UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN L. BRAGA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 12-cv-00139 (JEB)
	)	
FEDERAL BUREAU OF INVESTIGATION.	)	
	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO THE FBI'S MOTION FOR SUMMARY JUDGMENT

Defendant Federal Bureau of Investigation ("FBI") has moved for summary judgment because it allegedly "responded appropriately to Plaintiff's four FOIA requests by [1] searching thoroughly for responsive records and [2] releasing all non-exempt, reasonably segregable information." Memorandum In Support Of Defendant's Motion For Summary Judgment ("Def. Mem.") at 1. The FBI is demonstrably wrong on both counts and, accordingly, is not entitled to the summary judgment it seeks.

FACTS

The facts to be adjudicated in this case are adequately documented in the written materials submitted by the parties. Defendant admits that "the FBI assisted" law enforcement authorities in Arkansas with respect to the West Memphis Three case, Defendant's Motion For Summary Judgment at 1, and the record reveals that the FBI maintains hundreds of pages of records relating to that assistance. The Freedom of Information Act ("FOIA") requests submitted by plaintiff, the responses to those FOIA requests by defendant, and plaintiff's replies to - and appeals from - those responses are frozen in the administrative record. The disputes between the parties lie in whether the FBI accounted for all of the relevant facts, how the FBI

interpreted those facts it decided to take into account and if the FBI correctly applied the relevant legal principles to those facts.

STANDARD OF REVIEW

We have no quarrel with the defendant's articulation of the general legal standards applicable to summary judgment motions in the federal courts. Anderson v. Liberty Lobby and its progeny prescribe the time-honored tests for applying Rule 56, and there is no dispute about that here.

What is more important though, in plaintiff's estimation, are the specific legal principles involved in applying summary judgment procedure in FOIA cases. First, and foremost in this regard, is the fundamental principle that "disclosure, not secrecy, is the dominant objective of the Act." Environmental Protection Agency v. Mink, 410 U.S. 73, 80 (1973). Second, flowing from this "dominant objective," is the principle that it is the agency's "ultimate burden of proof," Def. Mem. at 3, to justify the withholding of requested information, not the plaintiff's burden to establish the converse. Third, in evaluating whether the agency has carried this "burden of proof," is the principle that all conflicting evidence is to be construed - and all interpretive inferences are to be drawn - in the light most favorable to the plaintiff. See Sample v. Bureau of Prisons, 466 F.3d 1086, 1087 (D.C. Cir. 2006). Strict application of these plaintiff-friendly and disclosure-friendly principles is essential to ensuring that the presumption of disclosure under the FOIA is not rendered hollow by the agencies controlling the information at issue.

ARGUMENT

When all is said and done, despite the reams of paper before the Court, the decision of this case boils down to three basic issues: 1) whether the FBI adequately searched for

records responsive to plaintiff's FOIA requests; 2) whether the FBI properly balanced the personal privacy and public disclosure interests underlying its invocation of FOIA Exemptions 6 and 7(C); and 3) whether the FBI overreached in its blanket interpretation of implied assurances of confidentiality for all cooperating state and local law enforcement agencies under Exemption 7(D). We address each of these issues, in turn, below.

I. THE INADEQUACY OF THE FBI'S SEARCH FOR RECORDS

Paragraph 32 of plaintiff's Complaint asserted, in pertinent part, that: "The FBI has demonstrably failed to conduct an adequate search for records responsive to Braga's FOIA requests. For example, Exhibit D attached to Exhibit 1 to this Complaint contains copies of FBI documents responsive to one or more of Braga's FOIA requests. Yet these documents were NOT produced by the FBI in response to any of Braga's FOIA requests. We have possession of many other similar records as well." Nowhere in the FBI's motion for summary judgment, nor in Mr. Hardy's Declaration upon which that motion is based, does the FBI address the documents in Exhibit D which are missing from its FOIA responses.

When the Court reviews the above-referenced Exhibit D, it will see that those documents are focused on the transmission and requested forensic testing of evidence in the West Memphis Three case. As the record readily reveals, the FBI was aware that documents concerning such evidentiary and forensic testing issues were a principal focus of plaintiff's FOIA requests. See, e.g., Hardy Dec. at Paras. 22 & 36 ("the FBI Laboratory" was "contacted" because of "plaintiff's specific references to records about forensic and scientific testing in his requests"). The record also confirms that "the FBI provided . . . assistance in terms of forensic/scientific testing and profiling" to the state and local law enforcement authorities who were primarily investigating the West Memphis Three case. Hardy Dec. at Para. 37.

Yet, curiously, it is those very types of documents - especially those conveying forensic testing results - which are most glaringly missing from the FBI's FOIA responses. Why these documents were not found and produced in response to one or more of plaintiff's FOIA requests remains a complete mystery at this point. But the mystery surrounding this missing cache of documents cannot simply be ignored, as the defendant would have it, when the FBI is seeking a summary judgment from this Court on the adequacy of its search. This is the FBI after all, an agency whose mission is dedicated to finding, tracking and preserving evidence and information.

On the facts before this Court, with the benefit of all reasonable inferences therefrom being drawn in plaintiff's favor, it is impossible to believe that additional responsive records relating to the FBI's own forensic and scientific testing of evidence in the West Memphis Three case are not located somewhere within the FBI. Giving the agency the "presumption of good faith," the only plausible explanation for these missing records is that they simply have not been found yet. Otherwise, the logical inference from their absence would have to be that they were destroyed, a suggestion which no one has yet advanced.

Because such documents have existed in the past at the FBI as Exhibit D proves, and because the presumption of good faith requires the Court to assume that those documents have not been destroyed, the Court must necessarily conclude that such evidentiary and forensic testing records still exist somewhere at the FBI. It should, accordingly, order that a more exhaustive search be undertaken for these documents until they are found. See Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990)(additional searches should be made "if there are others that are likely to turn up the information requested").

What type of search that is should be largely left up to FBI personnel acting diligently in good faith to find the missing records. A good place to start, though, might be with expanded

search terms. According to Mr. Hardy's declaration, the FBI records systems were searched using only the following "terms: 'Damien Echols,' 'Steven Branch,' 'Michael Moore,' and 'Christopher Byers.'" Hardy Dec. at Paras. 34 & 36. Perhaps a search for records relating to the "West Memphis Police Department," its lead investigator "Inspector Gary Gitchell" and the "Arkansas State Crime Laboratory" might be more productive than the search terms used to date, given the subject matter of the types of records which are missing.

II. THE IMPROPRIETY OF THE FBI'S PERSONAL PRIVACY BALANCING

The FBI has withheld information responsive to plaintiff's FOIA requests under Exemptions 6 and 7(C). See Declaration of David M. Hardy ("Hardy Dec.") at Para. 4. Mr. Hardy explained the FBI's process for doing so as follows: "The practice of the FBI is to assert Exemption (b)(6) in conjunction with Exemption (b)(7)(C). Although the balancing test for Exemption (b)(6) uses the higher standard of "*would* constitute a clearly unwarranted invasion of personal privacy," and the test for (b)(7)(C) uses the lower standard of "*could* reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. Under both exemptions, privacy interests are balanced against the public's interest in disclosure." Id. at 16, n.13.

This "consolidated" analysis completely blurs - and, thus, eliminates - key distinctions between the two exemptions. As the Supreme Court has noted, "while both Exemptions 6 and 7(C) implicate privacy interests, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical and similar files." United

States Department of Justice v. Reporters for Freedom of the Press, 489 U.S. 749 (1989). Or, as the plaintiff's Complaint put it:

> The use of the phrase "clearly unwarranted" mandates that [Exemption 6] only apply when a balancing of the individual's right of privacy substantially outweighs the basic purpose of FOIA, which is to open agency action to the light of public scrutiny. . . .
> The use of the term "unwarranted" mandates that [Exemption 7(C)] only apply when an individual's right of privacy outweighs the basic purpose of FOIA . . .

Complaint at Paras. 8 & 9. Thus, the distinction between the two exemptions is not just the "would" and "could" phraseology identified by Mr. Hardy. It is also the substantially increased burden of balancing created by the use of the qualifier "substantially" in Exemption 6.

Because of these significantly different burdens of proof associated with these two exemptions, the exemptions are in fact NOT "sufficiently similar to warrant a consolidated discussion." The ready analogy is to the different burdens of proof between criminal and civil cases. It would never be acceptable to evaluate a defendant's criminal guilt with its associated standard of proof beyond a reasonable doubt through a consolidated discussion of that defendant's civil liability focusing on a preponderance of the evidence standard of proof. Because of the different standards of proof, these are "apples" and "oranges" which cannot be evaluated together. Yet that is effectively what the FBI has done here by blending together the analyses for Exemptions 6 and 7(C). The analysis of these exemptions simply must be conducted separately in order to have any integrity and to effect the clear statutory differences between the two of them.[1] The FBI should be ordered to conduct such a separate analysis.

[1] The problem associated with such "consolidated" analysis in this case is exacerbated even further by the fact that Mr. Hardy's declaration reads as if the FBI typically applied the lower standard of Exemption 7(C) - whether the privacy interests simply outweigh the public disclosure interests - in conducting that analysis. The result is an impermissible administrative transformation of the higher statutory burden of proof under Exemption 6 into the lower burden of proof under Exemption 7(C).

Moreover, in conducting a new, proper analysis of distinct Exemptions 6 and 7(C), the FBI should also expand its view of the importance of the public disclosure interests associated with the requested information. Those public disclosure interests are routinely given short shrift in the FBI's balancing, as described in Mr. Hardy's declaration. See Hardy Dec. at Paras. 47-57. For example, it is simply wrong to assert that "[t]here is very little public interest in knowing which people may have been of investigative interest to law enforcement, for whatever reason, in this case." Hardy Dec. at Para. 52.

Instead, as the Circuit Court of Appeals recognized in Roth v. United States, 642 F.3d 1161 (D.C. Cir. 2011), there is "considerable public interest in the potential innocence of individuals sentenced to death." Mr. Echols is just such an individual, see Complaint at Para. 11, and his counsel's FOIA requests amply identified such an interest in disclosure of the requested records. See id. at Para. 13. The examination of other people "of investigative interest," of course, is one paradigmatic means of finding evidence to prove Mr. Echols' innocence. The FBI should thus be instructed to give more weight to the "considerable public interest" in the West Memphis Three case when it reprocesses its Exemption 6 and 7(C) claims.

III. THE FBI'S OVERBROAD "IMPLIED" ASSURANCES OF CONFIDENTIALITY

The FBI has also withheld information responsive to plaintiff's FOIA requests under Exemption 7(D). See Hardy Dec. at Para. 4. In Paragraph 63 of his declaration, Mr. Hardy describes how the FBI broadly implies an "assurance of confidentiality" in order "to protect police reports and information obtained obtained by local law enforcement authorities that were provided to the FBI by law enforcement agencies for use in providing assistance in the investigation of the murders of the three young boys." According to Mr. Hardy: "Confidentiality

must be maintained to facilitate this type of law enforcement cooperation, which is necessary in criminal investigations." Id.

The FBI's position sweeps far too broadly. If Congress had wanted to exempt from disclosure under FOIA all information so shared between law enforcement authorities, it could easily have written such an exemption. But it did not do so. Instead, as pertinent herein, Congress created a statute which exempted information provided to law enforcement authorities only under either an express assurance of confidentiality[2] or an implied assurance of confidentiality. Under the FBI's interpretation, the breadth of the exception to disclosure for implied assurances of confidentiality would ultimately end up swallowing the general rule of disclosure under the FOIA.

Not surprisingly, courts have declined to accept such a sweeping invocation of Exemption 7(D)'s "implied assurance of confidentiality" test. For example, in Lazaridis v. United States Department of Justice, 766 F. Supp. 2d 134 (D.D.C. 2011), the FBI withheld information in response to a FOIA request by claiming that an implied assurance of confidentiality existed with regard to information supplied to it by the Ottawa County Michigan Sheriff's Department. The District Court rejected the claim, finding instead that "Exemption 7(D) seems inapplicable to this information because the FBI's source - the Ottawa County Sheriff's Department - is identified and, thus, not confidential." The same analysis applies here as well. The record in this case, including the documents already released by the FBI in response to plaintiff's FOIA requests, are replete with references to communications between the FBI and the West Memphis Police Department and/or the Arkansas State Crime Laboratory. See e.g., Hardy Dec., Exhibit T at Braga-1. Those "confidential" sources are already out of the bag.

[2] In this case, the FBI has also invoked the "express assurance of confidentiality" aspect of Exemption 7(D) to withhold certain information from plaintiff. We have no quarrel with that invocation.

Almost twenty years after the fact now, there is no warrant for protecting communications between them and the FBI any longer.[3]

In Department of Justice v. Landano, 508 U.S. 165, 179-180 (1993), the Supreme Court recognized that the applicability of Exemption 7(D) has to be determined on a case-by-case basis. Such a fact-specific examination of the exemption's premise of source confidentiality is wholly at odds with the FBI's claim of blanket confidentiality for all state and local law enforcement communications. It is, though, wholly consistent with the FOIA's "dominant objective" of public disclosure. The agency's Exemption 7(D) claims based on implied assurances of confidentiality in this regard should be rejected, and the information withheld from the plaintiff on that ground should now be provided to him.

CONCLUSION

For all of the foregoing reasons, the record before this Court is insufficient for the FBI to be granted the summary judgment it seeks on plaintiff's FOIA claims. Instead, the FBI should be directed: 1) to search further for the records indisputably missing from its responses to date; 2) to balance properly the personal privacy and public disclosure interests associated with its invocation of FOIA Exemptions 6 and 7(C); 3) to interpret more narrowly its sweeping assertion of implied assurances of confidentiality underlying many of its Exemption 7(D) claims; and 4) to produce to plaintiff immediately the crime scene videotape previously withheld from him.

[3] Although it is not entirely clear, it seems that such an Exemption 7(D) "implied assurance of confidentiality" is the ground upon which the FBI has stubbornly refused to provide plaintiff with a copy of the VHS Crime Scene Video Tape referenced in its FOIA responses. The withholding of this information is even more dubious because the crime scene here was a public space. See Cottone v. Reno, 193 F.3d 550 (D.C. Cir. 1999)(information in the public domain is usually not exempt from disclosure). A copy of this tape should therefore be ordered to be produced to plaintiff immediately.

Respectfully submitted,

__/s/_ Stephen L. Braga_____
Stephen L. Braga
(D.C. Bar No. 366727)
Law Office of Stephen L. Braga, PLLC
3079 Woods Cove Lane
Woodbridge, VA 22192
(617) 304-7124
slbraga@msn.com

October 5, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Plaintiff's Opposition To The FBI's Motion For Summary Judgment, Plaintiff's Statement Of Material Facts In Genuine Dispute and the Proposed Order thereto, were served on all counsel of record through the Court's ECF system.

__/s/_Stephen L. Braga_____
Stephen L. Braga