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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT L. BARRETT,)	
)	2:09-cv-02959-GEB-EFB
Plaintiff,)	
)	
v.)	<u>ORDER DENYING PLAINTIFF'S</u>
)	<u>MOTION FOR SUMMARY JUDGMENT</u>
UNITED STATES DEPARTMENT OF)	<u>AND GRANTING DEFENDANT'S</u>
JUSTICE, FEDERAL BUREAU OF)	<u>CROSS-MOTION FOR SUMMARY</u>
INVESTIGATION,)	<u>JUDGMENT</u>
)	
Defendant.)	
_____)	

Pending are cross-motions for summary judgment in this Freedom of Information Act ("FOIA") action, concerning whether Defendant properly withheld documents responsive to Plaintiff's FOIA request under two statutory exemptions: 5 U.S.C. § 552(b)(7)(A) and (7)(D). For the reasons stated herein, Defendant's motion under exemption 5 U.S.C. § 552(b)(7)(A) is granted and Plaintiff's cross-motion on this exemption is denied. Since the documents are found to have been properly withheld under 5 U.S.C. § 552(b)(7)(A), the issue whether 5 U.S.C. § 552(b)(7)(D) exempted the responsive documents from disclosure is not reached.

I. LEGAL STANDARD

When deciding cross-motions for summary judgment, each motion is evaluated on its own merits, "taking care in each instance to draw all reasonable inferences against the party whose motion is under

1 consideration." B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587,
2 592 (6th Cir. 2001); Bryan v. McPherson, 608 F.3d 614, 619 (9th Cir.
3 2010) (stating all reasonable inferences that can be drawn from the
4 evidence "must be drawn in favor of the non-moving party"). A party
5 seeking summary judgment bears the initial burden of demonstrating the
6 absence of a genuine issue of material fact for trial. Celotex Corp. v.
7 Catrett, 477 U.S. 317, 323 (1986). If this burden is satisfied, "the
8 non-moving party must set forth, by affidavit or as otherwise provided
9 in [Federal] Rule [of Civil Procedure] 56, specific facts showing that
10 there is a genuine issue for trial." T.W. Elec. Serv., Inc. v. Pacific
11 Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quotations
12 and citation omitted) (emphasis omitted).

13 FOIA "mandates a policy of broad disclosure of government
14 documents when production is properly requested." Kamman v. U.S. I.R.S.,
15 56 F.3d 46, 48 (9th Cir. 1995) (citing 5 U.S.C. § 552(a)). "An agency
16 may withhold a requested document only if it falls within one of the
17 nine statutory exemptions to the disclosure requirement." Id. (citations
18 omitted). "The delineated exemptions are to be interpreted narrowly."
19 Milner v. U.S. Dept. of the Navy, 575 F.3d 959, 963 (9th Cir. 2009)
20 (quotation omitted). FOIA's "broad provisions favoring disclosure,
21 coupled with the specific exemptions, reveal and present the 'balance'
22 Congress has struck" between "the right of the public to know and the
23 need of the Government to keep information in confidence." John Doe
24 Agency v. John Doe Corp., 493 U.S. 146, 152-53 (1989).

25 The government has the burden of proving "that a particular
26 document falls within one of the exemptions." Kamman v. U.S. I.R.S., 56
27 F.3d at 48.

28

1 [The government] may meet this burden by submitting
2 affidavits showing that the information falls
3 within the claimed exemption. In evaluating a claim
4 for exemption, a district court must accord
5 substantial weight to agency affidavits, provided
6 the justifications for nondisclosure are not
7 controverted by contrary evidence in the record or
8 by evidence of agency bad faith.

9 Milner v. U.S. Dept. of the Navy, 575 F.3d at 963 (quotation and
10 citation omitted).

11 **II. BACKGROUND AND SUMMARY JUDGMENT FACTUAL RECORD**

12 Plaintiff claims an interest in solving what is referenced as
13 the Zodiac case. (Pl.'s Resp. to Def.'s Statement of Undisputed Facts
14 ("Def.'s SUF") #4.) The self-described "Zodiac Killer" committed at least
15 five brutal murders and severely injured two other victims in northern
16 California in 1968 and 1969. (Def.'s SUF #1.)

17 Plaintiff submitted a FOIA request to the Federal Bureau of
18 Investigations ("FBI") on July 17, 2009, in which he sought high
19 resolution copies of all latent fingerprints contained in the Zodiac
20 case. (Def.'s Resp. to Pl.'s Statement of Undisputed Facts ("Pl.'s SUF")
21 #2.) The FBI did not directly investigate the Zodiac crimes; it assisted
22 local law enforcement agencies through forensic examinations which
23 included analysis of latent fingerprints. (Def.'s SUF #3.) The Zodiac
24 crimes remain unsolved. Id. #2.

25 Defendant identified 24 pages of photographs of latent
26 fingerprints, which are responsive to Plaintiff's FOIA request. (Def.'s
27 SUF #11.) Local law enforcement agencies involved in the investigation
28 of the Zodiac case submitted the fingerprints to the FBI for analysis.
Id. #12.

Since the responsive documents were obtained from local law
enforcement agencies, the FBI contacted the local agencies regarding

1 Plaintiff's FOIA request. Id. #13. "All three local law enforcement
2 agencies refused to consent to disclosure, requesting that the FBI
3 withhold the latent prints entirely." Id. #14. The Napa County
4 Sheriff's Department refused to consent by letter, stating:

5 This case is still an open homicide investigation .
6 . . . Our office has jurisdiction in this case as
7 one victim was killed in our county and our agency
8 . . . still continues to follow up on leads.

9 Our agency previously submitted latent prints
10 to your agency to assist in identification of a
11 suspect. These latent prints are crucial to our
12 ongoing criminal investigation I adamantly
13 want to insure that this evidence is not to be
14 released . . . as to do so would jeopardize the
15 successful prosecution of a suspect in this
16 investigation.

17 (Hardy Decl., Ex. D.) The San Francisco Police Department requested the
18 prints be withheld via email, stating:

19 Because the San Francisco Police Department's
20 investigation in this matter is open and ongoing,
21 disclosure of documents and case materials may
22 endanger successful investigation. Although a
23 substantial amount of time has passed since the
24 commission of these crimes, the SFPD still receives
25 potential leads and information on the case on a
26 frequent basis.

27 (Hardy Decl., Ex. E.) The City of Vallejo Police Department requested
28 the fingerprints be withheld in a telephonic communication. (Def.'s SUF
#19.)

29 **III. DISCUSSION**

30 Defendant argues it properly withheld the latent fingerprints
31 under 5 U.S.C. § 552(b)(7)(A) ("Exemption 7(A)"), which exempts from
32 disclosure "records or information compiled for law enforcement purposes
33 . . . to the extent that [their production] could reasonably be expected
34 to interfere with enforcement proceedings." The parties agree that the
35 latent fingerprints were compiled for "law enforcement purposes." (Pl.'s

1 Mot. 8:26-9:2.) However, they dispute whether production of the latent
2 fingerprints "could reasonably be expected to interfere" with an
3 "enforcement proceeding."

4 **A. Enforcement Proceeding**

5 Defendant argues it properly withheld the latent fingerprints
6 under Exemption 7(A) since disclosure could interfere with local law
7 enforcement agencies' ongoing investigations of the Zodiac case. (Def's
8 Mem. of P.&A. in Supp. of Mot. for Summ. J. ("Def's Mot.") 12:21-25.)
9 Plaintiff counters, "[t]he government must show more than an open
10 investigation" before it is authorized to use Exemption 7(A). (Pl.'s
11 Am. Mem. of P.&A. in Supp. of Mot. for Summ. J. ("Pl.'s Mot.") 9:19-20.)
12 Plaintiff further argues, the Zodiac case is "40 year[s] old . . . [and]
13 is receiving little police attention." Id. at 11:9-11.

14 Under Exemption 7(A), a pending criminal investigation
15 constitutes an "enforcement proceeding." See, e.g., Boyd v. U.S. Dept.
16 of Justice, 475 F.3d 381, 386 (D.C. Cir. 2007) (citing Bevis v. Dept. of
17 State, 801 F.2d 1386, 1387-89 (D.C. Cir. 1986)). The fact that an
18 investigation is "dormant" does not make Exemption 7(A) inapplicable.
19 Cook v. U.S. Dept. of Justice, No. C04-2542L, 2005 WL 2237615, at *2
20 (W.D. Wash. Sept. 13, 2005) (summary judgment granted to defendant in
21 FOIA action where documents, which concerned investigation of unsolved
22 1971 airplane hijacking, were withheld under Exemption 7(A)).

23 The Declaration of David Hardy, Section Chief of the
24 Record/Information Dissemination Section of the FBI, and correspondence
25 from the Napa County Sheriff's Department and San Francisco Police
26 Department attached as exhibits thereto evidence that the Zodiac case
27 investigation is ongoing, and Plaintiff has presented no admissible
28

1 evidence that the investigation has been completed or is inactive.¹
2 (Hardy Decl. ¶¶ 11, 19, 27, Ex. D, Ex. E.) Therefore, Defendant has
3 demonstrated the absence of a genuine issue of material fact as to the
4 existence of an "enforcement proceeding" under Exemption 7(A).

5 **B. Could Reasonably Be Expected to Interfere**

6 Defendant contends releasing the latent fingerprints can
7 reasonably be expected to interfere with the ongoing Zodiac
8 investigations because, *inter alia*, "[o]ne or more private individuals
9 may seek to identify the Zodiac Killer by the latent prints." (Def.'s
10 Mot. 13:18-20.) Defendant explains further: "[i]f the prints' release
11 led to an identification, the identification could alert a Zodiac Killer
12 suspect to evade capture." *Id.* at 13:20-22 (citations omitted).

13 Defendant relies on David Hardy's Declaration as evidence that
14 disclosure of the fingerprints could reasonably be expected to interfere
15 with the "Zodiac Killer" investigations. (Hardy Decl. ¶¶ 11, 19, 27, Ex.
16 D, Ex. E.) Mr. Hardy avers:

17 In this case the FBI has asserted Exemption
18 (b)(7)(A) to protect the criminal investigatory
19 evidence identified as Latent Case #A-10042
20 contained in FBI File 9-HQ-49911. The prints are
21 photographic copies of latent prints provided to
22 the FBI by local California police agencies during
23 their investigations of the Zodiac Killer murders.
24 The murders remain unsolved and are open in several
25 California jurisdictions. As a result of this
26 request, FBIHQ contacted representatives of several
27 California law enforcement agencies who responded
28 that the investigations are pending and requested
that the FBI not release the copies of latent
prints to the public because to do so could
jeopardize their investigations and prosecution of
a suspect. . . . The release of the latent print
photographs could result in identification of a

27 ¹ Plaintiff submitted two newspaper articles to support his
28 position that the Zodiac case is not currently being investigated.
(Pl.'s Ex. in Supp. of Mot. for Summ. J., 7 and 8.) Defendant objected
to these exhibits as inadmissible hearsay. The objections are sustained.

1 suspect by the plaintiff or another person, and
2 possible notification of said suspect who could
3 evade capture by law enforcement. . . . Indeed, the
4 authorities who are actively investigating this
5 open case have expressed concern that the release
6 of this information could interfere with their
7 investigations. Thus, the FBI has properly applied
8 Exemption (b)(7)(A) to protect the evidentiary
9 material in the latent prints case #A-10042.

6 (Hardy Decl. ¶¶ 27-28.)

7 Plaintiff counters Defendant has failed to show how release of
8 the records could reasonably be expected to interfere with an
9 enforcement proceeding since "identification of a suspect is exactly why
10 fingerprints were collected in the first place." (Pl.'s Mot. 12:18-19,
11 15:20-23.) Plaintiff contends, "while theoretically possible, [the
12 successful identification and notification of the suspect] is extremely
13 remote . . . and completely unrealistic." Id. at 13:3-4, 18-19
14 (quotation omitted). Further, Plaintiff responds to the government's
15 interference argument with the declaration of his handwriting expert,
16 Michael Grimm. Mr. Grimm declares:

17 Should identifications be effected in this
18 matter, the San Francisco Field Office of the
19 Federal Bureau of Investigation and/or the San
20 Francisco Police Department Homicide Division will
21 be notified immediately. . . .

20 With regard to the FBI's concerns that the
21 release of the latent print photographs . . . could
22 result in someone successfully identifying the
23 "Zodiac Killer" and ultimately notifying the killer
24 so that the person may evade capture, while
25 theoretically possible, the theory is extremely
26 remote. In order for a comparison and
27 identification to be made with the latent prints in
28 this case, the individual comparing the latent
prints would need to be proficient in the
comparison process. Only through years of latent
print comparison experience would the individual be
qualified to make a latent print identification.
Any individual with that degree of experience would
likely be in law enforcement or law enforcement
support. Anyone in that position would be inclined
to notify the proper authorities due to moral and
ethical responsibilities. . . . Furthermore, an

1 individual would need to have access to fingerprint
2 records, which are typically not available to the
3 general public.

4

5 By releasing the latent print images to the
6 public would only serve to assist the authorities
7 in identifying the "Zodiac Killer". This would
8 enable latent print examiners throughout the United
9 States the ability to enter these latent prints
10 into local automated fingerprint databases, thereby
11 exponentially increasing the possibility of solving
12 this forty-two year old unsolved case.

13 (Pl.'s Ex. 4, 2-3.)

14 Under exemption 7(A) "the government is not required to make
15 a specific factual showing with respect to each withheld document that
16 disclosure would *actually interfere* with a particular enforcement
17 proceeding. The [FBI] need only make a general showing that disclosure
18 . . . [could reasonably be expected to] interfere with its enforcement
19 proceedings." Lewis v. I.R.S., 823 F.2d 375, 380 (9th Cir. 1987)
20 (quotation and citations omitted) (emphasis in original); see generally
21 Halperin v. C.I.A., 629 F.2d 144, 149 (D.C. Cir. 1980) (stating the
22 "court must take into account . . . that any affidavit or other agency
23 statement of [interference] will always be speculative to some extent,
24 in the sense that it describes a potential future harm rather than an
25 actual past harm").

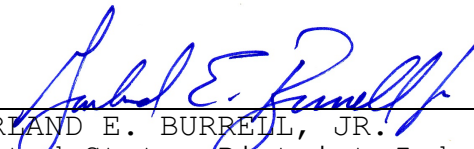
26 Mr. Hardy's declaration contains a "general showing" that
27 disclosure of the fingerprints could interfere with local law
28 enforcement agencies' ongoing investigations of the Zodiac case.
Further, even though Mr. Grimm disagrees with Mr. Hardy's ultimate
opinion that release of the fingerprints could result in a suspect being
notified, Mr. Grimm's averments do not controvert the facts, which
underlie Mr. Hardy's opinion. For example, Mr. Grimm avers that

1 releasing the prints would "exponentially increase" the possibility that
2 a suspect be identified. (Pl.'s Ex. 4, 3.) Similarly, Mr. Grimm declares
3 that any individual qualified to make a latent print identification
4 "would be inclined to notify the proper authorities[,]" but this
5 averment does not controvert Mr. Hardy's position that release of the
6 fingerprints could result in possible notification of the suspect.
7 Therefore, Defendant has shown the absence of a genuine issue of
8 material fact that release of the fingerprints could reasonably be
9 expected to interfere with the ongoing enforcement proceedings. See
10 Alyeska Pipeline Service Company v. U.S. E.P.A., 856 F.2d 309 (D.C. Cir.
11 1988) (finding summary judgment appropriate where federal agency
12 submitted affidavit discharging its burden of showing the absence of a
13 genuine issue of material fact).

14 **IV. CONCLUSION**

15 For the stated reasons, Defendant's motion for summary
16 judgment on Exemption 7(A) is GRANTED, and Plaintiff's cross-motion for
17 summary judgment motion on this issue is DENIED. Judgment shall be
18 entered in favor of Defendant.

19 Dated: October 20, 2010

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21 
22 _____
GARLAND E. BURRELL, JR.
United States District Judge