UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LAWRENCE ROSENBERG, Plaintiff, v. UNITED STATES DEPARTMENT OF IMMIGRATION AND CUSTOMS ENFORCEMENT UNITED STATES MARSHALS SERVICE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, and FEDERAL BUREAU OF INVESTIGATION, Defendants.	CIVIL ACTION NO. 12-452 (CKK)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT FBI'S RENEWED MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

Defendant FBI's renewed motion for summary judgment and supporting materials fall far short of correcting the myriad deficiencies identified in the Court's August 12, 2013 Order. *First*, like the prior two declarations of David Hardy, the barebones Third Hardy Declaration still fails to provide sufficient facts to establish that the FBI's search for responsive records was adequate. Indeed, the FBI failed to comply with the Court's order to conduct a search "tailored to the nature of Plaintiff's request" (Mem. Op. at 11) because, as the FBI concedes, it searched only the Central Records System, and has not explained why responsive records are unlikely to be located in hard-copy files, on hard drives, or in other FBI databases.

Second, the FBI continues to assert overbroad exemption claims and to withhold material that FOIA requires it to disclose. The FBI has not properly "revise[d] its redactions or provide[d] a supplemental explanation for the use of Exemptions 6 and 7(C)" with respect to the 27 documents the Court identified, has provided no supporting facts for its assertions of implied assurances of confidentiality under Exemption 7(D), and has failed to justify its invocation of Exemption 7(E)-1. *See* Mem. Op. at 16, 23–24. The Court should deny the FBI's motion for summary judgment and grant Plaintiff's cross-motion.

ARGUMENT

I. THE FBI HAS FAILED TO CARRY ITS BURDEN TO ESTABLISH THAT ITS SEARCH FOR RESPONSIVE RECORDS WAS ADEQUATE

This Court concluded that the FBI failed to carry its burden to establish the adequacy of its search for responsive records because it "did not aver that the Central Records System is the only collection of files likely to contain responsive documents" nor that "the FBI searched all systems of records 'likely to possess the requested information.'" Mem. Op. at 11. Indeed, neither of the first two Hardy Declarations "even attempts to establish that the requested

communications between the FBI and various third parties prior to or after the raid are likely to be found in the Central Record System." *Id.* at 12.

The Third Hardy Declaration—which the FBI filed in support of its renewed motion for summary judgment—comes nowhere close to curing these failures of proof. The Third Hardy Declaration states in conclusory terms that "the CRS is the only FBI system of records where responsive records would reasonably reside" because Plaintiff's FOIA request sought "criminal investigative records." Third Hardy Decl. ¶ 6 (DE 71–2). But the Third Hardy Declaration elsewhere contradicts its own implicit premise that "criminal investigative records" are retained only in the CRS. *Id.* Indeed, the Third Hardy Declaration goes on to explain that "information on subjects whose electronic and/or voice communications have been intercepted as a result of . . . electronic surveillance conducted by the FBI" are *separately* maintained in the FBI's Electronic Surveillance ("ELSUR") database, not the CRS. *Id.* ¶ 6 n.1. Yet the Third Hardy Declaration admits that the FBI has *never* searched the ELSUR database for records responsive to Plaintiff's FOIA request. *See id.* ¶ 6.

Moreover, the Third Hardy Declaration does not exclude the possibility that responsive documents are likely to exist in the hard-copy files or on the hard drives of the agents involved in investigating Sholom Rubashkin and/or Agriprocessors, Inc. *See id.* Yet the FBI failed to search any hard-copy files or hard drives, without any explanation as to why those sources are not "likely to possess the requested information." Mem. Op. at 11.

Thus, the Third Hardy Declaration again fails to establish that the FBI adequately searched for "the requested communications between the FBI and various third parties" that Plaintiff requested. *Id.* at 12 & n.5. The FBI nonetheless offers three arguments in an attempt to justify its narrow search, all of which fail. *First*, the FBI states that its practice is to search for

responsive records only in the CRS unless there is "additional information pointing to records that may be outside the CRS." FBI Mem. at 3. But this Court already has directed the FBI to conduct a search "tailored to the nature" of Plaintiff's FOIA request, not one that merely conforms with the FBI's practice in other cases. Mem. Op. at 11. The FBI, however, has not searched for responsive hard-copy documents or for documents retained only on an agent's hard drive, despite the breadth of Plaintiff's request. Third Hardy Decl. ¶ 6. Moreover, the FBI uniquely possesses the key piece of information bearing on whether responsive material is maintained in ELSUR database: whether Mr. Rubhaskin and/or Agriprocessors were subject to "electronic surveillance conducted by the FBI." *Id.* If so, by the FBI's own description, information pertaining to such surveillance should be available in the ELSUR database. *See id.* Yet despite its unique knowledge, the FBI has refused to state whether it conducted electronic surveillance on Mr. Rubahskin and/or Agriprocessors. *See id.* ¶¶ 6–7. The Court therefore still has "no way to make th[e] determination" whether hard-copy files, hard drives, or the ELSUR or other databases contain "documents responsive to the Plaintiff's request in this case." Mem. Op. at 12 n.4.

Second, the FBI compounds this error when it suggests that "the records located by the FBI through its automated search of the CRS provided no indication that other potentially responsive records would exist in any other database or system." FBI Mem. at 6. Yet the FBI elsewhere argues that the reasonableness of a search is judged by "the method of the search rather than its results." *Id.* at 5. The FBI therefore is simply wrong when it argues that its refusal to search hard-copy files, hard drives, or the ELSUR or other databases was reasonable merely because information in one database, the CRS, did not point toward those other separate sources. *See id.* at 6.

Finally, the FBI misses the point when it argues that "[a]ny relevant communications between third parties . . . would logically be indexed in the criminal investigative file" maintained in the CRS. *Id.* at 7. Once again, the FBI makes no attempt to square this statement with the FBI's own admission that the fruits of electronic searches are maintained in the separate ELSUR database, or with the possibility that responsive records remain in hard-copy files or on hard drives. *See id.* at 6 n.2. For this reason as well, the FBI has failed to establish that its search for responsive records was adequate.

II. THE FBI CONTINUES TO ASSERT OVERBROAD EXEMPTIONS AND TO WITHHOLD REASONABLY SEGREGABLE MATERIAL

The Court ordered the FBI to "either revise its redactions or provide a supplemental explanation for the use of Exemptions 6 and 7(c)" with respect to 27 pages of responsive material, to respond to Plaintiff's challenge regarding "the adequacy of FBI's showing that the interviewees were *implicitly* assured that their identities would remain confidential" for purposes of Exemption 7(D), and to provide additional justification for certain of its invocations of Exemption 7(E). Mem. Op. at 16, 23–24 (emphasis in original). The FBI's submission, however, does not discharge these burdens. Accordingly, the Court should deny the FBI's motion for summary judgment and grant Plaintiff's cross-motion.

A. The FBI Has Failed To Justify Its Use Of Exemptions 6 And 7(C) With Respect To The 27 Pages Identified In The Court's Order

The FBI has failed "to provide a supplemental explanation for the use of Exemptions 6 and 7(C)" with respect to the 27 pages of responsive material identified in the Court's order. *See* Mem. Op. at 16. The Third Hardy Declaration and the FBI's brief merely recite, in conclusory terms, that the FBI "conducted an additional review of these records" and "determined that additional information could be segregated for release." Third Hardy Decl. ¶ 10; FBI Mem. at 8. Yet the FBI provides no further details or explanation regarding the information it continues to

withhold under Exemptions 6 and 7(C). *See* Third Hardy Decl. ¶ 10; FBI Mem. at 8. This failure not only contravenes the Court's order, but also underscores the FBI's failure to provide "a detailed justification" for its redactions. *Valfells v. CIA*, 717 F. Supp. 2d 110, 120 (D.D.C. 2010).

The FBI does not stop with this failure, but continues to assert overbroad exemption claims with respect to the 27 pages. Indeed, the FBI made *no* additional disclosures on 2 of the 27 pages, Rubashkin-934 and Rubashkin-935. *See* FBI Mem. Ex. A. The FBI thus has not so much as modified any of the sweeping exemption claims on those documents, even though the FBI asserted only Exemptions 6 and 7(C) to justify at least one redaction on Rubashkin-935. *See id.*

The FBI's supplemental disclosures on several of the documents are scant at best—and the FBI offers nothing but the same worn "conclusory statements" to justify them. *Valfells*, 717 F. Supp. 2d at 120. The FBI disclosed an additional 7 words or fewer on at least 7 of the documents, making those additional disclosures worthless as a practical matter. *See* FBI Mem. Ex. A (Rubashkin-18 (4 words), Rubashkin-19 (4 words), Rubashkin-171 (4 words), Rubashkin-323 (6 words), Rubashkin-548 (7 words), Rubashkin-795 (5 words), Rubashkin-1008 (3 words)). And the FBI continues to withhold extensive information—sometimes including entire paragraphs—and not just names or other unique information that could identify a third party. *See, e.g.*, *id.* (Rubashkin-70, Rubashkin-874, Rubashkin-934, Rubashkin-935). The FBI's failure to provide supporting facts for its insistence on these overbroad exemption claims warrants denial of the FBI's motion and granting Plaintiff's cross-motion. *See, e.g.*, Mem. Op. at 16; *Am. Civil Liberties Union v. U.S. Dep't of Def.*, 628 F.3d 612, 629 (D.C. Cir. 2011).

B. The FBI Does Not Show That Interviewees Were Implicitly Assured Confidentiality For Purposes Of Exemption 7(D)

This Court previously held that it would consider "a number of factors" in determining whether the FBI established that interviewees were implicitly assured confidentiality and, thus, whether the FBI's invocation of Exemption 7(D) was proper. Mem. Op. 22. Those factors include "the character of the crime at issue," "the source's relation to the crime," whether the source received payment, and whether the source has an "ongoing relationship with the law enforcement agency and typically communicates with the agency only at locations and under conditions which assure the contact will not be noticed." *Id.* (citing *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 179 (1993)).

The FBI makes passing reference to the *Landano* factors, but does not offer any developed factual or legal arguments to demonstrate that it has satisfied those factors here. *See* FBI Mem. at 9–10. In fact, much of the FBI's submission focuses on the policy reasons animating Exemption 7(D), not on the showing required to invoke it. *See* Third Hardy Decl. ¶ 12; FBI Mem. at 11. But the undisputed fact that Exemption 7(D) is valuable to law enforcement authorities (*see* Third Hardy Decl. ¶ 12; FBI Mem. at 11) does not address the propriety of the FBI's attempt to use that Exemption here.

Moreover, to the extent the FBI addresses the *Landano* factors on the merits, it concedes that the interviewees "were not paid sources" (Third Hardy Decl. ¶ 11; FBI Mem. at 10) and otherwise merely repeats—without any new supporting facts—its conclusory assertions that the alleged crimes involved "fraudulent financial activities" and that the interviewees "were interviewed under circumstances in which an assurance of confidentiality may be implied." *Compare* First Hardy Decl. ¶ 46 (DE 46-1) *and* Mem. Op. at 22 *with* Third Hardy Decl. ¶ 11. Of course, those assertions are insufficient to discharge the FBI's burden, or this Court would have

not have ordered the FBI to supplement them. *See* Mem. Op. at 22–23. But even now, the FBI offers no "detailed justification" or supplemental information for these assertions, such as a generic description of the location of the interviews, the participants, the level of formality or informality, or any representations conveyed by the interviewers to the interviewees. *Valfells*, 717 F. Supp. 2d at 120. It therefore has failed to establish that its invocation of Exemption 7(D) is proper.

C. The FBI Has Failed To Justify Its Invocation Of Exemption 7(E)-1

Finally, the FBI's submission does not justify its invocation of Exemption 7(E)-1 with respect to the 5 responsive documents identified by the Court, Rubashkin-56, Rubashkin-139, Rubashkin-157, Rubashkin-734 and Rubashkin-735. *See* Mem. Op. at 23–25. Indeed, the FBI does not make *any* additional disclosures on *any* of those 5 documents, but instead stands on all of its prior redactions without providing sufficient facts to support them. *See* FBI Mem. Ex. A.

First, the FBI's discussion of Rubashkin-734 and Rubashkin-735 still does not explain "how revealing the specific questions the agency suggested be asked as part of an investigation of possible obstruction of justice . . . could reasonably be expected to risk circumvention of the law." Mem. Op. at 24. The FBI merely asserts, without explanation, that disclosure of these questions could somehow "permit[] criminals to predict investigative questions, and to adjust their responses and behaviors to avoid detection or mislead investigations." Third Hardy Decl. ¶ 15. At the same time, however, the FBI acknowledges that these questions were tailored to the specific allegations against Mr. Rubashkin and others in one specific case. *See id.* It therefore remains unclear how disclosure of these questions might contribute to some future obstruction of justice crime.

Second, the FBI for the first time invokes the Bank Secrecy Act, and argues that the Act supports its Exemption 7(E) claims on Rubashkin-56, Rubashkin-139, and Rubashkin-157. *See*

id. ¶ 16. The FBI, however, does not provide any factual support for its barebones assertion that these materials are protected by the Act. *See id.* The FBI does not even identify, in generic terms, the information redacted or the type of report involved, even though the FBI acknowledges that "the nature or type of reports which can be obtained pursuant to the [Act] are known to the public." *Id.* And the FBI does not explain how disclosure of the redacted information would permit circumvention of the law or evasion of FBI investigative efforts in future cases. *See id.*

CONCLUSION

The Court should deny the FBI's motion and grant Plaintiff's cross-motion.

Respectfully submitted,

Date: September 11, 2013

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