

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH J. DILLON

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE

Defendant.

Case No. 1:17-cv-01716-RC

FOURTH DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Federal Bureau of Investigation's ("FBI") Record/Information Dissemination Section ("RIDS"), Information Management Division ("IMD"),¹ in Winchester, Virginia. My previous declarations in this matter dated June 14, 2018, September 12, 2018, and October 24, 2018, explain my employment history and responsibilities at the FBI. *See* ECF No. 14-2, 20-1, and 23-2 respectively (hereafter referred to as "First Hardy Declaration," "Second Hardy Declaration," and "Third Hardy Declaration"). This declaration supplements, and hereby incorporates by reference, the information previously provided in my prior declarations.

(2) The FBI submits its fourth declaration to address its search for additional email records and its application of (b)(6) and (b)(7)(C) to withhold information within those records; and to verify the FBI is submitting pages from the Amerithrax Interim Major Case Summary ("IMCS") for *in camera* inspection by the Court.

¹ In May 2018, the FBI changed the name of its Records Management Division ("RMD") to IMD.

THE FBI'S SEARCH FOR ADDITIONAL EMAIL RECORDS

(3) In response to the Court's Memorandum Opinion dated January 17, 2019 (ECF No. 27), the FBI contacted subject matter experts at the Washington Field Office ("WFO") to cause another search of any locations where responsive email records should be located within the anthrax mailing ("AMERITHRAX") investigative file. RIDS provided WFO with the information provided by Plaintiff (evidence the FBI's search did not locate particular responsive emails) to assist in their search. WFO conducted an additional search of the file attachments (commonly referred to in the FBI as 1A attachments) for responsive emails. In WFO's assessment, this was the location where records would most likely be located. Through this search, WFO was able to locate binders of email records that, due to the massive size of the investigative file,² were apparently overlooked in the FBI's original search through this file. The WFO personnel combed this material for emails responsive to Plaintiff's request and sent all responsive emails located through their search to RIDS. Amidst this material were the emails specifically pointed to by Plaintiff.

(4) Upon receiving this material from WFO, RIDS processed a total of 343 pages of additional email records responsive to Plaintiff's request. Of these pages, 102 were released in part with portions being withheld pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), and 241 pages were withheld in full because they were duplicative of other documents accounted for in the FBI's production. Simultaneous to filing this declaration, the FBI provided processed copies of these additional email records to Plaintiff.

² There are over 8,000 1A attachments in the investigative file.

**APPLICATION OF EXEMPTIONS (b)(6) AND (b)(7)(C) – CLEARLY UNWARRANTED
INVASION OF PERSONAL PRIVACY**

(5) Within the additional email records, the FBI asserted Exemptions (b)(6) and (b)(7)(C) to withhold the names and/or identifying information of third parties merely mentioned, the names and/or identifying information of FBI employees, as well as the names and/or identifying information of non-FBI federal government personnel. For further explanation as to the FBI's reasoning for withholding this information, please see the First Hardy Declaration at ¶¶ 55-62. The FBI carefully reviewed this material and found no additional segregable information. The release of any additional information would result in unwarranted and clearly unwarranted invasions of individuals' personal privacy. The FBI could not see how disclosure of these individuals' names/identifying information would benefit public understanding enough to justify such violations of personal privacy.

**DOCUMENTS WITHHELD IN FULL UNDER EXEMPTION 5 (DELIBERATIVE
PROCESS PRIVILEGE) TO BE PROVIDED *IN CAMERA***

(6) Per the Court's order dated January 17, 2019, the FBI is providing an un-redacted copy of the IMCS portions in question for *in camera* review.

(7) As described in my prior declarations, The FBI considers the IMCS a deliberative process privileged product. For evidence of this, the FBI is attaching to its *in camera* filing a statement included in the introduction to the IMCS explaining how the summary is a deliberative, pre-decisional, inter/intra-agency communication. Essentially, the IMCS was created with the expectation it would remain in a zone of protection. This is because the report was an un-refined sorting of facts and an internal summary of the progress of the government's investigation in 2006, years prior to its conclusion. Many of the findings in the IMCS are not reflective of the final case summary, publically available on the Department of Justice's public

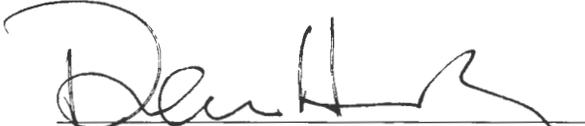
website, www.justice.gov. As stated in the First Hardy Declaration at ¶ 60, the harm in release of this information would be two-fold. First, it would show an example of internal agency deliberations being made subject to public scrutiny. This would dissuade government employees from fully participating in government deliberations, and degrade the quality of agency decision-making. Second, it would cause public confusion as it would lay bare the interim findings of the agency at a time when they were still subject to substantive change. This is especially true considering a final, public report is available to the public. Thus, the FBI believes the IMCS exemplifies the type of material that should be protected by Exemption 5, in conjunction with the deliberative process privilege.

CONCLUSION

(8) In response to Court's January 17, 2019, RIDS commenced an additional search at WFO for the missing emails pointed to by Plaintiff. In the process of looking for these particular emails, Plaintiff located additional responsive email records as well as the emails specifically pointed to by Plaintiff. The FBI processed this additional responsive material for release, withholding information pursuant to FOIA Exemptions (b)(6) and (b)(7)(C), and is providing this information to Plaintiff simultaneous to the filing of this declaration. Within these records, the FBI could not identify any additional segregable, non-exempt information available for release. Additionally, the FBI is providing an un-redacted copy of the IMCS portions in question for *in camera* inspection by the Court.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of March, 2019.



DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Information Management Division
Federal Bureau of Investigation
Winchester, Virginia