NO. 16-2359

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PHILIP EIL
Plaintiff/Appellee,

v.

U.S. DRUG ENFORCEMENT ADMINISTRATION
Defendant/Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND

HON. JOHN J. MCCONNELL, JR.

BRIEF FILED BY PLAINTIFF / APPELLEE

/s/ Neal J. McNamara
Neal J. McNamara (#13163)
Jessica S. Jewell (#1177282)
NIXON PEABODY LLP
One Citizens Plaza, Ste 500
Providence, RI 02903
(401) 454-1000
(401) 454-1030 (fax)
nmcnamara@nixonpeabody.com
jsjewell@nixonpeabody.com
Cooperating Attorneys,

American Civil Liberties
Union Foundation of Rhode Island

Attorneys for Plaintiff/Appellee
Philip Eil

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I. REASONS WHY ORAL ARGUMENT SHOULD BE PERMITTED

Philip Eil ("Mr. Eil") submits that the Court should hear oral argument in this case, an appeal by the U.S. Drug Enforcement Administration ("DEA"). Mr. Eil contends that the case presents legal issues of sufficient substance to merit oral argument in accordance with Fed. R. App. P. 34(a)(2).

II. JURISDICTIONAL STATEMENT

The United States District Court for the District of Rhode Island ("District Court") had federal question jurisdiction, provided by 28 U.S.C. § 1331, over Mr. Eil's claims arising under the Freedom of Information Act ("FOIA"), specifically 5 U.S.C. §552(a)(4)(B). While the case was before the District Court, Mr. Eil and the DEA each filed Motions for Summary Judgment. In its Memorandum and Order ("Decision"), the District Court granted Mr. Eil's Motion for Summary Judgment and denied the DEA's Motion for Summary Judgment. The Court entered Judgment for Mr. Eil on September 16, 2016. This Court therefore has jurisdiction in accordance with 28 U.S.C. § 1291. The DEA filed its appeal on November 9, 2016.

III. INTRODUCTION

The 2011 criminal trial, *U.S.A. v. Paul Volkman*, resulted in one of the longest sentences for prescription drug-dealing in U.S. history: four consecutive

life sentences. For nearly 5 ½ years Mr. Eil, a journalist, has been attempting, via FOIA, to obtain the exhibits that the DEA put into evidence during that trial.

It is an unfortunate fact that a significant portion of the evidence presented by the DEA involved sensitive medical information. But, in order to carry out its statutory function and prove that Paul Volkman ("Dr. Volkman") was dealing drugs under the guise of practicing medicine, the DEA needed to (and chose to) present the requested records to the jury. The DEA carefully and consciously selected each of the requested exhibits from voluminous discovery material before the government presented the documents at trial.[1] In a sense, the crime scenes in this case were human bodies and the medical and death records were the evidence gathered from these crime scenes that the prosecution used to convict Dr. Volkman. Each of these exhibits led, in part, to Dr. Volkman's ultimate conviction and historic sentence.

As discussed in more detail below, 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 this Court should affirm the District Court's grant of Summary Judgment in Mr. Eil's favor.

[1] In fact, the trial evidence is just the tip of the iceberg of documents related to the DEA's investigation into Dr. Volkman – and the only documents that Mr. Eil has requested. No doubt, the government spent years investigating this case, collecting and sifting through information, before trying Dr. Volkman with the documents at issue in the instant case.

Mr. Eil has identified a significant public interest in the trial evidence in question and this significant interest clearly outweighs the relevant privacy interests. The District Court recognized these interests and struck an appropriate balance in its Decision by ordering that the DEA redact certain information before disclosing the documents to Mr. Eil. Mr. Eil requests that this Court affirm the Decision.

IV. STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether 5 U.S.C. §552(b)(6) or (b)(7)(C) exempts from public disclosure the withheld and/or redacted[2] criminal trial exhibits presented by the DEA and, specifically, whether the significant public interest in these records outweighs the relevant privacy concerns.

V. STATEMENT OF THE CASE

A. Procedural Background

Mr. Eil filed a complaint in District Court on March 18, 2015 alleging that the DEA had wrongfully withheld – through wholesale withholdings and also redactions – public information that the DEA should have produced in accordance with FOIA. Joint Appendix ("JA") 2, ECF No. 1.[3] After engaging in very limited

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[2] As discussed herein, Mr. Eil disputes the vast redactions the DEA has made with respect to the records. Mr. Eil does not take issue with the redactions ordered by the District Court, as discussed in more detail below.

[3] All references to "ECF No. __" are to the docket of the District Court proceedings.

discovery, Mr. Eil and the DEA agreed that the issue was ripe for summary judgment. On March 14, 2016, Mr. Eil filed a Motion for Summary Judgment (JA 3, ECF No. 15) and on May 4, 2016, the DEA filed a Cross-Motion for Summary Judgment (JA 3, ECF No. 16). Both parties filed additional memoranda on June 20, 2016 (JA 3, ECF No. 18) and July 20, 2016 (JA 4, ECF No. 19), respectively. The District Court held oral arguments on August 3, 2016.

On September 16, 2016, the District Court granted Mr. Eil's Motion for Summary Judgment and denied the DEA's Motion for Summary Judgment. Order on Motion for Summary Judgment (JA 4, ECF No. 22). In its Decision, the District Court ordered that the DEA produce all exhibits admitted into evidence at Dr. Volkman's trial, with personally identifying information redacted and with the trial exhibit numbers redacted, with a substituted alternative identifying character in each place where a trial exhibit number was located (to further protect the identities of the patients). The District Court entered Judgment in favor of Mr. Eil the same day. (JA 4, ECF No. 24). The DEA appealed on November 9, 2016.

B. Statement of Facts

i. *Underlying Criminal Trial: U.S.A.* v. Paul Volkman

In May 2007, a grand jury for the United States District Court for the Southern District of Ohio ("Trial Court") returned a 22-count indictment charging Dr. Volkman, a physician with an M.D./Ph.D. from the University of Chicago,

with conspiring to unlawfully distribute a controlled substance in violation of 21 U.S.C. §841(a), maintaining drug-involved premises in violation of 21 U.S.C. §856(a)(1), the unlawful distribution of a controlled substance leading to death in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and possession of a firearm in furtherance of a drug-trafficking crime in violation of 18 U.S.C. §§ 924(c)(1) and (2). JA 39, ¶¶3, 5. In fact, on May 23, 2007, the DEA announced the indictment, stating in a press release that Dr. Volkman and his co-defendants "handed out more than 1,500,000 pain pills between October 2001 and February 2006," made $3,087,500 from this scheme, allegedly caused "the deaths of at least 14 people," and that "[t]his indictment serves as a warning to all medical professionals that if you illegally prescribe medication for personal gain you will be prosecuted to the fullest extent of the law." JA 39, ¶4.

The 2011 trial against Dr. Volkman lasted eight weeks, during which the government presented 70 witnesses and introduced more than 220 exhibits – including inspection reports, prescription slips, death certificates, autopsy reports, medical records, and photographs – into evidence. JA 40, ¶11, JA 20. It is noteworthy that neither the Exhibit List, nor the PACER docket, shows that any of the exhibits were ordered to be filed under seal.[4] JA 40, ¶12. In May 2011, the

[4] At oral argument before the District Court Judge McConnell questioned whether "the U.S. Attorney ma[d]e a mistake in not requesting that the personal medical records either be sealed or redacted[.]" District Court transcript of Aug. 3,

jury found Dr. Volkman guilty on all but two counts. JA 41, ¶20. The DEA quickly issued a press release, noting, in part, that "[Dr.] Volkman was one of the nation's largest physician dispensers of oxycodone in 2003 and 2005. Evidence presented during the trial showed that [Dr.] Volkman prescribed and dispensed millions of dosages of various drugs including diazepam, hydrocodone, oxycodone, alprazolam, and carisoprodol." JA 41, ¶21. Approximately nine months later, Dr. Volkman was sentenced and the DEA was again quick to tout the importance of this case and its focus on the diversion of controlled substances, stating in a press release:

> The lengthy investigation into Dr. Paul Volkman, coupled with a life sentence, exemplifies that not only is DEA determined to combat prescription drug abuse in this country, but that the judicial system recognizes the seriousness of the issue in today's society. Addressing the diversion of controlled pharmaceuticals is one of the top priorities of the Drug Enforcement Administration. The life sentence should serve as a warning to all medical professionals that if you prescribe medication for personal gain, with no consideration for the well-being of others, you will be investigated and prosecuted to the fullest extent of the law.[5] JA 41, ¶23.[6]

2016, hearing on Cross-Motions for Summary Judgment ("Transcript"), p. 33:7-10. United States Attorney Bethany Wong conceded that it would have made her "job easier in this case[.]"

[5] The DEA continued to highlight the significance of Dr. Volkman's case years after his conviction, presenting the case at conferences and featuring Dr. Volkman's sentencing as one of its "Top Stories" of 2012. JA 42, ¶¶24-27.

[6] The press release is referenced in Mr. Eil's Affidavit at paragraph 23 and Mr. Eil attached it to his Affidavit at Exhibit I before the District Court.

ii. Mr. Eil's Attempts to Obtain the DEA's Trial Exhibits

Since January 2012, Mr. Eil has been attempting to obtain the exhibits from Dr. Volkman's trial. JA 42, ¶28. Following the verdict, Mr. Eil first reached out to numerous people to request access to these exhibits: the clerk of the Trial Court, the clerk of the Sixth Circuit Court of Appeals, lead prosecutor and Assistant United States Attorney Timothy Oakley, and the trial judge, Judge Sandra Beckwith. All of these requests were denied, and both Attorney Oakley and Judge Beckwith instructed and/or assured Mr. Eil that FOIA was the proper avenue for accessing these materials.[7] JA 42, ¶¶28-34.

Following this advice, Mr. Eil filed a FOIA request on February 1, 2012 ("FOIA Request" or "Request"), with a complete list of the trial exhibits attached. The Request was initially received by the Executive Office of U.S. Attorneys ("EOUSA"), which held the Request for nine months before transferring it to the DEA in late 2012. From May 7, 2013 to March 12, 2015 (one year, ten months, and five days), the DEA made a total of ten partial releases of information, withholding a significant portion of the pages it reviewed. JA 43, ¶39.

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[7] The DEA takes issue with the District Court's remarks on the importance of public judicial records and, apparently ignoring Mr. Eil's various attempts to obtain the judicial records, gallingly states that if Mr. Eil truly seeks judicial records he is in the "wrong forum." Brief for Appellant, dated April 19, 2017 ("DEA Brief"), p. 18.

Furthermore, hundreds of the pages the DEA actually produced to Mr. Eil were largely redacted, making these documents effectively no more than blank pages. JA 43, ¶39. The combination of delays, withheld documents, and redactions prompted Mr. Eil to file his complaint in March of 2015, more than three years after his initial FOIA Request. After Mr. Eil filed his complaint, the DEA, through counsel, made additional productions of documents. JA 44, ¶45. And, as stated in the DEA's Brief, the DEA has made additional productions of documents since the District Court Decision. However, to date, Mr. Eil has still received only a portion of the evidence the DEA showed to the jury during Dr. Volkman's trial.

Specifically, to date, the DEA has withheld (by its own account): (1) medical records of approximately 27 former patients of Dr. Volkman's, (2) 22 exhibits containing death-related records or photographs; and (3) redactions of "a postmortem exam, toxicology report, and evidence collection record related to finding the dead body of the deceased in medical records of deceased patients that have been produced."[8] DEA Brief, p. 9. In other words, more than six years after the trial *U.S.A. v. Paul Volkman* ended, after Dr. Volkman has been sentenced to life in prison and his case has traveled to the United States Supreme Court, significant portions of the trial record remain inaccessible to the public.

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[8] Although the DEA states that it has disclosed over 19,500 pages of responsive records, many of these pages have been significantly redacted. See DEA Brief, p. 8.

iii. DEA's Reliance on FOIA Exemptions to Withhold and Redact Large Volumes of Trial Exhibits

Throughout its disclosures, the DEA primarily relied upon two exemptions to withhold and redact requested documents: (1) 5 U.S.C. §552(b)(7)(C) which exempts from disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" and (2) 5 U.S.C. §552(b)(6), which provides that "[m]aterials contained in sensitive records such as personnel or medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" are exempt from disclosure under FOIA.[9]

The DEA must now establish that these exemptions apply to the information withheld and redacted. For the reasons provided below, it cannot meet its burden. Mr. Eil respectfully requests that this Court affirm the Decision of the District Court awarding him Summary Judgment.

VI. SUMMARY OF ARGUMENT

Mr. Eil has alleged that the DEA wrongfully withheld and redacted public information – specifically the government's trial exhibits that the DEA chose not to redact or file under protective seal in a high-profile federal criminal prosecution of a physician. Mr. Eil argued before the District Court that the FOIA exemptions

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[9] Throughout its disclosures, the DEA relied on other FOIA exemptions as well; however, those are not at issue in this appeal.

upon which the DEA relied to withhold this information do not apply to the requested trial exhibits and, therefore, the requested documents should be produced in accordance with FOIA. This is because the significant public interest outweighs the privacy concerns in these requested trial exhibits. The same argument applies before this Court.

Additionally, although the standard of review for this matter is de novo, the DEA has argued before this Court that the District Court erred in its Decision by applying the incorrect standard (e.g., by applying the judicial records standard instead of the FOIA standard) and by failing to explicitly consider the privacy interests in death-related records at issue. Even if this Court determines that the District Court erred as the DEA contends, this Court should still affirm the ultimate Decision and affirm Summary Judgment in Mr. Eil's favor based on Mr. Eil's primary argument – that the significant public interest in these documents outweighs the privacy concerns at issue.

VII. ARGUMENT

A. Standard of Review

The standard of review of the District Court's determination is de novo. Union Leader Corp. v. U.S. Dep't of Homeland Sec., 749 F.3d 45, 49 (1st Cir. 2014) (citing Carpenter v. U.S. Dep't of Justice, 470 F.3d 434, 437 (1st Cir. 2006)

and Church of Scientology Int'l v. U.S. Dep't of Justice, 30 F.3d 224, 228 (1st Cir. 1994)).

B. The FOIA Framework

There is a presumption of disclosure under FOIA and it is the government's burden to show that a FOIA exemption applies to the requested information. FOIA is an important tool in holding the government accountable because it provides citizens a means to 'know what their government is up to.' " Stalcup v. CIA, 768 F.3d 65, 69 (1st Cir. 2014) (quoting Carpenter, 470 F.3d at 437). In fact, "FOIA was intended to expose the operations of federal agencies 'to the light of public scrutiny.' " Carpenter, 470 F.3d at 437 (citing Dep't of the Air Force v. Rose, 425 U.S. 352, 372, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976)). FOIA seeks to prevent "the development and application of a body of 'secret law.' " Providence Journal Co. v. U.S. Dep't of Army, 981 F.2d 552, 556 (1st Cir. 1992). Further, FOIA promotes an informed citizenry, which is "vital to the functioning of a democratic society." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 57 L. Ed. 2d 159 (1978).

Thus, FOIA "presumes public entitlement to agency information[.]" Providence Journal Co., 981 F.2d at 556. In response to a FOIA request, the governmental agency must promptly make available to any person those materials in the possession of the agency, unless the agency can establish that the materials

fall within one of nine exemptions. Carpenter, 470 F.3d at 438 (citing 5 U.S.C. § 552(a)(3)). The withholding agency, in this case, the DEA, has the burden to establish its right to an FOIA exemption. In order "[t]o fulfill the broad purposes of FOIA, [the courts] construe these exemptions narrowly." Stalcup, 768 F.3d at 69 (citing FBI v. Abramson, 456 U.S. 615, 630, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982)).[10]

C. The Public Interest of the Requested Information Outweighs Any Privacy Interests

i. The Applicable Balancing Test

FOIA "[e]xemption 7(C) permits the government to withhold information 'compiled for law enforcement purposes' when the release of that information 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.' " Moffat v. United States DOJ, 716 F.3d 244, 250-51 (1st Cir. 2013). Exemption 6 "protects from disclosure 'personnel and medical files and similar

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[10] Interestingly, the DEA cites to New England Apple Council v. Donovan, 725 F.2d 139, 142 (1st Cir. 1984), for the proposition that the FOIA "exemptions represent 'the congressional determination of the types of information that the Executive Branch must have the option to keep confidential.' " (Citations omitted.) Had the DEA wanted to keep the requested records confidential, it could have either *not* admitted records into evidence *or* it could have taken precautions to file the records under seal. And, contrary to the DEA's argument that the requested documents are simply records about "private citizens that happens to be in the warehouse of the Government[,]" (DEA Brief, p. 16), U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 774 (1989), these are records that the DEA deliberately made public, and that were instrumental in obtaining a criminal conviction and a life sentence for the defendant.

files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' " Union Leader Corp., 749 F.3d at 50 n. 4 (citing 5 USC §552(b)(6)). Exemption 6 is less protective of personal privacy than 7(C). Id.

When the government relies on either of these exemptions, a court must balance the privacy interests against the public interest in disclosure of the requested information. Moffat, 716 F.3d at 251 (citing Maynard v. CIA, 986 F.2d 547, 566 (1st Cir. 1993)). "The issue for the Court is whether disclosure would promote the purpose of FOIA in 'opening agency action to the light of public scrutiny[.]' " Lardner v. U.S. Dep't of Justice, 2005 U.S. Dist. LEXIS 5465, * 68 (D.D.C. March 31, 2005). " 'Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose.' " Id. at *65 (citing Reporters Comm., 489 U.S. at 773).

ii. Mr. Eil Has Identified a Significant Public Interest

Conceding for purposes of this Brief that relevant individuals have legitimate privacy interests[11] in the requested materials, Mr. Eil has also articulated a legitimate public interest in the requested trial exhibits. "The public interest

[11] The DEA spends much of its Brief commenting on the privacy interests in the requested information (and how the District Court erred with respect to the privacy interests); however, Mr. Eil has conceded that there are important privacy interests at play. See Transcript, p. 11:3-6. The issue is, and always has been, balancing the competing public and private interests in the requested information. And, as discussed in more detail below, Mr. Eil contends that the District Court struck the appropriate balance with respect to these competing interests.

FOIA seeks to uphold is the right of citizens to understand and obtain information about the workings of their own government." Moffat, 716 F.3d at 252 (citing Maynard, 986 F.2d at 566). In Carpenter, the Court held that "[t]he asserted public interest must shed light on a federal agency's performance of its statutory duties." Carpenter, 470 F.3d at 440 (citing Reporters Comm., 489 U.S. at 773 and Maynard, 986 F.2d at 566). "Indeed, the 'core purpose' of the FOIA, to which the public interest must relate, is to ensure that government activities are open to public scrutiny, not that information about private citizens, which happens to be in the government's possession, be disclosed." Id. at 441 (citing Reporters Comm., 489 U.S. at 774; Maynard, 986 F.2d at 566).

Here, the public has a significant interest in knowing how the DEA investigates – and the federal government prosecutes – physicians who unlawfully prescribe painkillers, especially those who wind up serving life terms in prison. See Parker v. U.S. DOJ, 852 F.Supp.2d 1, 13 (D.D.C. 2012) ("there is a valid public interest in knowing how [the] DOJ handles the investigation of unlicensed attorneys.") See also Lurie v. Dep't of Army, 970 F. Supp. 19, 37 (D.D.C. 1997) ("The public interest also extends to knowing whether an investigation was comprehensive and that the agency imposed adequate disciplinary measures."). Specifically, the "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[.]" DEA Mission Statement, https://www.dea.gov/about/mission.shtml (last visited July 17, 2017). To that end, the DEA's primary responsibilities are the "[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. 11727, 38 Fed. Reg. 18357 (July 10, 1973) (incorporating Reorganization Plan No. 2 of 1973 which set forth these major responsibilities).

U.S.A. v. Paul Volkman was a high-profile, high-stakes example of that agency's mission in action. Dr. Volkman's case centered around whether, as a physician, he had lawfully dispensed controlled substances or whether he had crossed over into criminal activity by prescribing controlled substances for illegitimate purposes. See 21 U.S.C. §841. The term "legitimate" is not defined in the statute. Therefore, one must look to the DEA's criminal prosecutions in order to understand where the agency draws the line between being a doctor and being a drug dealer. The trial exhibits that the government decided to show to the jury –

exhibits which were carefully selected from voluminous discovery documents – were centrally important to the prosecution's aim to convince the jury that Dr. Volkman was prescribing controlled substances for illegitimate purposes. Because that boundary is not clear from the statute (which, again, hinges on the interpretation of "legitimacy"), the public can only understand how the DEA carries out its statutory functions based on examining how the statute 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 large portions of the requested exhibits, as the government has so far done, is to hide critical details of how the DEA carries out its own statutory functions. 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 withheld documents.[12] Contrary to the DEA's assertions – that Mr. Eil has not identified any public interest – the information contained in these exhibits falls squarely within the boundaries of " 'shed[ding] light on an agency's performance of its statutory

[12] By way of example, the importance of the information contained in these records is 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 JA 37, ¶11. The jury's ability to distinguish between the legitimate and illegitimate prescribing of drugs, and the government's ability to prosecute the same, to different patients is tied to the medical records.

duties' or otherwise let[ting] citizens know 'what their government is up to.' " See Bibles v. Or. Natural Desert Ass'n, 519 U.S. 355, 355-56 (1997) (per curiam).[13]

The DEA also suggests that Mr. Eil has articulated only a "vague, high level public interest" in "a routine case." DEA Brief, p. 23. First – if it needs to be stated why a trial that leads to four life sentences is not "routine" – there is ample evidence (much of it provided by the DEA) that this is not a "routine case," including the number of pills Dr. Volkman was accused of distributing, the amount of money he and his co-conspirators made from their scheme, the number of deaths these activities were shown to have caused, the legal resources the government employed at the trial, and the length of the sentence that resulted from the trial.

And, as already shown, the interest in this case is more than simply curiosity – journalistic or otherwise – in Dr. Volkman's fate. It is about opening the DEA's investigation and prosecution of a prolific drug dealer to public scrutiny. This

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[13] The DEA also attempts to recast the articulated public interest in such a way that renders it useless under FOIA. Specifically, the government contends that Mr. Eil is simply interested in the innocence or guilt of Dr. Volkman. The government extrapolates this misstatement out to suggest that the public interest could only relate to the outcome of a particular criminal trial. The government also wrongfully states that this is byproduct of Mr. Eil's "journalistic interest" and therefore not sufficient for purposes of the FOIA scheme. As thoroughly stated in Mr. Eil's papers before the District Court, as well as in the Decision, the significant public interest is not merely in Dr. Volkman's innocence or guilt, or any particular outcome, but rather the actual process that the DEA undertook – the carrying out of its statutory duties.

Court has noted that a governmental agency may implicitly acknowledge the public interest in "knowing what it is up to" when it issues a press release "trumpeting" its operations. See Union Leader, 749 F.3d at 156. Here, the DEA did more than simply issue a press release – from the beginning to the end of Dr. Volkman's trial, to post-conviction, the DEA has touted its investigation, the government's prosecution of Dr. Volkman, and the general significance of the case. The DEA has also stated that Dr. Volkman's prosecution should serve as a warning to others. The government cannot on the one hand hold this case up as an example of how it investigates and prosecutes diversion cases and on the other state that a significant portion of the evidence used to convict such a defendant is not actually available to the public or of significant interest to the public. FOIA is meant to prevent such "secret law." Dr. Volkman's case, by the DEA's own repeated admission, represents a crucial chapter in the DEA carrying out its statutory functions with respect to investigating and prosecuting physicians who prescribed controlled substances for illegitimate purposes – drug dealers who are supposed to be physicians.

Mr. Eil has clearly articulated a significant public interest in the requested trial exhibits from a highly significant, high-profile criminal case.[14]

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[14] And, just because there is a significant public interest in these requested documents does not lead to the foregone conclusion that records of any and all federal prosecutions would have the same end result, as the DEA suggests.

iii. The Public Interest Outweighs Any Purported Privacy Interest

Mr. Eil has met his burden by identifying a legitimate public interest. The Court must now weigh this interest against any privacy interest to determine whether the requested exhibits – which were already shown in an open court, under no seal – should be disclosed.[15] See Rodriguez v. U.S. Dep't of Army, 31 F. Supp. 3d 218, 233 (D.D.C. 2014) (holding that an identified public interest must be balanced against the privacy interest). The documents that Mr. Eil requests – the very information which led a jury to convict Dr. Volkman and a judge to later sentence him to four life sentences – would certainly forward the public interest in knowing what the DEA is up to. As stated herein, this is the very key to understanding how the DEA investigated and the government prosecuted Dr. Volkman in a case that the DEA itself has stated should serve as a reminder to the

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[15] Mr. Eil acknowledges that the previous public disclosure of the trial exhibits (whether at trial or in appellate papers after the fact) does not waive any legitimate privacy interests of Dr. Volkman's patients or their family members. The DEA argues that the District Court "discounted" these privacy interests because of the "government's prior 'failures to take measures to protect the privacy interests[.]' " DEA Brief, p. 29 (citing DEA's Addendum ("A")13). Mr. Eil respectfully disagrees. Although the District Court chastised the government for its less-than-stellar approach, the District Court went on to state that "regardless of the government's prior failure to take measures to protect the privacy interest of those third parties, it is this Court's obligation to make a determination of the privacy interests involved." A 13. Therefore, there is no merit to the DEA's suggestion that the District Court considered the government's waiver when rendering its decision in this case. Nor was there a need to address the "practical obscurity" doctrine as the government has suggested.

public about its enforcement efforts related to the unlawful prescriptions of narcotics. The District Court appropriately struck a balance between the competing interests, noting that it could "protect most of the privacy interests of the third parties by excluding personally identifiable information in the exhibits." A 15.[16]

Based on the foregoing, Mr. Eil respectfully requests that the Court affirm the District Court's determination and hold that the significant public interest in the requested documents outweighs the legitimate privacy issues at stake, especially in light of the District Court's conscientious Decision with respect to the ordered redactions.

D. The District Court Did Not Err in Rendering Its Decision and Even If It Did, the Court Should Affirm the Decision For the Reasons Set Forth Herein

Although Mr. Eil contends that this Court can affirm the District Court's Decision without determining whether the District Court erred, Mr. Eil briefly addresses the DEA's arguments with respect to the purported errors. Specifically, the DEA argues that the District Court failed to follow the well-established FOIA standard and instead applied the standard that governs the release of judicial

[16] As explained infra, Mr. Eil disputes the government's contention that these redactions were a "superficial" fix. DEA Brief, p. 3.

records. The DEA further argues that the District Court erred by failing to separately consider the privacy interests in death-related images and reports.

i. The District Court Did Not Apply the Wrong Standard or Let it "Infect" Its Decision

The DEA argues that the District Court applied an incorrect balancing approach "untethered from FOIA." Specifically, the government asserts that the District Court held that Mr. Eil has a presumptively paramount right to the medical records that could be overcome only a compelling showing justifying nondisclosure. The DEA also argues that the District Court "compound[ed] its error" by holding that Mr. Eil had a public interest in monitoring the judicial system and maintaining public scrutiny of judicial proceedings. Mr. Eil disagrees with these contentions. The District Court clearly applied FOIA's balancing test and simply noted the significant public interest in judicial records as a backdrop to the case at hand. It was not an error for the District Court to refer to cases discussing the importance of open trials and access to judicial records and then turn to the appropriate legal standard at hand where it detailed the significant public interest in the documents – specifically how the requested information would shed light on the DEA's statutory functions. That the disclosure of the trial exhibits simultaneously meets the goal of openness of trials and judicial records does not undermine the District Court's analysis under FOIA.

The government also argues that the District Court failed to consider the wealth of information in the public record and whether the release of the information would shed any additional light on the government's conduct. While it is true that trial transcripts and some exhibits are available, this does not mean that a complete record of this trial is publicly available. When the government prosecuted Dr. Volkman, it did not simply rely on witness testimony; it chose to also include 220 exhibits to supplement and amplify that testimony. If the government thought the documentation was so important to the trial, how can it now say that it would not add to the public's understanding of the case? Certainly the medical records of the very patients Dr. Volkman was on trial for injuring, or even killing, would yield new information. See Stalcup, 768 F.3d at 74 (A court must consider whether providing a requestor with private information "would yield any new information"); see also U.S. Dep't of State v. Ray, 502 U.S. 164, 178 (1991).

ii. The District Court Appropriately Evaluated the Privacy Interests Involved

The DEA contends that the District Court failed to consider the privacy interests of Dr. Volkman's former patients. This is simply not true. The District Court clearly determined that the records at issue were " 'highly personal' and 'intimate in nature.' " A 13 (citing Kurzon v. Dep't of Health & Human Servs., 649 F.2d 65, 68 (1st Cir. 1981). Both Mr. Eil and the District Court noted the

"unfortunate fact that the court exhibits contain intimate details of private individuals." A 14.[17] Really, the government takes issue with the fact that despite recognizing a great privacy interest, the District Court found that the scales tipped in the public interest's favor. The District Court did not fail to recognize the weight of the privacy interests; rather, the District Court appropriately weighed the interests and determined that with the required redactions, the District Court could protect the majority of these interests.[18]

The DEA's argument is essentially that because the redactions would not completely protect their privacy, the District Court must have failed to properly

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[17] The DEA states that the District Court "admitted that it did not take these privacy interests 'too seriously[.]' " DEA Brief, p. 12 (citing A 12). This is an astonishing misrepresentation of what the District Court actually said – that is, that given the government's failure to previously protect the information, it was "hard to take the government's vehement arguments asserting the strong privacy interests of the third parties here too seriously." A 12. The District Court went on to note the government's, at best, lackadaisical previous approach to protecting the very information that it now states is highly sensitive.

[18] Without clearly articulating an argument, the DEA also noted that the former patients have an additional interest in remaining free from harassment associated with the disclosure of their identities. DEA Brief, p. 28. Presumably the DEA takes issue with the fact that the District Court did not explicitly address this argument. Whatever the DEA's point, the argument is meritless. The release of the requested documents would no more expose these individuals to harassment than information that is already publicly available (e.g., the indictment, trial transcript, trial exhibits accessible through PACER and the Exhibit List). Furthermore, the DEA has grossly mischaracterized Mr. Eil's communications as harassment and tries to paint basic journalistic procedure – including contacting people affected by high-profile crimes and politely requesting an interview – as dangerous, malevolent behavior.

weigh their privacy interests. The DEA jumps to this conclusion only by making the leap that the FOIA balancing test is all or nothing. It is not. And, the very case upon which the DEA relies illustrates this point: in Rose, the U.S. Supreme Court noted that in the context of FOIA disclosure,

> [t]o be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts[.] Moreover, we repeat, Exemption 6 does not protect against disclosure [of] every incidental invasion of privacy - only such disclosures as constitute 'clearly unwarranted' invasions of personal privacy.

Dep't of the Air Force v. Rose, 425 U.S. 352, 381-82 (1976). The District Court properly considered the privacy interests – and crafted a solution, consisting of redactions of not only the personally identifying information, but also the exhibit numbers (to prevent the public from easily matching up the records to names) – in order to address those legitimate privacy interests.

iii. The District Court Did Not Err With Respect to the Death-Related Records

Lastly, the DEA contends that the District Court erred by failing to consider the special and significant privacy interests in the death-related records that the DEA withheld. First, it was the government who failed, during arguments before the District Court, to make the argument that these records should be treated any

differently from the other medical records that it withheld. Therefore, any such argument here is waived. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991). In fact, even underdeveloped arguments before the District Court are considered not preserved for appellate review. P.R. Tel. Co., Inc. v. Sprintcom, Inc., 662 F.3d 74, 98 (1st Cir. 2011) ("A party is ordinarily not entitled to wait until an appeal, after its arguments have failed, to spring newly-minted arguments based on undeveloped references left in the record below."); McCoy, 950 F.2d at 22 ("If claims are merely insinuated rather than actually articulated in the trial court, we will ordinarily refuse to deem them preserved for appellate review.").

The First Circuit has consistently recognized that "Judges are not obliged to do a movant's homework, searching sua sponte for issues that may be lurking in the *penumbra of the motion papers*. Thus, the raise-or-waive rule applies with full force when an appellant tries to present a new theory about why facts previously placed on record are determinative." United States v. Slade, 980 F.2d 27, 31 (1st Cir. 1992). "Phrased another way, a party is not at liberty to articulate specific arguments for the first time on appeal simply because the general issue was before the district court." Id. (citing Brown v. Trustees of Boston Univ., 891 F.2d 337, 357 (1st Cir.1989), cert. denied, 496 U.S. 937, 110 S.Ct. 3217, 110 L.Ed.2d 664

(1990)); see Perfect Puppy, Inc. v. City of E. Providence, R.I., 807 F.3d 415, 418 (1st Cir. 2015) (stating that "judges need not entertain . . . ill-developed arguments") (citing United States v. Zannino, 895 F.2d 1, 17 (1st Cir.1990) (holding that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work")); B & T Masonry Const. Co. v. Pub. Serv. Mut. Ins. Co., 382 F.3d 36, 40 (1st Cir. 2004) ("To preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court—and a veiled reference to a legal theory is not enough to satisfy this requirement."); Rivera–Gomez v. De Castro, 843 F.2d 631, 635 (1st Cir. 1988) ("Judges are not expected to be mindreaders. Consequently, a litigant has an obligation 'to spell out its arguments squarely and distinctly,' or else forever hold its peace.").

Even if this were properly before the Court, the DEA contends that the District Court erred by not explicitly identifying the death-related records at issue and by "minimizing" the significant privacy interests at stake in these records. Mr. Eil disagrees. The District Court specifically noted the medical records of patients, but did not go into detail about each of the records. The District Court acknowledged that the individuals had a significant privacy interest in their medical records, which Mr. Eil contends do not necessarily exclude death-related records. Therefore, the District Court appropriately balanced the interests at issue.

It was unnecessary for the District Court to separately parse out the privacy interests of the death-related records.

VIII. CONCLUSION

Mr. Eil has clearly articulated a legitimate public interest in these trial exhibits – specifically, shedding light on the DEA carrying out its statutory function of investigating and prosecuting physicians who overprescribe and/or illegitimately prescribe painkillers. Although the DEA tries to minimize the legitimate public interest – or embolden the privacy interests – the fact is that there are competing interests in these records and the Court must apply the balancing test to determine whether the push or the pull wins out. Here, the District Court has already answered that the significant public interest outweighs the privacy interests, with limited redactions of the trial exhibits by the government. Mr. Eil respectfully requests that the Court affirm the District Court's Decision granting Mr. Eil Summary Judgment and denying Summary Judgment to the DEA.

Appellee,

Philip Eil
By His Attorneys,

/s/ Neal J. McNamara
Neal J. McNamara (#13163)
Jessica S. Jewell (#1177282)
NIXON PEABODY LLP
One Citizens Plaza, Ste 500
Providence, RI 02903
(401) 454-1000
(401) 454-1030 (fax)
nmcnamara@nixonpeabody.com
jsjewell@nixonpeabody.com

Cooperating Attorneys,
American Civil Liberties Union
Foundation of Rhode Island

July 19, 2017

CERTIFICATION

I hereby certify that on the 19th day of July, 2017, I filed and served this document electronically through the Court's CM/ECF system to:

Assistant U.S. Attorney Bethany Wong
Assistant U.S. Attorney Richard Myrus
Assistant U.S. Attorney and Chief of Appeals Donald Campbell Lockhart
U.S. Department of Justice
50 Kennedy Plaza, 8th Floor
Providence, RI 02903

Jaynie Lilley
Matthew Collette
U.S. Department of Justice
950 Pennsylvania Ave NW, Rm 7321
Washington, DC 20530

/s/ Neal J. McNamara

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,753 words, even including the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word, in 14-point Times New Roman font.

/s/ Neal J. McNamara
Neal J. McNamara (#13163)
Attorney for Appellee
Dated: July 19, 2017