Exhibit E

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

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*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.

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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

Exhibit F

AFFIDAVIT OF NICHOLAS MYLES

STATE OF OHIO
COUNTY OF CUYAHOGA

I, Nicholas Myles, swear under penalty of perjury that the following statement is true and correct:

1. I was a licensed loan officer in the State of Ohio from approximately 2001 through 2009.

2. I was indicted in State of Ohio v. Myles, 11-cr-557589 and USA v. Myles, 10-cr-75, N.D. Ohio.

3. Prosecutors alleged that I was involved in a mortgage fraud conspiracy with Anthony Viola and others to defraud lenders into making 'no money down' mortgage loans and that various loan applications contained material misrepresentations.

4. Following the indictments, I authorized my legal counsel to negotiate a resolution to these charges.

5. During the criminal proceedings, I met with federal and state prosecutors who worked together through a multi-jurisdictional Mortgage Fraud Task Force.

6. During these interviews, I informed prosecutors Mark Bennett and Dan Kasaris that the state of Ohio Division of Financial Institutions conducted multiple audits of Central National Mortgage, where I was operations manager, and that the company passed all audits.

7. During the investigation, I received a subpoena to provide computers and other documents to Cuyahoga County Prosecutor's Office.

8. I complied with the subpoena and brought computers and documents to Prosecutor Michael Jackson, and he did not pursue any criminal charges.

9. Several years later, Prosecutor Dan Kasaris ordered me to falsely testify that I never brought any computers to the Prosecutor's Office.

10. During interviews with law enforcement, I also informed Mr. Bennett and Mr. Kasaris the following:

- Lenders including Argent Mortgage, Long Beach Mortgage, New Century and Washington Mutual routinely 'waived' guidelines and permitted 'no money down' mortgage loans
- Any seller funded down payment assistance was disclosed to lenders and was not part of any fraudulent scheme
- Lender representatives routinely authorized loans that did not meet the lender's guidelines.
- I fired Kathryn Clover as a mortgage originator at Central National Mortgage because she was committing fraud.

11. Even though I provided honest and truthful information to prosecutors, both Mark Bennett and Dan Kasaris frequently raised their voices during meetings and threatened to prosecute my wife Dyan unless I entered a guilty plea and agreed to testify against Anthony Viola, Uri Gofman and others.

12. Mr. Bennett insisted that I testify that lenders were victims of mortgage fraud schemes, even though I did not believe lenders were victims and that, in many of the charges against me, I was not involved with the loan submissions.

13. While I was in final negotiations to resolve my case, Mr. Kasaris stated that unless I signed a plea agreement at that moment, he intended on returning to his office and indicting my wife Dyan.

14. Upon reading court dockets and reviewing email exchanges between Kathryn Clover and Dan Kasaris, I believe I was prosecuted in order to protect Mr. Kasaris' romantic relationship with Clover.

15. I believe both my plea agreement and trial testimony against Anthony Viola were coerced.

Further I sayeth naught.

Nicholas Myles

Sworn and subscribed in my presence this 09 day of December, 2022.

NOTARY PUBLIC

Notarial Seal
STATE OF OHIO

Leah R Caskey
Notary Public, State of Ohio
My Commission Expires
August 26, 2024

Exhibit G


ounty Mortgage Fraud Task Force Announces Largest Mortgage Fraud Case
Mark Bennett
Assistant United States Attorney

PRESS RELEASE

AUSA Mark Bennett honored for prosecuting mortgage-fraud cases

Thursday, April 23, 2015

For Immediate Release

U.S. Attorney's Office, Northern District of Ohio

Assistant U.S. Attorney Mark S. Bennett was honored this week for his work prosecuting mortgage-fraud cases by the United States Department of Housing and Urban Development – Office of Inspector General.

Bennett has prosecuted nearly 100 defendants involved in mortgage fraud. Northeast Ohio is recognized as one of the areas hardest hit by the mortgage-fraud crisis that swept the country in the early 2000s.

"Your efforts have truly made a difference to the public," Nicholas Padilla, Jr., the deputy assistant Inspector General for HUD, said in presenting the award.

"Mark has been tenacious in seeking justice for the victims of mortgage fraud, and those who caused so much hardship in our city," said U.S. Attorney Steven M. Dettelbach.

Among the cases Bennett has prosecuted:

United States v. Thomas France: France, of Strongsville, was sentenced to more than 10 years in prison and ordered to pay more than $3 million in restitution for fraud involving six properties in Medina. France was part of a group that sold the homes at fraudulently inflated purchase prices. All the homes eventually went into foreclosure, resulting in a loss of approximately $3.3 million.

United States v. Anthony Viola and Uri Gofman: Viola, a real estate company owner from Cleveland Heights, was sentenced to more than 12 years in prison and real estate owner Uri Gofman, of Beachwood, was sentenced to more than eight years in prison. A jury convicted Viola and Gofman of multiple counts related to the fraudlulent sale of 34 homes, resulting in a loss of more than $3 million.

United States v. Romero Minor, et. al: Minor, of Macon, Georgia, was sentenced to nearly six years in prison for fraud involving $7.5 million and 48 properties in Mahoning and Trumbull Counties. Minor recruited straw buyers to "purchase" properties in their names. Minor represented to the straw buyers that he needed individuals like them with good credit to apply for mortgage loans on properties in their names as a way of

helping other individuals in the community with bad credit who could not purchase homes in their own names, He then conspired with others to prepare and submit fraudulent mortgage loan applications to various mortgage lenders knowing that they contained false information. Minor received thousands of dollars at closing from the mortgage proceeds with the assistance of the title agents. Overall, nine people were convicted of crimes for their roles in the scheme.

Bennett, 45, joined the U.S. Attorney's Office in 2007. He previously worked for the Ohio Attorney General. He is a graduate of Baldwin Wallace College and the Cleveland-Marshall College of Law and serves on the Legal Aid Society's board.

Updated April 23, 2015

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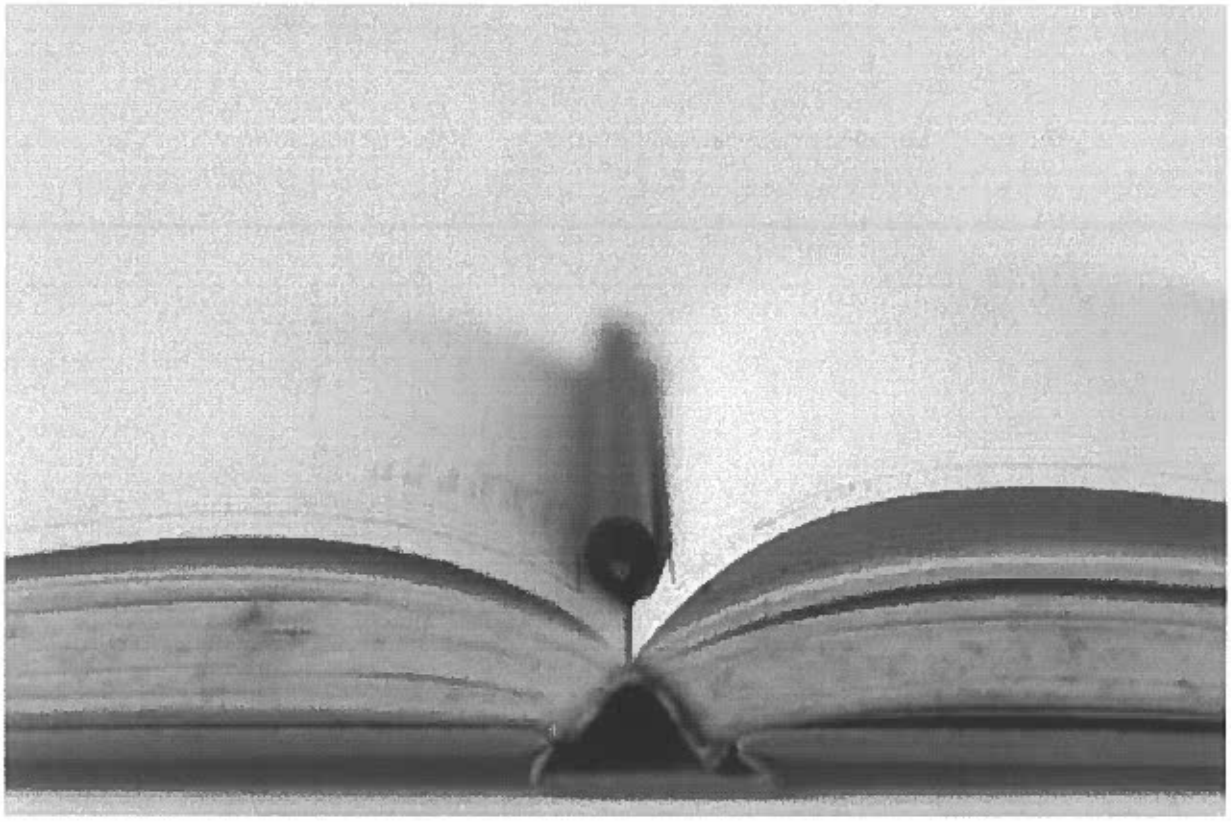

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Northeast Ohio mother, son sentenced to prison for $8 million health-care fraud scheme - cleveland.com

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Couple Gets Lengthy Prison Terms for Fentanyl Sales Scheme | Ohio News | US News

Exhibit H

From: Bennett, Mark (USAOHN) (USAOHN) <Mark.Bennett2@usdoj.gov>
To: tonytopaz <tonytopaz@aol.com>
Cc: Daniel Kasaris (p4dsk@cuyahogacounty.us) <p4dsk@cuyahogacounty.us>
Subject: RE: Newcomb 302 request from Tony Viola
Date: Sun, Apr 8, 2012 8:45 pm

I have checked the system and do not have a 302 for Mr. Newcombe. I have inquired with the agents and other AUSAs on the case to see if one was created and they can provide. I will not be in the office next week. But they can respond directly to Mr. Kasaris.

Mark S. Bennett
Assistant United States Attorney
801 W. Superior Ave., Suite 400
Cleveland, Ohio 44113
216.622.3878 (direct)
216.522.2403 (fax)
mark.bennett2@usdoj.gov

From: tonytopaz@aol.com [mailto:tonytopaz@aol.com]
Sent: Sunday, April 08, 2012 6:20 PM
To: Bennett, Mark (USAOHN)
Subject: Re: Newcomb 302 request from Tony Viola

Mr. Kasaris says he does not have Mr. Newcomb's 302, if possible, kindly reforward that, thank you.

Tony

-----Original Message-----
From: Bennett, Mark (USAOHN) (USAOHN) <Mark.Bennett2@usdoj.gov>
To: 'tonytopaz@aol.com' <tonytopaz@aol.com>; 'dkasaris@cuyahogacounty.us' <dkasaris@cuyahogacounty.us>
Sent: Sun, Apr 8, 2012 10:31 am
Subject: Re: Newcomb 302 request from Tony Viola

Mr. Viola,

I have provided those to Mr. Kasaris. I am sure he will provide pursuant to local rule and the Court's trial order.

Mark Bennett

From: tonytopaz@aol.com [mailto:tonytopaz@aol.com]
Sent: Saturday, April 07, 2012 03:47 PM
To: Bennett, Mark (USAOHN); dkasaris@cuyahogacounty.us <dkasaris@cuyahogacounty.us>
Subject: Newcomb 302 request from Tony Viola

Mr Bennett - I am respectfully requesting that you e mail me a copy of the Argent witness, Mr. Steve Newcomb, his 302 statement summary. He testified on direct exam on Friday and will resume this coming week. Thank you.

Tony Viola

and this was my response to mark
I do not have any newcomb 302

dan

Daniel J Kasaris
Assistant County Prosecutor
Cuyahoga County, Ohio
1200 Ontario ST. 9th Floor
216-443-7863
216-698-2270 (fax)

Attached Message

From: Daniel Kasaris <dkasaris@cuyahogacounty us>
To: Mark (USAOHN) Bennett <Mark.Bennett2@usdoj.gov>
Cc: Jeffrey P. (FBI) Kassouf <Jeffrey.Kassouf@ic fbi.gov>, John (USAOI IN) Siegel <John Siegel@usdoj gov>
Subject: Re: Viola - 302s of lender, Rich and Calo
Date: Sun, 08 Apr 2012 12:56:01 -0400

mark
this is what you sent
I do not have a 302 for steve newcomb
thx
dan

Daniel J. Kasaris
Assistant County Prosecutor
Cuyahoga County, Ohio
1200 Ontario ST. 9th Floor
216-443-7863
216-698-2270 (fax)

>>> "Bennett, Mark (USAOHN)" <Mark.Bennett2@usdoj.gov> 2/29/2012 5:25 PM >>>
Dan,

I have not found the interview of Steve Newcomb from Argent, but you probably already have that one. In addition, please be advised that we have put all of our trial exhibits on a disk and will send that disk, along with the Colley disk out tomorrow.

Thanks,
Mark

Mark S. Bennett
Assistant United States Attorney
801 W. Superior Ave., Suite 400
Cleveland, Ohio 44113
216.622.3878 (direct)
216.522.2403 (fax)
mark.bennett2@usdoj.gov

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 02/22/2011

On February 18, 2011, SCOTT NEWCOMBE, was telephonically interviewed, by Forensic Accountant Ron Saunders, Special Agent Jeffrey Kassouf and Special Assistant United States Attorney Micah Ault, after being advised of the nature of the interview and the identity of the interviewing personnel, NEWCOMBE provided the following information:

NEWCOMBE worked at ARGENT MORTGAGE, and transferred over to Citigroup Global once Argent was sold to Citigroup. NEWCOMBE is involved in ACC Capital as they wind down Argent.

Argent was a loan originator.

During the years 2005-2006 Argent processed a significant number of loans.

Argent required the borrower provide a down payment, which was generally provided through a cashiers check.

Argent had a stated loan program. These loans were typically higher risk, so they carried a higher interest rate on the loan. In the stated income loan program, the borrower states their income on the loan application, also known as a 1003. Argent required the borrower to sign a certification or letter as to their income.

Argent originated their loans through mortgage brokers. The mortgage brokers were required to go through an approval process before Argent would accept any loans.

The loans were assigned to the underwriting department if the loan met the underwriting guidelines a conditional loan approval with various terms was issued.

Final approval on the loan would be issued after the loan conditions were met.

Argent would send various loan documents to the title company to be signed at closing. Once the title company closed the loan and completed the documents, they would send the completed

Investigation on 02/18/2011 at Cleveland, Oh

File # 329A-CV-71645 Date dictated

by SA Jeffrey P. Kassouf

documents back to Argent. Once this was done Argent would fund the loan.

The account executive, was the sales representative in the field who dealt with the mortgage brokers.

The account manager oversaw the underwriter and funding processes.

Underwriting approved the loans, if there were any exceptions or conditions not met the account manager could override or waive a condition, if it made good business sense. (*)

It was important to underwriting to pull the borrower's credit report. The credit score drove the loan process.

The borrower's income was important to assess the risk of repayment.

A debt to income ratio was calculated based upon the income provided in the 1003.

Purchase loans required proof of the down payment.

The appraisal was required to be done by a disinterested third party.

The appraiser dealt with the mortgage broker, who submitted the appraisal report to Argent. Once received the appraisal would be sent for a desk review. If any followup by the desk review was needed they could call the appraiser.

The Account Manager and Underwriter placed heavy reliance that the 1003 was completed accurately and truthfully.

If the borrower was self employed a third party letter from a Certified Public Accountant was needed.

Argent required 5% of the down payment must be from the borrowers own funds, regardless of the Loan to Value.

Gift funds had to come from an immediate family member. If a gift was provided a gift letter was required, stating the funds were given truly as a gift and no repayment was required.

Argent did not accept third party down payments from a down payment provider.

Argent accepted seller second mortgages, also known as seller carry backs. The loan contract stating the terms and conditions was required to be provided to Argent. If a seller second was entered into Argent expected this was a legitimate transaction which would be repaid.

At one point Argent allowed only the buyer HUD Settlement Statement, however, their policy switched to requiring both the buyer and seller side. Argent switched this policy when it was discovered unauthorized third party disbursements were being made on the loans.

Closing costs were based upon the purchase agreement. The closing costs were capped at a certain percentage. Therefore the seller could only provide a certain maximum percentage.

Any money going to the buyer would need to be disclosed to Argent.

Argent Mortgage Company, LLC
BORROWER'S DISBURSEMENT AUTHORIZATION

SETTLEMENT/CLOSING AGENT TITLE NETWORK OF AMERICA LLC 35401 EUCLID AVENUE SUITE 215 WILLOUGHBY, OH 44094	BORROWER(S) KATHRYN CLOVER
PROPERTY ADDRESS 3233 DELLWOOD ROAD, CLEVELAND HEIGHTS, OH 44118	SELLER(S)
CLOSING DATE 06/30/2005 FUNDING DATE 06/30/2005 LOAN NUMBER 0082568999 - 9705 LOAN PURPOSE Purchase	LEGAL DESCRIPTION LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF:

FROM: Argent Mortgage Company, LLC - Division 03 - Reg 05 Sales PHONE NO. (800)369-5117 FAX
FUNDING CONTACT:

INSTRUCTIONS TO SETTLEMENT/CLOSING AGENT:
BELOW IS A LIST OF ALL SETTLEMENT CHARGES AND DISBURSEMENTS APPLICABLE TO THIS LOAN. YOU MUST USE THESE FIGURES TO PREPARE YOUR SETTLEMENT STATEMENT. YOU CANNOT DEVIATE FROM THESE FIGURES WITHOUT PRIOR WRITTEN AUTHORIZATION FROM Denise Obrock. ANY AMOUNTS MARKED WITH AN " * " ARE PREPAID FINANCE CHARGES AND CANNOT BE INCREASED OR ADDED ONCE LOAN DOCUMENTS HAVE BEEN PREPARED UNLESS NEW LOAN DOCUMENTS ARE GENERATED.

Settlement Charges LOAN AMOUNT: $ 161,500.00

Item Payable	Pay to	Paid Outside of Closing (POC)	Paid by Borrower	Paid by Lender	Paid by Seller	Total Amount Paid
Underwriting Fee to Lender	Argent Mortgage Company, LLC	$0.00	$550.00	$0.00	$0.00	$550.00 *
Interest 1 days @ 36.06	Argent Mortgage Company, LLC	$0.00	$36.06	$0.00	$0.00	$36.06 *
Origination Fee to Broker 2.477%	Central National Mortgage (W)	$0.00	$4,000.36	$0.00	$0.00	$4,000.36 *
Appraisal Fee	EUDAX APPRAISAL (W)	$0.00	$350.00	$0.00	$0.00	$350.00
Tax Related Service Fee	Argent Mortgage Company, LLC	$0.00	$70.00	$0.00	$0.00	$70.00 *
Flood Search Fee	Argent Mortgage Company, LLC	$0.00	$9.00	$0.00	$0.00	$9.00 *
Hazard Insurance Premium	INSURANCE OFFICE OF (W)	$0.00	$560.50	$0.00	$0.00	$560.50
Closing/Remote Close/Trip	FAMILY TITLE SERVICES INC (W)	$0.00	$450.00	$0.00	$0.00	$450.00 *
Title Ins/Endorsements/Survey	FAMILY TITLE SERVICES INC (W)	$0.00	$576.25	$0.00	$0.00	$576.25
Recording/Recording	FAMILY TITLE SERVICES INC (W)	$0.00	$200.00	$0.00	$0.00	$200.00
Courier/Wire/E-Mail Fee	FAMILY TITLE SERVICES INC (W)	$0.00	$115.00	$0.00	$0.00	$115.00 *
					TOTAL CHARGES	$7,217.17

ESCROW ACCOUNTS

	Annual Amount	Monthly Amount	Number of Months	Total Charge
TAXES	$0.00	$0.00	0	$0.00
HAZARD INSURANCE	$0.00	$0.00	0	$0.00
FLOOD INSURANCE	$0.00	$0.00	0	$0.00
EARTHQUAKE INSURANCE	$0.00	$0.00	0	$0.00
WINDSTORM INSURANCE	$0.00	$0.00	0	$0.00
			INITIAL DEPOSIT	$0.00

Argent Mortgage Company, LLC
BORROWER'S DISBURSEMENT AUTHORIZATION

Additional Disbursements to Others

Item Payable	Account Number	Balance	Total Amount Paid
		TOTAL DISBURSEMENTS	

FUNDING INFORMATION

WIRE AMOUNT	
DEPOSIT(S) / EARNEST MONEY	
WAREHOUSE LINE	
CASH OUT	$15,717.17
FUNDING CONTACT:	

BORROWER(S) AUTHORIZATION

Argent Mortgage Company, LLC ("LENDER") IS HEREBY AUTHORIZED AND REQUESTED TO DISBURSE THE LOAN FUNDS TO THE SETTLEMENT/CLOSING AGENT TO BE APPLIED/DISBURSED IN ACCORDANCE WITH AND AS SHOWN IN THIS AUTHORIZATION. IT IS UNDERSTOOD THAT THIS STATEMENT IS AN ESTIMATE ONLY AND IS AUTHORIZED TO MAKE ADJUSTMENTS TO THE FIGURES AS NECESSARY TO REFLECT CHANGES IN THE CLOSING/SETTLEMENT DATE OR TO REFLECT UPDATED PAYOFF AMOUNTS FOR ANY PRIOR LIENS OR ACCOUNTS TO BE SATISFIED WITH THEIR LOAN PROCEEDS.

Borrower KATHRYN CLOVER — Date 6/30/05

Borrower — Date

Borrower — Date

Borrower — Date

Borrower — Date

Borrower — Date

SETTLEMENT/CLOSING AGENT REPRESENTATIVE — Date 6-30-05

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 14-3348/3624

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY L. VIOLA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Ohio
Eastern Division, Case No. 1:08CR506

GOVERNMENT'S OPPOSITION TO, AND MOTION TO STRIKE, VIOLA'S REQUEST(S) THAT THE COURT TAKE JUDICIAL NOTICE OF AFFIDAVITS

Anthony L. Viola, Pro Se
#32238-160
F.C.I. McKean
P.O. Box 8000
Bradford, PA 16701

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Viola initially filed his Request That The Merits Panel Take Judicial Notice of Affidavits Filed In The District Court and Unopposed By The Government (Doc. #31) with the affidavits attached in this Case on February 2, 2015. Viola filed the same Request and affidavits (Doc. # 35) on March 2, 2015[1]. The Government respectfully requests that this Court deny Viola's Requests and Strike these filings (Doc. #31 and #35) from the record for the following reasons:

One, these affidavits are not in the record. Second, the averments within the affidavit do not comport with Federal Rule of Evidence 201(b)(1) and (2). The facts alleged are not generally known in the community, and the facts claimed in the affidavit certainly are not ones that "can accurately and readily be determined from sources whose accuracy cannot reasonably be questioned." Accordingly, since the affidavits do not satisfy the Rule, this Court should not take judicial notice of the affidavits or an of the information asserted.

Furthermore, the United States hotly dispute Viola's allegation that Dawn Pasela was ever threatened by the Undersigned or any federal agents, or that the Undersigned or any federal agent had anything to do with Mr. Pasela untimely

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[1] The Undersigned respectfully requests that the Court not consider the delay in opposing Viola's initial Request as a reduction to the extent with which the Undersigned disputes Viola's allegations. The Undersigned has been preparing for a particularly contested trial since January, 2015, and in trial since February 20, 2015 in United States v. Atway, et al. in the Northern District of Ohio. (Case #1:14CR070).

death. Viola's allegations are baseless and asserted simply in an attempt to inflame the matter. Accordingly, both Requests should be stricken from the Record.

Finally, Viola incorrectly states to this Court that the United States did not oppose the Motion to which he attached the affidavits. (R. 470, Motion to Compel, PageID 10355). In fact, the United States filed a Response in Opposition (R. 471, PageID 10369) in the District Court, and the District Court denied Viola's Motion to Compel. (R. 473, Memorandum and Order, PageID 10379). Because the affidavits had no bearing on Viola's Motion to Compel, and Viola's allegations were so frivolous, neither the United States, nor the District Court needed to address Viola's allegations or the affidavits.

Respectfully Submitted,

Steven M. Dettelbach
United States Attorney

s/Mark S. Bennett
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THE COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA
JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OHIO 44113

DANIEL GAUL
Judge
(216) 443-8706

February 7, 2014

Mr. Anthony L. Viola
#32238160
Ashland Federal Correctional Institution
P.O. Box 6001
Ashland, KY 41105

Dear Tony,

I have been meaning to write since your correspondence. Hope you are doing well and that your health and spirits are holding up.

I recently spoke with Court Reporter Melissa Jones. I have authorized her to prepare that portion of your trial transcript that you requested. This will be provided to you by my court at no cost in the interest of justice.

Also, I spoke with Attorney Angelo Lonardo yesterday. He is representing the ex-Marine bank robber whom you have come into contact with (Walker). Anyway, Lonardo and I spoke about how fortunate Lonardo's client was to meet up with you at the institution.

Lonardo has a very high opinion of you which I share. Hope things work out for you and his client also.

Please let me know if I may be of further service.

Sincerely yours,

Daniel Gaul
Judge

DG/jc