

**IN THE CIRCUIT COURT FOR ST. CHARLES CITY
TWENTY-FIRST JUDICIAL CIRCUIT
STATE OF MISSOURI**

American Civil Liberties Union,)	
of Missouri Foundation, Inc., and)	
)	
Mustafa A. Abdullah,)	
)	Cause No. 14SL-CC02395
Plaintiffs,)	
)	Division: 9
v.)	
)	Judge: David L. Vincent, III
County of St. Louis,)	
)	
Respondent.)	

**MEMORANDUM IN SUPPORT OF THE FEDERAL BUREAU OF INVESTIGATION'S
MOTION TO INTERVENE
TO RETRIEVE CERTAIN FEDERAL RECORDS AND
PROTECTING SUCH RECORDS FROM DISCLOSURE**

COMES NOW Intervener, Federal Bureau of Investigation (“FBI”), by and through its attorneys, Richard G. Callahan, United States Attorney for the Eastern District of Missouri, and Nicholas P. Llewellyn, Assistant United States Attorney for said District, and in support of its Motion for to Intervene to Retrieve Certain Federal Records and Protecting Such Records from Disclosure, submits this memorandum in support of the FBI’s Motion to Intervene in this action for the limited purpose of authorizing and requiring return of certain FBI-generated materials currently held in the office of the St. Louis County Counselor, and seeking an order protecting such records from disclosure to Plaintiffs by Defendant County of St. Louis under the Missouri Sunshine Law.

BACKGROUND

During late 2013 and thereafter, the FBI generated materials from “their investigation of Ed Mueth fraud.” *Gov’t Exh. D.* In the course of its investigation, and in connection with the ongoing investigation by Defendant St. Louis County, FBI-generated material was provided January 31, 2014, to Defendant St. Louis County, through the St. Louis County Counselor’s Office. *Gov’t Exh. A.* On March 3, 2014, the FBI provided the St. Louis County Counselor’s Office with “an electronic version of FBI reports on a compact disc...” *Gov’t Exh. B.* The FBI-generated material was accompanied by a cover letter from the FBI expressly stating:

“Please be advised that the documents are loaned to your agency and remain the property of the FBI. The documents and their contents are not to be distributed outside your agency, and the documents must be returned to the FBI once your agency no longer needs them.” (Emphasis added) *Gov’t Exhs. A & B*

Upon information and belief, some or all of the FBI-generated materials were/or are being relied upon by the St. Louis County Counselor’s Office, in its official capacity, to determine whether to pursue criminal charges and/or civil asset recovery.

By letter dated July 2, 2014, Plaintiff American Civil Liberties Union (“ACLU”) through its Program Associate, Plaintiff Mustafa Abdullah, requested copies of:

- 1) The report prepared by the Federal Bureau of Investigation (“FBI”) regarding embezzlement of county funds by Edward Mueth (“Mueth Report”);
- 2) Any and all documents provided by the FBI to Saint Louis County as part of the Mueth Report; and
- 3) Any and all documents regarding distribution of the Mueth Report written, electronically stored, or retained by Saint Louis County or any official or employee of St. Louis County. *Gov’t Exh. C.*

By letter dated, July 7, 2014, Defendant St. Louis County, through St. Louis County Counselor Patricia Redington, denied the request pertaining to the “documents prepared by the FBI and provided to this office...you are free to make a Freedom of Information Act request directly to the

FBI if you believe the records should be released.” *Gov’t Exh. D.* Defendant St. Louis County made a discretionary decision not return the FBI-generated materials until “such time as the FBI advises that we may release the records...” *Gov’t Exh. D.* On July 16, 2014, Plaintiffs filed the Petition in this action regarding disclosure of the documents listed in the enumerated paragraphs above, seeking release of the FBI-generated materials under the Missouri Sunshine Law, Mo. Rev. Stat. § 610 *et. seq.* *Petition.* Defendant St. Louis County has not yet returned the FBI-generated investigative materials to the FBI or to the Office of the United States Attorney for the Eastern District of Missouri.

On July 16, 2015, Plaintiffs also filed a Motion for Temporary Restraining Order “to simply maintain the status quo in which Defendant maintains a copy of the documents requested.” *Motion for TRO*, ¶7. Neither the FBI nor the Office of the United States Attorney seeks return of the FBI-generated material at this time due to the on-going investigation, as well as Plaintiff’s pending Petition. Therefore, the status quo should not be affected.

Neither Plaintiffs nor Defendant have sought, pursuant to 28 C.F.R. Part 16, Subpart B (§16.21, *et seq.*), approval from the United States Department of Justice (DOJ) for disclosure of the subject records which are the property of the FBI, a component of DOJ. DOJ has not approved the full disclosure of such FBI-generated property to the Plaintiffs, did not authorize Defendant St. Louis County to disclose said FBI-generated materials or their contents to any person or agency for any purpose beyond the subject investigation, and has not authorized Defendant St. Louis County to distribute such documents outside the office of the St. Louis County Counselor.

ARGUMENT

The Federal Bureau of Investigation has sought to intervene here to protect disclosure of FBI-generated material under the Missouri Sunshine Law, or immediately following the

completion of Defendant St. Louis County's investigation, and to object to the disclosure of the FBI-generated materials to Plaintiffs as violative of the investigative techniques and investigatory files or law enforcement evidentiary privileges and the privacy rights of those subject of FBI-generated materials in this matter.

A. Return of FBI Records

Pursuant to 28 U.S.C. §534(a)(4), the FBI as the designee of the Attorney General is specifically authorized to "exchange such records and information with, and for the official use of, authorized officials of the . . . States, cities, and penal and other institutions." Accordingly, the FBI was authorized to provide to the St. Louis County Counselor's Office, for its review and official use, written and electronic FBI-generated materials which memorialized the FBI interviews and investigation. However, such exchange of records authorized by Section 534(a)(4) is "subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 U.S.C. § 534(b). Where, as here, the FBI seeks to protect, and eventually retrieve, its own FBI-generated materials loaned to the St. Louis County Counselor's Office, particularly where the written and electronic material at issue here was accompanied with a cover letter from the FBI containing the specific language cited above indicating that they are loaned FBI documents. Thus, the FBI is entitled to retrieve such written and electronic FBI-generated material. United States v. Napper, 887 F.2d 1528 (11th Cir. 1989). In Napper, the United States brought suit against the City of Atlanta, seeking the return of FBI documents loaned to law enforcement officials during the investigation of local child murder cases. Local news media intervened, seeking to dismiss the action. The Eleventh Circuit held that the United States was entitled to return of the documents, despite a state court's order requiring the City to produce the records to the media under Georgia's Open Records Act. Id. at 1530. Nor does the fact that some of the documents may have been disclosed beyond the authorization of the FBI or the DOJ

now affect its right to recover its own documents. Id. A document “created at government expense, i.e., with government materials and on government time,” is “indisputably the property of the Government.” Pfeiffer v. CIA, 60 F.3d 861, 864 (D.C. Cir. 1995).

Defendant St. Louis County’s only expectation was to use the written and electronic FBI-generated materials for a very limited purpose— as a loan —and then to give it back. When the St. Louis County Counselor’s Office was given a letter which clearly stated that the material was federal property, and that the FBI-generated materials were simply loaned to that office, Defendant St. Louis County acquired no legally protected interest in the FBI-generated materials—and any release of that FBI-generated property to a newspaper, such as Plaintiffs ACLU and Mustafa Abdullah, is a release of something that the St. Louis County Counselor’s Office does not own in violation of the implied contract indicated in the cover-letters accompanying the material, and in violation of any express contract which the Office of the United States Attorney or FBI made when they loaned the materials for their very limited purpose.

Property rights are a bundle of sticks. “The hallmark of a protected property interest is the right to exclude others. That ‘is one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd., 527 US 666, 673(1999)(citation omitted). The language contained in the cover letters of January 31, 2014 and March 3, 2014, at the clearly excludes others, namely anyone except the specific agency to whom the federal property is loaned.

If the FBI (and any other federal law enforcement agency) knows that its sensitive reports may be disseminated publicly, after they are merely loaned to just one agency, the willingness of federal law enforcement to cooperate with local agencies will be seriously compromised and could sever the relationship that the FBI has with state and local law enforcement. Maintaining close cooperative relationships with state and local agencies is an essential component of the FBI’s law

enforcement strategy. The public interest will not be served if the FBI generated material at issue here are subject to a state sunshine law, which nullifies the original limited loan. In addition, the public interest and interests of justice are directly effected as it would not be inconceivable that as a result of having no federal protection of the loaned federal property, federal law enforcement agencies may require state and local law enforcement and prosecutor's offices to appear at the federal agency's office where the material is maintained for viewing or listening without allowing the federal property off of the federal premises.

Under these circumstances, this Court should order that all of the FBI-generated investigative material, both written and electronic, shared with Defendant St. Louis County regarding the investigation at issue pursuant to 28 U.S.C. §534(a)(4), including all copies of such records, if any, be returned to the FBI and not produced by Defendant St. Louis County under a Missouri Sunshine Law request.

B. Law Enforcement Investigative Privilege

The courts have recognized "a public interest in minimizing disclosure of documents that would tend to reveal law enforcement investigative techniques or sources." Black v. Sheraton Corp. of America, 564 F.2d 531, 545 (D.C.Cir.1977). This public interest has been protected by what has been referred to as the law enforcement investigative privilege utilized primarily in the context of "the harm to law enforcement efforts which might arise from public disclosure of . . . investigatory files." United States v. Winner, 641 F.2d 825, 831 (10th Cir.1981) (quoting from Black v. Sheraton). The privilege is applied "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witnesses and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise prevent interference in an investigation." In re Department of Investigation, 856

F.2d 481, 484 (2d Cir.1988). There is a strong presumption against overriding or lifting the privilege. See, Dellwood Farms, Inc. v. Cargill, Inc., 128 F.3d 1122, 1125 (7th Cir. 1997).

That the written and electronic FBI-generated materials sought by Plaintiffs are investigatory records compiled for law enforcement purposes is unequivocal. The FBI is a law enforcement agency. See 28 C.F.R. § 0.85. The records which the FBI seeks to have returned and protected memorialize the FBI's investigation. The material may contain information provided about the potential criminal activity of third parties. Disclosure of statements made by interviewees could lead to reprisals against them for furnishing the information provided to the FBI. See, Kanter v. Federal Bureau of Investigation, 478 F. Supp. 552, 554-55 (N.D. Ill. 1979). Such reprisals may deter others with knowledge from coming forward and divulging information in the future.

Here, disclosing all the reports and materials prepared by the FBI agent(s) in connection with the subject investigation would tend to compromise the effectiveness of investigative methods and techniques and would reveal investigatory records compiled for law enforcement purposes. Consequently, they may be protected from disclosure by the law enforcement investigative privilege. ¹ United States v. Dellwood Farms, 128 F.3d at 1125; In re Dept. of Investigation 856 F.3d at 484; Black v. Sheraton Corp., 564 F.2d at 545-548; Jabara v. Kelley, 75 F.R.D. 475, 493 (E.D.Mich. 1977).

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Typically, assertion of a law enforcement evidentiary privilege is made by a formal claim of privilege by the responsible official in the department specifically describing the information for which protection is sought and the rationale as to why the information falls within the scope of the privilege. U.S. v. Winner, 641 F.2d at 831. As the parties to this action have not yet properly sought disclosure of the records as required by 28 C.F.R. § 16.21, *et seq.*, the responsible Department of Justice official has not yet formally asserted the privilege. At such time as the subject records are returned to the FBI and the parties make the appropriate requests for them pursuant to the applicable DOJ regulations, the FBI would provide an index of any documents for which the law enforcement privilege is formally asserted. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).

Revealing that a third party is or has been the subject of an FBI investigation is likely to constitute an invasion of that third person's privacy in violation of the statutory protections found in Exemptions 6 and 7C of the Freedom of Information Act ("FOIA") 5 U.S.C. § 552(b)(6), (7)(c); see, Antonelli v. Federal Bureau of Investigation, 721 F.2d 615, 618 (7th Cir. 1983)

In regard to the personal privacy aspects of disclosure, the Federal Privacy Act, 5 U.S.C. § 552a, the FBI also acknowledges that much of the information sought to be returned and protected involves an investigation conducted by the FBI to which there is no investigative interest to the FBI at this time. In Black v. Sheraton, the court squarely addressed the issue of applying the subject privilege to past investigations and unequivocally held that the privilege does apply to past investigations: "We reject plaintiff's contention that the public interest in nondisclosure can be disregarded simply because the principal investigation involved here has apparently been concluded." In so ruling the court reasoned:

It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.
(citations omitted)

Black v. Sheraton, 564 F.2d at 546.

Here, as in Black, this Court should order that all of the FBI-generated investigative materials shared with Defendant St. Louis County regarding the investigation at issue, including all copies of such records, if any, be returned to the FBI or the United States Attorney to determine if a law enforcement privilege exists to be asserted within the FBI-generated protected materials.

C. Plaintiffs Remedy Is To Seek Disclosure From the FBI Pursuant to the Freedom Of Information Act

The FOIA enumerates nine categories of records that Congress determined should be exempt from public disclosure. 5 U.S.C. § 552(b). As noted by the Supreme Court in CIA v.

Sims, 471 U.S. 159, 166-167 (1985), the mandate of the FOIA calls for a broad disclosure of Government records. Congress recognized, however, that public disclosure is not always in the public interest and thus provided that agency records may be withheld from disclosure under any of the nine exemptions defined in 5 U.S.C. § 552(b).

Plaintiffs are currently seeking disclosure under the Missouri Sunshine Law but not FOIA. With regard to each redacted portion, the FBI has asserted that the redacted information is exempt under (“Exemption 6”), 5 U.S.C. § 552(b)(6), and/or 5 U.S.C. § 552(b)(7)(C) (“Exemption 7C”). Under Exemption 6, 5 U.S.C. § 552(b)(6), the FOIA exempts from disclosure: “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” The Supreme Court has broadly defined “similar records” as “government records containing information which applies to a particular individual.” See Gordon v. FBI, 390 F.Supp.2d 897, 902 (N.D.Cal. 2004). Here, because the FBI-generated materials contain information which applies to a particular individual(s), this Court should find that it is a “similar file” within the meaning of Exemption 6.

Similarly under Exemption 7C, 5 U.S.C. § 552(b)(7)(C), the FOIA also exempts: “Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy...” Exemption 7C is incorporated into the FBI regulations which require: “If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that individual is deceased... will help the processing of your request.” 28 C.F.R. §16.3(a). Exemption 7C allows for a broader exemption for privacy interests. In Dep’t of Justice v. Reporters Committee, 489 U.S. 749 (1989), the Supreme Court held “as a categorical matter that a third party’s request for law enforcement records or information about a private citizen can

reasonably be expected to invade that citizen's privacy." Id. at 780. Furthermore, individuals have a strong interest in non-disclosure of documents in which they may "be associated with criminal activity." Schiffer v. FBI, 78 F.3d 1405, 1409 (9th Cir. 1996). The mere reporting of an incident does not eliminate the privacy interest of individuals. See Fiduccia v. Dep't of Justice, 185 F.3d 1035, 1047 (9th Cir. 1999) (holding that previously reported incidents of an FBI search did not diminish the individuals' privacy interest). Thus, this Court should also hold that even if the incident(s), which is contained in the FBI-generated materials at issue here, was made public in news reports, the information contained therein still maintains strong privacy interests that favor non-disclosure under Exemptions 6 and 7C.

The FBI maintains that without a Privacy Waiver, disclosure of law enforcement records or any information that may exist in an FBI file about a third party can reasonably be considered an unwarranted invasion of personal privacy, and that such records are exempt from disclosure pursuant to Exemptions 6 and/or Exemption 7C. The FBI-generated materials at issue in this case are federal law enforcement records concerning individuals other than Plaintiffs and Plaintiffs have provided no Privacy Waiver(s) consenting to disclosure of the information. The privacy interests of the individuals outweigh any public interest in disclosure under Exemptions 6 and/or 7C of the FOIA.

In 2007, the St. Louis Post-Dispatch sought FBI-generated material from the St. Charles Prosecuting Attorney. The court found in that case that:

"...The documents which are at issue in this case are subject to section 610.021 RSMo., not section 610.100 RSMo. Section 610.021(14) ["Records which are protected from disclosure by law;"] allows defendant to close documents which are protected from disclosure by the Freedom of Information Act, and the documents at issue here are protected from disclosure by 5 U.S.C. 552(b)(7)(c). Defendant may therefore close the records and deny Petitioner's request to produce them...." *Gov't Exh. E*.

CONCLUSION

Based upon the authority and reasoning discussed in this Memorandum, Intervener FBI moves this Court to grant the FBI's intervening interest in protecting the written and electronic FBI-generated materials from disclosure under the Missouri Sunshine Law, and order Defendant St. Louis County and its counsel not to disclose the material to Plaintiffs and return the subject records at the completion of its investigation, including all copies, if any, to the FBI or the United States Attorney to determine if a law enforcement privilege exists to be asserted within the FBI-generated protected material and order Plaintiffs to continue their pursuit of disclosure of the federal property under the FOIA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, the foregoing *Memorandum in Support of the FBI's Motion to Intervene* was filed with the Court, and by sent electronically to the following:

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