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' Reply to Defendants' Opposition To Plaintiffs' Motion to Modify Protective Order

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REPLY

Plaintiffs, Broward Bulldog, Inc. and Dan Christensen (collectively "the Bulldog"), established in their Motion to Modify the Court's Protective Order that the record before the Court sufficiently demonstrates a likelihood that the FBI is concealing responsive, non-exempt records and improperly redacting or withholding non-exempt records. Therefore, the Court should allow the Bulldog to conduct limited discovery regarding (1) the adequacy and reasonableness of the search the FBI conducted and (2) the propriety of the FBI's redaction and withholding of responsive records it claims are exempt.

The Bulldog emphasized that the FBI has provided no explanation of why an FBI Special Agent, believed by the Bulldog to be Gregory J. Sheffield, wrote a memorandum dated April 16, 2002, in which he concluded that a family of Saudis living in Sarasota, Florida, until two weeks before September 11, 2001, had "many connections" to the September 11 hijackers, but then, ten years later, after the Bulldog reported about the FBI's investigation of the family, the FBI told members of the press that it had found "no connections" between the family and the hijackers and had made the records of the investigation available to congressional investigators.

The FBI asserts no explanation need be given because the explanation could have no bearing on whether it has shown that it has complied with the Freedom of Information Act. It says the Court can conclude the search was adequate from the declarations it filed and reviewing the documents it submitted. DE-103 at 3. That simply cannot be done. Only the requested depositions, interrogatories, and request for production of documents would allow the plaintiffs and the Court to determine (1) what documents were created or obtained by the FBI in connection with its Sarasota investigation, (2) how and where the documents were stored, (3) who had custody and control of the documents, and (4) whether those documents still exist but

have not been found or have been found and improperly withheld.

If, for example, documents relating to the FBI's Sarasota investigation were not stored in electronic format, the electronic searches described in the declarations filed by the FBI would not have located the documents. If the documents were not sent to the FBI's Central Records System, searches of that system would not have been adequate. If the documents were not imprinted with the PENTTBOM case name or case number, but were kept separately, with a different file name and file number or with no file name or file number, a search of the PENTTBOM file would not have been adequate or reasonable.

Is it plausible that something like this could have happened? The record in this case demonstrates that it is. Soon after this case was filed, counsel for the FBI claimed that the FBI had not located any responsive documents whatsoever. DE-88-1 ¶81. Only after the FBI learned from counsel for the Bulldog that former U.S. Senator Bob Graham had told the Bulldog that the FBI had shown him documents responsive to the Bulldog's FOIA request did the FBI admit that it had responsive documents and produce them in redacted form. DE-88-1 ¶80. The FBI never provided an explanation for why it had not located the documents when they were initially requested or soon after the lawsuit was filed. When those initial documents were produced on March 28, 2013, DE-88-1 ¶13, they contained information which appeared to contradict the FBI's own statements to the press about its Sarasota investigation—evidence that the FBI's initial denial of the fact that it had responsive documents was an effort to withhold responsive documents deliberately and in violation of FOIA. DE-88-1 ¶84.

After the FBI admitted possession of 35 responsive documents and partially produced 31 of those pages, it then claimed that it had nothing further to produce, that it had conducted a reasonable and adequate search for responsive documents, that nothing more remained to be

found, and that summary judgment should be granted in its favor. DE-25 & DE-25-1 (original summary judgment motion and Declaration of David M. Hardy). The FBI made this claim even though it was apparent that many more documents should have been found in light of the fact that the FBI had identified a significant suspected accomplice in the 9/11 plot. DE-28 & DE-29 (opposition to original summary judgment motion). The Bulldog's sense in this regard was backed up by the testimony of Sen. Graham on the basis of his many years of experience in the U.S. Senate and its Intelligence Committee, as well as his service on the Joint Intelligence Committees Inquiry into 9/11 itself. DE-29-5 ¶48. The Court, in denying summary judgment and compelling a further search, found that the FBI had an "eagerness to assert exemptions and wooden method of interpreting Plaintiffs' FOIA requests." DE-60 at 7. The Court held the FBI's "characterization of Plaintiffs' second [FOIA] request is literal to the point of being nonsensical." DE-60 at 9. The Court found in the documents that had been produced "various inconsistencies" giving rise to concerns about the reasonableness of the search. DE-60 at 11. The Court found "apparent gaps" in the documents produced and reference to "investigative work, in addition to that mentioned in the . . . documents," as well as "'[f]urther investigation'" to be done. DE-60 at 11-12.

The Court pointed out that "No reports of underlying inspections and investigation have been produced" and that the FBI had offered no reasons why no "documents in between those from September of 2001 and . . . April of 2002 were produced." DE-60 at 12. The Court described the "chronological jump in the documents" as "highly unusual." DE-60 at 12. It held "that not only does the library of located documents presented seem incomplete, but the summary documents do in fact seem to contradict one another," and "there is nothing in Defendants' thirty-five produced pages that reconciles this stark contradiction." DE-60 at 13, 14.

On the basis of "these gaps and inconsistencies," DE-60 at 14, the Court ordered a more thorough search, nothing that the FBI did "not explain to the Court's satisfaction why additional steps were undertaken or were suddenly reasonable to undertake merely because a lawsuit was filed," DE-60 at 15, and did "not explain why" it had not searched its Tampa Field Office when the request was made. DE-60 at 16.

The Court took note of the fact that Sen. Graham had testified that he had been "informed that other documents in existence that he was never shown, were relevant to his inquiry," DE-60 at 19, and that Graham had spoken with FBI agent Jacqueline Maguire about the additional documents but the FBI did "not account for the documents that Graham was told existed, but that he was never shown." DE-60 at 19.

After the Court then ordered an additional search on the basis of these findings and concerns, the FBI located and produced on May 9, 2014, four additional pages of documents that it admitted were responsive to the FOIA requests. BULLDOG 36-39. A month later on June 6, 2015, the FBI located another 32 pages of records and released redacted versions on June 6, 2014. BULLDOG 40-70. Three weeks later, on June 27, 2014, the FBI located and partially released 11 more pages. BULLDOG 71-81.

One stated that the head of the family under investigation was "ALLEGEDLY A WEALTHY INTERNATIONAL BUSINESSMAN" and that the "FAMILY LEFT BEHIND EXPENSIVE ITEMS INCLUDING CLOTHIN[G] JEWELRY AND FOOD IN A MANNER SUGGESTING THAT THEY FLED UNEXPECTEDLY WITHOUT PRIOR PREPARATION AND PERMANENTLY." BULLDOG 36. It also stated: "FURTHER INVESTIGATION REVEAL[ED] MANY CONNECTIONS BETWEEN THE [redacted] FAMILY AND INDIVIDUALS ASSOCIATED WITH THE TERRORIST ATTACKS ON 9/11/01."

BULLDOG 37. They revealed that Esam Ghazzawi was the subject of the investigation and that the FBI had obtained a letter, a list of phone numbers, and copies of checks written to the Barlow Group, manager of the Prestancia subdivision where Ghazzawi owned the home located at 4224 Escondito Circle in which his daughter and son-in-law lived. BULLDOG 38-43. The documents showed the investigation had begun in September 2001, BULLDOG 44-70, and, significantly, continued through February 2, 2012—well after the FBI publicly stated in September 2011 that it had found "no connections" between the family and the hijackers. If "no connections" had been found, why was the investigation continuing more than a decade after it started? The documents found in response to the Court-ordered search showed that the subject of the investigation, presumably Esam Ghazzawi, had "re-entered the U.S.," that he "was previously a person of interest in the PENTTBOMB (sic) investigation," that the FBI "intended to interview" him, and that he or, more likely, his son-in-law, "was a supporter of UBL," referring to Osama bin Laden. BULLDOG 71-72. The documents showed that Ghazzawi listed a "POC in Charlotte AO," apparently meaning that Ghazzawi had listed a Point of Contact in the FBI's Auxiliary Office in Charlotte, North Carolina.

The documents produced pursuant to the Court-ordered search showed that FBI agents had written multiple memos showing "many connections" between the Saudi family under investigation and the 9/11 hijackers, not just a single memo. BULLDOG 74-76.

Nevertheless, David Hardy now contends that the "additional search efforts required by the Court" resulted in the location of only "small pieces of responsive information offering minimal to no additional information concerning the FBI's investigations of the 9/11 attacks and the occupants of 4224 Escondido (sic) Circle." DE-97-1 ¶17. This grossly understates the significance of the search results. The additional documents underscore that the FBI's Sarasota

investigation did, in fact, uncover significant evidence that the 9/11 hijackers may have received support from the Sarasota family and showed that Esam Ghazzawi, a man with close connections to the Saudi Royal Family and who had been photographed with President George H.W. Bush, DE-99-1 ¶120, was the subject of the investigation when it began and continued to be a subject of the investigation more than a decade later. Hardy's assertion that the Court-ordered search resulted in "minimum to no additional information" also underscores the likelihood that many documents have not yet been retrieved. It remains incomprehensible that the FBI would have found many connections between the Sarasota family and the 9/11 hijackers and then not have generated a large volume of records relating to attempts to ascertain whether the family and others with whom they had contacts, such as members of the Saudi royal family, were complicit in the 9/11 attacks.

As important, none of the documents produced provide any hint of why the FBI, contrary to the indications in all of these documents, told reporters on September 9 and 15, 2011, that the FBI had investigated the Sarasota family and found "no connections" to the 9/11 hijackers, when, in fact, it had found "many connections."

Of course, the FBI not only produced 81 pages of partially-redacted records to the Bulldog, it also provided the Court with 80,266 pages of records which bore the PENTTBOM case number and which were located in the Tampa Field Office. From these documents, the FBI asserts that the Court should be able to "determine for itself whether there are any other documents reflecting 'many connections,' or 'any connections,' between the occupants of 4224 Escondito Circle and the 9/11 hijackers." DE-103 at 4. This would not be true, however, if the FBI never placed the PENTTBOM case file number, 265D-NY-280350-TP, on documents relating to its Sarasota investigative records. Notably, the FBI has redacted the Case ID number

from some of the documents that it did produce. For example, the Case ID number on the April 16, 2002, "many connections" memo has been redacted in reliance on FOIA Exemption 7E, and David Hardy explains in his Fifth Declaration that this was necessary "to protect sensitive case file numbers." DE-97-1 ¶56. He explains:

> The release of file numbering convention identifies the investigative interest or priority given to such matters. Applying a mosaic analysis, suspects could use these numbers (indicative of investigative priority), in conjunction with other information known about other individuals and/or techniques, to change their pattern of activity to avoid detection, apprehension, or create alibis for suspected activities, etc.

DE-97-1 ¶56. But the FBI made no claim that it was necessary to redact the PENTTBOM case file number. For example, that number appears unredacted on BULLDOG 12, 15, 18, 19 and other documents. It appears likely therefore that the PENTTBOM case file number or ID number was not placed on all FBI records relating to the FBI's investigation of the Sarasota family and that those documents would not have been within the 80,266 pages that the FBI delivered to the Court – documents which the FBI now says can establish whether any other records showing many or any connections exist beyond those already provided to the Bulldog.

The only way for the Court, the Bulldog, and the readers served by the Bulldog to know whether other responsive records exist but have not been produced by the FBI is for the Court to require the limited depositions of Gregory J. Sheffield, the agent who conducted the investigation; Jacqueline Maguire, the FBI agent who told Sen. Graham that other records exist and would explain why the FBI made public statements contradicting its internal records (and who also briefed the Meese Commission concerning the reliability of Sheffield's memo); and the FBI's declarants, David Hardy and Michael Seidel, who contend that the FBI has made a reasonable and adequate search.

The FBI contends that depositions of Hardy and Seidel would not be useful because

Hardy and Seidel already have provided detailed declarations regarding how the FBI search was conducted. But there is much that they have not explained, such as whether they asked Sheffield for the records on which he based his conclusion and where those records are now stored, or whether they reviewed the records that Maguire told Graham would explain why the FBI publicly stated it had found "no connections" while its internal documents said otherwise. The FBI does say that plaintiffs do not contend that Maguire or Sheffield participated in the search for responsive documents. That suggests that probably Hardy and Seidel never asked them to participate even though they would know which documents were collected, how they were marked for filing, and where they are now stored.

The declarations of Hardy and Seidel also do not explain why the FBI initially redacted the final paragraph of the April 16, 2002, memo, DE-97-2 Block 17, in reliance on FOIA Exemptions (b)(1) & (b)(3) (classification and national security), but later dropped its reliance on either those exemptions and redacted the same information on other grounds, stating: "This information was previously exempt under Exemption (b)(1). However, the information is still being withheld pursuant to other applicable FOIA exemptions." DE-72-1 at 2. The FBI initially had classified the information pursuant to Executive Order 13,256 Section 1.4(c) which applies to "intelligence activities (including covert action), intelligence sources or methods, or cryptology." It also had claimed the redaction was required by the National Security Act of 1947, 50 U.S.C. § 3001. But once the Court ordered the FBI to submit the unredacted version of this record to it for *in camera* review, the FBI withdrew its claim that the information had been properly classified or that its disclosure would jeopardize national security. This is further tangible evidence that the FBI has engaged in intentional concealment of records in violation of FOIA and this warrants allowing the Bulldog to engage in at least some discovery designed to

provide the Court the evidence that it needs to adjudicate the issues that this case presents.

Finally, the FBI argues that the Bulldog is seeking the deposition of Maguire and Sheffield to probe their mental processes and it says this is not permissible discovery in a FOIA case because it does not relate to the adequacy of the FBI's search. If, however, Maguire and Sheffield were to testify that documents relating to the Sarasota investigation were labeled and stored so that they would not become a part of the PENTTBOM investigation or that they could be located through electronic word searches, that testimony would bear directly on not only the adequacy and reasonableness of the search performed, but also the propriety of the FBI's redaction and withholding of the fragmentary documents which the FBI has acknowledged. Testimony of that sort would bear on whether the FBI has engaged in misfeasance or malfeasance which it is trying to conceal. The FBI says nothing about whether that sort of discovery is allowed.

CONCLUSION

The Court should grant the Bulldog's motion to modify its protective order to allow the limited proposed discovery prior to addressing the FBI's renewed motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 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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