No. 12-1236

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE: REQUEST FROM THE UNITED KINGDOM PURSUANT TO THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS IN THE MATTER OF DOLOURS PRICE,

UNITED STATES,

Petitioner – Appellee

v.

TRUSTEES OF BOSTON COLLEGE,

Movant – Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF OF APPELLANT TRUSTEES OF BOSTON COLLEGE

Jeffrey Swope (BBO #490760)
Nicholas A. Soivilien (BBO #675757)
EDWARDS WILDMAN PALMER LLP
111 Huntington Avenue
Boston, Massachusetts 02199-7613
(617) 239-0100
jswope@edwardswildman.com

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

No. 12-1236

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE: REQUEST FROM THE UNITED KINGDOM PURSUANT TO THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE UNITED KINGDOM ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS IN THE MATTER OF DOLOURS PRICE,

UNITED STATES,

Petitioner – Appellee

v.

TRUSTEES OF BOSTON COLLEGE,

Movant – Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF OF APPELLANT TRUSTEES OF BOSTON COLLEGE

The Government contends that Boston College's appeal is foreclosed by this court's July 6, 2012, decision in the consolidated appeals in *In re: Request from the United Kingdom Pursuant to the Treaty Between the Government of the United States of America and the Government of the United Kingdom on Mutual Assistance in Criminal Matters in the Matter of Dolours Price* (No. 11-2511) and *Moloney v. Holder* (No. 12-1159) (collectively, "*In re: Dolours Price*"). Boston

College's appeal is not foreclosed by that decision, because its appeal involves different subpoenas, for different materials, and, most importantly, presents different legal arguments, from those on which this court reached its decision in *In re: Price*.

This appeal and the appeal in *In re: Dolours Price* do, of course, both relate to confidential interview materials gathered by Boston College researchers as part of the Belfast Project that are securely stored in the Burns Library at the university. But the relevant underlying factual record in the two appeals is different in the following important respects:

- the May 5, 2011, subpoenas at issue in *In re: Dolours Price* sought production from Boston College of a narrowly focused set of materials described as "original tape recordings of any and all interviews of Brendan Hughes and Dolours Price," and documents related to the creation of those interview recordings
- there was no question what materials held in the Belfast Project archives were responsive to the May 5, 2011, subpoenas because those subpoenas defined what they sought with particularity
- Boston College produced the materials relating to Brendan Hughes without objection because he had died before the subpoenas were served

and Boston College's undertaking to keep his interview materials confidential ended at his death

- when the district court on December 27, 2011, ordered the production to the Government of the materials relating to the interviews of Dolours Price (D. 47, Boston College Opening Brief, Add. 51), the appellants in *In re: Dolours Price* – but not Boston College – appealed from that order (Docket No. 39)
- production of the materials relating to the interviews of Dolours Price was stayed not at the request of Boston College, but of the appellants in *In re: Dolours Price* (Docket Nos. 40 and 45)
- the August 4, 2011, subpoenas at issue in this appeal sought production of materials that were not narrowly focused, but instead were generically described as materials "containing information regarding the abduction or death of Mrs. Jean McConville"
- the August 4, 2011, subpoenas therefore required Boston College to review and determine which of the Belfast Project materials it holds might be considered responsive to the August 4, 2011, subpoenas
- when it filed its motion to quash the May 5, 2011, subpoenas (Docket No. 5), Boston College asked (at 16-17) as alternative forms of relief either that the district court allow Boston College to examine the

information the Government had filed with the district court under seal that described the Government's investigation to help Boston College determine whether the subpoenas were overbroad, or that the district court undertake its own *in camera* review to determine that question

- in its December 16, 2011, Memorandum and Order (D. 32, Boston College Opening Brief, Add. 1) the district court accepted the request by Boston College that the district court itself make those determinations through an *in camera* review of the interview materials of 24 Belfast Project interviewees
- after completing that *in camera* review, the district court in its January 20, 2012, Order (D. 47, Boston College Opening Brief, Add. 51) compelled production of confidential Belfast Project materials relating to eight out of the 24 interviewees' materials that Boston College had submitted to the district court *ex parte* for its *in camera* review
- this appeal by Boston College is limited to the materials for which production was compelled by the district court's January 20, 2012, order, and not the materials relating to Brendan Hughes or Dolours Price at issue in the May 5, 2011, subpoena that were the subject of this court's decision in *In re: Dolours Price*.

Because Boston College's appeal involves different subpoenas and different confidential materials at risk of compelled production, this court did not have occasion in *In re: Dolours Price* to consider the arguments Boston College presents in the context of the materials that are the subject of this appeal.

ARGUMENT

In addition to the differences in the factual record between this appeal by Boston College and the appeal this court decided in *In re: Dolours Price*, the legal rulings of this court in *In re: Dolours Price* do not resolve all of the arguments made by Boston College in this appeal. Boston College acknowledges that many of the arguments it advanced in its opening brief were not accepted by this court in *In re: Dolours Price*. But that fact does not mean that the remaining arguments Boston College advances are not viable.

In *In re: Dolours Price*, this court held that "[t]he choice to investigate criminal activity belongs to the government and is not subject to ***veto*** by academic researchers." Slip Op. 39 (emphasis added). Boston College has never contended, and does not contend in this appeal, that academic researchers have any kind of "veto" over Government investigations into possible criminal behavior. Boston College Opening Brief at 21. As a result, that basis for this court's decision in *In re: Dolours Price* does not foreclose any arguments Boston College makes in this appeal.

What Boston College does argue is that, under this court's settled precedents, when the materials sought by a subpoena are ones gathered in the course of confidential academic research, that circumstance should be taken into account by a reviewing court in determining what materials are responsive to a subpoena. That issue, which involves questions of relevance, remains wholly viable after this court's decision in *In re: Dolours Price*.

I. THIS COURT'S DECISION IN *IN RE: DOLOURS PRICE* DID NOT OVERTURN OR LIMIT THIS COURT'S PRECEDENTS THAT REQUIRE HEIGHTENED SENSITIVITY WHEN DETERMINING WHAT CONFIDENTIAL ACADEMIC RESEARCH MATERIALS MUST BE PRODUCED AS RESPONSIVE TO A SUBPOENA.

Under this court's prior precedents, culminating in *In re: Special Proceedings*, 373 F.3d 37 (1st Cir. 2004), when the materials sought by a subpoena are confidential academic research, the reviewing court is required to apply "heightened sensitivity" to assure that only materials that are in fact "directly relevant" to the subject matter of the subpoena are produced.

The Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), on which this court relied in reaching its decision in *In re: Dolours Price*, did not bar a reviewing court from considering whether materials sought by a subpoena (in that case, from a reporter) were relevant to the subject matter scope of the subpoena. On the contrary, *Branzburg* expressly acknowledged that, even in

criminal investigations, discovery is limited to information provided to "***relevant*** and material" questions. 408 U.S. at 708 (emphasis added).

In the context of materials gathered from a reporter, this court construed *Branzburg* as follows: "our own cases are in principle somewhat more protective." *In re: Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). In that decision this court established that, when reviewing materials gathered in the course of activities that raise "First Amendment concerns," "heightened sensitivity" is applied so that compelled production is limited to "directly relevant" materials. 373 F.3d at 45. In such cases, disclosure

> ***may not be compelled*** unless ***directly relevant*** to a nonfrivolous claim or inquiry undertaken in good faith, and disclosure ***may be denied*** where the ***same information is readily available from a less sensitive source***.

Id. (citations omitted, emphasis added).

The First Circuit cases that this court cited as precedent for the holding *In re: Special Proceedings* included *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998), which involved confidential academic research. While the subpoena in *Cusumano* was issued in a civil case, the subpoena in *In re: Special Proceedings* was, like the subpoenas issued to Boston College, in aid of criminal proceedings. In establishing the principles in *In re: Special Proceedings*, this court made no distinction between discovery in criminal and civil proceedings

In re: Special Proceeding was not overturned or limited by *In re: Dolours Price*. On the contrary, in *In re: Dolours Price*, this court cited *In re: Special Proceedings* several times (Slip Op. at 34-35 and 34 n.22), and gave no indication in those references to it that this court questioned, much less modified, the principles enunciated in *In re: Special Proceedings*.

Further indication that this court's decision in *In re: Dolours Price* did not foreclose the issue Boston College presents in this appeal comes from this court's careful description in *In re: Dolours Price* of what it was not deciding. This court noted that no party in *In re: Dolours Price* had raised on appeal the issue whether the district court had discretion to review the materials to determine whether they fell within the scope of the subpoena. Slip Op. at 15 n.9. Later in its opinion, this court said that it "had no occasion to pass" on the issue whether the district court could determine whether the documents were responsive to the subpoenas. *Id.* at 29. This court therefore expressly reserved judgment on the issue that remains alive in Boston College's appeal. That issue is whether the district court erred in deciding which Belfast Project interview materials are responsive to the subpoenas' request for materials "containing information regarding the abduction or death of Mrs. Jean McConville."

In re: Special Proceeding held that "heightened sensitivity" is required in reviewing confidential academic research materials to determine that they are

"directly relevant." Heightened sensitivity to determine direct relevance is not a privilege against production. Applied in the context of this case, where the subpoenas were issued pursuant to a mutual legal assistance treaty between the United States and the United Kingdom, heightened sensitivity will not interfere with the Government's interest in assisting the United Kingdom in pursuing discovery of facts relevant to that country's criminal investigation. By definition, heightened sensitivity assures that materials that are directly relevant to the subpoenas are ordered produced. Heightened sensitivity simply works to protect confidential materials gathered in academic research when those materials are not in fact responsive to a subpoena.

II. THE DISTRICT COURT FAILED TO APPLY CORRECTLY THE HEIGHTENED SCRUTINY REQUIRED BY THIS COURT.

The district court said that it applied the heightened sensitivity test this court enunciated *In re: Special Proceedings* in its review of the transcripts of 24 Belfast Project interviewees to determine what materials were relevant to the description provided in the August 5, 2011, subpoenas that sought "information regarding the abduction or death of Mrs. Jean McConville" January 20, 2012, Findings and Order at 40-41; Add. 53. (The district court referred to the test as one of "special," rather than "heightened," sensitivity, but that word choice does not appear to have been intended to modify the nature of the review the district court believed it should conduct pursuant to this court's direction in *In re: Special Proceedings*.)

As Boston College contends in Section III of its Opening Brief (at 37-54), the district court's own words and actions demonstrate that it did not apply this court's test appropriately.[*] The district court itself expressly said that it found that only "***[o]ne*** interviewee provides information responsive to the subpoena." January 20, 2012, Findings and Order, Add. 52 (emphasis added). Yet the district court compelled production of interview materials from eight different Belfast Project interviewees. Neither the district court's statement that only one interviewee's information was responsive, nor the district court's specific errors in determining direct relevance that are argued in the sealed portions of Boston College's Opening Brief (pp. 40-54), were addressed in *In re: Dolours Price*, and they obviously were not determined by that decision.

[*] The Government asserts without basis that Boston College "misstated the record" in arguing that the district court erred in applying the test. Government Brief at 22, citing Boston College Opening Brief at 34-35. The pages of the Boston College brief that the Government itself cites have the direct quotes from the district court's decision on which Boston College relies.

Conclusion

For the reasons set forth in Boston College's Opening Brief and this Reply Brief, the January 20, 2012, Findings and Order should be reversed.

Respectfully submitted,

/s/ Jeffrey Swope

Jeffrey Swope (BBO #490760)
Nicholas A. Soivilien (BBO #675757)
EDWARDS WILDMAN PALMER LLP
111 Huntington Avenue
Boston, Massachusetts 02199-7613
(617) 239-0100
jswope@edwardswildman.com

Dated: August 6, 2012

Certificate of Compliance with Fed. R. App. P. 32(a)(5)

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 2003 in 14 point Times New Roman.

/s/ Jeffrey Swope
Jeffrey Swope

Certificate Of Service

I hereby certify that on August 6, 2012, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Dina M. Chaitowitz
Randall E. Kromm
John T. McNeill
James J. Cotter, III
Eamonn S. Dornan

/s/ Jeffrey Swope
Jeffrey Swope