**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| KENNETH J. DILLON,<br><br>Plaintiff,<br><br>v.<br><br>U.S. DEPARTMENT OF JUSTICE,<br><br>Defendant. | Civil Action No. 17-1716 (RC) |

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant, the U.S. Department of Justice ("DOJ"), by and through undersigned counsel, respectfully submits this combined opposition to Plaintiff's cross-motion for summary judgment (*see* ECF No. 42) and reply to Plaintiff's opposition to Defendant's renewed motion for summary judgment (*see* ECF No. 41). In light of the Federal Bureau of Investigation's ("FBI") supplemental search and production of records to Plaintiff after the Court's prior decision (*see* ECF No. 27), as detailed in the Declaration of Michael G. Seidel (ECF No. 38-2), Defendant has now properly responded to Plaintiff's request for records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff argues in his opposition that there is a material issue of fact with regard to the adequacy of search, and that Defendant failed to explain the legal basis for withholding of records released to Plaintiff. However, as discussed below, Defendant conducted a reasonable and adequate search for records, produced an adequate *Vaughn* declaration, properly withheld information pursuant to FOIA exemptions, and properly segregated any non-exempt information for release to Plaintiff. The FBI provides the supplemental declaration of

David M. Hardy, attached hereto, in further support of its response to Plaintiff's FOIA requests. Accordingly, this Court should grant Defendant's renewed motion for summary judgment, *see* ECF No. 38.

## ARGUMENT

### I. The FBI Conducted An Adequate Search For Records

The FBI has satisfied its obligation under FOIA to search for records responsive to Plaintiff's request. Under FOIA, an agency is required to make "a good faith effort to conduct a search for the requested records, using methods reasonably expected to produce the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). A search is not rendered inadequate merely because it failed to "uncover every document extant." *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). The established reasonableness standard by which FOIA searches are judged "does not require absolute exhaustion of the files; instead it requires a search reasonably calculated to uncover the sought materials." *Miller v. U.S. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1986). Once the agency demonstrates the adequacy of its search, the FOIA requestor must show "that the agency's search was not made in good faith." *Maynard v. CIA*, 986 F.2d 547, 560 (1st Cir. 1993). Unsupported assertions of bad faith are insufficient to raise a material question of fact with respect to the adequacy of an agency's search for purposes of summary judgment. *See Oglesby*, 920 F.2d at 67 & n.13.

FBI has met its burden of showing it complied with FOIA by providing "a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325-26 (D.C. Cir. 1999) (quoting *Oglesby*, 920 F.2d at 68). Plaintiff disputes the adequacy of the search because FBI asserted that no new

documents were discovered as a result of its supplemental searches and Plaintiff points to additional locations where other potentially responsive records may exist. Specifically, Plaintiff claims that the FBI failed to search the computers that were seized from Dr. Ivins. *See* Pl.'s Cross Mot. for Summ. J., ECF No. 42 at 10. Plaintiff argues that it was inappropriate for the FBI to conclude that the FBI's investigative file would contain all potentially responsive records to Mr. Dillon's request, and that the Court should order the FBI to search both the home and work computers of Dr. Ivins, which were seized by the FBI. *Id.*

In the Court's prior decision in this case, the Court concluded that summary judgment as to the FBI's search would be inappropriate because the FBI "never substantively addressed Dillon's evidence of unproduced emails." *See* ECF No. 27 at 14. Subsequently, armed with Dillon's additional evidence regarding the potential existence of other emails, the FBI took additional efforts to ensure that its search was reasonable. Specifically, as explained in the Seidel Declaration, the FBI contacted its subject matter experts at the Washington Field Office ("WFO") to perform a supplemental search of any locations where responsive email records were likely to be located within the Amerithrax investigative file. Seidel Decl. ¶ 57. WFO conducted an additional search of the file attachments (commonly referred to in the FBI as 1A attachments) for responsive emails. *Id.* In WFO's assessment, this was the only location where records of this type (emails received by the FBI from an outside source) would likely be located. *Id.* Through this search, WFO successfully located binders of email records that were apparently overlooked in the FBI's original search through this file. *Id.* The email records included the emails specifically pointed to by Dillon. *Id.*

As noted by Seidel, the FBI processed *all* emails between Dr. Ivins and specified colleagues for the time period of September through October, 2001—not just the emails

identified by Dillon. *Id.* ¶ 57. The FBI reasonably expected any responsive records to Plaintiff's requests, including such emails, to be housed where the FBI typically houses its investigative records—the Central Records System. *Id.* ¶ 58. Also, as explained in the supplemental Hardy Declaration, to the extent the FBI maintained any "images" from Dr. Ivins's computer, these records would have been maintained in the paper records located in the 1A attachments to the main investigative file. *See* Supp. Hardy Decl. ¶ 5. Accordingly, because no other locations would be expected to contain potentially responsive records to Plaintiff's requests, the FBI's search of its investigative files was reasonable.

In light of the additional emails discovered by the FBI's supplemental search, Dillon attempts to move the goal post and requests the FBI to revert back to his initial request, which Dillon considers as covering "far more" records. *See* ECF No. 42 at 11. Although Dillon acknowledges that both the FBI and the Court had previously considered his request to have been narrowed, Dillon argues that such narrowing was unilateral and improper, *id.* at 8, 15, that the narrowing was merely a "test" request, *id.* at 11. Not so.

As described in the FBI's previous declarations in this matter, by letter dated December 22, 2016, Plaintiff narrowed his request to two specific pieces of evidence - "Ivan's emails to or from Patricia Fellows and Mara Linscott; and Laboratory Notebook No. 4282." *See* Seidel Decl., Exhibit BB. Indeed, Dillon's own *complaint* confirms that he narrowed the scope of his request. Dillon states explicitly that he "limited his request to two items – 1.) Ivin's emails to or from Patricia Fellows and Mara Linscott; and 2) Laboratory Notebook No. 4282." Compl. (ECF No. 1) ¶ 20. As a result, the FBI has conducted searches of the Amerithrax investigative files to locate these specific items and has produced the exact Laboratory notebook sought by Plaintiff and responsive emails. As recounted in the FBI's previous declarations, it has searched all

locations where responsive records are reasonably expected to be located and has focused its efforts on searching for the items responsive to Plaintiff's narrowed request.

Moreover, as explained in the supplemental Hardy Declaration, the FBI denied that it ever agreed to perform an open-ended "test" search in this case. *See* Supp. Hardy Decl. ¶ 6. Indeed, performing such a search—only to later conduct additional searches following expansion of narrowed requests—would result in the FBI's needless duplication of efforts as it chases an ever-changing search target. *Id.* Accordingly, especially at this later stage of the litigation, the Court should decline to require the FBI to engage in such a resource-insensitive search process now. Although the FBI initially overlooked a binder of emails during its initial request, the FBI took good faith efforts to retrace its steps and successfully located responsive records—including the very email records described by Dillon. In light of the FBI's fulsome explanation of these search efforts, nothing more should be required.

In sum, the FBI searched its records systems, reviewed the investigative file, and consulted with subject matter experts in the field. These exhaustive efforts establish the FBI performed a reasonable search to locate records responsive to Plaintiff's request.

## II. The FBI Properly Withheld Some Information Pursuant to the FOIA Exemptions

FOIA places the burden of justifying that the requested material withheld falls within one of its exemptions on the agencies subject to the FOIA. 5 U.S.C. § 552(a)(4)(B); *see Petroleum Info. Corp. v. U.S. Dep't of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). The Court has described that burden as a "substantial" one, *Morley v. CIA*, 508 F.3d at 1114, but the Supreme Court has also observed that "[w]hen disclosure touches upon certain areas defined in the exemptions . . .[,] the [FOIA] recognizes limitations that compete with the general interest in disclosure, and that, in appropriate cases, can overcome it." *Nat'l Archives & Records Admin. V.*

*Favish*, 541 U.S. 157, 172 (2004). To meet their burden, agencies typically provide courts with declaration(s) and a *Vaughn* index describing their application of exemptions available under FOIA. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C. Cir. 2006). To prevail, this evidence must provide a "relatively detailed justification" justifying the agency's actions. *Mead Data Ctr., Inc. v. U.S. Dep't of Air Force*, 566 F.2d at 251; *see Judicial Watch*, 449 F.3d at 146-147; *King v. U.S. Dep't of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).

In this case, the Seidel Declaration adequately justifies each redaction by the FBI.[1] The FBI provided an exemption application index which is a consolidated document to be used as a reference for a person reviewing the Seidel Declaration. This index lists the processed pages and the exemptions applied on each page and, in conjunction with the FBI's *Vaughn* declaration, provides an adequate explanation of why the FBI asserted specific exemptions and where within the body of responsive records exemptions were applied.

**a. Exemptions 6 and 7(C)**

*i. Third Parties Merely Mentioned*

First, Dillon challenges the FBI's assertion of Exemptions 6 in conjunction with Exemption 7(C) regarding the FBI's withholding of information regarding the names and/or identifying information of third parties merely mentioned.[2] As explained in the Seidel

[1] In light of the Court's prior decision denying the FBI's categorical application of Exemption 5 to the Interim Major Case Summary ("IMCS"), Dillon does not rehash those arguments in his opposition. The FBI follows suit and respectfully refers the Court to the other claimed FOIA exemptions, which apply to a large portion of the IMCS excerpts withheld by the FBI.

[2] Dillon points out that the government's brief does not address the specific issue of third parties "merely mentioned." *See* ECF No. 42 at 12. Although the FBI noted such withholdings in its supporting declaration and brief, the FBI's legal analysis of the issue was inadvertently omitted. Dillon does not argue that the FBI has waived its arguments regarding the application of Exemptions 6 and 7(C) to such information. Indeed, the FBI preserved its claim of the challenged exemptions here via the Seidel declaration. *See Hardy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, 243 F. Supp. 3d 155, 162 (D.D.C. 2017) ("[a]n agency may

Declaration, the FBI withheld this information because the release of information about specific individuals, without notarized authorizations permitting such a release, violates their individual privacy interests. Seidel Decl. ¶ 56. The disclosure of the names or other personal information about these individuals would reveal that they were (at least at one time) connected with an FBI investigation, which could subject them to possible harassment or criticism, and focus derogatory inferences and suspicion on them. *Id.* The FBI also weighed the potential release of this information against the public interest, and concluded that the disclosure of names and identifying information "would not significantly increase the public's understanding of FBI operations and activities." *Id.* ¶ 57.

In Dillon's opposition, he generally asserts that "at least some of the names and/or identifying information of the federal employees mentioned in the documents at issue were not properly withheld." ECF No. 42 at 17. Specifically, Dillon takes issue with the FBI's reliance on the D.C. Circuit's *SafeCard Servs., Inc. v. SEC* case as applying only to "private individual[s], and not to federal employees." Dillon's criticism, however, is misplaced. Although the Court in *SafeCard* considered the privacy interests of private individuals, the Court did not also analyze the privacy interests of federal employees. Nor did the Court address whether the privacy interests of federal employees are dependent on whether they were acting within the scope of their employment. Indeed, the privacy interest of civilian federal employees includes the right to control information related to themselves and to avoid disclosures that "could conceivably subject them to annoyance or harassment in either their official or private lives." *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980); *see also Nix v. United States*, 572 F.2d 998,

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carry its burden of properly invoking an exemption by submitting sufficiently detailed affidavits or declarations"). Accordingly, the FBI has preserved its exemption claims with respect to third parties merely mentioned through submission of the declaration from Michael Seidel, *see, e.g.*, Seidel Decl. ¶ 96, and addresses Dillon's specific arguments in this brief.

1006 n.8 (4th Cir. 1978) (noting that, to implicate a federal employee's privacy interest under FOIA, harassment does not have to rise to the level that life or physical safety is in danger).

Here, as explained by David Hardy in his supplemental declaration, federal employees maintain personal lives separate from their professional lives and the FBI considers its withholdings in the specific context of whether an employee is acting in a private capacity. *See* Supp. Hardy Decl. ¶ 7. In this case, many of the records at issue are personal in nature, and often one party is sending or receiving emails from a personal email account. Supp. Hardy Decl. ¶ 7. Therefore, even though some of the FBI's withholdings may involve individuals who were employed by the government at the time, the FBI properly considered the privacy interest of those employees in the same context as the FBI would for private individuals. Moreover, because Dillon's opposition fails to provide any public interest in the release of the names or other identifying information of federal employees acting in a private capacity, the FBI properly determined that the individual privacy interests outweighed the public interest with respect to this information. *See Pinson v. U.S. Dep't of Justice*, 177 F. Supp. 3d 56, 88 (D.D.C. 2016).

*ii. Names of FBI and non-FBI employees*

Next, Dillon objects to the "categorical" exemption regarding the FBI's withholding of FBI and non-FBI employees under Exemptions 6 and 7(C). *See* ECF No. 42 at 14. As explained in the Seidel Declaration, these employees were acting in their official capacities and aided the FBI in the law enforcement investigative activities reflected in these records. Seidel Decl. ¶ 71. The FBI concluded that the disclosure of the identities and identifying information of these federal employees could subject them to unauthorized inquiries and harassment that would constitute a clearly unwarranted invasion of their personal privacy. *Id.* Further, in conducting

the requisite balancing analysis, the FBI concluded that the release of this information would not significantly increase the public's understanding of FBI operations or activities. *Id.* ¶ 72.

Here, Dillon does not dispute that these individuals have a significant privacy interest, nor does he explain what, if any, public interest would be served by the release of this information. Although Dillon musters authority that disfavors a *per se* rule of nondisclosure , *see Stern v. FBI*, 737 F.2d 84, 92-93 (D.C. Cir. 1984), Dillon's showing falls far short of establishing that the FBI ever implemented such a rule here. To the contrary, the FBI considered the significant privacy interests of the specific individuals identified in the records and determined that these interests outweighed the minimal public interest in this information. *See* Seidel Decl. ¶ 72. Accordingly, the FBI properly withheld this information under Exemptions 6 and 7(C) because the release of the information would merely subject government personnel to scrutiny while failing to show how such personnel contributed to the FBI's duties with respect to Dr. Ivins. *See Lesar*, 636 F.2d at 487-88.

*iii. Third Parties of Investigative Interest*

Dillon also challenges the FBI's withholdings under Exemption 7(C) with respect to third parties of investigative interest. *See* ECF No. 42 at 19. In support, Dillon argues that the public has a compelling interest in knowing whether the FBI is refusing to disclose information that could help exonerate Dr. Ivins. *Id.* (citing *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1181 (D.C. Cir. 2011)). Dillon argues that "the release of the withheld information about the university is the only way to determine whether Ivins was innocent." *Id.*

In this case, the FBI withheld the names and identifying information of third parties of investigative interest, *see* Seidel Decl. ¶ 98. As stated in the Seidel Declaration:

> The names and personal information within the IMCS include names and personal information of individuals targeted for investigation who were later determined not to

> have committed crimes. Release in this context could result in embarrassment, ridicule, and negative inferences regarding these individuals. This is especially unjustified considering these individuals were never found to have committed illegal acts. Thus, the FBI determined they maintain substantial privacy interests in not having their identities disclosed in this context.

*Id.* Furthermore, the FBI compared its processing of the Interim Major Case Summary ("IMCS") to names released in the final Amerithrax Major Case Summary available publically, and only withheld names of individuals not released in that summary. *Id.*

Here, Dillon does not claim that the third parties of investigative interest lack any privacy interests. Rather, Dillon claims that a similar public interest exists here as in the *Roth* case with respect to Dr. Ivins. But Dillon provides only speculation that any possible exculpatory evidence proving Dr. Ivins is innocent is maintained within the IMCS. Indeed, Dillon offers no concrete evidence that the release of names in this category would actually lead to such exculpatory evidence. Accordingly, Dillon's speculation regarding a potential public interest is insufficient to defeat the FBI's serious concerns regarding the privacy intrusions on the individuals whose identities were withheld within this category. *See* Supp. Hardy Decl. ¶ 8; *see Pinson*, 177 F. Supp. 3d at 88.

**b. Exemptions 1 and 3**

*i. Executive Order 13526 and the National Security Act*

Dillon challenges the FBI's ability to withhold intelligence sources and methods pursuant to Exemption 1 (pursuant to Executive Order ("E.O.") 13526 § 1.4(c)) and Exemption 3 (pursuant to the National Security Act of 1947, 50. U.S.C. § 3024(i)(1)) because the FBI's justifications are "conclusory." *See* ECF No. 42 at 20-21. In the context of documents withheld due to their classified status, courts must "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record because the Executive

departments responsible for national defense . . . matters have unique insights into what adverse [e]ffects might occur as a result of a particular classified record." *Larson v. U.S. Dep't of State*, 565 F.3d 857, 864 (7th Cir. 2015) (internal quotation marks and citations omitted). Overall, the court need only examine whether the agency's classification decision "appears 'logical' or 'plausible.' *Id.* at 862 (citing *Wolf v. CIA*, 473 F.3d 370, 374-75 (D.C. Cir. 2009); *see also Morley v. CIA*, 508 F.3d 1108, 1124 (D.C Cir. 2007) ("little proof or explanation is required beyond a plausible assertion that information is properly classified."). As discussed below, the FBI properly supported such withholdings in the Seidel declaration.

In his declaration, Seidel (the Acting Section Chief of the FBI's Record/Information Dissemination Section ("RIDS")) confirmed that he personally reviewed the material and confirmed the information protected pursuant to Exemption 1 remains classified at the Secret level pursuant to E.O. 13526 § 1.4(c). As a result of his review, Seidel provided the following information:

> The classified information details intelligence activities and information gathered or compiled by the FBI about a specific individual of national security interest. Disclosure could reasonably be expected to cause serious damage to the national security, as it would: (a) reveal the actual intelligence activity or method utilized by the FBI against a specific target; (b) disclose the intelligence-gathering capabilities of the method; and (c) provide an assessment of the intelligence source penetration of a specific target during a specific period of time. With the aid of this detailed information, hostile entities could develop countermeasures that would, in turn, severely disrupt the FBI's intelligence-gathering capabilities. This severe disruption would also result in severe damage to the FBI's efforts to detect and apprehend violators of national security and criminal laws of the United States.

*See* Seidel Decl. ¶ 88. As such, Mr. Seidel established what this information relates to and the harm to national security in disclosing this information publically.

Also, in regards to intelligence sources and methods protectable pursuant to Exemption 3 and the National Security Act of 1947, Mr. Seidel also provides a description of the types of

information located within the records qualifying for withholding pursuant to this statute, and the harm in releasing the information. Specifically, Mr. Seidel stated:

> [T]here exists descriptions of sources and methods used in the Amerithrax investigation the FBI typically uses to protect the national security of the United States. Revelation of this information would reveal key, non-public information about the FBI's use of these techniques, risking their circumvention by future investigative targets.

*Id*. ¶ 92. Even though Exemption 3 does not require a harm analysis, the FBI provided the above describing the harm in the release of this information. As such, the FBI established both that the information qualified for protection pursuant to Exemption 3 and the National Security Act of 1947, and release of this information risks harms to FBI intelligence sources and methods.

The CIA performed a similar review under Exemption 1 with respect to the withheld information. Specifically, the declaration from Antoinette B. Shiner, the Information Review Officer for the Litigation Information Review Office at the Central Intelligence Agency ("CIA"), confirmed that the information withheld under Exemption 1 satisfied "the procedural and the substantive requirements of E.O. 13526[.]" Shiner Decl. ¶ 10. Shiner confirmed that the withheld information "reveals specific intelligence acquired by the CIA and could reveal the source of those details." *Id.* ¶ 11. Further, the CIA noted that the redacted portions of the IMCS were withheld under Exemption 3 because the information "reveals procedures used in the conduct of intelligence operations" and also "would tend to reveal the specific sources and methods used to acquire foreign intelligence." *Id.* ¶ 15.

Thus, both the CIA and FBI readily established the withheld information remains classified and warrants withholding pursuant to Exemptions 1 and 3.

*ii. Pen Register Information*

Dillon also challenges the FBI's assertion of Exemption 3 to withhold Pen Register information pursuant to the Pen Register Act. *See* ECF No. 42 at 17. Specifically, Dillon claims

Exemption 3 can only be asserted to withhold Pen Register orders, not "all information the order may contain even if appearing in other documents." *Id.* (quoting *Labow v. U.S. Dep't of Justice,* 831 F.3d 523, 528 (D.C. Cir. 2016)). Further, Dillon argues generally that the FBI cannot withhold information regarding the use of pen registers during its Amerithrax investigation where the FBI has already revealed this fact. *Id.* at 18.

Notably, the D.C. Circuit in *Labow* did not directly address the withholdings at issue here. Indeed, the Court stated that "[t]o the extent the statute arguably authorizes withholding documents other than a pen register order, we have no occasion to address the issue because we do not know whether this case involves withholdings of any records beyond a pen register order." *Labow*, 831 F.3d at 528. Accordingly, the Court remanded the issue for further consideration. Ultimately, the District Court concluded that the "[i]nformation at the crux of a pen register order that . . . happens to appear in a document outside of the order itself and would necessarily compromise the order, is therefore information that falls within the scope of Exemption 3's protection as triggered by the Pen Register Act." *Labow v. Dep't of Justice,* 278 F. Supp. 3d 431, 441 (D.D.C. 2017). Here, the information protected by the FBI under Exemption 3 reveals the existence of pen registers, how they were used by the FBI in the Amerithrax investigation, the targets of particular pen registers, and the information gathered through the pen registers. *See* Supp. Hardy Decl. ¶ 11. Therefore, the FBI determined that this information was at the crux of the pen register, and revealing this information would undoubtedly compromise the orders. Thus, the FBI properly asserted Exemption 3 to withhold this information.

*iii. Grand Jury Information*

Next, Dillon challenges the FBI's withholding of grand jury information. Dillon argues that "the FBI does not claim that the specific documents at issue would necessarily evidence a connection to a grand jury." ECF No. 42 at 23. Dillon asserts that the Seidel 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." *Id.*

Contrary to Dillon's assertions, the information withheld by the FBI pursuant to Exemption 3 and Federal Rule of Criminal Procedure 6(e) contains a clear nexus to federal grand jury proceedings. In fact, the records state on their face specific information was gathered through grand jury proceedings. Thus, the FBI must withhold this material to protect the inner workings of a Federal Grand Jury, in accordance with FRCP 6(e). *See* Supp. Hardy Decl. ¶ 12.

**c. Exemption 7(D)**

Dillon challenges the FBI's assertion of 7(D) to protect the identities and information provided by sources that provided information to the FBI pursuant to implied assurances of confidentiality. *See* ECF No. 42 at 23. Specifically, Dillon argues that "the FBI does not assert that the source had a close relation" to the FBI and also argues that "the FBI does not state that the information provided by the informant was obtained through the informant's connection with the crime." *Id.* at 23.

The FBI withheld information under Exemption 7(D) in only two instances where the FBI located information provided by private businesses. *See* Seidel Decl. ¶ 101. These businesses provided valuable, detailed information relevant to the FBI's investigation of the mailing of anthrax to various individuals. *Id.* As explained in the Seidel Declaration, the information provided by these businesses is singular in nature and unique to these sources due to

their proximity to the activities on which they reported. *Id.* In light of the malicious intent of the individual responsive for the mailings, the FBI determined release of this information would likely result in retaliation against these businesses, and these businesses/personnel would not have provided this information freely to the FBI without an expectation of confidentiality. *Id.*

As explained in the supplemental Hardy Declaration, the businesses involved in this case had direct dealings with Dr. Ivins and, therefore, the FBI determined that the release of the information they provided would readily identify the businesses to individuals familiar with activities described in the records at issue. *See* Supp. Hardy Decl. ¶ 13. Again, because the information provided by the businesses involved the malicious mailing of biological weapons to individuals, the FBI determined these businesses could have reasonably feared violent retaliation by the perpetrator of these crimes based on their cooperation with the FBI's investigation, especially since at the time this information was provided, the perpetrator had not been discovered or neutralized. *Id.* Additionally, the businesses provided information that the customers of these businesses would normally expect to be maintained as confidential. *Id.* Indeed, some of these businesses' customers might look unfavorably upon the businesses' cooperation with law enforcement. *Id.* Thus, the FBI reasonably determined these businesses would not have provided this information to the FBI without an expectation of confidentiality. Further, release of these businesses' information could hinder the FBI's ability to obtain similar types of information from businesses in the future, as release here could dissuade businesses from sharing such information freely with the FBI. *Id.* Accordingly, because Dillon has not controverted this evidence, the FBI properly withheld this information under Exemption 7(D).

**d. Exemption 7(E)**

*i. Information Concerning Surveillance*

Dillon also challenges the FBI's assertion of Exemption 7(E) to protect surveillance techniques. *See* ECF No. 42 at 24-25. Specifically, Dillon argues that the FBI does not adequately describe how the techniques implicated are non-public, and how release of this information would allow for circumvention of these techniques. *Id.*

Within this category, the FBI protected information concerning the installation, locations, monitoring, and types of devises utilized in surveillances by the FBI. Seidel Decl. ¶ 104. The FBI also protected the methods the FBI uses to collect and analyze information obtained for investigative purposes and sensitive investigative techniques used to conduct national security investigations. *Id.* ¶¶ 105, 107.

As explained in the supplemental Hardy Declaration, although the specific types of surveillance are publically known, other information regarding the timing, justification, and nature of the deployment of surveillance techniques in certain investigative circumstances is not publicly known. Supp. Hardy Decl. ¶ 14. Revealing this information in conjunction with real-world investigative examples would reveal to criminals the types of surveillance techniques the FBI is likely to deploy in particular investigative circumstances. *Id.* This would allow criminals to build an understanding of non-public FBI investigative strategies, allowing them to predict and subvert FBI investigative surveillance techniques, and continue to circumvent the law. *Id.* As such, the FBI properly applied Exemption 7(E) to withhold this information.

*ii. Collection and/or Analysis of Information*

Dillon challenges the FBI's assertion of Exemption 7(E) to withhold techniques and procedures for collecting and analyzing investigative information. *See* ECF No. 42 at 25-26. Dillon posits "this category appears to be a sort of catch-all for withholding documents." *Id.* 21-

22. To understand the FBI's broad assertion of 7(E) to withhold information in this category, it is important to take into account the nature of the records at issue. The FBI asserted 7(E) to withhold this type of information within the portions of the IMCS responsive to Plaintiff's request. The IMCS was an internal, deliberative communication, designed to provide government decision-makers an understanding of the progress and strategies employed by investigators in the Amerithrax investigation. Thus, the IMCS contains a play-by-play description of how the FBI pursued and will likely pursue this type of investigation in the future. Revealing the overarching methodology for how the FBI will pursue such an investigation would provide criminals with a trove of information they could use to predict and thwart FBI investigative efforts in the future. Therefore, the FBI asserted Exemption 7(E) to withhold any information that would allow criminals to predict how the FBI will: (1) gather information needed to further its investigations into biological attacks; (2) filter this information to determine what is meaningful evidence, which evidence is actionable, and which evidence has little investigative significance; and (3) follow strategies for pursuing investigative leads once particular, actionable evidence/intelligence is gathered. Release of any of this information would allow criminals to make informed decisions about how they might deploy countermeasures, or time and structure their criminal activities, to avoid investigative scrutiny by the FBI. Thus, release of any of this information would enable criminals to circumvent the law. Supp. Hardy Decl. ¶ 15.

*iii. Techniques Used to Conduct National Security Investigations*

Dillon challenges the FBI's assertion of Exemption 7(E) to withhold techniques used to conduct national security investigations with the argument the FBI has not provided sufficient detail to show what specific techniques are at play, and how revelation of their use would present

law enforcement circumvention harms. *See* ECF No. 42 at 26-27. "[A]n agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation." *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002).

In this case, the FBI withheld information related to how it evaluated certain national security concerns associated with a suspected suspect, and also its evaluation of possible foreign national security threats associated with the deployment of biological weapons. Supp. Hardy Decl. ¶ 16. Revealing this information would allow targets of national security investigations to determine the types of information that trigger FBI national security investigations. *Id.* This would enable these foreign adversaries to discover how they might structure their behavior to avoid providing the FBI information it could use to predicate national security investigations. *Id.* Additionally, revealing the specific foreign adversaries the FBI determined to be potential threats in relation to the deployment of biological weapons, and the regions of the world from where biologic threats could emanate, would alert foreign adversaries to the FBI's investigative interest in their activities. *Id.* This would allow these foreign targets to preemptively deploy countermeasures to avoid FBI investigations/intelligence gathering methods, and avoid detection and/disruption of their plots aimed at subverting the national security of the United States. *Id.* Accordingly, the FBI properly withheld this information under Exemption 7(E).

**III. The FBI Released All Segregable Materials**

Dillon's generic challenge to the adequacy of the FBI's segregability determinations, *see* ECF No. 42 at 20, fails to provide any details sufficient to refute the FBI's declaration. To the contrary, the FBI established that it conducted a thorough analysis and released information wherever reasonably possible. *See* Seidel Decl. ¶ 112. "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). That, Dillon has not done.

The FBI provided Dillon all non-exempt records responsive to his FOIA request. In doing so, the FBI identified all non-exempt information which could be released to Plaintiff. As a result, the FBI processed and released responsive pages of the IMCS and Bruce Ivins's notebook and email communications. The FBI withheld some information pursuant to the FOIA Exemptions and released all other information from the emails and notebooks. Therefore, The Court should find that the FBI appropriately segregated non-exempt from exempt materials in the records it processed.

**CONCLUSION**

For the reasons set forth above, and those discussed in Defendant's opening brief, Defendant respectfully requests that this Court grant judgment in favor of the FBI.

Dated: August 12, 2019

Respectfully submitted,

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for the District of Columbia

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