No. 18-2573 (L); 22-2186

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY L. VIOLA,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Records/Information Dissemination Section; UNITED STATES DEPARTMENT OF JUSTICE, Executive Offices for United States Attorneys-Freedom of Information & Privacy Staff; CUYAHOGA COUNTY MORTGAGE FRAUD TASK FORCE;

Defendants–Appellees,

KATHRYN CLOVER,

Defendant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
No. 1:15-cv-00242-SPB, U.S. District Judge Susan Paradise Baxter

BRIEF OF APPELLANT WITH ATTACHED JOINT APPENDIX VOLUME 1

Alan Chen, Law Student
Daniel Mejia-Cruz, Law Student
YALE LAW SCHOOL ADVANCED APPELLATE LITIGATION PROJECT*
127 Wall Street
New Haven, CT 06511
(914) 316-2302

David Roth, Esq.
Tadhg Dooley, Esq.
Pro bono counsel
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

Attorneys for Appellant

*This brief has been prepared by the Advanced Appellate Litigation Project, operated by Yale Law School. The brief does not purport to present the school's institutional views, if any. The motions for admission of law students Alan Chen and Daniel Mejia-Cruz were filed on April 3, 2023, and are pending with the Court.

TABLE OF CONTENTS

Table of Authorities iii
Introduction 1
Jurisdictional Statement 4
Issues Presented for Review 4
Related Cases and Proceedings 5
Statement of the Case 6
I. The Prosecution of Anthony Viola 6
II. Viola's FOIA Requests and This Lawsuit 8
III. The Government's Initial *Vaughn* Indices 11
IV. The District Court's Initial Decisions 12
A. The District Court's Grant of the Task Force's Motion to Dismiss 12
B. The District Court's Grant of Summary Judgment to the FBI and EOUSA 15
V. The First Appeal and Proceedings on Remand 16
VI. The District Court's Summary Affirmance and the Present Appeal 19
Summary of the Argument 20
Standard of Review 22
Argument 24
I. The District Court erred in granting summary judgment to the EOUSA and the FBI. 24
A. The District Court failed to adequately explain the reasons for its summary judgment decision. 24
B. The FBI and EOUSA failed to establish the adequacy of their search for records. 28

C. The FBI and EOUSA failed to establish that FOIA exemptions applied to all the documents they withheld. 36

II. The District Court erred in granting the Task Force's motion to dismiss. 49

A. The only question presented by the Task Force's motion to dismiss was whether the Task Force was a federal agency under FOIA. 50

B. The District Court improperly considered information outside the pleadings when deciding the Task Force's motion to dismiss. 51

C. Viola plausibly alleged that the Task Force was a federal agency subject to FOIA. 57

Conclusion 59

TABLE OF AUTHORITIES

Page(s)

Cases

Abdelfattah v. U.S. Department of Homeland Security,
488 F.3d 178 (3d Cir. 2007) 31, 33, 48

American Civil Liberties Union of New Jersey v. Federal Bureau of Investigation,
733 F.3d 526 (3d Cir. 2013) 36

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 55

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 55

Brehm v. U.S. Department of Justice Office of Information & Privacy,
591 F. Supp. 2d 772 (E.D. Pa. 2008) 50

Campbell v. U.S. Department of Justice,
164 F.3d 20 (D.C. Cir. 1998) 30, 33

Carter v. Stanton,
405 U.S. 669 (1972) 52, 56

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 52

Coastal States Gas Corp. v. Department of Energy,
644 F.2d 969 (3d Cir. 1981) 25, 28

Coffey v. Bureau of Land Management,
249 F. Supp. 3d 488 (D.D.C. 2017) 30, 34

Competitive Enterprise Institute v. Office of Science & Technology Policy,
827 F.3d 145 (D.C. Cir. 2016) 35

Conoco Inc. v. U.S. Department of Justice,
687 F.2d 724 (3d Cir. 1982) 36

Cottone v. Reno,
193 F.3d 550 (D.C. Cir. 1999) 41

Cox Broadcasting Corp. v. Cohn,
420 U.S. 469 (1975) 41

Davin v. U.S. Department of Justice,
60 F.3d 1043 (3d Cir. 1995) 23, 25, 37, 39, 41, 43, 44, 45, 47

Department of Air Force v. Rose,
425 U.S. 352 (1976) 36

DiBacco v. U.S. Army,
795 F.3d 178 (D.C. Cir. 2015) 33

Dluhos v. Strasberg,
321 F.3d 365 (3d Cir. 2003) 24

Doe v. Princeton University,
30 F.4th 335 (3d Cir. 2022) 23, 52

Eberg v. U.S. Department of Defense,
193 F. Supp. 3d 95 (D. Conn. 2016) 30

Erickson v. Pardus,
551 U.S. 89 (2007) 24

Ferri v. Bell,
645 F.2d 1213 (3d Cir. 1981) 40, 43

Founding Church of Scientology of Washington, D.C., Inc. v. Bell,
603 F.2d 945 (D.C. Cir. 1979) 16, 25, 26

Guidotti v. Legal Helpers Debt Resolution, LLC,
716 F.3d 764 (3d Cir. 2013) 54

Hinton v. Department of Justice,
844 F.2d 126 (3d Cir. 1988) 37

Manna v. U.S. Department of Justice,
51 F.3d 1158 (3d Cir. 1995) 23, 37

Morley v. Central Intelligence Agency,
508 F.3d 1108 (D.C. Cir. 2007) 28, 29

Oglesby v. U.S. Department of Army,
920 F.2d 57 (D.C. Cir. 1990) 33

OSHA Data/CIH, Inc. v. U.S. Department of Labor,
220 F.3d 153 (3d Cir. 2000) 36

Pension Benefit Guarantee Corp. v. White Consolidated Industries, Inc.,
998 F.2d 1192 (3d Cir. 1993) 16, 51

Robert D. Mabe, Inc. v. OptumRX,
43 F.4th 307 (3d Cir. 2022) 54

In re Rockefeller Center Properties, Inc. Securities Litigation,
184 F.3d 280 (3d Cir. 1999) 53

Rose v. Bartle,
871 F.2d 331 (3d Cir. 1989) 16, 52, 53, 54

Sheet Metal Workers International Association, Local Union No. 19 v. U.S. Department of Veterans Affairs,
135 F.3d 891 (3d Cir. 1998) 36

U.S. Department of Defense v. Federal Labor Relations Authority,
510 U.S. 487 (1994) 40, 43

U.S. Department of Justice v. Landano,
508 U.S. 165 (1993) 44, 45, 46

U.S. Department of Justice v. Tax Analysts,
492 U.S. 136 (1989) 1

U.S. Department of State v. Ray,
502 U.S. 164 (1991) 39

Valencia-Lucena v. U.S. Coast Guard,
180 F.3d 321 (D.C. Cir. 1999) 35

Van Bourg, Allen, Weinberg & Roger v. National Labor Relations Board,
656 F.2d 1356 (9th Cir. 1981) 16, 22, 25, 26, 27, 28

Wiener v. Federal Bureau of Investigation,
943 F.2d 972 (9th Cir. 1991) 27

Statutes

5 U.S.C. § 551(1) 51, 58
5 U.S.C. § 552(a)(3)(A) 36
5 U.S.C. § 552(a)(3)(C) 21
5 U.S.C. § 552(a)(4)(B) 4, 50, 51
5 U.S.C. § 552(b)(6) 39
5 U.S.C. § 552(b)(7)(C) 40
5 U.S.C. § 552(b)(7)(D) 44
5 U.S.C. § 552(b)(7)(E) 46, 47
28 U.S.C. § 1291 4
28 U.S.C. § 1331 4

Other Authorities

Federal Rule of Civil Procedure 12(b)(6) 14, 23, 51, 55
Federal Rule of Civil Procedure 12(d) 16, 49, 52, 53, 56, 57
Federal Rule of Civil Procedure 56 ..... 14, 49, 52, 54, 55
Federal Rule of Appellate Procedure 4(a)(1)(B) 4
Senate Report No. 98-221 (1983) 47, 48

INTRODUCTION

Congress enacted the Freedom of Information Act (FOIA) to "open agency action to the light of public scrutiny" by imposing "a general philosophy of full agency disclosure." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). Nearly a decade into this FOIA case, that purpose has not been fulfilled here.

Following a lengthy investigation by an interagency task force, Plaintiff-Appellant Anthony Viola was convicted in federal court of mortgage fraud. Immediately thereafter, he was tried on identical charges in Ohio state court. During those state-court proceedings, evidence came to light of serious improprieties in the government's investigation of him, including allegations made by an employee of the task force that investigators had directed her to spy on Viola's private communications with his attorneys. After hearing substantial exculpatory evidence that was not available to Viola in his federal prosecution, the state-court jury acquitted him of all charges.

Seeking to learn more about these troubling allegations regarding possible misconduct by investigators or prosecutors and hoping to uncover information that might support a claim for post-conviction relief,

Viola requested documents under FOIA from the FBI and the Executive Office of U.S. Attorneys (EOUSA). Nearly a decade later, he has yet to receive them. Instead, the agencies have performed only perfunctory, error-prone searches for information, failing to uncover documents that Viola has shown are in their possession or to justify their refusal to pursue obvious avenues for locating additional materials. And they have withheld thousands of pages of responsive documents based on inscrutable, pro forma assertions that various FOIA exemptions apply.

These agencies' failures to discharge their FOIA responsibilities are bad enough. Worse is the District Court's consistent failure to give this case the attention FOIA requires and to follow clearly established law. Instead of conducting a careful *de novo* review of the government's FOIA responses, the District Court has repeatedly rubberstamped the government's submissions with no analysis or explanation. And it has continued to do so even after this Court itself raised questions about the adequacy of the District Court's review and then remanded (at the government's request) this case back to the District Court for more factual development. Yet despite that remand—and following years' more litigation in the District Court—that Court simply "reaffirmed" its prior conclusions

with no reasoning at all.

This is not how FOIA should operate. This Court should vacate the judgments in favor of the FBI and the EOUSA and direct the District Court to conduct the searching review of the agencies' submissions that FOIA demands. But even if this Court were to do the District Court's work for it and scrutinize the agencies' submissions in the first instance, it should reach the same result. Neither agency has demonstrated that they conducted a search tailored to Viola's actual requests. And neither has met their burden of supporting the FOIA exemptions they are relying on to withhold thousands of pages of responsive documents. FOIA places the burden of proof on the government to show that it has done what the statute requires. It has not met that burden here.

Finally, the District Court dismissed the task force itself from this case, concluding that Viola had failed to show it was a federal agency subject to FOIA. In doing so, the District Court relied on affidavits submitted by the task force attesting to "facts" that were directly contrary to the well-pled allegations of Viola's complaint. Because Rule 12 forbids the consideration of this sort of evidence outside the complaint, the District Court's dismissal of the Task Force should also be reversed.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this case under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. The District Court entered a final judgment in favor of all defendants on June 11, 2018. JA37–38. Viola filed a notice of appeal on July 13, 2018. JA1–2. That notice of appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(B) because U.S. agencies are parties in this case. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

On October 31, 2019, this Court granted a motion to stay this appeal and for a partial remand. Doc. No. 003113391972. It expanded the scope of that remand on July 10, 2020. Doc. No. 102. ECF 134. On June 10, 2022, the District Court "reaffirmed" its June 11, 2018, judgment. JA39–41. On June 27, 2022, Viola filed a second notice of appeal. JA3. On July 11, 2022, this Court lifted the stay in the pending appeal (No. 18-2573) and consolidated that case with Viola's newly filed appeal (No. 22-2186).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in granting summary judgment to the FBI and the EOUSA on Viola's FOIA claims when (a) the District

Court's decisions did not explain the basis for its holdings, (b) the agencies failed to establish that they conducted a search for documents adequately tailored to Viola's requests, and (c) the agencies' *Vaughn* indices and affidavits did not support the FOIA exemptions they relied on to withheld documents? JA647.

2. Did the District Court properly grant the Task Force's motion to dismiss based on facts attested to by the Task Force in affidavits that are directly contrary to Viola's allegations? JA647.

RELATED CASES AND PROCEEDINGS

This case is a consolidation of two appeals (Nos. 18-2573 and 22-2186) from the same case in the District Court.

While this case was pending, Viola filed a FOIA suit against the U.S. Department of Justice in the District Court for the District of Columbia, which is currently pending. *See Viola v. U.S. Dep't of Justice*, No. 16-cv-1411-TSC (D.D.C.). Viola also filed a FOIA-related suit in that same district, which was dismissed on July 27, 2022. *Viola v. U.S. Dep't of Justice*, No. 21-cv-1462-CKK (D.D.C.).

The present FOIA suit arises from Viola's prosecution by state and federal authorities in state and federal courts in Ohio. In addition to

those criminal actions (and related actions for post-conviction relief), several civil actions have arisen from those criminal prosecutions. While some of those actions may still be pending, undersigned counsel are not aware of any other actions (pending or resolved) that are directly relevant to this appeal.

STATEMENT OF THE CASE

In 2011 and 2012, Anthony Viola was prosecuted in parallel federal and state proceedings for conspiracy to commit mortgage fraud. While he was convicted in the federal case, he won acquittal in his state case after offering exculpatory evidence that was not available to him in the federal trial. From prison, Viola brought this FOIA action in order to obtain additional exculpatory evidence that may provide a basis to challenge his federal conviction, as well as to learn more about the questionable circumstances and tactics of the government's investigation and prosecution of him. Despite nearly a decade of FOIA litigation, Viola has yet to receive the information he seeks.

I. The Prosecution of Anthony Viola

Following an investigation by the Cuyahoga County, Ohio Mortgage Fraud Task Force (Task Force)—a multi-jurisdictional task force

comprised of federal, state, and local law-enforcement agencies—Anthony Viola was convicted in 2011 by an Ohio federal jury of conspiracy to defraud mortgage lending companies. JA108.[1] Shortly after his federal conviction, Dawn Pasela, the office manager for the Task Force, contacted Viola to inform him that she believed the Task Force had wrongfully withheld evidence and committed other prosecutorial misconduct. JA109; JA119. Among other things, Pasela informed Viola that prosecutors had instructed her to conduct and record a series of post-indictment interviews with Viola under false pretenses, in order to learn about Viola's defense strategy. JA109. She also alleged that federal prosecutors had misplaced and suppressed exculpatory evidence. JA109; JA119. Finally, Pasela provided Viola with several pieces of exculpatory evidence, which Viola alleges federal prosecutors had failed to turn over during his federal prosecution. JA389; JA546–47; JA641.

In 2012, Viola was tried in Ohio state court for offenses nearly identical to those on which he was convicted in federal court. But in that trial, some of this additional evidence was presented to the jury. After

[1] Given the procedural posture of this case, this brief will assume as true the allegations of Viola's pro se complaint.

reviewing that evidence, the Ohio jury acquitted Viola. JA109. Pasela had offered to testify at this state-court trial about the alleged prosecutorial misconduct she had witnessed. JA110. But following an alleged threat from Task Force prosecutors that she "leave town" or else face "federal prison" time, she withdrew. JA110. Pasela was found dead shortly thereafter, preventing further investigation into her allegations of prosecutorial misconduct. JA119–20.

II. Viola's FOIA Requests and This Lawsuit

In 2013, while in prison, Viola served a FOIA request on the FBI, seeking evidence to use in his habeas petition challenging his federal conviction. JA121. In that request, Viola sought all records in the FBI's possession prior to his federal trial related to, *inter alia*, "Dawn Pasela's undercover wired recordings of discussions with [Viola]" and "Ms. Pasela's death." JA121. In 2014, Viola served a FOIA request on the EOUSA, requesting "information concerning [Viola's] criminal case or any matters involving [him] or [his] company." JA125.

After over a year had passed with neither agency producing any documents, Viola sued both the FBI and EOUSA in the U.S. District Court for the Western District of Pennsylvania, the district where he was

then imprisoned. JA43. In his complaint, Viola alleged that the FBI and EOUSA were improperly withholding records, inhibiting him from proving prosecutorial misconduct in his pending habeas petition.

Two months after filing his complaint, in December 2015, the FBI provided Viola a first interim batch of documents. JA60–64; JA167–68. Viola received two more interim batches of documents from the FBI in January and March of 2016. JA168–69. For documents which the FBI reviewed but withheld in their entirety, the FBI provided a "deleted page information sheet," listing the asserted FOIA exemption for each withheld page. JA62–64. Viola objected that the FBI's claimed FOIA exemptions were inappropriate or unsubstantiated, and he requested counsel. JA54; JA59. Viola also claimed that the documents he did receive confirmed that federal prosecutors possessed additional exculpatory evidence that had not been turned over to the defense. JA53–54.

In May 2016, Viola filed a motion to compel, arguing that the FBI was acting in bad faith by redacting publicly available information to which no FOIA exemption applied. JA70. At a hearing, counsel for the FBI indicated that "based on [Viola's] filings, . . . [the FBI is] indeed going to revisit what he has identified as records that he should have. So

they're going to double back and look at those . . . [and] then process those again as well." Tr. of May 11, 2016, Hearing at 5:14–21, Case No. 15-cv-242 (W.D. Pa.), ECF No. 39.

In reviewing some of the documents in the FBI's initial interim releases, Viola learned that the FBI had turned over documents and evidence to the Task Force for storage. JA93. In response, he amended his complaint to add the Task Force and Kathryn Clover—a co-defendant in Viola's prosecution who testified against him at trial—as defendants in his FOIA suit. JA106. During a status conference on November 10, 2016, the Magistrate Judge ordered the FBI to "expedite[] production of tapes and/or transcripts of tapes of Dawn Pasella [sic] and emails from and to Kathryn Clover, to the extent they exist and are releasable, along with a *Vaughn* index, by the end of the year." JA133; Tr. of Nov. 17, 2016, Hearing at 9:21–24, Case No. 15-cv-242 (W.D. Pa.), ECF No. 43.

The EOUSA finished processing Viola's FOIA request in October 2016. Of 462 total processed pages, the EOUSA released 103 to Viola in full, released 33 in part, and withheld 326 in full. JA141. The FBI produced additional records in four interim releases between November 2016 and February 2017. JA171–72; JA271–73.

III. The Government's Initial *Vaughn* Indices

On January 31, 2017, the EOUSA filed its *Vaughn* index listing the 32 documents it had withheld or released in part. JA254. The index provided a description of each document, listed the claimed FOIA exemptions, and provided a brief basis for claiming each exemption. JA254.

Rather than submitting a *Vaughn* index, the FBI provided an affidavit on February 27, which described its claimed exemptions generically, then provided a list of 2,554 Bates stamped pages along with a code that corresponded to a category of information the FBI viewed as exempt. JA265. No description or explanation of the claimed exemption was provided for any of the pages. To date, Viola has not received a *Vaughn* index for these 2,554 pages.

In support of their filings, both defendants filed declarations describing the EOUSA's and FBI's efforts to process Viola's FOIA request. JA139; JA163; JA268. In particular, the FBI noted that, while the FBI had not located any records related to Dawn Pasela or Kathryn Clover, "the Cuyahoga County Mortgage Fraud Task Force might possibly have such tapes." JA174.

IV. The District Court's Initial Decisions

A. The District Court's Grant of the Task Force's Motion to Dismiss

On March 10, 2017, the Task Force moved to dismiss the amended complaint for lack of personal jurisdiction and failure to state a claim, arguing principally that it was not a federal agency to which FOIA applied. JA372. The Magistrate Judge informed Viola that the Task Force's motion to dismiss "may be treated . . . as a motion for summary judgment," but that Viola was permitted to respond to the "motion to dismiss" by filing "a proposed amendment to the complaint." JA385. Viola opposed the Task Force's motion to dismiss, arguing that the Task Force constituted a federal agency for FOIA and housed federal records transferred to it by the FBI. JA390–91. Viola also attached to his brief as exhibits a grant application indicating the Task Force received federal funding and trial testimony by an FBI agent that the Task Force was staffed by several federal agencies, including "HUD, OIG, Housing & Urban Development, Office of the Inspector General, postal inspectors," and "the FBI." JA390.

In reply, the Task Force provided an affidavit from the Ohio Attorney General's Office as well as the Task Force's Memorandum of

Understanding, both supposedly indicating that the Task Force was comprised exclusively of state entities and received no federal funding. JA433. Viola responded once more with more evidence rebutting the Task Force's affidavits, showing the Task Force was comprised of federal agencies and received federal funds. JA468.

In August 2017, then-Magistrate Judge Baxter recommended that the District Court grant the Task Force's motion to dismiss, relying on the affidavits submitted by the Task Force to find that it was "undisputed" that "the Task Force was not federally funded" and "[n]one of the constituent members of the Task Force was a federal agency." JA12. After reviewing Viola's objections, the District Court (Judge Hornak) declined to adopt this recommendation, referring Viola's objections that he had pleaded the Task Force was a federal agency back to the Magistrate Judge for consideration. JA16–20.

On May 11, 2018, then-Magistrate Judge Baxter again recommended that Viola's claims against the Task Force be dismissed. JA21. Following the District Court's remand, the Task Force had filed yet another affidavit stating that the Task Force was comprised entirely of state entities and did not receive any federal funding. JA573. Magistrate Judge

Baxter again relied on the Task Force's affidavits to conclude that Viola had failed to meet his burden to show the Task Force was a federal agency under FOIA. JA575. She also recommended the claims against the Task Force be dismissed for lack of personal jurisdiction. JA575–79.

This time, the District Court granted the Task Force's motion to dismiss, adopting Magistrate Judge Baxter's second report and recommendation as the opinion of the court. JA37–38. The District Court further concluded that Viola had "failed to plausibly 'show' that the Task Force is . . . an 'agency' for FOIA purposes." JA37 n.1. At the same time, the District Court recognized that its (and the Magistrate Judge's) consideration of the Task Force's affidavits and documents "[a]rguably . . . would convert the Rule 12(b)(6) portion of the Task Force's motion to one for summary judgment." JA37 n.1. But the District Court inexplicably did not state that it *was* converting the motion into a Rule 56 motion, nor did it analyze the issues presented under a summary judgment standard. *Id.* Thus, both the District Court and the Magistrate Judge resolved the motion to dismiss by considering materials outside the complaint, without converting the matter to a Rule 56 motion.

B. The District Court's Grant of Summary Judgment to the FBI and EOUSA

On July 25, 2017, the EOUSA and FBI defendants moved for summary judgment. JA47. Viola opposed their motion, challenging both the adequacy of their search and the sufficiency of the evidence supporting their claimed exemptions. JA505.

In the same report and recommendation in which she recommended granting the Task Force's motion to dismiss, then-Magistrate Judge Baxter also recommended the granting summary judgment to the FBI and EOUSA. JA21. Her report cursorily concluded—in a single paragraph—that the FBI's and EOUSA's affidavits, "describe Defendants' 'justifications for nondisclosure with reasonably specific detail,' . . . 'demonstrate that the information withheld logically falls within the claimed exemptions . . . [,]' [and] demonstrate that all reasonably segregable non-exempt information has been provided to Plaintiff." JA32–35. Viola objected to this recommendation on several grounds, including that the FBI's and EOUSA's searches were inadequate, that the FBI's and EOUSA's declarations and *Vaughn* indices had failed to adequately explain why certain documents were not produced, that the Magistrate Judge's report recommending summary judgment contained inadequate explanation, and that

the Task Force housed federal agency records. JA622–26.

The District Court adopted the Magistrate Judge's recommendation in full, without additional analysis, in the same order in which it adopted that Magistrate Judge's second recommendation as to the task force. JA37–38.

V. The First Appeal and Proceedings on Remand

On July 13, 2018, Viola appealed the District Court's decision. JA1. Soon thereafter, Viola moved for the appointment of counsel. On April 3, 2019, the Court appointed Stephen Raiola to represent Viola pro bono. Doc. No. 003113202649. At the same time, the Court directed the parties to address at least two issues in their briefs:

> (1) whether the District Court properly considered documents outside the pleadings in ruling on the Task Force's motion to dismiss, see Fed. R. Civ. P. 12(d); Rose v. Bartle, 871 F.2d 331, 339 n.3 (3d Cir. 1989); Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993); and (2) whether the District Court provided a sufficiently detailed analysis in granting the FBI's and DOJ's motion for summary judgment, in order to establish that a careful de novo review of the agencies' disclosure decisions has taken place, see Van Bourg, Allen, Weinberg & Roger v. NLRB, 656 F.2d 1356, 1358 (9th Cir. 1981) (per curiam); Founding Church of Scientology of Washington, D.C., Inc. v. Bell, 603 F.2d 945, 950 (D.C. Cir. 1979).

JA647. Viola's pro bono counsel filed a brief on July 15.

After obtaining several extensions of time to file a responsive brief, the FBI and EOUSA moved for a stay and partial remand. Doc. No. 003113355074 (Sept. 23, 2019). They disclosed that the EOUSA's *Vaughn* index submitted to the district court "incorrectly described certain documents" and sought a partial remand to permit the EOUSA to submit a corrected index. *Id.* at 6. The EOUSA also indicated that it would "reprocess responsive documents in its possession to determine anew whether some or all of the documents should be withheld as exempt." *Id.* at 2. This Court granted the stay, remanding to the district court to supplement the record while retaining jurisdiction. JA133.

Nine months later, on June 29, 2020, the EOUSA and FBI moved this Court to expand the scope of the partial remand to include the FBI. Doc. No. 99. During the EOUSA's review of its records on remand, it discovered responsive documents belonging to the FBI that the FBI had failed to review in response to Viola's FOIA request. *Id.* at 2. Upon further investigation, the FBI discovered that despite its previous assertions that its search was adequate, it had failed to locate thousands of responsive records in its possession. JA744–45. The FBI attributed this oversight to its failure to search for documents originally created

electronically in its file system. JA744–45. This Court granted the motion to expand the scope of the remand. JA265.

Back in the district court, the EOUSA filed an updated *Vaughn* index on January 22, 2021. JA649–50; JA652. The EOUSA explained that it had not conducted a new search on remand; instead, it had simply re-reviewed the documents it had originally identified in 2017, producing some additional documents and creating a new index for those it continued to withhold. JA669.[2] In May, the FBI filed also filed a *Vaughn* index, the first and only one it prepared in this case. JA841. But that index only covered the batch of newly discovered documents discussed above,

[2] The EOUSA's explanation of its review is internally inconsistent and confusing. It stated that in October 2016, it responded to Viola's request by releasing 103 pages in full and 33 pages in part, while withholding in full 326 pages, for a total of 462 pages. JA668–69. The EOUSA later requested a remand from the Third Circuit to conduct a "re-review" of the documents on this *Vaughn* index, and it then conducted "a second and independent review of the responsive records." JA669. Nothing in this affidavit states that the EOUSA conducted a new search for documents. But the supplemental response resulting from this re-review was comprised of 316 pages released in full, 313 pages released in part, and 148 pages withheld in full, for a total of 777 pages. JA669. The EOUSA also determined as part of its re-review that 37 pages in the original *Vaughn* index were not responsive, so it removed them. JA669. The EOUSA's "re-review" thus included 300+ pages that apparently were not part of its initial review, but its affidavit does not explain where these pages came from or account for this obvious discrepancy in its explanation of its process.

namely the ones the FBI located for the first time after the EOUSA brought to the FBI's attention that the FBI's original search had missed thousands of pages of responsive documents. In total the FBI processed an additional 9,075 pages of documents, over three times as many pages as it originally processed. JA734. The FBI did not provide a *Vaughn* index supporting its claims of exemptions for the original 2,554 pages documents identified in the original search. Both agencies provided affidavits accompanying their indices, discussing their process for searching and reviewing relevant documents. JA666; JA732.

Viola objected to both agencies' updated *Vaughn* indices and supporting affidavits, arguing that both agencies' searches were inadequate, that the agencies overclaimed FOIA exemptions, and that their indices failed to provide sufficient detail to determine whether certain responsive records were properly withheld. JA705; JA1256.

VI. The District Court's Summary Affirmance and the Present Appeal

On June 10, 2022—nearly seven years after Viola filed suit and over nine years after his first FOIA request—the District Court summarily "reaffirmed" its grant of summary judgment to the FBI and EOUSA on the "corrected and supplemented" record. JA41. By then, the case had

been reassigned to the newly confirmed District Judge Baxter, who had presided over the case and written the original reports and recommendation that Judge Hornak had previously adopted. Her opinion endorsing her previous conclusions as a Magistrate Judge spanned three pages and contained no analysis of Viola's objections. JA39–41.

Viola filed a notice of appeal on June 27, 2022. JA3. On July 11, this Court lifted its stay of the original appellate proceedings and consolidated the stayed case with the newly filed appeal. JA1. On December 5, 2022, this Court appointed the undersigned as pro bono counsel. Doc. No. 151. It directed all parties to address the same questions the Court identified in the first appeal, specifically:

> (1) whether the District Court properly considered documents outside the pleadings in ruling on the Task Force's motion to dismiss; and (2) whether the District Court provided a sufficiently detailed analysis in granting the FBI's and DOJ's motion for summary judgment, in order to establish that a careful *de novo* review of the agencies' disclosure decisions has taken place.

Doc. No. 150 (internal citations omitted).

SUMMARY OF THE ARGUMENT

I. The District Court erred in granting summary judgment to the EOUSA and FBI for three independent reasons.

First, the District Court failed to provide any statements of law or factual findings to support its grant of summary judgment. This Court thus lacks any basis on which to judge whether the District Court fulfilled its obligation to conduct *de novo* review of the government's proffered reasons for withholding documents responsive to Viola's FOIA request. This alone merits reversal. *See infra* at 24–28.

Second, the government's affidavits failed to establish the adequacy of their search for records. Federal agencies have a statutory obligation under FOIA to conduct "reasonable efforts to search for" requested records. 5 U.S.C. § 552(a)(3)(C). But the FBI's and EOUSA's affidavits contain glaring omissions. Both agencies failed to search for entire topics that Viola requested, as well as failed to search files likely to contain responsive documents. *See infra* at 28–35.

Third, the government failed to establish that the criteria for FOIA exemptions 6, 7(C), 7(D), and 7(E) were met. And it failed to show that the presence of some material that fell within the scope of one of those exemptions justified withholding entire documents, rather than redacting the exempt information. *See infra* at 36–49.

II. The District Court also erred in dismissing Viola's claims

against the Task Force. By their own admission, the Magistrate Judge and the District Court relied on evidence presented by the Task Force that was outside the pleadings and was directly contrary to Viola's factual allegations. To properly consider such evidence, the District Court was obligated to convert the Task Force's motion to dismiss to one for summary judgment and then to review the evidence on a summary judgment standard. Neither court did so. Limiting the analysis just to Viola's pleadings, as the lower courts were required to do, Viola alleged that the Task Force was comprised of federal agencies and received federal funding. Those allegations, assumed true as they must be, plausibly stated that the Task Force is a federal agency, subject to FOIA, establishing both a proper claim against it and that the District Court had personal jurisdiction over it. *See infra* at 49–59.

STANDARD OF REVIEW

Because "appellate court[s] [are] particularly ill-equipped to conduct [their] own investigation into the propriety of claims for non-disclosure . . . [d]isclosure of the factual and legal basis for the trial court's decision is especially compelling in FOIA cases." *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 656 F.2d 1356, 1357–58 (9th Cir. 1981). This

Court applies a "two-tiered test" when reviewing a district court's order granting summary judgment in a proceeding seeking disclosures under FOIA. *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1048–49 (3d Cir. 1995). First, this Court reviews the government's affidavits *de novo* "to determine whether the agency's explanation was full and specific enough to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of the withholding." *Id.* at 1049 (quotation marks omitted). Second, "if this Court concludes that the affidavits presented a sufficient factual basis for the district court's determination," it then reviews factual determinations for clear error. *Id.* "Questions of law" regarding applicability of the FOIA exemptions "are reviewed *de novo*." *Manna v. U.S. Dep't of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995).

On appeal, a district court's grant of a Rule 12(b)(6) motion to dismiss is reviewed de novo. *Doe v. Princeton Univ.*, 30 F.4th 335, 341 (3d Cir. 2022). This Court "accept[s] all factual allegations in the complaint as true and view[s] them in the light most favorable to the plaintiff." *Id.* at 340. And because Viola filed his complaint pro se, his pleadings are "liberally construed" and "held to less stringent standards than formal

pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). This Court "will apply the applicable law, irrespective of whether the *pro se* litigant has mentioned it by name." *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003).

ARGUMENT

I. The District Court erred in granting summary judgment to the EOUSA and the FBI.

In 2018, the District Court granted summary judgment to the EOUSA and the FBI on Viola's claims in a cursory decision with no analysis. Then, following remand and years' more litigation, it simply "reaffirmed" its prior decision with no meaningful discussion. Because the District Court did not conduct the careful review of the EOUSA's and FBI's FOIA responses that the statute requires, its decision should be vacated. This Court should do the same if it reviews the substance of the government's responses for itself: The EOUSA and the FBI have not demonstrated that their approaches to locating responsive documents were adequate. And they have not established that the exemptions they claim apply to the documents withheld.

A. The District Court failed to adequately explain the reasons for its summary judgment decision.

The District Court erred in granting summary judgment in favor of

the FBI and EOUSA because it failed to articulate the basis for its holdings in sufficient detail to provide a basis for meaningful appellate review. District courts must "conduct a *de novo* review of a government agency's determination to withhold requested information." *Davin*, 60 F.3d at 1049. De novo review in FOIA cases requires the district court to "provide statements of law that are both accurate and sufficiently detailed to establish that the careful [d]e novo review prescribed by Congress has in fact taken place." *Founding Church of Scientology of Wash., D.C., Inc. v. Bell*, 603 F.2d 945, 950 (D.C. Cir. 1979) (per curiam). In particular, for each withheld document, the district court must "identify the exemption which supports non-disclosure." *Van Bourg*, 656 F.2d at 1357; *see also Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 980 (3d Cir. 1981) ("In the future this court . . . will require district courts to state explicitly the legal basis as well as the findings that are necessary to demonstrate that the documents are exempt or disclosable under the FOIA.")

The District Court failed to do this. Twice. In its original decision prior to Viola's first appeal, the District Court did not provide *any* factual findings or legal reasoning justifying the government's claimed

exemptions. It failed even to identify which exemptions applied to which documents, let alone explain why those exemptions were satisfied. Instead, the District Court just adopted the Magistrate Judge's recommendation, without making any effort at all to respond to Viola's objections. JA37–41. And the only analysis in the Magistrate Judge's recommendation was the statement that the defendants' "[d]eclarations demonstrate that the information redacted from the records produced to Plaintiff are exempt from disclosure under FOIA." JA34. Neither the District Court's decision nor the Magistrate Judge's recommendation came anywhere close to establishing that they conducted the careful de novo review of the government's submissions that FOIA requires.

Worse yet, the District Court repeated the very same error on remand. That was so even though this Court's briefing order had specifically raised the question of "whether the District Court provided a sufficiently detailed analysis in granting the FBI's and DOJ's motion for summary judgment, in order to establish that a careful de novo review of the agencies' disclosure decisions has taken place." JA647. And that order cited cases fleshing out the District Court's obligation to conduct that detailed analysis. JA647 (citing *Van Bourg*, 656 F.2d 1356; *Founding*

Church of Scientology, 603 F.2d 945). Yet despite being on notice of this Court's concern about the sufficiency of its prior decision, the District Court simply "reaffirmed" the decision she had previously reached as a Magistrate Judge, making no effort either (1) to address any possible deficiency in the District Court's prior decisions *or* (1) to explain why the "corrected and supplemented" record supported "reaffirmance." JA41. The District Court just rubber stamped its rubber stamp.

These decisions fall short of the District Court's well-established obligation to disclose "the factual and legal basis" for its decisions, to "state in reasonable detail the reasons for its decision as to each document in dispute," and to "identify the exemption which supports non-disclosure" for any documents it deemed the FBI and EOUSA need not disclose. *Van Bourg*, 656 F.2d at 1357–58. Instead, in both the original proceeding and on remand, its finding consisted of only "a list of affidavits submitted by government and the conclusory statement that the above-listed affidavits and declarations carry the government's burden of proof to show that the FOIA exemptions were properly applied in this case." *Wiener v. FBI*, 943 F.2d 972, 988 (9th Cir. 1991) (quotation marks omitted). This Court has "no means of ascertaining" whether "the correct legal

standard" was applied "to the various exemptions claimed." *Coastal States*, 644 F.2d at 980. Vacatur and remand is necessary so that "the district court may state in reasonable detail the reasons for its decision as to each document in dispute." *Van Bourg*, 656 F.2d at 1358.

B. The FBI and EOUSA failed to establish the adequacy of their search for records.

"To prevail on summary judgment . . . the agency must show beyond material doubt that it has conducted a search reasonably calculated to uncover all relevant documents." *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007). Given "congressional intent tilting the scale in favor of disclosure," the "agency seeking to avoid disclosure" faces a "substantial burden." *Id.* Because the searches described in the FBI's and EOUSA's declarations failed to meet their burden, the District Court erred by granting them summary judgment.

1. The EOUSA failed to establish the adequacy of its search.

Viola's FOIA request to the EOUSA asked for "information concerning [his] criminal case or any matters involving [him] or [his] company." JA125. And on November 10, 2016, the District Court ordered the EOUSA and the FBI to "expedite[] production of tapes and/or transcripts

of tapes of Dawn Pasella [sic] and emails to Katherine [sic] Clover, to the extent they exist and are releasable." JA133. The EOUSA search for records, described in the Declarations of Kara Cain, JA666, and David Luczynski, JA139, was inadequate in two respects.

First, the EOUSA failed to search for files related to Viola's company, the Realty Corporation of America. Though Viola had expressly requested responsive records relating to his company, the EOUSA searched its "case management system" only "using plaintiff's name, Anthony Viola." JA671. The EOUSA explained that "case files are not created or stored under business names and that any and all records related to Mr. Viola or his business would be located upon a search using his name." JA671. But it also acknowledged that the "Assistant United States Attorney ('AUSA') assigned to a case has the discretion to determine what records are maintained in the criminal case file." JA671. By its own admission, had the AUSA who prosecuted Viola chosen to omit records relating to the Realty Corporation of America from Viola's criminal case file, then the EOUSA's search would have missed those responsive records. The EOUSA's search was thus not "reasonably calculated to uncover all relevant documents." *Morley*, 508 F.3d at 1114. It was not "tailored to the

nature of [Viola's] particular request," *Campbell v. U.S. Dep't of Justice*, 164 F.3d 20, 28 (D.C. Cir. 1998), since it "unreasonably limit[ed] the scope of [the EOUSA's] search . . . in a manner inconsistent with the request," *Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 498 (D.D.C. 2017); *see also Eberg v. U.S. Dep't of Def.*, 193 F. Supp. 3d 95, 110 (D. Conn. 2016) (holding search inadequate when the agency "d[id] not explain why [the] search excluded terms pertaining to [part of] Plaintiff's FOIA request").

Second, the EOUSA's search for records related to Dawn Pasela and Kathryn Clover was inadequate. In its original affidavit, the EOUSA noted that it "performed a separate search of records sent from the district for any information regarding" Dawn Pasela and Kathryn Clover. JA143. After remand, the EOUSA clarified that it also had asked AUSA Bennett to search his records for documents relating to the two witnesses. JA 671–72. But the EOUSA did not conduct that search itself, instead simply relying on AUSA Bennett. That reliance is troubling, given that Viola is seeking documents regarding Bennett's possible misconduct in his prosecution of Viola. Yet despite that obvious potential conflict, the

EOUSA did not itself attempt to search Bennett's records.[3]

In addition, the EOUSA's affidavits fail to explain why other records, outside of Viola's case file and Bennett's self-search of his records, were not likely to return relevant documents. *See Abdelfattah v. U.S. Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007) ("[T]he agency should provide a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials . . . were searched." (internal quotation marks omitted)). Without such an explanation, the District Court had "no factual basis" to determine the searches were adequate, rendering summary judgment improper. *See id.* at 183.

2. The FBI failed to establish the adequacy of its search.

Viola's FOIA request to the FBI asked for, *inter alia*, any documents mentioning his name, FBI notes from the interviews of "Uri Gofman and Jonathan Rich," and documents related to Dawn Pasela, including "[a]ny

[3] Although not part of the record, publicly available news reports reveal that Bennett recently resigned from the Department of Justice following an OIG investigation. That investigation was taking place in 2020, the same time period the EOUSA re-reviewing documents and producing a new *Vaughn* index following remand of the case to the District Court. These facts further call into question the reasonableness of the EOUSA's reliance on Bennett to search for responsive documents.

reports, investigation or information concerning Ms. Pasela's death." JA121. In response, the FBI searched its Central Records System (CRS) "by using a three-way phonetic breakdown of 'Viola, Anthony, L.'" and Viola's nickname, "Tony Viola." JA741–42. After identifying the casefiles indexed to Viola's name, the FBI identified and processed 2,554 responsive pages of documents. JA742–44. Despite the FBI's insistence that it had "conducted a search reasonably calculated to locate records responsive to plaintiff's request," JA280, *after* the District Court originally granted summary judgment and while this appeal was pending, the EOUSA alerted the FBI that the EOUSA itself had thousands of pages of FBI records in its possession that the FBI had somehow failed to find in its own prior searches. JA744–45. The FBI subsequently explained that it had missed these records because its initial search relied only on the physical casefiles. JA744–45. When, on remand, it conducted a search of missing electronic files, it found an additional 9,075 documents, over three times the number of documents originally identified. JA745. The FBI's affidavits fail to establish the adequacy of its searches, for three reasons.

First, the FBI failed to establish that it searched "*all* files likely to

contain responsive materials." *Abdelfattah*, 488 F.2d at 182 (emphasis added). The FBI's declaration states that the casefiles in CRS indexed to Viola's name were "reasonably . . . expected" to contain responsive records. JA745–46. But FOIA requires the FBI to search "all locations 'likely' to contain" responsive documents, not just "the locations 'most likely' to contain" such documents. *DiBacco v. U.S. Army*, 795 F.3d 178, 190 (D.C. Cir. 2015). And there is clear evidence in this case that voluminous records existed outside the CRS system: The FBI's search of that system failed to uncover nine-thousand pages of documents found in other systems, documents the FBI only discovered when the EOUSA brought them to the FBI's attention. Yet despite learning its CRS system contained only a small percentage of the documents about Viola in the FBI's possession, the FBI declined to search for additional records beyond Viola's casefile. Because the FBI failed to explain why "no other record system was likely to produce responsive documents," summary judgment was inappropriate. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

Second, the FBI failed to "tailor[]" its search "to the nature of [Viola's] particular request." *Campbell*, 164 F.3d at 28. Viola had requested, among other things, interview files of "Uri Gofman and Jonathan Rich";

"[c]orrespondences, investigations, transcripts or any other information concerning Dawn Pasela's undercover wired recordings of discussions" with Viola; and "[c]opies of e[-]mails from Kathryn Clover to the FBI that mention [Viola's] name." JA121. Mischaracterizing Viola's request as one for "FBI investigatory information concerning himself," JA745, the FBI searched only for records containing Viola's name and his casefile. This is an arbitrary abridgment of Viola's actual FOIA request, which specifically requested information in the FBI's possession related to Uri Gofman, Jonathan Rich, Dawn Pasela, and Kathryn Clover—whether or not those documents would be in Viola's casefile or indexed to Viola's name. As with the EOUSA's search, this "unreasonably limit[ed] the scope of [the FBI's] search . . . in a manner inconsistent with the request," rendering summary judgment inappropriate. *Coffey*, 249 F. Supp. 3d at 498.[4]

Third, the FBI failed to search information within its control for documents responsive to Viola's request. Specifically, the tapes of Dawn

[4] The FBI argued below that any additional records recovered through a proper search for the records Viola requested would have only uncovered documents appropriately withheld based on FOIA exemptions 6 and 7(c). JA1565. But that is not a ground for refusing to perform the search. Rather, the FBI should have performed the search, then claimed and justified an exemption.

Pasela's conversations with Viola, prepared during the FBI's investigation of Viola in connection with the work of the Task Force, are under the FBI's "constructive control." *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149 (D.C. Cir. 2016). There is evidence that the Pasela tapes—tapes apparently stored with the Task Force—are within the FBI's control, including sworn trial testimony that "anybody involved" in the Task Force (including the FBI) had access to the evidence stored at the Task Force "at any time," JA246; a statement from the FBI agent supervising Viola's case that "the Cuyahoga County Mortgage Fraud Task Force might possibly have . . . tapes" of Viola and Pasela's conversations, JA174; and redacted documents received from the FBI's FOIA releases showing that evidence was released from the FBI to the Task Force, JA1520–22; JA1524; *see also* JA1469–70; JA1481–82. Drawing all reasonable inferences in favor of Viola, as courts are required to do on summary judgment, the FBI's failure to "follow through on [an] obvious lead[]" by "search[ing] the center it had identified as a likely place where the requested documents might be located" renders summary judgment inappropriate. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325, 327 (D.C. Cir. 1999).

C. The FBI and EOUSA failed to establish that FOIA exemptions applied to all the documents they withheld.

Congress enacted FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (internal citation omitted). The act requires any "agency" upon "any request" to make records "promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Because the purpose of the requirement is to "facilitate public access to [g]overnment documents," its "dominant objective" is "disclosure, not secrecy." *Am. Civil Liberties Union of N.J. v. FBI*, 733 F.3d 526, 531 (3d Cir. 2013) (quoting *Sheet Metal Workers Int'l Ass'n, Local Union No. 19 v. U.S. Dep't of Veterans Affairs*, 135 F.3d 891, 897 (3d Cir. 1998)). Given these imperatives, an agency may withhold documents that are responsive to a FOIA request only if "the responsive documents fall within one of nine enumerated statutory exemptions," and the agency "bears the burden of justifying the withholding." *OSHA Data/CIH, Inc. v. U.S. Dep't of Labor*, 220 F.3d 153, 160 (3d Cir. 2000). Crucially, and in line with the purpose of the Act, the exemptions are intended to be "exclusive and narrowly construed" such that doubts are resolved in favor of disclosure. *Conoco Inc. v. U.S. Dep't of Justice*, 687 F.2d 724, 726 (3d Cir. 1982).

Here, the government failed to provide proper justifications for its invocation of FOIA Exemptions 6, 7(C), 7(D), and 7(E). In order to "facilitate review of the agency's actions, the government must submit detailed affidavits indicating why each withheld document falls within an exempt FOIA category." *Manna*, 51 F.3d at 1163. And while "there is no set formula for a *Vaughn* index, the hallmark test is 'that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure.'" *Davin*, 60 F.3d at 1050 (quoting *Hinton v. Dep't of Justice*, 844 F.2d 126, 129 (3d Cir. 1988)). Put differently, in order to claim an exemption, the government must "provide the 'connective tissue' between the document, the deletion, the exemption and the explanation. It is insufficient for the agency to simply cite categorical codes, and then provide a generic explanation of what the *codes* signify." *Davin*, 60 F.3d at 1051.

Although this case was remanded at the government's request, neither the FBI's nor the EOUSA's updated *Vaughn* indices remedied the deficiencies of the originals. And in the case of the FBI, the new index fails to cover the initial 2,554 Bates-stamped pages that were produced

without a description or justification for the claimed exemptions. As previously discussed, the FBI's subsequent *Vaughn* index does not cover those processed pages.

Where the government has provided an update, the level of detail in both of the subsequent indices did not change. For example, both indices use codes—and generic explanations of what the codes signify—just as they did in the first *Vaughn* indices, without further detail provided. *Compare* JA329–57 (the FBI's initial *Vaughn* index providing boilerplate language as to what certain codes mean) *with* JA841–43 (the FBI's subsequent *Vaughn* index providing the same). The FBI's new *Vaughn* index is, like its first attempt, another string of columns and codes that leave Viola and the Court in the dark about what exactly has been withheld under assertions of FOIA's statutory exemptions.

In some cases, the updated indices provide even less information than the already-deficient initial indices. The EOUSA's updated index, for example, does not include a "Justification" column originally included in the initial Index. *Compare* JA254–64 *with* JA652–64. Simply put, the government has yet again failed to "provide the 'connective tissue'" between the withholdings and the claimed exemptions that is necessary for

any court to hold that the FBI or the EOUSA's submissions were sufficient.

The "general deficiencies in the government's *Vaughn* index alone" require reversal here. *Davin*, 60 F.3d at 1053. Nevertheless, in the event the Court reaches the applicability of the claimed FOIA exemptions, neither the FBI nor the EOUSA have met their "burden . . . to justify the withholding of any requested documents." *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). This renders the District Court's reaffirmance of summary judgment improper.

1. Exemptions 6 and 7(C)

Both the FBI and the EOUSA asserted FOIA Exemptions 6 and 7(C) to redact or withhold entire categories of documents. The assertion of these Exemptions was overbroad.

Though their terms differ, both these exemptions are directed at personal information. Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7(C) permits an agency to withhold law enforcement records that "could reasonably be expected to constitute an unwarranted invasion of

personal privacy." 5 U.S.C. § 552(b)(7)(C). Both exemptions require a balancing test, in which courts must weigh the extent of the invasion into the privacy interest against the public benefit that would result from the disclosure of the information. *See U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994); *Ferri v. Bell*, 645 F.2d 1213, 1217 (3d Cir. 1981).

For its part, the FBI asserts both Exemptions 6 and 7(C) for thousands of pages over nine categories of materials[5] that are generically described. The FBI's descriptions of these pages are cursory. *See* JA758–68. As to Exemption 6, the FBI's descriptions do not demonstrate that the redacted or withheld information consists of personnel, medical, or similar files. And as to Exemption 7(C), this Court has held that a withholding of information on this basis must be supported with an explanation "*why* [disclosure] would result in embarrassment or harassment either to

[5] These include the "names and other identifying information" of FBI special agents and professional staff; non-FBI, federal government personnel; local and state law enforcement personnel; local and state government personnel; third parties of investigative interest; third parties who provided information to the FBI; third parties merely mentioned; third-party victims; and information collected on third-party individuals by a private firm hired by Viola. *See* JA758–68.

the individuals interviewed or to third parties." *Davin*, 60 F.3d at 1060 (emphasis added). The FBI's descriptions provide no such explanation.

Additionally, the government's conclusory assertions that the privacy interests of various individuals are being protected under Exemptions 6 and 7(C) are irrelevant if the withheld materials are already part of the public record. That is because "materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record." *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) ("interests in privacy fade when the information involved already appears on the public record"). Here, nothing in the FBI's declaration suggests that the FBI took *any steps* to determine if the material it is withholding were already part of the public record (such as through disclosure in Viola's criminal trials). *See* JA765, 771–72. It is the government, not the requester, that bears the burden of identifying whether any documents are the same as those previously released or include information that was disclosed to the public via, for example, witness testimony at trial. The FBI's speculation that the agency "likely did not process a copy of the same pages" from Viola's criminal trial, *see* JA1571, is

not enough to establish that the FBI actually did anything to determine whether these documents were part of the public record.

Finally, the FBI asserts Exemptions 6 and 7(C) to withhold information that does not appear to contain personal and related identifying information. For example, Bates numbers 6894 to 6898 contain redactions of information that appears to be information Viola *himself* stated during an interview. *See* JA1531–35. But the law is clear: information other than personally identifying data (for example, Social Security numbers, home addresses, phone numbers, and email addresses) should be produced.

The EOUSA's assertions of Exemptions 6 and 7(C) fare no better. The EOUSA relies on Exemption 6 to withhold or redact broad categories of documents, including witness interviews, JA652–53 (Page Numbers 300–331); JA658–61 (Page Numbers 493–524); marked trial exhibits, JA653–56 (Page Numbers 353–427, 438–439, and 458–461); and bar association complaints that Viola filed against his lawyer, JA663 (Page Numbers 623–627). But nothing in the EOUSA's descriptions of these documents suggests that any of them are personnel, medical, or similar files that may be withheld or redacted under Exemption 6. And as for

Exemption 7(C), the EOUSA does not explain why the release of this information would "would result in embarrassment or harassment either to the individuals interviewed or to third parties." *Davin*, 60 F.3d at 1060. Nor did the EOUSA identify any steps it took to determine if some withheld material was already in the public record. *See* JA676.

Finally, the agencies' assertions of FOIA Exemptions 6 and 7(C) can be overcome by a balancing of the public benefit that would result from disclosure. Assertions of either Exemption 6 or 7(C) require a court to "balance the public interest in disclosure against the [privacy] interest Congress intended the exemption to protect." *U.S. Dep't of Def.*, 510 U.S. at 495; *see also Ferri*, 645 F.2d at 1217 (explaining that "the proper approach . . . is a de novo balancing test, weighing the privacy interest and the extent to which it is invaded, on the one hand, against the public benefit that would result from disclosure, on the other."). But both agencies only provide generic justifications for the claimed Exemptions in their affidavits. These explanations are insufficient because "[s]elf-serving, conclusory statements in an affidavit do not satisfy the government's statutory burden." *Ferri*, 645 F.2d at 1224. The failure to conduct any balancing at all certainly falls short of the "detailed balancing effort"

required to invoke Exemption 7(C). *Davin*, 60 F.3d at 1060.

2. Exemption 7(D)

The FBI also invokes Exemption 7(D) to redact or withhold a large category of documents. This exemption protects "records or information compiled for law enforcement purposes" when the disclosure "could reasonably be expected to disclose the identity of a confidential source." 5 U.S.C. § 552(b)(7)(D). In order to properly invoke this Exemption, a government agency bears the burden of establishing that each source "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 171–72 (1993). Here, the FBI does not carry that burden.

First, the FBI must provide "an individualized showing of confidentiality *with respect to each source*," *Landano*, 508 U.S. at 174 (emphasis added). That is so whether the confidentiality at issue was express or implied. In the District Court, the FBI asserted that its declarations provide details sufficient to support assertions that the protected sources provided information under an assurance of confidentiality. *See* JA303–12; JA768–72. That is incorrect. If an agency withholds information

under Exemption 7(D) due to any "*express* assurances of confidentiality, the agency is required to come forward with probative evidence that the source did in fact receive an express grant of confidentiality." *Davin*, 60 F.3d at 1061. The agency itself has conceded that it "has not attempted to demonstrate that [it] made explicit promises of confidentiality to particular sources." JA1573.

The FBI's invocation of Exemption 7(D) thus relies only on *implied* assurances of confidentiality. When the government relies on such an implied assurance, it must "point to . . . narrowly defined circumstances that will support" that inference. *Landano*, 508 U.S. at 179. The FBI's boilerplate assertion below that it was "reasonable to infer that each individual who provided information to the FBI did so under circumstances from which an assurance of confidentiality may be implied" does not satisfy that burden. JA770. Courts have refused to hold that such a "sweeping presumption comports with common sense and probability." *Landano*, 508 U.S. at 175 (quotation marks omitted). Of course, an implied assurance of confidentiality can be inferred based on "the nature of the crime and the source's relation to it." *Id.* at 179. But this was a mortgage-fraud case, not "a gang-related murder" where a witness "likely

would be unwilling to speak to the Bureau except on the condition of confidentiality." *Id.* Because the FBI's affidavits make no effort to provide "an individualized showing of confidentiality with respect to each source," *id.* at 174, it fails to carry its burden under Exemption 7(D).

Second, the FBI has not evaluated the impact of public testimony on the confidentiality of the alleged sources. It is therefore clear that, on this record, the FBI has failed to provide evidence necessary to meet its burden of establishing that every "source provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *Id.* at 171–72 (quotation marks omitted).

3. Exemption 7(E)

The FBI also asserts Exemption 7(E). This Exemption protects law enforcement information that would disclose non-public "techniques and procedures for law enforcement investigations or prosecutions, or . . . guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). But notwithstanding the Exemption's broad scope, in order for it to apply, the technique or procedure at issue must

not be well known to the public. *See, e.g.*, *Davin*, 60 F.3d at 1064 (explaining that the Exemption cannot be used to justify the withholding of "routine techniques and procedures already well-known to the public"); S. Rep. No. 98-221, at 25 (1983) (explaining that the Exemption's protections should not be extended to "routine techniques and procedures already well known to the public.").

The FBI claims that Exemption 7(E) covers its redactions of seven categories of documents. JA773–82. These documents are described as statistical information, file numbers, subject description codes, analyses of investigatory information and examination results, and operational plans. *Id.* For example, one particular category is titled "Sensitive Information and Analysis of Investigatory Information Obtained From Queries of the National Crime Information Center [] and Database Reports," and the withheld documents are described as "NCIC reporting documents on third-party individuals." JA778–79. But it is not clear how this category might contain documents that shine a light on any "investigative technique" or "guideline[] for law enforcement investigations." 5 U.S.C. § 552(b)(7)(E). These cursory exemption claims are insufficient to carry the FBI's burden.

4. Segregability

Finally, both the EOUSA and the FBI have withheld entire documents or pages based on the above exemptions, without explaining why the claimed exemptions justify withholding the entire document. As this Court has previously explained, "[a]n agency cannot justify withholding an entire document simply by showing it contains some exempt material." *Abdelfattah*, 488 F.3d at 186 (internal quotation marks omitted). Rather, it must "demonstrate that all reasonably segregable, nonexempt information was released." *Id.* To meet that burden, an agency must provide (1) a "description of the agency's process," (2) a "factual recitation of why certain materials are not reasonably segregable," and (3) an "indication of what proportion of the information in a document is nonexempt and how that material is dispersed throughout the document." *Id.* at 186–87 (quotation marks omitted).

The EOUSA and FBI failed to provide the explanation that *Abdelfattah* requires. Instead, they offer only conclusory statements about their agencies' processes. For example, the EOUSA asserts that it "conducted a line-by-line review to satisfy the EOUSA's reasonable segregability obligation." JA679. But this assertion provides no specificity and

no explanation as to the standards of such a line-by-line review by which information was judged segregable or not. And neither the FBI nor the EOUSA address *Abdelfattah*'s third point that agencies must provide an indication of what proportion of the information in a given document is nonexempt and how that material is dispersed. As a result, neither Viola nor the Court can assess the sufficiency of the agencies' segregability determinations. That precludes any determination about the appropriateness of the agencies' processes.

II. The District Court erred in granting the Task Force's motion to dismiss.

The District Court dismissed Viola's FOIA claims against the Task Force, concluding that it was not a federal agency subject to FOIA. In doing so, the District Court considered evidence outside the pleadings, but it neither converted the Task Force's motion to dismiss into a Rule 56 motion, as required by Rule 12(d), nor did it apply a summary judgment standard. Confining the analysis solely to Viola's allegations, as the District Court was required to do, Viola plausibly alleged that the Task Force was subject to FOIA and the District Court's personal jurisdiction.

A. The only question presented by the Task Force's motion to dismiss was whether the Task Force was a federal agency under FOIA.

The Task Force moved to dismiss Viola's complaint based on personal jurisdiction and failure to state a claim. JA372–73, 375–82. While both the Task Force and the Magistrate Judge apparently thought of these as alternative arguments, JA30–32, they are really just one: Both turn on whether the Task Force is a federal agency for purposes of FOIA.

FOIA grants the district court in the district in which a complainant resides jurisdiction over suits to compel the production of unlawfully withheld agency records. 5 U.S.C. § 552(a)(4)(B). By enacting FOIA, the federal government plainly consented to district courts where a suit is appropriately filed exercising personal jurisdiction over the federal government and its agencies. When Viola filed his FOIA suit, he was a resident of the Western District of Pennsylvania. *See* JA107 ("Plaintiff . . . is housed at the McKean Federal Correctional Institution . . . [in] Bradford, Pa."); *Brehm v. U.S. Dep't of Justice Office of Info. & Privacy*, 591 F. Supp. 2d 772, 772–73 (E.D. Pa. 2008) (noting plaintiff "is currently incarcerated . . . in South Carolina" meaning plaintiff "resides in South

Carolina"). The Western District of Pennsylvania thus had personal jurisdiction in Viola's suit over any agency subject to FOIA.

Viola's complaint alleged the Task Force was just such an agency. He specifically alleged it was "a federally-funded entity, consisting of numerous federal, state and local law enforcement agencies." JA108; *see also* 5 U.S.C. § 551(1) (defining "agency" for purposes of FOIA as "each authority of the Government of the United States," with certain exceptions not relevant here). If Viola's allegations that the Task Force was a federal agency were sufficient, then Section 552(a)(4)(B) provided him a cause of action against it. And by the same token, the District Court had personal jurisdiction over it in this case. The Task Force's motion to dismiss thus raised only one question: whether Viola adequately alleged the Task Force was a federal agency for purposes of FOIA.

B. The District Court improperly considered information outside the pleadings when deciding the Task Force's motion to dismiss.

When deciding a Rule 12(b)(6) motion, courts may consider only the allegations contained in the complaint, attached exhibits, or judicially noticeable facts. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). Any extrinsic evidence may be

considered only if "integral to or explicitly relied upon in the complaint." *Doe*, 30 F.4th at 342. When information outside the pleadings is presented, a district court must either exclude it—that is, not consider it—or it must convert the motion to dismiss into one for summary judgment. Fed. R. Civ. P. 12(d). To do so, the court must "provide[] notice of its intention to convert the motion and allow[] an opportunity to submit materials admissible in a summary judgment proceeding." *Rose v. Bartle*, 871 F.2d 331, 342 (3d Cir. 1989). The court's intention to convert the motion "must be unambiguous." *Id.* at 341. And once the motion has been converted, the court must apply the legal standard of Rule 56. *Carter v. Stanton*, 405 U.S. 669, 671 (1972) (per curiam). This includes providing opportunity for parties to conduct discovery. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).

Here, the District Court took neither of Rule 12(d)'s two paths. The Task Force moved to dismiss Viola's complaint, arguing that it was not a federal agency subject to FOIA. While its original motion relied solely on the pleadings, the Task Force submitted two affidavits along with its reply: one from Christa Dimon, a lawyer in the Office of the Ohio Attorney General, and one from Arvin Clar, Director of the Task Force during

Viola's prosecution. JA433–67; JA582–86. Despite purporting to resolve this motion under Rule 12, the Magistrate Judge unambiguously considered this evidence, relying on these affidavits to conclude that Viola failed to *prove* that the Task Force was a federal agency. JA32. Likewise, the District Court explicitly cited the "additional documentation" filed by the Task Force—referring to the Dimon and Clar affidavits—and concluded that this additional evidence "demonstrates that there is no basis to consider the Task Force to be an 'agency' for FOIA purposes." JA37 n.1. These materials considered by both the District Court and the Magistrate Judge were plainly not matters incorporated into the complaint or subject to judicial notice; they were affidavits of private individuals attesting to certain facts submitted to provide support for the Task Force's motion to dismiss.

Because the District Court and the Magistrate Judge did not "exclude" this evidence, their only option was to convert the Task Force's motion to dismiss into one for summary judgment. *Rose*, 871 F.2d at 339 n.3; Fed. R. Civ. P. 12(d). But they unambiguously did not do that either. Rather than indicating the intention to convert the motion, the District Court "repeatedly stated that it was deciding a motion to dismiss." *In re*

Rockefeller Ctr. Props., Inc. Sec. Litig., 184 F.3d 280, 288 (3d Cir. 1999) *see* JA38 (granting "motion to dismiss" filed by the Task Force). And prior to its recommendation that the Task Force's motion be granted, the Magistrate Judge informed Viola only that the court "may" convert the motion—not that it would—and it informed him that "[i]n response to the *motion to dismiss*," he could amend his complaint. JA385 (emphasis added). Thus, neither the District Court nor the Magistrate Judge provided clear notice that they were going to convert the Task Force's motion into a Rule 56 motion.

Those Courts' errors did not end there. Had they converted the Task Force's motion into a motion for summary judgment, the next step would be to afford Viola "an opportunity to submit materials admissible in a summary judgment proceeding." *Rose*, 871 F.2d at 342. This includes an opportunity to engage in discovery. *See Robert D. Mabe, Inc. v. OptumRX*, 43 F.4th 307, 330 (3d Cir. 2022) ("[O]nce the motion [to dismiss] is converted to a motion for summary judgment, reasonable allowance must be made for the parties to obtain discovery."); *accord Guidotti v. Legal Helpers Debt Resolution, LLC*, 716 F.3d 764, 775 n.6 (3d Cir. 2013). But while Viola—a pro se litigant not familiar with the niceties of Rule 12 motion

practice—had sua sponte submitted some evidence already in his possession that he thought bore on the issues, the District Court refused to give him the opportunity to conduct discovery so as to rebut the outside-the-record evidence submitted by the Task Force. Viola had specifically asked the District Court to order the "government [to] produce a copy of the FBI's memorandum of understanding with the Task Force," a document that would plainly be highly relevant to its status as a federal agency. JA538. But the District Court decided the Task Force's motion without acting on that request.

Finally, the District Court and Magistrate Judge failed to apply the legal standards of Rule 56. The District Court's order purports to grant the Task Force's "motion to dismiss" because Viola "ha[d] failed to plausibly 'show' that the Task Force is . . . an 'agency' for FOIA purposes." JA37 n.1. And the Magistrate Judge's recommendation purported to apply the legal standard for a "Motion to Dismiss for Failure to State a Claim" under "Federal Rule of Civil Procedure 12(b)(6)," citing such paradigmatic Rule 12(b)(6) cases as *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). JA26–27. These courts plainly did not apply the legal standard of Rule 56, as would be

required had it converted the motion to one for summary judgment.

In its order, the District Court briefly suggested that its violation of Rule 12(d) was somehow permissible because Viola himself "add[ed] unauthenticated documentation to the record" and thereby "opened the door to considering information on this issue outside of the record." JA38. But two wrongs do not make a right. Whether submitted by Viola himself or the Task Force, Rule 12(d) required the District Court either to exclude everything or to convert the motion to summary judgment. There is no in-between approach. And the District Court's "door opening" justification is particularly inappropriate when dealing with a pro se litigant, like Viola was at the time. His failure to grasp the technicalities of Rule 12 motions practice should not be used as an excuse to resolve the Task Force's motion on a quasi-summary-judgment standard without giving Viola any chance to conduct discovery that might call into question the Task Force's factual assertions. Because the District Court neither excluded the evidence that was submitted outside the pleadings nor properly converted the Task Force's motion into a motion for summary, the District Court's order of dismissal must be vacated and remanded. *Carter*, 405 U.S. at 671–72.

C. Viola plausibly alleged that the Task Force was a federal agency subject to FOIA.

The District Court's failure to follow Rule 12(d) was not harmless. Confining itself to the pleadings, the District Court should have denied the Task Force's motion to dismiss because Viola plausibly alleged that the Task Force was a federal agency. He alleged that the Task Force was comprised of multiple federal agencies and was staffed by officers from those agencies. JA108 (alleging "[t]he Cuyahoga County Mortgage Fraud Task Force was a federally-funded entity, consisting of numerous federal, state and local law enforcement agencies"). He also alleged that the Task Force was supported with federal funds. And though not properly part of the record on the motion to dismiss, in response to the Task Force's motion, Viola provided pieces of evidence then available to him supporting his allegations that the Task Force was really just an arm of several federal agencies. *See*, *e.g.*, JA390 (citing trial testimony from an FBI agent that the Task Force included "members from various agencies such as HUD, OIG, Housing & Urban Development, Office of the Inspector General, postal inspectors and myself, and members of the FBI"); JA510 (similar). That evidence included public statements from federal officials describing the Task Force in terms similar to Viola's allegations. JA515–16

(press release from the Task Force noting that it "is comprised of federal, state, and local law enforcement agencies" including the "HUD Inspector General's Office," "FBI," "U.S. Attorney's Office," and "U.S. Postal Inspector"); JA518 (letter from a prosecutor representing the Task Force to the DOJ thanking them for "the Mortgage Fraud Grant" and noting that the Task Force consisted of federal agencies like "Housing and Urban Development, U.S. Postal Inspectors . . . and FBI"); JA519 (grant documents awarding federal funds from the DOJ Office of Justice Programs to the Task Force); JA1468 (trial testimony from an FBI agent that the Task Force was "comprised of various local and federal agencies" including "the FBI").

The District Court's consideration of the Task Force's affidavits was thus far from harmless. Viola alleged that the Task Force operates essentially as an arm of multiple federal law-enforcement agencies, supporting federal prosecutions lead by federal prosecutors. Indeed, Viola was only ever convicted in federal court on charges brought by federal prosecutors based on the Task Force's investigation. The FBI and the Department of Housing and Urban Development each undeniably constitute "agencies" under FOIA. *See* 5 U.S.C. § 551(1) (defining "Agency" for purposes of

FOIA as "each authority of the Government of the United States," with certain exceptions not relevant here). They are still "agencies" when they act jointly to investigate federal crimes and support federal prosecutors, even if their cooperation includes individuals from state agencies. Accepting all of Viola's factual allegations as true and reading his pro se pleadings liberally, Viola plausibly alleged that the Task Force is a federal agency subject to FOIA. Whether Viola ultimately will *prove* those allegations is something that can be decided only after further discovery into the Task Force's nature and composition.

CONCLUSION

This Court should vacate the District Court's grant of summary judgment in favor of the FBI and EOUSA and its order dismissing Viola's claims against the Task Force.

Dated: April 3, 2023

Respectfully submitted,

By: /s/ *David R. Roth*

David Roth
Tadhg Dooley
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400
droth@wiggin.com
tdooley@wiggin.com

Attorneys for Appellant

CERTIFICATION OF BAR MEMBERSHIP

David R. Roth certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. Tadhg Dooley is also a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: April 3, 2023

/s/ *David R. Roth*
David R. Roth

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit LAR 31.1(c), the undersigned counsel for Appellant certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 12,109 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office 365 and is set in 14-point sized Century Schoolbook font;

(iii) is identical to the seven hard copies to be sent to the Clerk of the Court via FedEx to ensure delivery is no later than 5 days after the electronic filing date; and

(iv) has been scanned with a virus detection program and no virus was detected.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: April 3, 2023

/s/ *David R. Roth*
David R. Roth

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2023, I have caused a copy of the foregoing to be served on counsel of record through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Additionally, seven copies of the foregoing brief with attached Appendix Volume 1 and four copies of separately filed Appendix Volumes 2-7 will be sent out this week by Federal Express to ensure delivery is no later than 5 days after the electronic filing date:

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

Dated: April 3, 2023

/s/ *David R. Roth*
David R. Roth

No. 18-2573 (L); 22-2186

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ANTHONY L. VIOLA,

Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, Records/Information Dissemination Section; UNITED STATES DEPARTMENT OF JUSTICE, Executive Offices for United States Attorneys-Freedom of Information & Privacy Staff; CUYAHOGA COUNTY MORTGAGE FRAUD TASK FORCE;

Defendants–Appellees,

KATHRYN CLOVER,

Defendant.

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
No. 1:15-cv-00242-SPB, U.S. District Judge Susan Paradise Baxter

JOINT APPENDIX
VOLUME 1 of 7 (JA1 – JA41)
ATTACHED TO BRIEF

Michael C. Coville, Esq.
Laura S. Irwin, Esq.
OFFICE OF U.S. ATTORNEY
700 Grant Street, Suite 4000
Pittsburgh, PA 15219
(412) 644-7337

Sharon Swingle, Esq.
Daniel Winik, Esq.
U.S. DEPARTMENT OF JUSTICE,
CIVIL DIVISION
950 Pennsylvania Ave NW
Washington, DC 20530
(202) 353-2689

Attorneys for Appellees

David Roth, Esq.
Tadhg Dooley, Esq.
Pro bono counsel
WIGGIN AND DANA LLP
One Century Tower
265 Church Street
New Haven, CT 06510
(203) 498-4400

Alan Chen, Law Student
Daniel Mejia-Cruz, Law Student
YALE LAW SCHOOL ADVANCED
APPELLATE LITIGATION PROJECT*
127 Wall Street
New Haven, CT 06511
(914) 316-2302
*Law student motions pending

Attorneys for Appellant

TABLE OF CONTENTS

Volume 1:

1. Notice of Appeal, filed 7/13/18 [ECF No. 101] JA1

2. Notice of Appeal, filed 6/27/22 [ECF No. 178] JA3

3. Magistrate Judge's Report and Recommendation, filed 8/8/17 [ECF No. 84] JA5

4. Memorandum Order, filed 9/28/17 [ECF No. 91] JA16

5. Magistrate Judge's Report and Recommendation, filed 5/11/18 [ECF No. 98] JA21

6. Memorandum Order, filed 6/11/18 [ECF No. 100] JA37

7. Order, filed 6/10/22 [ECF No. 177] JA39

Volume 2

8. District Court Docket Sheet, No. 1:15-cv-00242-SPB JA42

9. Plaintiff's Exhibits in Support of Complaint, filed 1/19/16 [ECF No. 9] JA53

10. Plaintiff's Motion to Compel Production of Documents and Recordings, filed 5/5/16 [ECF No. 16] JA70

11. Plaintiff's Motion to Compel Discovery, filed 5/26/16 [ECF No. 19] JA93

12. Plaintiff's Amended Complaint, filed 6/11/16 [ECF No. 31] . JA106

13. Defendants' Motion for Enlargement of Time to Submit Vaughn Indexes, filed 12/27/16 [ECF No. 44] JA133

14. Plaintiff's Confirmation That The FBI Possessed Voice Recordings at Issue in this Case, filed 1/5/17 [ECF No. 48] .. JA240

15. Defendants' Response to the Order of Court Dated January 4, 2017, filed 1/31/17 [ECF No. 51] JA251

Volume 3:

16. Defendants' Response to the Order of Court Dated January 4, 2017, filed 2/27/17 [ECF No. 58] JA265

17. Defendant Cuyahoga County Mortgage Fraud Task Force's Motion to Dismiss, filed 3/10/17 [ECF No. 64] JA372

18. Order by US Magistrate Judge Susan Paradise Baxter, filed 3/14/17 [ECF No. 67] JA385

19. Plaintiff's Opposition to Cuyahoga County Mortgage Fraud Task Force's Motion to Dismiss, with Supporting Affidavit Attached, filed 4/5/17 [ECF No. 73] JA389

Volume 4:

20. Reply Brief in Support of Defendant Cuyahoga County Mortgage Fraud Task Force's Motion to Dismiss, filed 4/27/17 [ECF No. 77] JA425

21. Plaintiff's Opposition to Mortgage Fraud Task Force's Motion for Leave, Including Additional Documents Confirming the Joint Task Force is a Federal Agency, filed 5/1/17 [ECF No. 80] JA468

22. Plaintiff's Response to Government Motion for Summary Judgment, filed 8/17/17 [ECF No. 85] JA505

23. Plaintiff's Objections to Magistrate's Report and Recommendation, filed 8/17/17 [ECF No. 86] JA510

24. Brief of Defendant Cuyahoga County Mortgage Fraud Task Force in Opposition to Plaintiff's Objections to Magistrate's Report and Recommendation, filed 8/17/17 [ECF No. 87] JA527

25. Plaintiff's Reply to Opposition to Objections to Magistrate's Report and Recommendation, filed 9/13/17 [ECF No. 89] JA531

26. Plaintiff's Supplemental Brief, filed 10/25/17 [ECF No. 93]. JA536

27. Defendant Cuyahoga County Mortgage Fraud Task Force's Supplemental Brief in Support of Motion to Dismiss, filed 10/27/17 [ECF No. 94] JA573

Volume 5:

28. Plaintiff's Objections to the Magistrate Judge's Report and Recommendation, filed 5/29/18 [ECF No. 99]..... JA621

29. Order Appointing Counsel, filed 2/14/19 [ECF No. 108]..... JA647

30. Defendant EOUSA's Response to Order of the Court Dated November 20, 2020, including exhibits, filed 1/22/21 [ECF No. 154] JA649

31. Plaintiff's Objections to the Defendant EOUSA's Response to Order of the Court Dated November 20, 2020, including exhibits, filed 2/25/21 [ECF No. 156] JA651

32. Defendant FBI's Response to the Order of the Court Dated November 20, 2020, including Declaration and Exhibits A-M, filed 5/27/21 [ECF Nos. 164, 164-1, 164-2] JA729

Volume 6:

33. Exhibit N to Defendant FBI's Response to the Order of the Court Dated November 20, 2020, filed 5/27/21 [ECF No. 164-3] JA840

Volume 7:

34. Plaintiff's Objections to the Defendant FBI's Response to the Order of the Court Dated November 20, 2020, including exhibits, filed 6/30/21 [ECF No. 167] JA1256

35. Defendants' Consolidated Response to Plaintiff's Objections, filed 8/23/21 [ECF No. 170] JA1558

36. Plaintiff's Reply to Defendants' Consolidated Response, including exhibits, filed 10/22/21 [ECF No. 173] JA1584

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA,	)	Case No. 15-cv-242 (Erie)
	)	
Plaintiff	)	Hon. Mark R. Horner
	)	
-vs.-	)	Magistrate: Hon. Susan Paradise Baxter
	)	
U.S. DEPARTMENT OF JUSTICE, et. al.,	)	**NOTICE OF APPEAL**
	)	
Defendants	)	

Now comes Anthony L. Viola, respectfully submitting this Notice of Appeal concerning the Court's final order in this matter. Kindly note that the Clerk's Office informed the undersigned that a ruling was made, but that order, dated June 11, 2018, was not mailed or provided to the Plaintiff. The Camp Office that handles legal mail can confirm this, (814) 362-8900, Mr. Stauffer or Mr. Rhinehart.

Thank you very much for your assistance.

Respectfully Submitted,

Anthony L. Viola # 32238-160
McKean Federal Correctional
Institution - P.O. Box 8000
Bradford, PA 16701

July 9, 2018

Anthony L. Viola ID # 32238-160
McKean Federal Correctional Institution
P.O. Box 8000 - Bradford, PA 16701

July 9, 2018

Clerk of Court
U.S. District Court
Western District of Pennsylvania
17 South Park Row
Erie, PA 16507

RE: Viola v. Department of Justice, et. al., Case # 15-cv-242

Dear Sirs:

Enclosed please find two (2) copies of a Notice of Appeal concerning the matter captioned above. Kindly return one time stamped copy of the Notice of Appeal in the envelop I've pre-addressed and stamped.

Thank you very much for your assistance.

Respectfully Submitted,
Tony Viola
www.FreeTonyViola.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY VIOLA,	)	Civil Action No. 1:15-cv-242
	)	
Plaintiff	)	Hon. Susan Paradise Baxter
-vs.-	)	
	)	**NOTICE OF APPEAL**
U.S. DEPARTMENT OF JUSTICE, et. al.,	)	
Defendants	)	

Plaintiff respectfully submits this Notice of Appeal concerning the Court's final order in this matter, document number 177, filed June 10, 2022.

Respectfully Submitted,

Anthony Viola
2820 Mayfield Road # 205
Cleveland Heights, Ohio 44118
MrTonyViola@ICloud.com
330-998-3290
June 22, 2022

Anthony Viola
2820 Mayfield Road # 205
Cleveland Heights, Ohio 44118
(330) 998-3290
MrTonyViola@icloud.com

June 22, 2022

Clerk of Court
United States District Court
Western District of Pennsylvania
17 South Park Row
Erie, PA 16501

RE: Viola v. U.S. Department of Justice, et. al., District Court Case Number 15-cv-242; Third Court of Appeals Number 18-2573

Dear Sirs:

Enclosed please find a Notice of Appeal concerning the matter captioned above.

I have also enclosed an additional copy of this Notice so you can time stamp the additional copy and return it to me in the envelope I provided.

Thank you very much for your assistance.

Respectfully Submitted,

Tony Viola

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA,	)	
Plaintiff,	)	**Civil Action No. 15-242 Erie**
	)	
v.	)	
	)	
	)	**District Judge Hornak**
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION; UNITED STATES DEPARTMENT OF JUSTICE; CUYAHOGA COUNTY MORTGAGE FRAUD TASK FORCE; and KATHRYN CLOVER,	)	**Magistrate Judge Baxter**
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that the Motions to Dismiss filed by Defendants Cuyahoga County Mortgage Fraud Task Force (ECF No. 64) and Kathryn Clover (ECF No. 54) be granted. It is further recommended that the Motions for Protective Orders (ECF Nos. 68 & 69) and Motion to Quash Deposition Notices (ECF No. 69) filed by Kathryn Clover be dismissed as moot.

II. REPORT

A. Relevant Procedural and Factual History

On October 1, 2015, Plaintiff Anthony L. Viola filed this *pro se* action seeking the production of documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.* ("FOIA"). Plaintiff's complaint names as Defendants the United States Department of Justice, Federal Bureau of Investigation ("FBI"), and the United States Department of Justice ("DOJ").

Plaintiff subsequently filed an amended complaint [ECF No. 31] adding Defendants Cuyahoga County Mortgage Fraud Task Force ("Cuyahoga Task Force") and Kathryn Clover ("Clover"), an alleged "agent of the federal government." Plaintiff seeks documents from Defendants related to an investigation into his business dealings, which resulted in his indictment and conviction. In 2011, Plaintiff was convicted after a jury trial of two counts of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and thirty-three counts of wire fraud in violation of 18 U.S.C. § 1343, in the United States District Court for the Northern District of Ohio. United States v. Viola, 1:08-CR-506, N.D. Ohio. In 2012, Plaintiff was acquitted after a jury trial in state court in the Cuyahoga County Common Pleas Court of fifty-nine charges that involved some of the same conduct at issue in his federal trial. State v. Viola, Case No. CR-10-536877-I, Cuyahoga County Common Pleas.

Plaintiff was sentenced in federal court to a total term of 150 months' imprisonment, consisting of 60 months' imprisonment for each conspiracy count and 150 months' imprisonment for each wire fraud count, to be served concurrently. Plaintiff filed several post-conviction motions for a new trial and for other relief, a direct appeal, and a motion to vacate under 28 U.S.C. § 2255, all of which have been unsuccessful. See, e.g., United States v. Viola, No. 1:08 CR 506, 2011 WL 6749643 (N.D.Ohio Dec. 22, 2011); United States v. Viola, No. 1:08 CR 506, 2012 WL 3044295 (N.D.Ohio July 25, 2012); United States v. Viola, No. 1:08 CR 506, 2015 WL 7259783 (N.D.Ohio Nov. 17, 2015); and United States v. Viola, No. 12-3112 (6th Cir. Nov. 6, 2013); Nos. 14-3348/14-3624 (6th Cir. Nov. 3, 2014), Nos. 14-4139/14-4199 (6th Cir. Jul 1, 2015).

Defendant Clover, acting *pro se,* has filed a motion to dismiss Plaintiff's claims against

her, primarily arguing that she is not subject to suit under FOIA because she is not a governmental agency. [ECF No. 54]. Defendant Cuyahoga Task Force has also moved to dismiss Plaintiff's amended complaint against it, arguing lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure12(b)(2), and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). [ECF Nos. 64]. Plaintiff has since filed responses to both motions. (ECF Nos. 63 and 73, respectively). This matter is now ripe for consideration.[1]

B. Standards of Review

Rule 12(b)(2) of the Federal Rules of Civil Procedure permits a court to dismiss a complaint for lack of personal jurisdiction. Fed.R.Civ.P. 12(b)(2). The burden is on the plaintiff to establish "either that the cause of action arose from the defendant's forum-related activities (specific jurisdiction) or that the defendant has 'continuous and systematic' contacts with the forum state (general jurisdiction)." Mellon Bank (E.) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir.1993) (citations omitted). In reviewing a motion to dismiss for lack of personal jurisdiction, the Court must accept as true all allegations in the complaint. See D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 102 (3d Cir.2009); Marten v. Godwin, 499 F.3d 290, 295–96 (3d Cir.2007).

When reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." Eid v. Thompson, 740 F.3d 118, 122 (3d Cir.

[1] Defendants FBI and DOJ only recently filed a motion to dismiss, or in the alternative, motion for summary judgment [ECF No. 81], to which Plaintiff has not yet filed a response. As a result, Plaintiff's claims against said Defendants will not be considered here.

2014), quoting Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir.2008). "As explicated in Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), a claimant must state a 'plausible' claim for relief, and '[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 147 (3d Cir. 2014). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678. In short, a motion to dismiss should be granted if a party does not allege facts which could, if established at trial, entitle him to relief. See Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir.2009).

In addition to the complaint, courts may consider matters of public record and other matters of which a court may take judicial notice, court orders, and exhibits attached to the complaint when adjudicating a motion to dismiss under Rule 12(b)(6). Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994), citing 5A Wright and Miller, Federal Practice and Procedure: Civil 2d, § 1357; Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990).

Importantly, the Court must liberally construe the factual allegations of the Complaint because pleadings filed by *pro se* plaintiffs are held to a less stringent standard than formal pleadings drafted by lawyers. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Therefore, if the Court "can reasonably read [the] pleadings to state a valid claim on which [plaintiff] could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or [plaintiff's] unfamiliarity with pleading requirements." Wilberger v. Ziegler, No. 08-54, 2009 WL 734728, at *3 (W.D. Pa. March 19, 2009), citing Boag v.

MacDougall, 454 U.S. 364 (1982) (*per curiam*). Nonetheless, a court need not credit bald assertions, unwarranted inferences, or legal conclusions cast in the form of factual averments. Morse v. Lower Merion School District, 132 F.3d 902, 906, n. 8 (3d Cir.1997).

Finally, if the court decides to grant a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6), the court must next decide whether leave to amend the complaint must be granted. The Court of Appeals has "instructed that if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile." Phillips, 515 F.3d at 236 citing Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir.2002).

C. Discussion

1. Defendant Cuyahoga Task Force - Lack of Personal Jurisdiction

Defendant Cuyahoga Task Force is a nonresident of the Commonwealth of Pennsylvania and argues that it has not had sufficient connection to Pennsylvania to permit the exercise of personal jurisdiction.

A federal court may exercise "personal jurisdiction over non-resident defendants to the extent permissible under the law of the state where the district court sits." Fed.R.Civ.P. 4(e). Pennzoil Prod. Co. v. Colelli & Assocs., Inc., 149 F.3d 197, 200 (3d Cir. 1998) (citation omitted). Pennsylvania's long-arm statute authorizes Pennsylvania courts to exercise personal jurisdiction over nonresidents "to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States." 42 Pa. Cons.Stat. Ann. § 5322(b); Remick v. Manfredy, 238 F.3d 248, 255 (3d Cir. 2001). The statute's reach is coextensive with the Due Process Clause

of the Fourteenth Amendment to the United States Constitution. Grand Entertainment Group, Ltd. v. Star Media Sales, 988 F.2d 476, 481 (3d Cir. 1993), citing Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 63 (3d Cir. 1984).

Consistent with the requirements of due process, courts must ensure that a nonresident defendant is subjected to personal jurisdiction only where its activities have been purposefully directed at residents of the forum, or otherwise availed themselves of the privilege of conducting activities there. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985).

> The Due Process Clause of the Fourteenth Amendment requires that nonresident defendants have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quotation marks and citations omitted). Having minimum contacts with another state provides "fair warning" to a defendant that he or she may be subject to suit in that state. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985) (quotation marks and citations omitted).

Kehm Oil Co. v. Texaco, Inc., 537 F.3d 290, 299–300 (3d Cir. 2008).

Federal courts recognize two forms of personal jurisdiction: general and specific jurisdiction. Kehm Oil Co., 537 F.3d at 300. General personal jurisdiction arises from a defendant's contacts with the forum that are unrelated to the cause of action being litigated and requires a showing that the defendant has had continuous and systematic contacts with the forum state. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412-13, 414 & n. 8 & 9 (1984).

Specific jurisdiction exists "when the plaintiff's claim is related to or arises out of the defendant's contacts with the forum." Mellon Bank (E.)PSFS, Nat'l Assoc. v. Farino, 960 F.2d 1217, 1221 (3d Cir.1992). Specific personal jurisdiction comports with due process as long as

the defendant has sufficient minimum contacts with the forum state, focusing on "the relationship among the defendant, the forum, and the litigation." Rush v. Savchuk, 444 U.S. 320, 327 (1980), quoting Shaffer v. Heitner, 433 U.S. 186 (1977). It has long been recognized that minimum contacts exist where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). In other words, when a defendant's conduct is such that she reasonably should have foreseen being haled into court in the forum, the necessary minimum contacts have been shown. World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Even a single act can support specific jurisdiction, so long as it creates a "substantial connection" with the forum. Burger King, 471 U.S. at 476.

As noted "[w]hen a defendant contests personal jurisdiction, the burden shifts to the plaintiff to prove its existence." Stillwagon v. Innsbrook Golf & Marina, LLC, 2012 WL 501685, *2 (W.D. Pa. Feb. 14, 2012), citing Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330 (3d Cir. 2009) and Mellon Bank, 960 F.2d at 1223. Therefore, Plaintiff has the "burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence." In re Enterprise Rent-A-Car, 735 F.Supp.2d at 306.

Here, Plaintiff first responds to Defendant's jurisdictional argument by asserting that *venue* in this district is appropriate; however, Defendant Cuyahoga Task Force moves to dismiss Plaintiff's claims against it based on lack of personal jurisdiction, not inappropriate venue. As to the jurisdictional argument, Plaintiff merely asserts, without evidence, that the Cuyahoga Task Force is a federally funded agency. In addition, Plaintiff attempts to establish personal jurisdiction by arguing that federal prosecutors engaged in inappropriate conduct in connection

with the Cuyahoga Task Force's investigation, which was allegedly aimed at undermining Plaintiff's innocence by, *inter alia*, hiding evidence of his innocence from the Task Force. None of these allegations are sufficient to show that this Court may properly exercise personal jurisdiction over the nonresident Defendant.

Moreover, it is undisputed that the Cuyahoga Task Force had no contacts whatsoever with the Commonwealth of Pennsylvania. The investigation and prosecutions of Plaintiff occurred in the federal and state courts of Ohio. The Cuyahoga Task Force was established by the Ohio Organized Crime Investigations Commission pursuant to a Memorandum of Understanding, whose signatory parties were Ohio law enforcement agencies. (ECF No. 77-1, Affidavit of Christa A. Dimon, Principal Assistant Attorney General, Office of the Ohio Attorney General, at ¶ 2). None of the constituent members of the Task Force was a federal agency. Funding for the Task Force was to be provided "in an amount to be determined by and consistent with the budget of the Ohio Organized Crime Investigations Commission." (Id. at ¶¶ 3, 6). Thus the Task Force was not federally funded.

Because the Cuyahoga Task Force has had no contacts with the Commonwealth of Pennsylvania and Plaintiff's FOIA action does not arise out of any business conducted in Pennsylvania, this Court lacks personal jurisdiction over said Defendant. See Sierra Club v. Tennessee Valley Auth., 905 F. Supp. 2d 356, 362 (D.D.C. 2012) ("Sierra Club's FOIA claim against TVA does not arise out of any business transacted between the parties in the District"). Accordingly, Plaintiff's claims against Defendant Cuyahoga Task Force should be dismissed for

lack of personal jurisdiction.[2]

b. Defendant Clover

Defendant Clover argues that Plaintiff's claims against her should be dismissed because Plaintiff has failed to state a claim upon which relief can be granted under FOIA. In particular, Defendant Clover asserts that FOIA does not create a private cause of action against a private citizen. The Court agrees.

Plaintiff seeks records pursuant to FOIA; however, FOIA only applies to federal governmental agencies. 5 U.S.C. § 552(a)(4)(B). FOIA defines "agency" as meaning "each authority of the Government of the United States." 5 U.S.C. § 551(1). See also 5 U.S.C. § 552(f)(1) ("'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"). The definition of "agency" does not include a private citizen, 5 U.S.C. § 551(1). See also Rocky Mountain Wild, Inc. v. United States Forest Serv., 230 F. Supp. 3d 985 (D. Colo. 2017) ("FOIA requests may only be made to government agencies, not private parties"); Brestle v. Lappin, 950 F. Supp. 2d 174, 179 n. 1 (D.D.C. 2013) ("Although plaintiff has named former BOP Director Harley Lappin as the defendant, only federal agencies are subject to suit under the FOIA"); and Martinez v. Bureau of Prisons, 444 F.3d 620, 624 (D.C. Cir. 2006) (named individual defendants were properly dismissed because no cause of action for relief exists for them under FOIA).

[2] Because the Court has determined that it lacks personal jurisdiction over Defendant Cuyahoga Task Force, it will not address Defendant's remaining argument that Plaintiff has failed to state a cause of action upon which relief may be granted against it.

Because Defendant Clover is a private citizen, she is not subject to suit under FOIA. 5 U.S.C. §§ 552(a)(4)(B) and 551.[3] Accordingly, the Amended Complaint should be dismissed against Defendant Clover for failure to state a claim upon which relief can be granted. Furthermore, because Plaintiff is unable to assert any set of facts to show that either of the Defendants is subject to suit, amendment of the Amended Complaint would be futile.

c. Defendant Clover's Pending Discovery Motions

Defendant Clover has filed a Motion for a Protective Order (ECF Nos. 68 & 69) and a Motion to Quash Deposition Notices (ECF No. 69). Defendant Clover's motions have merit because Plaintiff has failed to comply with Federal Rules of Civil Procedure regarding discovery and because discovery under FOIA is extremely limited and would not likely be granted under these circumstances. However, in light of the recommendation to dismiss Plaintiff's claims against her, the above motions should be dismissed as moot.

III. CONCLUSION

For the foregoing reasons it is respectfully recommended that the Motions to Dismiss filed by Defendants Cuyahoga County Mortgage Fraud Task Force (ECF No. 64) and Kathryn Clover (ECF No. 54) be granted, and that the Motions for Protective Orders (ECF Nos. 68 & 69) and Motion to Quash Deposition Notices (ECF No. 69) filed by Kathryn Clover be dismissed as moot. It is further recommended that the Clerk be directed to terminate Defendants Cuyahoga Task Force and Clover from this case.

---

[3] Plaintiff's response in opposition to Defendant Clover's motion is not on point as he presents argument and allegations concerning Defendant Clover's conduct (and the conduct of irrelevant nonparties) in relation to his criminal investigation and trials, which are not relevant to whether a claim is properly asserted against her under FOIA.

In accordance with the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and Fed.R.Civ.P. 72(b)(2), the parties are allowed fourteen (14) days from the date of service to file written objections to this report and recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file objections will waive the right to appeal. Brightwell v. Lehman, 637 F. 3d 187, 193 n. 7 (3d Cir. 2011).

BY THE COURT

/s/ Susan Paradise Baxter
SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: August 8, 2017

cc: The Honorable Mark R. Hornak
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, et al, Defendants.	)	No. 1:15-cv-00242 Judge Mark R. Hornak

MEMORANDUM ORDER

This civil action was received by the Clerk of Court on October 1, 2015, and was referred to United States Magistrate Judge Susan Paradise Baxter for Report and Recommendation ("R&R") in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. The Magistrate Judge's Report and Recommendation, issued on August 8, 2017, recommended that the Motions to Dismiss filed by Defendants Cuyahoga County Mortgage Fraud Task Force ("Task Force") (ECF No. 64) and Kathryn Clover (ECF No. 54) be granted, and that the Motions for Protective Orders (ECF Nos. 68 & 69) and Motion to Quash Deposition Notices (ECF No. 69) filed by Kathryn Clover be dismissed as moot. It was further recommended that the Clerk be directed to terminate Defendants Task Force and Clover as parties in this case. Service was made on Plaintiff by mail at FCI McKean, where he is incarcerated, and on Defendants by ECF. Objections were filed by the Plaintiff on August 17, 2017. Defendant Task Force filed a Brief in Opposition to the Objections on August 30, 2017, as did Defendant Clover on September 5, 2017. The Plaintiff filed a Reply Brief on September 13, 2017, and Defendant Clover thereafter responded on September 25, 2017.

The Court has carefully reviewed the Objections filed by the Plaintiff and the various responses to them, and finds that they do not impair the R&R as to the dismissal of the claims as to Defendant Clover, as set out at length below. As to the Objections relative to the dismissal of the Task Force on personal jurisdiction grounds, the Plaintiff now advances documentation that he contends demonstrates that contrary to certain observations contained in the R&R, the Task Force was the recipient of some federal funding, and that the Task Force included agents affiliated with one or more federal agencies, and that as a result, there is a sufficiently weighty issue as to whether the Task Force is an "agency" under FOIA such that dismissal is improper at this juncture.

This Court is not so sure, and would note that even if the Court were to consider those assertions by the Plaintiff to be true for these purposes, they may or may not alter the conclusion of the R&R that the Plaintiff has failed to carry his burden of demonstrating that there is a basis for this Court to conclude that such "agency" status exists or that the Court may exercise personal jurisdiction over the Task Force (at all or in Pennsylvania) such that this civil action can be maintained, and maintained in this forum. Part of the problem is that it appears that not all of the information that the Plaintiff now tenders with his Objections was in the record when the Magistrate Judge issued her R&R, and beyond that, the weight (if any) to be given it was not addressed in the R&R. Further, even if the Task Force is an "agency" for FOIA purposes, it is not at all certain that there are sufficient contacts with the forum state to permit the assertion of personal jurisdiction over the Task Force in this Court. Beyond all of that is the reality that there is authority for the principles that the Plaintiff's in-custody status in this District does not make him a resident here for FOIA venue purposes, *Kelly v. JAG of the Navy*, 2012 WL 6611009 (D. Kan. Dec. 18, 2012), and/or that this FOIA action could and perhaps should be transferred to the Northern District of Ohio because that is where the Plaintiff's criminal trial was conducted, and

his FOIA request relates directly to that proceeding, *Carpenter v. Dept. of Justice*, 2005 WL 1290678 (D. Conn. Apr. 28, 2005), and/or that the most significant nexus is with the proceedings in that District, *Ferri v. Dept. of Justice*, 441 F. Supp. 404 (M.D. Pa. 1977).

While this Court harbors substantial doubts that the factual matters now asserted by the Plaintiff could carry the day to provide for FOIA coverage over, and resulting FOIA litigation against, the Task Force (either at all or in this District), the Court also concludes that the Magistrate Judge, familiar as she is with the record and proceedings in this case, is better situated to consider them in the first instance, along with her further consideration of one or more other legal principles that could counsel against the assertion of jurisdiction over the Task Force, either in this District or at all. Thus, the Objections of the Plaintiff as to the R&R's treatment of the claims asserted against the Task Force are sustained only to the extent that the R&R is vacated and not adopted, all without prejudice to further action by the Magistrate Judge, only as to its treatment of the FOIA claim against the Task Force, and such matter is referred back to the Magistrate Judge for further proceedings and consideration. This is *not* a disposition by this Court on the merits of the Task Force's dismissal motion, but only a referral to the Magistrate Judge for further consideration of such matters, on such terms as she determines to be just and proper.

Secondly, as to Defendant Clover, the Plaintiff seems to assert in his Objections, in substance, that Ms. Clover should be treated as an "agency" for FOIA purposes because of her testimony during his state court trial that she reviewed at her home several boxes of documents she had provided to the prosecution, and that therefore, because she once "possessed" them, she is now amenable as a Defendant to this FOIA suit. The Court disagrees. First, the materials that the Plaintiff has so entered on the docket are outside of the allegations of his Amended Complaint, which in essence asserted that because Ms. Clover was an "indispensable" party (although no claim

as to her in such capacity was alleged as such in the Amended Complaint), she should remain in the case. ECF No. 31 at 3, 30. However, it does not appear to this Court that such assertions alter the correctness of the R&R's conclusion that Ms. Clover is simply not a proper party to this FOIA action, and she certainly does not become one based on the assertion that at the request of the prosecution lawyer in the Plaintiff's state court trial, she had once reviewed documents that she had provided to the prosecution in the first instance. Further, she did not become a proper party in this FOIA action on the basis that it is alleged in the Amended Complaint that she was a Government witness at the Plaintiff's criminal trials, that the real properties at issue in those trials were purchased or managed by her, that she sent emails to prosecuting attorneys, or attended meetings with them or allegedly received financial support from the Government. *See* ECF Nos. 31 at 3, 65 at 8. Finally, as to matters requested by Ms. Clover in her latest filing, given the disposition of the claims asserted against her here, this Court has no occasion to assess whether this Court should now join a sister United States District Court in determining the Plaintiff to be a vexatious litigant, as it would appear (at least for the time being) that such Order from the Northern District of Ohio would appropriately address that issue. Further, in light of the disposition here of the claims asserted against Ms. Clover, this Court will deny the request for sanctions against her without prejudice to its refiling should the litigation actions of the Plaintiff support it.

After *de novo* review of the pleadings and documents in the case, together with the Report and Recommendation and Objections thereto, the following Order is entered:

AND NOW, this 28th day of September, 2017;

IT IS HEREBY ORDERED that the Motion to Dismiss filed by Defendant Kathryn Clover (ECF No. 54) is GRANTED, and the Motions for Protective Orders (ECF Nos. 68 & 69) and Motion to Quash Deposition Notices (ECF No. 69) filed by Kathryn Clover are DISMISSED AS

MOOT. It is further ORDERED that the R&R is vacated without prejudice to further proceedings to the extent of its recommendation as to the Motion to Dismiss filed by the Cuyahoga County Mortgage Fraud Task Force (ECF No. 64). The Clerk is directed to terminate Defendant Clover from this case. The Report and Recommendation of Magistrate Judge Baxter, issued August 8, 2017, is adopted as the Opinion of the Court as expressly modified by this Memorandum Order, and the matter is referred back to the Magistrate Judge for further proceedings.

Mark R. Hornak
United States District Judge

cc: All counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA,	)	
Plaintiff,	)	**Civil Action No. 15-242 Erie**
	)	
v.	)	
	)	
	)	**District Judge Hornak**
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION; UNITED STATES DEPARTMENT OF JUSTICE; CUYAHOGA COUNTY MORTGAGE FRAUD TASK FORCE; and KATHRYN CLOVER,	)	**Magistrate Judge Baxter**
Defendants.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that:

1. the motion to dismiss filed by Defendant Cuyahoga County Mortgage Fraud Task Force [ECF No. 64] be GRANTED; and

2. the motion for summary judgment filed by Defendants United States Department of Justice, Executive Offices of the United States, and Federal Bureau of Investigation [ECF No. 81], be GRANTED.

II. REPORT

A. Relevant Procedural and Factual History

On October 1, 2015, Plaintiff Anthony L. Viola filed this *pro se* action seeking the production of documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq*.

("FOIA"). Plaintiff's complaint names as Defendants the United States Department of Justice, Federal Bureau of Investigation ("FBI"), and the United States Department of Justice ("DOJ"). Plaintiff subsequently filed an amended complaint [ECF No. 31] adding Defendants Cuyahoga County Mortgage Fraud Task Force ("Task Force") and Kathryn Clover ("Clover"), an alleged "agent of the federal government." Plaintiff seeks documents from Defendants related to an investigation into his business dealings, which resulted in his indictment and conviction. In 2011, Plaintiff was convicted after a jury trial of two counts of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and thirty-three counts of wire fraud in violation of 18 U.S.C. § 1343, in the United States District Court for the Northern District of Ohio. United States v. Viola, 1:08-CR-506, N.D. Ohio. In 2012, Plaintiff was acquitted after a jury trial in state court in the Cuyahoga County Common Pleas Court of fifty-nine charges that involved some of the same conduct at issue in his federal trial. State v. Viola, Case No. CR-10-536877-I, Cuyahoga County Common Pleas.

Plaintiff was sentenced in federal court to a total term of 150 months' imprisonment, consisting of 60 months' imprisonment for each conspiracy count and 150 months' imprisonment for each wire fraud count, to be served concurrently. Plaintiff filed several post-conviction motions for a new trial and for other relief, a direct appeal, and a motion to vacate under 28 U.S.C. § 2255, all of which have been unsuccessful. See, e.g., United States v. Viola, No. 1:08 CR 506, 2011 WL 6749643 (N.D.Ohio Dec. 22, 2011); United States v. Viola, No. 1:08 CR 506, 2012 WL 3044295 (N.D.Ohio July 25, 2012); United States v. Viola, No. 1:08 CR 506, 2015 WL 7259783 (N.D.Ohio Nov. 17, 2015); and United States v. Viola, No. 12-3112 (6th Cir. Nov. 6, 2013); Nos. 14-3348/14-3624 (6th Cir. Nov. 3, 2014), Nos. 14-4139/14-4199 (6th Cir. Jul

1, 2015).

On February 23, 2017, Defendant Clover, acting *pro se,* filed a motion to dismiss Plaintiff's claims against her, primarily arguing that she is not subject to suit under FOIA because she is not a governmental agency. [ECF No. 54]. On March 10, 2017, Defendant Task Force filed its own motion to dismiss Plaintiff's amended complaint, arguing lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure12(b)(2), and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). [ECF Nos. 64]. Plaintiff subsequently filed responses to both motions. [ECF Nos. 63 and 73, respectively].

On July 25, 2017, Defendants FBI and DOJ filed a motion to dismiss or in the alternative motion for summary judgment [ECF No. 81], arguing that the information sought to be obtained by Plaintiff is exempt from disclosure and that all discoverable information has been provided to Plaintiff. Plaintiff filed a short response to this motion on August 17, 2017 [ECF No. 85], arguing that the Court still needed to rule on his pending motion for limited discovery [ECF No. 46] before he would be able to respond, and that he would need an additional thirty (30) days to respond to Defendants' motion after such ruling occurred. However, the Court already issued an Order on January 10, 2017, denying Plaintiff's motion for limited discovery, without prejudice to Plaintiff's right to re-file the motion if appropriate records weren't identified in the Vaughn Index to be produced by Defendants on or before February 28, 2017. [ECF No. 49]. Defendants subsequently submitted their Vaughn Indices on January 31, 2017 [ECF No. 51] and February 27, 2017 [ECF No. 58]. Plaintiff has not since re-filed his motion for limited discovery, nor has he otherwise raised any objections to the Vaughn Index produced by either Defendant. In addition, Plaintiff has not filed a further substantive response to Defendants' motion [ECF No.

81], despite the passing of eight months since the filing of his initial response [ECF No. 85].

In the meantime, on August 8, 2017, this Court issued a Report and Recommendation ("R&R") [ECF No. 84], recommending that the motions to dismiss filed by Defendants Clover [ECF No. 54] and Task Force [ECF No. 64] be granted. In particular, this Court found that Plaintiff's claims against Defendant Clover should be dismissed because FOIA does not create a private right of action against a private citizen, and that Plaintiff's claims against Defendant Task Force should be dismissed for lack of personal jurisdiction because said Defendant did not have sufficient contacts with the Commonwealth of Pennsylvania. Plaintiff filed objections to the R&R on August 17, 2017 [ECF No. 86], including documentation intended to demonstrate that jurisdiction is proper because the Task Force is an "agency" under FOIA.

By Memorandum Order dated September 28, 2017 [ECF No. 91], District Judge Mark R. Hornak adopted the Court's R&R insofar as Plaintiff's claims against Defendant Clover were dismissed from this case; however, Judge Hornak vacated, without prejudice, this Court's recommendation to dismiss Plaintiff's claims against Defendant Task Force, because the documents submitted with Plaintiff's objections were not in the record and, thus, not considered by this Court when the R&R was issued. Accordingly, Judge Hornak referred this matter back to this Court for further proceedings and consideration of matters pertaining to jurisdiction and venue over Plaintiff's claims against Defendant Task Force.

On October 2, 2017, this Court issued an Order [ECF No. 92] requiring both Plaintiff and Defendant Task Force to file supplemental briefs addressing the matters raised for the first time in Plaintiff's objections, as more fully delineated in Judge Hornak's Memorandum Order. These

briefs have since been filed by the parties. [ECF Nos. 93, 94].[1] These matters, as well as the pending motion filed by Defendants FBI and DOJ [ECF No. 81] are now ripe for consideration.

B. Standards of Review

1. Motion to Dismiss for Lack of Personal Jurisdiction

Rule 12(b)(2) of the Federal Rules of Civil Procedure permits a court to dismiss a complaint for lack of personal jurisdiction. Fed.R.Civ.P. 12(b)(2). The burden is on the plaintiff to establish "either that the cause of action arose from the defendant's forum-related activities (specific jurisdiction) or that the defendant has 'continuous and systematic' contacts with the forum state (general jurisdiction)." Mellon Bank (E.) PSFS, N.A. v. DiVeronica Bros., Inc., 983 F.2d 551, 554 (3d Cir.1993) (citations omitted). "Because federal courts are courts of limited jurisdiction, a presumption arises that they are without jurisdiction until the contrary affirmatively appears." Myers v. Am. Dental Ass'n, 695 F.2d 716, 724 (3dCir. 1982). "The person asserting jurisdiction bears the burden of showing that the case is properly before the court in all stages of the litigation." Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1045 (3d Cir. 1992). In other words, once a defendant raises a lack of personal jurisdiction as a defense, the burden to prove the existence of personal jurisdiction over the defendant shifts to the plaintiff. Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 146 (3d Cir. 1992). Normally, in response to a motion to dismiss for lack of personal jurisdiction, a plaintiff need only make a prima facie showing that the defendants are subject to personal jurisdiction. When the parties

---

[1] The Court notes that Plaintiff's supplemental brief [ECF No. 93] raises, for the first time, a Sixth Amendment right to counsel claim, as well as an argument that former Defendant Clover should be required to respond to discovery requests. (Id. at p. 4). Both of these matters fall outside the purview of this Court's Order of October 2, 2017 [ECF No. 92] and will, thus, be disregarded.

have conducted jurisdictional discovery, however, a plaintiff's burden of proof is by the preponderance of the evidence. Pieczenik v. Dyax Corp., 265 F.3d 1329, 13334 (Fed.Cir. 2001). The plaintiff may not rely on the pleadings to satisfy his burden, but must establish a basis for personal jurisdiction through sworn affidavits or other competent evidence. North Penn Gas Co. v. Corning Natural Gas Corp., 897 F.2d 687, 689 (2d Cir. 1990). In reviewing a motion to dismiss for lack of personal jurisdiction, the Court must accept as true all allegations in the complaint. See D'Jamoos v. Pilatus Aircraft Ltd., 566 F.3d 94, 102 (3d Cir.2009); Marten v. Godwin, 499 F.3d 290, 295–96 (3d Cir.2007).

2. Motion to Dismiss for Failure to State a Claim

A motion to dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(6) must be viewed in the light most favorable to the plaintiff and all the well-pleaded allegations of the complaint must be accepted as true. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007). A complaint must be dismissed pursuant to Rule 12 (b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). See also Ashcroft v. Iqbal, 556 U.S. 662, 678 (May 18, 2009) (specifically applying Twombly analysis beyond the context of the Sherman Act).

The Court need not accept inferences drawn by plaintiff if they are unsupported by the facts as set forth in the complaint. See California Pub. Employee Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997). Nor must the court accept legal conclusions set forth as factual allegations. Twombly, 550 U.S. at 555, citing Papasan v. Allain, 478 U.S. 265, 286 (1986). See also McTernan v. City of York, Pennsylvania, 577 F.3d 521, 531 (3d Cir. 2009) ("The tenet that a

court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). A Plaintiff's factual allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 556, citing 5 C.Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004). Although the United States Supreme Court does "not require heightened fact pleading of specifics, [the Court does require] enough facts to state a claim to relief that is plausible on its face." Id. at 570.

In other words, at the motion to dismiss stage, a plaintiff is "required to make a 'showing' rather than a blanket assertion of an entitlement to relief." Smith v. Sullivan, 2008 WL 482469, at *1 (D.Del. February 19, 2008) quoting Phillips v. County of Allegheny, 515 F.3d 224, 231 (3d Cir. 2008). "This 'does not impose a probability requirement at the pleading stage,' but instead 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." Phillips, 515 F.3d at 234, quoting Twombly, 550 U.S. at 556.

The Third Circuit subsequently expounded on the Twombly/Iqbal line of cases:

> To determine the sufficiency of a complaint under Twombly and Iqbal, we must take the following three steps:
>
> First, the court must 'tak[e] note of the elements a plaintiff must plead to state a claim.' Second, the court should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth.' Finally, 'where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief.'

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) quoting Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010).

3. *Pro Se* Pleadings

Pro se pleadings, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" Haines v. Kerner, 404 U.S. 519, 520 (1972). If the court can reasonably read pleadings to state a valid claim on which the litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. Boag v. MacDougall, 454 U.S. 364 (1982); United States ex rel. Montgomery v. Brierley, 414 F.2d 552, 555 (3d Cir. 1969) ("petition prepared by a prisoner... may be inartfully drawn and should be read 'with a measure of tolerance'"); Freeman v. Department of Corrections, 949 F.2d 360 (10th Cir. 1991). Under our liberal pleading rules, a district court should construe all allegations in a complaint in favor of the complainant. Gibbs v. Roman, 116 F.3d 83 (3d Cir.1997) (overruled on other grounds). See, e.g., Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (discussing Fed.R.Civ.P. 12(b)(6) standard); Markowitz v. Northeast Land Company, 906 F.2d 100, 103 (3d Cir. 1990) (same). Because Plaintiff is a *pro se* litigant, this Court will consider facts and make inferences where it is appropriate.

4. Motion for Summary Judgment

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall be granted if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Under Rule 56, the district court must enter summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Summary judgment may be granted

when no "reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (19896).

"In a FOIA suit, an agency is entitled to summary judgment once it bears its burden of demonstrating that no material facts are in dispute and that all information that falls within the class requested either has been produced, is unidentifiable, or is exempt from disclosure." Isasi v. Jones, 594 F.Supp.2d. 1, 4 (D.D.C. 2009), citing Students Against Genocide v. Dept. of State, 257 F.2d 828, 833 (D.C.Cir. 2001); Weisberg v. Dept. of Justice, 627 F.2d 365, 368 (D.C.Cir. 1980). "To successfully challenge such a showing, the non-moving party 'must set forth specific facts showing that there is a genuine issue for trial,' Fed.R.Civ.P. 56(e), with respect to the adequacy of the search, the applicability of the exemptions claimed, or the segregability of the information withheld, *see* 5 U.S.C. § 552(a)(3) and (b)." Isasi, 594 F.Supp.2d at 4.

As part of its showing, an agency must also demonstrate that when "viewing the facts in the light most favorable to the requester, … [it] 'has conducted a search reasonably calculated to uncover all relevant documents.'" Steinberg v. United States Dept. of Justice, 23 F.3d 548, 552 (D.D.C. 1994), quoting Weisberg v. Dept. of Justice, 745 F.2d 1476, 1485 (D.C.Cir. 1984). The agency must show that it made a "good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested." Oglesby v. Dept. of the Army, 920 F.2d 57, 68 (D.C.Cir. 1990). An "agency generally need not 'search every record system if there are others that are likely to turn up the information requested.'" Campbell v. United States Dept. of Justice, 164 F.3d 20, 27-28 (D.C.Cir. 1998), quoting Oglesby, 920 F.2d at 68. To show that its search was reasonable, the agency may submit affidavits or declarations that explain in reasonable detail and in a non-conclusory fashion the

scope and method of the agency's search. Perry v. Block, 684 F.2d 121, 126 (D.C.Cir. 1982). In the absence of contrary evidence, such affidavits or declarations are sufficient to demonstrate an agency's compliance with FOIA. Id. at 127.

C. Discussion

1. Defendant Task Force

"The Freedom of Information Act (FOIA) vests jurisdiction in federal district courts to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Kissinger v. Reports Committee for Freedom of the Press, 445 U.S. 136, 139, 100 S.Ct. 960, 63 L.Ed.2d 267 (1980); 5 U.S.C. § 552(a)(4)(B). "[T]he only proper defendant in a FOIA action is a federal agency." Abuhouran v. Nicklin, 764 F.Supp.2d 130, 133 (D.D.C.2011), quoting Isasi, 594 F.Supp.2d at 4, aff'd 2010 WL 2574034 (C.A.D.C.2010)); Scherer v. U.S., 241 F.Supp.2d 1270, 1278 (D.Kan.), aff'd 78 Fed.Appx. 687 (10th Cir.2003). In this regard, Courts have found that to be subject to FOIA, a private entity must present a "threshold showing of substantial federal supervision of private activities." Forsham v. Harris, 445 U.S. 169, 180 (1980). In the case of federal grant recipients, "to convert the acts of the recipient from private acts to governmental acts [requires] extensive, detailed, and virtually day-to-day supervision" by the federal government. Id. at 180; Robbins v. New York Corn & Soybean Growers Ass'n, Inc., 244 F.Supp.3d 300, 306-307 (2017).

Here, Plaintiff contends that Defendant Task Force qualifies as a federal agency based upon documents that allegedly show the Task Force received federal funds, included federal agencies, and was supervised on a daily basis by FBI Agent Jeff Kassouf ("Kassouf"). (ECF No. 93, Plaintiff's Supplemental Brief, at pp. 1-3). In support of this contention, Plaintiff has

submitted, *inter alia*, (1) three pages from the transcript of Kassouf's testimony at Plaintiff's criminal trial, where he testified that "there was coordination" between the FBI and the Task Force, and that evidence obtained from an FBI search "was brought back to the Task Force location" (ECF No. 93-1 at pp. 12-14)[2]; (2) a press release, dated August 26, 2009, stating that the Task Force members included, *inter alia*, the HUD Inspector General's Office, FBI, U.S. Attorney's Office, and U.S. Postal Inspector (Id. at pp. 16-17); and (3) a six-month report generated by the Task Force for the period from January 1 through January 30, 2012, which states that the Cuyahoga County Prosecutor's Office was awarded an American Recovery and Reinvestment Act grant in the amount of $279,950, on September 16, 2009, which was used to add three new employees for 24 months (Id. at pp. 19-22).[3] This evidence, taken as a whole, falls far short of establishing that the Task Force's activities were subject to "extensive, detailed, and virtually day-to-day supervision" by the federal government, which is required to consider it a federal agency under FOIA. Forsham, 445 U.S. at 180; Robbins, 244 F.Supp.3d at 306. On this basis alone, Plaintiff's FOIA claims against Defendant Task Force should be dismissed.

Moreover, Plaintiff has failed to advance any viable argument or evidence to dispel this Court's original finding that Defendant Task Force had no sufficient connection to Pennsylvania to permit the exercise of personal jurisdiction. As noted in this Court's original R&R, the investigation and prosecutions of Plaintiff occurred in the federal and state courts of Ohio. The

---

2 Plaintiff adds that Kassouf also testified that the FBI joined the Task Force and "assigned" him to the Task Force to work at its "undisclosed location," and that there were a dozen federal officials working at the Task Force; however, no transcript pages of such testimony have been provided. Rather, Plaintiff refers the Court to the entirety of Kassouf's testimony "on the PACER System, USA v. Viola, 08-cr-506, N.D. Ohio." (ECF No. 93, at p. 2).

3 Plaintiff submitted a number of other documents that the Court has reviewed, none of which provides any relevant insight as to whether Defendant Task Force should be considered a federal agency under FOIA. (See ECF No. 93-1, at pp. 1-11, 15, 18, 23-28).

Task Force was established by the Ohio Organized Crime Investigations Commission pursuant to a Memorandum of Understanding, whose signatory parties were Ohio law enforcement agencies. (ECF No. 77-1, Affidavit of Christa A. Dimon, Principal Assistant Attorney General, Office of the Ohio Attorney General, at ¶ 2). None of the constituent members of the Task Force was a federal agency. Funding for the Task Force was to be provided "in an amount to be determined by and consistent with the budget of the Ohio Organized Crime Investigations Commission (OOCIC")." (Id. at ¶¶ 3, 6). Thus the Task Force was not federally funded.[4]

Because the Task Force has had no contacts with the Commonwealth of Pennsylvania and Plaintiff's FOIA action does not arise out of any business conducted in Pennsylvania, this Court lacks personal jurisdiction over said Defendant. See Sierra Club v. Tennessee Valley Auth., 905 F. Supp. 2d 356, 362 (D.D.C. 2012) ("Sierra Club's FOIA claim against TVA does not arise out of any business transacted between the parties in the District"). Accordingly, the Court renews its recommendation that Plaintiff's claims against Defendant Task Force be dismissed for lack of personal jurisdiction, in any event.

b. Defendants FBI and DOJ

Defendants FBI and DOJ contend that they are entitled to summary judgment as to Plaintiff's FOIA claims against them because they have produced to Plaintiff "all segregable non-

---

[4] This conclusion has since been buttressed by Defendant Task Force's submission of the Declaration of Arvin Clar, an employee of the Ohio Bureau of Criminal Identification and Investigations who was directly involved with Defendant Task Force between 2007 and 2011. [ECF No. 94-1]. In his Declaration, Mr. Clar declares, in pertinent part,

> No federal funding, including but not limited to federal grants or federal loans, was utilized to create or maintain [the Task Force]. All funding for [the Task Force] was provided exclusively by the OOCIC as set forth in the Memorandum of Understanding. Any assertion that the federal government or any federal agency had anything to do with funding [the Task Force] is false.

(ECF No. 94-1, at ¶ 11).

exempted information sought in Plaintiff's requests," and have justified their failure to disclose withheld information based on various exemptions under both the Privacy Act, 5 U.S.C. § 552a(j)(2), and FOIA, 5 U.S.C. §§ 552(b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E).

To prevail on a FOIA claim, the Plaintiff must demonstrate that the defendant agency improperly withheld agency records. Mingo v. U.S. Dep't of Justice, 793 F. Supp. 2d 447, 452 (D.D.C. 2011). FOIA requires a federal agency to release all records responsive to a properly submitted request except those protected from disclosure by specific exemptions. Marshall v. FBI, 802 F. Supp. 2d. 125, 131 (D.D.C. 2011), (referencing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975); 5 U.S.C. § 552(b)). If a record contains information that is exempt from disclosure, any "reasonably segregable" information must be disclosed after deletion of the exempt information unless the non-exempt portions are "inextricably intertwined with exempt portions." 5 U.S.C. § 552(b); Mead Data Cent., Inc. v. United States Dept. of the Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). To demonstrate that all reasonably segregable material has been released, the agency must provide a "detailed justification" rather than "conclusory statements." Mead Data, 566 F.2d at 261. The agency is not, however, required "to provide such a detailed justification" that the exempt material would effectively be disclosed. Id. All that is required is that the government show "with 'reasonable specificity'" why a document cannot be further segregated. Armstrong v. Executive Office of the President, 97 F.3d 575, 578-79 (D.C. Cir. 1996). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." Mead Data, 566 F.2d at 261, n.55.

A government agency is entitled to summary judgment if it can demonstrate that the

exemptions claimed for withholding the information sought by the plaintiff actually apply, and that all reasonably segregable non-exempt information requested was disclosed after exempt information was redacted. See Sanders v. Obama, 729 F. Supp. 2d 148, 154 (D.D.C. 2010) aff'd sub nom. Sanders v. U.S. Dep't of Justice, 2011 WL 1769099 (D.C. Cir. Apr. 21, 2011). A court may award summary judgment to an agency solely based on the agency's affidavits or declarations "when they describe 'the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record or by evidence of agency bad faith.'" See, e.g., Mingo, 793 F. Supp. 2d at 452, quoting Larson v. Dep't of State, 565 F.3d 857, 862 (D.C. Cir. 2009) (other citations omitted). Agency declarations are accorded a "presumption of good faith." Kretchmar v. FBI, 2012 WL 3126775 at *3 (D.D.C. July 25, 2012), citing Long v. U.S. Dep't of Justice, 450 F.Supp.2d 42, 54 (D.D.C. 2006). To rebut the "presumption of good faith, the plaintiff 'must point to evidence sufficient to put the Agency's good faith into doubt.'" Id., citing Ground Saucer Watch, Inc. v. CIA, 692 F.2d 770, 771 (D.C. Cir. 1981).

Here, in support of their motion, Defendants have submitted the Declarations of David Luczynski ("Luczynski"), Attorney Advisor with the DOJ's Executive Office for United States Attorneys ("EOUSA") [ECF No. 82-1]; and the Second Declaration of David M. Hardy ("Hardy"), Section Chief of the Record/Information Dissemination Section, Records Management Division [ECF No. 82-2]. These Declarations demonstrate that the information redacted from the records produced to Plaintiff are exempt from disclosure under FOIA. They describe Defendants' "justifications for nondisclosure with reasonably specific detail," and "demonstrate that the information withheld logically falls within the claimed exemptions, and are

not controverted by either contrary evidence in the record or by evidence of agency bad faith." Mingo, 793 F. Supp. 2d at 452. They also demonstrate that all reasonably segregable non-exempt information has been provided to Plaintiff. (See ECF No. 82-1, Declaration of David Luczynski, at ¶¶ 11, 15-18, 21-22, 25; ECF No. 82-2, Second Declaration of David M. Hardy, at ¶¶ 4-7, 26-83). Moreover, the Declarations accurately reflect, and are adequately supported by, the documentary evidence attached to each, and have not been disputed factually by Plaintiff.

Because the record evidence before this Court establishes that the agencies involved (1) conducted searches that were adequate and reasonable under the circumstances, (2) segregated and released all segregable information, and (3) adequately described and explained all information withheld so as to justify all withholdings as authorized under one or more of the enumerated Privacy Act and/or FOIA exemptions, the Court recommends that summary judgment be granted in favor of Defendants FBI and DOJ and against Plaintiff.

III. CONCLUSION

For the foregoing reasons it is respectfully recommended that:

1. the motion to dismiss filed by Defendant Cuyahoga County Mortgage Fraud Task Force [ECF No. 64] be GRANTED; and

2. the motion for summary judgment filed by Defendants United States Department of Justice, Executive Offices of the United States, and Federal Bureau of Investigation [ECF No. 81], be GRANTED.

In accordance with the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), and Fed.R.Civ.P. 72(b)(2), the parties are allowed fourteen (14) days from the date of service to file written objections to this report and recommendation. Any party opposing the objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file objections will waive the right to appeal. Brightwell v. Lehman, 637 F. 3d 187, 193 n. 7 (3d Cir.

2011).

BY THE COURT

Susan Paradise Baxter

SUSAN PARADISE BAXTER
United States Magistrate Judge

Dated: May 11, 2018

cc: The Honorable Mark R. Hornak
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, et al, Defendants.	)	No. 1:15-cv-00242 Judge Mark R. Hornak

MEMORANDUM ORDER

This prisoner civil rights action was received by the Clerk of Court on October 1, 2015, and was referred to United States Magistrate Judge Susan Paradise Baxter for report and recommendation in accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrates. The magistrate judge's report and recommendation, issued on May 11, 2018, recommended that the motion to dismiss filed by Defendant Cuyahoga County Mortgage Fraud Task Force [ECF No. 64] be GRANTED. It was further recommended that the motion for summary judgment filed by Defendants United States Department of Justice, Executive Offices of the United States, and Federal Bureau of Investigation [ECF No. 81], be GRANTED. Service was made on Plaintiff by mail at FCI McKean, where he is incarcerated, and on Defendants by ECF. Objections were filed by the Plaintiff on May 29, 2018. After *de novo* review of the petition and documents in the case, together with the report and recommendation and objections thereto[1], the following order is entered:

[1] The Court has carefully considered the submissions of the Plaintiff, and as did the Magistrate Judge, concludes upon *de novo* review that based solely on the filings and submissions of the Plaintiff, he has failed to plausibly "show" that the Task Force is either an "agency" for FOIA purposes, or that there is personal jurisdiction over that organization in this District. The Task Force has submitted additional documentation beyond that which it submitted at ECF No. 77-

AND NOW, this 11th day of June, 2018;

IT IS HEREBY ORDERED that the motion to dismiss filed by Defendant Cuyahoga County Mortgage Fraud Task Force [ECF No. 64] is GRANTED. It is further ORDERED that the motion for summary judgment filed by Defendants United States Department of Justice, Executive Offices of the United States, and Federal Bureau of Investigation [ECF No. 81], is GRANTED. The Clerk of Court is directed to close this case. The report and recommendation of Magistrate Judge Baxter, issued May 11, 2018, is adopted as the Opinion of the court.

Mark R. Hornak
United States District Judge

cc: All counsel of record

1 that demonstrates that there is no basis to consider the Task Force to be an "agency" for FOIA purposes. Arguably, considering those most recent submissions would convert the Rule 12(b)(6) portion of the Task Force's motion to one for summary judgment. But in that regard, the Court would note that the Plaintiff has had no hesitation in adding unauthenticated documentation to the record, ECF No. 99, and thus the Plaintiff has more than opened the door to considering information on this issue outside of the record, and in the Court's estimation, has been placed "on notice" that such could be considered by the Court if necessary in resolving the Task Force's dismissal motion. As the Magistrate Judge correctly concluded, there is no basis for this Court to exercise jurisdiction over the Task Force in this District in any event, and the Plaintiff himself has not advanced a "showing" that there is a plausible basis to bring the Task Force under the ambit of the FOIA.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ANTHONY L. VIOLA, **Plaintiff,**	)	**Civil Action No. 15-242 Erie**
v.	)	**District Judge Susan Paradise Baxter**
UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION; UNITED STATES DEPARTMENT OF JUSTICE; CUYAHOGA COUNTY MORTGAGE FRAUD TASK FORCE; and KATHRYN CLOVER, **Defendants.**	)	

ORDER

This matter is before this Court on partial remand from the Third Circuit Court of Appeals to correct and supplement the record before the appeals court, which has retained jurisdiction.

On May 27, 2021, Defendant Federal Bureau of Investigation ("FBI") filed an updated Vaughn Index [ECF No. 164-3], supported by the 55-page Third Declaration of Michael Seidel, Section Chief of the Record/Information Dissemination Section of the FBI's Information Management Division ("Seidel Declaration") [ECF No. 164-1]. The updated index details the FBI's findings and treatment of 9,075 additional pages of documents that were processed in response to Plaintiff's FOIA request. Of these documents, 1,099 pages were released in full, 1,099 pages were released in part, and 6,877 pages were withheld in full pursuant to various exemptions claimed by the FBI, as detailed in the Seidel Declaration.

On June 30, 2021, Plaintiff filed a response to the FBI's updated submissions, raising three objections: (1) the FBI's search for relevant documents was inadequate; (2) the FBI's assertions of FOIA exemptions 6, 7(C), 7(D), and 7(E) are overly broad; and 3) the FBI failed to provide sufficient descriptions of the withheld documents to allow Plaintiff and the Court to determine whether the documents have been properly withheld. [ECF No. 167]. Defendants FBI and the Executive Office of the United States Attorney ("EOUSA") subsequently filed a consolidated response to Plaintiff's objections [ECF No. 170], to which Plaintiff has filed a reply [ECF No. 173]. The record to be corrected and supplemented in response to the partial remand Order from the Third Circuit Court is now closed.

On February 4, 2022, Plaintiff's court-appointed attorneys, on behalf of themselves and their law firm, have filed a motion to withdraw as Plaintiff's counsel in this matter [ECF No. 174], which motion remains pending before this Court. A telephonic hearing on this motion was held before the Court on April 14, 2022, at which time the parties were also given the opportunity to present arguments in support of their respective positions regarding the FBI's updated submissions.

After a thorough review and consideration of the documents and arguments presented by the parties, the Court finds that Plaintiff's objections to Defendants' updated submissions are without merit. Specifically, the Court concludes that Defendants have (1) conducted searches that were adequate and reasonable under the circumstances, (2) segregated and released all segregable information, and (3) adequately described and explained all information withheld so as to justify all withholdings as authorized under one or more of the enumerated Privacy Act and/or FOIA exemptions.

AND NOW, this 10th day of June, 2022,

IT IS HEREBY ORDERED that, this Court's prior Order of June 11, 2018 [ECF No. 100], granting, *inter alia*, the motion for summary judgment filed by Defendants FBI and EOUSA [ECF No. 81], is reaffirmed on the record that has now been corrected and supplemented in accordance with the narrow mandate of the partial remand from the Third Circuit Court.

IT IS FURTHER ORDERED that the motion for leave to withdraw as counsel filed by Plaintiff's attorneys, Mark D. Herman, Esquire, Amee Frodle, Esquire, and the law firm of Covington & Burling LLP, [ECF No. 174] is GRANTED.

The Clerk is directed to mark this case CLOSED.

Susan Paradise Baxter

SUSAN PARADISE BAXTER
United States District Judge