguire?

INTRODUCTION

Appellants Broward Bulldog, Inc., and Dan Christensen ("the Bulldog") seek historical records concerning the FBI's investigation of the 9/11 terrorist attacks under the Freedom of Information Act. The Bulldog's appeal challenges the FBI's withholding and redaction of these materials, which include records of the FBI's investigation of the al-Hijjis' connections to the hijackers and unclassified information concerning the planning, execution, and funding of the attacks.



From the start, the FBI's tactics have been contrary to the "information policy of full disclosure" that FOIA imposes on the federal government. The FBI did not timely produce documents responsive to the Bulldog's requests and forced the Bulldog to sue to enforce its rights. Only then did the FBI locate and produce records responsive to the Bulldog's requests, but in dribs and drabs, spread across a year of litigation. Rather than withhold information judiciously, the FBI redacted every word for which it could make a colorable argument—even if that meant claiming a record could not be released because its disclosure would constitute an unwarranted invasion of the privacy of a senior member of al-Qaeda. The FBI left the Bulldog no choice but to litigate countless asserted exemptions, then submitted boilerplate defenses of those exemptions that denied the Bulldog a meaningful opportunity to challenge them.

The District Court decried the FBI's conduct as "shocking" and "shameful." It nevertheless upheld many of the FBI's assertions that information responsive to the Bulldog's requests is exempt from FOIA's disclosure requirements and granted partial summary judgment to the FBI.

In furtherance of its efforts to learn the truth regarding the FBI's investigation of the al-Hijjis' "many connections" to the hijackers, the Bulldog now appeals.

STATEMENT OF THE CASE[1]

The Bulldog Uncovers The FBI's Sarasota Investigation.

In September 2011, the Bulldog, a publisher of investigative news, interviewed Sarasotans who said Abdulaziz and Anoud al-Hijji, a wealthy Saudi couple with family ties to Saudi royalty, DE-28-¶18, had fled their home two weeks before the 9/11 attacks.[2] The Bulldog's sources said the FBI had searched the al-Hijjis' home and found an empty safe and indications the family had removed a computer, but that the house otherwise appeared as if its owners had gone "out to a movie," leaving behind three cars, "opulent furniture," and their other possessions. A counterterrorism officer told the Bulldog the FBI had obtained phone records, security photographs, and other evidence that linked the al-Hijjis to the hijackers and another al-Qaeda operative who lived in Florida in 2001. It appeared that, at a minimum, the al-Hijjis knew the hijackers, received warning of the attacks, and fled the country before they occurred.

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[1] For necessary context, the facts and procedural history of this case and *Broward Bulldog, Inc. v. U.S. Department of Justice*, No. 12-61735-Civ-Zloch (S.D. Fla.) ("*Bulldog I*"), a case before Judge William Zloch arising from the Bulldog's first FOIA request regarding the FBI's investigation of the al-Hijjis, are presented here.

[2] Fifteen of the nineteen hijackers were Saudi nationals.

The Bulldog reported these facts on its website, FloridaBulldog.com, and in *The Miami Herald* on September 8, 2011. The Bulldog quoted Senator D. Robert Graham, the co-chair of the Joint Inquiry of the Senate Select Committee on Intelligence and House Permanent Select Committee on Intelligence into intelligence community activities before and after the terrorist attacks of September 11, 2001 ("Joint Inquiry"), who said the FBI did not inform Congress of its investigation of the al-Hijjis but should have disclosed it. DE-28-¶19.

On September 15, 2011, the FBI issued a statement confirming it had investigated a Sarasota family. Contrary to what Senator Graham had told the Bulldog, the FBI claimed that "[a]t no time did the FBI develop evidence that connected the family members" to the hijackers or "the 9/11 plot" and that "all of the documentation regarding the 9/11 investigation was made available to the 9/11 Commission and the [Joint Inquiry]." DE-28-1 at 48. Senator Graham disputed the FBI's claim that it had disclosed the investigation to Congress, thus raising the specter that the FBI might be concealing something of public importance. DE-28-¶20.

The Bulldog made a FOIA request to the FBI and a state-law public-records request to the Florida Department of Law Enforcement ("FDLE") for records concerning the Sarasota investigation. DE-28-¶21. On December 21, 2011, FDLE produced records regarding an FBI-FDLE interview of Wissam Hammoud on

April 7, 2004. Hammoud linked Abdulaziz al-Hijji to Osama bin Laden and al-Qaeda operative Adnan Shukrijumah. DE-28-1-¶17. Hammoud said that, before 9/11, al-Hijji discussed training to fly at Venice Airport—where some 9/11 hijacker-pilots trained—lauded bin Laden as a hero, spoke of joining the mujahedin in Afghanistan, and tried to recruit Hammoud. *Id.* FDLE records identified Anoud al-Hijji's father as Esam Ghazzawi, a wealthy Saudi with close ties to the royal family, whose father helped forge the U.S.-Saudi alliance in the 1950s. DE-28-¶21.

Senator Graham also asked the FBI to explain its press release. DE-28-¶22. The FBI showed him some of its investigative files, which contradicted the FBI's public assertion that it found no connections between the al-Hijjis and the hijackers. *Id.* The FBI refused to explain this discrepancy or show Senator Graham its full Sarasota file. *Id.* Senator Graham told the Bulldog that something seemed to be terribly amiss. *Id.*

On September 5, 2012, after the FBI failed to produce documents responsive to its FOIA request, the Bulldog commenced *Bulldog I*. DE-28-¶23. The FBI initially responded that it could not locate any records of its Sarasota investigation—including, apparently, those shown to Senator Graham. DE-28-¶¶22-23.

On March 26, 2013, Congress appropriated $500,000 for a three-person commission appointed by the FBI (the "Meese Commission") to review, among other things, the FBI's Sarasota investigation.[3] *See* P.L. 113-6, 127 Stat. 197, 247 (113th Cong., 1st Sess., Mar. 26, 2013); DE-28-¶24.

On March 28, 2013, the FBI announced it had located thirty-five pages of records relating to its Sarasota investigation, would withhold four, and would produce thirty-one with redactions. DE-28-¶24. The records included an FBI memorandum dated April 16, 2002, which contradicted the FBI's September 15, 2011, press release. It said the FBI had found "many connections" between the al-Hijjis and "individuals associated with the terrorist attacks on 9/11/2001." DE-28-¶25. The memorandum confirmed that the al-Hijjis fled the country shortly before 9/11 and that one family member attended the same flight school as certain hijackers. *Id.* The Bulldog, *Tampa Bay Times*, *Sarasota Herald Tribune*, *Sarasota Magazine*, and other media identified FBI Agent Gregory J. Sheffield as the memorandum's author. *Id.*

On March 31, 2014, Judge Zloch denied the FBI's summary judgment motion. *See* DE-28-1-¶24. On April 4, 2014, Judge Zloch ordered the FBI to conduct a more thorough search for records. *Id.* He criticized the FBI's

[3] The FBI appointed former Attorney General Edwin Meese, former Congressman Tim Roemer, and Bruce Hoffman to the Meese Commission.

"eagerness to assert exemptions and wooden method of interpreting Plaintiffs' FOIA requests." *Id.* He found the FBI's public statements "seem[ed] to be in conflict" with the documents it had produced and that there was "nothing in Defendants' thirty-five produced pages that reconciles this stark contradiction." *Id.*

After conducting the searches ordered by Judge Zloch, which included searches for the terms "Abdulaziz al-Hijji," "Anoud al-Hijji," and "Esam Ghazzawi," the FBI located and produced redacted copies of forty-seven additional pages. DE-28-¶¶26-27. They confirmed the al-Hijjis had "many connections" to the 9/11 hijackers. DE-28-¶27. The FBI also located in its Tampa field office 80,266 additional pages relating to its 9/11 investigation. *Id.* The FBI claimed that all of these documents were classified as "Secret." *Id.* On May 1, 2014, Judge Zloch ordered the FBI to produce these records to him for *in camera* review.[4] *Id.*

The Meese Commission Tries To Discredit The
"Many Connections" Memorandum.

On March 25, 2015, the Meese Commission released its final report. The report said the FBI had told the Meese Commission the "many connections" memorandum was "'poorly written' and wholly unsubstantiated." DE-35-5 at 3.

[4] On October 2, 2017, Judge Zloch informed the parties he has completed his review. He entered a summary judgment briefing schedule on October 16, 2017.

The report also claimed that, when questioned by the FBI, the memorandum's author "was unable to provide any basis for the contents of the document or explain why he wrote it." *Id*. The report did not address evidence compiled by the Bulldog or mention the FBI-FDLE interview of Hammoud linking Abdulaziz al-Hijji to bin Laden and al-Qaeda. DE-28-¶29.

On April 8, 2015, the Bulldog submitted to the FBI a FOIA request for (1) transcripts of Meese Commission proceedings and interviews, (2) Memoranda for the Record, (3) personal service contracts, (4) drafts of the final report, (5) FBI briefings and summaries given to the Commission, and (6) the Sarasota family "case file" the Commission reviewed ("Request 1"). DE-1 at 46.

The FBI failed to produce the requested records by its May 6, 2015, statutory deadline. DE-28-¶30. On May 19, 2015, the FBI advised the Bulldog that "unusual circumstances" applied to the processing of Request 1. *Id*.

The Bulldog propounded a narrower request on July 4, 2015 ("Request 2"). DE-28-¶31. The FBI again violated FOIA and failed to produce the requested records. *Id*.

On July 4, 2016, the Bulldog requested all documents regarding any discipline of the agent who prepared the "many connections" memorandum ("Request 3"). DE-28-¶32. On July 15, 2016, the FBI refused to confirm or deny the existence of records responsive to Request 3. DE-28-¶33.

The Bulldog Commences This FOIA Litigation.

On June 15, 2016, more than a year after submitting Request 1, and having received no response to Requests 1 and 2 beyond acknowledgments of receipt, the Bulldog commenced this action against the FBI. DE-1.

Before the FBI answered, on July 15, 2016, President Barack Obama and the Director of National Intelligence declassified twenty-eight pages of the Joint Inquiry report—co-authored by Senator Graham—regarding possible Saudi government support for the 9/11 hijackers. They had concluded "the harm to national security by releasing" the pages was "outweighed by the public interest in additional transparency concerning the Committees' findings." DE-28-¶39.

On July 25, 2016, the FBI answered the complaint.[5] DE-10. On October 31, 2016, the FBI finally released 220 pages of records responsive to Request 2. DE-28-¶35. They included heavily redacted copies of (1) an FBI briefing memorandum about the Sarasota investigation dated April 30, 2014 (DE-27-2 at 37-40) ("Document 2"); (2) a briefing memorandum dated October 24, 2014 (*id.* at 41-42) ("Document 3)"; and (3) a memorandum regarding "Updates and Initiatives

[5] Count III of the Bulldog's complaint addressed Request 3, the Bulldog's request for records of disciplinary action against Sheffield. As the Bulldog proposed, the FBI asked Sheffield about these records, and he said there are none. DE-42 at 4. The parties agreed this resolved Count III. *Id.*

(as of 5 October 2012)" (*id.* at 45-48) ("Document 5").[6] The FBI redacted the widely reported names of the investigation subjects (the al-Hijjis) and the author of the "many connections" memorandum (Sheffield), as well as the name of the FBI agent who briefed the Meese Commission.

Document 2, the April 2014 briefing memorandum, noted the Bulldog's 2011 reporting that the FBI had "found ties between the hijackers" and the al-Hijjis, Senator Graham's questioning of the FBI's public response that "the family had no connections to the hijackers," and the FBI's prior memorandum that said the FBI's "investigation revealed many connections between the [al-Hijjis] and the hijackers," but referred to the "many connections" memorandum as "badly written" and a "bad statement." DE-27-2 at 37-39 (BB-1-3). The FBI told the Meese Commission there "is no actual documentation of searches and work done to rule out connections." *Id.* at 39 (BB-3). Nothing in any of the released records explained why the FBI reported "many connections" between the al-Hijjis and the hijackers in 2002 but denied the existence of any connection in 2011 and 2015.

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[6] The FBI assigned each page it produced a Bates number with the prefix "Broward Bulldog-__," abbreviated herein as "BB-__." Ultimately, the parties litigated the FBI's withholding of or redactions to twenty-eight documents. The parties assigned each of these documents a number and referred to them as "Document __." *See* DE-73-1, DE-73-2, DE-73-3, DE-87-1 (identifying Documents 1-28).

On November 21, 2016, the FBI announced it had found another 1,166 pages of "potentially responsive" records, but "over 60% of the documents concern[ed] information originating from other government agencies" and required the FBI to "coordinate with over approximately 20 agencies." DE-17-¶5.

The FBI Files Its First Summary Judgment Motion.

Having failed to complete its review of the 1,166 pages, the FBI moved for partial summary judgment on December 30, 2016, and asked the District Court to approve its redactions to the 220 pages of records it had produced on October 31, 2016. DE-27. FBI declarant David M. Hardy, the FBI's record/information dissemination section ("RIDS") chief, set forth a boilerplate description of each withholding "justification category" asserted by the FBI and claimed the FBI had properly withheld all the information it determined fit within any such category. DE-27-1 at 13-45. His declaration did not explain how any exemption applied to any specific redaction. *Id.* Hardy also claimed that, in response to Request 2, the FBI had produced all responsive, nonexempt records. DE-27-1-¶88.

And yet, on December 30, 2016, the FBI notified the Bulldog that it had completed its review of ninety pages of responsive records and produced eighty-six partially-redacted pages. Then, on January 27, 2017, the FBI announced it had found another 313 responsive pages. DE-34-1 at 8. It produced 170 partially-redacted pages that day. *Id.* The FBI explained that these "records were not

initially identified because the Office of the Director of the F.B.I. had inadvertently mistaken these records as exact duplicates of records previously produced." DE-34 at 2. The FBI conceded the 170 pages were not duplicates. *Id*.

The Bulldog Moves To Depose FBI Special Agent Jacqueline Maguire.

On January 27, 2017, the FBI un-redacted portions of Documents 2 and 3, DE-27-2 at 37-42 (BB-1-6), and identified Jacqueline Maguire as the special agent who had briefed the Meese Commission on the discrepancy between the FBI's "many connections" memo and the FBI's assertion it had found no al-Hijji-hijacker connections. *See* DE-34 at 3. On January 31, 2017, the Bulldog moved for leave to depose Maguire on the grounds that her testimony could illuminate whether the FBI "did, in fact, find many connections between the al-Hijji family and the terrorist attacks on the United States, but did not conduct any further investigation of those connections either due to incompetence or to conceal from Congress and the American public evidence of Saudi government support for the terrorist attacks." DE-35 at 4.

Following oral argument on February 9, 2017, Magistrate Judge John O'Sullivan denied the Bulldog's motion. DE-50 at 49. He held the Bulldog's reasons for seeking the deposition were too "speculative" and that the Bulldog had failed to establish "bad faith" by the FBI. *Id*. The Bulldog appealed to the District Court, which denied the appeal without a hearing. DE-51, 53.

Oral Argument On The FBI's First Summary Judgment Motion Prompts The FBI To Remove Certain Redactions.

The District Court heard argument on the FBI's first summary judgment motion on February 7, 2017. DE-55. The District Court agreed the FBI's redactions of the al-Hijjis' names served no purpose because the "family's name is already public." DE-55 at 23. When asked why it had redacted the name of the author of the "many connections" memorandum, the FBI said it was protecting the agent's privacy. DE-55 at 26. The District Court said this answer was inconsistent with the FBI's disclosure of the names of other agents who were involved in the investigation, such as Maguire and FBI Liaison Officer Elizabeth Callahan. DE-55 at 26-27.

Two days after the hearing, the FBI lifted redactions discussed at the summary judgment hearing, DE-42 at 2, including the names of agents who briefed the Meese Commission, but not the name of the agent who wrote the "many connections" memorandum.

On February 14, 2017, the FBI announced it had located 795 responsive pages, released 190 of them with redactions, and withheld the other 605 pages. DE-52 at 3. On February 22, 2017, twelve days before trial, the FBI said it had identified another sixty-one responsive pages—all from an FBI presentation to the Meese Commission entitled "Overview of the 9/11 Investigation" (DE-73-3)

("Document 22")—and would produce fifty-two (many with redactions). DE-68-1 at 18.

On February 22, 2017, the FBI filed a renewed motion for continuance of the trial and for leave to file a second summary judgment motion to approve hundreds of redactions. DE-52. The FBI said it had only "complete[d] its production of records responsive to the last of the three FOIA requests" that day—almost two years after the Bulldog submitted Request 1. DE-52 at 1.

The FBI's First Summary Judgment Motion Is Granted In Part.

On February 27, 2017, a week before the parties' trial date, the District Court granted the FBI's summary judgment motion in part. DE-58. It upheld, among other things, redactions to Document 2 pursuant to FOIA Exemptions 5 (inter-agency or intra-agency memoranda) and 7E (techniques and procedures for law enforcement investigations or prosecutions), *id.* at 10-23; redactions to Document 3 pursuant to Exemptions 1 (classified information), 3 (statutory exemptions), and 7E, *id.* at 23-29; and redactions to Document 5 pursuant to Exemptions 1, 3, 5, 7A (interference with enforcement proceedings), 7D (disclosure of confidential source or certain confidential information), and 7E. *Id.* at 31-36.

The District Court Decries The FBI's Tactics As "Shocking" And "Shameful."

On February 28, 2017, the District Court heard argument on the FBI's motion for continuance of the trial. DE-73-6. The Bulldog said it was prepared for trial on March 6, 2017, and that twenty-six documents remained in dispute. DE-73-6 at 11. The FBI insisted the District Court should allow it to file another summary judgment motion and postpone the trial indefinitely. DE-73-6 at 14-16. The District Court granted the FBI's motion in part, but criticized the FBI:

> It's distressing to see the lengths to which a private litigant must go in order to obtain documents under FOIA from the Government. It's distressing to see the length of time that has elapsed, from the time these requests were presented to the time the agency turned over anything. It's shocking, quite frankly.
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> * * *
>
> [I]f you need to meet and confer with Plaintiff's counsel, you don't need 30 days to do that, nor did the agency need years to produce these records. It's shameful.

DE-73-6 at 14-15.

On March 13, 2017, the FBI moved for another extension of time. DE-61. It disclosed that, on March 7, 2017, it had located additional responsive records using "information received from the FBI Director's Office." DE-61 at 4. The FBI said these records "were believed to have been destroyed long ago" but were found "within a storage facility intact." DE-62 at 1. The FBI did not explain why it believed the records had been destroyed or why it had not disclosed their presumed destruction. *Id.* at 2-7. Nor did the FBI resolve the contradiction

between its latest disclosure and Hardy's prior assertions that the FBI had made reasonable and adequate searches for records responsive to the Bulldog's requests. DE-61, DE-62. The District Court denied the FBI's motion that same day. DE-63.

The FBI Files Its Second Summary Judgment Motion, Locates Still More Records, Then Files A Third Summary Judgment Motion.

On March 14, 2017, the FBI moved for summary judgment regarding Request 1. DE-66. It asked the Court to hold it had properly withheld or redacted those records it had reviewed after it filed its first summary judgment motion. The FBI filed a fourth declaration from Hardy, who claimed the FBI had located 896 responsive pages, withheld 568, released 199 in part, and released 129 in full. DE-66-1 at 3.

Hardy said the FBI had "labeled [its February 22, 2017] release a 'final release' because it was relying on its original search as being a reasonable search, and did not anticipate locating additional responsive documents." DE-66-1 at 5 n.4. He said that, "[o]n March 7, 2017, [the Director's Office] provided RIDS with additional [undisclosed] leads for possible responsive records. Through these leads, RIDS located 4 additional responsive [memoranda] (totaling 11 pages) within the FBI's Sentinel case management system." *Id.* at 7. Hardy said these "records [were] supposed to be destroyed in April 2016"—notwithstanding the Bulldog's request for them in April 2015. *Id*.

According to Hardy, the FBI refused to produce the "Sarasota case file" the Meese Commission had reviewed because, according to the FBI, it had produced the same documents to Judge Zloch for *in camera* review in *Bulldog I*. *Id.* at 7 n.7.

On March 24, 2017, the FBI announced it had located yet another 302 pages of responsive records, but would release only twenty. DE-73-5 at 2. In support of its claimed right to withhold 280 pages, the FBI submitted twelve singled-spaced pages that listed approximately twelve exemptions for each page withheld. DE-73-5 at 26-37. The Bulldog could not meaningfully challenge these exemption claims.

The twenty redacted pages include critical summaries of FBI interviews of witnesses who knew hijackers Mohamed Atta and Marwan al-Shehhi—whom the al-Hijjis had met, according to the Bulldog's reporting—conducted on September 15, 2001 (DE-73-5 at 16-18) ("Document 26"). The pages also included an FBI memorandum bearing the names ALHIJJI and OSAMA BIN LADEN and dated April 19, 2004 (*id.* at 19-24) ("Document 27"). According to Document 27, a witness—Hammoud—told the FBI a Saudi man had fled Sarasota with his family shortly before 9/11; the family had entertained Saudi guests at their residence; "the man had known some of the terrorists from the September 11th 2001 attacks, who had been taking flight training at Venice Airport during that time"; and the man "would speak of going to Afghanistan and becoming a freedom fighter or Mujahedin." *Id.* at 23-24 (BB-1576-77).

Also included was an August 31, 2004, memorandum in which the FBI's Fort Myers field office said the subject of an investigation had not been interviewed because he had been living outside the United States for the preceding two-and-a-half years (DE-73-5 at 25) ("Document 28").

On March 31, 2017, the FBI filed a third summary judgment motion concerning the documents it had located on March 7 and 13, 2017. The FBI asked the District Court to hold that it had conducted an adequate search for responsive records and had properly asserted FOIA exemptions in connection with these recently identified documents.

The Court Grants The FBI's Second and Third Summary Judgment Motions In Part.

On May 16, 2017, the District Court, without hearing oral argument, granted the second and third summary judgment motions in part.

Adequacy and Reasonableness of Search

The District Court accepted the FBI's assertion that it had conducted an "adequate" search. DE-99 at 17. The District Court held that misleading statements in Hardy's declarations, the FBI's initial decision not to search its central records system, its unusual storage of records in the Director's Office and outside the FBI's central records system, its piecemeal production of documents, the gaps in the FBI's productions, and the FBI's apparent intent to punish the

Bulldog for scrutinizing the FBI's work did not establish the FBI acted in bad faith. DE-99 at 16-18.

Document 1: The Sarasota Family Case File

The District Court held that the FBI need not produce the Sarasota family case file the Meese Commission reviewed ("Document 1"). The District Court presumed the FBI acted in good faith when it "deemed" the Bulldog's request for the case file to be duplicative of the FOIA request at issue in *Bulldog I*. DE-99 at 19-20.

Document 22: The Overview of 9/11 Investigation

Most of the FBI's redactions to Document 22, the "Overview of 9/11 Investigation" PowerPoint (DE-73-3), invoked Exemption 7E's "techniques and procedures for law enforcement investigations or prosecutions" clause. The District Court categorically rejected these redactions.[7] The District Court found much of the redacted material "does not discuss any FBI investigative techniques

[7] The District Court also held that most of the FBI's redactions to Document 22 under Exemptions 6 and 7C were "not justified because the redactions contain information regarding suspects and subjects of interest in the September 11 attacks … and the public interest in learning about these individuals outweighs any privacy interest they may have." DE-99 at 37-38. For example, the FBI withheld credit card activity, a credit card application, and a visa application on the grounds that their release would constitute an unwarranted invasion of the privacy of Khalid Shaikh Mohammad, the architect of the 9/11 attacks, and Mustafa al-Hawsawi, an al-Qaeda financier. *See* DE-73-3 at 25, 38-39 (BB-1518, 1535-36).

and procedures; instead the material often encompasses facts and information gathered about FBI suspects." DE-99 at 38. Therefore, the District Court held "the FBI ha[d] failed to meet its burden establishing Exemption 7(E) applies to the redacted information." *Id.*

The FBI Moves For Reconsideration Of Document 22.

On June 2, 2017, the FBI moved for reconsideration of the District Court's holding that the FBI had failed to establish that Exemption 7E applies to Document 22. DE-102. The FBI submitted a sixth declaration from Hardy, who claimed disclosure of the redacted materials might reveal how terrorists stay "under the radar," how they slip through the system, how much money can be moved without detection, and where a security camera had been placed. DE-105-1-¶¶13-27.

The FBI claimed the District Court applied the wrong standard to its Exemption 7E redactions. The District Court had held Exemption 7E allows the FBI to withhold certain records that disclose techniques and procedures, but only if disclosure could create a risk of circumvention of law enforcement. The FBI argued that risk of circumvention need not be shown and that Exemption 7E provides "categorical" protection of all techniques and procedures. DE-102 at 6. Earlier in the case, the FBI had argued just the opposite—that Exemption 7E "requires the agency to establish that disclosure would risk circumvention of the

law. *See PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 249-50 (D.C. Cir. 1993)." DE-27 at 22, DE-66 at 29.

The Court Reverses Its Ruling On Document 22 And Exemption 7E.

The District Court noted that the D.C. Circuit requires an agency invoking the "techniques and procedures" clause of Exemption 7E to establish that disclosure could create a risk of circumvention of law enforcement, but that the Second and Ninth Circuits do not. DE-108 at 4-5. The District Court said courts in this Circuit follow the D.C. Circuit rule but concluded that Hardy's declaration showed disclosure could create a risk of circumvention. *Id.* at 5. Although the District Court recognized that much of the information the FBI has withheld "does not directly discuss techniques and procedures," it nevertheless concluded, based on Hardy's declaration, that the FBI's "redactions are necessary to prevent disclosure of FBI techniques or procedures" and reversed its prior holding. *Id.* at 4.

The District Court directed the FBI to submit a proposed final judgment after consulting with the Bulldog. DE-108 at 7. On July 25, 2017, the FBI submitted a proposed final judgment, and the Bulldog submitted its objections to that proposal. DE-111, DE-111-1.

The District Court entered its Final Judgment on July 26, 2017, and declined to include an appendix the parties requested. DE-112.

STANDARD AND SCOPE OF REVIEW

This Court "reviews a district court's grant of summary judgment in a FOIA case *de novo*, viewing all facts and reasonable inferences in the light most favorable to the non-moving party, and applying the same standard used by the district court." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (citation omitted). That standard—Rule 56 of the Federal Rules of Civil Procedure—provides that a court shall only "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(a). Therefore, while federal courts "generally" resolve FOIA cases on motions for summary judgment, *Miccosukee Tribe*, 516 F.3d at 1243, a court cannot award summary judgment in a FOIA case if the parties genuinely dispute a material fact. *See, e.g.*, *Animal Legal Def. Fund v. FDA*, 836 F.3d 987, 989 (9th Cir. 2010) (en banc) (citation omitted).

SUMMARY OF ARGUMENT

Point I. The FBI's erratic, disjointed, and incomplete search for records is evidence the FBI acted in bad faith. Accordingly, the FBI is not entitled to a presumption that its search for records was reasonable and adequate. A trial on the merits is required for this issue.

Point II. The FBI did not demonstrate that it is entitled to summary judgment with respect to the FOIA exemptions it has asserted. The FBI's boilerplate declarations do not establish that the information the FBI has withheld satisfies each element of each FOIA exemption the FBI has invoked. Therefore, the FBI is not entitled to summary judgment as to Documents 1, 2, 3, 5, and 22. Nor is the FBI entitled to summary judgment as to any assertion of Exemption 5 or Exemption 7E.

Point III. The District Court erred by not allowing the deposition of a key witness, FBI Special Agent Jacqueline Maguire, because her testimony could have shown that the FBI withheld and redacted records to conceal wrongdoing by the FBI, as suggested by the inconsistencies between its internal records showing the al-Hijjis had many connections to the 9/11 hijackers and its public statement that it found no such connections.

ARGUMENT

Congress intended FOIA to be a mechanism by which citizens would hold accountable "the hundreds of departments, branches, and agencies which are not directly responsible to the people." S. Rep. No. 89-813, at 3 (1965). To that end, FOIA imposes on the federal government "an information policy of full disclosure," *see id.*, and closes the "loopholes" that had allowed federal agencies to treat FOIA's predecessor, Section 3 of the Administrative Procedure Act, "more as

a withholding statute than a disclosure statute." *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1190-91 (11th Cir. 2007) (citations omitted). Congress specifically intended that FOIA would thwart officials who withhold information "in order to hide mistakes or irregularities committed by [an] agency" or who deny access to information needlessly. *See GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375, 385 (1980).

The Final Judgment in this case is inconsistent with an information policy of full disclosure. The District Court has relieved the FBI of its duty to conduct a search that is reasonably calculated to locate all relevant documents, failed to hold the FBI to its burden of establishing the applicability of each FOIA exemption it invokes, and denied the Bulldog limited discovery that would tend to establish the FBI's wrongful withholding of documents to which the Bulldog is entitled under FOIA. In so doing, the District Court has rendered FOIA a withholding statute, rather than a disclosure statute. The Final Judgment should therefore be reversed.

I.

The District Court Erred In Concluding The FBI Established The Adequacy Of Its Search As A Matter Of Law.

The FBI did not establish that it conducted a reasonable and adequate search for responsive records. The FBI bears the burden of demonstrating that it "made a good faith effort to conduct a search using methods which can be reasonably

expected to produce the information requested."[8] To meet this burden, the FBI must "'show beyond a material doubt … that it has conducted a search reasonably calculated to uncover all relevant documents.'"[9] Reasonableness depends on the circumstances of the case.[10] An agency may meet its burden "by producing affidavits, which should set forth the files reviewed, search terms used, type of search performed, and aver that all files likely to contain responsive materials were searched."[11] Importantly, affidavits should provide enough detail to "afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment."[12] Affidavits that do not say how the agency searched for responsive documents—who conducted the search, where, and using what search

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[8] *McClanahan v. U.S. Dep't of Justice*, 204 F. Supp. 3d 30, 41 (D.D.C. 2016) (internal quotation marks and citation omitted).

[9] *Miccosukee Tribe*, 516 F.3d at 1248 (citation omitted) (emphasis added).

[10] *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (finding genuine issues of material fact as to adequacy of agency's search because agency failed to search files likely to contain information responsive to FOIA request).

[11] *Miccosukee Tribe*, 516 F.3d at 1247-48 (finding that, with assistance of affidavits and multiple depositions, plaintiffs were able to discover necessary facts).

[12] *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 152 (D.D.C. 2013) (citations omitted).

terms—do not satisfy the agency's burden.[13] Where "a review of the record raises substantial doubt, particularly in view of well defined requests and positive indications of overlooked materials," summary judgment should be denied on the basis of the agency's failure to conduct an adequate search.[14] Indeed, "[a]ny doubt about the adequacy of the search should be resolved in favor of the requester."[15]

The record below raised substantial doubt regarding the adequacy and reasonableness of the FBI's searches. Questions regarding the FBI's honesty about its al-Hijji investigation date back to at least 2011, when the FBI claimed, in response to the Bulldog's reporting, it had found no connections between the al-Hijjis and the 9/11 hijackers and, in any event, had reported the investigation to Congress. Senator Graham, former chairman of the Senate Select Committee on

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[13] *Nat'l Sec. Counselors*, 960 F. Supp. 2d at 152 (denying summary judgment with respect to adequacy of CIA's search); *Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 370 (D.C. Cir. 1980) (summary judgment improper in part because affidavits submitted by FBI were inadequate).

[14] *Iturralde v. Comptroller of Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003) (citation and internal quotation marks omitted); *see also Miccosukee Tribe*, 516 F.3d at 1251-52 ("material issues of fact regarding whether those conducting the search reasonably made an effort to contact all employees who had responsive records and whether the search efforts were properly coordinated" preclude summary judgment).

[15] *Negley v. FBI*, 658 F. Supp. 2d 50, 59 (D.D.C. 2009) (citations omitted) (emphasis added).

Intelligence, declared under oath that the FBI had not actually disclosed its investigation to Congress. DE-28-1 at 58-64. In other words, the FBI lied.

The FBI's failure to respond to the Bulldog's FOIA requests in a timely fashion raised doubts in the context of this case. Nothing explains all the delays the Bulldog has encountered.

For example, the Bulldog submitted Request 1 on April 8, 2015. It sought the work papers of a three-person commission that had completed its work two weeks earlier. Little searching should have been required. Nevertheless, the FBI's sole response was that "unusual circumstances" prevented a timely production of records.

The FBI then failed to respond to the Bulldog's narrower Request 2 in a timely manner. Request 2 sought only the Meese Commission records the Bulldog thought would be most relevant to the Meese Commission's assertion that—notwithstanding the "many connections" memorandum—the FBI had found "no connections" between the al-Hijjis and the hijackers.

After the Bulldog filed its complaint on June 16, 2016, the FBI continued to delay. It failed to produce any records until October 31, 2016, and redacted portions of those records that it plainly had no basis to redact, such as the fact that Maguire was the agent who had briefed the Meese Commission concerning the "many connections" memorandum.

Finally, the FBI produced certain documents later than it should have because it thought they had been destroyed in April 2016—an explanation that only makes sense if the Court ignores the fact that the Bulldog requested them in April 2015.

Late productions of additional documents can create an inference that an agency's search was inadequate.[16] Here, the FBI's seven piecemeal productions interfered with the orderly adjudication of the case.[17] The FBI made most of its supplemental productions on the eve of important deadlines, like the deadlines for summary judgment motions and trial. This is strong evidence the FBI not only performed inadequate searches, but also withheld documents in bad faith for strategic advantage.

Missing records also raise doubts regarding the adequacy of an agency's search.[18] The Meese Commission's report said the commission "interviewed over

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[16] *See Miccosukee Tribe*, 516 F.3d at 1256; *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1386 (8th Cir. 1985) ("the discovery of additional documents is evidence that the search was not thorough").

[17] The FBI produced 220 pages on October 31, 2016; ninety pages on December 30, 2016; 300 pages on January 27, 2017; a re-release of BB-0013-0611 with fewer redactions on February 10, 2017; 831 pages on February 14, 2017; fifty-nine pages on February 22, 2017; and 164 pages on March 24, 2017.

[18] *Iturralde*, 315 F.3d at 315 ("court may place significant weight on the fact that a records search failed to turn up a particular document in analyzing the adequacy of a records search").

30 Bureau and United States Intelligence Community (USIC) officials and other experts." The Bulldog's Request 1 sought "the Transcripts of commission proceedings and interviews" and Memoranda for the Record. DE1-4 at 2. Yet, the FBI did not produce a transcript of any of the thirty-plus interviews the Meese Commission said it had conducted and provided very few notes from these interviews. These and many other similar omissions easily could have been avoided if the FBI had carefully reviewed the FOIA requests, the Meese Commission's report, and the documents it produced. The FBI's production gaps raise issues of material fact that preclude summary judgment as to the FBI's claim that it conducted an adequate search.

Furthermore, not one of the eight declarations the FBI filed contained sufficient details for the Bulldog "to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment."[19] None of the declarations identified the person in the Director's Office who searched for documents, the search terms the FBI used, or the basis for the FBI's conclusion that information responsive to the Bulldog's requests would not be located on the "principal records system searched" by the

[19] *Nat'l Sec. Counselors*, 960 F. Supp. 2d at 152.

records unit.[20] Nor did the FBI explain why absolute discretion and deference was given to the Director's Office.[21]

These concerns are not academic. For example, the documents the FBI has produced spell "al-Hijji" in different ways. If the FBI did not search for alternative spellings, its search was inadequate.[22] Because the FBI's affidavits do not disclose its search terms, neither the Bulldog nor the Court can gauge the sufficiency of the FBI's search. Under these circumstances, the District Court should not have presumed the FBI searched in good faith or awarded the FBI summary judgment.[23]

The present record supports the following reasonable inferences: the FBI stored Meese Commission records in the Director's Office and outside the FBI's

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[20] *See* DE-75-2 (asserting that "RIDS assessed that such information would not reasonable be expected to be located in the CRS…. Instead, RIDS contacted the FBI Director's Office.").

[21] *See Nat'l Sec. Counselors*, 960 F. Supp. 2d at 154 (finding that CIA's conclusory allegation that "'Director's Area was the only directorate reasonably likely to have' responsive records" was insufficient to satisfy its burden).

[22] *Kleinert v. Bureau of Land Mgmt.*, 132 F. Supp. 3d 79, 87-89 (D.D.C. 2015) (summary judgment improper where agency only searched for wrong spelling of name); *Int'l Counsel Bureau v. U.S. Dep't of Def.*, 864 F. Supp. 2d 101, 108 (D.D.C. 2012) (government's search inadequate because it did not use alternate spellings and/or known alias).

[23] *See Dinsio v. FBI*, 445 F. Supp. 2d 305, 313 (W.D.N.Y. 2006) ("presumption of good faith that attaches to declarations submitted by a government agency is no substitute for the 'reasonable detail' that those declarations must contain") (emphasis added).

regular filing system for an unknown reason; the Director's Office did not provide the records to the FBI personnel responsible for processing FOIA requests in a timely fashion; and, when it finally started to provide the records, the Director's Office made numerous mistakes and omitted critical documents, significantly slowing the production of documents and creating serious questions regarding the completeness of the production. Indeed, many records still appear to be missing. No one in the Director's Office has submitted a declaration that rebuts these disturbing inferences, which must be presumed to be true on the FBI's motion for summary judgment.

As the District Court found, the FBI employed "shocking" and "shameful" tactics. The FBI's conduct—its delays, unusual storage of relevant records, failure to produce requested documents, including transcripts and notes of interviews identified in the Meese Commission's report, and filing of declarations that omit a detailed description of the FBI's searches—required the District Court to deny the FBI any deference as to the reasonableness and adequacy of its searches. Given the many doubts surrounding the FBI's handling of the Bulldog's FOIA requests, this Court should require the FBI to prove the reasonableness and adequacy of its searches at a trial at which its representatives are subject to cross-examination.

II.

The FBI Has Not Established That The Exemptions It Has Invoked Apply To The Documents It Has Withheld And Redacted.

"[V]irtually every document generated by an agency is available to the public in one form or another, unless it falls within one of [FOIA's] nine exemptions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). FOIA's statutory exemptions are "'explicitly made exclusive' and must be 'narrowly construed.'" *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011) (citations omitted). "[J]udicial weighing of the benefits and evils of disclosure on a case-by-case basis" is not permitted, *FBI v. Abramson*, 456 U.S. 615, 631 (1982), and the "sense that certain sensitive information should be exempt from disclosure" must yield to FOIA's "scheme of categorical exclusion" and strong presumption in favor of disclosure. *See Milner*, 562 U.S. at 577-78, *Abramson*, 456 U.S. at 631.

"[T]he burden is on the agency to sustain its action," *i.e.*, its assertion of a FOIA exemption. 5 U.S.C. § 552(a)(4)(B). *See also Ely v. FBI*, 781 F.2d 1487, 1489-90 (11th Cir. 1986). A district court reviews an agency's invocation of a FOIA exemption *de novo*. 5 U.S.C. § 552(a)(4)(B). The agency's assertion that an exemption applies is not entitled to any deference. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989).

The FBI has withheld all or part of Documents 1, 2, 3, 5, and 22, but it has not established the applicability of the exemptions it has invoked. To the extent it

endorses the FBI's withholding or redaction of these documents—or any assertion of Exemption 5 or Exemption 7E in this case—the District Court's final judgment should be reversed.

A. The FBI Has Not Proved That FOIA Exemptions 5 And 7E Apply To Document 22.

The FBI invoked FOIA Exemption 7E and redacted from Document 22 (DE-73-3), the "Overview of 9/11 Investigation," information concerning the preparations of the hijackers and their co-conspirators. *See generally id.*, DE-105-1. It also asserted Exemption 5 and withheld information concerning certain investigative leads and data sources. The FBI has not proved that FOIA Exemption 7E applies to the information it redacted from Document 22, and the public record below contains no evidence that Exemption 5 applies to Document 22. Accordingly, the FBI is not entitled to summary judgment on Document 22. *See Ely*, 781 F.2d at 1489-90.

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

The FBI invoked FOIA Exemption 7E and redacted from Document 22 information concerning the funding of the 9/11 attacks and the conspirators' financial transactions, identification the hijackers obtained, flights by which the hijackers entered the United States, the hijackers' surveillance flights, the hijackers' weapons, the dates the hijackers purchased their tickets for 9/11, the

dates on which the hijackers arrived in the cities from which the hijacked flights departed, a security camera photograph, "information about investigative leads and sources of information the FBI finds useful or significant in its analysis," "information about a conspirator and his actions taken in preparation for the attacks," and certain "investigative leads derived from forensic analysis."[24] *See generally* DE-73-3, DE-105-1. The FBI's boilerplate assertions do not satisfy its burden of proving that Exemption 7E applies to the withheld information.

Exemption 7E exempts from mandatory disclosure "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). The Bulldog does not dispute that the FBI compiled Document 22 for law enforcement purposes, and the FBI does not assert that the information it has withheld implicates guidelines for law enforcement investigations or

[24] The FBI also withheld BB-1541 pursuant to Exemption 3. *See* DE-73-3 at 3 (listing pages withheld entirely). The declaration the FBI submitted in support of its redactions to Document 22 does not address this page. *See generally* DE-105-1. The FBI has not established a FOIA exemption applies to BB-1541, and this Court should reverse the District Court's summary judgment ruling that the FBI may withhold it.

prosecutions. Therefore, to prove that Exemption 7E applies to the information it has withheld, the FBI must prove the production of the information (1) would disclose (2) techniques and procedures (3) for law enforcement investigations or prosecutions and (4) could reasonably be expected to risk circumvention of the law.

FOIA does not define Exemption 7E's key terms, but disclose ordinarily means "[t]o make (something) known or public; to show (something) after a period of inaccessibility or of being unknown; to reveal." *Disclose*, Black's Law Dictionary (10th ed. 2014). Thus, an agency cannot "disclose" a technique or procedure if it is already public. Congress endorsed this reading of the statute in the conference report that immediately preceded Exemption 7E's addition to FOIA: "the scope of this exception against disclosure of investigative 'techniques and procedures' should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques." H.R. Rep. No. 93-1380, at 11-12 (1974). Accordingly, "courts have uniformly required that the technique or procedure at issue ordinarily must not be well known to the public." Department of Justice Guide to the Freedom of Information Act: Exemption 7(E) at 5 (posted Apr. 13, 2013) (available at https://www.justice.gov/oip/foia-guide/exemption_7e/download) (collecting cases).

A "technique is a particular method of doing an activity, usually a method that involves practical skills." *Technique*, Collins English Dictionary (https://www.collinsdictionary.com/us/dictionary/english/technique). A procedure is "[a] specific method or course of action." *Procedure*, Black's Law Dictionary (10th ed. 2014).

The term "law enforcement investigations or prosecutions," while undefined, is narrower than the term "law enforcement purposes." *Milner*, 562 U.S. at 583-84 (Alito, J., concurring). Law enforcement purposes include "crime prevention and maintenance of security," which "are separate and distinct from investigation and prosecution." *Id.*

Finally, 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). It is clear this requirement applies when an agency withholds documents that would "disclose guidelines for law enforcement investigations or prosecutions," but Circuit Courts disagree about its applicability when an agency withholds documents that would disclose techniques and procedures for law enforcement investigations or prosecutions. *See* DE-108 at 4-5 (noting split between D.C. Circuit and Second and Ninth Circuits).

The uncertainty stems from a comma that divides Exemption 7E's two clauses. Exemption 7E's techniques and procedures clause and its guidelines

clause share a subject, "production," but Exemption 7E uses the word production only once. Therefore, Exemption 7E has a "two-part compound predicate." *See* University of Chicago, *The Chicago Manual of Style* ¶ 6.23 (17th ed. 2017). "A comma is not normally used to separate a two-part compound predicate joined by a coordinating conjunction." *Id.* *See also id.* ¶ 5.198 (coordinating conjunction joins two clauses "of equal grammatical rank"). The misuse of a comma to divide Exemption 7E's compound predicate makes the statute grammatically unsound and ambiguous as to whether the risk of circumvention requirement applies when production would reveal qualifying techniques and procedures.

The Supreme Court's instruction that FOIA's exemptions "must be 'narrowly construed'" requires this Court to resolve any statutory ambiguity against the Government and in favor of disclosure. *See Milner*, 562 U.S. at 565. A narrow construction of Exemption 7E—one that favors disclosure—requires an agency to demonstrate that the disclosure of withheld documents could reasonably be expected to risk circumvention of the law, whether the documents reveal law enforcement techniques and procedures or law enforcement guidelines.

The FBI has not established that release of the information it has withheld would amount to a disclosure, reveal techniques and procedures for law enforcement investigations or prosecutions, or risk circumvention of the law.

First, production of the withheld information likely would not "disclose" anything. Document 22 is a high-level overview of the planning and execution of the 9/11 attacks. The Joint Inquiry report co-authored by Senator Graham, the 9/11 Commission Report, and the 9/11 Commission's staff-issued monographs concerning terrorist financing and terrorist travel addressed each of these subjects in greater depth than the FBI's PowerPoint presentation could have. *See* S. Rep. No. 107-351, H.R. Rep. No. 107-792 (2002); National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* (2004); John Roth et al., *Monograph on Terrorist Financing: Staff Report to the Commission* (2004); Thomas R. Eldridge et al., *9/11 And Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States* (2004). The FBI has not proven that the information it withheld or redacted from Document 22 is not disclosed in these reports or some other public document.[25] Therefore, the FBI has not established Exemption 7E applies to Document 22.

Second, the information at issue does not concern techniques and procedures for law enforcement investigations or prosecutions. According to the District Court, Document 22's "redacted content does not directly discuss techniques and

[25] *Compare, e.g.*, DE-28-1 at 43 (dates hijackers purchased 9/11 tickets) *and* DE-105-1 at 10 (asserting "information about the timing of the purchase of the conspirators' plane tickets" cannot be disclosed).

procedures." DE-108 at 4. *See also* DE-99 at 38 ("[M]uch" of the redacted material "does not discuss any FBI investigative techniques and procedures[.]"). Instead, the FBI has withheld "facts and information gathered about FBI suspects." DE-99 at 38. Perhaps al-Qaeda's techniques and procedures can be gleaned from this information. This is, in fact, the FBI's principal concern. *See, e.g.*, DE-105-1 at 9 ("Revelation of which types of weapons the conspirators were most successful with would provide a criminal with insight into how to successfully plan future criminal acts without detection."), 10 ("Disclosure of this information would provide a playbook to future subjects on how much money one can move around in certain forms without attracting attention."). But Exemption 7E applies only to techniques and procedures <u>for law enforcement investigations or prosecutions</u>. *See* 5 U.S.C. § 552(b)(7)(E). Facts and information the FBI gathered about the hijackers and their activities, without more, do not disclose such techniques and procedures.

Virtually all of the FBI's assertions of Exemption 7E fail for this reason.[26] The facts the FBI gathered about the hijackers and their co-conspirators reveal, at

[26] BB-1508, a withheld photograph, reflects the fact that someone once placed a security camera somewhere. *See* DE-73-3 at 3 (listing pages withheld entirely), DE-105-1 at 7. Even if the definition of techniques and procedures could stretch so far as to include pointing a security camera in a certain direction to record people passing in front of it, Exemption 7E would not apply because such a technique and procedure is "well known to the public." *See* H.R. Rep. No. 93-

most, unclassified al-Qaeda tradecraft and the universally known fact that the FBI investigated the 9/11 attacks. This information would not disclose the "particular method[s]" and "course[s] of action"—the techniques and procedures—by which the FBI investigates terrorist activity. *See Technique*, Collins English Dictionary; *Procedure*, Black's Law Dictionary. Therefore, Exemption 7E's "techniques and procedures for law enforcement investigations or prosecutions" requirement is not satisfied.

The FBI's arguments to the contrary treat FOIA as a withholding statute, rather than a disclosure statute. The FBI asserts that it may withhold a document that reveals "the specific types of data the FBI finds most useful" or "allows insight into the specific factors significant to analysis by the FBI." *See* DE-105-1 at 8, 10. In other words, the FBI thinks it may withhold a document because it identifies information that the FBI considers important. That cannot be correct. Construing Exemption 7E in this way reads the techniques and procedures

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1380, at 11-12. Exemption 7E also would not apply because a security camera's placement reflects, at most, a technique and procedure for "crime prevention" or "maintenance of security," not law enforcement investigations or prosecutions. *See Milner*, 562 U.S. at 583-84. Finally, the FBI has not submitted evidence that the security camera in question is hidden and remains in the location from which it took the withheld photograph. Accordingly, the FBI has not established that disclosure of the photograph would create any risk of circumvention of the law. *See Blackwell*, 646 F.3d at 42.

requirement out of the statute and gives the FBI unfettered discretion as to the information it will and will not produce.

The FBI's claim that it need not produce documents that disclose its "investigative findings" or "any commonalities and patterns [it] detected" fails for a similar reason. *See id.* at 7, 9. Exemption 7E does not exempt from disclosure information reflecting the FBI's findings or analysis unless the FBI demonstrates that such information would reveal techniques and procedures for law enforcement investigations or prosecutions. The FBI's construction of Exemption 7E—that such information is categorically exempt from disclosure—is contrary to the statute's plain meaning, and this Court should reject it.

Third, production of the withheld documents would not create any risk of circumvention of the law. *See Blackwell,* 646 F.3d at 42. Detailed information concerning the planning and execution of the 9/11 attacks is widely available already. *See supra*. If the disclosure of such information could create a risk of circumvention of the law, Congress, the 9/11 Commission, and others have already created that risk by releasing their reports. The release of Document 22—a summary of identical or similar information—would not elevate or create any new risk. Therefore, Exemption 7E does not apply.

Since the FBI has failed to demonstrate that the release of the information withheld from Document 22 would constitute a disclosure, would reveal

techniques and procedures for law enforcement investigations or prosecutions, and could create a risk of circumvention of the law, the FBI is not entitled to summary judgment as to its assertions of Exemption 7E.

2. The FBI has not proved that Exemption 5 applies to Document 22.

The FBI invoked FOIA Exemption 5 and withheld or redacted six pages from Document 22 (DE-73-3 at 3, 51-54 (BB-1550-55)); the District Court granted the FBI summary judgment with respect to four of the six (*id.* at 51-54 (BB-1550, 1553-55)). DE-99 at 38. Yet the FBI offered no evidence that Exemption 5 applies to these four pages, and the District Court, which reviewed the pages *in camera*, offered only a cursory and contradictory explanation as to why Exemption 5 applies. The District Court erred in granting summary judgment, and this Court should remand for further proceedings.

Exemption 5 exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with an agency[.]" 5 U.S.C. § 552(b)(5). Exemption 5 permits an agency to withhold documents pursuant to a "deliberative process privilege." *See Fla. House of Representatives v. U.S. Dep't of Commerce*, 961 F.2d 941, 945 (11th Cir. 1992). An agency invoking the deliberative process privilege "must show that the document [withheld] is (1) predecisional, i.e., 'prepared in order to assist an agency decisionmaker in arriving at his decision,'

and (2) deliberative, i.e., 'a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.'" *Id.* (citations omitted). The purpose of the privilege "is to ensure that a decisionmaker will receive the unimpeded *advice* of his associates." *Id.* at 947. Accordingly, "purely factual material that does not reflect the agency's deliberative process generally is not protected." *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1491 (11th Cir. 1992), *abrogated on other grounds by U.S. Dep't of Justice v. Landano*, 508 U.S. 165 (1993).

First, the FBI offered no evidence that Exemption 5 applies to the withheld information. In support of its redactions to Document 22, the FBI submitted a declaration that does not refer to Exemption 5 or invoke any privilege. *See* DE-105-1 at 10-11. The FBI described the withheld information as factual material—(i) "information about investigative leads and the sources of data the FBI finds useful to or significant in its analysis" and (ii) "information about investigative leads derived from forensic analysis"—and did not identify it as either predecisional or deliberative. *See id*.

Second, the limited public record belies the District Court's cursory holding that Exemption 5 applies. The District Court held: "[T]he redactions under Exemption 5 appropriately protect FBI deliberations, recommendations, and decisions…. [O]n pages [DE-73-3 at 51-54 (BB-1550, 1553-55)], it is readily

discernible the information is properly withheld under Exemption 5." DE-99 at 38 (emphasis added). "Decisions" are not protected by Exemption 5's deliberative process privilege, however. Exemption 5 applies only to "predecisional" information. *See Fla. House of Representatives*, 961 F.2d at 945.

Exemption 5 also does not apply to "purely factual material," *Nadler*, 955 F.2d at 1491, but, apart from the District Court's two-sentence holding, the public record describes the information redacted from Document 22 as factual material. *See* DE-99 at 38, DE105-1 at 10-11. The District Court did not explain how it bridged the gap between its finding that the FBI withheld "facts and information gathered about FBI suspects" and its conclusion that Exemption 5 applied. *See* DE-99 at 38. Such an explanation was required because nothing in the public record supports the District Court's conclusion. *See Ely*, 781 F.2d at 1493 (district court reviewing documents *in camera* must "'create as complete a public record as possible'").

Since the District Court sanctioned the withholding of information regarding "decisions" and appears to have approved without explanation the withholding of purely factual material—none of which is exempt from disclosure under Exemption 5—this Court should reverse the District Court's grant of summary judgment and instruct the District Court to (i) create a robust public record, (ii) determine whether the information withheld from Document 22 under

Exemption 5 is predecisional and deliberative, and (iii) segregate for production any information to which Exemption 5 does not apply.

B. The FBI Did Not Identify A FOIA Exemption That Applies To Document 1 And Therefore Must Produce It.

The Bulldog specifically requested Document 1, DE-73-1 at 2-3, the Sarasota family case file the Meese Commission reviewed, DE-1-¶42, but the FBI refused to produce it on the grounds that it had "deemed" the Bulldog's request "duplicative" of a FOIA request at issue in *Bulldog I* and produced "[n]on-exempt portions" of the file in response to that request. DE-66-1 at 7 n.7. The District Court erred when it granted the FBI summary judgment because the FBI's basis for withholding Document 1 is not a recognized FOIA exemption.

FOIA recognizes only nine exemptions. Duplicative requests and productions are not among them. "Unless a document falls into one of the nine recognized exemptions from disclosure under FOIA, it is due to be disclosed." *Miccosukee Tribe*, 516 F.3d at 1253-55 (reversing summary judgment and holding agency could withhold documents requested on grounds that requestor "already had them"). Since the FBI does not claim that a recognized FOIA exemption applies to Document 1, Document 1 must be produced. This Court should reverse the District Court's final judgment accordingly.

C. The FBI Has Not Proved That Exemptions 5, 7D, And 7E Apply To Document 2.

The FBI invoked Exemption 7D and redacted from Document 2 (DE-27-2 at 37-40), the FBI's April 30, 2014, briefing memorandum, information concerning the FBI-FDLE interview of Wissam Hammoud in April 2004 and an FBI interview of the al-Hijjis' neighbor Larry Berberich.[27] *See id.* at 38-39 (BB-2-3). The FBI also withheld information concerning "[g]aps/[p]ossible [i]ssues/ [r]ecommendations" pursuant to Exemption 5 and unknown information pursuant to Exemption 7E. *Id.* at 38-40 (BB-2-4). The FBI has not established these exemptions apply to Document 2.

1. The FBI has not proved that Exemption 7D applies to Document 2.

Exemption 7D does not apply to Document 2's discussions concerning Hammoud and Berberich because Hammoud's cooperation with the FBI and the information he provided are publicly known and the FBI has not established Berberich was a confidential source.

Exemption 7D exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … could reasonably be expected

[27] The District Court rejected two other FBI assertions of Exemption 7D, which are not discussed here.

to disclose the identity of a confidential source" or "information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). "A source is confidential within the meaning of exemption 7(D) if the source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." *Williams v. FBI*, 69 F.3d 1155, 1159 (D.C. Cir. 1995) (internal quotation marks and citations omitted). The fact that "a source communicated with the [FBI] during the course of a criminal investigation" is not enough to establish an implied assurance of confidentiality. *Landano*, 508 U.S. at 178. A party requesting information can overcome Exemption 7D by "show[ing] that the exact information contained in the record is already in the public domain." DE-58 at 18 (citation and quotation marks omitted).

First, Hammoud's name and the exact information he provided the FBI and FDLE in an interview on April 7, 2004, are in the public domain. *See* DE-27-2 at 38 (BB-2) (information redacted after the phrase "In April 2004, FBI agents"). FDLE has already produced its summaries of this interview to the Bulldog. DE-28-1 at 20-27. Additionally, after the District Court held that the FBI could withhold Document 2's discussion of Hammoud, DE-58 at 18, it ordered the FBI to produce Document 27, DE-73-5 at 19-24 (BB-1572-77)—the FBI's summary of the Hammoud interview—with only one redaction for an FBI file number. *See*

DE-112-¶¶2, 4. Thus, the information concerning Hammoud that the FBI redacted from Document 2 is public, and Exemption 7D does not apply.

Second, the FBI has not established Berberich was a confidential source. *See* DE-27-2 at 39 (BB-3) (information redacted from first paragraph). As the District Court found, the FBI offered no evidence Berberich was a source at all. DE-58 at 18. In fact, a Bulldog article appears to have been the FBI's source. *See* DE-27-2 at 39 (BB-3) (Berberich "was mentioned in the article stating he had a gut feeling [redacted]," *i.e.*, the al-Hijjis, "had something to do with the attacks.") (emphasis added).

Assuming Berberich was a source, the FBI offered no evidence in support of its claim that he provided information under an implied assurance of confidentiality. At a minimum, Berberich's on-the-record comments to the Bulldog and voluntary submission of a declaration detailing his communications with law enforcement regarding the al-Hijjis, DE-28-1 at 70-72, raise a question of material fact as to whether he expected the FBI to keep his identity confidential.

Furthermore, even if Berberich had been a confidential source, his identity and the information attributed to him are public. *See* DE-27-2 at 39 (BB-3); DE-28-1 at 19-20 (recounting information Berberich provided law enforcement). Therefore, Exemption 7D does not apply.

2. The FBI has not proved that Exemption 5 applies to Document 2.

The FBI did not establish Exemption 5 applies to Document 2. The FBI invoked the deliberative process privilege, DE-27-1 at 24-25, but offered no evidence that the information redacted from Document 2 is predecisional and deliberative. *See Fla. House of Representatives*, 961 F.2d at 945; Section II.A.2, *supra*. Instead, the FBI submitted boilerplate language concerning Exemption 5's scope and the "public confusion" that might result from releasing information that is subject to the privilege. DE-27-1 at 24-25. This language is so broad and has so little to do with why Exemption 5 specifically applies to Document 2 that the FBI has also cited it to explain why Exemption 5 applies to Documents 5, 8-10, 13, 15-16, and 18-20—some of which the FBI had not even located at the time the language was drafted.[28] *See* DE-66-1 at 10 n.13 (citing DE-27-1-¶53 as evidence that more than fifty redactions satisfy requirements of Exemption 5).

The District Court's *in camera* review of Document 2 does not salvage the FBI's assertion of Exemption 5 because the court did not "create as public a record as possible" explaining why Exemption 5 applies. *See Ely*, 781 F.2d at 1493; DE-

[28] For these reasons, this boilerplate language also does not establish that Exemption 5 applies to the records identified in note 13 of Hardy's fourth declaration. *See* DE-66-1 at 10 n.13. The FBI is not entitled to summary judgment with respect to its assertions of Exemption 5 in connection with these records.

58 at 23 (single sentence adopting FBI's assertion that deliberative process privilege applies). Remand is required.

3. The FBI has not proved that Exemption 7E applies to Document 2.

The FBI did not establish Exemption 7E applies to Document 2, either. As with Exemption 5, the FBI submitted boilerplate language concerning Exemption 7E's scope and threatened that criminals will circumvent the law if the records at issue are released, but it has offered no evidence that releasing the information it has withheld would amount to a disclosure, would reveal techniques and procedures or guidelines for law enforcement investigations or proceedings, or could create a risk of circumvention of the law. *See* DE-27-1 at 36-44. As the D.C. Circuit held, in rejecting a similar declaration Hardy submitted in support of redactions made pursuant to Exemption 7E:

> The DOJ cites Exemption 7(E) "to protect procedures and techniques used by FBI [agents] during the investigation." This near-verbatim recitation of the statutory standard is inadequate. We are not told what procedures are at stake. (Perhaps how the FBI conducts witness interviews? Or how it investigates public corruption?) Nor are we told how disclosure of the FD-302s or investigative materials could reveal such procedures. (Are the procedures spelled out in the documents? Or would the reader be able to extrapolate what the procedures are from the information contained therein?) …. [T]he agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed.

Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice, 746 F.3d 1082, 1102 (D.C. Cir. 2014). An explanation of what procedures are involved and

how they would be disclosed is absent here. Accordingly, the FBI is not entitled to summary judgment regarding its assertions that Exemption 7E applies to Document 2.[29]

D. The District Court Did Not Apply The Correct Standard Of Review To Document 3.

The FBI invoked Exemptions 1 and 3[30] and withheld large sections of Document 3, DE-27-2 at 41-42 (BB-5-6), the October 24, 2014, report regarding "9/11 Additional Evidence," in which the FBI concluded a review of the evidence did not "identif[y] new participants in the 9/11 attacks but harden[ed] the existing known connections to the plot."[31] The District Court did not review the FBI's assertions of Exemptions 1 and 3 *de novo*, and this Court should reverse and remand for further proceedings.

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[29] The FBI cites the same inadequate boilerplate language in support of every one of its assertions of Exemption 7E. *See, e.g.*, DE-27-1 at 36-44; DE-66-1 at 11 n.19-24, 16-18; DE-75-2 at 14 n.23, 15 n.24-27. For the reasons stated, the FBI is not entitled to summary judgment with respect to its assertions of Exemption 7E in connection with these records, either.

[30] Exemption 1 exempts from mandatory disclosure records that are properly classified pursuant to an Executive order. 5 U.S.C. § 552(b)(1). Exemption 3 exempts from mandatory disclosure a record that is "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3).

[31] The FBI also withheld sections of Document 3 under Exemption 7E. For the reasons stated in Section II.C.3 and note 29, the FBI's boilerplate submissions do not establish that Exemption 7E applies to Document 3, and the FBI is not entitled to summary judgment.

A district court must determine the applicability of a FOIA exemption *de novo*. 5 U.S.C. § 552(a)(4)(B). This duty stands in contrast to a district court's "review of other agency action," which "must be upheld if supported by substantial evidence and not arbitrary or capricious." *Reporters Comm.*, 489 U.S. at 755.

The District Court did not review the FBI's assertions of Exemptions 1 and 3 *de novo*. It deferred to the FBI instead. *See* DE-58 at 27 ("Because of the possible strong implications for national security, courts should defer to an agency's decision to withhold information under Exemptions 1 and 3.") (citations omitted). Rather than determine whether Exemptions 1 and 3 actually apply to Document 3, the District Court only considered whether the FBI had produced sufficient evidence that Exemptions 1 and 3 apply. *See id.* at 29 ("[T]he Court finds the Government has provided ample evidence the redacted material is exempt from disclosure under Exemptions 1 and 3 because of national security concerns."). The District Court's application of the wrong standard of review requires reversal of its summary judgment order and remand.[32]

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[32] If deference to the FBI were not foreclosed by FOIA's text, it would still be inappropriate here, given the unresolved inconsistencies concerning (i) the FBI's public claims that it found no connections between the al-Hijjis and the hijackers and its private report that it had found many connections and (ii) the FBI's claim that it notified Congress about the Sarasota investigation and Senator Graham's sworn statement that the FBI did not disclose the investigation to Congress. *See* DE-28-1 at 58-64. On remand, the District Court must hear evidence, resolve these inconsistencies, and ascertain whether the FBI has lied to

E. The District Court's Grant Of Summary Judgment As To Document 5 Was Incorrect.

The FBI invoked Exemptions 1, 3, 5, 7A, 7D, and 7E and withheld portions of Document 5, DE-27-2 at 45-48 (BB-9-12), the report concerning "Updates and Initiatives (as of 5 October 2012)," which describes the Saudi network that supported hijackers Nawaf al-Hazmi and Khalid al-Mihdhar when they arrived in San Diego. The report identifies Fahad-al-Thumairy, a Saudi diplomat and imam at the King Fahd Mosque in Los Angeles, and Omar al-Bayoumi, a salaried employee of the Kingdom of Saudi Arabia, as two people who assisted the hijackers at the behest of a third person, whose name is redacted. DE-27-2 at 47-48 (BB-11-12), DE-28-1-¶¶56-57. This document is significant because it shows the FBI had evidence of Saudi government complicity in the 9/11 attacks but has done nothing about it. DE-28-1-¶60. The District Court erred in granting the FBI summary judgment on Document 5.

First, as with Document 3, the District Court did not review the FBI's assertions of Exemptions 1 and 3 *de novo*. It deferred to the FBI and determined only that the FBI had produced a sufficient explanation as to why Exemptions 1

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the public about its Sarasota investigation before determining whether Exemptions 1 and 3 apply to documents withheld by the FBI.

and 3 apply. *See* DE-58 at 32. The District Court's application of the wrong standard of review requires reversal of its summary judgment order and remand.

Second, the FBI's boilerplate assertions of Exemptions 5 and 7E are inadequate for the reasons set forth in Sections II.C.2 and II.C.3 and notes 28 and 29, *supra*. The District Court's grant of summary judgment should be reversed.

Third, Hardy's declaration in support of the FBI's assertions of Exemptions 7A and 7D does not explain how any specific redaction to Document 5 satisfies the relevant statutory elements. *See* DE-27-1 at 29-36. Accordingly, the District Court's grant of summary judgment should be reversed.

Additionally, the Bulldog respectfully asks this Court to examine Document 5 *in camera* and to order the FBI to produce any information it has redacted that demonstrates the Saudi government supported the 9/11 attacks on the United States.

F. Remand Is Required Because The District Court Did Not Make An Express Finding Concerning Segregability.

FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5 U.S.C. § 552(b). It is a district court's affirmative duty to consider the issue of segregability. *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007) (citation omitted). A "district court clearly errs when it approves the government's

withholding of information under the FOIA without making an express finding on segregability[,]" and such an error "requires a remand." *Id.*

Here, the District Court made no express findings on segregability. *See* DE-58, DE-99, DE-108. This Court should reverse the Final Judgment and remand this case with an instruction to the District Court to consider whether the FBI can produce additional information consistent with any applicable exemptions and to make such findings expressly.

III.

The District Court Erred In Denying The Bulldog's Motion To Depose FBI Special Agent Jacqueline Maguire.

On January 30, 2017, the FBI identified Jacqueline Maguire as the FBI special agent who briefed the Meese Commission regarding the Sarasota investigation. She told the Commission that the "many connections" memorandum was "poorly written" and "unsubstantiated." The Bulldog immediately sought leave to depose her.

Maguire's testimony likely would show that the FBI improperly withheld or redacted responsive records. *See* DE-50 at 30. Maguire's testimony might also show that the FBI sought to discredit the "many connections" memorandum to stave off criticism that it failed to conduct an adequate investigation of the al-Hijjis' ties to the 9/11 attacks and improperly concealed the investigation from Congress.

A plaintiff is entitled to discovery in a FOIA case if it makes a showing that impugns the agency's declarations or "provide[s] some tangible evidence that an exemption claimed by the agency should not apply."[33] This can be done by calling into question the agency's use of exemptions to conceal its own bad acts.[34] The record here showed that the FBI did not timely respond to the Bulldog's records requests, failed to produce any records until well after the lawsuit was filed, improperly redacted information, including Maguire's identity as the agent who briefed the Meese Commission on the Sarasota investigation, and may have asserted exemptions to conceal that it mishandled evidence relating to the 9/11 attacks. The District Court should have allowed the Bulldog to depose Maguire about the FBI's evolving position regarding the al-Hijjis' ties to al-Qaeda and any documents evidencing the reasons for its change of position.[35]

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[33] *Hawthorn Mgmt. Servs., Inc. v. Dep't of Housing & Urban Dev.*, No. 03:96CV2435 (AHN), 1997 WL 821767, at *2 (D. Conn. Dec. 18, 1997) (citations omitted).

[34] *See, e.g., 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").

[35] *See, e.g., Van Strum v. EPA*, 680 F. Supp. 349, 352 (D. Or. 1987) (summary judgment inappropriate where plaintiff "raised sufficient questions as to the integrity of the [agency's] affidavits to warrant discovery").

CONCLUSION

The Court should (i) reverse the Final Judgment and direct the District Court to conduct a trial in order to determine whether the FBI conducted a reasonable and adequate search for responsive records, (ii) reverse the District Court's summary judgment upholding the FBI's redaction and withholding of the contested documents, and (iii) reverse the District Court's order denying the Bulldog leave to depose Jacqueline Maguire.

Respectfully submitted,

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I hereby certify that on October 16, 2017, 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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