UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Jonathan Corbett, Plaintiff v. Transportation Security Administration, United States of America, Alejandro Chamizo, Broward County, Broward Sheriff's Office Defendants	**12-CV-20863 (Lenard/O'Sullivan)** **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT BROWARD COUNTY'S SECOND MOTION TO DISMISS**

I. SUMMARY

On March 2nd, 2012, Plaintiff Jonathan Corbett ("CORBETT") filed the original complaint in this action alleging, among other claims not relevant to this motion, violation of the Florida Public Records Act and civil conspiracy to commit the same (D.E. #1). An amended complaint was filed on May 8th, 2012 (D.E. #20). The basis for the alleged violation and related conspiracy is that Defendant Broward County ("BROWARD") lied about the existence of an airport security checkpoint video in response to a public records request made by CORBETT. On March 21st, 2012, BROWARD filed a motion to dismiss alleging improper service, improper party, and failure to state a claim upon which relief can be granted (D.E. #9). This motion was denied by this Court as moot based on Plaintiff's filing of an amended complaint (D.E. #19). BROWARD now re-alleges failure to state a claim in its second motion to dismiss (D.E. #30), which this memorandum opposes.

It its motion, BROWARD admits that it lied in response to CORBETT's public records request, but alleges that: 1) the TSA directed it to lie about the existence of the checkpoint video,

and 2) BROWARD's lawful reliance on that direction required it to falsely respond to CORBETT's Public Records Act request.

The bold assertion that the existence of public records can be falsely denied in a response to a public records request is entirely unfounded and flatly a misstatement of law, and BROWARD's assertion that the TSA directed it to lie is a question of fact not stipulated to by the Plaintiff. For these reasons, both of BROWARD's arguments fail.

II. STANDARD OF REVIEW

In a motion to dismiss under Rule 12(b)(6), it is well-settled that a court must "accept[] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff[.]" *Reese v. Ellis et. al.*, 10-14366, May 1st, 2012 (11th Cir.), *quoting Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009). This standard is unchanged by *Twombly* and *Iqbal* in regards to factual allegations. "When there are well-pleaded factual allegations, a court should assume their veracity." *Iqbal v. Ashcroft*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009).

Defendant is correct that the binding precedent set in *Iqbal* requires that this court to evaluate any inferences or conclusions by a "plausibility" standard. . *See* BROWARD's Motion to Dismiss II, pp. 3, 4. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 1949.

Defendant is also correct that *pro se* pleadings must be afforded greater leniency than those submitted by an attorney. *Id*. *See* BROWARD's Motion to Dismiss II, p. 4.

III. ARGUMENT

A. QUESTIONS OF FACT EXIST REGARDING THE DISCUSSIONS BETWEEN BROWARD AND THE TSA

BROWARD's motion muddies two very separate issues: whether the TSA directed BROWARD that they could not disclose the content of the security checkpoint video, and whether the TSA directed BROWARD that they could not disclose the existence of the security checkpoint video. BROWARD's motion states that CORBETT's complaint alleges both of these events, and then admits the same. *See* BROWARD's Motion to Dismiss II, pp. 4 – 6.

However, CORBETT's complaint alleges neither of these two assertions. Instead, it is simply asserted that BROWARD and the TSA "conferred" with each other and the result of this conference was that BROWARD falsely responded to CORBETT's public records request. *See* First Amended Complaint, ¶¶ 5, 143, 144. Whether the TSA directed BROWARD to do something during that conference is, at present, unknown. At best, the complaint acknowledges that BROWARD *may* have relied on a TSA assertion of SSI. *Id.*, ¶ 142 (noting use of the phrase "*Any* reliance" to indicate that CORBETT has no proof of reliance), but at no point has CORBETT in any way alleged that BROWARD's false denial of the existence of the video was made solely at the TSA's insistence.

Indeed, the contents of the discussions between BROWARD and the TSA have not yet been disclosed to CORBETT; instead, CORBETT has only seen the effects of that discussion, to wit: that his public records request was responded to falsely. *Id.*, ¶ 78.

BROWARD correctly notes that a complaint must allege facts that plausibly state a claim. *See* BROWARD's Motion to Dismiss II, p. 3, quoting *Sinaltrainal*. BROWARD has

admitted to having discussions with the TSA regarding CORBETT's public records request. *Id.*, p. 6 ("Based on that required interaction [with the TSA], County was able to determine…"). BROWARD has also admitted that after those discussions, they falsely responded to CORBETT in their response to him ("the County was required by the TSA to withhold that information…"), although they maintain that such lies were their legal obligation. They also maintain that this legal obligation means that their false response does not count as a "lie", which belies Merriam-Webster's primary definition of the word ("an assertion of something known or believed by the speaker to be untrue with intent to deceive"). *Id.*

Under these circumstances, a reasonable person could infer many plausible scenarios in which BROWARD would be liable for the charges levied against it. For example, one scenario is that the TSA and BROWARD had a discussion where the TSA directed that the content of the videos were SSI, but BROWARD decided on its own that it should also falsely deny their existence. It is also plausible that the TSA and BROWARD decided together that the release of the checkpoint videos would be embarrassing[1] or would be evidence of civil liability, and therefore decided to pretend that they were SSI. It is also plausible that the TSA told BROWARD to release the videos to CORBETT, but BROWARD decided completely on its own to withhold them and lie about their existence for similar reasons as in the preceding scenario.

Discovery will help shed light on exactly which party foolishly decided that the existence of SSI can, and should, be falsely denied. Until then, the fact that CORBETT was not privy to the exact discussions between BROWARD and the TSA does not preclude either of the claims

[1] CORBETT regularly embarrasses the TSA in the media. For example, in March 2012 he published a video demonstrating that the TSA's costly nude body scanners were easily defeated. This video was viewed by millions across the globe and reported by Drudge Report, Fox News, The Economist, The Guardian, Daily Mail, NPR, BBC, Wired Magazine, *etc*.

against BROWARD. The allegation that two parties mutually discussed a course of action (an allegation admitted by BROWARD), followed by the undertaking of that course of action (also admitted by BROWARD), tied with unlawful harm to the Plaintiff (as discussed in the following sections), is a set of facts that would lead a reasonable person to conclude that it is plausible that BROWARD committed the counts charged. Keeping in mind the requirement that this Court must construe the circumstances in the light most favorable to the plaintiff, this is sufficient to survive a Rule 12(b)(6) motion.

B. A PUBLIC RECORDS REQUEST MAY NOT FALSELY DENY THE EXISTENCE OF A RECORD SIMPLY BECAUSE IT IS CONSIDERED SSI

CORBETT does not dispute that BROWARD cannot release a record that is lawfully and accurately designated as SSI. However, there is no statutory authority that allows BROWARD to falsely deny the existence of a record. BROWARD's motion is conspicuously devoid of both specific statutory references and case law supporting its assertion that it may lie in a public records response, as it must be, because such law does not exist. *See* Deft.'s Motion to Dismiss II, p. 6 ("under TSA mandates, the CFR, and the Florida Public Records Act, the subject CCTV recordings, including the existence of those recordings, were simply not disclosable"). If BROWARD wants to claim that its conduct is defensible in light of mandates, regulations, or law, it must cite those authorities with specificity.

However, just because BROWARD omits specific legal citations from its memorandum does not mean that we cannot begin such a review at this time. An analysis of BROWARD's

position must start with a plain reading of the law. Luckily, the Florida Public Records Law could not be more clear:

> (d) A person who has custody of a public record who asserts that an exemption applies to a part of such record **shall redact** that portion of the record to which an exemption has been asserted and validly applies, and such person **shall produce the remainder** of such record for inspection and copying.
>
> (e) If the person who has custody of a public record contends that all or part of the record is exempt from inspection and copying, **he or she shall state the basis of the exemption** that he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute.
>
> (f) If requested by the person seeking to inspect or copy the record, the custodian of public records **shall state in writing and with particularity the reasons** for the conclusion that the record is exempt or confidential.

Fla. Stat. §§ 119.07(d), (e), (f) *(emphasis added)*. The requirements in the state of Florida are black and white: a record either must be disclosed, or it must be redacted or withheld along with a statement as to the basis for the decision. Nowhere else in Fla. Stat § 119 *et. seq*., nor anywhere else in the Florida Statutes or Constitution, ever contemplates falsely denying the existence of a record and deceiving the general public.

BROWARD also argues that in addition to state law requirements, federal law would also require them to deny the existence of this record. However, federal law actually *does* enumerate situations in which the existence of a public record may be falsely denied (unlike Florida law, which never allows for the same), and none of those enumerated situations apply here. 5 USC § 552(c) allows an agency to deny the existence of a record if it would interfere with certain ongoing criminal investigations, requests a search on the name of a confidential informant, or

requests a record relating to the FBI's foreign counterintelligence efforts. SSI, on the other hand must be admitted to and identified, even if it must not be released.

It should be further noted that FOIA "exemptions are to be interpreted narrowly," that there is "strong presumption in favor of disclosure," and that "an agency that invokes one of the statutory exemptions to justify the withholding of any requested documents or portions of documents bears the burden of demonstrating that the exemption properly applies to the documents." *Lahr v. National Transportation Safety Board*, 569 F.3d 964 (2009), *partially citing U.S. Dep't of State v. Ray*, 502 U.S. 164, 173, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991).

Finally, if BROWARD had genuine concern that disclosing the existence of a document may qualify as releasing SSI, it could have responded with a so-called "Glomar denial," which essentially is a note that the agency can neither confirm nor deny the existence of records. That is, they could have responded something to the effect of, "The existence of checkpoint video is SSI, and therefore we cannot disclose whether or not records responsive to your request exist." BROWARD *did not* do this; they responded flatly that the records did not exist. A Glomar denial allows for due process via judicial review, whereas a flat-out lie prevents judicial review because the requestor has no way of knowing that a document may have been withheld.

C. THE NOTION THAT NOT ONLY THE CONTENT OF THE VIDEOS, BUT ALSO THE <u>EXISTENCE</u> OF VIDEOS, CAN BE CONSIDERED SSI IS PATENTLY ABSURD

This brief will not address whether the videos themselves may constitute SSI, as it is unnecessary to reach those arguments in order to dispose of BROWARD's motion[2]. Instead, let us consider the preposterous proposition that "the existence of security cameras at TSA checkpoints is a secret."

First, a review of federal statutes and regulations is of no avail to BROWARD. In fact, to the contrary, the most natural reading of the law precludes such a position. 49 CFR § 15.5, which identifies what can be considered SSI, starts with the following statement:

> "SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which the Secretary of DOT has determined would..."

Even if, *arguendo*, the content of the checkpoint videos met the requirements that follow the ellipses in the above quotation, their existence is not "information obtained or developed in the conduct of security activities."

Next, CORBETT attaches Exhibit A, signage posted by the TSA commonly found at airport checkpoints across the nation, reading, "This checkpoint is under video surveillance." CORBETT attaches Exhibit B, a photograph of the TSA security checkpoint where the controversy in this case arose, taken from the public (unsecured) area of the airport. No less than four "camera domes" are visible in this photograph. CORBETT attaches Exhibit C, a photograph of the same checkpoint taken from the secure area. No less than nine camera domes are visible in this photograph.

[2] If the Court would prefer a briefing on this issue before ruling on this motion, Plaintiff would be happy to provide a supplemental brief.

CORBETT would also like to direct this Court's attention to the fact that in the recent past, BROWARD has released not only the existence of checkpoint video, but the videos themselves. See, for example, http://www.youtube.com/watch?v=-Jzyp-1fhzE – a YouTube video uploaded by the TSA itself after another controversial encounter with a passenger. This video was taken at the same airport – Fort Lauderdale-Hollywood International Airport – as the one in which the incident that gave rise to this complaint occurred.

The assertion that the existence of checkpoint videos is somehow secret, sensitive, or otherwise not public knowledge is so far beyond the realm of reality that it should bring pause to the Court to consider whether BROWARD's motion was submitted in good faith. The TSA not only admits but attempts to inform all travelers about the video recording via its signage, and then broadcasts the location of the cameras by using highly visible camera domes. BROWARD has released checkpoint videos in the past. It is extraordinarily unlikely that BROWARD's in-house defense counsel, an employee of the Broward County Aviation Department, was unaware of any of the above at the time of writing his motion.

D. BROWARD'S ALLEGED RELIANCE ON TSA'S CLAIM THAT CHECKPOINT VIDEOS ARE SSI DOES NOT ABSOLVE BROWARD OF LIABILITY AT THIS STAGE

BROWARD's motion argues that it had relied on the TSA's assertion that both the content and the existence of the videos are SSI. As discussed above in section III(A), this is not a matter of stipulated fact and therefore cannot be a basis for granting a Rule 12(b)(6) motion. But, if it *were* stipulated fact, *arguendo*, BROWARD would have to demonstrate that their reliance on TSA assertions absolved them of liability even if those assertions turned out to be

untrue. In a 12(b)(6) motion, BROWARD would have to demonstrate that using only the information within the four corners of CORBETT's complaint.

BROWARD's motion fails to demonstrate this in any way, or to suggest any test this Court should apply to determine whether there was lawful reliance. As such, there is nothing for CORBETT to respond to in this memorandum. However, CORBETT can point out that any reliance on a TSA assertion would, at the least, need to be a reasonable, good-faith reliance, and in light of the above – especially section III(A)'s discussion of how questions of fact exist regarding the discussions between BROWARD and TSA – BROWARD cannot even come close to meeting those conditions.

E. THE PUBLIC INTEREST WOULD NOT BE SERVED BY ALLOWING AGENCIES TO FALSELY DENY THE EXISTENCE OF PUBLIC RECORDS

The foundation of all public records laws is that the public has a compelling interest in government transparency, an interest which must be respected with exceptions only in extraordinary circumstances. "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." Fla. Stat. § 119.01(1).

Exemptions to the presumption of public disclosure for narrow classes of information are necessary to protect public privacy, law enforcement investigations, trade secrets of private companies who provide services to public entities, national security, and others.

A core tenant of most public records laws is that an agency claiming an exemption has the burden of proving that an exemption exists. *Lahr*. Such a claim is challengeable by the

requesting party in the courts, which is consistent with our constitutional system of checks and balances.

However, if an agency is allowed to lie in response to public records requests, the possibility for judicial review has been eroded because the requesting party is duped into thinking that there is nothing to challenge since they are informed that "no records exist." Indeed, relevant to this action, CORBETT initially accepted BROWARD's initial assertion that it had no camera footage. It was only until many months later when the TSA also denied having video footage that CORBETT realized he had been lied to and was able to challenge BROWARD's action in this Court. *See* First Amended Complaint, ¶¶ 77 – 79. The damage done by BROWARD's lies may indeed be permanent: it remains to see if the records sought by CORBETT still exist, or have been destroyed since his request was denied.

Were this Court to grant BROWARD's motion, it would be sanctioning dishonesty between the government and the public in a way that disregards both the letter and the intent of both federal and state law. The people of this nation cannot meaningfully be heard in a democratic fashion if the actions of the government are hidden from them; such a prospect indeed would interfere with the constitutional right to vote, petition one's government for redress, and due process.

It would also nearly completely insulate all records kept by the TSA from public records requests, as the TSA could now simply label any document as SSI and then pretend that it doesn't exist, thereby eliminating the opportunity to challenge that SSI designation. With the TSA's history of abuse of the SSI designation[3], general policy of hiding of embarrassing

[3] For example, the TSA labeled a flyer announcing the retirement of a secretary and the availability of "coffee and Krispy Kreme doughnuts" at her farewell gathering as SSI. See

documents[4], and even threatening media agencies covering stories that would give the TSA negative publicity[5] (all issues with which this Court will become intimately familiar at later points in this litigation), this effect must not be understated.

F. PLAINTIFF HAS PLAUSIBLY DEMONSTRATED THE EXISTENCE OF A CIVIL CONSPIRACY

BROWARD alleges that CORBETT's complaint is "vague and conclusory" as to its claims of civil conspiracy, and recites the four elements required: 1) an agreement between two or more parties, 2) to do an unlawful act or to do a lawful act by unlawful means, 3) the doing of some overt act in pursuance of the conspiracy, and 4) damage to the plaintiff as a result of the conspiracy. *See* BROWARD's Motion to Dismiss II, pp. 6, 7.

BROWARD has admitted to the first and third elements. *See* BROWARD's Motion to Dismiss II, p. 6 (Element 1: "Based on that required interaction [with the TSA], County was able to determine…") (Element 3: "the County was required by the TSA to withhold that information…").

Element four is obvious enough not to warrant serious discussion: if CORBETT's public records request was falsely denied, his rights under the Florida Public Records law were clearly

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Secrecy -- For TSA, Just Another Tool of the Trade. The Huffington Post. http://www.huffingtonpost.com/fred-gevalt/secrecy----for-tsa-just-a_b_570393.html.

[4] *TSA Misusing SSI to Avoid Embarrassment, Liability, Former FAA Special Agent Charges*, http://www.infowars.com/articles/ps/tsa_misusing_ssi_avoid_embarrassment.htm

[5] *TSA "Strongly Cautions" Against Writing About Security Loophole*. Consumerist. http://consumerist.com/2012/03/reporters-tsa-strongly-cautions-against-writing-about-security-loophole.html

violated. False denial is so frowned upon by the State of Florida that it is actually a criminal offense, in addition to a civil one. See Fla. Stat. § 119.10(2).

The only element of which there is genuine debate is element two: whether the act that resulted from the conspiracy was unlawful. For the reasons discussed in the preceding sections, a response to a public records request may not affirmatively mislead the public simply because, *arguendo*, the record constitutes SSI.

III. CONCLUSION

Based on the foregoing, BROWARD's Motion to Dismiss should be **denied**, and BROWARD should be ordered to immediately file an answer to the complaint.

Dated: Miami, Florida

June 6th, 2012

Respectfully submitted,

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Exhibit A

Exhibit A – "This checkpoint is under video surveillance"

Exhibit B

Exhibit B – Four Camera Domes Visible from Public Area

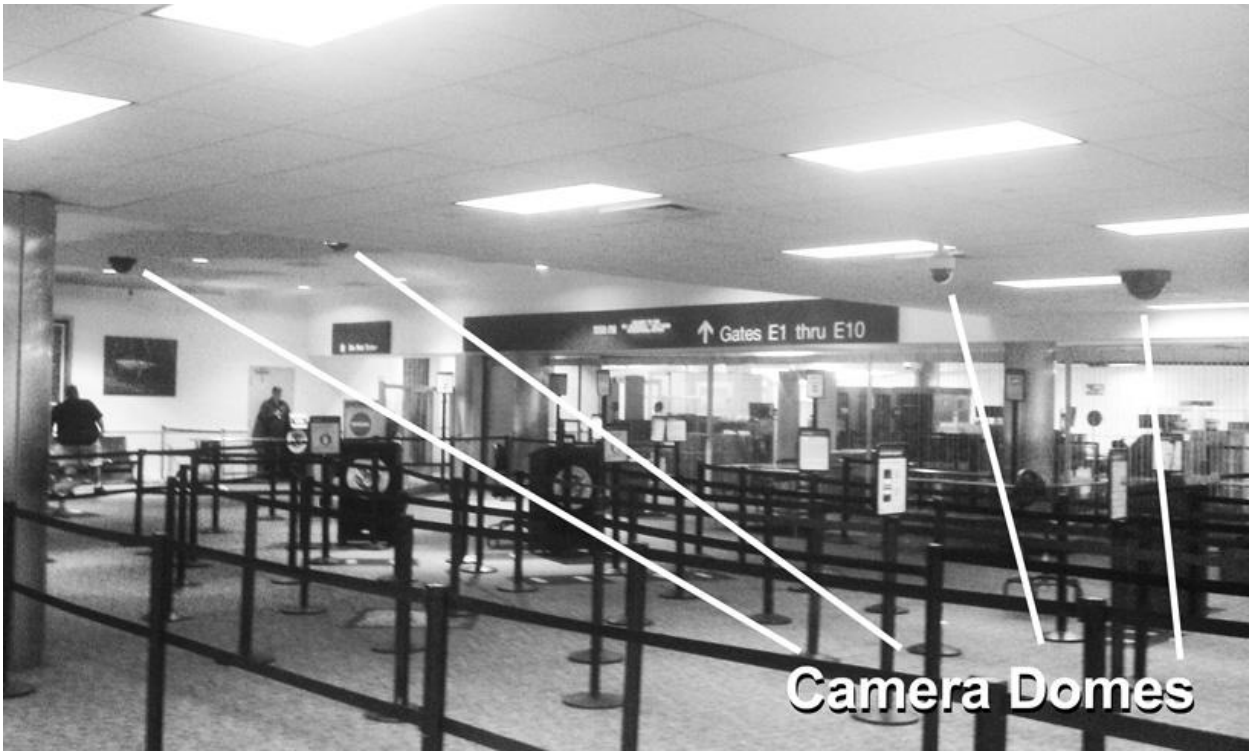

Exhibit C

Exhibit C – Nine Camera Domes Visible from Secure Area