UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DENNIS JOSEPH RAIMONDO, ET AL.,

Plaintiffs,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No.13-cv-02295-JSC

ORDER RE: PLAINTIFFS' MOTION FOR RECONSIDERATION

Re: Dkt. No. 102

Plaintiffs Dennis Raimondo and Eric Garris bring claims under the Freedom of Information Act and the Privacy Act against Defendant the Federal Bureau of Investigation ("FBI"). Plaintiffs seek records regarding a 2004 threat assessment the FBI conducted of a website, Antiwar.com, with which the Plaintiffs are affiliated, and related investigations that the FBI conducted of Plaintiffs. Plaintiffs also seek expungement of certain records related to the exercise of their First Amendment rights. The parties filed cross-motions for summary judgment which the Court granted in part and denied in part. (Dkt. No. 90.) Plaintiffs' motion for reconsideration, in part, of that Order is now pending before the Court. (Dkt. No. 102.) After carefully considering the arguments and briefing submitted, the Court concludes that oral argument is unnecessary, see Civ. L.R. 7-1(b), and GRANTS IN PART and DENIES IN PART Plaintiffs' motion for reconsideration.

BACKGROUND

In August of 2011, Raimondo and Garris discovered that they and the website, Antiwar.com, had been subject to FBI surveillance. (Dkt. No. 28-1 ¶ 15.) In particular, Plaintiffs discovered a

heavily redacted FBI memorandum from April 30, 2004 ("April 30 Memo") which suggested that the FBI had conducted a threat assessment of Antiwar.com "an anti-interventionist website that publishes news and opinion articles regarding U.S. foreign and military policy." (Id. ¶ 2.) Garris is the founder, managing editor, and webmaster of Antiwar.com, and Raimondo is the editorial director. (Id. ¶¶ 8-9.) Plaintiffs contend that the FBI initiated investigations into each of them based on First Amendment protected speech activity which was memorialized in the April 30 Memo. (Id. ¶ 3.)

Two months later, Plaintiffs separately filed Freedom of Information Act ("FOIA") and Privacy Act requests (collectively known as "FOIPA requests") seeking disclosure of records maintained by the FBI regarding themselves. Plaintiffs exhausted their administrative remedies and then filed this action in May 2013. Five months after the lawsuit was filed, the FBI made its first interim release of records, which has been supplemented several times during the pendency of this action. At the time the parties' summary judgment motions were filed, the FBI had identified 290 responsive pages of records: of these, 26 pages had been released in full, 104 pages were released in part, 117 pages were withheld in full, and 43 pages were withheld in full as duplicates. (Dkt. No. 71 ¶ 4.)

The Court denied the parties' cross-motions for summary judgment on Plaintiff's FOIA and Privacy Act disclosure claims without prejudice and granted the government's motion for summary judgment on Plaintiffs' (e)(7) and (d)(2) Privacy Act claims. (Dkt. No. 90.) The parties then settled the FOIA claims, but not the Privacy Act claims because Plaintiffs believe that documents the government recently produced give rise to new issues with respect to Plaintiffs' Privacy Act claims. (Dkt. No. 101.) Plaintiffs thereafter filed a request for leave to file a motion for reconsideration regarding these new issues, which the Court granted. (Dkt. No. 105.) The motion is now fully briefed. (Dkt. Nos. 102, 108, 109.)

DISCUSSION

A party seeking leave to file a motion for reconsideration must show either: (1) "at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court"; (2) "[t]he emergence of new material facts or a change of law occurring after the time of such order;" or (3) a "manifest failure by the Court to consider material facts or dispositive

legal arguments" previously presented to the court. N.D. Cal. Civ. L. R. 7-9(b), "No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party...seeks to have reconsidered." N.D. Cal. Civ. L.R. 7-9(c). "A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999).

Plaintiffs contend that reconsideration is warranted based on newly discovered evidence. In particular, Plaintiffs point to four documents which they contend: (1) undermine the government's proffered explanation for the threat assessment memorialized in the April 30 memo, and (2) reflect two additional recordings of Plaintiffs' First Amendment activities which give rise to new Privacy Act claims. The government counters that Plaintiffs' arguments are nothing more than an attempt to rehash the Court's prior ruling with respect to the April 30 Memo, and that to the extent that Plaintiffs seek to identify new Privacy Act violations in the new documents, they are not part of this action.

A. The April 30 Memo

Section 552a(e)(7) of the Privacy Act provides that a federal agency may not "maintain [any] record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). "The purpose of the section (e)(7) First Amendment protection is to prevent collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." MacPherson v. I.R.S., 803 F.2d 479, 483 (9th Cir. 1986) (quoting S. Rep. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6971). In granting summary judgment in the government's favor on this claim, the Court concluded that although the April 30 Memo undisputedly describes Plaintiffs' exercise of their First Amendment rights, the government was nonetheless entitled to maintain the document pursuant to the authorized law enforcement

activity exception.

In support of its motion for summary judgment, the government submitted the Declaration of Andrew Campi, the Assistant Special Agent in Charge of the FBI's Newark Field Office. (Dkt. No. 70.) According to the Campi Declaration, in March of 2004, while conducting research on the internet, an agent with the Newark FBI office discovered a possible copy of the FBI's post-9/11 watch list on the website Antiwar.com. (Dkt. No. 70 at ¶ 9; Dkt. No. 70-1 at 3.[1]) This prompted further review of the website and led to discovery of a second 22-page spreadsheet dated May 22, 2002 with "FBI SUSPECT LIST" noted in the header and "Law Enforcement Sensitive" noted in the footer of each page. (Id.) Both spreadsheets contained personally identifiable information of the individuals listed. (Dkt. No. 70 at ¶ 9.) The Newark Office thus conducted a threat assessment of Plaintiffs and Antiwar.com to determine whether they posed a threat to national security. The threat assessment included a review of publicly available articles authored by or referencing Plaintiffs and Antiwar.com.11 (Id. at ¶ 10.) This threat assessment is memorialized in the April 30 Memo.

In opposing summary judgment, Plaintiffs argued that while the FBI was entitled to conduct an investigation, they were not entitled to document Plaintiffs' exercise of their First Amendment rights. The Court disagreed concluding that Plaintiffs' argument would place the FBI in an untenable position—agents could investigate national security concerns, but they could not document their investigation if doing so would in any way describe exercise of an individual's First Amendment rights. (Dkt. No. 90 at 22.) The Court held that there was no genuine dispute that the threat assessment was pertinent to authorized law enforcement activity; namely, whether publication of the watch list on Antiwar.com posed a national security threat. Ultimately, the Court concluded that "[i]f the investigation itself is pertinent to an authorized law enforcement activity, the Privacy Act does not regulate what can be done in the course of that investigation or how that authorized investigation may be documented." (Id. at 23:16-19.)

Plaintiffs contend that documents produced after the Court's summary judgment order

[1] Record citations are to material in the Electronic Case File ("ECF"); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

show that the government in fact discovered the publicly posted watch list several months prior to conducting the threat assessment, which Plaintiffs contend undermines the government's claim that the threat assessment was based on discovery of the watch list on Antiwar.com. Plaintiffs base their argument on an FBI memorandum dated April 22, 2008 ("April 2008 Memo") which states that "[t]he FBI has been aware of this FBI Suspect List being posted on the internet since at least November of 2003." (Dkt. No. 102-1 at 27.) However, there is nothing in the April 2008 Memo to suggest that the FBI discovered the watch list posted on Antiwar.com in November 2003—as opposed to elsewhere on the internet. As such, the April 2008 Memo does not contradict the statements in the Campi Declaration or in the April 30 Memo itself that an FBI agent from the Newark office discovered the watch list on Antiwar.com in March of 2004. (Dkt. No. 70 at ¶ 9 ("[f]ollowing release of the March 24, 2004 EC, while conducting research on the internet, a member of the Newark office discovered a possible "watch list," an untitled 22-page spreadsheet, dated October 3, 2001, on the website www.antiwar.com.") Indeed, the April 30 Memo itself states that a March 24, 2004, electronic communication "advised that the post-9/11 "watch list," "Project Lookout," was posted on the Internet" and that "[d]ifferent versions of these lists may be on the Internet." (Dkt. No. 102-1 at 16.) There is thus nothing in April 2008 Memo to suggest that the FBI knew the watch list was on Antiwar.com in November 2003 and nonetheless waited until April 2004 to conduct the at-issue threat assessment.

Nor is the Court persuaded by Plaintiffs' reliance on a subsequently discovered August 2004 Memo, which Plaintiffs contend provides an example of a narrowly tailored investigatory memorandum. Once the government has established that documents which it has maintained were "pertinent to and within the scope of an authorized law enforcement activity"—which it has—Section (e)(7) does not authorize the Court to substitute its judgment for that of the FBI regarding the manner or scope of the investigation.

Accordingly, Plaintiffs' motion for reconsideration of the Court's Order regarding Plaintiffs' 552a(e)(7) claim based on the April 30 Memo is DENIED.

B. Newly Discovered Documents

Plaintiffs also contend that two recently produced or produced in less redacted form

documents also give rise to claims under (e)(7) because "Plaintiffs cannot discern any apparent basis for the law enforcement exception to apply to these memoranda." (Dkt. No. 102-1 at 8:14-15.) These documents are (1) a November 28, 2006 FBI memorandum ("November 2006 Memo") which includes an excerpt from an article published on Antiwar.com discussing the decrease in enlisted military officers; and (2) an April 5, 2006 FBI memorandum ("April 2006 Memo") which lists Antiwar.com as a website that publicly posted details regarding an upcoming Halliburton shareholder meeting. (Dkt. No. 102-1 at 52-57.) The government does not address Plaintiffs' argument that these documents give rise to new Privacy Act claims, and instead insists that the documents fail to shed any light on the April 30 Memo and do not provide a basis for reconsidering the Court's prior summary judgment ruling.

The Court agrees that these two new documents fail to provide a basis for reconsidering the Court's prior Order with respect to Plaintiffs' (e)(7) Privacy Act claim. Because these documents were not before the Court—or the parties for that matter—at the time of the summary judgment briefing, they were not encompassed by the Court's summary judgment order. However, as Plaintiffs correctly note, their Privacy Act claim is broadly pled alleging that "Defendant FBI collected and maintained records describing how Plaintiffs exercise their rights guaranteed by the First Amendment in violation of 5 U.S.C. § 522a(e)(7)" and does not specifically allege which documents are at issue in the claim. (Dkt. No. 28-1 at ¶¶ 87-89; Dkt. No. 28-1 at pp. 35, 39 (administrative claim similarly broadly worded requesting expungement of all records not just the April 30 Memo).)

Given that the government did not produce the documents until August 2016 and has not raised an objection to the timeliness of Plaintiffs' claims regarding these documents, the Court concludes that Plaintiffs may separately raise (e)(7) Privacy Act claims with respect to the November 2006 Memo and the April 2006 Memo. The record currently before the Court, however, is not adequate for the Court to consider such a claim now. The memos themselves are heavily redacted, the Court has only Plaintiffs' characterization of the purpose of the memos and no statement from the government regarding the nature of the memos or the law enforcement investigation memorialized in the memos. Accordingly, the parties are ordered to meet and confer

to discuss a briefing schedule to bring Plaintiffs' claims regarding these two documents to the Court for resolution.

CONCLUSION

For the reasons stated above, Plaintiffs' motion for reconsideration is GRANTED IN PART and DENIED IN PART. The parties shall meet and confer to discuss a briefing schedule for resolution of Plaintiffs' Privacy Act claims with respect to the November 2006 Memo and the April 2006 Memo. The parties shall file a stipulated briefing schedule, or separate proposals for the same if they are unable to agree, by August 14, 2017. The parties shall also address whether they would like a referral to a magistrate judge for a settlement conference.

This Order disposes of Docket No. 102.

IT IS SO ORDERED.

Dated: July 18, 2017

JACQUELINE SCOTT CORLEY
United States Magistrate Judge

United States District Court
Northern District of California