IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Kenneth J. Dillon, Plaintiff,	
v.	Civil Action No. 1:17-cv-1716 (RC)
U.S. Department of Justice, Defendant.	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant respectfully moves for summary judgment on the grounds that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law. Defendant has provided justification and explanation with an affidavit from David M. Hardy, the Section Chief of the Record/Information Dissemination Section ("RIDS"), Records Management Division ("RMD").

In support of this motion, Defendant respectfully submits the attached memorandum of points and authorities, statement of material facts not in genuine dispute, proposed order and declaration.

Respectfully submitted,

JESSIE K. LIU, D.C. BAR # 472845
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092
Civil Chief

By: /s/___________________________________
BENTON G. PETERSON, D.C. Bar # 10298
Assistant U.S. Attorney
555 Fourth St., N.W.
Washington, D.C. 20530
(202) 252-2534

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Kenneth J. Dillion, Plaintiff,	)	
v.	)	Civil Action No. 1:17-cv-1716 (RC)
U.S. Department of Justice, Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and pertains to the request of Plaintiff Kenneth J. Dillion for records from the Federal Bureau of Investigation ("FBI"), a component of the United States Department of Justice ("DOJ" or "Department"). As set forth in the accompanying *Vaughn* Index and the declaration from David M. Hardy, the FBI has conducted a reasonable search of agency records, has disclosed all non-exempt responsive records, and has not improperly withheld any responsive records from Plaintiff. Thus, there is no genuine issue as to any material fact, and defendant is entitled to judgment as a matter of law.

I. STATEMENT OF FACTS

Defendant hereby incorporates the Statement of Material Facts Not In Genuine Dispute ("SOF"), and the declarations and exhibits referenced therein, filed contemporaneously with this Memorandum. Defendant submits the declaration of David M. Hardy, Section Chief of the FBI's Record/Information Dissemination Section (RIDS), Records Management Division (RMD), based in Winchester, Virginia, to support the FBI's search for and review and processing of responsive records under FOIA. *See* Hardy Decl. ¶ 1.

II. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether a genuine issue of material fact exists, the trier of fact must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. V. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). The nonmoving party must show that the dispute is genuine and material to the case. A "genuine issue" is one whose factual dispute is capable of affecting the substantive outcome of the case and is supported by admissible evidence that a reasonably trier of fact could find for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). The burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Summary Judgment in FOIA Cases

FOIA cases are typically and appropriately decided on motions for summary judgment. *Gold Anti-Trust Action Comm., Inc. v. Bd. of Governors of Fed. Reserve Sys*., 762 F. Supp. 2d 123, 130 (D.D.C. 2011). In a FOIA action, an agency that moves for summary judgment "bears the burden of showing that there is no genuine issue of material fact, even when the underlying facts are viewed in the light most favorable to the requester." *Weisberg v. U.S. Dep't of Justice*, 705 F. 2d 1344, 1350 (D.C. Cir. 1983). An agency can meet its burden by submitting declarations or affidavits. Fed. R. Civ. P. 56(c)(1)(A). Summary judgment is justified in a FOIA lawsuit once the agency demonstrates that no material facts are in dispute and, if applicable, that each document that falls within the class requested either has been produced, is unidentifiable, or

is exempt from disclosure. *Students Against Genocide v. Dep't. of Stat*e, 257 F.3d 828, 833 (D.C. Cir. 2001).

III. ARGUMENT

A. THE FBI CONDUCTED AN ADEQUATE SEARCH OF ITS RECORDS SYSTEMS.

In responding to a FOIA request, an agency must conduct a reasonable search for responsive records. *Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990); *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1352 (D.C. Cir. 1983). An agency is not required to search every record system, but need only search those systems in which it believes responsive records are likely to be located. *Oglesby*, 920 F.2d at 68. "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was reasonably calculated to uncover all relevant documents." *Fischer*, 596 F.Supp.2d at 42 (quoting *Valencia-Lucena v. United States Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal citation and quotation marks omitted)).

Thus, an agency may conduct an adequate search under FOIA without locating any responsive records. Furthermore, even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document so long as the search was diligent and reasonable. *See Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885, 892 n.7 (D.C. Cir. 1995). Thus, "[t]he search need only be reasonable; it does not have to be exhaustive." *Miller v. United States Dep't of State*, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing *Nat'l Cable Television Ass'n v. FCC*, 479 F.2d 183, 186 (D.C. Cir. 1973)).

The burden rests with the agency to establish that it has "made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce

the information requested." *Oglesby*, 920 F.2d at 68; *see also SafeCard Services v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). An agency may prove the adequacy of its search through a reasonably detailed declaration. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982); *Goland v. CIA,* 607 F.2d 339, 352 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980); *Miller*, 779 F.2d at 1383 ("An agency may prove the reasonableness of its search through affidavits of responsible agency officials so long as the affidavits are relatively detailed, non-conclusory and submitted in good faith"). Although the agency has the burden of proof on the adequacy of its search, the "affidavits submitted by an agency are 'accorded a presumption of good faith,'" *Carney v. United States Dep't of Justice*, 19 F.3d 807, 812 (2d Cir.), *cert. denied*, 513 U.S. 823 (1994) (quoting *SafeCard Services*, 926 F.2d at 1200).

Thus, once the agency has met its burden regarding the adequacy of its search, the burden shifts to the requester to rebut the evidence by a showing of bad faith on the part of the agency. *Miller*, 779 F.2d at 1383. A requester may not rebut agency affidavits with purely speculative allegations. *See Carney*, 19 F.3d at 813; *SafeCard Services*, 926 F.2d at 1200; *Maynard v. CIA*, 986 F.2d 547, 559-60 (1st Cir. 1993). As discussed below, the FBI met the reasonableness standard in conducting its search for records and is therefore entitled to summary judgment.

1. The FBI Central Records System

In processing requests from individuals seeking information on themselves, the FBI begins by searching its Central Records System ("CRS"). The CRS consists of a numerical sequence of files, called FBI "classifications," which are organized according to designated subject categories. Hardy Decl. ¶ 38. The broad array of CRS file classification categories include types of criminal conduct and investigations conducted by the FBI, as well as categorical subjects pertaining to counterterrorism, intelligence, counterintelligence, personnel, and administrative matters. *Id.*

The general indices to the CRS are the index or "key" to locating records within the enormous amount of information contained in the CRS. *Id.* ¶ 39. The CRS is indexed in a manner which meets the FBI's investigative needs and priorities, and allows FBI personnel to reasonably and adequately locate pertinent files in the performance of their law enforcement duties. *Id.* The general indices are arranged in alphabetical order and comprise an index on a variety of subject matters to include individuals, organizations, events, or other subjects of investigative interest that are indexed for future retrieval. *Id.* The entries in the general indices fall into two category types:

> (a) <u>Main entry</u>. This entry pertains to records indexed to the main subject(s) of a file, known as "main file" records. The "main" entry carries the name of an individual, organization, or other subject matter that is the designated subject of the file.
>
> (b) <u>Reference entry</u>. This entry, or a "cross-reference," pertains to records that merely mention or reference an individual, organization, or other subject matter that is contained in a "main" file record about a different subject matter.

Id. FBI Special Agents ("SA") and/or designated support personnel may index information in the CRS by individual (persons), by organization (organizational entities, places, and things), and by event (*e.g.,* a terrorist attack or bank robbery). *Id.* ¶ 40.

a. The FBI's Search for Records Responsive to Plaintiff's Requests was Adequate.

The FBI conducted reasonable and adequate searches for records responsive to Plaintiff's requests. The Hardy declaration establishes that the FBI has made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested, and therefore has conducted a search of all locations that are likely to yield documents responsive to Plaintiff's FOIA requests. Thus, the FBI's search for records was adequate. *See Nation Magazine*, 71 F.3d at 892 n.7; *Miller*, 779 F.2d at 1383 ("'the search need only be reasonable; it does not have to be exhaustive.'") (citing *Nat'l Cable Television Ass'n v.*

FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

An agency's search for records in the context of a FOIA case is adequate if it was "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999). A search is not inadequate merely because it failed to "uncover every document extant," *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); a search is inadequate only if the agency fails to "show, with reasonable detail, that the search method . . . was reasonably calculated to uncover all relevant documents." *Oglesby v. Dep't of Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

To justify its search for purposes of summary judgment, an agency may prove the adequacy of its search through a reasonably detailed declaration. *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982). Once the agency has shown "that it conducted 'reasonably calculated' searches," the burden is on the plaintiff to identify specific additional places the agency should now search. *Hodge v. FBI*, 703 F.3d 575, 580 (D.C. Cir. 2013).

According to David Hardy, RIDS conducted a CRS index search for responsive records employing the UNI application of ACS and a Sentinel index search by using the following search terms: "Bruce Edward Ivins," "Interim Major Case Summary," and "Amerithrax." Hardy Decl. ¶ 45. The search included a three-way phonetic breakdown of "Bruce Edward Ivins" which covered "Ivins, Bruce, Edward," "Ivins, Bruce, E" and an on-the nose search for "Ivins, Bruce, Edward." *Id.* A CRS search encompassed records maintained in FBIHQ as well as all FBI's field offices. *Id.* The search resulted in records indexed under Bruce Edward Ivins and Amerithrax, and determined responsive to Plaintiff's two FOIA requests. *Id.*

i. FOIA Request Number 1329350

By letter dated May 15, 2015, Plaintiff submitted a Freedom of Information Act ("FOIA") request for the Interim Major Case Summary ("IMCS") which is a 2,000 page report on the Amerithrax investigation. Statement of Material Facts ("SOF") ¶ 1. In a letter dated May 26, 2015, the Federal Bureau of Investigation ("FBI") acknowledged receipt of the FOIA request and assigned FOIA Request Number 1329350. *Id.* ¶ 2. The FBI informed Plaintiff records responsive to his request were previously processed for another requester and were available on the FBI's public website, http://vault.fbi.gov. *Id.*

By letter dated June 1, 2015, Plaintiff filed an appeal with DOJ OIP stating "the Interim Major Case Summary" is not in the Vault. . ." *Id.* ¶ 3. In a letter dated June 23, 2015, DOJ OIP acknowledged receipt of the appeal and assigned it number AP-2015-03626. *Id.* ¶ 4. By letter dated August 10, 2015, DOJ OIP remanded Plaintiff's request to the FBI for a search for responsive records. *Id.* ¶ 5.

In a letter dated January 7, 2016, the FBI provided Plaintiff a cost estimate for processing the responsive records and requested written confirmation of his agreement to pay fees. *Id.* ¶ 12. The FBI also notified Plaintiff of the opportunity to reduce the scope of his request. *Id.* By letter dated January 28, 2016, Plaintiff confirmed his willingness to pay estimated duplication and international shipping fees. *Id.* ¶ 13. Additionally, Plaintiff requested receipt of the records on CD as well as through email attachments. *Id.*

On March 31, 2016, Plaintiff sent a message through the eFOIA portal indicating his willingness to pay associated duplication fees. *Id.* ¶ 14. Various email exchanges between Plaintiff and the FBI dated April 3, 2016 through April 11, 2016, confirmed Plaintiff's interest in

narrowing the scope of his request to material on Bruce Ivins and the IMCS' table of contents. *Id.* ¶ 15.

In a letter dated April 11, 2016, the FBI acknowledged the email exchanges and confirmed the scope was narrowed to thirty-eight pages which included material on Bruce Ivins and the table of contents. *Id.* ¶ 16. In a letter dated January 30, 2018, the FBI notified Plaintiff that they had concluded its review of the IMCS' table of contents and determined the records were categorically exempt from disclosure. *Id.* ¶ 18.

In response to FOIA Number 1329350, the FBI conducted a CRS search using the term "Interim Major Case Summary" and located no records. Hardy Decl. ¶ 47. The FBI then conducted an index search using the term "Amerithrax" which resulted in one investigative file. *Id.* The FBI electronically reviewed the investigative file and was unable to locate the IMCS. *Id.* Next, the FBI contacted the subject matter experts at the Washington Field Office and requested their assistance. *Id.* The Washington Field Office reviewed the physical investigative file and was unable to locate the IMCS. *Id.* The Washington Field Office reached out to the FBI's Laboratory Services in Quantico, Virginia, who located the IMCS and sent it to RMD for processing. *Id.*

ii. FOIA Request Number 1327397

By letter dated April 18, 2015, Plaintiff submitted a FOIA request seeking records on the 2001 anthrax mailings. SOF ¶ 20. More specifically, Plaintiff sought "all email messages, laboratory notebooks, paper and computer files, and information about meetings and telephone conversations in September and October, 2001 of Dr. Bruce Ivins." *Id.* In a letter dated April 27, 2015, the FBI acknowledged receipt of the FOIA request and assigned FOIA Request Number 1327397. *Id.* ¶ 21. The FBI informed Plaintiff records responsive to his request were

previously processed for another requester and were available on the FBI's public website, http://vault.fbi.fov. *Id*.

By letter dated June 19, 2015, Plaintiff filed an appeal with DOJ OIP stating the FBI "has never released any records responsive to my request. . ." *Id*. ¶ 22. Plaintiff indicated the FBI needs to release the following records: Ivan's emails to or from various named individuals, Notebook 4010 as well as relevant pages from Notebooks 3655, 3945 and 4251, paper and computer files including files from Ivan's computer, information from meetings Ivan attended, as well as his telephone and credit card records. *Id*.

By letter dated November 24, 2015, DOJ OIP remanded Plaintiff's request to the FBI for a search for responsive records. *Id*. ¶ 24. In a letter dated April 15, 2016, the FBI notified Plaintiff records responsive to his request were previously processed under the FOIA, and enclosed for Plaintiff a CD containing six pages of previously processed documents and a copy of an Explanation of Exemptions sheet. *Id*. ¶ 25. The FBI also stated "[a]dditional records potentially responsive to your subject may exist" and to "submit a new FOIA request if [Plaintiff] would like the FBI to conduct a search of the indices to our Central Records System." *Id*.

By letter dated June 6, 2016, Plaintiff filed an appeal with DOJ OIP indicating that the FBI released six pages of records previously processed under a separate FOIA request. *Id*. ¶ 26. The FBI indicated Plaintiff should submit a new FOIA request if [he] would like the FBI to conduct a search of the indices to the Central Records. *Id*. Plaintiff stated he refused to submit another FOIA request that would go to the back of the queue. *Id*.

In a letter dated December 22, 2016, Plaintiff further described the desired records and asked for two specific pieces of evidence - "Ivan's emails to or from Patricia Fellows and Mara

Linscott; and Laboratory Notebook No. 4282." *Id.* ¶ 29. By letter dated January 30, 2017, the FBI confirmed receipt of Plaintiff's request and indicated it was searching the indices to the Central Records System for information responsive to the request, and indicated that Plaintiff was considered a general requester and would be charged applicable search and duplication fees. *Id.* ¶ 30. In a letter dated December 19, 2017, the FBI notified Plaintiff it had reviewed seven pages of records on Bruce Ivins and released all pages either in full or in part. *Id.* ¶ 31.

By letter dated January 30, 2018, the FBI notified Plaintiff it had reviewed an additional ninety-eight pages of records regarding Bruce Ivins' laboratory notebook and released all pages either in full or in part. *Id.* ¶ 32.

In response to FOIA Number 1327397, the FBI conducted an index search in ACS and Sentinel using the words "Bruce Edward Ivins." Hardy Decl. ¶ 47. The FBI located an investigative file and reviewed the material for email communications between Bruce Ivins and specifically named individuals as well as Notebook No. 4282 as requested by Plaintiff. *Id.*

In sum, the FBI conducted an adequate search of its agency files for records responsive to Plaintiff's FOIA requests. The FBI processed and released 105 pages of Bruce Ivins' notebook and email communications. Hardy Decl. ¶ 103. The FBI asserted a (b)(5) categorical denial in conjunction with the deliberative process privilege for 22 pages of the IMCS. *Id.* Within the documents released in part, the FBI asserted FOIA Exemptions (b)(6) and (b)(7)(C) to protect information the release of which would constitute unwarranted and clearly unwarranted invasions of personal privacy. *Id.* Additionally, the FBI preserved underlying exemptions (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E) should the court deny the FBI's (b)(5) categorical denial of the IMCS. *Id.* The FBI determined there is no further non-exempt information that can be reasonably segregated and released.

B. THE FBI PROPERLY APPLIED THE FOIA EXEMPTIONS.

"[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). The *Vaughn* declaration submitted by Hardy provide the Court and Plaintiff with an explanation of the FBI's justification for withholding records in full or in part pursuant FOIA Exemptions 1, 3, 5, 6, 7(C), (E), 5 U.S.C. §§ 552 (b)(1), (b)(3), (b0(5), (b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E). Because no non-exempt responsive records have been improperly withheld from Plaintiff, summary judgment should be entered in favor of defendant.

1. Sufficiency of the Agency's *Vaughn* Declarations.

Summary judgment in FOIA cases may be awarded "based solely on the information provided in [agency] affidavits or declarations when the affidavits or declaration describe 'the justifications for non-disclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *Fischer*, 596 F.Supp.2d at 42 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). Typically, the agency's declarations or affidavits are referred to as a *Vaughn* index, after the case of *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). The purpose of a *Vaughn* index is "to permit adequate adversary testing of the agencies claimed right to an exemption." *NTEU v. Customs*, 802 F.2d 525, 527 (D.C. Cir. 1986) (citing *Mead Data Central v. United States Dep't of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), and *Vaughn*, 484 F.2d at 828). Thus, the index

must contain "an adequate description of the records" and "a plain statement of the exemptions relied upon to withhold each record." *NTEU*, 802 F.2d at 527 n.9.

In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), David Hardy executed a declaration to support defendant's motion for summary judgment. Hardy is well-qualified to explain the FBI's justifications for its withholdings. In his official capacity as Section Chief of RIDS, he supervises approximately 243 employees who staff a total of 12 FBIHQ units and two field operations service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN Government Act of 2007, the OPEN FOIA Act of 2009, and the FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. Hardy Decl. ¶ 2. Hardy's responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13526, and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. *Id*. Hardy has been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13526, §§ 1.3 and 3.1. *Id*.

The Hardy declaration demonstrates that the FBI carefully reviewed responsive records, and properly withheld information subject to FOIA Exemptions. Hardy Decl. ¶ 47-48. The *Vaughn* declarations provide the Court and Plaintiff with an explanation of the FBI's justification for withholding records in full or in part pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). *Id*. ¶ 48. Therefore, the *Vaughn* declarations are sufficient.

2. The FBI Properly Applied FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E).

The FBI, as stated, has withheld responsive records under FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E). The coded categories used by the FBI to explain and justify its assertion of each FOIA exemption are summarized in ¶ 48 of the Hardy Declaration. The Hardy declaration also provides a detailed explanation of the FBI's rationale for withholding each particular category of information under the cited FOIA exemption. Hardy Decl. ¶¶ 51-100. The Court should therefore enter summary judgment in favor of Defendant as to its assertion of each of these exemptions to withhold responsive material.

i. Exemption 1

Exemption 1 provides that the disclosure provisions of the FOIA do not apply to matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *Morley v. CIA*, 508 F.3d 1108, 1123 (D.C. Cir. 2007); *see also Students Against Genocide v. Dep't of State*, 257 F.3d 828, 833 (D.C. Cir. 2001). Here, the FBI is preserving Exemption (b)(1) to protect foreign government information classified at the "Secret" level. Hardy Decl. ¶ 81.

David Hardy personally and independently examined the information withheld from Plaintiff pursuant to Exemption 1 and determined that the information satisfied the requirements of E.O. 13526, the Executive Order which governs the classification and protection of information that affects the national security,[1] and that the information complied with the various substantive and procedural criteria of the Executive Order. Hardy Decl. ¶ 73. In this case, all information that Hardy determined to be classified is marked at the "Secret" level because the unauthorized

[1] E.O. 13526, § 6.1(cc) defines "National Security" as "the national defense or foreign relations of the United States."

disclosure of this information reasonably could be expected to cause serious damage to national security. *Id.* (citing E.O. 13526 § 1.2 (a)(2)).

The Court of Appeals has adopted a "deferential posture in FOIA cases regarding the 'uniquely executive purview' of national security." *Larson v. Department of State*, 565 F.3d 857, 865 (D.C. Cir. 2009). In *Larson*, the Court reiterated that it has "'consistently deferred to executive affidavits predicting harm to the national security, and [has] found it unwise to undertake searching judicial review'" of the assertions in such affidavits. *Id.* (quoting *Ctr. For Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 927 (D.C. Cir. 2003)). The Court stated, moreover, that "[i]f an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise, . . . the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Id.*

As defendant has satisfied this standard, the Court should uphold the Agency's withholding of records under Exemption 1. "The [agency]'s arguments need only be both 'plausible' and 'logical' to justify the invocation of a FOIA exemption in the national security context." *ACLU/DOD*, 628 F.3d at 624 (quoting *Wolf v. CIA*, 473 F.3d 370, 374–75 (D.C. Cir. 2007)); *accord Morley*, 508 F.3d at 1124 ("[T]he text of Exemption 1 itself suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified."). Each of the documents withheld under Exemption 1 are identified in the Hardy Declaration, along with a description of the information contained in the document as well as the classification applicable to the document. *See infra* at nn. 7-9.

Specifically, Hardy determined that the classified information continues to warrant classification at the "Secret" level and is exempt from disclosure pursuant to E.O. 13526, § 1.4(b) because it contains foreign government information (Hardy Decl. at ¶¶ 75-81), § 1.4(c) because it

concerns intelligence activities (including covert action), intelligence sources or methods, or cryptology (*id.* at ¶¶ 82-84); and § 1.4(d) because it concerns foreign relations or foreign activities of the United States, including confidential sources (*id.* at ¶¶ 85-86). Thus, the sworn declaration provided by the FBI provides "a plausible assertion that information is properly classified." *See Morley*, 508 F.3d at 1124. That is sufficient to grant summary judgment. *See id.*

ii. Exemption 3

FOIA Exemption 3 covers matters that are "specifically exempted from disclosure by statute" provided that statute either "(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(A). Thus, the sole issue for decision "is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Morley v. CIA,* 508 F.3d 1108, 1126 (D.C. Cir. 2007).

Here, the FBI has identified the following categories of information withheld under Exemption 3, Hardy Decl. ¶ 87, and explained its justification for invoking this exemption, Hardy *Id.* ¶ 88-91.

Category (b)(3)	**INFORMATION PROTECTED BY STATUTE**
(b)(3)-1	Information Specifically Exempted by 50 U.S.C. § 3024(i)(1) (National Security Act of 1947) [cited in conjunction with (b)(1)]
(b)(3)-2	Information Specifically Exempted by 18 U.S.C. § 3123 (Pen Registers)

(a) National Security Act of 1947

The FBI withheld information pursuant to Section 102A(i)(1) of the National Security Act of 1947 (NSA), as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), 50 U.S.C. § 3024(i)(1), which provides that the Director of National Intelligence (DNI) "shall protect from unauthorized disclosure intelligence sources and methods." On its face, this federal statute leaves no discretion to agencies about withholding from the public information

about intelligence sources and methods, and therefore the protection afforded to intelligence sources and methods by 50 U.S.C. § 3024(i)(1) is absolute. *See CIA v. Sims*, 471 U.S. 159 (1985).

In order to fulfill its obligation of protecting intelligence sources and methods, the DNI is authorized to establish and implement guidelines for the Intelligence Community (IC) for the classification of information under applicable laws, Executive Orders, or other Presidential Directives, and for access to and dissemination of intelligence. 50 U.S.C. §§ 3024(i)(1). The FBI is one of 17 member agencies comprising the IC, and as such must protect intelligence sources and methods. Hardy Decl. ¶ 89.

As described above, Congress enacted the NSA, as amended by the IRTPA, to protect the IC's sources and methods of gathering intelligence. Disclosure of such information presents the potential for individuals to develop and implement countermeasures, which would result in the loss of significant intelligence information relied upon by national policymakers and the IC. Given that Congress specifically prohibited the disclosure of information pertaining to intelligence sources and methods used by the IC as a whole, David Hardy determined that the FBI's intelligence sources and methods would be revealed if any of the withheld information is disclosed to plaintiff, and that the FBI is therefore prohibited from disclosing the information under 50 U.S.C. § 3024(i)(1). Hardy Decl. ¶ 90. Accordingly, this information was properly withheld pursuant to Exemption 3, based on 50 U.S.C. § 3024(i)(1). *Id.*

(b) Pen Register Statute

The FBI applied this exemption in conjunction with 18 U.S.C. § 3123(d), the Pen Register Act, which protects from disclosure information pertaining to the existence of a pen register or a trap and trace device. Hardy Decl. ¶ 91. Pursuant to the statute, a court order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that the

order be sealed until otherwise ordered by the court. 18 U.S.C. § 3123(d)(1). Courts have recognized the Pen Register Statute as one that falls within the ambit of Exemption 3. *See Jennings v. FBI*, No 03-1651, slip op. at 11-12 (D.D.C. May 6, 2004); *Riley v. FBI*, No. 00-2378, 2002 U.S. Dist. LEXIS 2632, at *5-6 (D.D.C. Feb. 11, 2002); *Manna v. DOJ*, 815 F. Supp. 798, 812 (D.N.J. 1993), *aff'd on other grounds*, 51 F.3d 1158 (3d Cir. 1995). Under the FOIA, an agency has no discretion to release any record covered by an injunction, protective order, or court seal which prohibits disclosure. *See GTE Sylvania, Inc. v. Consumers Union*, 445 U.S.375, 386-387 (1980); *Robert Tyrone Morgan v. U.S. Department of Justice*, 923 F.2d 195 (D.C. Cir. 1991).

Here, the FBI withheld information under Exemption 3 consisting of the details surrounding FBI Special Agents making arrangements to set up and install a pen register and trap and trace device during a criminal investigation. Hardy Decl. ¶ 91. The FBI properly applied Exemption 3 in this case because Hardy determined that the FBI is precluded from disclosing such information pursuant to 18 U.S.C. § 3123 (*id.*). *Sennett v. Department of Justice*, -- F.Supp.2d --, 2013 WL 4517177 at * 8 (D.D.C. 2013).

iii. Exemption 5

Exemption 5 of FOIA allows the withholding of inter- or intra-agency records that would not be available by law to a party other than an agency in litigation with the agency. 5 U.S.C. § 552(b)(5). Pursuant to Exemption 5, the three most frequently invoked privileges are the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. *Berger v. IRS*, 487 F. Supp. 2d 482, 498-500 (D.N.J. 2007) (citing *Manna v. Dep't of Justice*, 815 F. Supp. 798, 814 (D.N.J. 1993)). In order to come within the deliberative process privilege, an agency document must be both pre-decisional and deliberative. *Manna I*, 815 F. Supp. at 814. A document is pre-decisional when it is received by the decision maker on a

specific matter prior to rendering a decision on that matter; and a document is deliberative when it reflects the give-and-take of the consultative process. *Id*.

Here, the FBI withheld in full the table of contents from the Interim Major Case Summary under the deliberative process privilege. Hardy Decl. ¶ 65. The table of contents is twenty-two (22) pages and lists each section of the IMCS. *Id*. The table of contents is part and parcel to the entire IMCS. *Id*. It is an interim investigative summary drafted in 2006 midway through the investigation. *Id*. A statement at the beginning of the IMCS indicates it is privileged and should not be disseminated outside the FBI, U.S. Postal Services, or the Department of Justice. *Id*. It also states the IMCS contains analyses, evaluations, assessments, and conclusions that are pre-decisional and deliberative in nature. *Id*. The IMCS was drafted in 2006, four (4) years before the FBI concluded its investigation and issued its final investigative report in 2010. *Id*. The final report in 2010 consisted of ninety-two (92) pages and detailed the government's evidence, findings, and conclusions. *Id*. In contrast, the IMCS is a preliminary case summary drafted midway through the anthrax investigation and contains information, analyses, and suppositions based on the limited and incomplete evidence available at the time. *Id*. It contains opinions and analyses based on inter-agency communications during the anthrax investigation. *Id*. Therefore, the IMCS, including its table of contents, is inherently deliberative. The inter-agency deliberations are relevant, substantive, and within the last 25 years which meets the threshold established by the FOIA Improvement Act of 2016. *Id*. Additionally, facts within the IMCS are inextricably intertwined with inter-agency opinions, recommendations, analyses, and conclusions. *Id*. The FBI is unable to segregate the facts from the deliberations without resulting in harm. *Id*.

The FBI determined releasing any part of the 2006 IMCS could reasonably be expected to cause harm. *Id*. Harm in releasing the information is two-fold. First, releasing any

information from the IMCS would inhibit inter-agency communications and stifle information sharing among federal agencies in joint investigations. *Id.* ¶ 66. The IMCS contains assessments, opinions, recommendations, and analyses by the FBI and USPS based on incomplete evidence partially through the investigation. *Id.* Releasing information from the IMCS would inhibit the free flow of information, assessments, and ideas expressed by FBI and other federal government employees. *Id.* Federal employees would be reluctant to offer their candid opinions and assessments for purposes of drafting an interim case summary if they knew the same premature conclusions and assessments would later be publicly released. *Id.* The hesitance created by releasing deliberative material would degrade the quality of inter-agency communications and deprive federal employees the ability to freely communicate opinions, assessments, and analyses. *Id.* Second, releasing any part of the IMCS would disclose information which does not reflect final agency conclusions. *Id.* When deliberating on a project, FBI and USPS personnel must consider multitudinous facts, sort, evaluate, and analyze them in order to make recommendations and compile an interim report. *Id.* The process requires agency personnel to examine, consolidate, and eliminate information to create a cohesive product such as the interim case summary. *Id.* Releasing pre-decisional information like the 2006 IMCS would create public confusion because the FBI already released to the public a final investigative report in 2010. *Id.* The public's confusion would come from the incomplete, conflicting, and inaccurate information in the IMCS because it does not reflect the FBI's ultimate investigative findings. *Id.*

Thus, release of the pre-decisional, deliberative, and non-public IMCS would stifle future FBI deliberations and inter-agency cooperation, and would ultimately create public confusion. Id. ¶ 67. The FBI could find no reason to segregate and release information from the 2006 IMCS

considering the harms explained above and the fact the FBI released to the public a final report in 2010. *Id*. The pre-decisional and deliberative nature of the IMCS readily falls under the deliberative process privilege and is exempt from disclosure pursuant to Exemption 5. Thus, the FBI withheld the IMCS' table of contents pursuant to Exemption 5 under the deliberative process privilege as well as other underlying FOIA Exemptions.

iv. Exemption 6

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. Fed. Deposit Ins. Corp.*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010).

The Supreme Court has found that "[i]ncorporated in the 'clearly unwarranted' language is the requirement for ... [a] 'balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.'" *Lepelletier*, 164 F.3d at 46 (citing *United States Dep't of Defense v. FLRA*, 964 F.2d 26, 29 (D.C. Cir. 1992) (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372 (1976)). In determining how to balance the private and public interests involved, the Supreme Court has sharply limited the notion of "public interest" under the FOIA: "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know

'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. Dep't of Justice*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). Information that does not directly reveal the operation or activities of the federal government "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters*, 489 U.S. at 775; *see also Beck*, 997 F.2d at 1492. Further, "something, even a modest privacy interest, outweighs nothing every time." *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); *but see Lepelletier*, 164 F.3d at 48 (in extraordinary circumstance where the individuals whose privacy the government seeks to protect have a "clear interest" in release of the requested information, the balancing under Exemption 6 must include consideration of that interest).

As to the withholdings under this exemption, the practice of the FBI is to assert Exemption (b)(6) in conjunction with (b)(7)(C), and defendant therefore discusses the FBI's assertion of these exemptions jointly below. This approach is appropriate because, although the balancing test for (b)(6) uses a "would constitute a clearly unwarranted invasion of personal privacy" and the test for (b)(7)(C) uses the lower standard of "could reasonably be expected to constitute an unwarranted invasion of personal privacy," the analysis and balancing required by both exemptions is sufficiently similar to warrant a consolidated discussion. The privacy interests are balanced against the public's interest in disclosure under the analysis of both exemptions. Accordingly, we will discuss the FBI's justification of the remaining withholdings below in connection with its assertion of Exemption 7(C).

v. Exemption 7

Exemption 7 of FOIA protects from disclosure "records or information compiled for law enforcement purposes," but only to the extent that disclosure of such records would cause an enumerated harm. 5 U.S.C. § 552(b)(7); *see FBI v. Abramson*, 456 U.S. 615, 622 (1982). In order to withhold materials properly under Exemption 7, an agency must establish that the records at issue were compiled for law enforcement purposes, and that the material satisfies the requirements of one of the subparts of Exemption 7. *See Pratt v. Webster*, 673 F.3d 408, 413 (D.C. Cir. 1982). In assessing whether records are compiled for law enforcement purposes, the "focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. Department of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations and internal quotations omitted).

"[T]he term 'law enforcement purpose' is not limited to criminal investigations but can also include civil investigations and proceedings in its scope." *Mittleman v. Office of Personnel Management*, 76 F.3d 1240, 1243 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1123 (1997) (citing *Pratt,* 673 F.2d at 420 n.32). When, however, a criminal law enforcement agency invokes Exemption 7, it "warrants greater deference than do like claims by other agencies." *Keys v. United States Dep't of Justice*, 830 F.2d 337, 340 (D.C. Cir. 1987) (citing *Pratt*, 673 F.2d at 418). A criminal law enforcement agency must simply show that "the nexus between the agency's activity . . . and its law enforcement duties" is "'based on information sufficient to support at least 'a colorable claim' of its rationality.'" *Keys*, 830 F.2d at 340 (quoting *Pratt*, 673 F.2d at 421).

Here, the FBI clearly satisfies the standard for invoking Exemption 7 of the FOIA because of its law enforcement mission. *See Rugiero v. United States Dep't of Justice*, 257 F.3d 534, 550 (6th Cir. 2001) (explaining that the "Court has adopted a per se rule" that applies not only to

criminal enforcement actions, but to "records compiled for civil enforcement purposes as well."). Furthermore, the various records at issue in this case were compiled for criminal law enforcement purposes during the course of the FBI's performance of its law enforcement mission and the investigation of criminal activities. Hardy Decl. ¶ 97-100. Thus, there can be no doubt that the underlying criminal investigations fall within the law enforcement duties of the FBI. Accordingly, the information readily meets the threshold requirement of Exemption (b)(7).

(a) Exemption 7(C) in conjunction with Exemption 6

In *Fischer*, because the Court determined that the FBI properly withheld information under FOIA Exemption 7(C), the Court did "not address defendant's claim that the information was also properly withheld under Exemption 6." 596 F. Supp. 2d at 47 n.17. The Court's reasoning applies as well to the information withheld in this case under these exemptions. Here, the FBI has identified the following categories of information withheld under Exemption 6 and 7(C), Hardy Decl. ¶ 92, and explained its justification for invoking this exemption, Hardy Decl. ¶¶ 93-95.

Category (b)(6) and (b)(7)(C)	CLEARLY UNWARRANTED INVASION OF PRIVACY AND UNWARRANTED INVASION OF PERSONAL PRIVACY
(b)(6)-1 and (b)(7)(C)-1	Names and/or Identifying Information of Third Parties Merely Mentioned
(b)(6)-3 and (b)(7)(C)-3	Names and/or Identifying Information of Non-FBI Federal Government Personnel
(b)(6)-4 and (b)(7)(C)-4	Names and/or Identifying Information of Third Parties of Investigative Interest

Exemption 7(C) of the FOIA exempts from mandatory disclosure information compiled for law enforcement purposes when disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The Supreme Court affirmed the broad scope of Exemption 7(C) in *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004). Accordingly, once the agency has demonstrated that the records were compiled for law enforcement purposes, the Court must next consider whether the release of information

withheld "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). This determination necessitates a balancing of the individual's right to privacy against the public's right of access to information in government files. *See, e.g., Reporters Committee*, 489 U.S. at 776-780; *Oguaju v. United States*, 288 F.3d 448 (D.C. Cir. 2002), *vacated* 124 S.Ct. 1903 (2004), *reinstated*, 378 F.3d 1115 (D.C. Cir.), *modified*, 386 F.3d 273 (D.C. Cir. 2004); *Beck v. Department of Justice*, 997 F.2d 1489, 1491 (D.C. Cir. 1993). The plaintiff bears the burden of establishing that the "public interest in disclosure is both significant and compelling in order to overcome legitimate privacy interests." *Perrone v. FBI*, 908 F. Supp. 24, 26 (D.D.C. 1995) (citing *Senate of Puerto Rico v. Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987)). *Accord SafeCard Services*, 926 F.2d at 1206 (public interest in disclosure of third party identities is "insubstantial").

Consequently, in order to trigger the balancing of public interests against private interests, a FOIA requester must (1) "show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake," and (2) "show the information is likely to advance that interest." *Boyd v. Criminal Division of United States Dep't of Justice,* 475 F.3d 381, 366, (D.C. Cir. 2007) (citing *Favish*, 541 U.S. at 172). It is the "interest of the general public, and not that of the private litigant" that the Court considers in this analysis. *Ditlow v. Schultz*, 517 F.2d 166, 171-72 (D.C. Cir. 1975).

Finally, only where the requester can produce meaningful evidence – "more than a bare suspicion" – which would cause a reasonable person to believe that the government had engaged in impropriety should the Court even consider balancing the privacy interests against the public interest in disclosure. *Favish*, 124 S. Ct. at 1581. Plaintiff here cannot allege any such impropriety.

Thus, after balancing the substantial privacy interests of law enforcement agents and other individuals against the non-existent public interest, the FBI has properly asserted Exemptions 6 and 7(C) to protect the identity of a number of categories of individuals identified in law enforcement records. Hardy Decl. ¶¶ 92-95. First, the names non-FBI Federal personnel (*see id.* ¶ 94) who work on criminal investigations have traditionally been protected against release by Exemption 7(C). *Davis v. U.S. Dept. of Justice*, 968 F.2d 1276, 1281 (D.C. Cir. 1992); *Lesar v. United States Dep't of Justice*, 636 F.2d 472, 487-488 (D.C. Cir. 1980); *Fischer*, 596 F.Supp.2d at 46-47; *Ray v. FBI*, 441 F. Supp. 2d 27, 34-35 (D.D.C. 2006); *Truesdale v. U.S. Dept. of Justice*, No. 03-1332, 2005 WL 3294004, at *6 (D.D.C. Dec. 5, 2005). Releasing their identities and information pertaining to these individuals would place each of these persons in such a position that they may suffer undue invasions of privacy, harassment and humiliation from disclosure of their identities in a law enforcement investigatory file. *See Keys*, 510 F.Supp.2d at 128 ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.").

Second, "[t]he names and identities of individuals of investigatory interest to law enforcement agencies [*see* Hardy Decl. ¶ 95]" *See Russell*, 2004 WL 5574164 at *5; *Coleman v. FBI*, 13 F.Supp.2d. 75, 80 (D.D.C. 1998) ("The categorical withholding of any law enforcement records that identify third parties has been repeatedly upheld") (citations omitted). The disclosure of the identities of third-party individuals who were of investigative interest to law enforcement because of their criminal activities is also protected because these third parties could face reputational harm if their identities were disclosed and they could also face acts of reprisal. *Russell*

v. FBI, No. 03-0611, 2004 WL 5574164, at *6 (D.D.C. Jan. 9, 2004); *Blanton v. Dep't of Justice*, 63 F.Supp.2d 35, 46 (D.D.C. 1999). Nondisclosure is also appropriate because the "[d]isclosure of [the third parties'] identities would not shed light on the FBI's performance o[f] its statutory duties to enforce the law." *Russell*, 2004 WL 5574164, at *6.

Third, individuals who provide information to law enforcement authorities, like the law enforcement personnel themselves, have protectable privacy interests in their anonymity (*see* Hardy Decl. ¶ 93). *Computer Professionals for Social Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996); *Nation Magazine*, 71 F.3d at 893; *Lesar*, 636 F.2d at 487-88; *Fischer*, 596 F.Supp.2d at 47-48; *Farese v. United States Dep't of Justice*, 683 F. Supp. 273, 275 (D.D.C. 1987). Accordingly, the privacy interests of third parties mentioned in law enforcement files are "substantial," while "[t]he public interest in disclosure [of third-party identities] is not just less substantial, it is insubstantial." *SafeCard Services*, 926 F.2d at 1205; *Ray*, 441 F.Supp.2d at 35 ("Exemption 7(C) recognizes that the stigma of being associated with a law enforcement investigation affords broad privacy rights to those who are connected in any way with such an investigation . . . ."). Our court of appeals has held "categorically" that "unless access to names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure." *SafeCard Services*, 926 F.2d at 1206.

(b) Exemption 7(E)

Exemption 7(E) of the FOIA provides protection for all information compiled for law enforcement purposes when release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk

circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *see also Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) ("the importance of deterrence explains why the exemption is written in broad and general terms" and further explains why the exemption looks "not just for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk"). The first clause of Exemption 7(E) affords "categorical" protection for "techniques and procedures" used in law enforcement investigations or prosecutions. *Smith v. Bureau of Alcohol, Tobacco and Firearms*, 977 F. Supp. 496, 501 (D.D.C. 1997) (citing *Fisher v. United States Dep't of Justice*, 772 F. Supp. 7, 12 n. 9 (D.D.C. 1991), *aff'd*, 968 F.2d 92 (D.C. Cir. 1992)). Here, the FBI has identified the following categories of information withheld under Exemption 7(E), Hardy Decl. ¶¶ 96-97, and explained its justification for invoking this exemption, Hardy Decl. at ¶¶ 98-100.

Category (b)(7)(E)	**LAW ENFORCEMENT INVESTIGATIVE TECHNIQUES AND PROCEDURES**
(b)(7)(E)-1	Information Concerning the Targets, Dates, Installation, Locations, Monitoring, and Type of Devices Utilized in Surveillance
(b)(7)(E)-2	Collection and Analysis of Information
(b)(7)(E)-3	Sensitive Investigative Techniques Used to Conduct National Security Investigations

The FBI properly withheld information under Exemption 7(E) because this exemption affords categorical protection to techniques and procedures used in law enforcement investigations; it protects techniques and procedures that are not well-known to the public as well as non-public details about the use of well-known techniques and procedures. *See* 5 U.S.C. § 552(b)(7)(E). *First,* the FBI protected information concerning the targets, dates, installation, locations, monitoring, and types of devices utilized in surveillance. Hardy Decl. ¶ 98. Disclosure of non-public details about when, how, and under what circumstances the FBI conducts surveillance would allow current and future subjects of FBI investigations to develop and utilize countermeasures to defeat or avoid surveillance; thus, rendering the investigative technique useless

to the FBI and other law enforcement agencies. *Id*. Therefore, the FBI properly applied FOIA Exemption 7(E) to protect information concerning the installation, locations, monitoring, and types of devices used in surveillance and present within the responsive records.

Second, the FBI protected methods that the FBI uses to collect and analyze the information that it obtains for investigative purposes. *Id.* ¶ 99. The release of this information would disclose the identity of methods used in the collection and analysis of information, including how and from where the FBI collects information and the methodologies employed to analyze it once collected. *Id.* The relative utility of these techniques could be diminished if the actual techniques were released in this matter. *Id.* This in turn would facilitate the accumulation of information by investigative subjects regarding the circumstances under which the specific techniques were used or requested and the usefulness of the information obtained. *Id.* Release of this type of information would enable criminals to educate themselves about the techniques employed for the collection and analysis of information and therefore allow these individuals to take countermeasures to circumvent the effectiveness of these techniques and to continue to violate the law and engage in intelligence, terrorist, and criminal activities. *Id.* The FBI has properly withheld this information pursuant to FOIA Exemption 7(E).

Third, the FBI protected sensitive investigative techniques used to conduct national security investigations. Due to the nature of these techniques, releasing information about them or discussing them in greater detail here would reveal their very nature, and when and how they are utilized by the FBI. Hardy Decl. ¶ 100. This would enable criminals targeted by these techniques to predict and circumvent their use by the FBI. *Id*. Additionally, the exemption protects internal investigative procedures and releasing it to the public could disclose confidential investigative information. *Id*. The information would allow criminals to gain

insight into the FBI's internal procedures for handling national security investigations and could impact its ability to effectively investigative criminal matters of this kind. *Id*. Therefore, the FBI preserves Exemption 7(E) to protect sensitive investigative techniques.

C. ALL REASONABLY SEGREGABLE MATERIAL HAS BEEN RELEASED TO PLAINTIFF.

Under the FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977); *Fischer*, 596 F.Supp.2d at 44. To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007). Moreover, the agency is not required to "commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content." *Mead Data*, 566 F.2d at 261, n.55.

Here, the FBI has performed adequate and reasonable searches for responsive records; has processed all such records and released all reasonably segregable non-exempt information from documents responsive to plaintiff's FOIA requests that are subject to FOIA; and has properly denied access to records and information pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E).

See 5 U.S.C. §§ 552 (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). During the processing of Plaintiff's requests, each responsive page was individually examined to identify non-exempt information that could be reasonably segregated from exempt information for release. Hardy Decl. ¶ 101. All segregable information was released to Plaintiff. *Id.* As demonstrated herein, the only information withheld by the FBI consists of information that would trigger reasonably foreseeable harm to one or more interests protected by the cited FOIA Exemptions. *Id.* From a thorough review, the FBI identified 127 responsive pages: 25 page released in full, 80 pages released in part and 22 pages withheld in full. *Id.* ¶ 102.

In sum, after extensive review of the documents at issue, David Hardy determined that there is no further non-exempt information that can be reasonably segregated and released without revealing exempt information. Accordingly, defendant is entitled to summary judgment.

IV. CONCLUSION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the FBI hereby moves for summary judgment because there is no genuine issue as to any material fact and the FBI is entitled to judgment as a matter of law. The FBI has provided all responsive documents and properly withheld information authorized under FOIA. In addition, by using a proper method of search, the FBI conducted an adequate search for responsive documents.

For the reasons set forth above, Defendant respectfully requests that this Court grant judgment in favor of the FBI.

Respectfully submitted,

JESSIE K. LIU, D.C. BAR # 472845
United States Attorney
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092
Civil Chief

By: /s/__________________________________
BENTON G. PETERSON, D.C. Bar # 102984
Assistant U.S. Attorney
555 Fourth St., N.W.
Washington, D.C. 20530
(202) 252-2534