

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS,
Plaintiff,

v.

FEDERAL BUREAU
OF INVESTIGATION, *et al.*,
Defendants.

Case 1:17-cv-01701-RC

**PLAINTIFF’S COMBINED STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE AND
RESPONSE TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS**

Pursuant to Local Rule 7(h), Plaintiff Reporters Committee for Freedom of the Press (“Reporters Committee” or “RCFP”) hereby submits his combined statement of material facts as to which there is no genuine issue and response to the statement of material facts submitted by Defendants Federal Bureau of Investigation (“FBI”) and United States Department of Justice (collectively “Defendants” or “Government”) (“Defendant’s SMF”).¹

PLAINTIFF’S RESPONSE TO DEFENDANT’S STATEMENT OF MATERIAL FACTS

1. Undisputed.
2. Undisputed that DOJ sent a letter dated April 27, 2017 that acknowledged receipt of items 2, 3 and 5 of RCFP’s FOIA request and assigned it FOIPA Request Number 1372437-000. It is further undisputed, but immaterial, that said letter stated that “. . . it is the FBI’s policy to neither confirm nor deny the existence of any records which could tend to indicate or reveal whether an individual or organization is of an investigatory interest to the FBI.”
- 3–6. Undisputed.
7. Disputed in part. Undisputed that DOJ sent a letter dated April 27, 2017, that

¹ The numbered paragraphs in Plaintiff’s response, below, correspond to those in the Defendants’ SMF.

acknowledged receipt of items 6 and 7 of Plaintiff's Request and assigned it Request Number NFP-71761. Disputed that items 6 and 7 of Plaintiff's Request "did not contain enough descriptive information to permit a search of the FBI's records." To the extent that Defendants' SMF ¶ 7 contains argument and/or conclusions of law, they should be disregarded by the Court.

8–10. Undisputed.

11. Disputed in part. Undisputed that the FBI has "modified its NFP determination concerning items 6 and 7 of RCFP's request." Disputed that items 6 and 7 of RCFP's Request are "overly broad" in "nature." To the extent SMF ¶ 11 can be read to represent that "[i]n order to locate records responsive to" items 6 and 7 of RCFP's Request the FBI "would have to conduct an expansive search of every investigative file within the CRS," it is further disputed. To the extent that Defendants' SMF ¶ 11 contains argument and/or conclusions of law, they should be disregarded by the Court.

12–13. Undisputed that SMF ¶¶ 12–13 reflect Defendants' current legal position vis-à-vis items 6 and 7 of RCFP's Request. To the extent that Defendants' SMF ¶¶ 12–13 contain argument and/or conclusions of law, they should be disregarded by the Court

14–15. Undisputed.

16. Disputed in part. To the extent SMF ¶ 16 can be read to represent that all "[r]ecords pertaining to undercover investigative operations in criminal and national security investigations where this technique" of impersonating members of the media, specifically, documentary filmmakers, "was used were compiled for law enforcement purposes" and that "[t]he ultimate purpose of these investigations would be to investigate or thwart criminal behavior," it is disputed. To the extent that Defendants' SMF ¶ 16 contains argument and/or conclusions of law, including that "records responsive to items 6 and 7 of RCFP's request would

have been created for a law enforcement purpose,” they should be disregarded by the Court.

17. Disputed in part. Undisputed that “the FBI’s use of FBI agents in an undercover capacity is well-known.” Disputed that “the specific details regarding those operations (such as how, where, and under what conditions they are utilized and deployed), is not generally known.” *See, e.g.*, Plaintiff’s SMF ¶¶ 25–27, 29–32, and 38–45. To the extent that Defendants’ SMF ¶ 17 contains argument and/or conclusions of law, they should be disregarded by the Court.

18. Disputed in part. Undisputed that “the FBI has acknowledged using FBI agents impersonating a documentary film crew in an undercover operation known as “Longbow[.]” Disputed that “the FBI has not acknowledged use of such a technique in any other FBI investigation.” *See, e.g.*, Plaintiff’s SMF ¶¶ 31–32, 36–37, and 40–42. To the extent that Defendants’ SMF ¶ 18 contains argument and/or conclusions of law, they should be disregarded by the Court.

19. Disputed. Defendant’s SMF ¶ 19 consists solely of argument and a disputed conclusion of law, which should be disregarded by the Court.

20. Disputed. Defendant’s SMF ¶ 20 consists solely of argument and disputed conclusions of law, which should be disregarded by the Court.

21. Disputed. Defendant’s SMF ¶ 21 consists solely of argument and disputed conclusions of law, which should be disregarded by the Court.

22. Disputed. Defendant’s SMF ¶ 22 consists solely of argument and disputed conclusions of law, which should be disregarded by the Court.

23. Disputed. Defendant’s SMF ¶ 23 consists solely of argument and disputed conclusions of law, which should be disregarded by the Court.

**PLAINTIFF’S STATEMENT OF MATERIAL FACTS AS
TO WHICH THERE IS NO GENUINE ISSUE**

24. In March 2017, FBI Special Agent Charles Johnson testified in a federal district court in Nevada that the FBI had impersonated documentary filmmakers in a 2014 investigation involving Cliven D. Bundy (“Bundy”). Townsend Decl. at ¶¶ 2–4 & Exs. A–C.

25. During his testimony, Agent Johnson confirmed that FBI agents had posed as documentary filmmakers to elicit recorded statements from Bundy and others, a fact that is also reflected in court filings. Townsend Decl. at ¶¶ 2–4 & Exs. A–C; Townsend Dec. at ¶ 17 & Ex. P.

26. On February 2, 2017, defendant filed a Motion in Limine in *United States v. Bundy*, No. 2:16-CR-46 (PAL) (GMN), ECF No. 1488 (D. Nev. Feb. 2, 2017). Townsend Decl. at ¶ 17 & Ex. P. The Motion in Limine states, *inter alia*, that FBI agents crafted “professional credentials, websites and business cards” to lend Longbow Productions the appearance of authenticity. *Id.* The Motion also states that Bundy “spoke with undercover agents . . . in a hotel room under circumstances designed to make Bundy believe that he was participating in [a] documentary by recounting his experiences surrounding the [case].” *Id.*

27. The FBI’s impersonation of a documentary film crew and its use of “Longbow Productions” footage in the *Bundy* and *Burleson* cases, *see United States v. Burleson*, No. 2:16-CR-46 (PAL) (GMN) (D. Nev.), was reported on by media outlets, including the *Las Vegas Review-Journal*, *The Washington Times*, and *The Intercept*. Townsend Decl. at ¶¶ 2–4 & Exs. A–C.

28. In or around April 2017, the documentary film *No Man’s Land*, which was produced and directed by David G. Byars (“Byars”), premiered. Byars Decl. ¶ 2.

29. On or about May 16, 2017, the documentary film *American Patriot: Inside the*

Armed Uprising Against the Federal Government (“*American Patriot*”) premiered on PBS. Ellis Decl. ¶ 2.

30. On or about May 15, 2017, *FRONTLINE* published the following news article about Longbow Productions: Abby Ellis, Sarah Childress, and Richard Rowley, *New Video Shows Undercover FBI Operation Against Bundy Family*, obtained from <https://www.pbs.org/wgbh/frontline/article/new-video-shows-undercover-fbi-operation-against-bundy-family/>, archived at <https://perma.cc/GGN5-UZVT>. Townsend Decl. ¶ 13 & Ex. L. The article appears online alongside a video clip of some of the footage shot by the FBI while it impersonated a documentary film company called “Longbow Productions.” *Id.*

31. On or about August 7, 1996, the Society for Professional Journalists published the following editorial about an FBI informant’s impersonation of a reporter for the Spokane Valley Herald in Washington during a 1996 FBI investigation: Society of Professional Journalists News, *FBI should stop using journalism as a cover for operations says SPJ*, SPJ (Aug. 7, 1996), obtained from <https://www.spj.org/news.asp?ref=462>, archived at <https://perma.cc/PXN3-S34X>. Townsend Decl. ¶ 12 & Ex. K.

32. On or about October 28, 2014, the AP published the following article about the FBI’s impersonation of an AP journalist during its investigation into a 15-year-old student suspected of sending bomb threats to administrators at his high school—Timberline High School—outside Seattle, Washington (the “Seattle/Timberline Incident”): Mike Carter, *FBI created fake Seattle Times Web page to nab bomb- threat suspect*, Seattle Times (Oct. 27, 2014), obtained from <http://www.seattletimes.com/seattlenews/fbi-created-fake-seattle-times-web-page-to-nab-bomb-threat-suspect/>, archived at <https://perma.cc/78WE-DMLS>. Townsend Decl. ¶ 8 & Ex. G.

33. On or about October 30, 2014, AP General Counsel Karen Kaiser delivered a letter to then-Attorney General Eric Holder regarding the Seattle/Timberline Incident. Townsend Decl. ¶ 18 & Ex. Q. The letter stated, in part, that the FBI's impersonation of an AP journalist "created a situation where [the AP's] credibility could have been undermined on a large scale" and that it is "improper and inconsistent with a free press for government personnel to masquerade as The Associated Press or any other news organization." *Id.*

34. A letter dated June 12, 2015 from U.S. Senator Chuck Grassley to then-FBI Director James Comey regarding, *inter alia*, the Seattle/Timberline Incident, states, in part, that "FBI agents posed as the Associated Press and created a fake AP news article in a successful phishing effort to deploy spyware[]" but that the FBI "did not alert the judge of their plan to mimic the media." Townsend Decl. ¶ 21 & Ex. T.

35. A letter dated October 30, 2014 to then-Attorney General Eric Holder from U.S. Senator Patrick Leahy regarding, *inter alia*, the Seattle/Timberline Incident, states, in part: "When law enforcement appropriates the identity of legitimate media institutions, it not only raises questions of copyright and trademark infringement but also potentially undermines the integrity and credibility of an independent press[.]" Townsend Decl. ¶ 22 & Ex. U.

36. On or about October 28, 2014, the AP published the following article about the Seattle/Timberline Incident: Gene Johnson, *FBI says it faked AP story to catch bomb suspect*, The Associated Press (Oct. 28, 2014), <http://www.ap.org/Content/AP-In-The-News/2014/APSeattle-Times-Upset-About-FBI-Impersonation>, archived at <http://perma.cc/ZH7W-XBFS>. Townsend Decl. ¶ 15 & Ex. N. That article quotes FBI special agent Frank Montoya Jr. as stating that FBI impersonation of members of the news media "happens in very rare circumstances[.]" *Id.*

37. On or about October 30, 2014, *The Stranger* published the following article about

the Seattle/Timberline Incident: Ansel Herz, *FBI Spokesperson Suggests Posing As an Associated Press Reporter Is No Different Than Posing As a Dentist*, *The Stranger* (Oct. 30, 2014, 3:03 PM), <http://slog.thestranger.com/slog/archives/2014/10/30/fbi-spokesperson-suggests-posing-as-an-associated-press-reporter-is-no-different-than-posing-as-a-dentist>, archived at <https://perma.cc/SD5N-NX8G>. Townsend Decl. ¶ 14 & Ex. M. That article quotes a spokesperson for FBI's Seattle Bureau as stating that the FBI, in connection with the Seattle/Timberline Incident, had "just used something in the style of media," and "could have pulled it off the Washington Post or New York Times." *Id.* The article also states that, when asked to provide a general number of how many times the FBI had impersonated journalists, the FBI spokesperson replied: "That's something you'd have to FOIA[.]" *Id.*

38. On or about October 31, 2014, *The New York Times* published the following article about the Seattle/Timberline Incident: Editorial, *Deceptions of the F.B.I.*, *The New York Times* (Oct. 31, 2014), <http://mobile.nytimes.com/2014/11/01/opinion/deceptions-of-thefbi.html>, archived at <https://perma.cc/N8GL-MEYD>. Townsend Decl. ¶ 5 & Ex. D. It states that the FBI's actions, "if not prohibited by the agency or blocked by courts, risk opening the door to constitutional abuses on a much wider scale." *Id.*

39. On or about December 21, 2016, *The Washington Post* published the following editorial: Joe Davidson, *FBI impersonation of journalists can be hazardous to their health*, *Wash. Post* (Dec. 21, 2016), obtained from <https://www.washingtonpost.com/news/powerpost/wp/2016/09/21/fbi-impersonation-of-journalists-can-be-hazardous-to-their-health/>, archived at <https://perma.cc/4EQP-8CL3>. Townsend Decl. ¶ 16 & Ex. O. The editorial states, *inter alia*, that "grave risks [] can grow from situations that allow people to confuse intelligence or law enforcement officials with journalists.

Like those officials, journalists go into dangerous environments, investigate controversial and illegal doings, and question unsavory characters. Being mistaken for an officer, while not having the same resources for protection — a gun and backup assistance, for example — can be hazardous to a reporter’s life.” *Id.*

40. On November 6, 2014, *The New York Times* published a letter to the editor from then-FBI Director James Comey regarding the Seattle/Timberline Incident: James Comey, Letter to the Editor, *The N.Y. Times* (Nov. 6, 2014), obtained from <http://mobile.nytimes.com/2014/11/07/opinion/to-catch-a-crook-the-fbis-use-of-deception.html>, archived at <https://perma.cc/GZ4C-N6B5>. Townsend Decl. ¶ 6 & Ex. E. Regarding the Seattle/Timberline Incident, the letter to the editor states, *inter alia*, that an “online undercover officer portrayed himself as an employee of The Associated Press, and asked if the suspect would be willing to review a draft article about the threats and attacks[.]” *Id.* The letter to the editor also states that the FBI’s impersonation of an AP editor in the Seattle/Timberline Incident “was proper and appropriate under Justice Department and FBI guidelines at the time” and that FBI impersonation of members of the media is “lawful and, in a rare case, appropriate.” *Id.*

41. On or about September 15, 2016, the DOJ Office of Inspector General (“OIG”) released the following report: *A Review of the FBI’s Impersonation of a Journalist in a Criminal Investigation* (Sept. 15, 2016), obtained from <https://oig.justice.gov/reports/2016/o1607.pdf>, archived at <https://perma.cc/PF6J-S5NE>. Townsend Decl. ¶ 7 & Ex. F (hereinafter “OIG Report”). The OIG Report states, *inter alia*, that in June 2016 the FBI issued new interim guidelines, referred to as Policy Notice (“PN”) 0907N, for impersonating member of the news media or a documentary film crew, instructing agents on new procedures they must follow

before posing as members of the news media or documentary filmmakers in connection with an investigation. *Id.*

42. The OIG Report also describes the FBI's impersonation of the AP journalist in the Seattle/Timberline Incident, stating that the undercover FBI agent sent the student suspect a link to a fake news article and photographs that had surveillance malware embedded within them. Townsend Decl. ¶ 7 & Ex. F. The OIG Report states that the suspect did not immediately respond to the agent's communications; it was only after the agent told the suspect that journalists "are not allowed to reveal their sources" that the suspect clicked the link, downloading the malware and revealing his location to the FBI. *Id.*

43. In or about Fall 2001, the Reporters Committee for Freedom of the Press published the following news article: Reporters Committee for Freedom of the Press, *Police officer poses as photographer to nab shooting suspect*, News Media and the Law Fall (Fall 2001), obtained from <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-fall-2001/police-officer-poses-photogra>, archived at <https://perma.cc/Y8L7-3AB8>. Townsend Decl. ¶ 19 & Ex. R.

44. On or about June 2000, the Committee to Protect Journalists published the following editorial about media impersonation: Committee to Protect Journalists, *CPJ concerned about second incident of police posing as journalists in hostage crisis*, CPJ Alerts (June 15, 2000), obtained from <https://cpj.org/2000/06/cpj-concerned-about-second-incident-of-police-posi.php>, archived at <https://perma.cc/FN3J-TV7K>. Townsend Decl. ¶ 20 & Ex. S.

45. *Surveillance and Espionage in a Free Society: A Report by the Planning Group on Intelligence and Security to the Policy Council of the Democratic National Committee*, (Richard H. Blum ed., 1972) details, *inter alia*, that army intelligence agents in 1967 obtained

press credentials from the New York City Police Department while investigating the actions of H. Rap Brown and Stokely Carmichael. *Id.* at 140-41.

46. On February 6, 2018, Defendants released 28 pages of records responsive to item (8) of Plaintiff's FOIA Request that reflect FBI guidelines and policies applicable to FBI agents' impersonation of members of the news media, including documentary filmmakers. Townsend Decl. ¶ 10 & Ex. I.

47. On or about August 16, 2018, the FBI and DOJ produced records responsive to Reporters Committee FOIA requests in the following cases: *Reporters Comm. for Freedom of the Press v. Federal Bureau of Investigation, et al.*, Case No. 18-cv-345 (D.D.C.) and *Reporters Comm. for Freedom of the Press v. Federal Bureau of Investigation, et al.*, Case No. 15-cv-1392 (D.D.C.). Townsend Decl. ¶ 11 & Ex. J. Included in those records was an e-mail from an FBI employee questioning whether the FBI's new policies regarding impersonation of members of the news media "appl[ies] only to future [undercover operations], or ... appl[ies] retroactively to ongoing UCOs [undercover operations] that have already been approved with the documentary film crew scenario?" *Id.* Also included in those records was an e-mail dated June 7, 2016 stating, in part, that "[t]here have been a number of communications to HQ components and the field in 2016 regarding the use of 'documentary' and similar type scenarios in undercover operations." *Id.* Also included in those records were documents referring to the "Documentary Scenario" and the "Documentary Film Crew scenario." *Id.*

48. To make the documentary film *No Man's Land*, Byars "was granted significant access by the occupiers to shoot footage for the film," and "was allowed to film with them in the occupied headquarters." Byars Decl. ¶ 3-4. "Obtaining that level of access was a time consuming and difficult process" for Byars in his view because "the occupiers tended to be

mistrustful of the media in general.” Byars Decl. ¶ 5.

49. Byars is certain that had the subjects of his film “known at the time of the occupation of the Malheur National Wildlife refuge” in January 2016 “what they now know” about the FBI’s impersonation of documentary filmmakers, he “would not have been given the same access to them that [he] was given to make *No Man’s Land*.” Byars Decl. ¶¶ 7–9. Further, had his subjects known about the FBI’s impersonation of documentary filmmakers at the time of filming, Byars “[doesn’t] know if *No Man’s Land* would have been made[.]” *Id.* at ¶ 9.

50. After *No Man’s Land* premiered, a comment was posted on the *Independent Lens* website for the film *No Man’s Land* asking if “FBI Undercover agents help[ed] with this film?” Byars Decl. ¶ 11 & Ex. A.

51. In Byars’ experience, “if an individual cannot be certain if they are speaking with a legitimate documentary filmmaker—as opposed to an undercover FBI agent—they are less likely to speak candidly, and more likely to refuse to speak at all.” Byars Decl. ¶ 12.

52. Byars believes that the FBI’s actions “will have longstanding, detrimental effects on the ability of real documentary filmmakers, like [him], to obtain access to subjects and to get them to appear on camera.” Byars Decl. ¶ 12.

53. Byars believes that “[i]f individuals involved in or connected to the occupation of the Malheur National Wildlife Refuge in 2016 had believed that [he] was an undercover FBI operative only pretending to be a documentary filmmaker, it could have put [him] in physical danger.” Byars Decl. ¶ 10.

54. Documentary filmmaker Abby Ellis (“Ellis”) worked on the documentary film *American Patriot* for *FRONTLINE*—the weekly documentary series that airs on PBS—about the 2014 standoff at Bundy’s ranch in Bunkerville, Nevada, and the 41-day occupation of Oregon’s

Malheur National Wildlife Refuge in 2016. Ellis Decl. ¶ 2.

55. While working on *American Patriot*, Ellis became aware of “rumors” that the FBI had posed as a documentary film crew. Ellis Decl. ¶ 5.

56. While working on *American Patriot*, Ellis was “asked by militia members and those connected to them whether [she] was an FBI agent,” and was told by certain individuals she interviewed for the film that they believed she was. Ellis Decl. ¶ 7.

57. Some individuals Ellis attempted to speak to for *American Patriot* would not communicate with her “because they thought [she] was an undercover FBI agent.” Ellis Decl. ¶ 7.

58. Ellis “speak[s] with people often in [her] line of work who do not immediately trust documentary filmmakers, but it was clear to [her] that at least some of the individuals [she] spoke to while working on *American Patriot* did not trust that [she] was who [she] said [she] was, and were suspicious that [she] was an undercover FBI agent.” Ellis Decl. ¶ 7.

59. Toward the end of filming for *American Patriot*, Ellis “learned from public media reports that the rumors regarding ‘Longbow Productions’ were true” and that “among other things, the FBI had created fake credentials and a website for ‘Longbow Productions,’ so that the targets of the FBI’s investigation would believe that they were speaking to a legitimate documentary film crew.” Ellis Decl. ¶ 6.

60. Ellis typically “spend[s] months conducting extensive off-the-record interviews before [she] even starts filming, to ensure that [she is] getting a fair and accurate view of who [her] subjects are,” because, in her view, “[u]nburdened access to interview subjects is necessary to make powerful, investigative documentary films.” Ellis Decl. ¶ 3.

61. In Ellis’ experience, “individuals will be less likely to speak to [her], and

especially on-camera, if they think that [she] could be an undercover FBI agent.” Ellis Decl. ¶ 10.

62. While working on *American Patriot*, Ellis was asked by potential interview subjects to provide proof that she was working with *FRONTLINE*. In some cases, even after Ellis provided proof that she was working with *FRONTLINE*, some individuals still refused to speak with her. Ellis Decl. ¶ 11.

63. Ellis “often meet[s] interview subjects alone in remote locations that [she] may have never visited before. That was true while [she] was working on *American Patriot* and, in the case of the Bundys and the often-armed militia members who supported them, many of those individuals harbored anger and distrust toward the federal government.” Ellis Decl. ¶ 9.

64. To Ellis “[i]t is unsettling to think that a subject’s false belief that [she] was an undercover FBI agent—based on the FBI’s impersonation of a documentary film crew—could have put [her] in danger.” Ellis Decl. ¶ 9.

65. By six letters—five dated April 27, 2017, and one dated May 18, 2017—David M. Hardy responded to Plaintiff’s FOIA Request on behalf of the FBI; he informed RCFP that the FBI had split the Request into four groups.

66. On June 5, 2017, RCFP submitted a timely administrative appeal challenging the FBI’s response to items (6) and (7) of its FOIA Request, arguing, *inter alia*, that items (6) and (7) of the Request “reasonably described” the records sought pursuant to 5 U.S.C. § 552(a)(3)(A). Townsend Decl. ¶ 23.

67. After June 5, 2017, Plaintiff received no further communication from Defendants concerning items (6) or (7) of the FOIA Request prior to the filing of this lawsuit. Townsend Decl. ¶ 24.

68. No records were produced to Plaintiff in response to its FOIA Request prior to the filing of the above-captioned lawsuit. Townsend Decl. ¶ 25.

Dated: September 14, 2018

Respectfully submitted,

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