

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO: _____

DANIEL VILLANUEVA,

Plaintiff,

vs.

UNITED STATES DEPARTMENT
OF JUSTICE AND THE FEDERAL
BUREAU OF INVESTIGATION,

Defendants.

_____ /

COMPLAINT

INTRODUCTION

Plaintiff, Daniel Villanueva (“Villanueva”), brings this action pursuant to Title 5, United States Code, Section 552(a)(4), against Defendants, the United States Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”), a component of DOJ, for violations of the Freedom of Information Act (“FOIA”) (5 USC § 552).

PRELIMINARY STATEMENT

1. This is an action brought pursuant to FOIA seeking the disclosure and release of records created or compiled by the FBI in connection with an investigation that it performed regarding allegations of wire and securities fraud and other offenses by numerous individuals and entities.

2. Plaintiff seeks injunctive relief, attorneys’ fees and expenses, and other appropriate relief pursuant to FOIA.

THE PARTIES

3. Plaintiff, Villanueva, is a citizen and resident of Florida, residing in Miami-Dade County, Florida.

4. Villanueva is a licensed private investigator. Prior to his work as a private investigator, Villanueva served in the United States Marine Corps for eight years before his honorable discharge and was lieutenant with the Miami-Dade Police Department, where he served for twenty-nine years prior to his retirement.

5. Villanueva is a founder, principal and investigator of HD Investigative Group, a private investigation firm in Miami-Dade County, Florida, and is a licensed private investigator. Villanueva assists attorneys and law firms with the investigation of individuals and entities for potential civil claims.

6. Villanueva and HD Investigative Group are engaged in an investigation into possible civil claims on behalf of those damaged by various physicians and businesses related to and in connection with a criminal investigation conducted by the FBI.

7. Villanueva seeks access to certain public records as part of the above described investigation.

8. Defendant DOJ is an agency of the United States.

9. Defendant FBI is a component of the DOJ.

10. The FBI conducted a criminal investigation of some of the same physicians and medical facilities now being investigated by Villanueva and now has possession, custody and control of records Villanueva seeks.

JURISDICTION AND VENUE

11. This action arises under the Freedom of Information Act (“FOIA”), Title 5, United States Code, Section 552.

12. This Court has jurisdiction over the parties and subject matter of this action pursuant Title 5, United States Code, Sections 552(a)(4)(B) and 552(a)(4)(E), and Title 28, United States Code, Section 1331.

13. Venue is proper in this district pursuant to Title 5, United States Code, Section 552(a)(4)(B), because Villanueva is a resident of Miami-Dade County, Florida.

BACKGROUND AND STATEMENT OF FACTS

THE FBI INVESTIGATION

14. On July 16, 2013, a Federal Grand Jury in the Western District of Texas returned a seven-count indictment against Michael Baker and Michael Gluk, the former chief executive officer and chief financial officer of ArthroCare Corp., a publicly traded medical device company.

15. Baker and Gluk were charged with conspiracy and wire and securities fraud for their alleged roles in a \$400 million scheme to defraud ArthroCare’s shareholders and members of the investing public by falsely inflating ArthroCare’s earnings, ultimately causing hundreds of millions of dollars of losses in shareholder value.

16. The indictment alleges conduct dating back to 2005.

17. The investigation was conducted by the FBI’s Miami, Florida, and Austin, Texas offices.

PLAINTIFF'S FOIA REQUESTS TO FBI AND RESPONSES THERETO

18. Villanueva is investigating civil claims on behalf of victims injured as a result of the ArthroCare fraud scheme.

19. As part of his investigative efforts, Villanueva contacted the FBI and requested information regarding the case files and investigator reports related to the ArthroCare investigation and was told to submit a FOIA request.

20. On June 22, 2018, Villanueva sent, via the FOIA online portal, a request to the FBI for all 302s (FBI investigative reports) and all other documents in the FBI files regarding the following individuals and entities who were the subjects of the FBI investigation discussed above as follow:

This record request relates to the Federal Investigation conducted by the FBI into a Securities and Exchange case on Arthocare Corporation a publicly traded corporation, its relationship with DiscoCare prior to and after Arthocare purchased DiscoCare, Inc. The Miami Field Office of the FBI was the lead office for the Investigation into DiscoCare, Inc., a medical company associated with the Palm Beach Lakes Surgery Center and both had a primary place of business at 20147 Palm Beach Lakes Blvd., Palm Beach, Florida. The Miami Field office investigated DiscoCare, The Palm Beach Lakes Surgery Center and its employees and associayes, not limited to but including the following persons; Dr. Jonathan Cutler, Mr. Michael Denker, Attorney Michael Stephen Steinger, Mr. Mark Izydore, Mr. Matthew Iscoe and Mrs. Jackie Marsh. The Arthocare Investigation was conducted by the FBI in the Western District of Texas, and several indictments were made as a result of the investigation under court case number 12-CR-00314. We request that all 302 reports and any documents in the FBI case filed related to the above persons and businesses be produced to us. These investigations took place sometime between 2005 and present.

Additionally produce these records:

Any other cases investigated by the FBI where Mr. Mark Izydore, Dr. Jonathan Cutler and/or Attorney Michael Stephen Steinger were investigated.

Any and all 302 reports, Statements or Documents related to the following:

Arthocare Corporation
DiscoCare, Inc.
Palm Beach Lakes Surgery Center
Dr. Jonathan Cutler
Michael Denker
Michael Stephen Steinger
Mark Izydore
Matthew Iscoe
Jackie Marsh

21. On June 27, 2018, Villanueva received an acknowledgement of receipt of his FOIA request from the FBI regarding the following FOIPA Request number and subject: FOIPA Request No. 1409484-000 Subject: Cutler, Jonathan, et al.

22. On June 28, 2018, Villanueva received correspondence from the FBI regarding two of his FOIA requests, FOIPA Request No. 1409491-000 regarding Subject: DiscoCare, Inc., and FOIPA Request No. 1409545-000 regarding Subject: Palm Beach Lakes Surgery Center, in which the FBI indicated that it was unable to identify “any main file records responsive to [his] request” and that, therefore, his request was administratively closed.

23. On July 2, 2018, Villanueva received an acknowledgement of receipt of his FOIA request from the FBI regarding the following FOIPA Request number and subject: FOIPA Request No. 1409750-000 Subject: Arthocare Corporation.

24. Thereafter, on August 23, 2018, a Public Information Officer from the Record/Dissemination Section (RIDS) FBI Records Management Division sent a communication to Villanueva in which the Officer indicated that the request was, at that time, in Initial Processing and that the assigned analyst was searching for, retrieving and reviewing potentially responsive records.

25. The August 23, 2018, communication explained the process pursuant to which requests are processed and explained that the searcher had not yet determined what track the search

was in or how long the search was expected to take. Instead, the Officer estimated the date on which the FBI would complete the action would be 1,335 days from the date the FBI opened the request.

26. On September 26, 2018, counsel for Villanueva submitted an electronic appeal through the FOIA online portal indicating that counsel had been retained to appeal the response regarding the time for compliance and the lack of information provided regarding the type and quantity of documents.

27. After several attempts for information regarding dispute resolution services and the appeal, on October 18, 2018, four months after the initial request, a FOIA information representative responded by email to counsel for Villanueva and stated that the search for documents was not yet complete and that they would contact counsel when the search was complete and an estimate of timing could be made.

28. After several attempts to contact someone by telephone for more information, on October 29, 2018, counsel for Villanueva spoke with a Deputy Director at the Office of Government Information Services (“OGIS”), which acts as the ombudsman for appeals regarding FOIA requests, and the Deputy Director followed up by email on October 30, 2018, and indicated that the FBI was working on the request but provided no further information regarding the timing.

29. Again, after several further attempts to gain additional information on the status of the search, counsel for Villanueva made additional attempts to contact someone by telephone and sent additional correspondence to the OGIS asking for information regarding when the appeal would be determined so that Villanueva would know if he should seek court intervention.

30. On November 13, 2018, counsel for Villanueva made further attempts to obtain information on the status of the search for documents or whether court action could be initiated,

and an unidentified person from the OGIS staff responded by email correspondence to counsel for Villanueva and provided only contact information for the public information officer at FBI.

31. Counsel for Villanueva continued to request information by telephone and email correspondence regarding the status of the search and whether the appeal was final so that court intervention may be sought. In November 2018, counsel for Villanueva contacted staff with the Office of Dispute Resolution to obtain information on how to proceed with the request.

32. A representative from the Office of Dispute Resolution indicated that if Villanueva narrowed his request, the search would proceed more quickly. Therefore, after several telephone conversations and email communications with an individual with FOIPA Negotiations, counsel for Villanueva sent a narrowed request seeking, initially, all 302s created and maintained by the FBI regarding specified individuals and entities in connection with the above described investigation.

33. After receiving limited information regarding timing, counsel for Villanueva spoke by telephone and email correspondence with a FOIPA representative who indicated that if Villanueva further narrowed his request, the search would proceed more quickly. Therefore, in February 2019, now eight months after the original request, counsel for Villanueva agreed to further narrow his search request to specific 302s and provided the narrowed request to the FOIPA representative.

34. After receiving no further updates nor responses to efforts to contact a representative by telephone or email correspondence, in April 2019, counsel for Villanueva again attempted to obtain information regarding the status of the search and appeal, and an unidentified representative sent an email correspondence indicating that the request was “awaiting assignment”

to a disclosure analyst and indicated that the estimated disclosure date for the now very narrowed request was approximately September 2020.

35. No explanation was given for why eight months after being told the request had been assigned to an analyst in August 2018, Villanueva was now being told the request was awaiting assignment to an analyst. Nor was any explanation given for why the estimated disclosure date had not changed despite Villanueva's narrowing of his request after previously being told that doing so would shorten the response time.

36. Again, after several attempts by Villanueva's counsel to obtain further information regarding the status of the search and the appeal, a public information officer responded in May 2019 that the estimated date of completion was September 2020 and requested guidance on how to proceed.

37. On May 24, 2019, counsel for Villanueva responded to the public information officer that Villanueva, who was growing even more frustrated with the lack of information, would agree to the narrowed search request just to be able to obtain some documents sooner, if possible.

38. On May 28, 2018, a public information officer again contacted Villanueva's counsel and indicated that the estimated date for the return of some documents in response to the narrowed request was approximately September 2020 – more than two years after the original request.

39. Counsel for Villanueva attempted to contact someone with information by telephone and continued checking the FOIA portal for further information, to no avail.

40. It appears the Defendants have taken no further action with respect to Villanueva's requests.

41. Without further information regarding what is available, if anything, and why the search of a narrowed down version of the request will take so long, Villanueva, who has incurred attorneys' fees in his efforts to obtain information and is running up against statute of limitations issues in the civil investigation, is left with no choice but to seek court intervention to obtain information and the release of documents.

42. The FBI and DOJ, through FOIA, have failed to comply with the requirements of Title 5, Section 552(a)(6), by failing to timely provide documents or information to Plaintiff.

43. Plaintiff has exhausted all possible efforts insofar as administrative remedies are concerned.

44. As set forth above, Plaintiff has engaged counsel to assist with his efforts to obtain documents from the FBI and to bring this claim and has incurred fees and costs in connection with that engagement.

COUNT I: VIOLATION OF FOIA

45. Plaintiff realleges and incorporates by reference paragraphs 1 through 44, above.

46. Each of the documents referred to in this Complaint is incorporated herein by reference.

47. Defendants, DOJ and FBI, have violated FOIA by failing to timely provide information regarding Plaintiff's FOIA requests, described above, and by withholding the requested records responsive to the FOIA requests listed above.

48. Plaintiff has been and will continue to be irreparably harmed until Defendants are ordered to produce the requested records.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court: (1) Declare Defendant's failure to comply with FOIA to be unlawful; (2) Enjoin Defendant from improperly withholding documents from Plaintiff; (3) Order Defendant to produce the requested records without further delay and release all nonexempt portions to Plaintiff; (4) Grant Plaintiff an award of attorney fees and other litigation costs reasonably incurred in this action pursuant to 5 USC § 552(a)(4)(E)(i); and (5) Grant Plaintiff such other and further relief which the Court deems proper.

Dated: August 16, 2019.

Respectfully submitted,

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