No. 18-2573

IN THE

United States Court of Appeals for the Third Circuit

ANTHONY VIOLA,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Pennsylvania, No. 1-15-cv-00242

BRIEF OF APPELLANT ANTHONY VIOLA

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July 15, 2019

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INTRODUCTION

The Freedom of Information Act ("FOIA") "permit[s] access to official information long shielded unnecessarily from public view" and "open[s] agency action to the light of public scrutiny." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (cleaned up). By informing citizens about their government's activities, the Act was designed to "create an expedient tool for . . . holding the government accountable," *Davin v. United States Dep't of Justice*, 60 F.3d 1043, 1049 (3d Cir. 1995), and to expose "government wrongdoing" as a means of "maintaining an open and free society." H. Rep. No. 104-795, pt. 1, at 7 (1996)).

Appellant Anthony Viola's case illustrates the critical role FOIA plays in exposing government misconduct. In 2011, an Ohio federal jury found Viola guilty of conspiracy to commit mortgage fraud. But in 2012, an Ohio state jury found Viola *not guilty* on similar charges after reviewing evidence that was not turned over to Viola in his federal case. The judge who oversaw the state case has stated that Viola is innocent; indeed, he has expressed hope that Viola's state-court "exoneration" will assist in "overturning" Viola's "federal conviction." Joint Appendix ("JA") 521. And Dawn Pasela, an employee of the multi-jurisdictional task force that investigated Viola, alleged that federal prosecutors engaged in serious prosecutorial misconduct, including deliberately hiding exculpatory evidence. If Pasela's account is proven true, Viola may be entitled to post-conviction relief. But there is no way

to prove Pasela's account without obtaining the records and voice recordings prosecutors possessed before the federal trial. Hence Viola's FOIA request, which seeks to "hold[] the government accountable," *Davin*, 60 F.3d at 1049, and vindicate Viola's constitutional rights, including his right to disclosure of exculpatory evidence before trial.

In the proceedings below, the government withheld hundreds of documents from Viola. To justify its refusal to disclose these records, the government asserted short, boilerplate, conclusory explanations that failed to describe the materials withheld. And the government disclaimed control of the records Viola sought, pointing fingers at an investigative Task Force that, in turn, claimed it was beyond the reach of FOIA. The District Court deferred to those explanations, granting the Task Force's motion to dismiss based on improper consideration of extrinsic evidence, and granting summary judgment to the government without reviewing the underlying documents or explaining which FOIA exemptions apply or why.

Under FOIA, Viola was entitled to more than that. Viola was entitled to government affidavits that were "full and specific enough to afford" him "meaningful opportunity to contest . . . the soundness of the withholding." *Manna v. United States Dep't of Justice*, 51 F.3d 1158, 1162-63 (3d Cir. 1995) (cleaned up). And he was entitled to the District Court's de novo review of the government's decision to withhold requested information. 5 U.S.C. § 552(a)(4)(B). As set forth

below, because the government's submissions fail to provide an adequate basis to review the soundness of the government's withholdings under FOIA, and because of the District Court's procedural errors along the way, the judgment below should be vacated and remanded for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Appellate Rule 34.1(b), Petitioner requests oral argument of 15 minutes per side. Oral argument would assist the Court in resolving the substantial legal and factual issues presented by this appeal. *See* 3d Cir. I.O.P. § 2.4. In addition, the resolution of several issues presented in this appeal may be of institutional or precedential value, *see id*., and this Court appointed *pro bono* counsel in this case.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this FOIA case under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because Viola filed a timely notice of appeal on July 11, 2018 from the District Court's June 11, 2018 final order granting (1) the Cuyahoga County Mortgage Fraud Task Force's motion to dismiss, and (2) the Department of Justice's motion for summary judgement. JA1-3, 36-37.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court erred in granting summary judgment to the Executive Office of the United States Attorneys ("EOUSA") and the FBI. JA137-145; JA249-324; JA585-92; JA31-37.

2. Whether the District Court erred in granting the Task Force's motion to dismiss based on improper consideration of documents outside the pleadings. JA373-80; JA387-91; JA466-67; JA534-39; JA29-31; JA36-37.

3. Whether the District Court abused its discretion in failing to address Viola's request for counsel under 28 U.S.C. § 1915(e) before disposing of his case on the merits. JA52.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before this Court and Appellant is unaware of any related cases that are pending or completed before this Court or any other.

STATEMENT OF THE CASE

Anthony Viola is currently serving a twelve-and-a-half year prison sentence for conspiracy to commit mortgage fraud.[1] He was investigated by the Cuyahoga County, Ohio Mortgage Fraud Task Force ("Task Force"), a multi-jurisdictional task force comprised of state, local, and federal agencies, and prosecuted in parallel federal and state cases. He lost the federal case, but won the state case after offering

[1] *United States v. Viola*, No. 1:08-CR-506 (N.D. Ohio).

evidence that the government failed to produce before the federal trial. Viola accordingly brought this FOIA case to obtain any additional exculpatory evidence the government failed to disclose that may provide a basis to challenge his federal conviction.

A. The Prosecution of Anthony Viola

In 2011, an Ohio federal jury convicted Anthony Viola of conspiracy to defraud mortgage lending companies into making "no money down mortgage loans" that violated the banks' lending guidelines. JA106.

Shortly after his federal conviction, Dawn Pasela, the office manager of the Task Force that had investigated him, contacted Viola to inform him that she believed that the Task Force had withheld evidence that should have been produced before trial and engaged in other prosecutorial misconduct. JA394-98. For example, Pasela confessed that prosecutors had instructed her to pose as a criminal justice student interested in Viola's case so that she could secretly record conversations about his defense strategy to give the prosecutors an advantage at trial. JA107; JA117; JA394-98. She also asserted that federal prosecutors had misplaced and suppressed exculpatory evidence, JA108, and she informed Viola that the government had pursued mutually exclusive theories of criminality regarding the same conduct: they prosecuted lender employees for knowingly authorizing loans that did not meet their banks' own lending guidelines, and reached civil fraud

settlements with these same banks, only to prosecute Viola for allegedly defrauding the banks into making those very same loans. JA396-97.[2]

To substantiate her claims, Pasela provided Viola with several documents the Task Force had failed to turn over, including: (1) cancelled checks from contributions Pasela made towards Viola's legal fees in order for prosecutors to track potential defense witnesses and Viola's legal expenses, JA396, 605; (2) the FBI's interview of a mortgage executive confirming that the company could waive the conditions of its underwriting guidelines if a particular loan made business sense, JA544-45, 549; (3) the closing instructions of a mortgage company stating that no-money-down cash-back loans could be approved in writing in advance by the lender, JA396; and (4) borrower's disbursement authorizations containing lender closing instructions authorizing the no money down loans that Viola was prosecuted for tricking banks into making. JA546-47. Viola then used this evidence in state court to argue that the banks had knowingly authorized the types of loans that the prosecutors had charged Viola with defrauding them into making. JA107-08. The defense proved effective. In 2012, after reviewing the evidence, an Ohio state court jury acquitted Viola of nearly identical charges to the charges he had been convicted

[2] Viola has also alleged that Pasela informed him of federal prosecutors using state officials as a "a witness screening mechanism" to avoid interviewing officials who thought Viola was innocent, and that a witness who testified against him, Kathryn Clover, was receiving undisclosed payments from the government. JA397.

of in federal court. JA107. And the state judge who presided over Viola's case became so convinced of Viola's innocence and the prosecution's "misconduct" that he sent Viola a letter expressing hope that Viola's "exoneration" would help him "in overturning [his] federal conviction." JA521.

Besides providing documents, Pasela offered to testify at Viola's state trial about the prosecutorial misconduct she had observed and the location of missing evidence that had prejudiced Viola's defense in federal court.[3] JA108; JA397. She was subpoenaed to testify, but alleged that the government threatened her with prosecution, so she declined to testify. JA117. On the eve of her scheduled court appearance, she died. JA117-18. After Pasela's death, her parents provided sworn statements confirming that Pasela was threatened for her willingness to testify on Viola's behalf and that the Task Force had asked Pasela to "to secretly record what [Viola] said" after "he had been indicted." JA117; JA603. The affidavits also confirm that Pasela "continued to attend events" organized by Viola's supporters until Viola's trial and "feared" that employees of the Task Force were "hiding" files "from the attorneys representing the people the task force was investigating." *Id*.

[3] In particular, Viola retained a forensic accountant to review three computers the Task Force had seized during their raids of mortgage companies to prove that he had never received money from the mortgage companies involved in the fraud and that the banks knowingly authorized "no money down" loans. JA393-94. That defense became unavailable, however, once the computers went missing.

B. The FOIA Requests and Initiation of this Lawsuit

In 2013, Viola served FOIA requests on the FBI to uncover the truth of Pasela's allegations and obtain the proof he needed to challenge his federal conviction. JA108, JA119. In those requests, he sought all records in the FBI's possession prior to his federal trial, including "any information concerning Dawn Pasela's undercover wired recordings of discussions with me," and all records "concerning Ms. Pasela's death." JA119. In 2014, Viola served a FOIA request on the EOUSA for "information concerning my criminal case or any matters involving me or my company." JA123.

On October 1, 2015, Viola sued the FBI and EOUSA in the United States District Court for the Western District of Pennsylvania because more than a year had passed without those agencies producing any documents. In his complaint, Viola alleged that the FBI and EOUSA were improperly withholding records, preventing him from proving prosecutorial misconduct in his pending habeas petition under 28 U.S.C. § 2255.

Two months after Viola filed his complaint, the FBI provided him with its first interim response to his FOIA requests. JA58-62. In that response, the FBI stated that it was withholding some documents and redacting others, and provided a list of the exemptions it was claiming. *Id*. For documents withheld entirely, the government provided deleted page information sheets, blank sheets of paper that listed the

numbers of asserted FOIA exemptions next to the bates number of any page the government had withheld. *Id*.

After receiving the FBI's document release, Viola informed the Court that he had received a small number of "heavily redacted" documents that substantiated Pasela's assertion that the government had exculpatory records it had never turned over to the defense. JA51. In the process, he challenged the "redactions because they are contrary to law" and requested "legal assistance because I do not have any legal training and because it is impossible to litigate . . . from jail." JA51-52.

In January and March of 2016, Viola received two additional FBI document releases. JA166-67. In response, Viola filed a motion to compel, asserting that the government was acting in bad faith by redacting publicly available information to which no FOIA exception applied. JA68-69. The Magistrate Judge denied Viola's motion, JA41, but the FBI stated that it would reprocess his FOIA requests to confirm whether additional information could be disclosed. JA277-78.

Following a hearing on his motion to compel, Viola requested that the Court order the FBI to produce its Memorandum of Understanding with the Task Force because "recently produced" documents confirmed that the FBI brought "evidence . . . to the joint task force for storage" and he wanted to confirm whether the "entity can be considered a federal agency." JA91. At the Magistrate's request, Viola

withdrew the motion. But he amended his complaint to add Kathryn Clover—a co-defendant who testified against him at trial—and the Task Force as Defendants.

The District Court held status conferences in late 2016, and ordered the government to produce a *Vaughn* index, an index named after the D.C. Circuit's decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), that explains the government's refusal to produce records requested under FOIA by "identifying each document withheld, the statutory exemption claimed, and a particularized description of how each document withheld falls within a statutory exemption." *Davin*, 60 F.3d at 1049; *see also* JA44. The District Court also ordered the "expedited production of tapes and/or transcripts of Dawn Pasella [sic] and emails from and to Kathryn Clover, to the extent they exist and are releasable." ECF No. 42, at JA44.

In October 2016, the EOUSA informed Viola that it had finished processing his FOIA requests and was withholding records under FOIA. JA157-58. The FBI also produced additional records in five interim releases that occurred between October 2016 and February 2017. JA269-70, JA277-78.

C. The Government's *Vaughn* Indexes

In December 2016, the government informed the District Court that it had not identified any records related to Pasela or Clover and requested additional time for the EOUSA and FBI to prepare their respective *Vaughn* Indexes. JA131-33. Along

with that request, the government attached two declarations describing the efforts that EOUSA and FBI had taken to process the FOIA request so far.

The EOUSA attached the Declaration of David Luczynski, which described the EOUSA's search for records and stated that the EOUSA was withholding hundreds of pages of records under FOIA. JA137-145. The FBI attached the Declaration of David Hardy, which explained that the FBI had provided several releases of *Vaughn* coded documents, but was still reviewing and reprocessing documents. JA161-72. The FBI's affidavit also indicates that it could not identify Pasela's tape recordings of Viola, but "the Cuyahoga County Mortgage Fraud Task Force might possibly have such tapes." JA172.

On January 31, 2017, the EOUSA filed a *Vaughn* Index listing the 32 documents it had withheld or released in part. JA249-62. The index provided a description of each document, listed applicable FOIA exemptions, and provided a two or three sentence basis for claiming each exemption. JA252-62. The following month, the FBI submitted an affidavit to serve as its *Vaughn* index. JA266. The affidavit explains the FBI's search for records, JA 275-280, and that it was withholding over one thousand pages of records under FOIA. JA266-68. Unlike the EOUSA, the FBI did not supply an index of the withheld documents, and the FBI did not describe any of the individual documents withheld. Instead, the FBI provided general explanations of the "justification categories" FBI invoked to withhold or

redact documents and explained that each code corresponded with a category of information the FBI viewed as exempt. JA282-321.

D. The Motions to Dismiss

In February 2017, Kathryn Clover moved to dismiss the case. Two weeks later, the Task Force moved to dismiss for lack of personal jurisdiction and failure to state a claim.

On March 14, 2017 the Magistrate Judge notified Viola that the Task Force's motion to dismiss "may be treated . . . as a motion for summary judgment" but that he could respond to the "motion to dismiss" by filing "a proposed amendment to the complaint." JA383. The following month, Viola responded to the Task Force's motion to dismiss by supporting his claims that the Task Force is a federal agency with a grant application indicating that the Task Force received federal funding, JA392, and quotations from an FBI agent's trial testimony indicating that the Task Force is staffed by several federal "agencies such as HUD, OIG, Housing & Urban Development, Office of the Inspector General, postal inspectors and myself, and members of the FBI." JA388.

In reply, the Task Force provided an affidavit from the Ohio Attorney General's Office and the Task Force's memorandum of understanding ("MOU"). JA431; JA432. The affidavit claims that "no federal funding was utilized in the creation of the task force," JA431, while the Task Force's MOU indicated that all

Task Force signatories were state or local law enforcement agencies. JA432-56. Viola responded once more with evidence rebutting the affidavits including: (1) a FBI agent's trial testimony that the "Mortgage Fraud Task Force is comprised of various local state and federal agencies," JA472, (2) a letter from the Cuyahoga County Prosecutor's office thanking a federal grant manager for "stimulus monies," JA487, and (3) a Task Force report indicating that it was comprised of federal agencies and received a federal "Recovery Act grant." JA490-91.

On July 25, 2017, the EOUSA and FBI filed a motion to dismiss, or in the alternative, a motion for summary judgment. Viola responded in August, arguing "the Government's filing does not indicate whether or not its search for responsive records was adequate or reasonably conducted." JA503. He also requested an extension or that the "Court rule on the pending Motion for Discovery" before he was "required to respond to the Government's Motion for Summary Judgment." *Id*.

E. The Magistrate Judge's First Report and Recommendation

On August 8, 2017, the Magistrate Judge recommended that the District Court grant the Task Force's motion to dismiss for lack of personal jurisdiction, stating that the Task force "was not federally funded" and "[n]one of the constituent members of the Task Force was a federal agency." JA11. The Magistrate also recommended dismissing Clover on the grounds that she was not subject to suit under FOIA as a private citizen. JA12-13.

Viola objected, arguing that there was ample evidence in the record that the Task Force contained federal members and received federal funding. JA508. He also argued that there was evidence of Dawn Pasela's recordings and that "[f]ederal prosecutors are not permitted to shift evidence to a joint task force and then disclaim knowledge" of those tapes or evidence. JA510-11.

On September 25, 2017, the District Court granted Clover's motion to dismiss, JA18, but declined to dismiss the claims against the Task Force because Viola's objections might "alter the conclusion of the R&R that 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," JA16. The District Court also noted that Viola's "action could and perhaps should be transferred to the Northern District of Ohio." *Id.*

F. The Magistrate Judge's Second Report and Recommendation

In October 2017, Viola filed supplemental briefing regarding the Task Force, explaining that the Task Force's affidavit was contrary to the complaint's well-pleaded allegations and the documents attached thereto, which demonstrated that the Task Force included a dozen federal agents, reported to the DOJ, and received federal funding. JA534-36. He also asked the Court to "consider requiring the government to produce the FBI's MOU to the . . . the Court" if his "submission" was "not sufficient proof that the Task Force was a federal agency." JA536. The Task

Force responded with a second affidavit stating that it did not receive federal funding and all signatory participants were state agencies. JA580.

On May 11, 2018, the Magistrate Judge issued a report and recommendation ruling on the Task Force's "motion to dismiss" and the EOUSA and FBI's "motion for summary judgment." JA20. The report concluded that "Plaintiff's FOIA claims against Defendant Task Force should be dismissed" because (1) Viola's evidence fell "short of establishing" that the Task Force is "a federal agency under FOIA," and (2) Viola "failed to . . . dispel the Court's original finding that" the "Task Force had no sufficient connection to Pennsylvania to permit the exercise of personal jurisdiction." JA30.

In a less-than-three-page analysis, the Magistrate Judge then recommended granting "summary judgment . . . in favor of Defendants FBI and DOJ."[4] JA34. The Magistrate never identified which specific FOIA exemptions applied or why the exemptions cover the particular documents withheld. JA33-34. Instead, the sole basis of the Magistrate's recommendation was that "Defendants have submitted . . . Declarations" that "demonstrate that the information redacted from the records produced by the Plaintiff are exempt from disclosure under FOIA" and that "all reasonably segregable non-exempt information has been provided to plaintiff." *Id*.

[4] The Magistrate and District Court's references to "DOJ" refer to the EOUSA.

Viola filed objections to the Second Report and Recommendation on May 29, 2018. JA585. In his objections, he challenged the adequacy of the government's search for records for several reasons, including that the Task Force "clearly houses federal records, yet the federal government neither searched the Task Force location nor explained why such a search would be unduly burd[e]nsome." JA587. Viola also noted that the "jail law library forms for FOIA suits and instructions say these claims should be filed here" and argued that if "this venue is inappropriate, the case should be transferred but not dismissed." JA589.

On June 11, 2018, the District Court granted the Task Force's "motion to dismiss" and the "motion for summary judgment" filed by the EOUSA and FBI. JA37. The Court "adopted" the report and recommendation as its opinion. *Id*. But it also passed upon the Task Force dismissal, stating that Viola "failed to plausibly 'show' that Task Force is . . . an agency for FOIA purposes," and the "Task Force has submitted additional documentation . . . that demonstrates that there is no basis to consider the Task Force to be an 'agency' for FOIA purposes." JA36 n.1.

G. The Present Appeal

On July 13, 2018, Viola appealed. JA1-3. In August, he filed a motion for the appointment of counsel, and in February 2019, the clerk referred this case to a motions panel. In April, this Court granted Viola's motion for appointment of counsel "[u]pon consideration of the factors set out in *Tabron v. Grace*, 6 F.3d 147,

155-56 (3d Cir. 1993).” JA608. The order instructed pro bono counsel to address: (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.” *Id.*

SUMMARY OF ARGUMENT

I. The District Court erred in granting summary judgment in favor of the EOUSA and FBI because neither the government, nor the District Court, provided the findings necessary for this Court to conclude that the government fulfilled its statutory duty to make all non-exempt records Viola requested “promptly available,” 5 U.S.C. § 552(a)(3)(A), after conducting “reasonable efforts to search for” the requested records, *id.* § 552(a)(3)(C).

The EOUSA and FBI withheld records under FOIA, and they submitted short, conclusory affidavits explaining why they withheld requested records. The District Court in turn erred by accepting those affidavits without further reasoning. *First*, the government’s affidavits raise genuine issues of fact regarding the adequacy of the government’s search for records. *Second*, the government’s affidavits fail to provide an adequate factual basis for the District Court to conclude that the withheld records were exempt from disclosure. *Third,* the government failed to provide proper legal

justifications for invoking FOIA Exemptions 5, 6, 7(C), 7(D), and 7(E). *Finally*, the District Court failed to provide a sufficiently detailed analysis for this Court to be sure that the District Court conducted the careful de novo review required by FOIA.

II. The District Court also erred in dismissing the Task Force under Federal Rules of Civil Procedure 12(b)(2) and 12(b)(6). Under FOIA, "the district court of the United States in the district in which the complainant resides" has "jurisdiction to enjoin the agency from withholding agency records." 5 U.S.C. § 552(a)(4)(B). And in this case, Viola plausibly alleged that the Task Force is a federal agency subject to personal jurisdiction under FOIA when he alleged that it was composed of federal agencies, received federal funding, and included federal officers who participated within and exercised control over the Task Force's operations. In concluding otherwise, the District Court ignored the plausible allegations of Viola's amended complaint. And it also improperly relied on disputed evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment.

III. Finally, the District Court abused its discretion by failing to address Viola's motion for counsel under 28 U.S.C. §1915(e)(1). In this Circuit, "serious consideration should be given to appointing counsel" when "it appears that an indigent plaintiff with a claim of arguable merit is incapable of presenting his or her case." *Tabron*, 6 F.3d at 156. But the District Court here gave no such consideration

at all, failing to provide a ruling on Viola's motion for counsel, despite Viola's entitlement to counsel under the correct legal standard as this Court concluded on appeal. Because Viola satisfied this Court's test for court-appointed counsel, the District Court abused its discretion in denying his request for counsel and improperly prejudiced Viola when it left him to litigate his case unassisted. As a result, this Court should remand for further proceedings with the assistance of court-appointed pro bono counsel.

STANDARD OF REVIEW

This Court applies a "two-tiered test" when reviewing an order granting summary judgment in FOIA proceedings. *Davin*, 60 F.3d at 1048-49. *First*, the Court exercises de novo review of "the affidavits below 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 (cleaned up). *Second*, "[i]f this Court concludes that the affidavits presented a sufficient factual basis for the district court's determination," *id.* (cleaned up), "questions of law" regarding the applicability of the FOIA exemptions "receive plenary review," *Manna*, 51 F.3d at 1163, and the district court's factual findings regarding the applicability of the exemptions are reviewed for clear error. *Davin*, 60 F.3d at 1049; *see also Lame v. United States Dep't of Justice*, 767 F.2d 66, 70 (3d Cir. 1985).

This Court reviews dismissal orders under Rules 12(b)(2) and 12(b)(6) de novo, applying the same motion to dismiss standard as the district court. *Buck v. Hampton Twp. Sch. Dist*., 452 F.3d 256, 260 (3d Cir. 2006); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002). Under that standard, this Court must "accept all factual allegations in the complaint as true," *Buck*, 452 F.3d at 260, construe all "disputed facts in favor of the plaintiff," *Pinker*, 292 F.3d at 368 (cleaned up), and "determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Blanyar v. Genova Prods. Inc.*, 861 F.3d 426, 431 (3d. Cir. 2017) (cleaned up). Because Viola filed his complaint *pro se*, this Court must also "liberally construe his pleadings," and "apply the applicable law, irrespective of whether the *pro se* litigant has mentioned it by name." *Dhulos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003); *see also Haines v. Kerner*, 404 U.S. 519, 520 (1972).

"A district court's decision to deny counsel under" 28 U.S.C. § 1915(e) is reviewed "for abuse of discretion." *Tabron*, 6 F.3d at 158.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE FBI AND EOUSA.

"The Freedom of Information Act was enacted to facilitate public access to Government documents" in order to "pierce the veil of administrative secrecy" and "open agency action to the light of public scrutiny." *United States Dep't of State v.*

Ray, 502 U.S. 164, 173 (1991) (cleaned up). The Act requires an agency to "make . . . records promptly available" upon a suitable request, 5 U.S.C. § 552(a)(3)(A), so long as the records are not "exempted under clearly delineated statutory language," *Rose*, 425 U.S. at 360-61 (quoting S. Rep. No. 89-813, at 3 (1965)).

Because FOIA "creates a strong presumption in favor of disclosure," *Davin*, 60 F.3d at 1049, an agency's obligations under FOIA include a duty to "make reasonable efforts to search for . . . records," 5 U.S.C. § 552(a)(3)(C), and provide "[a]ny reasonably segregable portion of a record . . . after deletion of the portions which are exempt," 5 U.S.C. § 552(b). In addition, "the plain language of the Act . . . places the burden on the Agency to justify the withholding of any requested documents," *Ray*, 502 U.S. at 173, and a corresponding burden on the district court to review an agency's withholding of records "de novo," 5 U.S.C. § 552(a)(4)(B).

In this case, the FBI and EOUSA each provided affidavits to justify withholding hundreds of pages of records under FOIA. But the District Court erred when it relied solely on those affidavits to grant summary judgment in favor of the FBI and EOUSA because: (1) the government failed to demonstrate that it conducted an adequate search for records; (2) the government failed to adequately explain why the materials it withheld were exempt from disclosure under FOIA; (3) the government failed to provide a proper legal justification for withholding records under FOIA Exemptions 5, 6, 7(C), 7(D), and 7(E); and (4) the District Court failed

to provide a sufficiently detailed analysis for this Court to conclude that the District Court conducted a de novo review of the government's withholding of records under FOIA.

A. The FBI and the EOUSA Failed to Establish the Adequacy of Their Search for Records.

The District Court erred when it granted summary judgment in favor of the FBI and the EOUSA because it improperly concluded that "the agencies involved . . . conducted searches that were adequate and reasonable." JA34. "Under the FOIA, an agency has a duty to conduct a reasonable search for responsive records." *Abdelfattah v. United States Dep't of Homeland Sec.*, 488 F.3d 178, 182 (3d Cir. 2007). "To prevail on summary judgment, then, the agency must show beyond material doubt" that its search was "reasonably calculated to uncover all relevant documents," *Morley v. C.I.A.*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (cleaned up), and "cannot limit its search" to certain places if there are additional sources "that are likely to turn up the information requested," *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990) (*Oglesby I*). The searches described in the FBI's and EOUSA's declarations do not meet that standard.

1. The EOUSA Failed to Establish the Adequacy of Its Search.

In response to Viola's request for "information concerning [his] criminal case or any matters involving [him] or [his] company," JA123, the EOUSA "search[ed] for records on 'Anthony Viola,'" using "the computer tracking system for the United

States Attorney Offices." JA140-41. That explanation is not enough, however, to establish the search's adequacy beyond material doubt.

First, the EOUSA's search was not "tailored to the nature" of Viola's "particular request," *Campbell v. DOJ*, 164 F.3d 20, 28 (D.C. Cir. 1998), because the EOUSA did not search for records relating to Viola's company, the Realty Corporation of America, despite his express request that the agency do so. JA123. As a result, the search was not "reasonably calculated to uncover *all* relevant documents" and summary judgment is inappropriate. *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (emphasis added; cleaned up); *see also Coffey v. Bureau of Land Mgmt.*, 249 F. Supp. 3d 488, 498 (D.D.C. 2017) (search terms inadequate where government "unreasonably limit[ed] the scope" of its "search to communications regarding a single subject . . . in a manner inconsistent with the request"); *Eberg v. U.S. Dep't of Defense*, 193 F. Supp. 3d 95, 110 (D. Conn. 2016) (search inadequate when declaration did not "explain why" the government "exclude[d] keywords from Plaintiff's FOIA request").

Second, the EOUSA failed to contact AUSA Mark Bennett when searching for Clover's emails as ordered by the Magistrate, despite Viola's statements that Clover, the co-defendant who testified against Viola, exchanged emails with Bennett, the AUSA who prosecuted Viola. JA106. Under FOIA, when there is an "undisputed connection" or "close nexus" between agency personnel and missing

evidence, an agency is required to contact those individuals "as a source likely to turn up the information requested" or explain why contacting those individuals "would be fruitless." *Valencia-Lucena*, 180 F.3d at 328 (cleaned up). Bennett had a "close nexus" to the Clover emails based on Viola's allegations that Clover corresponded with Bennett via email, JA106. But because the EOUSA neither contacted Bennett nor explained why contacting Bennett would be "fruitless," summary judgment is inappropriate. *Valencia-Lucena*, 180 F.3d at 328.

Third, the EOUSA indicated that it "performed a separate search of records . . . for any information regarding Dawn Pasela" and "Kathryn Clover," JA141, but it failed to provide any information about how it conducted this search despite its obligation to do so. *See Abdelfattah*, 488 F.3d at 182 ("The 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." (cleaned up)). As a result, the District Court had no "factual basis" to make its determination that this second search was adequate, making summary judgment improper. *See id*. at 182-83.

2. The FBI Likewise Failed to Establish the Adequacy of Its Search.

In response to Viola's requests for all documents mentioning his name, the notes of the FBI's interviews of "Uri Gofman and Jonathan Rich" and any "reports, investigation or information concerning Ms. Pasela's death," JA175, the FBI

contacted "the lead FBI Special Agent . . . over [Viola]'s criminal investigation," JA280, and searched for records "using a three-way phonetic breakdown of 'Viola, Anthony, L.'" and Appellant's nickname "Tony Viola." JA275-76. Like the EOUSA, however, the FBI failed to establish that its search for records was adequate for three reasons.

First, the FBI explained that it had searched the FBI's "principal records system . . . where records responsive to this request would reasonably be found," JA278-79, but it never established that "*all* files likely to contain responsive materials . . . were searched." *Abdelfattah*, 488 F.3d at 182 (emphasis added; cleaned up). Under FOIA, the FBI was obligated to search "all locations 'likely' to contain" responsive materials and not only those locations "'most likely' to contain responsive documents." *DiBacco v. U.S. Army*, 795 F.3d 178, 190 (D.C. Cir. 2015). Accordingly, because the FBI failed to establish that "no other record system was likely to produce responsive documents," summary judgment is premature. *Oglesby I*, 920 F.2d at 68.

Second, FBI's search, like the EOUSA's, was not "tailored to the nature" of Viola's "particular request," *Campbell*, 164 F.3d at 28, because it only searched for records containing Viola's name even though he had requested interview files of "Uri Gofman and Jonathan Rich" and "reports, investigation or information concerning Ms. Pasela's death." JA119. Like the EOUSA, the FBI never explained

why it failed to search for those additional names. The FBI's refusal to use Ms. Pasela's name as a search term is particularly unjustified given her employment by the Task Force that investigated Viola, her significant allegations of wrongdoing by Task Force employees, and the sworn affidavits (including from Ms. Pasela's parents) attesting to the content of those allegations. JA107-08; JA117; JA394-98 (describing Ms. Pasela's allegations that prosecutors suppressed exculpatory evidence and instructed her to surreptitiously monitor Viola's defense strategy). Thus, the search was not "reasonably calculated to uncover all relevant documents" and summary judgment is inappropriate. *Valencia-Lucena*, 180 F.3d at 325 (cleaned up); *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 678 F. Supp. 2d 162, 166 (S.D.N.Y. 2009) (summary judgment inappropriate where defendant did not justify its failure to use an obvious acronym as a search term).

Finally, the FBI Special Agent who supervised Viola's case told the FBI that the "Cuyahoga County Mortgage Fraud Task Force might possibly have . . . tapes" of his conversations with Dawn Pasela. JA172. As a result, the FBI was required to "follow through" on this "obvious" lead "to discover" the requested documents or explain why such a search would be unnecessary or constitute an "undue burden." *Valencia-Lucena*, 180 F.3d at 325-27. Although the FBI may not have retained physical possession of the tapes, its search obligation extended to all records under its "constructive control," including records that are "not on its premises."

Competitive Enter. Inst. v. Office of Sci. & Tech. Policy, 827 F.3d 145, 149 (D.C. Cir. 2016). And "drawing all reasonable inferences in favor" of Viola, as this Court must at this stage of the litigation, *Blunt v. Lower Merion School Dist.*, 767 F.3d 247, 294 (3d Cir. 2014), there was ample evidence that the Task Force tapes were under the FBI's constructive control, including sworn trial testimony establishing that "anybody involved" in the Task Force had access to the evidence stored at the Task Force "at any time." JA244. Indeed, the federal government relied upon the Task Force's evidence in its criminal prosecution of Viola. JA244. Accordingly, because the FBI's "failure to search the center it had identified as a likely place where the requested documents might be located clearly raises a genuine issue of material fact as to the adequacy of the . . . search," summary judgment is inappropriate. *Valencia-Lucena*, 180 F.3d at 327.

B. The Government Failed to Provide an Adequate Factual Basis for the District Court to Rule on Its Summary Judgment Motion.

The District Court also erred when it granted summary judgment in favor of the EOUSA and the FBI because those agencies failed to provide an adequate factual basis to withhold materials under FOIA. "[T]o allow courts to make a reasoned determination respecting the legitimacy of exemptions," *Conoco Inc. v. DOJ*, 687 F.2d 724, 728 (3d Cir. 1982), "the government must submit detailed affidavits," or *Vaughn* indexes, "indicating why each withheld document falls within an exempt FOIA category," *Manna*, 51 F.3d at 1163. There is "no set formula for a *Vaughn*

index." *Davin*, 60 F.3d at 1050. But "[s]elf-serving, conclusory statements . . . do not satisfy the government's statutory burden," *Ferri v. Bell*, 645 F.2d 1213, 1224 (3d Cir. 1981), and it "is insufficient for the agency to simply cite categorical codes and then provide a generic explanation of what the [redaction] *codes* signify," *Davin*, 60 F.3d at 1051.

In the proceedings below, the EOUSA invoked FOIA Exemptions 3, 5, and 7(C), and the FBI invoked FOIA Exemptions 3, 6, 7(C), 7(D), and 7(E) to justify withholding documents.[5] Both agencies also claimed that "no reasonably segregable non-exempt information was withheld from plaintiff." JA144. But neither agency provided the District Court with enough information to independently confirm that FOIA Exemptions 5, 6, or 7 applied, or that all segregable information was provided. Thus, summary judgment is inappropriate.

1. The District Court Lacked an Adequate Factual Basis to Rule on the Applicability of the Claimed Exemptions.

The District Court lacked an adequate factual basis rule on the applicability of the claimed FOIA exemptions because the EOUSA and FBI failed to "describe *each* document or portion thereof withheld," *King v. DOJ*, 830 F.2d 210, 223 (D.C. Cir. 1987), and to "correlate statements made in the Government's refusal

[5] The FBI and EOUSA also asserted Privacy Act Exemption (j)(2), but that Exemption does not apply where—as here—"disclosure of the record would be . . . required under section 552." 5 U.S.C. § 552a(b)(2).

justification with the actual portions of the document," *Vaughn*, 484 F.2d at 827. To fulfill its burden to establish that materials are exempt from disclosure, "precedent requires that the Agency provide the 'connective tissue' between the document, the deletion, the exemption and the explanation." *Davin*, 60 F.3d at 1051. But neither agency did so here by "includ[ing] a specific factual recitation linking the documents . . . with the claimed FOIA exemptions." *Davin*, 60 F.3d at 1065. Nor did the agencies "demonstrat[e] applicability of the exemptions invoked *as to each document or segment withheld*." *King*, 830 F.2d at 224 (emphasis in original). On account of those deficiencies, the FBI's and the EOUSA's affidavits fall short of providing the District Court "an adequate factual basis for its determination," and the "order of the district court granting summary judgment to the government [i]s inappropriate," *Davin*, 60 F.3d at 1065.

The FBI's Index: To justify withholding records under FOIA, the FBI provided generic descriptions of the "justification categories" FBI used to encode produced documents, JA282-321, and explained that it had produced some redacted documents and withheld others, stamped with "*Vaughn* coded categories of exemptions." JA282-85. In utilizing these category codes, however, the FBI employed the same "coded indexing system" that this Court rejected as inadequate in *Davin*. 60 F.3d at 1051. As in *Davin*, the FBI's affidavit here provides "generic explanations broad enough to apply to any FOIA request," but "provides no

information about particular documents that might be useful in evaluating the propriety of the decision to withhold." *Id*. For example, the FBI claimed that in each of the dozens of instances in which it invoked "FOIA exemption categories (b)(6)-2 and (b)(7)(C)-2," it invoked the exemption to "protect the names and/or identifying information of personnel from non-FBI government agencies" because the "publicity associated with the release of their names and/or identifying information . . . could trigger hostility towards them." JA293. But the affidavit provides none of context need to evaluate that claim; it does not describe a single specific document, *id*., and the deleted page information sheets only provide page numbers and cryptic cross references to the generic explanations set forth in the affidavit, such as: "Page 205~ b7D --4." JA350.

As several courts—including this one—have held, dispatching of dozens of exemptions with the same categorical analysis, like the FBI did here, is inadequate given an agency's obligations to (1) "ti[e]" its explanations to "the content of the specific redactions," *Davin*, 60 F.3d at 1051, and (2) demonstrate "applicability of the exemptions invoked *as to each document or segment withheld*." *King*, 830 F.2d at 224 (emphasis in the original) ("Categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate."); *Wiener v. FBI*, 943 F.2d 972, 978–79 (9th Cir. 1991) (finding "boilerplate" explanations of coded index "drawn from a master response"

inadequate since "[n]o effort is made to tailor the explanation to the specific document withheld." (cleaned up)). And these generic explanations are particularly inappropriate here when used in support of the FBI's claim under Exemption 7(C), which weighs personal privacy interests against the public interest in disclosure and requires "document by document fact-specific balancing." *Davin*, 60 F.3d at 1060.

The EOUSA's Index: Like the FBI, the EOUSA justified withholding information via broad categorical explanations such as "Exemption (b)(7)(C) was applied to withhold the records in an effort to protect the identity of third-party individuals . . . the release of which could subject such persons to an unwarranted invasion of their privacy." JA143-44. Unlike the FBI, the EOUSA also provided a *Vaughn* index that listed the 32 documents it withheld in full or part along with a brief description of each document. JA249-62. But that index fails to make EOUSA's *Vaughn* submissions any better than the FBI's for two reasons.

First, the index entries "do not identify their author, recipient, date of origin or source" for the particular documents, making it "difficult, if not impossible" to determine whether certain exemptions, like Exemption 5, apply.[6] *Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 366-67 (4th Cir. 2009) (cleaned up).

[6] The EOUSA invoked Exemption 5 for 15 of the 31 documents from which it withheld information. JA252-62.

Second, the EOUSA's index justifications contain only the sorts of "[s]elf-serving, conclusory statements" that "do not satisfy the government's statutory burden," *Ferri*, 645 F.2d at 1224, and they also fall short of the "detailed balancing effort" required to claim FOIA Exemption 7(C), *Davin*, 60 F.3d at 1060. For example, the index claims in several instances "[t]he name of the prisoner, a third party, is clearly protected," or "[t]here are no public interests to weigh" without providing any further analysis. JA253. In another, it withholds an entire 151-page document to "protect the names . . . of third parties," JA252, ignoring that disclosure interests could "vary from portion to portion of an individual document," *Davin*, 60 F.3d at 1060 (cleaned up).

2. The District Court Also Lacked an Adequate Factual Basis to Rule on Segregability.

The District Court also lacked an adequate factual basis to conclude that the FBI and EOUSA had "released all segregable information." JA34. To prove that all reasonable segregable information has been released, the 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 non-exempt and how that material is dispersed throughout the document." *Abdelfattah*, 488 F.3d at 186-187 (cleaned up); *see also Davin*, 60 F.3d at 1052 (same). But the FBI and the EOUSA provided none of the above. Instead, those agencies provided conclusory statements such as "no

reasonably segregable non-exempt information was withheld from plaintiff," JA144, while the limited factual information provided gives every reason to question whether the agencies provided all reasonably segregable information. For example, the EOUSA's *Vaughn* index indicates that it withheld an entire 81-page report to protect the identity of one prisoner, JA260, and an entire 151-page report to protect the names of third parties, JA252, without explaining why "the privacy interests at stake could not be protected simply by redacting particular identifying information." *Davin*, 60 F.3d at 1052.

Under *Davin* and *Abdelfattah*, the "absence" of further "information necessitates a remand," *Abdelfattah*, 488 F.3d at 187, for the government to provide "an adequate factual basis for the district court to determine whether [Viola] has been afforded all reasonably segregable information," *Davin*, 60 F.3d at 1052.

C. The FBI and the EOUSA Failed to Establish that the Criteria for Invoking FOIA Exemptions 5, 6, 7(C), 7(D), and 7(E) Were Met.

Because the "general deficiencies in the government's *Vaughn* index alone require reversal of the district court's order and remand for further fact finding," this Court need not reach the applicability of the FOIA exemptions. *Davin*, 60 F.3d at 1053. But in the event this Court does reach that issue, the FBI and EOUSA did not meet their "burden . . . to justify the withholding of any requested documents." *Ray*, 502 U.S. at 173. Because of FOIA's "strong presumption in favor of disclosure," *id.*, FOIA exemptions are "intended to be exclusive and narrowly construed," and all

doubts must be resolved in favor of disclosure. *Conoco*, 687 F.2d at 726. Indeed, even when records are covered by a statutory exemption, they must be disclosed unless the agency "reasonably foresees that disclosure would harm an interest protected by an exemption described in [5 U.S.C. § 552(b)]." 5 U.S.C. § 552(a)(8)(A). Here, neither agency satisfied their burden for invoking Exemptions 5, 6, 7(C), 7(D), and 7(E), rendering summary judgment improper.

Exemption 5. The EOUSA withheld documents based on Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters that would not be available by law to a party . . . in litigation with the agency," 5 U.S.C. § 552(b)(5), including records subject to "the deliberative-process privilege, the attorney-client privilege, and the attorney work-product privilege," *Nat'l Ass'n of Criminal Def. Lawyers v. U.S. Dep't of Justice Exec. Office for U.S. Attorneys*, 844 F.3d 246, 249 (D.C. Cir. 2016). But in this case, summary judgment is improper for two reasons.

First, the EOUSA failed to explain the "foreseeable harm" that would result from the disclosure of the withheld records, stating only that documents were "withheld in their entirety by application of exemption (b)(5) to protect attorney work product and deliberative process intertwined." JA254-62. As a consequence, the District Court "lack[ed] sufficient information to determine whether the . . .

material has been properly withheld," *Rosenberg v. U.S. Dep't of Def.*, 342 F. Supp. 3d 62, 78 (D.D.C. 2018), and summary judgment is improper.

Second, the EOUSA invoked Exemption 5 to withhold two "[h]andwritten statement[s] of a third party containing personal information, background, history relative to the investigation, and his or her findings associated with the criminal investigation of the plaintiff." JA254. But since the "source" of these documents is not "a Government agency," and the EOUSA has not asserted that these third-parties were government consultants, these documents originating from third parties are not "inter-agency" or "intra-agency" documents exempt from disclosure under Exemption 5. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-12 (2001) (third-party tribal communications to a federal agency did not fall within Exemption 5); *Rojas v. Fed. Aviation Admin.*, 922 F.3d 907, 915 (9th Cir. 2019) ("By its plain terms, Exemption 5 applies only to records that the government creates and retains.").

Exemption 7(C). Both the FBI and EOUSA withheld documents based on Exemption 7(C), which 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). "Exemption 7(C)'s protection of personal privacy is not absolute," however, so "the proper approach to [a] request under . . . section 7(C) 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." *Ferri*, 645 F.2d at 1217.

To invoke Exemption 7(C), the FBI and EOUSA offered generic explanations such as: the release of "the names/ and or identifying information of . . . government personnel . . . could hinder their effectiveness in conducting investigations" or "subject these individuals to unofficial harassing inquiries." JA295. But neither agency explained "*why*" the disclosure of names "would result in embarrassment or harassment," despite the fact that this explanation is necessary to invoke Exemption 7(C). *Davin*, 60 F.3d at 1060 ("[T]he FBI's refusal to disclose . . . could not be justified under Exemption 7(C), without explaining why the interviews would result in embarrassment or harassment either to the individuals interviewed or to third parties."). The agencies also did not explain why redactions of personal information would not suffice to protect privacy interests. Nor did the agencies determine whether the individuals with the asserted privacy interest were alive. *Davin*, 60 F.3d at 1059 ("If the number of individuals is not excessive, the agency could be required to determine whether the individuals are alive before asserting a privacy interest on their behalf.").

For its part, the FBI invoked Exemption 7(C) with respect to hundreds of documents in a series of footnotes citing the same generic explanation that all of the FBI's personnel "have significant personal privacy interests" and the "FBI could

identify no discernible public interest in the disclosure of this information because the disclosure of names . . . would not shed light on the operations and activities of the FBI." JA291-92. In doing so, the FBI improperly dismissed the fact that certain witnesses "may have testified at Plaintiff's trial," JA291, ignoring this Court's ruling that "information given by testimony at trial . . . may indicate that the individual's privacy interest is substantially less compelling than might otherwise be assumed," *Lame*, 654 F.2d at 923. Also, the FBI incorrectly based its protection of the names of third party witnesses on the need to have "continued access . . . to persons willing to honestly relate pertinent facts bearing upon a particular investigation," JA298, disregarding this Court's ruling that the "Government's asserted interest in assuring future cooperation of witnesses with FBI investigations is not a valid reason for refusing to disclose information under Exemption 7(C)," *McDonnell v. United States*, 4 F.3d 1227, 1256 (3d Cir. 1993).

The EOUSA's submissions fare no better. Its affidavit offers the same generic justifications as the FBI's. And to the extent the EOUSA offered a *Vaughn* index, it either balanced the privacy interest against the public interest by offering a seven word conclusion that "[t]here are no public interests to weigh," or conducted no balancing at all. JA252 ("Exemption (b)(7)(C) is asserted to protect the names" of individuals "on the grounds that disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy."). Neither explanation is

sufficient: "[s]elf-serving, conclusory statements in an affidavit do not satisfy the government's statutory burden," *Ferri*, 645 F.2d at 1224. And 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.

Exemption 6. In every instance where it asserted Exemption 7(C), the FBI also asserted Exemption 6, which protects "personnel, medical, and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personnel privacy." 5 U.S.C. § 552(b)(6). As with Exemption 7(C), evaluating whether information falls within the scope of Exemption 6 requires 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. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994). But "Exemption 7(C) is more protective of privacy than Exemption 6." *Id.* at 496 n.6.

Because the FBI failed to provide an adequate legal basis to justify the withholding of records under Exemption 7(C), and because Exemption 7(C) is more protective than Exemption 6, its invocation of Exemption 6 fails for the same reasons as its invocation of Exemption 7(C). *Am. Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59, 83-84 (2d Cir. 2008) ("Because exemption 7(C) offers broader protection than exemption 6 . . . a decision that exemption 7(C) does not allow withholding also forecloses the defendants' reliance on exemption 6."), *vacated on*

other grounds, 558 U.S. 1042 (2009). And the FBI also failed to assert that the information it sought to withhold under Exemption 6 was a "personnel, medical," or "similar file," even though that is necessary for a document to be covered by Exemption 6. 5 U.S.C. § 552(b)(6). As a result, the FBI never even asserted that the criteria for Exemption 6 are satisfied, rendering the withholding of documents under Exemption 6 improper.

Exemption 7(D). The FBI invoked Exemption 7(D), which protects information furnished "on a confidential basis" during "a criminal investigation," 5 U.S.C. § 552(b)(7)(D), to protect five categories of information, including "confidential source file numbers." JA301-310. To properly invoke Exemption 7(D), the FBI "bears the 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." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 171-72 (1993) (cleaned up).

In this case, the FBI explained that it was invoking Exemption 7(D) to protect "confidential informants who report to the FBI on a regular basis pursuant to an express assurance of confidentiality," JA302, and "information provided by third party sources to the FBI under implied assurances of confidentiality." JA308.

That explanation failed to meet the FBI's burden for three reasons. *First*, the FBI failed to provide "an individualized showing of confidentiality with respect to

each source," despite its obligations to do so. *Landano*, 508 U.S. at 174. *Second*, the FBI did not discuss the impact of public testimony on the confidentiality of alleged sources. *Lame*, 654 F.2d at 928. ("In determining whether an assurance of confidentiality had been given, these explanations should have included a discussion of the impact of any subsequent public disclosures made by the source."). *Third*, and finally, the FBI failed to provide evidence that any of the alleged sources were given an express or implied assurance of confidentiality.

When "an agency attempts to withhold information under Exemption 7(D) by *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 (emphasis in original). This proof "could take the form of declarations from the agents who extended the express grants of confidentiality, contemporaneous documents from the FBI files[,] . . . evidence of a consistent policy of expressly granting confidentiality[,] . . . or other such evidence that comports with the Federal Rules of Evidence." *Id*. But the FBI provided no such evidence here, offering only conclusory statements that "[n]umerous confidential sources . . . provide information under express assurances of confidentiality," JA301, and it "found evidence within the records showing the FBI granted these individuals express assurances of confidentiality." JA306. Under *Davin*, more was required. Statements asserting an "alleged policy . . . to grant express assurances of

confidentiality" are not sufficient, *Davin*, 60 F.3d at 1061, and an agency cannot simply assert that individuals were given express assurances of confidentiality; it must provide specifics "regarding the circumstances surrounding the interviews in which express grants of confidentiality were given." *Id*. at 1061 & n.5, 1062 (affidavit stating that "Exemption (b)(7)(D) was asserted to withhold information received from a source under an express promise that it would be held in confidence" insufficient to justify withholding under (b)(7)(D)).

In contrast to an express assurance of confidentiality, an implied assurance of confidentiality can be inferred for "paid informants," or individuals who communicate with the FBI "only at locations and under conditions which assure the contact will not be noticed." *Landano*, 508 U.S. at 179 (cleaned up). Implied assurances can also be inferred based on "the nature of the crime and the source's relation to it," *id*., but the "Government may not carry its burden of establishing a source's confidentiality . . . simply by asserting that a source communicated with the government during the course of a criminal investigation." *McDonnell*, 4 F.3d at 1260; *Landano*, 508 U.S. at 174-75 (same).

In its affidavit, the FBI claims that certain "third party sources provided invaluable assistance" during the "investigation of the plaintiff" and it is "reasonable to infer that . . . an assurance of confidentiality" because "[a]ll of these individuals could reasonably fear that disclosure of their identities would place them in danger

of possible retaliation." JA308-09. But the FBI makes no claim the sources were paid or only communicated in secret settings. And this was not a violent crime like "a gang-related murder" where a witness "likely would be unwilling to speak to the Bureau except on the condition of confidentiality." *Landano*, 508 U.S. at 179. As a result, the circumstances of this case provide no basis to infer an assurance of confidentiality "to withhold documents under Exemption 7(D)." *McDonnell*, 4 F.3d at 1259.

Exemption 7(E). Finally, the FBI invoked Exemption 7(E), which 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).

The FBI asserted Exemption 7(E) over seven categories of materials, including what it described as statistical information, file numbers, surveillance information, analysis of investigatory information, and operational plans. JA310-20. But the FBI failed to establish that the threshold requirements for this exemption were met on several occasions. For example, the FBI invoked Exemption 7(E) to protect "sensitive case file numbers," JA313, and "NCIC reporting documentation on third party individuals," JA319, despite the fact that neither is an "investigative technique" or "guideline[] for law enforcement investigations." 5 U.S.C. §

552(b)(7)(E). Accordingly, like the government's invocation of Exemptions 7(C) and 7(D), the FBI's invocation of Exemption 7(E) is conclusory and fails to demonstrate that the legal criteria for Exemption 7(E) are met.

D. The District Court Failed to Adequately Explain the Reasons for Its Summary Judgment Order.

Finally, even if the government met its initial burden to justify non-disclosure, the District Court erred in granting summary judgment in favor of the EOUSA and FBI because it did not articulate the basis for its holdings in sufficient detail to provide a basis for meaningful appellate review. Under FOIA, the District Court was required to "conduct a *de novo* review of the government agency's determination to withhold requested information." *Davin*, 60 F.3d at 1049; *see also* 5 U.S.C. § 552(a)(4)(B). And because de novo review places "the burden of actually determining whether the information is as the Government describes it . . . on the court system," the District Court needed to disclose "the factual and legal basis of [its] decision," including by identifying "the exemption which supports non-disclosure" when it "decide[d] that the agency need not disclose particular information." *Van Bourg v. Nat'l Labor Relations Bd.*, 656 F.2d 1356, 1357 (9th Cir. 1981) (cleaned up); *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.");

Founding Church of Scientology of Wash., D.C., Inc. v. Bell, 603 F.2d 945, 950 (D.C. Cir. 1979) ("District Court decisions in FOIA cases must 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.").

In this case, the District Court did not "state in reasonable detail the reasons for its decision as to each document in dispute" despite its obligation to do so. *Van Bourg*, 656 F.2d at 1358; *see also Coastal*, 644 F.2d at 980. It did not provide any factual findings to explain why it was appropriate for the government to withhold particular documents. Nor did it identify which exemptions applied and why. Instead, the District Court's decision merely adopts the Magistrate Court's recommendation, and all the Magistrate Court's recommendation states is that government's "[d]eclarations demonstrate that the information redacted from the records produced to plaintiff are exempt from disclosure under FOIA." JA33.

Because the "district court's findings" merely "consist of a list of the affidavits submitted by" the "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 at 988 (cleaned up), there is "no means of ascertaining" what the District Court's ultimate holding was, let alone "whether the district court applied the correct legal standard with respect to the various exemptions claimed," *Coastal*, 644 F.2d at 980.

Consequently, even if the government's *Vaughn* submissions provided the District Court with an adequate factual basis to determine whether particular exemptions applied, the District Court's decision fails to provide *this Court* with an adequate record to determine whether the District Court conducted a careful de novo review or committed legal error. Thus, the District Court's summary judgment order must be "vacated and remanded so the district court may" state the basis for its holding "in reasonable detail." *Van Bourg*, 656 F.2d at 1358.

II. THE DISTRICT COURT ERRED IN GRANTING THE TASK FORCE'S MOTION TO DISMISS.

A. The District Court Improperly Dismissed the Task Force on the Ground that It Is Not a Federal Agency.

The District Court erred by granting the Task Force's motion to dismiss on the grounds that it is not a federal agency because Viola plausibly alleged that the Task Force is a federal agency, and the Court improperly relied on evidence extrinsic to the pleadings in concluding otherwise. To decide a Rule 12(b)(6) motion, courts cannot consider evidence outside the pleadings unless the evidence is properly subject to judicial notice or "integral to or explicitly relied upon in the complaint." *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014) (cleaned up). But here, the District Court relied on evidence extrinsic to the pleadings in granting the Task Force's motion to dismiss—an affidavit from a private individual that was not subject to judicial notice or incorporated into the complaint. JA37. Specifically, the

District Court held that "[t]he Task Force has submitted . . . documentation . . . that demonstrates that there is no basis to consider the Task Force to be an 'agency' for FOIA purposes." JA36 n.1. And it adopted the Magistrate Judge's report and recommendation, which relied on a Task Force affidavit to conclude that "[n]one of the constituent members of the Task Force was a federal agency." JA31.

If the District Court had correctly relied on Viola's allegations, rather than evidence from outside the pleadings, it could not have granted the motion to dismiss. Viola pleaded that the Task Force is "a federally-funded entity" and comprised of federal agencies who collected and forwarded evidence to the Task Force. JA106. So "accept[ing] all factual allegations in the complaint as true," *Buck*, 452 F.3d at 260, construing all "disputed facts in favor of the plaintiff," *Pinker*, 292 F.3d at 368 (cleaned up), and reading the pro se complaint liberally, *Dhulos*, 321 F.3d at 369, Viola plausibly alleged that the Task Force is an agency under FOIA, and the District Court erred in granting the motion to dismiss.

To consider extrinsic evidence at the pleading stage, a district court must convert the motion to dismiss into a motion for summary judgment under Rule 12(d) by providing (1) "unambiguous" notice of "its intention to convert" the motion and (2) "an opportunity to submit materials admissible in a summary judgment proceeding" as required by Rule 56. *Rose v. Bartle*, 871 F.2d 331, 341-42 (3d Cir.

1989). The court must then "dispose" of the motion "as provided in Rule 56." *Carter v. Stanton*, 405 U.S. 669, 671 (1972).

Here, the District Court failed to take any of the steps mandated by Rule 12(d) to convert the motion to dismiss into a motion for summary judgment. The District Court first failed to give unambiguous notice that it "intend[ed] to convert the motion," because the Court "repeatedly stated that it was deciding a motion to dismiss," *In re Rockefeller Ctr. Properties, Inc. Securities Litig.*, 184 F.3d 280, 288 (3d Cir. 1999), and instructed Viola that he could "file a proposed amendment to the complaint" in "response to the motion to dismiss," JA383. Compounding that confusion, the Court only hinted that it "may" treat the motion to dismiss as motion for summary judgment, leaving it unclear whether it would in fact convert it. *Id.*

Likewise, the District Court neglected to afford Viola a "reasonable opportunity to present all the material that is pertinent to the motion," Fed. R. Civ. P. 12(d), because it ruled on the Task Force's motion *before* addressing Viola's request that the "government produce a copy of the FBI's memorandum of understanding with the Task Force," JA536. And finally, the District Court and the Magistrate failed to rely on the legal standard of Rule 56. JA36 n.1 (granting the "motion to dismiss" because Viola had "failed to plausibly 'show' that the Task Force is . . . an 'agency' for FOIA purposes"); JA20 (applying Rule 12 standard when recommending that District Court grant Task Force's "motion to dismiss"

despite separately treating EOUSA's and FBI's motion as seeking "summary judgment").

Accordingly, because the District Court's 12(b)(6) ruling is "based in part" on "matters outside the pleadings," and because the Court failed to convert the motion to dismiss to one for summary judgment, dismissal is improper and the District Court's order must be vacated and remanded. *Carter*, 405 U.S. at 671-72.

B. Federal Rule of Civil Procedure 12(b)(2) Does Not Provide Alternative Grounds for Dismissal.

The District Court likewise erred in dismissing Viola's complaint under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction.

At the outset, personal jurisdiction is not an issue when, as here, the federal government is sued in a federal court expressly given "jurisdiction" under federal law. 5 U.S.C. § 552(a)(4)(B). Through FOIA, the government clearly consents to suit within its own courts. *Cf. Pennoyer v. Neff*, 95 U.S. 714, 725 (1877) (recognizing that parties may voluntarily consent to a court's personal jurisdiction).

Regardless, Viola met his burden to establish the District Court's personal jurisdiction over the Task Force. Although plaintiffs have the burden to demonstrate personal jurisdiction, "in the preliminary stages of the litigation . . . that burden is light." *D'Jamoos ex rel. Estate of Weingeroff v. Pilatus Aircraft Ltd.*, 566 F.3d 94, 110 (3d Cir. 2009) (cleaned up); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (party invoking federal jurisdiction must establish jurisdiction "with

the manner and degree of evidence required at the successive stages of the litigation," such that "[a]t the pleading stage, general factual allegations . . . may suffice"); *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 18 (D.C. Cir. 2011) ("lesser showing required at the pleading stage" to establish jurisdiction). "Prior to trial, the plaintiff is only required to establish a prima facie showing of jurisdiction." *D'Jamoos*, 566 F.3d at 110 (cleaned up). And on a motion to dismiss, a plaintiff's jurisdictional allegations are "taken as true and all factual disputes are resolved in their favor." *O'Connor v. Sandy Lane Hotel Co. Ltd.*, 496 F.3d 312, 316 (3d Cir. 2007) (cleaned up).

Here, Viola made a prima facie showing of jurisdiction by plausibly alleging that the Task Force is a federal agency and Viola had Pennsylvania residency. 5 U.S.C. § 552(a)(4)(B) ("[T]he district court of the United States in the district in which the complainant resides" has "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant"); *see also Arevalo-Franco v. INS*, 889 F.2d 589, 590-91 (5th Cir. 1989); *Murphy v. TVA*, 559 F. Supp. 58 (D.D.C. 1983). In particular, Viola plausibly alleged that the Task Force is a federal agency because it included federal entities, received federal funding, and had federal officers who participated within and exercised control over the Task Force's internal operations. JA392; JA469-94; JA513-17. Viola also plausibly alleged his residency in

Pennsylvania. JA387 ("The Plaintiff is housed in this judicial district."); JA538 ("[T]he Plaintiff has been in prison in Pennsylvania nearly four years."); *Brehm v. U.S. Dep't of Justice Office of Info. & Privacy*, 591 F. Supp. 2d 772, 773 (E.D. Pa. 2008) (plaintiff "is currently incarcerated . . . in South Carolina," meaning "complainant resides in South Carolina").

Even if the District Court could have concluded that it lacked personal jurisdiction over the Task Force, the appropriate remedy was transfer, not dismissal. When a court lacks personal jurisdiction, "the court *shall*, if it is in the interest of justice, transfer such action or appeal to any other such court . . . in which the action or appeal could have been brought." 28 U.S.C. § 1631 (emphasis added). Transfer here would be in the interest of justice not only in light of Viola's pro se status in District Court, but also because failure to transfer forces Viola to restart the litigation from scratch, further delaying the relief he seeks and prolonging imprisonment of a person who seeks to prove his innocence.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO APPOINT COUNSEL.

Finally, the District Court abused its discretion when it failed to appoint counsel under 28 U.S.C. § 1915(e)(1), which provides district courts with the authority to "request an attorney to represent any person unable to afford counsel." In this Circuit, "serious consideration should be given to appointing counsel" when "an indigent plaintiff with a claim of arguable merit is incapable of presenting his or

her case." *Tabron*, 6 F.3d at 156. To guide a district court's discretion, this Court has identified several "factors that bear on the need for appointed counsel" including: (1) the plaintiff's ability to present his case, (2) the complexity of the legal issues, (3) the need for factual investigation and plaintiff's ability to pursue investigation, (4) plaintiff's capacity to retain counsel on his own, (5) the extent to which a case turns on credibility determinations, and (6) whether the case requires expert testimony. *Id*. at 155-57; *Montgomery v. Pinchak*, 294 F.3d 492, 498-99 (3d Cir. 2002).

When initiating this litigation, Viola requested the appointment of counsel because he did "not have any legal training" or experience with FOIA's complex framework. JA52 ("I am respectfully requesting that This Most Honorable Court consider appointment of counsel or, if that request is denied, at least provid[e] a list of attorneys with expertise in FOIA litigation concerning evidence withheld before a criminal trial."). The District Court, however, never ruled on this request, which was an abuse of discretion in and of itself. *See Johnson v. U.S. Dep't of Treasury*, 939 F.2d 820, 824 (9th Cir. 1991) ("[A] district court abuses its discretion if it fails to rule upon a motion for appointment of counsel before granting a motion . . . disposing of the case."); *Brown-Bey v. United States*, 720 F.2d 467, 471 (7th Cir. 1983) ("The failure of the trial court to exercise its discretion at all—in this case, in failing to rule on appellant's request for appointment of counsel—constitutes an

abuse of discretion."). And even if it had, the District Court would have abused its discretion because Viola is entitled to counsel under the applicable legal standard, as this Court later concluded on appeal. JA608.

As stated above, Viola's case implicates his fundamental constitutional right to receive exculpatory evidence from the government before trial. And this case concerns serious allegations of government wrongdoing, which are supported by Viola's own sworn affidavit, the sworn affidavit of Pasela's parents, the existence of documents that the prosecutors told Viola did not exist, and an FBI report and trial testimony admitting the existence of post-indictment recordings of Viola. The judge who oversaw Viola's state-court trial has likewise taken the extraordinary step of stating that the evidence strongly suggests that Viola's federal conviction should be "overturned." JA521. Indeed, the seriousness of Viola's claims, alone, indicates that he was entitled to counsel below given this Court's instruction that "counsel should ordinarily be appointed" when a "plaintiff's claim is truly substantial." *Tabron*, 6 F.3d at 156. But the individual *Tabron* factors also reinforce the conclusion that Viola was entitled to counsel in proceedings before the Magistrate and District Court.

Under the first applicable factor, the record is replete with evidence that Viola struggled to present his case, which is a "significant factor" in determining whether to appoint counsel. *Id*. For example, when the Task Force submitted a motion to

dismiss for lack of personal jurisdiction, Viola responded by contending that the District Court was the appropriate "venue" and that "diversity of citizenship amongst the parties confers jurisdiction," JA387; JA538, even though venue and subject matter jurisdiction are separate legal principles from personal jurisdiction—a point known to trained lawyers, but not laymen.

Under the second factor, this case involves multiple complex legal questions such that it would serve "the ends of justice to have both sides of a difficult legal issue presented by those trained in legal analysis," *Tabron*, 6 F.3d at 156 (cleaned up). These issues include: (1) the standard for adequately justifying withholding documents under 5 U.S.C. § 552(a)(4)(B), (2) the legal burden the government had to demonstrate that it produced all reasonably segregable information under 5 U.S.C. § 552(b), (3) the standard governing adequacy of searches under FOIA, (4) the standards governing application of more than five FOIA exemptions, and (5) the law governing conversion of a motion to dismiss to one for summary judgment under Rule 12(d).

The remaining *Tabron* factors favor the appointment of counsel as well. Viola demonstrated that he was unable to retain counsel on his own. He informed the Court that he contacted an attorney who was "unable to assist" and had contacted the Pennsylvania Bar Referral Program without success. JA52. Viola needed to conduct a factual investigation to respond to issues such as the Task Force's argument that it

is not a federal agency, but Viola was unable to navigate the discovery rules, unable to obtain discovery, and was limited in his ability to conduct that investigation by his incarceration. *See Montgomery*, 294 F.3d at 498. Finally, the extent to which this case rests on credibility determinations favors the appointment of counsel because resolving the ultimate issue in this FOIA case depended on the agency's representations in their *Vaughn* index, which Viola has vigorously contested. *See, e.g.*, JA238 (stating that the Hardy Declaration was "materially misleading"); JA108 (arguing that the government "shifted exculpatory evidence . . . to hide proof of my innocence").

Because the *Tabron* factors demonstrate that the District Court should have granted Viola's request for counsel, the District Court abused its discretion by not doing so. And because Viola was "prejudiced by the District Court's refusal to appoint counsel," *Montgomery*, 294 F.3d at 506, this Court should vacate the District Court's orders below and remand the case for further proceedings. *Id*.

CONCLUSION

For the reasons above, this Court should: (1) reverse and remand the District Court's grant of summary judgment in favor of the FBI and EOUSA; (2) vacate and remand the District Court's order dismissing the Task Force; and (3) order the appointment of counsel for further proceedings in the District Court.

Respectfully submitted,

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July 15, 2019

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on the Brief of Appellant was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in April 2017, and is presently a member in good standing at the Bar of said court.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

I hereby certify that this brief complies with the type-volume requirements and limitations of Fed. R. App. P. 32(a). Specifically, this brief contains 12,931 words in 14-point Times New Roman font.

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The undersigned hereby certifies that the text of the electronic brief is identical to the text in the paper copies.

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The undersigned hereby certifies that this brief complies with L.A.R. 31.1(c) because the virus detection program Symantec Endpoint Protection ("SEP"), has been run on the file and no virus was detected.

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the 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.

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