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

REPLY BRIEF OF APPELLANT EDWARD "BUD" TUFFLY

Michael Bekesha
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

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ARGUMENT

The United States Department of Homeland Security is improperly withholding the names of 149 criminal aliens under Exemptions 6 and 7(C) of the Freedom of Information Act. In an effort to satisfy its burden, DHS almost exclusively argues that the names of the 149 criminal aliens should be withheld because "of today's 'often hostile atmosphere surrounding unauthorized immigration.'" Brief for Appellee at 11-15. Because of this alleged hostile atmosphere, DHS suggests – without any evidence whatsoever – that if the names are released, hypothetical individuals will use the information to contact and harass the 149 criminal aliens. That argument fails for three reasons.

First, "there is always the possibility that, if the individual names are disclosed, Plaintiffs or someone other than Plaintiffs could contact the individuals personally. However, that is always a possibility when information is disclosed — the inquiry is whether the stated purpose of the FOIA request justifies the possible intrusion on privacy." *New York Times Company v. U.S. Department of Homeland Security*, 959 F. Supp. 2d 449, 456 (S.D.N.Y. 2013). As Tuffly testified, his sole purpose for seeking this information is 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 since being released, and whether they have now been removed. Tuffly Decl. at 3 (ER 12). 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*. Therefore, like the First Circuit concluded in *Union Leader v. U.S. Department of Homeland Security*, the criminal aliens' privacy rights are diminished by the fact that Tuffly does not seek to contact the aliens. 749 F.3d 45, 53 (1st Cir. 2014).

Second, because Tuffly does not seek the addresses of the criminal aliens, the release of the names would not facilitate personal intrusions. *New York Times Company*, 959 F. Supp. 2d at 456. Tuffly – or anyone else for that matter – would not know where to look to find these aliens. In addition, as DHS claims, "a number of the released persons have already been removed or voluntarily departed the United States following their release." Brief of Appellee at 18. Therefore, even if a hypothetical individual for some reason wished to contact one or more of the criminal aliens, the criminal alien may not even reside in the United States anymore. DHS's contention that the disclosure of the names will enable unknown and unnamed individuals to find and contact the aliens simply is untenable.

Third, Tuffly has demonstrated that the names of the criminal aliens are necessary to provide insight on the activities of government. The release of the names will allow Tuffly and others to assess 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 request, 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 the criminal aliens at issue in this case, it is impossible 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. In fact, DHS concedes that knowing whether the aliens have been removed or voluntarily departed is a significant public interest. Brief of Appellee at 18 ("Notably, without citing to anywhere in the record or any evidence at all, DHS states, "a number of the released persons have already been removed or voluntarily departed the United States following their release."). However, because DHS has not provided any evidence at all about who no longer resides in the United States or where Tuffly may find the basis for its assertion, Tuffly cannot confirm DHS's representations. This case is solely about learning what occurred after the criminal aliens were released.

CONCLUSION

For the foregoing reasons and the reasons identified in Tuffly's opening brief, 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: October 12, 2016

Respectfully submitted,

/s/ Michael Bekesha

Michael Bekesha
James F. Peterson
JUDICIAL WATCH, INC.
425 Third Street, S.W., Suite 800
Washington, DC 20024
(202) 646-5172

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains 760 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/ Michael Bekesha

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY 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 October 12, 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/ Michael Bekesha