IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 16-61289-Civ-Altonaga/O'Sullivan

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

Plaintiffs,

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' Motion for Relief from a Part of the Final Judgment
and for Indicative Ruling for Relief Barred by a Pending Appeal

The defendants, the U.S. Department of Justice and the Federal Bureau of Investigation (collectively, "the FBI"), declassified on Thursday, September 12, 2019, one critical piece of information at issue in this case in an FBI memorandum dated October 5, 2012, but they have continued to withhold the information from the Plaintiffs, Broward Bulldog, Inc. and Dan Christensen (collectively, "the Bulldog"). On the basis of that declassification, the Bulldog moves pursuant to Federal Rules of Civil Procedure 60(b)(5) and (60(b)6) for relief from the following parts of the Court's Orders and Final Judgment:

(1) The February 27, 2017, Order Granting in Part and Denying in Part the Defendants' Motion for Summary Judgment on Counts II and III, DE-58 at 31-33;

(2) The May 16, 2017, Order Granting the Defendants' Summary Judgment in and Denying Summary Judgment in Part, DE-99 at 23-24;

(3) The June 29, 2017, Order Granting the Defendants' Motion for Reconsideration, DE-108; and

(4) The July 26, 2017, Final Judgment, DE-112.

The Bulldog also moves pursuant to Federal Rule of Appellate Procedure 12.1 for an indicative ruling on this motion because the relief sought is barred by the parties pending appeal and cross-appeal.

FACTUAL BASIS FOR THIS MOTION

The Court's Orders and Final Judgment allowed the FBI to withhold from the Bulldog the name of an individual who has been identified in the October 5, 2012, memo as having "tasked" two Saudis, with providing assistance to the 9/11 hijackers. That name is included in the record identified in this case as Document 5. The FBI redacted that name solely in reliance on Freedom of Information Act Exemptions 1 and 3, 5 U.S.C. §§ 552(b)(1)(A) & 552(b)(3).

News reports of the FBI's declassification decision are attached as Exhibit 1 and 2.

Document 5, the document at issue, is attached as Exhibit 3 with that portion of which the Bulldog's counsel understands as having been declassified highlighted in yellow and marked by the Bulldog's counsel as "Declassified."

Exhibit 4 is a memorandum the United States filed on September 12, 2019, in *In re Terrorist Attacks Against the United States on September 11, 2001*, No. 03-MDL-1370 (S.D.N.Y.), describing the information that has been declassified and explaining the basis for that declassification decision.

Exhibit 5 is a Declaration of former FBI Agent Bassem Youssef filed by the plaintiffs in the *September 11* litigation. In it, Youssef concludes that the FBI had no basis for continuing to withhold the name which it declassified.

Exhibit 6 is the Protective Order entered in the *September 11* litigation pursuant to which the FBI produced the name to the plaintiffs' counsel in that litigation. The Protective Order does not create a FOIA Exemption.

FOIA Exemption 1 provides FOIA disclosure requirements do not apply to matters 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."

Exemption 3 provides FOIA disclosure requirements do not apply to matters "specifically exempted from disclosure by statute (other than section 552b of this title), 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." In asserting this exemption, the FBI relied specifically on section 102A(i)(1) of the National Security Act of 1947 ("NSA"), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), codified as 50 U.S.C. §3024(i)(1). DE-27 at 10 & DE-27-1 at ¶ 46 (Declaration of David M. Hardy). That provision of the NSA "requires the Director of National Intelligence ("DNI") to 'protect from unauthorized disclosure intelligence sources and methods.'" DE-27 at 10.

This Court specifically addressed the propriety of the FBI's redaction of the name in its February 27, 2017, summary judgment order, stating:

The Bulldog also moves pursuant to Federal Rule of Appellate Procedure 12.1 for an indicative ruling on this motion because the relief sought is barred by the parties pending appeal and cross-appeal.

E. October 5, 2012 Memorandum

The last document at issue is an October 5, 2012 Memorandum titled "Updates and Initiatives." (Hardy Decl. Exs., Ex. K, 45–48). In this four-page-document, the Government invokes Exemptions 1, 3, 5, 6, 7(A), 7(C), 7(D), and 7(E). (See id.). The Government already invokes these exemptions throughout the other three documents, with the exception of Exemption 7(A), which allows the Government to withhold documents that "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A).

Plaintiffs insist the October 5, 2012 Memorandum "may be the most important" document at issue in Count II. (Resp. 16). They argue the Court should reject the exemptions for "the same reasons" the other redactions in the rest of the documents should be rejected; and with respect to Exemption 7(A), Plaintiffs request the Court require the Government to provide a more detailed explanation of why the exemption applies. (Id. 17–18). The Court first analyzes Exemptions 1 and 3, followed by 7(D) and 7(E), and then the remaining exemptions.

1. Exemptions 1 and 3

Exemption 1 protects from disclosure information marked as classified in accordance with an executive order, see U.S.C. § 552(b)(1); here, the FBI classifies the information under Executive Order 13526 (see Mot. 8; Hardy Decl. ¶ 33). Exemption 3 protects information that falls within a statute; the FBI invokes the National Security Act (see Hardy Decl. ¶ 46), which protects "intelligence sources and methods from unauthorized disclosure," 50 U.S.C. § 3024(i)(1).

The Government explains Exemptions 1 and 3 apply because the redacted information pertains to national security intelligence activities and sources. (See Hardy Decl. ¶¶ 33–37, 46–48). The Court agrees the FBI's intelligence-gathering methods "are valuable . . . so long as those who would use countermeasures against them remain unsuspecting. . . . Once an intelligence method is disclosed, its continued use is compromised and the [FBI] must attempt to develop and validate new intelligence methods at significant monetary and informational costs." Larson v. U.S. Dep't of State, 565 F.3d 857, 863 (D.C. Cir. 2009) (alterations added).

The Court accords substantial weight to the Government's affidavit with respect to Exemptions 1 and 3 because "the Executive departments responsible for national defense and foreign policy matters have unique insights into" the adverse effects that may result from release of a classified record. Krikorian, 984 F.2d at 464 (quoting Military Audit Project, 656 F.2d at 738). "The judiciary 'is in an extremely poor position to second-guess' the predictive judgments made by the government's intelligence agencies regarding questions . . . [of] national security posed by disclosing particular intelligence sources." Larson, 565 F.3d at 865 (alterations added; citations omitted).

> Following the "weight of authority counseling deference in national security matters," Ctr. for Nat. Sec. Studies v. U.S. Dept. of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003), the Court finds Exemptions 1 and 3 are properly invoked throughout the October 5, 2012 Memorandum. The Government sufficiently explains why the information relates to intelligence sources and methods, how the information is properly classified in the interest of national security, and why it must remain classified. See Larson, 565 F.3d at 865 ("If an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." (alteration added)). Accordingly, summary judgment is appropriate with respect to the use of Exemptions 1 and 3 throughout the October 5, 2012 Memorandum.

DE-58 at 31-33.

The Court the October 5, 2012, Memorandum again in its May 16, 2017, summary judgment order, without altering any aspect of its ruling above pertaining to redaction of the name under Exemptions 1 and 3. DE-99 at 23-24.

The Court granted the FBI's motion for reconsideration of a part of an earlier order not pertaining to invocating of Exemptions 1 and 3 to protect the name, DE-108, and then entered a Final Judgment, DE-112, without further elaboration on its decision to allow the FBI to redact the name from the October 5, 2012, FBI memorandum.

The Bulldog and the FBI appealed and cross-appealed the Final Judgment to the Eleventh Circuit and the appeals remains pending as Case Nos. 17-13787 & 17-4264. The Eleventh Circuit heard oral argument on the appeals on July 19, 2018. No decision has been rendered.

As reported on September 12, 20019, in the *Florida Bulldog,* Exhibit 1, and *The Wall Street Journal,* Exhibit 2, the United States has declassified and disclosed to the plaintiffs' counsel in *In re Terrorist Attacks Against the United States on September 11, 2001*, No. 03-MDL-1370 (S.D.N.Y.), the name in Document 5, Exhibit 3, which it previously upheld due to its classification and its purported disclosure of intelligence sources and methods

The accuracy of the reporting was confirmed by the United States September 12, 2019, memorandum filed in the *September 11* litigation stating that the United States had declassified the name and would not claim it constituted a "state secret" "[i]n light of the exceptional nature" of and "public interest" in the case. Exhibit 4 at 1 & 3. In its memo, the Unites State advised the Court that it had "agreed to conduct a line-by-line review of the 2012 Summary Report to determine whether any information contained therein, although properly classified and/or privileged, could nonetheless be disclosed in the litigation. This review included consideration of whether any information could be *declassified and released in the public interest* and in the exercise of discretion pursuant to section 3.1(d) of Executive Order 13,526." Ex. 4 at 3. That provision states:

Sec. 3.1. Authority for Declassification. (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

> (d) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, *the need to protect such information may be outweighed by the public interest in disclosure of the information*, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure. This provision does not: (1) amplify or modify the substantive criteria or procedures for classification; or (2) create any substantive or procedural rights subject to judicial review.

(Emphasis added).

The United States' memorandum further explained:

> [I]n consultation with the Attorney General, the FBI has exercised its discretion, under section 3.1(d) of Executive Order 13,526, to declassify limited information in the 2012 Summary Report, specifically, the name of the third main subject of investigation. The September 11 terrorist attacks were the most lethal in our nation's history, and the FBI has long been committed to providing the families of the victims with transparency regarding its investigation of the events

> of that tragic day, consistent with maintaining the national security and the FBI's overriding goal of preventing future terrorist attacks. Thus, under the exceptional circumstances of this case, the name of the third main subject has been declassified and is being released to counsel pursuant to the FBI Protective Order.

Exhibit 4 at 4. The United States' memorandum expressly contemplates that the name released to the *September 11* plaintiffs' counsel will be released to the public in that it attempts to explain to the public in footnote 2 the significance of the declassified information. The memorandum states: "in the interesting of ensuring that neither plaintiffs not the public are misled by inaccurate or incomplete phrasing in what was meant to be an internal FBI document, the FBI wishes to make clear that this declassification decision should not be taken as an affirmation or confirmation of the statements in the 2012 Summary Report about that individual." Exhibit 4 at 4 n.2.

Notably, the United States memorandum made no claim that the National Security Act of 1947 prohibited disclosure of the name to the plaintiffs' counsel or anyone else or that the name could be or had been categorized as constituting an intelligence source or method which the Director of National Intelligence wished to protect.

The Protective Order under which the FBI provided the name to the plaintiff's counsel, Exhibit 6, creates a procedures which allows the FBI to produce requested records requested in discovery to the plaintiffs' counsel which would be prohibited from disclosure under the Privacy Act, 5 U.S.C. § 552a, without presenting Privacy Act objections to the Court for a decision regarding disclosure. Exhibit 6 further provides: "Information that the FBI deems Protected Information shall be designated as such by stamping the phrase 'Subject to FBI Protective Order' on any document or record containing Protected Information prior to the production of such document or record." Exhibit 6 ¶ 3. The Protective Order imposes no limitation on the right of the FBI to disclose information which it has designated as Protected Information. Exhibit 6 ¶ 21.

It also provides no procedure through which nonparties, such as the Bulldog, may intervene to challenge the FBI's designation of information as protected.

The Bulldog, by way of a notice of supplemental authority, alerted the Eleventh Circuit on September 12, 2019, to the FBI's declassification decision.

ARGUMENT

I.

Rule 60(b)(6) Authorizes the Granting of this Motion

Federal Rule of Civil Procedure 60(b) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if `a significant change either in factual conditions or in law' renders continued enforcement `detrimental to the public interest.'" *Horne v. Flores*, 557 U.S. 433, 447 (2009) (*quoting Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)).

In *Rufo*, the Supreme Court set forth a two-step analysis for determining whether modification of existing injunctive relief is warranted. First, the "party seeking the modification of [a final judgment] bears the burden of establishing that a significant change in circumstances warrants revision of the decree." *Rufo*, 502 U.S. at 383. The moving party may satisfy this burden by showing "a significant change either in factual conditions or in law." *Id.* at 384.. In this regard, "the question is whether any change in factual or legal circumstances renders continued enforcement of the original order inequitable." *Horne*, 557 U.S. at 457, 129 S.Ct. 2579.

Second, if the moving party satisfies this initial burden, it must show that "the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 391, 393; *see also Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1563-64 (11th Cir.1994). Modification may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change, (2) significant time has passed and the objectives of the original order have not been met, (3) continuance is no longer warranted, or (4) a continuation would be inequitable and each side has legitimate interests to be considered. *Jacksonville Branch, NAACP v. Duval County Sch. Bd*., 978 F.2d 1574, 1582 (11th Cir.1992) (*citing Rufo*, 502 U.S. at 391-92); *see also In re Consol. `Non-Filing Insurance' Fee Litig.*, 431 Fed. Appx. 835, 840-41 (11th Cir.2011).

Under Rule 60(b)(5), a court "applies a flexible standard to determine whether changed circumstances dictate that [a judgment] should be modified." *In re Consol. Litig.*, 431 Fed. Appx. at 840 (*citing Rufo*, 502 U.S. at 380, 112 S.Ct. 748).

Rule 60(b)(5) applies because the FBI has changed its position and no longer can claim that the information is classified or that its release is needed to protect intelligence sources or methods, significant time has passed and the objectives of the original order to protect classified information have been met, continuance of the order is no longer warranted in light of declassification of the name, and continuation of the order is not only inequitable, it is not permitted by FOIA . The Eleventh Circuit held in *Alley v. US Dept. of Health and Human Services*, 590 F. 3d 1195 (11th Cir. 2009), that Rule 60(b)(5) is the proper procedural route for parties to use when circumstances warrant modification of an order regulating the release of government information. In *Alley*, the Eleventh Circuit noted that an order restricting disclosure of information under the Privacy Act should be raised pursuant to Rule 60(b)(5) with the court

issuing the order rather than by a new lawsuit. On remand, Judge Morales Howard of this Court vacated the order at issue and allowed release of the records at issue. Fla. Medical Ass'n v. Dep't of Health, Education & Welfare., 947 F. Supp. 2d 1325 (M.D. Fla. 2013).

If for any reason, Rule 60(b)(5) is regarded as inapplicable, then Rule 60(b)(6) applies because the United States should not be able to continue to withhold from the Bulldog information which is no longer exempt from the disclosure requirements of FOIA and which is information of critical importance to litigation which has been brought in an attempt to hold the Kingdom of Saudi Arabia accountable for the thousands of deaths and injuries that occurred in the September 11, 2001, attacks. As the United States itself has recognized in declassifying the name and as it obvious, there is exception public interest in that litigation. The plaintiffs in the litigation have struggled to obtain the name due to their stated belief that the name is that of a Saudi government official and that this will allow them to prove their liability case against the Kingdom of Saudi Arabia; the FBI has withheld this name from the Bulldog and from the plaintiffs for almost two decades now, possibly to protect the United States' alliance with Saudi Arabia; but the United States has now taken what appears to ba an important turn and declassified what was once thought to be an essential secret. The public and the press have a role to be played here. The Freedom of Information Act was adopted by Congress to ensure that they can make a fair assessment of just what exactly the government is up to here. That is very far from clear. And while release of the name, may not provide all of the answers, it could be an important crack in a dike that been standing for almost two decades.

And, as noted above, the Protective Order under which the name was handed to the plaintiff's counsel does not and obviously cannot create an exemption to the disclosure requirements of FOIA. The Protective Order only implements the limitations imposed on

agencies by the Privacy Act, 5 U.S.C. §552a, which by its express terms does not create an exemption to FOIA disclosure requirements. Specifically, 5 U.S.C. §552a(b)(1) provides that if disclosure is required by "section 552 of this title," FOIA, then the conditions of disclosure of the Privacy Act do not apply to the agency.

It warrants repetition here also that in redacting the name at issue from the October 5, 2012, memorandum, the FBI did not assert that any of the personal privacy protections found in FOIA Exemptions 6 and 7(C). apply to this name. The FBI solely asserted that Exemptions 1 and 3 apply to the name.

Rule 60(c) provides only that a motion under Rules 60(b)(5) and (b)(6) "must be made within a reasonable time." The Bulldog filed this motion within days of learning of the FBI's declassification decision. Accordingly, the motion should be regarded as timely.

II.

Federal Rule of Appellate Procedure Authorizes an Indicative Ruling

Federal Rule of Appellate Procedure 12.1 provides:

> (a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.
>
> (b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

In accordance with this rule, the Court should enter an order that it would grant the Bulldog's motion pursuant to Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6) in light of the FBI's declassification of the name at issue in the October 5, 2012, FBI memorandum. The

Bulldog then would ask the Eleventh Circuit for a limited remand for the Court to enter an order granting this motion and directing the FBI to release Document 5 to the Bulldog without redacting the name.

CONCLUSION

The Court should enter an order indicating that it would grant this motion and order the FBI to produce Document 5 without redacting the name at issue to the Bulldog if the Eleventh Circuit were to remand jurisdiction to determine this motion during the pending appeal.

In light of the relevance of this matter to the pending appeal and cross-appeal, and the importance of disclosure of this information to a controversy of the greatest national importance, the Bulldog also respectfully asks that the Court expedite its consideration of this motion.

Respectfully submitted,

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CERTIFICATE OF CONSULTATION

I hereby certify that I consulted with opposing counsel Carlos Raurell, and I am authorized to represent that the FBI requested three days through Thursday, September 19, 2019, to indicate its position with respect to how the Court should address this motion.

s/ *Thomas R. Julin*
Thomas R. Julin

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and through that filing served:

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