UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61735-CIV-ZLOCH

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

Plaintiffs,

vs.

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

Defendants.
_____/

DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

Defendants United States Department of Justice and Federal Bureau of Investigation, by and through their undersigned counsel, file their Renewed Motion for Summary Judgment, and state:

I. INTRODUCTION

This litigation under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et. seq., arises out of a FOIA request submitted by plaintiffs on October 27, 2011, seeking FBI records pertaining to "an anti-terrorism investigation regarding activities at the residence at 4224 Escondito Circle, in the Prestancia development near Sarasota, Florida prior to 9/11/2001. The activities involve apparent visits to that address by some of the deceased 9/11 hijackers."

On May 13, 2013, defendants filed their motion for summary judgment. This Court determined that it lacked sufficient information to assess the reasonableness of the search conducted by the FBI in this case. D.E. 60 at 3-4. Accordingly, the Court directed defendants

to produce the universal case file no. 265D-NY-280350-TP for in camera review. Defendants produced the Tampa PENTBOMB sub file, numbering 80, 266 pages of material. As directed by the Court, the FBI conducted manual searches of the 80,266 pages to determine if responsive documents existed. Additionally, the FBI conducted computer text searches, using search terms directed by the Court. D.E. 60 at 20-21.

In the course of conducting the additional searches, the FBI located additional responsive documents, which it released to plaintiffs, with redactions in some instances. In addition to the 35 pages disclosed on March 28, 2013, the FBI made these additional disclosures: May 9, 2014 (4 pages); June 6, 2014 (32 pages); and June 27, 2014 (11 pages). All the documents disclosed to plaintiffs are contained in Exhibit A to the Fifth Declaration of David M. Hardy, containing Bulldog 1-81.

Defendants have engaged in a reasonable search of its files to locate documents responsive to plaintiffs' FOIA request. Additionally, defendants have properly invoked applicable exemptions under 5 U.S.C. § 552(b) to redact portions of some documents, and to withhold four documents in their entirety.

II. DEFENDANTS CONDUCTED AN ADEQUATE SEARCH FOR DOCUMENTS RESPONSIVE TO PLAINTIFFS' FOIA REQUEST

The adequacy of an agency's search for documents requested under FOIA is judged by a reasonableness standard. Ray v. U.S. Dept. of Justice, 908 F.2d 1549, 1558 (11th Cir. 1990), rev'd on other grounds, U.S. Dept. of State v. Ray, 502 U.S. 164 (1991), citing Miller v. United States Department of State, 779 F.2d 1378, 1383 (8th Cir. 1985). The search need not be exhaustive. Rather, "the agency must show beyond material doubt … that it has conducted a search reasonably calculated to uncover all relevant documents." Ray, 908 F.2d at 1558 (citation omitted).

"[T]he adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." Iturralde v. Comptroller of the Currency, 315 F.3d 311, 315 (D.C. Cir. 2003), citing Steinberg v. Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994).

In response to plaintiffs' October 27, 2011 FOIA request, the FBI conducted a search of its Central Records System (CRS), to identify all potentially responsive main and cross-reference files indexed under the terms: "Address 4224 Escondito Circle Sarasota FL" and "Four Two Two Four Escondito Circle." Exhibit C, Declaration of Michael G. Seidel ("Seidel Decl."), ¶ 5. The FBI conducted additional text searching of the Electronic Case File (ECF) to identify all potentially responsive main and cross-reference files indexed under the search terms "Escondito Circle" and "Escondito and Sarasota." These searches yielded six documents. Due to privacy concerns under 5 U.S.C. § 552(b)(6) and (b)(7)(C), these pages were withheld in full during the administrative phase. Id.

After the lawsuit was initiated, the Record/Information Dissemination Section (RIDS) contacted the FBI Tampa Field Office, since that office would handle any investigations in the Sarasota area. Seidel Decl., ¶ 6. FBI personnel in the Tampa office were canvassed to locate persons who had participated in the 2001 investigation of allegedly suspicious activity at 4224 Escondito Circle. Also, persons directly involved in answering congressional requests from Senator Graham related to the previous occupants of 4224 Escondito Circle were queried. These individuals informed the Litigation Support Unit that they searched through records gathered to respond to the congressional inquiry; conducted text searches in ECF of all known names, addresses and telephone numbers for the occupants at that address; searched through the Tampa Field Office PENTTBOM sub-file (265D-NY-280350-TP), and their personal e-mails. Id. This

search yielded 14 documents, consisting of 35 pages. On March 28, 2013, these pages were disclosed to plaintiffs as Sarasota 1-35.

Pursuant to the Court's Order of April 4, 2014, the RIDS arranged for transfer of the Tampa Field Office PENTTBOM sub-file, numbering over 80,000 pages, to Winchester, Virginia. Seidel Decl., ¶ 8. Manual searches of the sub-file were conducted by 127 RIDS employees, spending approximately 596 hours in a page-by-page review. Id., ¶ 10. An additional 31 pages was located. Additionally, a text search of copies of CDs prepared for the Court were conducted was a cross check. No new documents were found.

The FBI also engaged in a text search of 28 specified terms provided by the Court. Seidel Decl., ¶ 12. An additional 11 pages were located. Id., ¶ 15.

The FBI engaged in a search reasonably calculated to find responsive documents. The search efforts included computer text searches, and manual review of the Tampa Field Office PENTTBOM sub-file.

III. THE FBI HAS PROPERLY INVOKED APPLICABLE EXEMPTIONS UNDER 5 U.S.C. § 552(b)

In reviewing the 81 pages of responsive documents, the FBI invoked various exemptions in 5 U.S.C. § 552(b). Defendants have provided the Fifth Declaration of David Hardy to establish the rationales for the exemptions asserted by the FBI. "Summary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Larson v. Dept. of State, 565 F.3d 857, 862 (D.C. Cir. 2009), citing Miller v. Casey, 730 F.2d 773, 776 (D.C. Cir. 1984). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears

'logical' or 'plausible.'" Id. (citation omitted).

A. Exemption (b)(6)

Section 552(b)(6) applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In U.S. Dept. of State v. Washington Post Co., 456 U.S. 595 (1982), the Supreme Court held that Congress' primary purpose in enacting Exemption 6 "was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." Id. at 599. Consistent with this purpose, the Court found that the phrase "similar files" was to have a broad, rather than a narrow, meaning. Id. at 600. Exemption 6 was intended to cover "detailed Government records on an individual which can be identified as applying to that individual." Id. at 602.

The privacy interest protected by Exemption 6 "includes an individual's interest in avoiding disclosure of personal matters." Office of The Capital Collateral Counsel, Northern Regional of Florida v. Dept. of Justice, 331 F.3d 799, 802-03 (11th Cir. (2003). Once a privacy interest has been identified, Exemption 6 requires a balancing of the privacy interest against the relevant public interest in disclosure. In Department of Justice v. Reporters Committee for Freedom of Press, 489 U.S. 749 (1989), the Supreme Court held that whether disclosure of a private document under Exemption 7(C) was warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny' … rather than on the particular purpose for which the document is being requested."[1] Id. at 772 (citation omitted).

[1] The Supreme Court's guidance in Reporters Committee as to the identification of the relevant public interest to be weighed against any privacy interest, in applying Exemption 6, also applies to Exemption 7(C). U.S. Dept. of Defense v. F.L,R.A, 510 U.S. 487, 496 n.6, 114 S.Ct. 1006, 1013 n.6 (1994)..

B. Exemption 7(C)

Section 552(b)(7)(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy." In Reporter's Committee, the Supreme Court observed that Exemption 7(C)'s privacy language was broader than the comparable language in Exemption 6 in two respects. 489 U.S. at 756. First, while Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). Second, while Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. Id. "Exemption 7(C) is more protective of privacy than Exemption 6." U.S. Dept. of Defense v. F.L.R.A., 510 U.S. 487, 496 n.6 (1994).

The documents responsive to plaintiffs' FOIA request, Bulldog 1-81, were all compiled for law enforcement purposes. In John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989), the Supreme Court observed that "[a] compilation, in its ordinary meaning, is something composed of materials collected and assembled from various sources or other documents." Id. at 153. The documents sought must merely have been "compiled" when the Government invokes the Exemption. In this case, the "[d]ocuments responsive to plaintiffs' October 27, 2011 request related to the FBI's investigation into the residence at 4224 Escondito Circle. This falls within the FBI's performance of its mission to protect and defend the United States against terrorist and foreign intelligence threats." Fifth Hardy Decl., ¶ 39. Therefore, these documents were compiled for law enforcement purposes.

The FBI has invoked Exemptions (b)(6) and 7(C) together, in accordance with its policy.

Fifth Hardy Decl., ¶ 40 n.11. In invoking these privacy exemptions, the FBI identifies five subcategories of "names and/or identifying information" of: (1) FBI Special Agents and Support Personnel; (2) Third Parties of Investigative Interest; (3) Third Parties Merely Mentioned; (4) Third Parties Who Provided Information to the FBI; and (5) Local Law Enforcement. Fifth Hardy Decl., ¶ 18.

In assessing an individual's privacy interest in preventing the disclosure of an FBI report containing his name, the District of Columbia Circuit observed, "[i]t is surely beyond dispute that 'the mention of an individual's name in a law enforcement file will engender comment and speculation and carries a stigmatizing connotation.'" Fitzgibbon v. CIA, 911 F.2d 755, 767 (D.C. Cir. 1990), citing Branch v. FBI, 658 F.Supp. 204, 209 (D.D.C. 1987). In King v. U.S. Dept. of Justice, 830 F.2d 210 (D.C. Cir. 1987), the appellate court stated:

> We have admonished repeatedly "that disclosing the identity of targets of law enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm," and that "[o]ther persons involved in the investigation – witnesses, informants, and investigating agents – also have a substantial interest in seeing that their participation remains secret." Third parties discussed in investigatory files may have a similarly strong interest in non-disclosure.

Id. at 233 (footnotes omitted). Plainly, the third parties whose names are in the responsive documents have a substantial privacy interest in the non-disclosure of their names and other identifying information.

The names of the occupants of 4224 Escondito Circle have been withheld pursuant to Exemption 6 and/or (b)(7)(C). Plaintiffs have argued that those names should not be withheld since public records indicate who owns the residence at 4224 Escondito Circle. The fact that information is publicly available does not necessarily extinguish an individual's privacy interest under Exemption 6 or 7(C). In Reporters Committee, the news organizations requested the rap

sheets of four members of the Medico family. The rap sheets were maintained by the DOJ, and contained descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject. 489 U.S. at 752. The Supreme Court acknowledged that much rap sheet information is a matter of public record, such as arrests, indictments, convictions, and sentences. Id. at 753. Despite this, the Supreme Court found that Medico had a protected privacy interest in his rap sheet. Relying upon Dept. of the Air Force v. Rose, 425 U.S. 352 (1976), the Supreme Court observed that, "[i]f a cadet has a privacy interest in past discipline that was once public but may have been 'wholly forgotten,' the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten."[2] Id. at 769.

"An individual does not lose his privacy interest under 7(C) because his identity as a witness may be discovered through other means." L & C Marine Transport, LTD. v. United States, 740 F.2d 919, 922 (11th Cir. 1984). Similarly, the former occupants of 4224 Escondito Circle have a privacy interest in the non-disclosure of their names in records compiled by the FBI, despite their names appearing in county real estate records.

The names of FBI Special Agents and support personnel have also been withheld because disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy. Fifth Hardy Decl., ¶¶ 42-44. In Nix v. United States, 572 F.2d 998 (4th Cir. 1978), the Fourth Circuit observed:

> One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with

[2] In Dept. of the Air Force v. Rose, the Air Force Academy posted summaries of proceedings to determine if a cadet had violated the Air Force Academy Honor and Ethics Code, with the name of the cadet redacted. 425 U.S. at 360-61. The FOIA requester sought copies of these summaries, with the names redacted, but the request was denied in part on the basis of Exemption 6. The Supreme Court agreed with the Second Circuit's view that the district court should engage in an in camera review of the summaries to determine if deletion of personal references and other identifying information would be sufficient to safeguard privacy. Id. at 381.

> respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

Id. at 1006 (footnote omitted).

In Neely v. FBI, 208 F.3d 461 (4th Cir. 2000), the appellate court noted that "the FBI agents, government employees, third-party suspects, and other third parties mentioned or interviewed in the course of the investigation have well-recognized and substantial privacy interests in the withheld information. Among other things, these individuals have a substantial interest in the nondisclosure of their identities and their connection with particular investigations because of the potential for future harassment, annoyance, or embarrassment." Id. at 464-65 (citations omitted). See also Matter of Wade, 969 F.2d 241, 246 (7th Cir. 1992)("We have stated that FBI agents' privacy interests are serious and substantial. Disclosure conceivably could result in annoyance and harassment of the agents by the requesting party.")(citations omitted).

The FBI engaged in an analysis of any public interest to be served in disclosure of the third parties' names, sufficient to make such disclosure a warranted invasion of personal privacy under Exemption (b)(7)(C). Fifth Hardy Decl. at 20-25. Whether disclosure of a private document under Exemption 7(C) is warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' … rather than on the particular purpose for which the document is being requested." Reporters Committee, 489 U.S. at 772 (citation omitted).

In Reporters Committee, a news organization requested the rap sheets, compilations of an individual's history of arrests, charges, convictions, incarcerations, of four members of the Medico family. Id. at 757. The requesters claimed there was a public interest in learning about Medico's past arrests or convictions since Medico allegedly had improper dealings with a

corrupt Congressman, and Medico was an officer of a corporation with defense contracts. Id. at 774. After recognizing that Medico had a privacy interest in his rap sheet, the Supreme Court found there was no cognizable public interest under the FOIA to warrant the invasion of his privacy interest. Knowledge of Medico's criminal history would "tell us nothing about the character of the *Congressman's* behavior. Nor would it tell us anything about the conduct of the *Department of Defense* (DOD) in awarding one or more contracts to the Medico Company." Id. at 774(emphasis in original). The Supreme Court explained this important distinction in discerning the public interest, observing that "the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." Id. (emphasis in original).

Disclosure of the names or identifying information of third parties contained in Bulldog 1-81, whether they are FBI agents or local law enforcement officers, individuals merely mentioned, individuals who provided information, or individuals of investigative interest, will not shed light on the FBI's operations or efficiency. Therefore, the privacy interests of the third parties outweigh any public interest in the disclosure of their names or other identifying information.

C. Exemption (b)(1)

The FBI invoked the exemption for classified information, 5 U.S.C. § 552(b)(1), for Bulldog 35 (block 8), 71 (blocks 4-5), 74 (block 10)-75 (block 2), and 79 (blocks 4-5). Section 552(b)(1) exempts from disclosure, matters that are – "(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

FBI Section Chief David Hardy personally and independently reviewed the information withheld from plaintiffs pursuant to Exemption 1. Fifth Hardy Decl., ¶ 24. He determined that the classified information continues to warrant classification at the "Secret" level, and is exempt from disclosure pursuant to Executive Order 13523, § 1.4(c), "intelligence activities (including covert action); intelligence sources or methods, or cryptology." Id. Specifically, the information withheld pursuant to Exemption (b)(1) was withheld to protect an intelligence method utilized by the FBI for gathering intelligence data. Id., ¶ 25. Mr. Hardy notes that the intelligence activities and methods withheld in this case are still used by the FBI today to gather intelligence information, and disclosure of such information could reasonably be expected to cause serious damage to the national security. Id., ¶ 27.

In assessing an agency's invocation of Exemption (b)(1), the courts "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects (sic) might occur as a result of a particular classified record." Larson v. Dept. of State, 565 F.3d at 864, citing Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918, 927 (D.C.Cir. 2003). In his declaration, Mr. Hardy analyzes what qualifies as an "intelligence activity" under E.O. 13526, § 1.4(c). Id., ¶ 25. Next, he found that disclosure of the specific information describing intelligence activities or methods could reasonably be expected to cause serious damage to the national security because: (1) disclosure would allow hostile entities to discover the current intelligence gathering methods used; (2) disclosure would reveal current specific targets of the FBI's national security investigations; and (3) disclosure would reveal the determination of the criteria used and priorities assigned to current intelligence or counterintelligence investigations. Id., ¶ 27.

D. Exemption (b)(3)

The FBI invoked Exemption (b)(3), which exempts from disclosure information that is specifically exempted from disclosure by statute, if that statute:

> (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

The FBI invoked Exemption (b)(3) for portions of Bulldog 71 (blocks 4 and 5); Bulldog 74 (block 10) -Bulldog 75 (block 2), and Bulldog 79 (blocks 4 and 5).

The statute relied upon by the FBI is 50 U.S.C. § 403-1(i)(1), National Security Act of 1947, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004.[3] Fifth Hardy Decl., ¶ 33-34. Section 3024(i)(1) directs that "The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure."

In CIA v. Sims, 471 U.S. 159 (1985), the Supreme Court held that 50 U.S.C. § 403(d)(3), which provided that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," qualified as a withholding statute under Exemption (b)(3). Id. at 167-68. 50 U.S.C. § 403(d)(3) is a predecessor version of 50 U.S.C. § 403-1(i)(1), which now provides that the "Director of *National* Intelligence shall protect intelligence sources and methods from unauthorized disclosure." (emphasis supplied).

In Sims, the Supreme Court found that, "[t]he plain meaning of the statutory language, as well as the legislative history of the National Security Act … indicates that Congress vested in the Director of Central Intelligence very broad authority to protect all sources of intelligence

[3] 50 U.S.C. § 403-1 has been transferred to 50 U.S.C. § 3024, "Responsibilities and authorities of the Director of National Intelligence."

information from disclosure." Id. at 168-69. The Court upheld the CIA's withholding of the names of researchers and 21 institutions contracted by the CIA to conduct research and development of chemical, biological, and radiological materials capable of employment in clandestine operations to control human behavior. Finding that the researchers were "intelligence sources" within the broad meaning of the statute since they provided, or were engage to provide, information the agency needed to fulfill its statutory obligations, the Court found § 552(b)(3) was properly invoked. Id. at 177.

The Director of National Intelligence is authorized to establish and implement guidelines for the Intelligence Community for the classification of information under applicable laws, Executive Orders, or other Presidential directives, and or access to and dissemination of intelligence. Fifth Hardy Decl., ¶ 35, citing 50 U.S.C. § §§ 403-1(i)(2)(A), (B). The FBI is one of 17 member agencies comprising the Intelligence Community, and must protect intelligence sources and methods. Mr. Hardy determined that the FBI's intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiffs. Fifth Hardy Decl., ¶ 36. This determination is well within the broad power conferred by Congress to agencies in the Intelligence Community to protect intelligence sources and methods from disclosure.

E. Exemption (b)(4)

The exemption at 5 U.S.C. § 552(b)(4) provides that withholding is permitted for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The FBI invoked Exemption (b)(4) for Bulldog 41-42, to protect the bank account number of The Estates of Prestancia Homeowners Association, Inc. Fifth Hardy Decl., ¶ 63.

Bulldog 41 (block 2) and Bulldog 42 (block 2) are the account numbers on the deposit slips of The Estates of Prestancia Homeowners Association. These were obtained by the FBI, contain financial information, and are confidential. Mr. Hardy found that disclosure of the bank account number could result in serious financial ramifications since a criminal could use the account number to illegally access the account. Fifth Hardy Decl., ¶ 64. Moreover, the FBI determined that this information would not have been supplied to them without an expectation that the bank account number would remain confidential. Id. Consequently, exemption (b)(4) was properly invoked.

F. Exemption (b)(7)(D)

The exemption at 5 U.S.C. § 552(b)(7)(D) was invoked for Bulldog 29-32, with all four pages being withheld in their entirety. Section 552(b)(7)(D) exempts from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

In U.S. Dept. of Justice v. Landano, 508 U.S. 165 (1993), the Supreme Court found that the word "confidential", as used in Exemption 7(D) referred to a degree of confidentiality less than total secrecy. "A source should be deemed confidential if the source furnished information with the understanding that the FBI would not divulge the communication except to the extent the Bureau thought necessary for law enforcement purposes." Id. at 174.

The FBI invokes the exemption for two categories: information provided by a local law enforcement agency under an implied assurance of confidentiality and names, identifying data

and/or information provided by an individual under an "implied" assurance of confidentiality. Fifth Hardy Decl. at 26-28. In the first category, Exemption (b)(7)(D) has been asserted to protect police reports and information obtained by local law enforcement agencies, that were provided to the FBI by law enforcement agencies. Id., ¶ 52. These police reports and information, obtained by various law enforcement agencies, were given to the FBI in conjunction with the local law enforcement agency's investigation into suspicious activity at 4224 Escondito Circle.

Cooperation between the FBI and local law enforcement agencies is vitally important to enforcement of the law and detection of threats to national security. The release of confidential information could have a chilling effect on the cooperation of various law enforcement agencies. Id. Moreover, the inability to treat information provided as confidential could deter local law enforcement agencies from providing information requested by the FBI, for fear that the information provided will be publicly disclosed. Id. The local law enforcement agencies should be deemed confidential sources since they likely provided their information to the FBI with the understanding that it would not divulge the communication except to the extent the FBI thought it necessary for law enforcement purposes.

Exemption (b)(7)(D) has also been applied to the names, identifying data, and/or information provided by an individual under an "implied" assurance of confidentiality. Fifth Hardy Decl., ¶¶ 53-54. The release of the information could clearly identify the source. Id., ¶ 54. In Landano, the Supreme Court observed that there may be generic circumstances in which an implied assurance of confidentiality fairly can be inferred. Factors such as the character of the crime at issue, and the source's relation to the crime, may be considered to determine if the source cooperated with the FBI with an implied assurance of confidentiality. 508 U.S. at 179.

In this case, the FBI was investigating allegations that the occupants at 4224 Escondito Circle had some link to the 9/11 terror attacks, which were perpetrated by an organized and well-funded terror group. If would be reasonable to believe that persons providing information about the inhabitants at 4224 Escondito Circle would unwilling to speak to the FBI except on the condition of confidentiality. In invoking this exemption, the FBI found that, "[t]he sensitivity of the information, and the position of the source, is such that it may be inferred that the information was provided with the expectation of confidentiality." Fifth Hardy Decl., ¶ 54.

G. Exemption (b)(7)(E)

The FBI invoked the exemption at 5 U.S.C. § 552(b)(7)(E) for the following categories of information: (1) file numbers; (2) dates and types of investigation (preliminary or full investigation); (3) internal non-public facsimile numbers; (4) investigative techniques and procedures; (5) intelligence analyst analytical techniques and procedures; and (6) database and database information. Fifth Hardy Decl. at 26-32. Section 552(b)(7)(E) protects from disclosure:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information … (E) 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.

In Mayer Brown LLP v. IRS, 562 F.3d 1190 (D.C. Cir. 2009), the Court of Appeals for the District of Columbia Circuit analyzed the text of § 552(b)(7)(E), and observed,

> the exemption looks not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk. Id. at 1193.

Exemption 7(E) "sets a relatively low bar for the agency to justify withholding." Blackwell v. FBI, 646 F.3d 37, 42 (D.C. Cir. 2011). "Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the IRS 'demonstrate[] logically how the release of [the requested] information might create a risk of circumvention of the law." Mayer Brown LLP, 562 F.3d at 1194 (citation omitted).

File Numbers

The FBI invoked Exemption 7(E) to withhold file numbers in portions of Bulldog 5-8, 10, 34, 36-37, 74-76, and 79-80. Fifth Hardly Decl., ¶ 56 n.20. The file numbering convention identifies the investigative interest or priority given to such matters by the FBI. Id. If these file numbers were disclosed, criminals could match the information contained in the document to attempt to glean the factors which gives the FBI cause to accord a higher or lower investigative priority. With such knowledge, criminals could change their behavior or activities in order to avoid actions which the FBI has accorded a higher investigative priority.

Dates and Types of Investigations (Preliminary or Full Investigation)

Exemption 7(E) was invoked for portions of Bulldog 5, 39, and 71-72, for dates and types of investigations. Fifth Hardy Decl., ¶ 57 n.21. The information withheld reveals the type of investigation, full or preliminary, being conducted, and the date it was initiated. Id., ¶ 57. Disclosing this information would allow individuals to know the types of activities that would trigger a full investigation, as opposed to a preliminary one. With such knowledge, individuals could adjust their behavior so as to avoid the higher scrutiny a full investigation brings to bear, so as to avoid detection.

Internal Non-Public Facsimile Numbers

The internal, non-public facsimile numbers listed in Bulldog 28-32 and 74 were withheld

under Exemption 7(E). Fifth Hardy Decl., ¶ 58 n.22. These non-public facsimile numbers are used daily by FBI agents and support personnel to transmit and receive investigatory records in the performance of the FBI's law enforcement mission. If these non-public facsimile numbers were disclosed, unscrupulous individuals could attempt to jam these numbers by making multiple calls. This would deprive the FBI of an important tool used to rapidly transmit and receive documents.

Investigative Techniques and Procedures

In Bulldog 6, 12, 33, 35, and 75, the FBI withheld investigative techniques and procedures under Exemption 7(E). These techniques and procedures are used by FBI agents to conduct national security investigations. Fifth Hardy Decl., ¶ 59. Disclosure of the information could enable subjects of FBI investigations to attempt to avoid detection by changing their activities or behavior. The value of these techniques and procedures would be diminished if criminals became aware of them, and altered their behavior to try and circumvent the techniques. Id.

Intelligence Analyst Analytical Techniques and Procedures

Exemption 7(E) was invoked in Bulldog 35 (block 1), which is a document written by an Intelligence Analyst. Fifth Hardy Decl., ¶ 61 n.24. The information redacted is "an analyst's note in regards to his/her interpretation and/or analysis regarding the investigation at issue." Id., ¶ 61. FBI intelligence personnel undergo specialized training to develop and apply analytical skills to develop and support particular investigations. Disclosure of these analytical techniques and procedural methods could enable subjects of FBI investigations to circumvent the law since they would have knowledge of the means used by the FBI to detect unlawful activity.

Database and Database Information

Exemption 7(E) was invoked for Bulldog 35 (block 8), since it disclosed database and database information. Fifth Hardy Decl., ¶ 62 n.25. These databases are non-public and allow FBI Special Agents, support personnel, and analysts to query information needed for its investigations using advanced software tools. Id., ¶ 62. These databases allow the FBI to develop investigative leads from a variety of source data, using analytical tools. The manner in which these databases are searched, organized, and reported to the FBI is an internal technique that is not ordinarily known to the public. Disclosure of this information could allow criminals to employ countermeasures to counteract the effectiveness of these databases, and impede the FBI's effectiveness in detecting unlawful activity.

IV. INFORMATION REASONABLY SEGREGABLE FROM EXEMPT INFORMATION HAS BEEN PROVIDED TO PLAINTIFFS

The FBI has processed 81 responsive pages: ten (10) pages were released in full; 67 pages were released in part; and four (4) pages were withheld in full. Fifth Hardy Decl., ¶ 67. For the pages withheld in full, the FBI determined that all information on those four pages were covered by one or more of the cited FOIA exemptions. Consequently, there was no information that could be reasonably segregated for release.

CONCLUSION

The FBI has conducted an adequate and reasonable search for documents responsive to plaintiffs' FOIA request. The FBI's search, and the additional manual and text searches ordered by the Court, have yielded the 81 pages of responsive records. The FBI is entitled to summary judgment on the issue of the adequacy of its search. The FBI is also entitled to summary judgment on the exemptions it has asserted under 5 U.S.C. § 552(b). These documents have been provided to the Court for in camera review, so the Court will be able to assess the factual

basis asserted for each exemption.

DATED: November 27, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 27, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

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SERVICE LIST
Broward Bulldog, Inc. v. U.S. Department of Justice, FBI,
Case No. 12-61735-CIV-ZLOCH
United States District Court, Southern District of Florida

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