UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KENNETH J. DILLON, PLAINTIFF vs. DEPARTMENT OF JUSTICE, DEFENDANT	)	Civil Action No. 1:17-cv-1716 (RC)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

*cases primarily relied upon

Statutes

Rules

I. Introduction

The anthrax mailings of 2001 led to the largest criminal investigation in American history. During the course of the investigation, the FBI focused on U.S. Army scientist Dr. Bruce Ivins as the most likely suspect. Under interrogative and surveillance pressure, Dr. Ivins committed suicide in 2008. In its Amerithrax Investigative Summary, the FBI identified Dr. Ivins as the individual who sent the anthrax-laced mail and closed the case in 2010.

Plaintiff, historian Kenneth J. Dillon, argues that Dr. Ivins prepared the anthrax to test vaccines against ex-Soviet threats and that it was then stolen from a university institute and mailed by al Qaeda (http://www.scientiapress.com/jdey-anthrax-mailings). To obtain more information about the Amerithrax investigation, Mr. Dillon submitted two FOIA requests in 2015, which the FBI assigned tracking numbers #1327397 and #1329350.

The FBI's initial Motion for Summary Judgment was denied and it has now renewed its motion. For the reasons that follow, the Court should deny the FBI's renewed motion and grant Mr. Dillon's cross-motion.

II. The FBI's search for records was inadequate

A. Background

Mr. Dillon's FOIA request #1327397 sought four categories of records "in regard to the 2001 anthrax mailings" for the time period of "September and October, 2001": Dr. Bruce Ivins' "email messages," "laboratory notebooks," "paper and computer files," and "information about meetings and telephone conversations." (Hardy Decl. Ex. S.) The FBI disregarded the specifics of this request and responded by directing Mr. Dillon to the FBI's public website, which contains a small sampling of documents from the vast investigative file on the 2001 anthrax mailings.

(Hardy Decl. Ex. T.) Believing (correctly, as it turns out) that the FBI possessed additional responsive records, Mr. Dillon administratively appealed the agency's response. (Hardy Decl. Ex. U.) In his appeal, Mr. Dillon gave examples of specific records in each category of records requested which he knew to exist, provided that they had not been destroyed. (Hardy Decl. Ex. U.) These examples included the identity of individuals known to have been emailing with Dr. Ivins; four of Dr. Ivins's laboratory notebooks, identified by number; and a description of the computer seized from Dr. Ivins which contained responsive files. (Hardy Decl. Ex. U.) Mr. Dillon made clear in his appeal, however, that locating these records was necessary, but not sufficient to fulfill his request. With regard to Dr. Ivins's notebooks, for example, although Mr. Dillon identified four by number, he explicitly stated, "To be fully responsive . . . *all* pages of *all* relevant notebooks for all dates should be released." (Hardy Decl. Ex. U) (emphasis added). Similarly, after noting that his request encompassed records contained in a specific Macintosh computer, Mr. Dillon went on to state that he sought "*all* paper and computer files, including on *other* work and personal computers used by Ivins." (Hardy Decl. Ex. U) (emphasis added).

Mr. Dillon's appeal resulted in a remand to the FBI for additional searches. (Hardy Decl. Ex. W.) On remand, the FBI released six pages of records, all of which had been previously processed. (Hardy Decl. Ex. X, Y.) In a cover letter accompanying the release, the FBI noted that "[a]dditional records potentially responsive to your subject may exist," but directed Mr. Dillon to "submit a new FOIA request" if he wanted the FBI to conduct a search of its Central Records System. (Hardy Decl. Ex. X.) Mr. Dillon administratively appealed the FBI's response, which again ignored the specifics of his FOIA request. (Hardy Decl. Ex. X, Y.) In this second administrative appeal, Mr. Dillon again provided examples of specific documents responsive to

the categories of records he requested, this time adding even more detail about these documents. (Hardy Decl. Ex. Y.)

In response to Mr. Dillon's second administrative appeal, the Office of Information Policy (OIP) affirmed the adequacy of FBI's search. (Hardy Decl. Ex. AA.) The affirmance letter assured Mr. Dillon that OIP had "carefully consider[ed] [his] appeal" and that the FBI "conducted an adequate, reasonable search for responsive records subject to the FOIA," which included a new search undertaken by the FBI on remand. (Hardy Decl. Ex. AA.)

All of this left Mr. Dillon puzzled. He was certain that responsive records existed – at least at one time – because their existence was publicly known. (Hodes Decl. Ex. A.) Yet the FBI could not locate these records after multiple searches, and the office charged with ensuring the FBI's compliance with FOIA concluded that the FBI's searches had been reasonable and adequate. (Hardy Decl. Ex. AA.) These circumstances pointed to the conclusion that the FBI possessed these records at one time, but no longer does. Hesitant to jump to the conclusion that the FBI had destroyed these and other related records, however, Mr. Dillon pressed his request to the FBI yet again. (Hardy Decl. Ex. BB.) In an attempt to confirm or refute his assumption that the records had been destroyed, Mr. Dillon asked the FBI to conduct a "test" in which the FBI would engage in further searches in order to determine whether records have "slipped through the cracks." (Hardy Decl. Ex. BB.) Rather than asking the agency to again search for all responsive records, Mr. Dillon focused on two sets of specific records that he was certain that a reasonable search would have uncovered if they had not been destroyed. (Hardy Decl. Ex. BB.) These two sets of records were "Ivins's emails to or from Patricia Fellows and Mara Linscott," and "Laboratory Notebook No. 4282." (Hardy Decl. Ex. BB.)

The FBI unilaterally construed Mr. Dillon's letter as a new FOIA request which was limited in scope to the two sets of records he asked the FBI to focus on. (Hardy Decl. Ex. CC.) After not receiving a substantive response from the FBI for over eight months, Mr. Dillon filed the present suit. During the course of litigation, the FBI located Laboratory Notebook No. 4282 and one email. (Seidel Decl. ¶ 54) By finding these records, the FBI answered, at least in part, the question of whether the requested documents had been destroyed or simply overlooked during the FBI's earlier searches. Some of the originally requested records had indeed "slipped through the cracks," although the status of other records remained unknown.

The FBI's initial post-litigation search, however, remained inadequate. Mr. Dillon, through counsel, advised the government's attorney that there were additional unreleased emails that were publicly known to exist, and provided five examples. (Hodes Decl. Ex. A.) He demanded to know whether these or other unreleased emails had been destroyed, as well as a description of the universe of emails that remained available. (Hodes Decl. Ex. A.)

The FBI did not provide Mr. Dillon with any of the additional information he sought, and instead moved for summary judgment, arguing that its search had been adequate. [ECF dkt: 14.] In opposing the FBI's motion, Mr. Dillon cited his earlier letter identifying unproduced emails that are publicly known to exist. This Court agreed with Mr. Dillon that in pointing to the unproduced emails he "has produced sufficient countervailing evidence to create a genuine dispute of material fact" as to the adequacy of the search. (Mem. Op. at 11.) This Court noted that there were several reasons why the FBI might not have located the emails, including the possibility that the emails fell outside the scope of the request, were in the possession of another agency, or were destroyed. (Mem. Op. at 12-13.) Because "DOJ never substantively addressed Dillon's evidence of unproduced emails," this Court was unable to determine whether the FBI's

search was inadequate, or alternatively whether the records were not produced because of one these alternative explanations. (Mem. Op. at 14.)

After this Court denied the FBI's motion for summary judgment, the agency determined that it had overlooked binders of email records that contained potentially responsive records. (Seidel Decl. ¶ 57.) The FBI processed all of the emails in the binders, but the only responsive emails it claims to have located were the ones which Mr. Dillon had previously referenced. (Seidel Decl. ¶ 57.) The FBI has now renewed its motion for summary judgment as to the adequacy of the search. For the reasons set forth below, the renewed motion should be denied and Mr. Dillon's cross-motion should be granted.

B. Argument

i. Location of other emails

The FBI initially assumed that it "only possessed select emails ingested into its records during the FBI's investigation of Ivins[.]" (Seidel Decl. ¶ 56.) This assumption proved erroneous, however. After conducting "an additional search of the file attachments," the FBI's Washington Field Office located "binders of email records" entitled "Review of Compaq Presario Hard Drive, [Redacted Name], 2001 Ivins and [Redacted Name] Email Exchanges." (Seidel Decl. ¶ 57 & n.10.) Given the revelation that the FBI possesses more of Ivins's emails than just a few "select emails ingested into its records," the question for this Court is whether all the potentially responsive emails in the FBI's possession exist in the binder entitled "Review of Compaq Presario Hard Drive, [Redacted Name], 2001 Ivins and [Redacted Name] Email Exchanges." The Court should conclude that potentially responsive records exist in other locations and that the FBI is therefore not entitled to summary judgment.

As an initial matter, it should be noted that the FBI continues to obfuscate the locations of all of Ivins's emails in its possession. Despite repeated requests from Mr. Dillon that the FBI account for the "universe" of such emails, the agency has steadfastly refused. As a result, Mr. Dillon and the Court face the unnecessarily complicated task of evaluating whether the FBI searched through all of Ivins's emails without all of the relevant information. The FBI has not indicated whether it maintains other binders of Ivins's emails or whether other types of "1A attachments," of which there are over 8,000, contain Ivins's emails.

What is clear, however, is that the FBI has not searched the most obvious location where Ivins's emails would be located, which is on the computers that were seized from him. Thus far, the FBI has only searched locations in the Amerithrax investigative file where "emails ingested by the FBI from an outside source" would be located. (Seidel Decl. ¶ 57.) Yet there is no indication that the FBI ingested into its records *all* of Ivins's emails in its possession.

According to the Amerithrax report summary, "The Task Force conducted searches of home and work computers and examined e-mails." (Ex. 1 at 6). It was "these and several other investigative efforts," according to the report, that "demonstrated that Dr. Bruce Ivins committed the crime." (Ex. 1 at 6.) It is certainly possible that the FBI ingested all emails from both Ivins's home and work computers which supposedly demonstrate that Dr. Bruce Ivins committed the crime, although the record is silent on this issue. Mr. Dillon's FOIA request, however is broader than just emails, and he is particularly interested in emails showing that Dr. Ivins did *not* commit the crime. Accordingly, it was not appropriate for the FBI to conclude that the 1A file would contain all records potentially responsive to Mr. Dillon's request. The FBI should be ordered to search both the home and work computers of Dr. Ivins which were seized, or any mirror images created therefrom. Alternatively, if the Court is not prepared to order such a search at this time,

the Court should at least require the FBI to respond to Mr. Dillon's repeated requests that it provide a description of the universe of Dr. Ivins's emails, including a list of his home, office, and laboratory computers as well as mirror images of them that might have contained his emails. Without this additional information, Mr. Dillon and the Court cannot reach the conclusion that the FBI's searches were reasonable.

ii. The scope of Mr. Dillon's request

Mr. Dillon's initial request covered far more than Ivins's emails to or from Patricia Fellows and Mara Linscott and Laboratory Notebook No. 4282. (Hardy Decl. Ex. S.) It sought Dr. Bruce Ivins's email messages, laboratory notebooks, paper and computer files, and information about meetings and telephone conversations records, all in regard to the 2001 anthrax mailings, for the time period of September and October 2001. (Hardy Decl. Ex. S.)

Mr. Dillon's December 22, 2016 letter to the FBI could be said to have narrowed the request in the sense that the "test" he proposed was limited to two categories of records which he was certain must exist. (Hardy Decl. Ex. BB.) Mr. Dillon's letter, however, made clear that he framed his request in this manner because he was "largely persuaded by [Mr. Hardy's] responses by the DOJ responses to [his] appeal that FBI does not possess not-yet-released documents on the activities of Bruce Ivins in September and October, 2001." (Hardy Decl. Ex. BB.) Mr. Dillon understandably believed the responses of the FBI and DOJ to be assertions made in good faith that the FBI possessed no further potentially responsive records, save for two categories of records as to which he was not convinced the FBI did not possess (e.g., Ivins's emails to or from Patricia Fellows and Mara Linscott, and Laboratory Notebook No. 4282.) Yet the fact remains that the FBI *did* possess additional records potentially responsive to Mr. Dillon's initial request.

As it turns out, the FBI possessed *eight thousand* file attachments containing potentially responsive records that it did not search until this Court denied the agency's motion for summary judgment.

Mr. Dillon's "test" letter also indicated that he had only "provisionally" adopted the assumption that additional potentially responsive records were not in the FBI's possession because they had been destroyed. (Hardy Decl. Ex. BB.) His letter further stated that he wanted to test his assumption "before proceeding further," suggesting that he intended a positive result of the "test" to entail "proceeding further" on his initial request.

In its initial Motion for Summary Judgment, the FBI did not characterize Mr. Dillon's "test" letter as a narrowing of his initial request. Rather, both Defendant's memorandum and the accompanying FBI declaration referenced Mr. Dillon's letter as having "further described the desired records and asked for two specific pieces of evidence[.]" (Hardy Decl. ¶ 32; Def. MSJ Mem. at 10.) The first mention of narrowing came in Mr. Dillon's Cross-Motion for Summary Judgment, filed by his previous counsel. (Pl. CMSJ Mem. at 3-4) ("A frustrated plaintiff eventually greatly narrowed his requests.") At the time this brief was filed, however, the FBI had not yet revealed that there were other locations where potentially responsive records might exist. Accordingly, Mr. Dillon's brief focused on the portion of the request as to which he could provide countervailing evidence that the FBI's search was inadequate. Mr. Dillon's previous counsel had "asked the FBI to explain the universe of emails located and also if any of these records had been destroyed," (Pl. CMSJ Mem. at 5), but when Defendant failed to comply, Mr. Dillon was left without the ability to point to any particular location where documents responsive to his initial request might be found.

Once it became clear that the FBI did in fact possess additional potentially responsive records, Mr. Dillon was in a position to press the full scope of his initial request, which he did. He clarified in his reply brief that his request "also was for additional forensic evidence pertaining to Dr. Bruce Ivins for the months of September and October of 2001," and explained that "there may be a misunderstanding arising from what is at issue in the requests made to the FBI." (Pl. CMSJ Reply at 2 & n.1.) Mr. Dillon's "test" letter "didn't state that his request (1327397) of April 18, 2015 was no longer at issue as plaintiff himself stated in his December 22, 2016 letter that he was merely testing the assumption that someone had destroyed responsive records." (Pl. CMSJ Reply at 2.)

In its surreply, the FBI took issue with Mr. Dillon's argument that the FBI should have searched for "forensic evidence." (Def. Surreply at 2.) The FBI noted that in neither Mr. Dillon's original request nor in his subsequent letter did "Plaintiff request[] forensic evidence." (Def. Surreply at 2.) However, the FBI acknowledged that Mr. Dillon's initial request 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." (Def. Surreply at 2.) The FBI's surreply did not claim that Mr. Dillon's initial request had been abandoned or was no longer at issue, but instead limited its arguments to showing why the agency had met its initial burden of conducting an adequate search. (Def. Surreply at 2.)

This Court's Memorandum Opinion denying the FBI's motion for summary judgment referred to Mr. Dillon having "narrowed his request substantially[.]" (Mem. Op. at 5.) However, the Court did not explicitly rule on the question of whether Mr. Dillon's initial request remained at issue. At any rate, regardless of how Mr. Dillon's prior counsel first characterized the December 22, 2016 letter, this Court should not deem that letter to be a waiver of the full scope

of the initial request. The FBI and DOJ letters, along with Defendant's Motion for Summary Judgment, led Mr. Dillon to believe that there were no other locations where potentially responsive records might exist and that the particular documents he focused on had simply fallen through the cracks. Once it became clear that there were other locations which contained records potentially responsive to Mr. Dillon's initial request, he quickly asserted his right to have the FBI search these locations for records responsive to the initial request. (Pl. CMSJ Reply at 2.) Since it was the representations of the FBI and DOJ that led Mr. Dillon to submit the "test" letter, it would be inequitable to limit the scope of Mr. Dillon's request now that it has turned out that Defendant's representations were made based on an erroneous factual premise regarding the existence of locations which might contain additional responsive records.

Even if the Court believes that Mr. Dillon is effectively changing his position as to whether the "test" letter constituted a narrowing of the scope of his request, he is not estopped from doing so as a matter of law. The D.C. Circuit has explained that because judicial estoppel "looks toward cold manipulation and not unthinking or confused blunder, it has never been applied where plaintiff's assertions were based on fraud, inadvertence, or mistake." *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980). Far from attempting to manipulate the Court, Mr. Dillon's prior counsel made clear in his reply brief – before the Court could have issued any ruling – that the entire scope of the first request was at issue.

The doctrine of equitable estoppel is also inapplicable because it requires that the party asserting it "have acted in reliance upon his opponent's prior position, and must now face injury if a court were to permit his opponent to change positions." *Id.* at 937. Here, Defendant did not act in reliance on any prior position of Mr. Dillon that the original request had been narrowed. Indeed, Mr. Dillon's characterization of the request as having been narrowed post-dates the

FBI's filing of its motion for summary judgment, and the FBI could obviously not have relied on a position that had not yet been taken. Additionally, the FBI would not be prejudiced in any way by permitting Mr. Dillon to take the position that the full scope of his initial request is at issue. The FBI was granted leave to file a surreply, at which point it had the opportunity to respond to Mr. Dillon's clarification that the full scope of the initial request remained at issue.

Given that the FBI improperly narrowed the scope of Mr. Dillon's FOIA request #1327397, it should be required to conduct further searches. The scope of these additional searches, however, will depend on the nature of the FBI's other holdings. Accordingly, Mr. Dillon renews his request that the FBI "provide descriptions of its holdings of Ivins's laboratory notebooks, paper and computer files, phone calls, and meetings for September and October, 2001," as set forth in his response to the Defendant's Notice of Submission. [ECF: 34-1 at 2-3].

III. The FBI's redactions were improper

A. Background

With respect to the records processed in response to FOIA request #1327397, the FBI has withheld information pursuant to Exemptions 6 and 7(C). The FBI asserts that the information to which these exemptions have been applied consists of the names and/or identifying information of third parties merely mentioned, FBI special agents/support personnel, and non-FBI federal government personnel. The FBI used coded categories 6/7(C)-1, -2, and -3, respectively, to reference its justifications for withholding. (Seidel Decl. ¶ 61.) The FBI also asserted Exemptions 6 and 7(C) as to the names and/or identifying information of third parties of investigative interest, using coded category 6/7(C)-4. (Seidel Decl. ¶ 61.)

As to Mr. Dillon's FOIA request #1329350 for the IMCS, the FBI has asserted Exemptions 1, 3, 5,[1] 6, 7(C), 7(D), and 7(E). (Seidel Decl. ¶ 61.) Exemption 1 is claimed pursuant to E.O. 13526 § 1.4(c), which covers intelligence activities, sources, and methods. (Seidel Decl. ¶ 61.) The FBI's reliance on Exemption 3 is in conjunction with the National Security Act, the Pen Register Act, and Fed. R. Crim. Pro. Rule 6(e). (Seidel Decl. ¶ 61.) The FBI's assertion of Exemption 5 is made under to the deliberative process privilege. (Seidel Decl. ¶ 61.) Exemption 7(D) is claimed with respect to an implied assurance of confidentiality. (Seidel Decl. ¶ 61.) The FBI's reliance on Exemptions 6, 7(C), and 7(E) are based on various coded categories which correspond to FBI-created justifications. (Seidel Decl. ¶ 61.)

B. Argument

i. Exemptions 6/7(C)-1, Third parties merely mentioned

Defendant's brief never specifically addresses the agency's justification for withholding the names and/or identifying information of third parties merely mentioned. Instead, its brief focuses on the subcategory of "individuals who provide information to law enforcement authorities." (Def. Mem. at 29.) This subcategory, however, will obviously involve different privacy and public interests than individuals who are merely mentioned in FBI records for other reasons. Yet nothing in the FBI's *Vaughn* declaration suggests that the agency applied Exemptions 6 and 7(C) to "individual[s] who provide information to law enforcement authorities" (Def. Mem. at 29).

[1] The FBI reasserts Exemption 5 as to the entirety of the IMCS (Seidel Decl. ¶ 76), but this Court has already denied the FBI's motion for summary judgment on that basis. Since the FBI offers no new evidence in support of its argument that the IMCS is exempt in its entirety, Mr. Dillon will not reiterate in this brief his arguments already made and accepted by the Court.

Defendant does, however, rely on the D.C. Circuit's decision in *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991) 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." (Def. Mem. at 29). Yet as this citation makes clear, the *Safecard* rule applies only to "private individual," and not to federal employees. Here, the FBI's *Vaughn* declaration never avers that the names and/or identifying information redacted under the coded category for Exemption 6/7(C)-1 involve private individuals. To the contrary, the FBI describes the withheld information as being contained in "Bruce Ivins['s] laboratory notebook and within the emails between him and his colleagues." Since Dr. Ivins worked at a federal agency, his work notebook and emails with his "colleagues" are likely to contain names and/or identifying information of at least some other federal employees. To the extent that the FBI has included in its withholding under coded category Exemption 6/7(C)-1 mere mentions of both private individuals and federal employees, its *Vaughn* submission is deficient. The use of a categorical approach to withholding is appropriate only where a "case fits into a genus in which the balance characteristically tips in one direction," such as the category of "names and addresses of private individuals appearing in files," as set forth in *Safecard*. 926 F.2d at 1206. Unlike private individuals, "the status of the individuals . . . as federal employees diminishes their privacy interests . . . because of the corresponding public interest in knowing how public employees are performing their jobs[.]" *Stern v. FBI*, 737 F.2d 84, 92 (D.C. Cir. 1984). As explained in the following section of this brief, at least some of the names and/or identifying information of the federal employees mentioned in the documents at issue were not properly withheld.

ii. Exemptions 6/7(C)-2 and -3, FBI and non-FBI federal employees

Unlike private citizens, the names of federal employees are not categorically exempt under Exemptions 6 and 7(C). For example, in *Stern*, the D.C. Circuit concluded that the names of some federal employees who were censured could be withheld under Exemption 7(C), while the names of other federal employees could not. 737 F.2d at 92-93. The D.C. Circuit explained that "[b]ecause the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, *per se* rules of nondisclosure based upon . . the type of individual involved . . . are generally disfavored." *Id.* at 91. Thus, the *Stern* court's determination as to the applicability of Exemption 7(C) to the federal employees at issue in that case was "based on the specific facts reflected in the record." *Id.* at 93. Given that the names of some federal employees may be withheld under Exemption 7(C) while others may not, it cannot be said that the use of a categorical approach to nondisclosure of the names of federal employees "would yield a uniform answer across the entire proffered category, regardless of any variation among the individual records or persons falling within it." *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 675 (D.C. Cir. 2016).

iii. Exemptions 6/7(C)-4, third parties of investigative interest

In the Amerithrax report, the Department of Justice announced that "[o]thers with access to RMR-1029 have been ruled out[.]" (Ex. 1 at 33.) Although a university in the southwest was ruled out by the DOJ as the source of the anthrax spores used in the mailings, Mr. Dillon's analysis of the case suggests that the anthrax spores used in the mailings were stolen from a different university institute in Virginia and mailed by al-Qaeda. As explained below, the public

interest in disclosing the names and/or identifying information about third parties decisively outweighs the privacy interests at stake.

The D.C. Circuit has specifically addressed a situation in which the FBI withheld information about third parties of investigative interest under Exemption 7(C) and the plaintiff argued that disclosure of the requested information would help exonerate an individual who was accused of committing multiple homicides. Weighing the privacy and public interests, the D.C. Circuit held, "Although [the third parties] have a significant interest in avoiding any association with a criminal investigation into a quadruple homicide, the public also has a compelling interest in knowing whether the FBI is refusing to disclose information that could help exonerate [the suspect]. Weighing the competing interests, we conclude that the balance tilts decidedly in favor of disclosing whether the FBI's files contain information linking [the third parties] to the FBI's investigation of the killings." *Roth v. United States DOJ*, 642 F.3d 1161, 1181 (D.C. Cir. 2011) (internal citation omitted).

The public interest here is similar to that in *Roth*. There is a compelling public interest in knowing whether the FBI has information linking the university to a theft of anthrax, as this information could exonerate Ivins. The privacy interest of the third parties in this case, in contrast, is far less than that in *Roth*. There is no reason to believe that disclosure of the withheld names and/or identifying information of individuals at the university would implicate them as the mailers of the anthrax spores. Rather, the link to the mailings, if any, would only implicate them as unwitting middlemen to an al-Qaeda plot to obtain anthrax spores. At the same time, the release of the withheld information about the university is the only way to determine whether Ivins was innocent.

Even if the Court finds that the privacy interest outweighs any public interest as to the names of individuals associated with the university, the FBI must still segregate and release information which could not reasonably be expected to identify specific individual(s) affiliated with the university.

iv. Exemption 1-2 and Exemption 3-1, National Security Act

The FBI's declarant attempts to justify the agency's reliance on Exemption 3 in conjunction with the National Security Act by averring that "the FBI's intelligence sources and methods are present within the responsive records and disclosing the information would reveal intelligence sources and methods which is (sic) prohibited from disclosure under 50 U.S.C. § 3024(i)(1)." (Seidel Decl. ¶ 91.) Similarly, with respect to Exemption 1, the FBI avers that "[t]he classified information details intelligence activities and information gathered or compiled by the FBI about a specific individual of national security interest." (Seidel Decl. ¶ 88.) It is hard to imagine more conclusory statements than ones which posit that "disclosing the information would reveal intelligence sources and methods" because "intelligence sources and methods" are present within the documents or because "[t]he classified information details intelligence activities and information[.]" *See Serbian E. Orthodox Diocese v. CIA*, 458 F. Supp. 798, 802 (D.D.C. 1978) ("[A] boilerplate claim that information discloses sources and methods is insufficient to sustain a defendant's burden to show that information is exempt"); *Founding Church of Scientology, Inc. v. Nat'l Sec. Agency*, 610 F.2d 824, 831-32 (D.C. Cir. 1979); *Schwartz v. DOD*, Case No. 15-CV-7077 (ARR) (RLM), 2017 U.S. Dist. LEXIS 2316 at *47 n.5, 2017 WL 78482 (E.D.N.Y. Jan. 6, 2017) ("accord[ing] no weight" to "conclusory statements" such as "The information at issue . . . concerns . . . 'intelligence sources or methods'' and "[T]he redacted information concerns intelligence sources or methods") (alterations in original).

The FBI's declarant also notes that at the outset of the investigation, the FBI did not know whether the culprits were foreign and that the use of biological weapons was seen as a threat to the national security of the United States. (Seidel Decl. ¶ 91.) However, these statements do not shed any additional light on the specific question of whether the information at issue relates to intelligence "sources," "methods," both, or neither. Based on the current record, the FBI has not met its burden under Exemption 3 in conjunction with the National Security Act.

v. Exemption 3-2, Pen Register Act

In *Labow v. United States DOJ*, 831 F.3d 523, 528 (D.C. Cir. 2016), the plaintiff "argue[d] that the Pen Register Act permits the government to withhold only a sealed pen register order itself. As a result, he contends, the statute does not justify withholding all information appearing in (or associated with) a sealed pen register order, even if the same information is contained in other responsive records beyond the order. In that event, Labow submits, because the Pen Register Act would not call for sealing the other records, Exemption 3 should not shield those other records from FOIA's disclosure mandate." *Id*. The D.C. Circuit generally agreed with this argument. ("As a general matter, we agree with Labow's reading of the Pen Register Act.") *Id.* Construing the Pen Register Act, the D.C. Circuit observed, "By its terms, the statute provides for sealing of a pen register order itself, not sealing of any and all information the order may contain even if appearing in other documents." *Id.*

Here, the FBI is not withholding a sealed pen register order, only information pertaining to the "existence or use" of a pen register or trap and trace device "and/or" the "existence of an investigation" involving a pen register. (Seidel Decl. ¶ 93.) As an initial matter, the FBI declarant's use of the phrase "and/or" leaves open the question of whether the withheld material discloses the use of a pen register at all. If the redacted pages only refer to the existence of an

investigation involving a pen register, but do not reveal that the investigation involved a pen register, then disclosure would reveal nothing about the contents or even the existence of a pen register. The FBI may not inoculate itself against disclosure of the records at issue by using its declaration to reveal the otherwise unascertainable link between the investigation and the use of a pen register. *Cf. id.* at 530. For example, the FBI cannot refuse to disclose information which would indicate that the Amerithrax investigation involved the use of a pen register now that it has revealed this very fact.

If the basis for the FBI's redactions is that the withheld information indicates the target of the pen register, the dates of use of a pen register, or other information that is contained in a sealed court order, it should state as much. Given the absence of such detail, the FBI's use of the phrase "and/or," and the FBI's announcement in its declaration that a pen register was involved in the investigation, the current record is inadequate to support the FBI's invocation of Exemption 3 in connection with the Pen Register Act.

vi. Exemption 3-3, Federal Grand Jury information

Under Rule 6(e) of the Federal Rules of Criminal Procedure, secrecy is required for "a matter occurring before the grand jury[.]" Fed. R. Crim. Pro. 6(e)(2)(B). This phrase includes "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of jurors, and the like." *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980). The D.C. Circuit has explained, however, that "[t]he mere fact that information has been presented to the grand jury does not itself permit withholding." *Labow v. United States DOJ*, 831 F.3d 523, 529 (D.C. Cir. 2016). Thus, the key question is whether the documents would "necessarily evince their connection to a grand jury . . . in a manner that could not be dealt with through redactions." *Id.* at 530.

Here, the FBI does not claim that the specific documents at issue would necessarily evince a connection to a grand jury, only that they "describe specific records subpoenaed by the federal grand jury." (Seidel Decl. ¶ 94.) The declaration does not preclude the possibility that the withheld information describes the subpoenaed records, but does not actually reveal that the records were subpoenaed by a grand jury. Just as "subpoenaed documents would not necessarily reveal a connection to a grand jury," *Labow*, 831 F.3d at 529, a description of subpoenaed documents would not necessarily reveal a connection to a grand jury. Thus, "[i]t is possible that, had the government released the documents without invoking Exemption 3, [Plaintiff] would never have known that any of the documents had been subpoenaed by a grand jury." *Id.* at 530. Further, the government does not explain why it would be unable to redact any mention of a grand jury in connection with the subpoenaed records and simply release the text of the document at issue which describes the subpoenaed records.

vii. Exemption 7(D), Implied Assurance of Confidentiality

A court must "consider four factors when assessing an implied assurance of confidentiality: the character of the crime at issue, the source's relation to the crime, whether the source received payment, and whether the source has an ongoing relationship with the law enforcement agency and typically communicates with the agency only at locations and under conditions which assure the contact will not be noticed." *Labow*, 831 F.3d at 531 (internal quotation marks omitted)

Although the crime at issue is serious, the FBI does not assert that the source had a close relation to it. (Seidel Decl. ¶ 101.) There is a complete lack of factual support describing the connection between the individuals and the crimes. The FBI does not state that the information provided by the informant was obtained through the informant's connection with the crime, only that the information provided was "singular in nature" and "unique to these sources" (Seidel

Decl. ¶ 101.) There is a vast difference, for example, between an eyewitness or co-conspirator on the one hand, and a records clerk on the other. Both may provide information to law enforcement that is singular in nature and unique to the source, but the latter would not expect that the information is being provided in confidence. Since the FBI has not provided sufficient information as to this second factor, it does not support a finding of confidentiality.

Finally, no information with respect to the third and fourth factors is provided in the declaration and therefore these factors weigh against a finding of confidentiality.

viii. Exemption 7(E)-1, Information concerning surveillance

The FBI has withheld under coded category 7(E)-1 surveillance "information concerning the installation, locations, monitoring, and types of devices utilized in surveillances by the FBI." (Seidel Decl. ¶ 104.) The FBI concedes that "[i]t is publicly known the FBI and other law enforcement agencies engage in different types of surveillance in investigations," but claims that disclosure here "would allow current and future subjects of FBI investigations to develop and utilize countermeasures to defeat or avoid surveillance[.]" (Seidel Decl. ¶ 104.) But at no point does the FBI explain how the surveillance information would allow detection or anticipation of surveillance by investigative targets. Nor does the FBI connect any of the information withheld to a specific law enforcement technique or procedure for surveillance. It is certainly not the case that all surveillance information about the installation, location, monitoring, and types of devices utilized in surveillance by the FBI is so sensitive that disclosure could reasonably be expected to risk circumvention of the law. For example, disclosure of generic references to "devices" such as "a microphone" or "locations" such as "inside a facility" would not qualify for protection under Exemption 7(E) because these aspects of surveillance are already known to the public. Certainly, disclosure of some "non-public details about when, how, and under what circumstances the FBI

conducts surveillance" could reasonably be expected to risk circumvention of the law, but the FBI's declarant never avers that the information at issue *here* concerns "non-public" details.

ix. Exemption 7(E)-2, Collection and/or Analysis of Information

The FBI has withheld information under the vaguely-worded category "Collection and/or Analysis of Information." (Seidel Decl. ¶ 105.) This category appears to be a sort of catch-all for withholding documents, covering any "methods the FBI uses to collect and analyze information obtained for investigative purposes." (Seidel Decl. ¶ 105.) The FBI claims that the "[r]elease of the information would disclose the identity of methods used in the collection and analysis of information" (Seidel Decl. ¶ 105) without any explanation as to how the mere *identity* of each and every method to which Exemption 7(E)-2 has been applied could reasonably be expected to risk circumvention of the law. Indeed, the FBI's claim to withholding is so broad as to include "how and from where the FBI collects information and the methodologies employed to analyze it, once it is collected." (Seidel Decl. ¶ 105.)

This category of information, as defined by the FBI, would therefore sweep within its scope obvious methods of collecting information, such as performing a Google search or obtaining a warrant. It would also include vague references to analysis of information that could not possibly lead to circumvention of the law if disclosed, such as in the sentence: "The FBI uses its video surveillance technology to record surveillance videos." The phrase "Collection/Analysis of Information" is so sweeping as to cover virtually every activity conducted by the FBI. Indeed, it is difficult to imagine anything that an FBI employee might do that which does *not* involve either collecting or analyzing information in some form or another.

The FBI also couples this vague description of the technique(s) involved with a vague description of the harm that would be caused. The FBI's declarant avers, "Disclosing the

information would enable criminals to educate themselves on the techniques employed for the collection and analysis of information, and allow individuals to take countermeasures to circumvent the effectiveness of these techniques." (Seidel Decl. ¶ 105.) A similar description of the alleged harm has been rejected as insufficient by this Court. This Court found an agency's "submissions offer too little detail to allow this Court to undertake a meaningful assessment of the redacted material" where the declarant averred that release of the information "'would permit potential violators . . . to develop countermeasures to evade detection, inspection and examination methods,' and 'would divulge to the Plaintiff the examination and inspection procedures, internal reporting requirements and instructions on how to process international travelers and goods seeking admission or entry into the United States, the very information that [the agency] seeks to protect.'" *Strunk v. United States Dep't of State*, 845 F. Supp. 2d 38, 47 (D.D.C. 2012).

The only additional information the FBI provides is its observations that the agency has not previously made the information at issue public through the Amerithrax Major Case Summary and that some of the investigative techniques which were involved in the investigation were "highly sensitive" and "technically-intricate[.]" (Seidel Decl. ¶ 106.) These observations, however, say nothing about whether the particular techniques for collection and/or analysis of information mentioned in the documents at issue *here* are publicly known, and do not help the reader understand which techniques or procedures the agency claims are exempt.

x. Exemption 7(E)-3, Techniques Used to Conduct National Security Investigations

The FBI withheld information which it claims are "sensitive investigative techniques used to conduct national security investigations." (Seidel Decl. ¶ 107.) The FBI's declaration is insufficient to establish the applicability of Exemption 7(E) because "[w]e are not told what

procedures are at stake. (Perhaps how the FBI conducts witness interviews? Or how it investigates public corruption?) Nor are we told how disclosure of the [requested records] could reveal such procedures. (Are the procedures spelled out in the documents? Or would the reader be able to extrapolate what the procedures are from the information contained therein?) Although Exemption 7(E) sets a low bar for the agency to justify withholding, the agency must at least provide *some* explanation of what procedures are involved and how they would be disclosed." *CREW*, 746 F.3d at 1102 (internal citations and quotation marks omitted). Because additional detail is necessary and the FBI claims that discussing the techniques "in greater detail here would reveal their very nature," it would be appropriate for the Court to examine the records at issue *in camera*. In this case, there are only four pages withheld under category Exemption 7(E)-4 and therefore the burden on the Court of *in camera* review would be minimal.

As far as the harm requirement under Exemption 7(E), the FBI states that disclosure "would enable criminals targeted by these techniques to predict and circumvent their use by the FBI, and could negatively impact the FBI's ability to effectively investigate criminal matters of this kind." (Seidel Decl. ¶ 107.) However, as noted in the previous subsection of this brief, conclusory claims such as those alleging that criminals might be able to employ countermeasures are insufficient to demonstrate a reasonable expectation of a risk of circumvention of the law.

xi. CIA's withholdings

The FBI claims that the "CIA determined information within the records is protected from disclosure and asserted Exemptions 1, 3, and 6 as underlying Exemptions[.]" (Seidel Decl. ¶ 109.) The CIA's declaration only asserts Exemptions 1 and 3, however, and not Exemption 6. (Shiner Decl. ¶ 6.) Accordingly, any Exemption 6 claim is waived. With respect to Exemption 1 and Exemption 3 in conjunction with the National Security Act, the CIA's declaration uses

language that is just as conclusory as the FBI's. Therefore, Mr. Dillon relies on the same arguments he made earlier in this brief with respect to Exemption 1 and Exemption 3 in conjunction with the National Security Act.

xii. USPS's withholdings

The FBI's justification for withholding material originating with USPS "is the same as Exemption category (b)(6)-4 and (b)(7)(C)-4[.]" (Seidel Decl. ¶ 107.) Therefore, Mr. Dillon relies on the same arguments he made earlier in this brief with respect to these coded exemption categories.

IV. Conclusion

For the foregoing reasons, the Court should deny Defendant's Motion for Summary Judgment and grant Plaintiff's Cross-Motion for Summary Judgment.

Respectfully Submitted,

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