UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN L. BRAGA, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, Defendant.	)	Civil Action No.: 12-0139 (JEB)

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, the Federal Bureau of Investigation ("FBI"), respectfully submits this reply memorandum in support of its motion for summary judgment in this case, which arises under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). Plaintiff, a criminal defense attorney, seeks FBI investigative records related to a criminal prosecution of his client by the State of Arkansas.

Plaintiff challenges one aspect of the adequacy of the FBI's search for responsive records and makes several legal arguments regarding Exemptions 6, 7(C) and 7(D). The challenge to the agency's search fails in light of the supplemental explanation provided by the FBI herewith. The legal challenges to the Exemptions lack merit.

I. FBI Conducted an Adequate Search.

The case law regarding an agency's search has consistently focused on the process of the agency's search and, necessarily, any material flaws in that process; the courts have just as consistently rejected a challenge to the adequacy of a search that is based on a single document or small number of documents that arguably should have been located but were not. "[T]he

adequacy of a FOIA search is generally determined *not by the fruits* of the search, but by the appropriateness of the *methods* used to carry out the search." *See, e.g., Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) (citing *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994) (emphasis added)). *See also Morley v. CIA*, 508 F.3d 1108, 1120 (D.C. Cir. 2007); *Nation Magazine v. Customs Service*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995); *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir.1991).

Here, Plaintiff's challenge to the agency's search depends on the FBI's failure to locate six pages of information apparently related to a request by the West Memphis Police Department for an FBI Laboratory analysis and the results of that analysis; Plaintiff argues that this material should have been found by the FBI in responding to his FOIA request. Opp. Mot. Sum. J. (R.15) at 3-5 (referring to Exhibit A of his Complaint). Plaintiff's two pages of argument urges the Court to infer from his Exhibit an unspecified failure in the thoroughness of the FBI's search, but this inference is one that the courts consistently reject because it is simply based on the fruits of the search, and not on the agency's methods or good faith. It is the agency's search process that matters. *See, e.g., Brehm v. DOD*, 593 F. Supp. 2d 49, 50 (D.D.C. 2009) (agency's search was adequate where agency searched the two systems likely to have responsive records and agency explained that other systems were unlikely to have responsive records).

As to process, Plaintiff does nothing to suggest additional places that the FBI should have searched but did not. Plaintiff's only suggestion relating to methodology is that the FBI should have used additional search terms, which he identifies. Opp. at 5. As explained in the FBI's supplemental Declaration of Dennis J. Argall (attached hereto), these search terms would not reasonably be expected to locate additional materials because any records similar to Plaintiff's Exhibit A would not have been indexed according to the terms he suggests. (Argall Decl. ¶ 7.)

This means the agency's search need not have included these terms to be reasonably calculated to locate all responsive records, and the Court should uphold the FBI's search on that basis here. *See Larson v. Dep't of State*, 565 F.3d 857, 869 (D.C. Cir. 2009) ("adequacy is measured by the reasonableness of the effort in light of the specific request.").

In addition, the FBI nevertheless did conduct two additional searches based on Plaintiff's suggestions, and these additional searches located no additional responsive information. (Argall Decl. ¶ 7.[1]) The FBI also searched the Laboratory files again out of an abundance of caution and located no additional responsive records. (*Id*. ¶ 6.) Therefore, Plaintiff's challenge fails on the evidence here. Plaintiff raises no other challenges to the FBI's search. For these reasons, the Court should find the FBI's search adequate under FOIA.

II. FBI Properly Applied Exemptions 6 and 7(C).

The FBI invoked both Exemptions 6 and 7(C) to withhold the names and other identifying information for third parties, whom the FBI described in six categories:

- FBI Special Agents and support personnel,
- third parties of investigative interest,
- state or local law enforcement personnel**,**
- third parties merely mentioned,
- third party victims, and
- third parties who provided information to the FBI.

(Hardy Decl. ¶ 43 and accompanying chart.)

[1] As explained in the Argall Decl. ¶ 7, the FBI can neither confirm nor deny the existence of records indexed by the name of the West Memphis Police Department Inspector pursuant to Exemptions 6 and 7(C), in the absence of a privacy waiver from the Inspector or proof of his death, because there is not an overriding public interest in such information.

Plaintiff raises two challenges. First, he argues that the FBI improperly analyzed these two Exemptions together and that this "consolidated" analysis "blurs -- and thus eliminates -- key distinctions between the two exemptions." Opp. at 5. This argument ignores the analytical similarity between the two Exemptions; they both seek to balance exactly the same two concepts: personal privacy versus public interest in the information. The only difference here is the different weighting:

> FOIA Exemptions 6 and 7(C) seek to protect the privacy of individuals identified in certain agency records. Under Exemption 6, "personnel and medical files and similar files" may be withheld if disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Under Exemption 7(C), "records or information compiled for law enforcement purposes" may be withheld "to the extent that" disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). . . . [B]ecause Exemption 7(C) permits withholding of such records if disclosure would constitute an "unwarranted" invasion of personal privacy, while Exemption 6 requires a " clearly unwarranted" invasion to justify nondisclosure, "*Exemption 7(C) is more protective of privacy than Exemption 6" and thus establishes a lower bar for withholding material*.

ACLU v. Dep't of Justice, 655 F.3d 1, 6 (D.C. Cir. 2011) (emphasis added). Because Plaintiff does not challenge the FBI's law enforcement purpose in invoking Exemption 7, the only relevant difference here between Exemptions 6 and 7(C) is that Exemption 7(C) is more protective of privacy than Exemption 6. The FBI uniformly invoked these two Exemptions for the same information and the case law therefore makes clear that the Court may address the Exemption 7(C) claim first and if it upholds it, there is no need to reach Exemption 6 separately. Plaintiff's argument ignores this case law and logic, and fails as a result.

Plaintiff's second challenge under the privacy Exemptions is that he claims a strong public interest in the records because his client, Damien Echols, was at one time under a death sentence and the D.C. Circuit in *Roth v. DOJ*, 642 F.3d 1161 (D.C. Cir. 2011), found that there was "considerable public interest in the potential innocence of individuals sentenced to death." Opp.

at 7 (apparently quoting 642 F.3d at 1176). There are several problems with Plaintiff's reliance on *Roth*, however.

First, Echols is no longer under a death sentence, having been released by the State of Arkansas. Complaint ¶ 11. Whatever public interest there might be that derived from the ultimate sentence handed down to Echols, that public interest was necessarily lost once the sentence was modified, particularly where the prisoner was also released altogether.

Second, Plaintiff's Opposition does nothing to explain how the records he seeks would tend to show that Echols was innocent or that the FBI had done something wrong in its handling of the lab requests that would make out a public interest analogous to the one recognized in *Roth*. Neither does his Complaint. (*E.g.*, R.1 ¶ 33.) Instead, Plaintiff's claims on behalf of Echols now fall in the same category as those by requesters who seek to use FOIA to establish their innocence or otherwise challenge their conviction. *See, e.g., Lasko v. DOJ*, 684 F. Supp. 2d 120, 133 (D.D.C. 2010); *Robinson v. Attorney General of the United States*, 534 F. Supp. 2d 72, 83 (D.D.C. 2008); *Taylor v. DOJ*, 257 F. Supp. 2d 101, 110 (D.D.C. 2003).

Plaintiff does not challenge the privacy interests of the persons named or otherwise identified in the responsive records.

For these reasons, the Court should find that the balance of interests favors withholding and uphold the FBI's use of Exemptions 6 and 7(C).

III. FBI Properly Applied Exemption 7(D).

The FBI invoked Exemption 7(D) to protect from disclosure the names and identifying information for "confidential sources" as well as the "information furnished" by such those sources. *See* 5 U.S.C. § 552(b)(7)(D). Plaintiff raises three challenges here, all of which fail. First, he argues that the FBI cannot simply withhold all information provided to it by state and

local law enforcement entities. (Opp. at 8.) This argument fails because it ignores the fact that the FBI did not simply apply a blanket treatment to all such information but in fact determined that in each instance where a third party provided information as part of the FBI's assistance to the West Memphis Police Department, the third party did so under circumstances implying an expectation of confidentiality. (Hardy Decl. ¶¶ 60-71.)

The FBI withheld information and documents originating from the Ripon (California) Police Department. State/local police departments generally share information with the FBI only with the expectation that the FBI will not turn around and disclose their information. (Hardy Decl. ¶ 63.) Moreover, here, the circumstances support a conclusion that the Ripon Police Department expected the FBI to treat its records confidentially and not to release them publicly. (Att. T to Hardy Decl., R.12-1 at pages "Braga 333" to "Braga 335," which appear at R.12-1 at pages 395 of 697 to 397 of 697.) And all of the documents obtained from the Ripon Police Department bear dissemination markings stating "Controlled Document" and "Duplication or Reissuance Controlled by Law," with a notation of the date of release to the FBI, and so the FBI withheld these in full. Hardy Decl. ¶¶ 63. (This information was also withheld pursuant to Exemptions 6 and 7(C), which does not require a showing of an assurance of confidentiality.)

The other information withheld by the FBI came from individuals who contacted law enforcement with information they thought might help in the apprehension of the perpetrators of the murders. The FBI withheld these individuals' identities and identifying information, as well as information the identities of third parties and other singular information provided by the sources. Courts that have addressed implied confidentiality since the Supreme Court's decision in *DOJ v. Landano*, 508 U.S. 165 (1993), have recognized that the nature of the crime and the source's relation to it as the primary factors in determining whether implied confidentiality exists.

The crimes here were the murders of three children, and the sources believed they knew or had come into contact with people who possibly could have been responsible for the crimes. The FBI reasonably concluded that confidentiality can be implied under these circumstances.

Second, Plaintiff argues that the identities of the West Memphis PD and Arkansas State Crime Laboratory are no longer confidential. Opp. at 8. The short answer is that the FBI did not rely on Exemption 7(D) to protect the identities of the West Memphis PD or the Arkansas State Crime Laboratory, but instead the FBI invoked Exemption 7(D) protect the information shared by them, specifically autopsy reports for the three murdered boys. The statutory text of Exemption 7(D) makes plain that the information itself is protected. *See* 5 U.S.C. § 552(b)(7)(D) ("information furnished by a confidential source"). Plaintiff cites no case law that establishes that releasing the names of the source necessarily forces the agency to drop its reliance on the other clause in Exemption 7(D). The case law is to the contrary and directly supports the FBI's position that Exemption 7(D) still applies to the information even after the identity of the source has been acknowledged. *See Parker v. DOJ*, 934 F.2d 375, 380 (D.C. Cir. 1991); *see also Neely v. FBI*, 208 F.3d 461, 467 (4th Cir. 2000); *Ferguson v. FBI*, 957 F.2d 1059, 1069 (2d Cir. 1992); *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (*en banc*); *Cleary v. FBI*, 811 F.2d 421, 423 (8th Cir. 1987).

Third, Plaintiff argues in a footnote that a video tape of the crime scene should be released "because the crime scene here was a public space." Opp. at 9 n.3. Plaintiff's argument misunderstands the nature of the public domain doctrine in *Cottone v. Reno*, 193 F.3d 550 (D.C. Cir. 1999), because that doctrine looks to the agency's record itself, not to the substance of it. The question is not whether the crime scene is a public space but whether the video tape itself has been put into the public domain by the FBI. There is no indication that the FBI has done so here, so this challenge fails.

The FBI's supplemental declaration makes explicit that the FBI withholds the video tape on the basis of Exemptions 6, 7(C), and 7(D), applying these exemptions are set forth in the Hardy Decl. ¶¶ 47-48, 53, 55, and 63. (Argall Decl. ¶ 8.)

Conclusion

For these reasons, the FBI respectfully asks the Court to grant its motion for summary judgment and enter judgment in Defendant's favor on all claims.

October 15, 2012

Respectfully submitted,

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REPLY TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS IN DISPUTE

Defendant, the Federal Bureau of Investigation ("FBI"), respectfully replies to Plaintiff's Statement of Material Facts in Genuine Dispute. FBI maintains there are no genuine disputes of material fact and that the facts set forth in Defendant's Statement of Material Facts (R.12 at 17-19 of 19) entitle Defendant to summary judgment. Plaintiff failed to respond to the FBI's Statement of Material facts, and those facts should therefore be deemed conceded by the Court, per Rule 56 and Local Rules 7 and 56.1.

Instead, Plaintiff has asserted, in seven numbered paragraphs, distinct issues of fact he deems are material. As explained individually below, none of these raise a material dispute of fact, the resolution of which would require further fact-finding in order to resolve material issues in this case.

1. Plaintiff's Statement: "Exhibit D to Exhibit 1 to the Complaint in this case contains copies of FBI records responsive to one or more of plaintiff's FOIA requests."

FBI Reply: This is neither disputed nor material. For purposes of this motion, FBI concedes that the information was attached to Plaintiff's complaint and that it appears responsive, but that does nothing to shed light on the adequacy of the FBI's processes for its search.

2. Plaintiff's Statement: "Records referenced in Paragraph 1 above were not produced to plaintiff in response to any of his FOIA requests. See Declaration of David M. Hardy ("Hardy Decl.") at Exhibit T."

FBI Reply: same as 1 above.

3. Plaintiff's Statement: "Accordingly, the FBI's search for records responsive to plaintiff's FOIA requests was inadequate because it did not turn up such potentially responsive records."

FBI Reply: same as 1 above. In addition, Plaintiff's statement is purely a legal point and is not a factual dispute.

4. Plaintiff's Statement: "The FBI impermissibly blended together its privacy balancings for Exemptions 6 and 7(C), rather than addressing them as the separate exemptions they are. See Hardy Decl. at 16, n. 13."

FBI Reply: This is not a factual dispute, but at best a purely legal argument.

5. Plaintiff's Statement: "In conducting the impermissibly blended privacy balancings referenced in Paragraph 4 above, the FBI typically accorded too much weight to the privacy interests and too little weight to the public disclosure interests associated with the information in question. See Hardy Decl. ¶¶ 47-57."

FBI Reply: This is not a factual dispute, but at best a purely legal argument.

6. Plaintiff's Statement: "The FBI improperly invoked FOIA Exemption 7(D) in blanket fashion claiming that all information provided to it by state and local law enforcement

authorities came to the agency 'under an implied assurance of confidentiality.' Hardy Decl. ¶ 63."

FBI Reply: This Statement is demonstrably false, as explained in the Hardy Declaration. Because no reasonable fact-finder could reach the conclusion Plaintiff posits from this evidence, this is not a genuine dispute of fact.

7. Plaintiff's Statement: "The record in this case reveals factually, and the law in this Circuit establishes legally, that not all of the information from state and local law enforcement agencies provided to the FBI in the West Memphis Three case was given 'under an implied assurance of confidentiality.'"

FBI Reply: This is not a factual dispute, but instead primarily a legal argument. To the extent it touches on factual issues, Plaintiff fails to identify the precise dispute and the Hardy Declaration explains the assurances of confidentiality accorded to the various categories of information described therein. This is not a material dispute of fact.

October 15, 2012

Respectfully submitted,

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