UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PHILIP EIL,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-cv-99-M-LDA
	)	
U.S. DRUG ENFORCEMENT ADMINISTRATION	)	
	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

It is an unfortunate fact that the vast majority of the evidence presented in the 2011 trial, U.S.A. vs. Paul Volkman, involved sensitive medical information. In order to prove that Dr. Volkman was dealing drugs under the guise of practicing medicine, the government needed to illustrate to jurors the methods of operation of the pain clinics where he worked. And central to this task was discussing the fatal effects of the illegal activity that took place in those clinics. There was no dispute during the trial that a number of Dr. Volkman's patients had died; the defense and prosecution disagreed, rather, on *why* these patients had died. In a sense, the crime scenes in this case were human bodies. In order to establish whether Dr. Volkman had illegally caused his patients' deaths, in addition to witness testimony, the government offered hundreds of exhibits – tangible, primary-source documentation of Dr. Volkman's actions and their effects. The central question at the heart of the trial – "Was Dr. Volkman a doctor of a drug dealer?" – could not be answered without examining sensitive documents that, outside of a courtroom, would be private information.

Plaintiff acknowledges the delicate balance at play here: the documents at issue were exhibits at a public trial, but these records also contain information that is normally private. But the Freedom of Information Act request at the basis of this litigation is not a frivolous request for information "about private citizens that happens to be in the warehouse of the Government[.]" See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989). Rather, the requested documents are an integral part of a years-long, taxpayer-funded investigation and prosecution by the U.S. Drug Enforcement Administration ("Defendant" or "DEA"). Each of these requested exhibits was carefully and consciously selected from voluminous discovery material before the government presented the documents at trial. Each of these exhibits led, in part, to Dr. Volkman's ultimate conviction and sentence to four consecutive life terms in prison – one of the longest sentences for a doctor in U.S. history.

It is for this reason – to shed light on how the government investigated and prosecuted Dr. Volkman, a prolific prescription drug dealer in an era and region of rampant overdose and abuse – that the Court should order the DEA to disclose the information that Plaintiff, Philip Eil ("Eil" or "Plaintiff"), seeks. Plaintiff does not seek these trial exhibits *because* they contain medical information. Rather, Plaintiff – who is an award-winning journalist – seeks these public documents because they were an integral part of investigating and prosecuting a significant trial. The trial transcript, alone, is not a complete record of this trial. (If witness testimony, alone, had been sufficient to convict Dr. Volkman, the government would not have presented any exhibits.) The exhibits Plaintiff seeks ultimately demonstrate how and why Dr. Volkman was convicted – and therefore how the DEA carried out its statutory obligations as a government agency with respect to Dr. Volkman.

Plaintiff has identified a significant public interest in the trial evidence in question and this significant interest clearly outweighs the relevant privacy interests. For the reasons set forth in Plaintiff's Memorandum of Support of His Motion for Summary Judgment, and for the reasons set forth herein, Plaintiff respectfully requests that this Court grant its Motion for Summary Judgment and deny Defendant's Motion for Summary Judgment.

II. LEGAL ARGUMENT

A. PLAINTIFF CONCEDES A PRIVACY INTEREST IN CERTAIN RECORDS BUT DENIES THE POSSIBILITY OF HARASSMENT[1]

Plaintiff does not dispute that individuals have privacy rights with respect to their medical records. However, Defendant is wrong that the release of these personal records, in this case, would subject the individuals in question to harassment. As an initial matter, names are readily available by reviewing (1) the indictment (which lists deceased former patients of Dr. Volkman), (2) trial exhibits already made public via PACER in the United States Court of Appeals, Sixth Circuit (identifying deceased former patients) and (3) the Exhibit List (see Defendant's Memorandum, p. 13, acknowledging that the trial Exhibit List identifies patients by name). Therefore, the release of the requested documents would no more expose these individuals to harassment than information that is already publicly available.

Furthermore, Defendant has grossly mischaracterized Plaintiff's communications as harassment. Plaintiff is an experienced journalist, who reached out to individuals to comment on a news story – a story about a high-profile federal trial. See Supplemental Affidavit of Philip

[1] Plaintiff does not suggest that the government waived third-party's privacy rights. Rather, Plaintiff noted that the government had on in one instance – in response to his FOIA request – redacted or withheld certain information, yet on the other hand, released that same information in unredacted form on PACER. Plaintiff simply wants to ensure that he has in his possession any documents which contain the same information which the government has already released into the permanent public sphere.

Eil.[2] There is nothing unlawful or harassing about this. The government tries to paint basic journalistic procedure as dangerous, malevolent behavior.[3]

Further, when trials take place – especially a high-profile one such as this – victims' names, appearances, and/or other identifying and potentially private information are often broadcast in the press. There is always some risk of harassment; however, in most cases, and in our society, we have accepted this possibility as one of the costs of the greater, Constitutional good of courtroom transparency.

B. PLAINTIFF HAS ESTABLISHED THAT THE SIGNIFICANT PUBLIC INTEREST IN KNOWING HOW THE GOVERNMENT INVESTIGATED AND PROSECUTED DR. VOLKMAN OUTWEIGHS THE PRIVACY INTERESTS

Defendant asserts that Plaintiff has failed to articulate a public interest that outweighs the privacy rights at issue. Plaintiff respectfully disagrees. Defendant repeatedly states that the only relevant public interest in the FOIA balancing analysis is the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to. See Bibles v. Oregon Natural Desert Ass'n, 519 U.S. 355, 355-56 (1997) (per curiam). This is precisely what Plaintiff has established. The information contained in these exhibits falls squarely within the boundaries of "shed[ding] light on an agency's performance of its statutory duties or otherwise let citizens 'know what their government is up to.' " Id.

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[2] Plaintiff notes that Defendant commented that the exhibits attached to Plaintiff's initial affidavit were out of order. While the exhibits are in the correct order, because they were inadvertently filed without "flat tabs" at the beginning of each exhibit, Plaintiff acknowledges that it was likely difficult for Defendant to follow along. Plaintiff resubmits his original affidavit with the exhibits, along with appropriate flat tabs.

[3] Describing Plaintiff's actions as "harassment" also ignores the possibility that these individuals would welcome speaking to a journalist about Dr. Volkman and/or his trial.

Specifically, according to the DEA's website, "[t]he mission of the Drug Enforcement Administration (DEA) is to enforce the controlled substances laws and regulations of the United States and bring to the criminal and civil justice system... those organizations and principal members of organizations, involved in the growing, manufacture, or distribution of controlled substances appearing in or destined for illicit traffic in the United States[.]" https://www.dea.gov/about/mission.shtml. Further, its website goes on to explain that in carrying out its mission "as the agency responsible for enforcing the controlled substances laws and regulations of the United States," its primary responsibilities include "[i]nvestigation and preparation for the prosecution of major violators of controlled substance laws operating at interstate and international levels" and "[e]nforcement of the provisions of the Controlled Substances Act as they pertain to the manufacture, distribution, and dispensing of legally produced controlled substances." Id. (emphasis added.) See also Exec. Order No. 11,727, 38 Fed. Reg. 18,357 (July 10, 1973) (incorporating Reorganization Plan No. 2 of 1973 which set forth these major responsibilities).

Dr. Volkman's case centered around whether he had lawfully dispensed controlled substances as a physician or whether he had crossed over into criminal activity. In other words, under the relevant statute, were the purposes for which he prescribed controlled substances legitimate or illegitimate? See 21 U.S.C. §841. Because the term "legitimate" is not defined in the statute, the general public must look to the DEA's criminal prosecutions in order to understand where the agency draws the line between being a doctor and a drug dealer.

The exhibits presented to the jury were centrally important to the prosecution's aim to convince the jury that Dr. Volkman was prescribing controlled substances for illegitimate purposes. They are documents that, individually and cumulatively, reflect a concerted

government strategy to draw a bright red line about the boundaries of legitimate chronic-pain management. Because that boundary is not clear from the statute (which, again, hinges on the interpretation of "legitimacy"), we, as a public, can only know how the DEA carries out its statutory functions based on how the statue is interpreted and applied in a real-life case, in a real-life courtroom, with a real-life doctor, and real-life patients and victims. To withhold the requested exhibits, en masse, as the government has so far done, is to hide that bright line from the public. The very information that one would need to fully understand the prosecution and conviction of Dr. Volkman – and the potential prosecution of other physicians – is locked away in these documents.

Further, the DEA, is in a very real sense, creating policy – the boundary between "legitimate" and "illegitimate" medicine – when it prosecutes cases such as Dr. Volkman's. Many constituencies have an interest in seeing details of this policy, including doctors who prescribe opiates for pain, who need to understand, and have a right to understand, where the DEA is drawing this line of "legitimacy." So too should patients – and the public – understand this distinction, given the dual epidemics of chronic pain and prescription-drug overdose afflicting the United States.

By way of example, the following requested records go to this significant public interest:[4]

- Exhibit 17b from the trial is described as PACK – VIDEO (DVD).[5] This video quite literally shows what the government was up to as it shows a patient working in concert with the government, to surveil Dr. Volkman, by bringing a hidden camera into his office and recording her office visit. The video likely also demonstrates conduct the DEA views as crossing the legitimate/illegitimate boundary.

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[4] Plaintiff reiterates that he is working from the exhibit list and letters provided by the Department of Justice; however, Plaintiff cannot articulate how every single document demonstrates the DEA's activity because he does not have a Vaughn index.

[5] Plaintiff was in the courtroom when this video was shown and knows it to be hidden-camera footage taken by one of Dr. Volkman's patients. See Supplemental Affidavit of Eil, ¶12.

- Various medical records[6] shed light on whether patients died as a result of Dr. Volkman's alleged unlawful prescribing. This question was at the very heart of the trial (expert witnesses disagreed strongly about the implications of these medical records) and in their selection and presentation, the records demonstrate both what the government was up to and of the DEA carrying out its statutory duties. The importance of the information contained in these records is further highlighted by the fact that the jury did not convict Dr. Volkman on Count IV of the Indictment (causing the death of Aaron Gillespie by unlawfully dispensing Oxycodone not for a legitimate purpose), but did convict him on causing the deaths of other patients. See Supplemental Affidavit of Eil, ¶11. That the jury was able to determine that in one instance Dr. Volkman's had not caused the death of his patient, but did in other instances, is a decision tied to their medical records. Clearly, the government could not prove illegal activity had occurred– and the jury could not convict Dr. Volkman for that activity – without a close review of these records. The minute details of the government's strategy of proving Dr. Volkman's illegitimacy are also significant, given the controversy within the field of pain management about the proper prescribing of opiates.

These records are easily distinguishable from those that Defendant references in its papers. For example, Defendant cites to Nat'l Sec. News Serv. v. U.S. Dep't of the Navy, 584 F.Supp.2d 94, 97 (D.D.C. 2008) for the position that medical records do not show what the government was up to. In that case, the Court held that the plaintiff had failed to articulate a cognizable public interest that outweighed the privacy rights at issue and held that "[n]o public interest is served by 'disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.' " Id. (quoting Reporter's Comm. for Freedom of the Press, 489 U.S. at 773). The records at issue in this case are not simply records "accumulated in various governmental files," but were the very records that the government relied upon to prosecute Dr. Volkman and they contain the very information needed to understand whether his practices were unlawful or not.[7] Further, the

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[6] A review of the exhibit list shows that medical records are contained in trial exhibits 27, 28a-b, 29a-e, 30a, 31, 32d, 33a-b, 34d, 35e, 37a-d, 38a-c, 40d, 41c, 42b, 43c, 44d-f,57a, 58a-c, 59a-c, 60a-b, 61a-d, 62a-c, 63b, 64a-d, 65a-d, 66, 66f, 67d, 68d, 69a, 69d, 84a-c, 85, 86a-d, 87a-c, 88a-c and 92-a-b.

[7] Defendant at one point refers to documents that are "actually public" as compared to the requested records. Exhibits of a trial are too "actually public" and Defendant's attempt to paint them as private documents is

information about private citizens contained in these records is not in the government's control as a "compilation." See Reporters Comm. for Freedom of the Press, 489 U.S. at 780. Nor do these records simply "happen[] to be in the warehouse of the Government[.]" Id. at 774. The records are documents the government purposefully gathered and culled through in order to carry out its statutory obligations and demonstrate to the jury how Dr. Volkman had violated the law. All of the requested documents have been previously shown in open court.

The records at issue in the case are also distinguishable from those in Moffat v. U.S. Dept' of Justice, 716 F.3d 244 (1st Cir. 2013), another case upon which Defendant relies. In that case, the requestor sought an FBI report which contained redacted interview notes which he believed would help exonerate him from his recent murder conviction. The Court held that his assertion that the document would reveal a method of law enforcement was "nothing more than speculation." Id. at 252. Again, the records Plaintiff seeks contained the actual evidence used to convict Dr. Volkman. It is not mere speculation, but fact, that there is information contained in these documents that reveals how the DEA views the line between legitimate and illegitimate prescribing of controlled substances – and, indeed, convinced a jury of the location of this legitimate/illegitimate line, and ensured a conviction which led to a life sentence in prison – and therefore what the government is up to.

Lastly, while Plaintiff has previously underscored other aspects of the significance of Dr. Volkman's trial, one key part of that significance is that the trial establishes how the DEA carries out its statutory functions during a time when the nation is facing a prescription-drug abuse crisis. The word "legitimate" is subjective, and the medical specialty of chronic pain management – which Dr. Volkman claimed to be practicing when he was investigated – is

misleading. Had the documents not been shown at trial, then there is no dispute that medical records would not otherwise be public. But the government chose to make them public by using them to help convict Dr. Volkman.

complex and controversial. The task of proving that he was, in fact, a drug dealer was not straightforward or simple. The investigation of Dr. Volkman lasted years. Pre-trial preparations lasted additional years. Testimony in the case, from 70 government-called witnesses, lasted weeks. The prosecution's closing argument lasted for over an hour.

What constitutes unlawful behavior is not obvious under the relevant statute, and it is for this reason that every detail of how the government investigated and prosecuted Dr. Volkman is significant. Plaintiff's position does not automatically lead to the conclusion that medical records would always be appropriately released when there is substantial public interest in an individual's death. Defendant's reliance on Marzen v. Dep't of Health and Human Servs., 825 F.2d 1148 (7th Cir. 1987) is misplaced. In that case, the requestor sought investigation records, which included medical records, of the Office for Civil Rights ("OCR") of the Department of Health and Human Services' ("HHS") investigation into possible discrimination against a child born with Down syndrome who died a week after birth. The Court held that the requestor had failed to establish a nexus between the release of the medical records and the public debate regarding future policy. The Court held that disclosure of the records "would almost certainly cause Infant Doe's parents more anguish" and would not appreciably serve the ethical debate since "most of the factual material concerning the details of the case... are already in the public domain." Id. at 1154. That is not the case here. The details of Dr. Volkman's victims are not widely known and the details of each of their deaths, and how he treated his patients, is important to understanding the line between lawful and unlawful drug prescriptions. Further, Defendant's statement that Plaintiff's theory would make any medical record of a victim of an "important crime" releasable through FOIA is also false. Again, Plaintiff seeks the medical records of the individuals whom a drug dealer interacted with under the guise of legitimate pain-

management medicine. This was not an ordinary drug dealer, however; he holds an M.D./Ph.D. from the University of Chicago, and, to this day, maintains his innocence. The key to his former patients' deaths – and his unlawful conduct – is locked in these documents.

III. CONCLUSION

Defendant contends that it has already provided records which demonstrate what the government was up to. However, it does not get to pick and choose, and decide that because Plaintiff may have some information about what the government is up to, that he is not entitled to the remaining information which similarly reveals what the DEA was up to and how it carried out its statutory duties. Plaintiff respectfully requests that this Court grant it summary judgment, deny Defendant's motion for summary judgment and order that Defendant produce the wrongfully withheld documents and any other relief this Court deems appropriate.

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June 20, 2016

CERTIFICATION

I hereby certify that on the 20th day of June, 2016, I filed and served this document electronically through the Court's CM/ECF system to:

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