UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH J. DILLON, PLAINTIFF vs. DEPARTMENT OF JUSTICE, DEFENDANT	)	Civil Action No. 1:17-cv-1716 (RC)

REPLY IN SUPPORT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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I. The FBI's search for records was inadequate

A. Scope of the request

Plaintiff's December 22, 2016 letter states:

> "I have been largely persuaded by your responses and by the DOJ responses to my appeals that FBI does not possess not-yet-released documents on the activities of Bruce Ivins in September and October, 2001. However, it is not clear how to reconcile this with the statement of former head of the investigation Richard Lambert that there is 'a wealth of exculpatory evidence' regarding Bruce Ivins (Lambert v. Holder et al, Tennessee Eastern District Court, April 2, 2015, Paragraph 55).
>
> I have provisionally adopted the assumption that somebody must have destroyed this evidence, but I would like to test this assumption before proceeding further." (Hardy Decl. Ex. BB)

Through this letter, Plaintiff sought to test whether there had been extensive destruction of evidence, and the test showed that this hypothesis was very likely incorrect. In turn, this made a failure by the FBI to conduct an adequate search as the most plausible explanation for the absence of the documents sought by Plaintiff's original FOIA request – documents that would normally be collected in a criminal case. So the appropriate next step was for the FBI to continue its search efforts. In fact, in one instance, the FBI's additional search found 102 pages of new Ivins emails, after having assured Plaintiff that it had been able to find no responsive records. The FBI should now be required to do a thorough search for all the records sought in Plaintiff's original request.

B. Failure to search both work and home computers

The government asserts that "to the extent the FBI maintained any 'images' from Dr. Ivins's *computer*, these records would have been maintained in the paper records located in the 1A

attachments to the main investigative file." (Def. Opp. CMSJ at 4, citing Hardy Decl. ¶ 5) (emphasis added). The key here is the FBI's use of the singular word "computer." The record incontrovertibly establishes that at least two of Dr. Ivins's computers were seized by the FBI. ("The Task Force conducted searches of home and work computers and examined e-mails") (Pl. CMSJ Ex. 1 at 6). Yet the only binders of emails the FBI searched were entitled "Review of Compaq Presario Hard Drive, [Redacted Name], 2001 Ivins and [Redacted Name] Email Exchanges." (Seidel Decl. ¶ 57 & n.10.)

It is also significant that the FBI's assertion is based on mere speculation as to what "would have" been done with any images. (Hardy Decl. ¶ 5.) In evaluating the FBI's speculation, the Court should be mindful of the fact that the last time the FBI relied on an assumption instead of facts as to where all emails would have been located— in the CRS— it was incorrect. It is telling that the FBI does not make any specific averments in support of its conjecture as to what would have been done with the images. For example, the FBI does not aver that the only image it possesses is the one of the Compaq Presario Hard Drive or that the only binders of emails it possesses are those it has searched to date.

If the FBI in fact created image(s) from only one of the computers it seized from Dr. Ivins, this would imply that either the FBI seized multiple computers from Dr. Ivins without having any interest in creating images to examine all of them, or else it deliberately failed to look for potentially key evidence on Dr. Ivins's other computer or computers by creating an image of the other computer or computers. Both of these possibilities would raise troubling questions about the integrity of the FBI's investigation of Dr. Ivins. In light of the gravity of these implications, the fact that the FBI only refers to the singular "computer," and its assumption as to the images it

possesses being based on pure speculation, the Court should order the FBI to search other images.

Finally, aside from the question of whether the FBI possesses *images* from multiple computers, the FBI fails to address the question of whether it still possesses multiple *computers* seized from Dr. Ivins. If the FBI does possess multiple computers, but not images from multiple computers, it should search the actual computers. If the FBI has destroyed one or more of the multiple computers it seized from Dr. Ivins without maintaining images of their contents, the FBI should be required to say as much.

C. Failure to account for the universe of emails

The FBI's opposition to Plaintiff's Cross-Motion for Summary Judgment contains no response to Plaintiff's argument that the FBI should be required to provide a description of the universe of emails (Pl. CMSJ Mem. at 6-7.) To the extent that the Court considers the statements in the declaration regarding the burdensomeness of providing an accounting of all emails, it should reject these conclusory assertions.

First, the declaration avers that providing an account of its holdings would require the FBI to "commit substantial manpower," (Hardy Decl. ¶ 6) but does not provide any estimate of the amount of work that would be involved. Therefore, the FBI has not demonstrated that any additional administrative burden would be unreasonable. Second, while case law permits an agency to refuse to conduct an unreasonable *search* for additional potentially responsive records, the government cites no authority for the proposition that an agency can refuse to reasonably *describe* what additional potentially responsive records it possesses. While accounting for the universe of Dr. Ivins's emails in the FBI's possession may impose some degree of burden on the agency, this information is essential for the adversarial system to function. *Oglesby v. United*

States Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990) ("A reasonably detailed affidavit . . . is necessary to afford a FOIA requester an opportunity to challenge the adequacy of the search and to allow the district court to determine if the search was adequate in order to grant summary judgment.")

II. The FBI's redactions were improper

A. Exemptions 6/7(C)

With respect to third parties merely mentioned, the FBI raises Exemptions 6/7(C) in its brief for the first time. Although the FBI's declaration earlier in this case made reference to the reasons for withholding the names of third parties merely mentioned, the Court should disregard argument made only in the declaration. *Shapiro v. United States DOJ*, 239 F. Supp. 3d 100, 119 n.6 (D.D.C. 2017) ("As Plaintiffs correctly observe, the FBI's multiple declarations contain extensive legal argument, much of which does not appear in the agency's briefs. . . . The FBI should ensure in the future, however, that it includes any legal argument that it wants the Court to consider in its briefs.")

As to the names and identifying information of FBI and non-FBI federal employees, the FBI agrees that a *per se* rule of withholding is not permitted, but argues that it did not employ such a rule in this case. (Def. Opp. CMSJ at 9.) The FBI further argues that the burden should be on Plaintiff to "establish[] that the FBI . . . implemented such a rule here." (Def. Opp. CMSJ at 9.) However, it is reasonable to draw an inference that the FBI used a *per se* rule where it redacted each and every mention of the name or identifying information of federal employees and provided a justification for withholding that, if accepted, would be tantamount to a categorical rule of withholding. At any rate, since the FBI disclaims use of a categorical rule, its withholding

decisions must be "based on the specific facts reflected in the record." *Stern v. FBI*, 737 F.2d 84, 93 (D.C. Cir. 1984). Here, the FBI provides no specific facts related to any individual federal employee, relying instead on generalizations common to all FBI and non-FBI employees, respectively.

Finally, the FBI justifies its withholding of the names and identifying information of third parties of investigative interest by arguing that Plaintiff "provides only speculation that any possible exculpatory evidence proving Dr. Ivins is innocent is maintained within the IMCS." (Def. Opp. CMSJ at 10.) In fact, as mentioned in Plaintiff's December 22, 2016 letter (Hardy Decl. Ex. BB), the former chief of the Amerithrax investigation and author of the IMCS, Richard Lambert, stated that there is a "wealth of exculpatory evidence" regarding Bruce Ivins, and it is reasonable to expect that such exculpatory evidence would be located within the IMCS. *Lambert v. Holder*, Case No. 3:15-cv-147-PLR-HBG (E.D. Tenn. Apr. 2, 2015) [ECF dkt: 1] at ¶ 55.

In FOIA cases, the burden of persuasion is on the agency resisting disclosure. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. United States DOJ*, 503 F. Supp. 2d 373, 378 (D.D.C. 2007). Here, although the FBI's justification for withholding would apply to both exculpatory and non-exculpatory information, the agency does not dispute the substantial public benefit that would flow from disclosure of exculpatory information. Nor does the FBI deny that there is any exculpatory information within the records it is withholding. Since there is a factual dispute as to the contents of the withheld information (i.e., whether it is exculpatory), the FBI was required to provide Plaintiff and the Court with sufficient information in its *Vaughn* declaration to make such a determination. *Id.* Accordingly, the FBI has not met its burden of proof as to its assertion of Exemptions 6 and 7(C) for the withholding of information about individuals of investigative interest.

B. Exemption 1-2 and Exemption 3-1, National Security Act

For Exemptions 1-2 and 3-1 (National Security Act), the FBI provides no further argument beyond rehashing the arguments made in its previous brief. Accordingly, Plaintiff should prevail on his motion for summary judgment as to these exemptions for the reasons set forth in his Cross-Motion for Summary Judgment.

C. Exemption 3-2, Pen Register Act

The FBI observes that on remand from the D.C. Circuit, this Court held that "[i]nformation at the crux of a pen register order that . . . happens to appear in a document outside of the order itself and would necessarily compromise the order, is therefore information that falls within the scope of Exemption 3's protection as triggered by the Pen Register Act." *Labow v. Dep't of Justice*, 278 F. Supp. 3d 431, 441 (D.D.C. 2017). (Dep. Opp. CMSJ at 13.) Assuming, *arguendo*, that the district court's non-binding decision is correct as a matter of law,[1] the FBI's withholdings here are improper because they extend to information beyond what is "at the crux of a pen register order[.]" *Id.*

The information contained in a pen register is "the identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied; the identity, if known, of the person who is the subject of the criminal investigation; the attributes of the communications to which the order applies, including the number or other identifier and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied, and, in the case of an order authorizing installation and use of a trap and trace device under subsection (a)(2), the geographic limits of the order; and a statement of the offense to

[1] *But see Labow v. United States DOJ*, 831 F.3d 523, 528 (D.C. Cir. 2016) ("By its terms, the statute provides for sealing of a pen register order itself, not sealing of any and all information the order may contain even if appearing in other documents.")

which the information likely to be obtained by the pen register or trap and trace device relates[.]" 18 U.S.C.S. § 3123(b)(1). Yet, in addition to this information, the FBI here is also withholding "the existence of pen registers, how they were used by the FBI in the Amerithrax investigation . . . and the information gathered through the pen registers." (Def. Opp. CMSJ at 13, citing Hardy Decl. ¶ 11.) The FBI should not be permitted to withhold this information, which goes beyond what is contained in the pen register order.

D. Exemption 3-3, Federal Grand Jury information

The FBI has provided additional information about its withholdings under Exemption 3-3, averring that "the records state on their face specific information was gathered through Federal Grand Jury Proceedings." (Hardy Decl. ¶ 12.) However, the government fails to explain whether, by "records," it means that every page of the records contains such a statement, or whether only one page of the records contains such a statement. If it is the latter, the FBI does not explain why it would be unable to segregate and release those portions of the records that do not state on their face that they were gathered through federal grand jury proceedings.

E. Exemption 7(D), Implied Assurance of Confidentiality

With respect to the first *Roth*[2] factor, the FBI reiterates the serious nature of the crime at issue, a point which Plaintiff has already acknowledged. The FBI provides no further information as to the third and fourth *Roth* factors. The FBI provides meager additional information as to the second *Roth* factor (i.e., the source's connection to the crime), averring only that "the businesses had direct dealings with Ivins[.]" (Hardy Decl. ¶ 13.) This statement says nothing about the proximity of the businesses "to the *crime*," 642 F.3d at 1184 (emphasis added) only to Dr. Ivins. Further, the D.C. Circuit has been clear that "[t]he mere fact that a

[2] *Roth v. United States DOJ*, 642 F.3d 1161, 1184 (D.C. Cir. 2011).

source may have some social or *business* association with the subject of a federal criminal investigation falls short of the particularity mandated by *Landano*." *Quinon v. FBI*, 86 F.3d 1222, 1231 (D.C. Cir. 1996) (emphasis added).

Finally, the FBI argues that "[s]ome of these businesses' customers might look unfavorably upon the businesses' cooperation with law enforcement, and their sharing of information typically expected to be kept confidential," and therefore "retaliation against these private business sources could also include anger among their customers, and loss of potential business." (Hardy Decl. ¶ 13.) However, the fear of loss of customers is far removed from the "the generic presumption of confidentiality that the Supreme Court appears willing to extend to sources of information concerning gang-related crimes." *Comput. Professionals for Soc. Responsibility v. United States Secret Serv.*, 72 F.3d 897, 906 (D.C. Cir. 1996). Indeed, even as to the more serious threat of retaliation by hacking, the D.C. Circuit rejected the application of Exemption 7(D) where an agency "offered no evidence that a fear of retaliation by hackers is sufficiently widespread to justify an inference that sources of information relating to computer crimes expect their identities and the information they provide to be kept confidential." *Id.*

F. Exemption 7(E)-1, Information concerning surveillance

The FBI now concedes that "the specific types of surveillance are publicly known," but claims that it should nevertheless be entitled to withhold the information because it is not public "when, why, and how they are deployed in certain investigative circumstances[.]" (Hardy Decl. ¶ 14.) Crucially, the FBI does not explain the way in which the "when, why, and how" of the non-public aspects of the publicly known technique would be revealed through disclosure. The D.C. Circuit requires the agency to explain not just what procedures are at issue, but "*how* disclosure of the [requested records] could reveal such procedures. (Are the procedures spelled out in the documents? Or would the reader be able to extrapolate what the procedures are from the

information contained therein?)" *Citizens for Responsibility & Ethics in Wash. v. United States DOJ*, 746 F.3d 1082, 1102 (D.C. Cir. 2014) (emphasis added). As best as can be discerned from the government's declarations in this case, the FBI's theory is that Exemption 7(E) permits nondisclosure of *any* technique *any* time it is used in connection with *any* investigation because *any* real-world use of the technique would "reveal to criminals the types of surveillance techniques the FBI is likely to deploy in particular investigative circumstances." (Hardy Decl. ¶ 14.) This radical and sweeping interpretation of Exemption 7(E) should be rejected by the Court.

Broadening Exemption 7(E) from the statutory language of "techniques and procedures" to a judicially-created category involving the *application* of techniques and procedures in a particular case would allow that exemption to swallow FOIA's disclosure provisions. As the Ninth Circuit has explained, "If we were to follow such reasoning, the government could withhold information under Exemption 7(E) under any circumstances, no matter how obvious the investigative practice at issue, simply by saying that the 'investigative technique' at issue is not the practice but the application of the practice to the particular facts underlying that FOIA request." *Rosenfeld v. United States Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995). Accordingly, the Court should reject the FBI's assertion of Exemption 7(E) as to the publicly known technique at issue here.

G. Exemption 7(E)-2, Collection and/or Analysis of Information

The FBI does not dispute that it has made a "broad assertion of 7(E) to withhold information in this category[.]" (Hardy Decl. ¶ 15.) The agency attempts to justify this "broad assertion" by describing the purpose of the IMCS document and then claiming entitlement to withhold its "overarching methodology." (Hardy Decl. ¶ 15.) It then emphasizes the general nature of the harms that would result from criminals being able to have access to information within this category.

Although the FBI attempts to defend the breadth of this category, it never addresses the vagueness of this category. Virtually everything the FBI does involves the collection and/or analysis of information, yet Congress did not provide the FBI with blanket immunity from FOIA. To the extent that the FBI provides some additional clarification in its most recent declaration, it provides more specificity only as to the harms that would flow from disclosure, omitting detail about the nature of the techniques at issue. Exemption 7(E) permits withholding of "techniques and procedures for law enforcement investigations or prosecutions," 5 U.S.C. § 552(b)(7)(E), and if it were expanded to include the "overarching methodology" of FBI investigations, the exemption would be virtually boundless. The FBI would be able to claim that such "techniques or procedures" would include "interviewing witnesses," "examining evidence," "assigning agents to a case," or any other vague and overarching methodology it chooses.

H. Exemption 7(E)-3, Techniques Used to Conduct National Security Investigations

With respect to Exemption 7(E)-3, the FBI expounds on the purported harms that would result from disclosure of the withheld information. (Hardy Decl. ¶ 16.) Yet the FBI fails to provide any additional information in support of its claim that the withheld information constitutes a technique or procedure in the first place. How the FBI "evaluate[s]" foreign security risks and threats may or may not be within the scope of Exemption 7(E)-3, depending on the particular technique involved. For example, how the FBI evaluates foreign security risks and threats may be no more than "consulting with experts" or "conducting research," as opposed to detailed analysis of the risk or threat. Because the FBI may have asserted this category of exemption to both information that it could permissibly withhold and information it could not permissibly withhold, the agency has not met its burden of justifying its reliance on Exemption 7(E) in this case.

I. Other agencies' withholdings

The government provides no additional declarations or arguments related to the withholdings by the CIA and USPS. Therefore, Plaintiff rests on the arguments he presented in his Cross-Motion for Summary Judgment.

III. Conclusion

For the foregoing reasons, the Court should grant Plaintiff's Cross-Motion for Summary Judgment.

Respectfully Submitted,

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