IN THE
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,

v.

U.S. DEPARTMENT OF JUSTICE, 950 Pennsylvania Avenue, NW Washington, DC 20530, and FEDERAL BUREAU OF INVESTIGATION, 935 Pennsylvania Avenue, NW Washington, DC 20535,

Defendants.

Plaintiffs' Memorandum in Opposition to Defendants' Renewed Motion for Summary Judgment

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REQUEST FOR ORAL ARGUMENT

At the heart of this litigation and the related litigation before Judge Altonaga is the apparent inconsistency between the FBI's public statements that it found "no connections" between the al-Hijji and Ghazzawi families of Sarasota and the 9/11 plot and its internal records showing that the FBI found "many connections" between the family and "individuals associated with the terrorist attacks on 9-11-2001." Former U.S. Sen. Bob Graham's contention that the FBI lied to the public and the press when it claimed to have made its Sarasota investigation records available to congressional investigators strongly suggested that the FBI was engaging in an aggressive effort to deceive the public about what its investigation had found in order to conceal its own misfeasance or, worse, malfeasance.

It may yet turn out that there is no actual inconsistency, but so far, no record produced by the FBI explains this inconsistency. Tautological arguments that the internal documents were poorly written and unsubstantiated tell the public nothing. The absence of this explanation calls into question the adequacy and reasonableness of the FBI's search for responsive records. It also undermines the legitimacy of the FBI's redaction and withholding of records in reliance on asserted exemptions, making reliance on its declarations supporting its summary judgment motion unwarranted.

If the Court's *in camera* review of the unredacted documents discloses the reason for the FBI's apparent inconsistency and shows misfeasance or malfeasance, the Court should order the redacted records disclosed forthwith. If, however, the Court's review of the unredacted records leaves the apparent inconsistency unresolved, the Court should allow the Bulldog to take limited discovery in accordance with an appropriate protective order. Although discovery is rarely allowed in FOIA actions, this case may be the exception that proves the rule. This is a unique case in which one of the country's most revered and respected statesmen, D. Robert Graham, former U.S. Senator from Florida, former Governor of Florida, and former Co-Chair of the Joint

Intelligence Committee Inquiry regarding September 11, 2001, has given testimony that the FBI lied to the American public and the press about its Sarasota investigation. Graham also has asserted that the FBI's action in this regard is detrimental to national security because it may allow Saudi Arabia to avoid responsibility for the horrific harm caused to the United States on September 11, 2001. On these unique facts, this Court should give the FBI's summary judgment motion close scrutiny, including through oral argument to ensure that the objectives of the Freedom of Information Act are fully achieved.

ARGUMENT

I.

The FBI Has Not Shown that it Conducted a Reasonable and Adequate Search

The FBI has not established that it conducted a reasonable and adequate search for responsive records, even though it claims to have expended hundreds of hours searching for responsive records and combing through tens of thousands of records using both automated electronic word searches and manual searches. Perhaps nothing demonstrates this more clearly than the fact that, in the lawsuit that the Bulldog filed against the FBI to obtain records relating to the work of the 9/11 Review Commission, referred to herein as the Meese Commission, the FBI produced a critically important record which was responsive to the Bulldog's FOIA request in this case but which the FBI never located or produced in this case, despite its claim that it spent hundreds of hours and used sophisticated methods to search for all responsive records. RSOF ¶ 29.[1] That document, attached hereto as Exhibit 1, is typed notes from an FBI interview of Wissam Taysir Hammoud. It shows that, in 2004, the FBI was told that Abdulaziz al-Hijji was a follower of Osama bin Laden and planned to become an Islamic freedom fighter in

[1] The notation "RSOF ¶ __" refers to the Bulldog's Response to the FBI's Statement of Uncontroverted Facts, which is filed with this memorandum.

Afghanistan.[2] RSOF ¶ 29 & Julin Dec. ¶ 118. No FOIA exemption applied to the bulk of that document, as evidenced by its production in the related case, and the document casts serious doubt about the FBI's public statements that its Sarasota investigation found "no connections" to the 9/11 plot, yet the FBI says in this case that all of its searching never found that document. Why not?

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."[3] 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.'"[4] Reasonableness depends on the circumstances of the case.[5] 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."[6] 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

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[2] Although al-Hijji's name is redacted in most places in this record, it is not redacted at the top of the last page. Hammoud's name also has been redacted from the document, but the notes correspond so closely to a public Florida Department of Law Enforcement report of the same interview, Attachment 2 & RSOF 23, that there can be no doubt that the document is the FBI's interview of Hammoud about al-Hijji.

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

[4] *Miccosukee Tribe of Indians v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008) (citation omitted) (emphasis added).

[5] *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).

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

summary judgment."[7] Affidavits that do not say how the agency searched for responsive documents—who conducted the search, where, and using what search terms—do not satisfy the agency's burden.[8] 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.[9] Indeed, "[a]ny doubt about the adequacy of the search should be resolved in favor of the requester."[10] The declarations in this case are noticeably devoid of information about who conducted the search and where. David M. Hardy signed five declarations attesting to how the search was conducted, but he does not claim that he conducted the search himself. Michael G. Seidel claims that he supervised the search, but he also does not name the actual employees who conducted the search. Neither Hardy nor Seidel explains why searches conducted in connection with the Bulldog's second suit against the FBI resulted in production of responsive, non-exempt records which should have been found in the searches conducted in this case.

This case also raises questions regarding the FBI's honesty about its al-Hijji investigation which date back to at least 2011, when the FBI claimed, in response to the Bulldog's reporting, that it had found no connections between the al-Hijjis and the 9/11 hijackers and, in any event,

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

[8] *Id.* (denying summary judgment with respect to adequacy of CIA's search); *see also 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).

[9] *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).

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

had reported the investigation to Congress. RSOF ¶¶ 15 & 19. Senator Graham, former chairman of the Senate Select Committee on Intelligence, declared under oath that the FBI had not actually disclosed its investigation to Congress. RSOF ¶¶ 16 & 20.

The complete absence of records which explain the inconsistency between the FBI's public statements and its internal records also creates substantial doubt as to the adequacy and reasonableness of the FBI's records search. Quite obviously, the FBI had some reason for publicly claiming that it found no evidence of connections between the al-Hijjis and the 9/11 plot, even though the internal records which this litigation forced the FBI to release showed that the FBI had found "many connections."

The FBI also still has not produced records which witness have identified. The plaintiffs' declarations were from (1) former U.S. Senator D. Robert Graham, who chaired the congressional Joint Inquiry into intelligence community activities before and after the terrorist attacks of September 11, 2001, DE 29-5, (2) Jone Weist, administrator for the Prestancia Estates homeowners' association, DE-29-3, (3) Larry Berberich, a senior administrator and security officer for Prestancia Estates, DE 29-2, (4) Patrick Gallagher, a man who resided next to 4224 Escondito Circle, DE-29-1, and (5) Dan Christensen, one of the plaintiffs in the case. DE-29-4. Together these declaration show that the FBI collected documents during its investigation that have neither been produced, identified, nor claimed to be exempt.

Sen. Graham's declaration calls the FBI's good faith into question by advising the Court that the Joint Inquiry attempted to obtain from the FBI documents regarding all of the work that it had done investigating the events of September 11, DE-29-5 ¶14, that the FBI failed to tell the Joint Inquiry about its 4224 Escondito Circle investigation, DE-29-5 ¶¶ 20-23, that "the FBI was not forthcoming with the Joint Inquiry regarding its Sarasota investigation," DE 29-5 ¶27, and that the FBI's actions "interfered with the Inquiry's ability to complete its mission." DE-29-5 ¶53. Sen. Graham testified in his declaration:

> On a matter of this magnitude and significance, my expectation is that the FBI would have hundreds or even thousands of pages of documents relating to the 4224 Escondito Circle investigation, and that those documents would be well indexed and easily retrievable to this day. As is apparent from the small number of documents released, this was not an investigation of run-of-the-mill criminal matters[.] It related to matters of paramount national importance.

DE-29-5 ¶51. Yet, the FBI still claims that it has been able to locate just 81 pages of responsive, non-exempt records. DE-97-2.

Jone Weist's declaration reflects that she produced to the FBI the "monthly and quarterly checks that had been received for payment of the homeowners' association dues on the property at 4224 Escondito Circle." DE-29-3 ¶11. Yet, the FBI has produced just one check, one deposit slip, and one debit authorization form, BULLDOG-40-43, and not the other records. One of the records produced by the FBI, BULLDOG 5-6, shows the FBI entered the al-Hijjis' home and found evidence there that they had quickly fled, yet the FBI has produced no inventory of the items found or where they are stored. No records have been produced showing how the FBI addressed Special Agent Gregory J. Sheffield's request for a "Rapid Start" investigation of the al-Hijjis or for the involvement of other law enforcement agencies. The FBI also has not produced gatehouse records or telephone records that the Bulldog was told showed that the 9/11 hijackers visited the home where the al-Hijjis lived and contacted the al-Hijjis. It is implausible that such records were not collected and analyzed once the FBI found "many connections" between the al-Hijjis and the 9/11 hijackers.

The record in this case also shows that the FBI claims that it made its record of the Sarasota investigation available to the JICI and the 9/11 Commission, RSOF ¶¶ 15 & 19, yet the FBI has not produced any records which reflect the transmittal of such documents to either body.

The Eleventh Circuit has made clear that in a Freedom of Information Act ("FOIA") enforcement action "'the agency must show beyond material doubt . . . that it has conducted a

search reasonably calculated to uncover all relevant documents.'"[11] The agency "may meet this burden by producing affidavits of responsible officials 'so long as the affidavits are relatively detailed, nonconclusory, and submitted in good faith.'"[12] "If the government agency meets its burden of proving that its search was reasonable, then the burden shifts to the requester to rebut the agency's evidence by showing that the search was not reasonable or was not conducted in good faith."[13]

This record strongly supports a conclusion that the FBI has not conducted a good faith search for all responsive documents. In support of their summary judgment motion the defendants have submitted the Fifth Declaration of David M. Hardy and the Second Declaration of Michael G. Seidel. Neither claims personal knowledge of how the FBI's search was conducted or the results obtained. Hardy purports to describe the search and states that his recitation is true and correct, but he also says that it was Seidel, not him, who has "direct personal knowledge of these searches." DE-97-1 ¶ 11. Earlier declarations Hardy filed made clear that his assertions were not based exclusively on his personal knowledge. His first declaration, upon which he still relies, states: "The statements contained in this declaration are based upon my personal knowledge, *upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith*." (DE 25-1 ¶ 2) (emphasis added). The Court cannot determine whether any facts in Hardy's declarations

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[11] *Ray v. U.S. Dep't of Justice,* 908 F.2d 1549, 1558 (11th Cir. 1990) (citations omitted), *rev'd on other grounds*, 502 U.S. 164 (1991).

[12] *Id.* (citation omitted); *see also Miccosukee Tribe of Indians v. United States*, 516 F.3d 1235, 1248 (11th Cir. 2008).

[13] *Ray,* 908 F.2d at 1558.

are inadmissible hearsay or facts within Hardy's personal knowledge.[14]

Seidel, for his part, states he "supervised and instructed [Litigation Support Unit] personnel" during their searches for records. DE 97-4 ¶ 4. It is clear that he also lacks personal knowledge of the search or the results that it generated.

In summary judgment proceedings, all declarations must be based on personal knowledge and must set forth facts that would be admissible under the Federal Rules of Evidence.[15] "[I]nadmissible hearsay cannot be considered on a motion for summary judgment."[16] The Hardy and Seidel declarations do not state who conducted the search or when the search was conducted. In prior litigation, Hardy's descriptions of searches conducted in FBI field offices were rejected for lack of personal knowledge.[17] His declaration in this case also tries to describe searches conducted in an FBI field office even though he claims no personal knowledge of those searches. His affidavit cannot establish that a good faith search was made and should be rejected.

In *Reporters Committee for Freedom of the Press v. FBI*, No. 17-5042 2017 WL 6390484 (D.C. Cir. Dec. 15, 2017), the D.C. Circuit recently overturned a District Court order which had held, in reliance on two declarations by David M. Hardy, that the FBI conducted a reasonable and adequate search for responsive records. The D.C. Circuit was sharply critical of Hardy's

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[14] *See Pace v. Capobianco*, 283 F. 3d 1275, 1278-79 (11th Cir. 2002) (holding affidavit based on information and belief is insufficient to create an issue of fact).

[15] *Josendis v. Wall to Wall Residence Repairs, Inc.*, 606 F. Supp. 2d 1376 (S.D. Fla. 2009) (Zloch, J.), *aff'd* 662 F. 3d 1292, 1315 11th Cir. 2011).

[16] *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999) (internal quotations and citations omitted).

[17] *See Rosenfeld v. U.S. Dep't of Justice*, No. C 07-03240 MHP, 2008 WL 3925633 at *12 (N.D. Cal. Aug. 22, 2008) ("there is no evidence that Hardy directly supervises the field offices. And if he does, there is no evidence of the level of contact he has with those offices. Consequently, his declaration with respect to searches conducted at the field offices [is] inadmissible").

description of the FBI's search because it failed to set forth search terms or the type of search performed. *Id.* at *3. Hardy had set forth his directions to targeted FBI divisions to conduct a search but "without ever describing how those divisions in fact did so." *Id.* The D.C. Circuit observed that Hardy's two declaration were "utterly silent as to which files or records systems were examined in connection with the targeted searches and how any searches were conducted, including, where relevant, which search terms were used to hunt within electronically stored materials." Id. The Court found this "defect particularly conspicuous." *Id.*

In response to multiple similarly vague Hardy declarations regarding a search, another federal court held the declarations failed to show an adequate search had been conducted. "Summary judgment," the court held, "is inappropriate 'where the agency's response raises serious doubts as to the completeness of the agency's search, where the agency's response is patently incomplete, or where the agency's response is for some other reason unsatisfactory.'"[18]

The solution to this problem is not to require the FBI to submit additional declarations. The solution to this problem is to allow the Bulldog's counsel to take a limited number of depositions so that the reasonableness and adequacy of the search can be carefully examined. The Bulldog has filed with this memorandum a motion which asks the Court to lift the protective order entered at the outset of this litigation which prevented any discovery from being conducted. Only the granting of that motion can solve the problem that the FBI has created.

II.

The FBI Has Not Shown that it
Properly Invoked Applicable FOIA Exemptions

Inasmuch as the FBI has made hundreds of redactions to the 81 pages of records produced and withheld additional records entirely, it is not possible for the Bulldog to address

[18] *National Day Laborer Organizing Network v. United States Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 96 (S.D.N.Y. 2012) (citation omitted).

each of the redactions and withholding decisions made. The Bulldog's lack of knowledge of the information that has been redacted is also a serious impediment to its presentation of meaningful arguments against the FBI's decisions. This should not be regarded as acquiescence in any of the FBI's decisions. Under these circumstances, only the Court's careful review of each of the redactions can serve to ensure that the purpose of FOIA is not undermined. But the following arguments nevertheless attempt to provide some guidance to the Court and reasons that it may conclude that the defendants have not met their burden to show documents responsive to plaintiffs' request are exempt from the disclosure requirements of FOIA.

A. Exemption 1 Does Not Apply.

Exemption 1, 5 U.S.C. § 552(b)(1), protects from disclosure only those records that are (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. Executive Order 13526, signed December 29, 2009, now governs classification. "If there is significant doubt about the need to classify information, *it shall not be classified*." *Id.* at §1.1(b) (emphasis added). The classification "'Secret' shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe." E.O. 13526 §1.2(a)(2). The defendants have not shown that any of the documents were properly classified in accordance with these procedures.

1. The Classification is Inconsistent with the FBI's Public Statements

The FBI publicly denied its Sarasota investigation produced any credible evidence connecting the persons at 4224 Escondito Circle to the terrorist attacks on September 11, 2001. Consistently, when the requesters sought the FBI files regarding this investigation, the defendants did not claim disclosure of the records would harm national security interests. Only after this lawsuit was filed did the defendants assert Exemption 1. The FBI's prior public

statements and the defendants' original response to the FOIA request are squarely inconsistent with their assertion now that the requested documents contained classified material that must be withheld. These inconsistent positions create genuine factual issues for trial. The FBI's statement on September 15, 2001, was: "[a]t no time did the FBI develop evidence that connected the family members to any of the 9/11 hijackers as suggested in the article, and there was no connection found to the 9/11 plot." RSOF ¶ 19 (citing to Julin Dec. ¶¶ 50-51). If that is the case, it cannot also be that disclosure of the redacted information reasonably could be expected to cause serious damage to the national security.

2. The Information Has Been Unclassified for More Than a Decade

When BULLDOG 5-6, the April 16, 2002, "many connections" memo by Gregory J. Sheffield, was originally produced, it bore a stamp indicating the FBI had classified it on 03-14-2013, well after the Bulldog had made its FOIA request on October 27, 2011, and well after the Bulldog filed this lawsuit on September 5, 2012. The Bulldog argued that if, in fact, the documents were not classified until March 14, 2013, and the information had been in FBI files for more than a decade, disclosure of the redacted information could not reasonably be expected to cause identifiable or describable damage to the national security as is required by E.O. 13526 § 1.1(a)(4) and, further, disclosure could not reasonably be expected to cause "serious damage" to the national security as is required to warrant "Secret" classification.

Although section 1.4(c) of Executive Order 13526 allows classification of information that pertains to "intelligence activities (including covert action), intelligence sources or methods, or cryptology," it does not permit classification of such information where disclosure of the information cannot reasonably be expected to cause identifiable or describable damage to the national security. The classification therefore was not appropriate. The Bulldog also noted that classification of the information was directly contradicted by Sen. Graham, who had reviewed the unredacted document, and insisted that "disclosure[] should serve our national security

interests." DE-29-5 ¶ 57.

After the Bulldog made these arguments, the FBI withdrew its claim that any portion of that document had been properly classified, stating in passive voice only that "it was determined the information on this page no longer warranted classification." DE-97-1 ¶ 9. Yet, remarkably, the FBI has not lifted the redaction to the paragraph that had been redacted on Exemption 1 grounds. The paragraph is the last paragraph on BULLDOG-6 and, as the Court will see, the FBI asserts no other basis for that redaction, so it should be ordered disclosed immediately.

Another document produced, BULLDOG-74-76, suffers from a similar classification defect. This document reflects that it was created on April 3, 2002, and that paragraphs on its first and second pages were classified as of June 3, 2014, more than a dozen years after the document was created. The document was classified after the Bulldog requested it and filed suit, and well after the Court's April 4, 2014, order requiring the FBI to conduct a more thorough search. This sort of post-hoc classification of parts of documents the FBI does not wish to disclose should be rejected.

B. Exemption 3 Does Not Apply.

Exemption 3, 5 U.S.C. § 552(b)(3), applies to records specifically exempted from disclosure by statute if that statute requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The section of the National Security Act of 1947 relied upon to withhold portions of the requested documents, 50 U.S.C. §403-1(i)(1), provides, as noted above, "The Director of National Intelligence shall protect sources and methods from unauthorized disclosure."

The assertion of Exemption 3 is deficient for all of the same reasons that assertion of Exemption 1 is deficient. The assertion is inconsistent with the prior public statements disclaiming that the investigation at issue developed any credible evidence of connections to the

terrorists, the information at issue has not been previously withheld, and the exemption has not been clearly or consistently directed to specific information.

C. Exemption 4 Does Apply and is Not Contested.

Exemption 4, 5 U.S.C. § 552(b)(4), pertains to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." It has been applied solely to bank account numbers found in BULLDOG-41-42. The Bulldog does not contest these redactions.

D. Exemption 6 Does Not Apply

Exemption 6, 5 U.S.C. § 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." As a preliminary matter, it seems clear that none of the responsive documents are either personnel or medical files. The statutory term "similar files" means those containing information of a "personal quality and nature."[19] To determine whether files are of a personal quality and nature, the agency must "examine[] the competing public and private interests."[20] If the agency concludes the files are of a personal quality and nature, it then must decide whether disclosure of the files would constitute a clearly unwarranted invasion of the privacy interest.

The records at issue here are of the most public nature in that they relate to an investigation of connections to the most heinous terrorist activity in modern United States history. The records are not believed to reflect anything "personal" about the subjects of the investigation other than that they either had such connections or they did not.

Even, however, if the files do reflect any personal information about the individuals

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[19] *Dep't of Air Force v. Rose*, 425 U.S. 352, 374 (1976); *see also Alley v. U.S. Dep't of Health & Human Servs.*, 590 F. 3d 1195, 1199 (11th Cir. 2009).

[20] *Alley*, 590 F.3d at 1199.

under investigation, the public interest in the records would make it impossible to show that disclosure of the files would constitute an unwarranted invasion of privacy. The public has an intense interest in understanding whether the FBI uncovered evidence of a significant threat to the country and, if so, what steps it took to alleviate that threat. In the related case before Judge Altonaga, she rejected many of the FBI's redactions on Exemption 6 and 7C grounds, stating that "[t]he Court agrees with Plaintiffs the FBI has not established it properly invokes Exemptions 6 and 7(C)." *Broward Bulldog, Inc. v. U.S. Dep't of Justice*, No. 16-61289-Civ-Altonaga/O'Sullivan, 2017 WL 746410 at *6 (S.D. Fla. Feb. 2, 2017), *appeal docketed*, No. 17-13787 (11th Cir.). She found the FBI "has not met its burden of showing disclosure of the names would constitute an invasion of privacy. Further, it has not addressed whether the invasion would be severe and whether the public's interest in disclosure outweighs any potential invasion of privacy." *Id.* at *6. "This is problematic given Plaintiffs' contention a significant public interest exists in learning about the FBI's investigation of the Al-Hijjis and showing the requested information is likely to advance this public interest." *Id.* The same considerations should be applied to the FBI's redactions on Exemption 6 and 7C grounds here.

In *News-Press v. U.S. Department of Homeland Security*, 489 F. 3d 1173 (11th Cir. 2007), the Eleventh Circuit ordered disclosure of records relating to the funds paid by the Federal Emergency Management Administration to hurricane victims. The Court held that it "easily conclude[d], as did both district courts, that the asserted interest in learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars in the wake of natural and other disasters is one which goes to 'the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government.'" *Id.* at 1192 (citation omitted). The Eleventh Circuit also held that the government had not met its heavy burden to show that disclosure of the files would constitute a clearly unwarranted invasion of privacy.

Here, the public interest in evaluating the investigation that the FBI conducted of the

Ghazzawis and the al-Hijjis in the aftermath of September 11 easily outweighs the very limited privacy interests the Ghazzawis and the al-Hijjis may have. The terrorist attacks on September 11 obviously were an event of profound national importance and a full evaluation of the response of law enforcement to those attacks is vital to attempting to ensure that such attacks do not occur again. Public interest in the records is magnified by the fact that the FBI failed to disclose its investigation to the Joint Inquiry and the 9/11 Commission. The privacy interest is diminished by the fact that the identities of the Ghazzawis and the al-Hijjis and the fact of their investigation already is known, they have fled the United States, and the FBI has publicly announced that the investigation that it conducted found no credible evidence of connections to the terrorists.

E. Exemption 7 Does Not Apply

The FBI also has asserted three Exemption 7, 5 U.S.C. § 552(b)(7), categories for "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; (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, or (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.

1. Exemption 7C.

Exemption 7C has no application here because disclosure would not result in an unwarranted invasion of an individual's personal privacy. The Supreme Court and the Eleventh

Circuit have explained that "an invasion is unwarranted where (1) the information sought implicates someone's personal privacy, (2) no legitimate public interest outweighs infringing the individual's personal privacy interest, and (3) disclosing the information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'"[21]

The records sought by the request are not of a sufficiently personal nature. "The disclosures with which [Exemption 7C] is concerned are those of 'an intimate personal nature' such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation. Information relating to business judgments and relationships does not qualify for exemption. This is so even if disclosure might tarnish someone's professional reputation." *Washington Post Co. v. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (internal citations omitted).

Although "individuals have a substantial privacy interest in their criminal histories," *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999), materials must "carry a clear implication of criminal activity" in order to implicate a personal privacy interest. *United States v. Hines*, 955 F.2d 1449, 1455 (11th Cir. 1992). The FBI's public announcements that it did not develop credible evidence of connections between the Ghazzawis and al-Hijjis and the terrorist attacks would seem to preclude the government from demonstrating that the records requested do implicate the Ghazzawis and al-Hijjis in any criminal activity. If that is the case, release of the records would serve rather than harm the interests of the Ghazzawis and al-Hijjis.

On the other hand, if the requested records implicate the Ghazzawis and al-Hijjis, their privacy interests might be harmed but the disclosure would be warranted because it certainly would "further[] the public's statutorily created 'right to be informed about what their

[21] *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989); *Karantsalis v. U.S. Dep't of Justice*, 635 F.3d 497, 502 (11th Cir. 2011).

government is up to.'" *Nadler v. U.S. Dep't of Justice*, 955 F.2d 1479, 1489 (11th Cir. 1992) (citation omitted). The requesters have a "legitimate public interest" in learning why the FBI conducted an investigation, found many connections between the Ghazzawis and al-Hijjis and terrorist activities, and then not only did nothing to apprehend them or initiate prosecution, but also did not inform the Joint Inquiry or the 9/11 Commission of these events. In this circumstance, disclosure would "contribute significantly to public understanding of the operations or activities of the government." *Karantsalis*, 635 F.3d at 504 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989)).

As Representative Kathy Castor has said, "One of the great criticisms of the pre-9/11 intelligence operations was the lack of cooperation and information sharing among agencies." Dan Christensen, *U.S. Rep. Castor Calls for Investigation of 9/11 Sarasota Connection; Graham Prods White House*, Broward Bulldog, Sept. 13, 2011. The Joint Inquiry never heard from the FBI about the Sarasota home. Only after the requesters began reporting on this issue did the FBI "correct the public record." *Id.* In correcting the public record, the FBI released just a brief statement, providing no details and stating the investigation uncovered no relation between the Sarasota home and 9/11. *Id.* If the FBI is still withholding information concerning 9/11, the FBI has failed to learn from the lessons of 9/11 and has put this country at risk. In this circumstance, disclosure is required. *See, e.g., Roth ex rel. Bower v. Dep't of Justice*, 642 F.3d 1161 (D.C. Cir. 2011).

The fact that the cat is already out of the bag also counsels that Exemption 7(C) cannot be applied here.[22] Judge Altonaga concluded that the names of the al-Hijjis and Ghazzawis no

[22] *Showing Animals Respect & Kindness v. U.S. Dep't of Interior*, 730 F. Supp. 2d 180, 192 (D.D.C. 2010) (regarding third parties who "were publicly charged in an indictment with violations of the Lacey Act"); *see also Am. Civil Liberties Union v. Dep't of Justice*, 655 F.3d 1 (D.C. Cir. 2011) (requested information would "disclose only information concerning a conviction or plea; it would not disclose mere charges or arrests").

longer could be withheld since the public interest outweighed any privacy interests they might have. *Broward Bulldog, Inc.*, 2017 WL 746410, at *6. She wrote: "Tellingly, some of the redacted names are already in the public domain, and Plaintiffs know the names of the individuals investigated by the FBI. . . . 'Under [the] FOIA's public domain exception, an agency may not rely on an otherwise valid [FOIA] exemption to justify withholding information that is already in the public domain.'" *Id.* at *7 (citation omitted).

2. Exemption 7D

Exemption 7D applies to 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 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." This exemption has been invoked solely to withhold the pages marked BULLDOG 29-32. The Court should review these documents *in camera* to ascertain whether this exemption applies and it should consider whether any portion of the document can be released even if some portion of it would reveal information furnished by a confidential source.

3. Exemption 7E

Exemption 7E applies to 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*." (Emphasis added.) Circuit courts are divided with respect to whether the emphasized language applies to both "techniques and

procedures" and "guidelines."[23] Judge Altonaga concluded, and the Bulldog agrees with her conclusion, that the risk circumvention requirement applies to both.[24] The Bulldog also contends that the FBI has not made an adequate showing that any of the information redacted on Exemption 7E grounds creates the required risk.

Exemption 7E has been invoked indiscriminately to mask file numbers, telephone numbers, unspecified techniques and procedures, "intelligence analyst analytical techniques and procedures," data bases and data base information, and the identities of every FBI agent named in the records. Exemption 7E was not intended to protect the public from knowing any of this information. The identities of law enforcement officers who publicly participated in an investigation, such as Gregory J. Sheffield and Jacqueline Maguire, are not protected. Exemption 7E also is not to be used simply to prevent reporters from contacting agents who had involvement with a significant investigation, as appears to be the case here. Exemption 7E is intended to allow withholding only of information that could reasonably be expected to risk circumvention of the law. The numerous Exemption 7E redactions should be rejected.

III.

Information Reasonably Segregable from
Exemption Information Has Not Been Provided to the Bulldog

The FBI claims to have released all information from records containing exempt information that is reasonably segregable. Non-exempt portions of a releasable FOIA document

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[23] *Compare Pub. Emps. for Envt'l Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 204 n.4 (D.C. Cir. 2014) (information may only be withheld for disclosing "techniques or procedures" if disclosure "could reasonably be expected to risk circumvention of the law"), *with Hamdan v. U.S. Dep't of Justice*, 797 F.3d 759, 778 (9th Cir. 2015) (documents disclosing "techniques or procedures" receive categorical protection), and *Allard K. Lowenstein Int'l Human Rights Project v. Dep't of Homeland Sec.*, 626 F.3d 678, 681 (2d Cir. 2010) (same).

[24] *Broward Bulldog, Inc. v. U.S. Dep't of Justice*, No. 16-61289-Civ-Altonaga/O'Sullivan, 2017 WL 4303806, at *2 (S.D. Fla. June 29, 2017).

must be disclosed unless the agency shows that they are inextricably intertwined with exempt information. *Kimberlin v. Dep't of Justice*, 139 F.3d 944, 949 (D.C. Cir.1998) (citations omitted). "To withhold the entirety of a document, the agency must demonstrate that it cannot segregate the exempt material from the non-exempt and disclose as much as possible."[25] Ordinarily, the Court may rely on the declarations an agency submits to find that this statutory requirement has been met. *See Bilderbeek v. U.S. Dep't of Justice*, 416 F. App'x 9, 13 (11th Cir. 2011) (unpublished). But where the good faith of the agency in searching for, redacting, and withholding records is properly called into question, the Court no longer can rely on declarations alone. Discovery to test the declarations should be allowed and trial should be conducted on all triable issues at which witnesses can be heard and cross-examined.

CONCLUSION

The Court should deny the FBI's motion for summary judgment; order the FBI to disclose any records that the Court determines, based on the record before it, should not have been withheld; and allow the Bulldog to conduct discovery as requested in the accompanying motion to modify the Court's protective order. The Court also should set the case for trial to address any remaining factual disputes that then remain regarding the adequacy and reasonableness of the FBI's search and the propriety of the FBI's redaction and withholding of responsive records.

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[25] *Hertzberg v. Veneman*, 273 F. Supp. 2d 67, 74 (D.D.C. 2003); *see also Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d. 83, 90 (D.D.C. 2009) (holding Homeland Security "ha[d] not met its burden . . . [of] show[ing] with reasonable specificity why [its] documents [could not] be further segregated and additional portions disclosed") (citations and quotations omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and through that filing served:

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