

EXHIBIT C

to the

PUBLISHER DEFENDANTS' MOTION FOR CONTINUANCE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GAWKER MEDIA, LLC et al,)
)
Plaintiff,)
)
v.)
)
THE FEDERAL BUREAU OF)
INVESTIGATION and THE EXECUTIVE)
OFFICE OF UNITED STATES)
ATTORNEYS,)
)
Defendant.)
)
)

Case No. 8:15-CV-01202-SCB-EAJ

DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Federal Bureau of Investigation (“FBI”) Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 21, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the state of Texas since 1980.

(2) In my official capacity as Section Chief of RIDs, I supervise approximately 224 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA, amended by the OPEN Government Act of 2007 and the Open FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI’s handling of Plaintiff’s FOIA requests seeking records pertaining to an investigation concerning recording(s) of Terry Bollea aka “Hulk Hogan” engaged in sexual relations with Heather Clem.

(4) This declaration is submitted in support of the FBI’s response in opposition to plaintiffs’ motion for summary judgment. It will provide a brief administrative history of Plaintiff’s FOIA requests, a general description of the FBI’s recordkeeping system, and an overview of our search efforts.

**ADMINISTRATIVE HISTORY OF PLAINTIFF’S
FOIA REQUEST**

(5) By letter dated November 8, 2013, Plaintiff, through its attorney Gregg D. Thomas, submitted a FOIA request to FBIHQ requesting “[a]ll documents relating to an

investigation, or a request for investigation, in October 2012 regarding allegations of illegal recording(s) of Terry Bollea a/k/a Hulk Hogan engaged in sexual relations.” (**See Exhibit A.**)

(6) By letter dated November 19, 2013, the FBI acknowledged receipt of plaintiff’s FOIA request and assigned it FOIPA Request Number 1238212-000. The FBI advised plaintiff that it could not release records concerning a third party, absent express authorization and consent of the third party, proof that the subject of his request is deceased, or a clear demonstration that the public interest in disclosure outweighs the personal privacy interest and that significant public benefit would result from the disclosure of the requested records.¹ The FBI enclosed a Certification of Identity form (form DOJ-361), to be completed by the subject of the request before it would conduct a search for records on a third party. The FBI stated if no response was received from plaintiff within 30 days from the date of the letter, plaintiff’s request would be closed. Lastly, the FBI advised plaintiff of his right to appeal the FBI’s determination by filing an administrative appeal with the Department of Justice (“DOJ”), Office of Information Policy (“OIP”) within sixty (60) days from the date of its letter. (**See Exhibit B.**)

(7) By email dated November 7, 2014, almost a year later since its initial request, Gawker Media, via its attorney Gregg D. Thomas, hereinafter referred to as plaintiff, submitted another FOIA request for records seeking “disclosure of any, and all records in the possession, custody, or control of the United States Department of Justice, including without limitation the agencies described below, relating to an investigation , and complaints or requests for investigation, concerning recording(s) of Terry Gene Bollea a/k/a “Hulk Hogan” engaged in sexual relations with Heather Clem.” Specifically, plaintiff sought:

- records reflecting any communication with Mr. Bollea and his counsel;

¹ Without the noted information, the requested records are exempt from disclosure pursuant to the FOIA, Title 5 U.S.C. § 552, Exemptions 6 and 7(C).

- any statement made by Mr. Bollea or his counsel;
- any records relating to video recording(s) of Mr. Bollea engaged in sexual relations with Heather Clem;
- any records concerning such video recording(s), including the recording(s) themselves;
- any records relating to the source and distribution of such video recording(s); and
- records relating to any attempt to disseminate such video recording(s), including any attempt to sell such video recording(s) to Mr. Bollea or his counsel.

Plaintiff provided a list of keywords they considered would reasonably assist the FBI in the search for responsive records and indicated the request included, but was not limited to, records from FBI HQ and Tampa Field office (“TPFO”). Plaintiff also included Certification of Identity Forms executed by Ms. Heather Dawn Cole, formerly Heather Clem, Mr. Bollea, three of his lawyers, namely David Houston, Charles Harder, and Kenneth Turkel. Furthermore, plaintiff agreed to pay up to \$ 500.00 in search and duplication fees. Finally, plaintiff provided specific instruction for the handling of any DVDs or other video footage provided in response to this request. **(See Exhibit C.)**²

(8) By letter dated November 17, 2014, the FBI acknowledged receipt of plaintiff’s request and assigned it FOIPA Request Number 1238212-001. The FBI advised plaintiff it was searching the indices to the Central Records System for information responsive to the request.

(See Exhibit D.)

² By letter dated November 10, 2014 sent via facsimile and mail, the law office of Harder Miller & Abrams informed the FBI they were representing Terry Bollea in a civil lawsuit against Gawker Media LLC, et al, and that in that case, the court determined that the materials within the possession of the FBI were potentially relevant to certain issues and ordered Mr. Bollea and his attorneys to sign FOIA waivers on that basis. Mr. Bollea’s attorneys provided information pertaining to the civil action and raised concerns about the privacy of other third party individuals whose privacy rights may be implicated in the records responsive to Gawker Media’s FOIA request.

(9) By letter dated January 29, 2015, the FBI informed plaintiff it located approximately 1168 pages of records potentially responsive to its FOIA request (FOIPA Request Number 1238212-001) and two compact discs; and pursuant to Department of Justice (“DOJ”) regulations, is required to notify requesters when anticipated fees exceed \$25.00. Plaintiff was advised that releases are made via CD unless otherwise requested; each CD contains up to approximately 500 reviewed pages; the first 100 pages or the cost equivalent (\$10.00) is free of charge; and if all potentially responsive pages were processed for release, plaintiff would owe \$50.00 in duplication fees (4CDs at \$15.00 less \$10.00), or \$136.80 if the plaintiff requested the release in paper. The FBI reminded plaintiff that the anticipated fees associated with its request were only an estimate, as some information may be withheld in full pursuant to FOIA exemptions, or may be non-responsive to the FOIA request. Thus, the actual charges could be less than the estimate provided. Plaintiff was instructed to notify RIDS in writing within thirty (30) days from the date of its letter of the desired release format (CD or paper) and the commitment to pay the estimated fees. RIDS noted that if plaintiff’s written format decision and commitment to pay fees was not received within thirty (30) days from the date of its letter, the request would be closed. Lastly, plaintiff was advised that if it wished to reduce the scope of the FOIA request, costs associated with the request would be less and receipt of the requested information would be timelier. (**See Exhibit E.**)

(10) By letter dated February 3, 2015, plaintiff advised the FBI it agreed to pay the estimated duplication fees. (**See Exhibit F.**)

(11) By letter dated February 4, 2015, the FBI advised plaintiff that the material requested was located in an investigative file which was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(A) because there was a pending or prospective law enforcement proceeding

relevant to these records and release of the information could reasonably be expected to interfere with the enforcement proceedings. The FBI advised plaintiff that it could appeal the FBI's determination by filing an administrative appeal with the Department of Justice ("DOJ"), Office of Information Policy ("OIP") within sixty (60) days from the date of its letter. **(See Exhibit G.)**

(12) By letter dated March 4, 2015, plaintiff submitted an appeal to OIP contesting the FBI's determination as described in its February 4, 2015 response letter. Plaintiff sent the same letter twice to OIP via facsimile and mail. **(See Exhibit H.)**

(13) By letter dated March 18, 2015, OIP acknowledged receipt of plaintiff's appeal and assigned it appeal number AP-2015-02411. OIP sent another letter dated March 20, 2015 acknowledging plaintiff's duplicate appeal and assigning appeal number AP-2015-02440. **(See Exhibit I.)**

(14) By letter dated May 6, 2015, OIP affirmed the FBI's determination. OIP advised plaintiff that it was denying its request that OIP itemize and justify each item of the information withheld, since it was not entitled to it at the administrative stage. Additionally, OIP advised plaintiff it was closing Appeal No. AP-2015-02440 administratively because it was a duplicate of Appeal No. AP-2015-02411. Finally, OIP advised plaintiff of its right to file a lawsuit in the federal district court if it was dissatisfied with its action on the appeal. **(See Exhibit J.)**

(15) On May 19, 2015, plaintiff filed his complaint in the instant action. **(See Docket Number 1.)**

EXPLANATION OF THE CENTRAL RECORDS SYSTEM

(16) The Central Records System ("CRS") is an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling its integrated missions and functions as a law

enforcement, counterterrorism, and intelligence agency to include performance of administrative and personnel functions. The CRS spans the entire FBI organization and encompasses the records of FBIHQ, FBI Field Offices, and FBI Legal Attaché Offices (“Legats”) worldwide.

(17) The CRS consists of a numerical sequence of files, called FBI “classifications,” which are organized according to designated subject categories. The broad array of CRS file classification categories include types of criminal conduct and investigations conducted by the FBI, as well as categorical subjects pertaining to counterterrorism, intelligence, counterintelligence, personnel, and administrative matters. For identification and retrieval purposes across the FBI, when a case file is opened, it is assigned a Universal Case File Number (“UCFN”) consisting of three sequential components: (a) the CRS file classification number, (b) the abbreviation of the FBI Office of Origin (“OO”) initiating the file, and (c) the assigned individual case file number for that particular subject matter.³ Within each case file, pertinent documents of interest are “serialized,” or assigned a document number in the order which the document is added to the file, typically in chronological order.

THE CRS GENERAL INDICES AND INDEXING

(18) The general indices to the CRS are the index or “key” to locating records within the enormous amount of information contained in the CRS. The CRS is indexed in a manner which meets the FBI’s investigative needs and priorities, and allows FBI personnel to reasonably and adequately locate pertinent files in the performance of their law enforcement duties. The general indices are arranged in alphabetical order and comprise an index on a variety of subject matters to include individuals, organizations, events, or other subjects of investigative interest

³ For example, in a fictitious file number of “11Z-HQ-56789,” the “11Z” component indicates the file classification, “HQ” indicates that FBI Headquarters is the FBI OO of the file, and “56789” is the assigned case specific file number.

that are indexed for future retrieval. The entries in the general indices fall into two category types:

- a. Main entry. This entry pertains to records indexed to the main subject(s) of a file, known as “main file” records. The “main” entry carries the name of an individual, organization, or other subject matter that is the designated subject of the file.
- b. Reference entry. This entry, or a “cross-reference,” pertains to records that merely mention or reference an individual, organization, or other subject matter that is contained in a “main” file record about a different subject matter.

(19) FBI Special Agents (“SA”) and/or designated support personnel may index information in the CRS by individual (persons), by organization (organizational entities, places, and things), and by event (*e.g.*, a terrorist attack or bank robbery). Indexing information in the CRS is based on operational necessity, and the FBI only indexes that information considered relevant and necessary for future retrieval. Accordingly, the FBI does not index every individual name or other subject matter in the general indices.

AUTOMATED CASE SUPPORT

(20) Automated Case Support (“ACS”) is an electronic, integrated case management system that became effective for FBIHQ and all FBI Field Offices and Legats on October 1, 1995. As part of the ACS implementation process, over 105 million CRS records were converted from automated systems previously utilized by the FBI into a single, consolidated case management system accessible by all FBI offices. ACS has an operational purpose and design to enable the FBI to locate, retrieve, and maintain information in its files in the performance of its myriad missions and functions.⁴

⁴ ACS and the next generation Sentinel system are relied upon by the FBI daily to fulfill essential functions such as conducting criminal, counterterrorism, and national security investigations; background investigations; citizenship and employment queries, and security screening, to include Presidential protection.

(21) The Universal Index (“UNI”) is the automated index of the CRS and provides all offices of the FBI a centralized, electronic means of indexing pertinent investigative information to FBI files for future retrieval via index searching. Individual names may be recorded with applicable identifying information such as date of birth, race, sex, locality, Social Security Number, address, and/or date of an event. Moreover, ACS implementation built upon and incorporated prior automated FBI indices; therefore, a search employing the UNI application of ACS encompasses data that was already indexed into the prior automated systems superseded by ACS. As such, a UNI index search in ACS is capable of locating FBI records created before its 1995 FBI-wide implementation to the present day in both paper and electronic format.⁵ Currently, UNI consists of approximately 111 million searchable records and is updated daily with newly indexed material.

ACS and SENTINEL

(22) Sentinel is the FBI’s next generation case management system that became effective FBI-wide on July 1, 2012. Sentinel provides a web-based interface to FBI users, and it includes the same automated applications that are utilized in ACS. After July 1, 2012, all FBI generated records are created electronically in case files via Sentinel; however, Sentinel did not replace ACS and its relevance as an important FBI search mechanism. Just as pertinent information was indexed into UNI for records generated in ACS before July 1, 2012, when a record is generated in Sentinel, information is indexed for future retrieval. Moreover, there is an index data sharing nexus between the Sentinel and ACS systems whereby components of

⁵ Older CRS records that were not indexed into UNI as a result of the 1995 ACS consolidation remain searchable by manual review of index cards, known as the “manual indices.” A search of the manual indices is triggered for requests on individuals if the person was born on or before January 1, 1958; and for requests seeking information about organizations or events on or before January 1, 1973. Records created after these dates would be captured through a UNI search.

information indexed into Sentinel are also replicated or “backfilled” into ACS. In sum, the Sentinel case management system builds on ACS and shares its operational purpose; Sentinel provides another portal to locate information within the vast CRS for FBI records generated on or after July 1, 2012.

ADEQUACY OF SEARCH

(23) Index Searching. To locate CRS information, RIDS employs an index search methodology. Index searches of the CRS are reasonably expected to locate responsive material within the vast CRS since the FBI indexes pertinent information into the CRS to facilitate retrieval based on operational necessity. Given the broad range of indexed material in terms of both time frame and subject matter that it can locate in FBI files, the automated UNI application of ACS is the mechanism RIDS employs to conduct CRS index searches. If a request seeks records that may have been generated on or after July 1, 2012, an overlapping search of ACS via the UNI application and a Sentinel index search are performed at the litigation stage to ensure adequacy of the CRS index search.

(24) CRS Search. In response to Plaintiff’s request, RIDS conducted a CRS index search on November 14, 2014, for responsive records employing the UNI application of ACS and a Sentinel index search by utilizing the following terms: “Bollea, Terry Gene,” “Boella, Terry,” “Bolea, Terry,” “Hulk Hogan,” “Hogan Hulk,” “Houston, David,” “dhouston@houstonlaw.com,” “Harder, Charles, J,” “Harder, Charles,” “charder@hmfirma.com,” “charder@wrslawyers.com,” “Turtle, Kenneth,” “Turtle, Ken,” “kturtle@bajocuva.com,” “Gawker,” “sex tape,” “Clem, Todd, Alan,” “Clem, Bubba,” “Bubba The Love Sponge Clem,” “Bubba The Love Sponge,” “Clem, Heather,” “Cole, Heather, Dawn,” “Cole, Heather,” “Davidson, Keith,” “Duarte, Vilma,” “Lloyd, Matt,” and “Loyd, Matt.” The

FBI used information provided in the various waivers submitted by plaintiff, such as dates of birth and Social Security numbers, to facilitate the identification of potentially responsive records.

(25) Search Results. As a result of these search efforts, the FBI located a main file originated in the Tampa Field Office responsive to Plaintiff's request. It consisted of a pending main investigation file; 9B-TP-2534791.

(26) Main and Cross-Reference Files. RIDS policy is to search for and identify only "main" files responsive to most FOIPA requests at the administrative stage; therefore, RIDS conducted an additional search of the CRS and Sentinel to locate any "cross reference" material responsive to plaintiff's request. This search confirmed the results of the original search. The FBI did not locate any additional records responsive to plaintiff's specific request.

(27) On May 27, 2015, EOUSA made a referral of records to the FBI. EOUSA referred one page and two CDs for disclosure determination by the FBI and requested that the FBI correspond with plaintiff directly as of the result of this consultation.

PENDING INVESTIGATION

(28) Upon receipt of plaintiff's lawsuit, the FBI contacted the Tampa Field Office ("TPFO") to request information pertaining to the current status of the investigation referenced in the records responsive to plaintiff's request. The TPFO advised RIDS that another law enforcement agency has an on-going investigation. Furthermore, TPFO indicated that release of any information from this file will interfere with that pending investigation; therefore, the information is exempt from disclosure pursuant to FOIA exemption (b)(7)(A), 5 U.S.C. § 552(b)(7)(A).

PROPOSED PROCESSING SCHEDULE

(29) Under 5 U.S.C. § 552(b)(7)(A), an agency may categorically deny access to records if the records were compiled for law enforcement purposes and the production of such records could reasonably be expected to interfere with law enforcement proceedings. In this case, the responsive records the FBI located are indexed in a pending main file. As a result, the FBI is categorically denying access to these records pursuant to FOIA exemption (b)(7)(A), because the production of these records could interfere with the pending investigation(s).⁶

(30) When asserting FOIA Exemption 7(A) at the litigation stage, an agency is required to search for, locate, and conduct a review of all responsive documents. During this categorical review of documents, other than documents that can be segregated for release because they trigger no 7(A) harm, each document is reviewed and assigned a functional category whereby release of the document will trigger one or more harms to an ongoing investigation or pending prosecution. The process of reviewing the Exemption 7(A) material for additional underlying exemptions transforms the review process from a categorical document-by-document review, to a much lengthier page-by-page review to identify additional, underlying exemptions for assertion despite the blanket coverage of Exemption 7(A).

(31) At this time, the FBI requests an order permitting it to move for summary judgment based on the applicability of Exemption 7(A) to certain records covered by that exemption without waiving any allegation that those records are exempt from release for other reasons. If the Court grants the FBI's motion for this order, Exemption 7(A) would be litigated given its categorical applicability, and in the event that Exemption 7(A) would expire during the pendency of this FOIA litigation – or if the Court rejects the FBI's withholdings under Exemption 7A – the underlying exemptions would be preserved. If the FBI's motion is granted,

⁶ The pending investigation(s) at issue here are expected to continue for an undetermined amount of time.

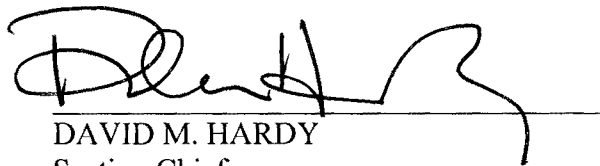
the FBI proposes a time period of thirty (30) days, namely until July 8, 2015, in which to process and release to Plaintiff all non-exempt material, identify documents for withholding under functional Exemption 7(A) categories, and propose a time period of fifteen (15) additional days, namely, until July 23, 2015, to prepare and file the *Vaughn* declaration fully explaining its assertion of Exemption 7(A).⁷

(32) If the FBI's motion is denied, then an additional three (3) months, namely, until September 8, 2015, will be needed to complete review and processing of the responsive records, assert all applicable underlying exemptions, and propose a time period of thirty (30) additional days, namely, until October 8, 2015, to prepare and file the *Vaughn* declaration. Based on our experience in Exemption 7(A) cases of this nature, the additional time required to complete a page-by-page review for underlying exemptions doubles the amount of time that is required to complete a categorical document review under 7(A). While performing the page-by-page review, the FBI will issue to Plaintiff interim responses/status reports every thirty (30) days beginning on July 8, 2015. Lastly, the FBI will prepare and file a *Vaughn* declaration on October 8, 2015 that not only details the FBI's FOIA Exemption 7(A) assertion, but also explains and justifies our assertion of each underlying FOIA Exemption.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A through G attached hereto are true and correct copies.

Executed this 8⁺₊-day of June, 2015.

⁷ For FY 2015, from October 2014 to June 1, 2015, there are a total of 5,114 pending requests, consisting of 5.35 million pages of information, currently assigned to the five FOIPA Disclosure Units for review.

A handwritten signature in black ink, appearing to read "D Hardy", is written over a horizontal line.

DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia