No. 16-15342

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD TUFFLY, AKA Bud Tuffly,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY,

Defendant-Appellee.

ON APPEAL FROM THE
U.S. DISTRICT COURT FOR ARIZONA

OPENING BRIEF OF APPELLANT EDWARD "BUD" TUFFLY

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JURISDICTIONAL STATEMENT

Jurisdiction in the U.S. District Court for the District of Arizona ("District Court") was pursuant to the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), and 28 U.S.C. § 1331. The District Court entered final judgment on March 3, 2016 ("Order"), which dismissed all claims. A timely Notice of Appeal was filed on March 3, 2016. Appellate jurisdiction exists pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the names of criminal alien detainees released from federal facilities in Arizona due to "fiscal uncertainty" are being properly withheld under the personal privacy exemptions of the Freedom of Information Act.

PERTINENT STATUTORY PROVISIONS

The relevant personal privacy exemptions under the statute provide:

> This section does not apply to matters that are –
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy[.]

5 U.S.C. § 552(b).

STATEMENT OF THE CASE

I. Nature of the Case.

Mr. Edward "Bud" Tuffly brought suit to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), and the Privacy Act, 5 U.S.C. § 552a ("Privacy Act"). Mr. Tuffly sought information concerning the release of criminal alien detainees from federal facilities in Arizona due to "fiscal uncertainty." After Mr. Tuffly filed his lawsuit, the U.S. Department of Homeland Security ("DHS") released records responsive to Mr. Tuffly's FOIA request, albeit with redactions. Specifically, DHS redacted the names of the criminal aliens, claiming that the aliens' names are exempt from disclosure pursuant to FOIA's personal privacy exemptions.

II. The Course of Proceedings.

Following the release of the records responsive to Mr. Tuffly's FOIA request, DHS moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

III. The District Court's Ruling.

On March 3, 2016, the District Court granted DHS's motion for summary judgment and dismissed the complaint, finding that the names of criminal aliens were properly redacted pursuant to FOIA's personal privacy exemptions.

STATEMENT OF FACTS

On or about February 26, 2013, Immigration and Customs Enforcement ("ICE"), a component of DHS, issued the following statement:

> As fiscal uncertainty remains over the continuing resolution and possible sequestration, ICE has reviewed its detained population to ensure detention levels stay within ICE's current budget. Over the past week, ICE reviewed several hundred cases and placed these individuals on methods of supervision less costly than detention. All of these individuals remain in removal proceedings. Priority for detention remains on serious criminal offenders and other individuals who pose a significant threat to public safety.

Exhibit A to Declaration of Edward "Bud" Tuffly ("Tuffly Decl.") at 1 (Excerpts of Record of Appellant Edward "Bud" Tuffly at 14 (hereafter "ER ___")). Subsequently, the *USA Today* reported that contrary to ICE's claims, at least some of the detainees released because of "fiscal uncertainty" had committed serious crimes or faced serious criminal charges, including kidnapping, sexual assault, drug trafficking, and homicide. *See* Exh. B to Tuffly Decl. (ER 16-17). The *USA Today* based its reporting, in part, on records it received in response to a separate FOIA request. *Id.*

Following this report by the *USA Today*, Mr. Tuffly sought information about all detainees released from detention facilities in Arizona due to "fiscal uncertainty." *See* Tuffly Decl. at 2 (ER 11). Specifically, he requested records sufficient to identify (1) the date each detainee was released; (2) the facility from which each detainee was released; (3) each detainee's criminal history and criminal

charges at the time of release; (4) methods of supervision to which each detainee was subjected; and (5) whether each detainee appeared for subsequent removal or other proceedings and/or was removed from the United States. *Id*. Mr. Tuffly stated that access to this information would allow the public to assess the accuracy of ICE's implied assertions about the lack of risk posed by the aliens' release. *Id*. It also would clarify whether the aliens being supervised on methods "less costly than detention" have committed or were charged with committing any additional crimes subsequent to their release. *Id*.

Importantly, Mr. Tuffly sought this information only to research, or make available for others to research, the backgrounds of the criminal aliens to determine all of their past crimes, any crimes that they have committed under supervision since being released, and whether they have now been removed. *Id.* at 3 (ER 12). Mr. Tuffly does not intend to contact, harass, or embarrass the aliens. *Id*. Nor does he intend for others to do so if and when the information is made public. *Id*.

DHS eventually released the records responsive to Mr. Tuffly's FOIA request, though with the names of the criminal aliens redacted. Nonetheless, Mr. Tuffly analyzed the records and found that the facts concerning the criminal aliens were closer to those reported by the *USA Today* than those asserted by ICE. *See* Order at 2 (ER 6). The responsive records indicated that, in total, the 149 criminal aliens were charged with nearly 260 crimes, including violent crimes such as

assault, domestic violence, weapons offenses, and battery. *Id.* at 5 (ER 9). Mr. Tuffly shared this information with the public, which resulted in news media coverage.

SUMMARY OF THE ARGUMENT

DHS is improperly withholding the names of criminal aliens released into "less costly forms of supervision" due to "fiscal uncertainty" under FOIA's personal privacy exemptions. The exemptions are not absolute. They require a balancing of the privacy interests at stake with the public's interest in disclosure. In this case, the criminal aliens have an attenuated privacy interest due to the fact that their prior convictions are already a matter of public record. Further, the release of the names will allow the public to monitor DHS's conduct in supervising potentially dangerous criminal aliens, who are subject to removal but have been released prior to that removal. The public's strong interest in disclosure therefore outweighs the minimal privacy interests of the criminal aliens. The U.S. Court of Appeals for the First Circuit already has considered a case with similar facts and concluded the same. Accordingly, this case should be remanded to the District Court so that DHS can be compelled to promptly produce the names of the criminal aliens to Mr. Tuffly.

STANDARD OF REVIEW

This Court employs a two-step standard of review in FOIA cases. *Watkins v. U.S. Bureau of Customs and Border Prot.*, 643 F.3d 1189, 1194 (9th Cir. 2011). First, this Court reviews *de novo* whether "an adequate factual basis exists to support the district court's decisions." *Id.* (quoting *Milner v. U.S. Dep't of the Navy*, 575 F.3d 959, 963 (9th Cir. 2009)). Second, "legal rulings, including [the district court's] decision that a particular exemption applies, are reviewed de novo." *Id.* (quoting *Lane v. Dep't of Interior*, 523 F.3d 1128, 1135 (9th Cir. 2008)). "The burden rests on the government to justify its decision to exclude disclosures under FOIA." *Id.* (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989)).

ARGUMENT

DHS is improperly withholding the names of 149 criminal aliens under Exemptions 6 and 7(C) of the Freedom of Information Act. Both exemptions require the balancing of public and private interests, though the analysis under the two provisions is not identical. *Lahr v. National Transp. Safety Bd.*, 569 F.3d 964, 973-74 (9th Cir. 2009). Exemption 7(C) is broader than Exemption 6. *Id.* Thus if withholding the criminal aliens' names under Exemption 7(C) is improper, it is also improper under Exemption 6. *Id*. Under Exemption 7(C), an agency may withhold information compiled for law enforcement purposes if "the production of

such . . . information could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C).[1]

There is no dispute that the information at issue in this case was compiled for law enforcement purposes. The only issue then, is whether the production of the names of the 149 criminal aliens could reasonably be expected to constitute an unwarranted invasion of personal privacy. The burden is on DHS to prove such. *Watkins* at 1194 (citing *Reporters Comm.*, 489 U.S. at 755).

In determining whether a record should be released under FOIA's personal privacy exemptions, courts require the requester to first show "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake." *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 172 (2004). Second, the requester must demonstrate "that the information is likely to advance that interest." *Id.* Particular to this case,

> Where there is a privacy interest protected by [the personal privacy exemptions] and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged government impropriety might have occurred.

Id. at 174.

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[1] For ease of reference, Mr. Tuffly refers to the two exemptions as the "personal privacy exemptions."

In *Union Leader Corporation v. U.S. Department of Homeland Security*, the First Circuit considered a case with similar facts to the current one. 749 F.3d 45 (1st Cir. 2014). There, ICE arrested six criminal aliens in New Hampshire as part of the nationwide "Cross Check" operation. *Id.* at 48. After ICE refused to release the names of the six criminal aliens in response to media questioning, the *Union Leader*, a New Hampshire newspaper, submitted a FOIA request seeking production of "any and all records and documents relating to and/or concerning the six individuals arrested" by ICE during the Cross Check operation. *Id*. ICE provided I-213 forms containing criminal histories and arrest records of the six criminal aliens, but redacted the aliens' names and addresses. *Id.* at 48-49. The newspaper sued seeking the names and addresses of the aliens and arguing that ICE improperly applied Exemptions 6 and 7(C). *Id.* at 49. The district court granted ICE's motion for summary judgment. *Id.*

On appeal, however, the First Circuit reversed, holding that the aliens' privacy rights were attenuated by both the fact that the underlying arrests and convictions were matters of public record, and that the newspaper's proposed investigation was limited. *Id.* at 53. The First Circuit added that the criminal aliens' privacy rights were further diminished by the fact that the *Union Leader* did not intend to contact the aliens. *Id.* Moreover, there was a substantial public interest in disclosure because the *Union Leader* provided "evidence that would

warrant a belief by a reasonable person" that ICE was negligent in handling its removal duties. *Id*. at 56. In particular, the newspaper provided an I-213 form already produced showing that at least one of the aliens was ordered removed from the United States a whole 23 years prior to the alien's 2011 arrest. *Id*.

The current case is highly analogous to *Union Leader*. The criminal aliens in this case were in DHS's custody during the course of pending removal proceedings. Due to "fiscal uncertainty," DHS elected to release these known criminal aliens back into the public under "methods of supervision less costly than detention." *See* Exh. A to Tuffly Decl. at 1 (ER 14). DHS's actions thus create a substantial public interest in knowing whether criminal aliens, released from detention and into the general population, threaten public safety by continuing to engage in criminal activity even under government supervision.[2]

Further, unlike the names of offenders at issue in *Reporters Committee*, the names of the 149 released criminal aliens in this case are necessary for the public to know "what their government is up to." *Reporters Comm*, 489 U.S. at 773.

[2] From 2010 through 2015, 124 criminal aliens released by DHS have been responsible for 135 homicide-related crimes. Two of these criminal aliens had previous homicide convictions. Before having committed these homicides, these 124 criminal aliens had amassed 464 criminal charges. Additionally, ICE released a total of 156 repeat offenders, 73 of which were by ICE's own discretion. Stephan Dinan, *124 Illegal Immigrants Released by DHS Later Charged With Murder, Report Finds*, Washington Times (Mar. 14, 2016) http://www.washingtontimes.com/news/2016/mar/14/124-illegal-immigrants-released-by-dhs-later-charg/.

Key to the Supreme Court's holding in *Reporters Committee* was the fact that a "response to [the] request would not shed any light on the conduct of any Government agency or official." *Id*. In this case, the names and records of the criminal aliens are necessary to provide insight on the activities of government. A further distinction from *Reporters Committee* is that the information sought in this case is desired only for the purpose of assessing a government actor's – in this case DHS – conduct in its response to "fiscal uncertainty." The particular facts about the private individuals are of little consequence and but are the necessary tools to enable a proper assessment.

Following their release, the 149 criminal aliens were still subject to removal proceedings and were allegedly under government supervision "less costly than detention." *See* Exh. A to Tuffly Decl. at 1 (ER 14). Implicit in ICE's statement that "[p]riority for detention remains on serious criminal offenders and other individuals who pose a significant threat to public safety" is an assertion that those released into "less costly methods of supervision" do not pose a significant threat to public safety. *Id.*

In withholding the names of the criminal aliens, DHS prevents the public from assessing both whether DHS made a reasonable assessment of the risks posed to the public by releasing criminal aliens under less strict supervision, and whether DHS's continued supervision has adequately safeguarded the public from

dangerous individuals who would otherwise have been subject to detention. As a result of the *USA Today*'s FOIA requests, it is already public knowledge that several of the criminal aliens released by ICE due to "fiscal uncertainty" had been charged with a number of violent crimes including assault, battery, domestic violence, and weapons charges. *See* Exh. B to Tuffly Decl. (ER 16-17). Yet, without the names of those criminal aliens, it is impossible for Mr. Tuffly or any other member of the public to determine if subsequent events shed further light on the DHS's actions. Specifically, it is imperative to know whether the released criminal aliens appeared at any subsequent removal hearings, committed additional crimes while under government supervision, or have been removed from the country. The above information constitutes evidence that would "warrant a belief by a reasonable person that the alleged government impropriety *might* have occurred." *Favish*, 541 U.S. at 174.

CONCLUSION

For the foregoing reasons, Mr. Tuffly respectfully requests that the Court reverse the District Court's order granting the motion for summary judgment and remand this matter for further proceedings.

Dated: July 5, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6, Appellant states that there are no known cases pending in this Court that are related to this action as defined under that Rule.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 3,024 words, excluding 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 a proportionally spaced typeface using Microsoft Word 2010, namely, 14 point Times New Roman.

/s/ James F. Peterson

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **OPENING BRIEF OF APPELLANT EDWARD "BUD" TUFFLY** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 5, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ James F. Peterson