

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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AMERICAN CIVIL LIBERTIES UNION and))
AMERICAN CIVIL LIBERTIES UNION))
FOUNDATION,))
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Plaintiffs,))
))
v.)	No. 13 Civ. 9198 (AT)
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NATIONAL SECURITY AGENCY,))
CENTRAL INTELLIGENCE AGENCY,))
DEPARTMENT OF DEFENSE,))
DEPARTMENT OF JUSTICE, and))
DEPARTMENT OF STATE,))
))
Defendants.))
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DECLARATAION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), of the Federal Bureau of Investigation (“FBI”) in Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001, to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980, to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked on FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 226 employees who staff a total of ten FBI Headquarters (“FBIHQ”) units and two field operational 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 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order (“E.O.”) 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and other Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13526,¹ and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to E.O. 13526, §§1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to plaintiffs’ request for information from the FBI’s files pursuant to the provisions of the FOIA, 5 U.S.C. § 552. Specifically, I am aware of the FBI’s handling of the FOIA request by plaintiffs American Civil Liberties Union and American Civil Liberties Union Foundation (collectively, “Plaintiffs”) to FBIHQ, seeking access to records relating to Executive Order 12,333, 3 C.F.R. 200 (1981 Comp.) (“E.O. 12,333”).

(4) The FBI processed a total of 65 pages responsive to Plaintiffs’ request. Of these pages, 2 pages were released in full, 57 pages were released in part, and 6 pages were withheld in full. The parties have agreed to litigate the lawfulness of the redactions and withholdings, except for information withheld pursuant to Exemptions (b)(6) and (b)(7)(C), of a specific subset of documents selected by the Plaintiffs from documents released by the FBI and other defendant agencies, as well as the adequacy of each agency’s searches. The Plaintiffs selected three

¹ 75 Fed. Reg. 707 (2010).

documents consisting of 18 pages from the FBI's subset of documents.² In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), this declaration is being submitted in support of Defendants' Motion for Partial Summary Judgment, in order to provide the Court and Plaintiffs with an explanation of the FBI's record-keeping system; the procedures used to search for, review, and process the responsive records; and the FBI's justification for withholding records in full or in part pursuant to FOIA Exemptions 1, 3, 7(A), 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(3), (b)(7)(A), (b)(7)(D) and (b)(7)(E).³

ADMINISTRATIVE HISTORY OF PLAINTIFF'S FOIA REQUEST

(5) By letter dated May 13, 2013, Plaintiffs submitted a FOIA request to FBI seeking access to certain records relating to E.O. 12,333. Specifically, Plaintiffs' request sought the following records:

1. Any records construing or interpreting the authority of the [FBI] under Executive Order 12, 333 or any regulations issued thereunder;
2. Any records describing the minimization procedures used by the FBI with regard to both intelligence collection and intelligence interception conducted pursuant to the FBI's authority under EO 12,333 or any regulations issued thereunder; and
3. Any records describing the standards that must be satisfied for the "collection," "acquisition," or "interception" of communications, as the FBI defines these terms, pursuant to the FBI's authority under EO 12,333 or any regulations issued thereunder.

In addition, Plaintiffs' request sought a waiver of all search, review and duplication fees, as well as an estimated date on which the FBI would finish processing its request. (*See Exhibit A.*)

(6) By letter dated June 7, 2013, the FBI acknowledged receipt of Plaintiffs' request and assigned it FOIPA Request Number 1216886-000. The FBI advised Plaintiffs that it was searching the indices to its Central Records System for information responsive to Plaintiffs'

² These documents are Bates-numbered EO 12333-FBI 13-15, 30-35, and 57-65.

³Exemption (b)(5) was also asserted to withhold information in responsive records; however, this exemption was not among those asserted in the subset of documents selected by Plaintiffs for challenge herein. Exemptions (b)(6) and 7(C) were also asserted but are not challenged by Plaintiffs, and so are not addressed in this declaration.

request; that the request for a fee waiver was being considered; and that the status of the request could be checked on www.fbi.gov/foia. (See **Exhibit B.**)

(7) By letter dated November 8, 2013, Plaintiffs submitted an appeal to the Department of Justice (“DOJ”), Office of Information Policy (“OIP”), arguing the FBI failed to meet its legal obligation to disclose information requested within the twenty-day statutory time period. (See **Exhibit C.**)

(8) By letter dated November 15, 2013, OIP acknowledged receipt of Plaintiffs’ appeal, assigning it appeal number AP-2014-00477. (See **Exhibit D.**)

(9) By letter dated December 30, 2013, OIP advised Plaintiffs that the DOJ regulations provide for an administrative appeal to OIP only after there has been an adverse determination by a component. It further advised that since no adverse determination had yet been made by the FBI, there was no action for the office to consider on appeal. (See **Exhibit E.**)

(10) On December 30, 2013, Plaintiffs filed their complaint in the instant action.⁴ (See **Docket Number 1.**)

(11) On May 9, 2014, the parties entered into a “Stipulation and Order Regarding Document Searches.” This stipulation set forth, among other things, the categories of documents the FBI agreed to search for and process. (See **Docket Number 30.**) The specifics of each category are as follows:

- (a) Any formal regulations or policies relating to that Agency’s authority under EO 12,333 to undertake “Electronic Surveillance” (as that term is defined in EO 12,333) that implicates “United States Persons” (as that term is defined in EO 12,333), including regulations or policies relating to that Agency’s acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.

⁴ Subsequent to the filing of the initial complaint on December 30, 2013, Plaintiffs filed their First Amended Complaint on February 18, 2014 and their Second Amended Complaint on October 31, 2014. (See **Docket Numbers 17 and 44.**)

- (b) Any document that officially authorizes or modifies under EO 12,333 that Agency's use of specific programs, techniques, or types of Electronic Surveillance that implicate United States Persons, or documents that adopt or modify official rules or procedures for the Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- (c) Any formal legal opinions addressing that Agency's authority under EO 12,333 to undertake specific programs, techniques, or types of Electronic Surveillance that implicates United States Persons, including formal legal opinions relating to that Agency's acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority generally or in the context of particular programs, techniques, or types of Electronic Surveillance.
- (d) Any formal training materials or reference materials (such as handbooks, presentations, or manuals) that expound on or explain how that Agency implements its authority under EO 12,333 to undertake Electronic Surveillance that implicates United States Persons, including its acquisition, retention, dissemination, or use of information or communications to, from, or about United States Persons under such authority.
- (e) Any formal reports relating to Electronic Surveillance under EO 12,333 implicating United States Persons, one of whose sections or subsections is devoted to (1) the Agency's compliance, in undertaking such surveillance, with EO 12,333, its implementing regulations, the Foreign Intelligence Surveillance Act, or the Fourth Amendment; or (2) the Agency's interception, acquisition, scanning, or collection of the communications of United States Persons, whether "incidental" or otherwise, in undertaking such surveillance; and that are or were:
 - i. Authored by the Agency's inspector general or the functional equivalent thereof;
 - ii. Submitted by the Agency to Congress, the Office of Director of National Intelligence, the Attorney General, or the Deputy Attorney General; or
 - iii. Maintained by the office of the Agency's director or head.

(12) The FBI made its first interim release of 15 pages of responsive records to Plaintiffs on or about September 22, 2014, and its second interim release on or about December 19, 2014. By letter dated December 19, 2014, the FBI advised Plaintiffs it had reviewed an additional 50 pages beyond the initially-reviewed 15 pages; of these 50 pages, it released 47 pages in full or part; it withheld certain information pursuant to FOIA Exemptions 1, 3, 5, 6, 7(A), 7(C) and 7(E),⁵ and the responses to referrals made by the FBI to other government agencies (“OGAs”) were included in the processed records. The FBI further advised Plaintiffs they could appeal the FBI’s determination by filing an administrative appeal with DOJ/OIP within sixty days from the date of the letter. Finally, the FBI provided, along with the 2nd Interim release of records, a Bates-stamped version of the records that had been released to the Plaintiffs in the 1st Interim release of records dated September 22, 2014.⁶ (See **Exhibit F.**)

(13) By letter dated January 14, 2015, the FBI revised its December 19, 2014 release letter to the Plaintiffs to reflect the correct Bates page numbers for each of its releases; to provide a detailed description of the pages contained in the 1st Interim Release and how they were identified in the attachment to the 2nd Interim release; and to provide the password to allow the Plaintiffs to remove the security setting for the electronic version of each of the documents attached to its December 19, 2014, release letter. (See **Exhibit G.**)

(14) On or about March 25, 2015, the FBI received from the NSD, for review and consultation, documents that originated with the FBI and/or contained FBI equities found during a search of NSD’s records. The FBI assigned this Request Number 1216886-001.

⁵ The December 19, 2014 release letter failed to identify the FBI’s assertion of exemption (b)(7)(D) to information contained within approximately four (4) pages of the records released in part and did not cite additional (b)(3) statutes, 50 U.S.C. 3605 (Public Law 86-36, Section 6) and 18 U.S.C. 798, asserted by the NSA.

⁶ The paragraphs in the September 22 release letter discussing the 1st and 2nd releases of records identified the incorrect Bates page numbers associated with each release. The Bates page numbers for the 2nd release should have been EO 12333-FBI-16 through EO 12333-FBI-65 and the Bates page numbers for the 1st release should have been EO 12333-FBI-1 through EO 12333-FBI-15.

(15) The FBI reviewed, processed and returned the records to NSD identifying all FBI information to be withheld therein and citing all applicable FBI FOIA Exemptions to be asserted.

(16) On or about October 14, 2015, Plaintiffs identified a subset of the documents released by the FBI that they wished to include in the motion for partial summary judgment, namely the three documents Bates numbered EO 12333-FBI 13-15, 30-35, and 57-65.⁷ Copies of these documents with redactions as they were released to Plaintiffs are attached hereto. (*See Exhibit H.*)

(17) Also identified in Plaintiffs' subset of documents were two (2) records the FBI received from the NSD. These records are NSD000202-NSD000207, described as "Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence," and NSD 9, described as an "OLC Legal Advice Memorandum to FBI General Counsel." Further identified in Plaintiffs' subset of documents were two (2) records the FBI received from DOJ's Office of Legal Counsel ("OLC"). These records are OLC 5, described as a "Legal advice memorandum discussing, among other things, legal issues pertaining to surveillance under EO 12333," dated April 2002; and OLC 6, described as a "Legal advice memorandum discussing, among other things, legal issues pertaining to surveillance under EO 12333," dated May 2003. In addition, identified in Plaintiffs' subset of documents as one (1) record the FBI received from the Central Intelligence Agency ("CIA"). The record is C06235758, described as "Activities of CIA and FBI_0."

(18) As explained below and in the attached *Vaughn* index, FBI 13-15 is partially withheld under Exemption 7(E); and FBI 30-35 and FBI 57-65 are withheld under Exemptions 1, 3, and 7(E). NSD 202-207 is withheld under Exemptions 1, 3, and 7(E) and NSD 9 is withheld under Exemptions 1 and 3. OLC 5 is withheld under Exemptions 1, 3, and 7(E) and OLC 6 is withheld under Exemptions 1, 3, 7(A), 7(D), and 7(E). C06235758 is partially withheld under

⁷ Bates page numbers EO 12333-FBI 13, 34 and 57 were released in full to Plaintiffs.

Exemptions 1, 3 and 7(E). The declaration and index provided by the National Security Agency (“NSA”) in this case also justifies in part the withholdings pursuant to Exemptions 1 and 3 of FBI 30-35 and FBI 57-65. The declaration and index provided by the CIA in this case also justifies in part the withholdings pursuant to Exemptions 1 and 3 and in full the withholdings pursuant to Exemption 7(E).

ADEQUACY OF SEARCH

(19) Search Methodology. It is the FBI’s general practice to search its Central Records System (“CRS”) to determine if the FBI has records about particular investigative subjects in response to most FOIA requests. The FBI ordinarily relies on the CRS because it is an extensive system of records consisting of applicant, investigative, intelligence, personnel, administrative, and general files compiled and maintained by the FBI in the course of fulfilling its integrated missions and functions as a law enforcement, counterterrorism, and intelligence agency. In the CRS, FBI employees record index terms in files that are useful to a particular investigation or that are deemed potentially useful for future investigative/intelligence retrieval purposes, such as names of individuals, organizations, companies, publications, activities, or foreign intelligence matters (or programs). In this case, the Plaintiffs’ FOIA request sought access to specific policy guides, manuals, procedures, regulations, directives, and other similar records that are not of an investigative nature; therefore, the request did not lend itself readily or naturally to a search of the CRS, as agency policy information is not the type of information indexed into the CRS for operational retrieval. As a practical matter and in RIDS’s experience, agency policy information resides with the responsible agency offices who promulgate and/or maintain such records. As such, an index search of CRS is generally not performed for such requests--and was not attempted here--as the responsive information would reasonably be located in responsible officials’ offices and not in any readily retrievable form in the CRS.

(20) Therefore, based on RIDS personnel's familiarity and expertise with the FBI's organizational structure and Divisions/Units with responsibility for the issues raised by the FOIA request, RIDS conducted a targeted search of specific FBI Headquarters Divisions/Units likely to possess responsive records relating to E.O. 12,333, as identified in items 1, 2, and 3 of plaintiffs' original request.

(21) Targeted Search of Specific FBI Headquarter Divisions/Units based upon Plaintiffs' request. RIDS prepared and circulated Electronic Communications⁸ to the FBI's Corporate Policy Office,⁹ Counterintelligence Division,¹⁰ Counterterrorism Division,¹¹ and its Office of the General Counsel Discovery Processing Units,¹² requesting each office to conduct a search of database systems, as well as paper and manual files, for records responsive to Plaintiffs' request. In addition, RIDS recommended that each recipient division/unit send to each of its employees an e-mail seeking all relevant records pertaining to this request. Each of these Divisions/Units reported that they completed the search requested in the Electronic Communication and advised RIDS whether or not any records responsive to the request were or were not located within its Division/Unit. As a result of these search efforts, the FBI was able to locate records responsive to the Plaintiffs' request herein. Each of the divisions/units targeted were selected because of its responsibilities and functions within the FBI, which made them the reasonably likely FBI Divisions/Units to have either created, implemented, utilized, maintained

⁸ An Electronic Communication is a document used to communicate within the FBI in a consistent format that can be uploaded by the originating Division or office, transmitted, and downloaded by recipient Divisions or offices within the FBI's internal computer network.

⁹ The Corporate Policy Office, now known as the Information Policy Office, centrally manages the coordination, review, approval, publication, and promulgation of FBI policy.

¹⁰ The Counterintelligence Division is a component of the National Security Branch charged with preventing and investigating foreign intelligence activities within the United States. The Counterintelligence Division targets both traditional and emerging nontraditional threats and investigates espionage activities using both intelligence and law enforcement techniques.

¹¹ The Counterterrorism Division is a component of the National Security Branch that works with intelligence and law enforcement partners to provide a centralized, comprehensive, and intelligence-driven approach to address international and domestic terrorism-related matters.

¹² The Discovery Processing Units identify information that is relevant and subject to disclosure during the civil discovery process.

or reviewed records that would be responsive to the Plaintiffs' request. RIDS determined that no other FBI Divisions/Units or personnel would reasonably likely possess records responsive to items 1, 2, and 3 of Plaintiffs' original request.

(22) Targeted Search of a Specific FBI Headquarters Division based upon the Stipulation. Following the entry of the "Stipulation and Order Regarding Document Searches" on May 9, 2014, RIDS personnel compared the original request of the parties to the requested categories of documents set forth in the Stipulation. Upon comparison, RIDS determined that records obtained from the earlier targeted searches of several offices per the original request already contained documents responsive to the request in the Stipulation as the scope of the original request and searches was broader than the items sought in the Stipulation. As such, with one caveat, a repeat search of those offices for a subset of the same material would be redundant and there was no factual basis to conclude a repeat search would yield additional responsive records. The caveat is that based on the additional specificity provided by Plaintiffs in the Stipulation seeking training-type material, RIDS determined that a search of the FBI's Training Division was necessary. Accordingly, RIDS prepared and circulated an Electronic Communication to the FBI's Training Division,¹³ requesting that it conduct a search of database systems, as well as paper and manual files, for records responsive to the Stipulation. In addition, RIDS recommended that the Training Division send to each of its employees an e-mail seeking all relevant records pertaining to the aforementioned paragraphs of the Stipulation. The Training Division reported that it completed the search requested in the Electronic Communication and that it found no records responsive to the Stipulation or subject to the FOIA.

¹³ The Training Division provides direction and support to FBI HQ and field divisions in the planning and execution of career development training to include curriculum, funding, instruction, evaluation, tracking, reporting, and implementation for the FBI workforce and partnering agencies. The Training Division is the premier law enforcement learning and research center and an advocate for law enforcement's best methodologies and practices worldwide.

(23) Scope of Search: To carry out its search of the locations that it identified as reasonably likely to possess responsive records, RIDS designed and carried out a search tailored to the described scope of responsive records sought in the Plaintiffs' original request, as well as the May 9, 2014, Stipulation. There is no indication from the information located as a result of the targeted searches of the specified FBI HQ Divisions/Units that responsive material would reside in the CRS or any other location; therefore, there was no factual basis for RIDS to conclude a search elsewhere could reasonably be expected to locate responsive material. Any further search would thus be unduly burdensome in nature. Beyond RIDS's own inquiries to determine where responsive records might reasonably reside, Plaintiffs provided no information that indicating that responsive documents could reasonably be expected to reside in other locations within the FBI.

JUSTIFICATION FOR NONDISCLOSURE UNDER THE FOIA

(24) All documents responsive to Plaintiffs' request were processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide Plaintiffs with all material in the public domain and with all reasonably segregable, non-exempt information in the responsive records. No reasonably segregable, non-exempt portions have been withheld from Plaintiffs. Further description of the information withheld beyond what is provided in this declaration could identify the actual exempt information that the FBI has protected. Copies of all pages released to the Plaintiffs by the FBI have been consecutively numbered EO 12333-FBI-1 through - FBI-65 at the bottom of each page. Pages withheld in their entirety were replaced by a Deleted Page Information Sheet ("DPIS"), which identifies the reason and/or the applicable FOIA exemptions relied upon to withhold the page in full, as well as Bates numbers for the withheld material.¹⁴ The exemptions asserted by the FBI as

¹⁴Bates page numbers EO 12333-FBI 4-7, 43, 44 and 65 were each withheld in full, citing applicable FOIA exemptions.

grounds for non-disclosure of portions of the information included in the subset of documents being challenged herein are FOIA Exemptions 1, 3, 7(A), 7(D), and 7(E).¹⁵

VAUGHN INDEX -- DOCUMENT CATEGORY GROUPINGS

(25) The *Vaughn* Index attached hereto as **Exhibit I** (hereinafter the “Index”) provides a detailed description of the withheld material that is the subject of Defendants’ motion. This Index specifies the relevant Bates page numbers, dates of records, a brief document description, specific FOIA exemptions applied to the pages, descriptions of the withheld information, and the status of the action taken with respect to each responsive page (*i.e.*, released in part (“RIP”) and withheld in full (“WIF”) or duplicate).

Exemption (b)(1) – Classified Information

(26) 5 U.S.C. § 552(b)(1). Exemption (b)(1) protects from disclosure records 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.

(27) Before I can consider an Exemption (b)(1) claim for withholding agency records, I must determine whether the information in those records is information that satisfies the requirements of E.O. 13526, the executive order that governs the classification and protection of information that affects the national security,¹⁶ and whether the information complies with the various substantive and procedural criteria of the order. E.O. 13526, signed by President Barack Obama on December 29, 2009, is the executive order that currently applies to the protection of national security information. I am bound by the requirements of E.O. 13526 when making classification determinations.

¹⁵ As noted, Plaintiffs are not challenging the FBI’s assertion of Exemptions (b)(6) and (b)(7)(C) to withhold information in the subset of documents they selected.

¹⁶ Section 6.1(cc) of E.O. 13526 defines “National Security” as “the national defense or foreign relations of the United States.”

(28) For information to be properly classified, and thus properly withheld from disclosure pursuant to Exemption (b)(1), the information must meet the requirements set forth in E.O. 13526 § 1.1(a):

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in § 1.4 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

(29) As I will explain in further detail below, in my role as an original classification authority, I have determined that the information withheld pursuant to Exemption (b)(1) is under the control of the United States Government, is classified and requires a classification marking at the "Secret" level since the unauthorized disclosure of the information reasonably could be expected to cause serious damage to national security. See E.O. 13526 § 1.2(a)(2). In addition to these substantive requirements, certain procedural and administrative requirements of E.O. 13526 must be followed before information can be considered properly classified, such as proper identification and marking of documents. In particular, I made certain that all procedural requirements of E.O. 13526 were followed:

- (1) each document was marked as required and stamped with the proper classification designation;
- (2) each document was marked to indicate clearly which portions are classified, and which portions are exempt from declassification as set forth in E.O. 13526 § 1.5(b);
- (3) the prohibitions and limitations on classification specified in E.O. 13526 § 1.7 were adhered to;

- (4) the declassification policies set forth in E.O. 13526 §§ 3.1 and 3.3 were followed; and
- (5) any reasonably segregable portions of these classified documents that did not meet the standards for classification under E.O. 13526 were declassified and marked for release, unless withholding was otherwise warranted under applicable law.

FINDINGS OF DECLARANT REGARDING EXEMPTION (b)(1)

(30) With the above requirements in mind, I personally and independently examined the FBI information withheld pursuant to Exemption 1.¹⁷ As a result of this examination, I determined that this classified information is owned by, was produced by or for, and /or is under the control of the U.S. Government. I further determined the classified information continues to warrant classification at the SECRET level pursuant to E.O. 13526 § 1.4(c), intelligence activities (including covert action), intelligence sources or methods, or cryptology.

(31) The information withheld in this case pursuant to Exemption 1 was examined in light of the body of information available to me concerning the national defense and foreign relations of the United States. This information was not examined in isolation. Instead, the information was evaluated with careful consideration given to the impact that disclosure of this information will have on other sensitive information contained elsewhere in the United States' intelligence files, including the secrecy of that other information. Equal consideration was given to the impact that other information, either in the public domain or likely known or suspected by present or potential adversaries of the United States, would have upon the information I examined, and upon attempts by a hostile entity to analyze such information.

(32) In those instances where, in my judgment, the disclosure of this information could reasonably be expected to cause serious damage to the national security, and its withholding outweighed the benefit of disclosure, I exercised my prerogative as an original classification

¹⁷ Exemption (b)(1) is asserted by the FBI or the FBI and an OGA to withhold information in the subset of documents Bates-numbered or referred to as: EO 12333-FBI 31-32, 59-62, NSD000203-NSD000206, NSD 9, OLC 5, OLC 6 and C06235758.

authority and designated that information as classified in the interest of national security at the “Secret” level, and invoked FOIA Exemption (b)(1) to prevent disclosure. Likewise, the justifications for the withheld classified information have been prepared with the intent that they be read with consideration given to the context in which the classified information is found, but also other information already in the public domain, as well as information likely known or suspected by hostile intelligence entities. It is my judgment that any greater specificity in the descriptions and justifications set forth herein with respect to the intelligence activities (including covert action), sources or methods could reasonably be expected to jeopardize the national security of the United States. As a result, the information appearing in these documents have been appropriately classified pursuant to E.O. 13526 and withheld pursuant to FOIA Exemption (b)(1). Additionally, the FBI is also asserting at times FOIA Exemption (b)(3) [50 U.S.C. § 3024(i)(1) (National Security Act of 1947)] and (b)(7)(E) in conjunction with (b)(1). Upon request, additional information supporting the assertion of FOIA Exemptions (b)(1) and (b)(3) will be provided to the Court *in camera, ex parte* as the withheld information cannot be further discussed on the public record without revealing classified information.

Exemption (b)(1) - E.O. 13526, § 1.4(c)
INTELLIGENCE ACTIVITIES, SOURCES AND METHODS

(33) E.O. 13526 § 1.4(c) exempts intelligence activities (including covert action), intelligence sources or methods, or cryptology from disclosure. An intelligence activity or method includes any intelligence action or technique utilized by the FBI against a targeted individual or organization that has been determined to be of a national security interest. An intelligence method is used to indicate any procedure (human or non-human) utilized to obtain information concerning such individual or organization. An intelligence activity or method has two characteristics. First, the intelligence activity or method -- and information generated by it -- is needed by U.S. Intelligence/Counterintelligence agencies to carry out their missions. Second,

confidentiality must be maintained with respect to the activity or method if the viability, productivity and usefulness of its information is to be preserved.

(34) The responsive documents containing information withheld pursuant to Exemption (b)(1), § 1.4(c) are as follows:

- (1) Electronic Communication (“EC”) from the FBI’s Office of General Counsel, National Security Law Branch to all FBI Offices setting out the policy and procedure for requesting Attorney General authority under Executive Order 12333, Section 2.5 to collect intelligence on U.S. persons overseas [Bates-numbered EO 12333-FBI 30-35];
- (2) Counterintelligence Division Policy Implementation Guide Cover Page, Introduction Page, § 4.18 and Appendix E-2 [Bates-numbered EO 12333-FBI 57-65];
- (3) Supplemental Guidelines for Collection, Retention, and Dissemination of Foreign Intelligence [Bates-numbered NSD000202-NSD000207];
- (4) OLC Legal Advice Memorandum to FBI General Counsel [referred to as NSD 9];
- (5) Legal advice memorandum discussing, among other things, legal issues pertaining to surveillance under EO 12333, dated April 2002 [referred to as OLC 5]; and
- (6) Legal advice memorandum discussing, among other things, legal issues pertaining to surveillance under EO 12333, dated May 2003 [referred to as OLC 6].
- (7) Activities of CIA and FBI_0 [Bates-numbered C06235758].

(35) The withheld information is protected by Exemption 1 because it describes and pertains to intelligence activities, sources, and methods utilized by the FBI in gathering intelligence information. Thus, the information falls squarely within the meaning of §1.4(c).

(36) The FBI (on its own or at the request of other agencies) protected information under FOIA Exemption (b)(1) and § 1.4(c) because the information is classified and the release of such information would reveal intelligence activities and methods used by the FBI against targets who are the subject of foreign counterintelligence investigations or operations; identify a

target of a foreign counterintelligence investigation; or disclose the intelligence gathering capabilities of the activities or methods directed at targets.

(37) It is my determination that the release of this information could permit hostile non-U.S. persons, entities, and foreign governments to appraise the scope, focus, location, target and capabilities of the FBI's intelligence-gathering methods and activities, and allow hostile agents to devise countermeasures to circumvent these intelligence activities or methods and render them useless in providing intelligence information. This revelation of intelligence activities and methods would severely disrupt the FBI's intelligence-gathering capabilities and could cause serious damage to our national security. This information is properly classified at the "Secret" level and withheld pursuant to E.O. 13526, § 1.4(c). Thus, the information is exempt from disclosure pursuant to Exemption 1.

EXEMPTION (b)(3)
INFORMATION PROTECTED BY STATUTE

(38) 5 U.S.C. § 552(b)(3) exempts from disclosure information which is:

specifically exempted from disclosure by statute... provided that such statute (A) (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; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(39) Exemption 3 was asserted to withhold information pursuant to Section 102A(i)(1) of the National Security Act of 1947 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."¹⁸ As relevant to 5 U.S.C. § 552(b)(3)(B), the National Security Act of 1947 was enacted before the date of enactment of the OPEN FOIA Act of 2009.¹⁹

¹⁸ Section 1024(i)(1) of the National Security Act was previously codified at 50 U.S.C. § 403(i)(1). As a

(40) 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)(i)(1). The FBI is one of 17 member agencies comprising the IC, and as such must protect intelligence sources and methods.

(41) As described above, Congress enacted the National Security Act, 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, I have determined that the FBI’s intelligence sources and methods would be revealed if any of the information withheld pursuant to Exemption 3 is disclosed to Plaintiffs, and thus, the FBI is prohibited from disclosing the information pursuant to 50 U.S.C. § 3024(i)(1). Thus, the FBI (on its own or at the request of other agencies) has properly withheld this information pursuant to Exemption 3, as prescribed by 50 U.S.C. § 3024(i)(1). Although no harm justification is required under Exemption 3, the harms described above apply to all (b)(3) material withheld under 50 U.S.C. § 3024(i)(1).²⁰

result of the reorganization of Title 50 of the U.S. Code, Section 102A(i)(1) is now codified at 50 U.S.C. § 3024(i)(1).

¹⁹ The OPEN FOIA Act of 2009 was enacted October 28, 2009, Pub. L. No. 111-83, 123 Stat. 2142, 2184 (2009); 5 U.S.C. § 552(b)(3)(B).

²⁰ Exemption (b)(3) is asserted by the FBI or the FBI and an OGA to withhold information in the subset of documents Bates-numbered or referred to as: EO 12333-FBI 31, 32, 59-62, NSD000203-NSD000206, NSD 9, OLC 5, OLC 6 and C06235758.

EXEMPTION 7 THRESHOLD

(42) A threshold requirement for application of Exemption (b)(7) is that the agency must first demonstrate that the records or information at issue were compiled for law enforcement purposes. Pursuant to 28 U.S.C. §§ 553, 534 and E.O. 12333 as implemented by the Attorney General's Guidelines for Domestic Operations ("AGG-DOM") and 28 C.F.R. § 0.85, the FBI is the primary investigative agency of the federal government with authority and responsibility to investigate all violations of federal law not exclusively assigned to another agency, to conduct investigations and activities to protect the United States and its people from terrorism and threats to national security, and to further the foreign intelligence objectives of the United States. Under this investigative authority, the responsive records herein were compiled for purposes of investigating and gathering intelligence information, and apprehending and prosecuting subjects who have committed acts of terrorism against the United States; such records relate to the enforcement of federal laws and such activity is within the law enforcement duty of the FBI. Accordingly, the responsive records were generated pursuant to the law enforcement duties of the FBI as articulated above. The FBI is responsible for detecting and investigating violations of Federal criminal laws, international terrorism, and threats to national security. All records responsive to Plaintiffs' request pertain to either FBI policy and procedures for requesting E.O. 12,333, § 2.5 authority to conduct electronic surveillance on United States Persons traveling outside of the United States or specific national security investigations of United States Persons traveling outside of the United States and the specific techniques used by the FBI in gathering intelligence information. Thus, these records were compiled for law enforcement purposes; squarely fall within the law enforcement duties of the FBI; and therefore, readily meet the threshold requirement of Exemption (b)(7).

EXEMPTION (b)(7)(A)
PENDING LAW ENFORCEMENT PROCEEDINGS

- (43) 5 U.S.C. § 552 (b)(7)(A) exempts from disclosure:

Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.

Application of this exemption requires: the existence of law enforcement records; a pending or prospective law enforcement proceeding; and a determination that release of the information could reasonably be expected to interfere with the enforcement proceeding. Typically, the FBI asserts Exemption (b)(7)(A) for a variety of different documents in an investigative file, which the FBI then groups into functional categories and describes in greater detail. In this case, however, the FBI has asserted Exemption (b)(7)(A) in a limited fashion to protect the names, personal identifying information, and activities of third-party subjects of pending FBI investigations in Document OLC 6. The release of the names, identifying information, and activities of third parties of on-going FBI investigations could result not only in the acknowledgment of the existence of the investigations, but also expose the identity of suspects, thereby jeopardizing the investigations. The FBI has applied Exemption (b)(7)(A) in OLC 6 to protect the names, personal identifying information, and activities of third parties of these open investigations.

EXEMPTION (b)(7)(D)
CONFIDENTIAL SOURCE INFORMATION

- (44) 5 U.S.C. § 552 (b)(7)(D) provides protection for:

records or information compiled for law enforcement purposes [which] could reasonably be expected to disclose the identity of a confidential source, including a state, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source.

- (45) Numerous confidential sources report to the FBI on a regular basis and are “informants” within the common meaning of the term. Some of these sources provide

information under an express assurance of confidentiality. Other individuals are interviewed under circumstances from which an assurance of confidentiality can reasonably be inferred. In either situation, these individuals are considered to be confidential sources since they furnished information only with the understanding that their identities and the information provided will not be released outside the FBI. Information provided by these individuals is singular in nature, and if released, could reveal their identities. The FBI has learned through experience that sources assisting, cooperating with, and providing information to the FBI must be free to do so without fear of reprisal. The FBI has also learned that sources must be free to furnish information to the FBI with complete candor and without the understandable tendency to hedge or withhold information because of fear that their cooperation with the FBI will later be made public. Sources providing information to the FBI should be secure in the knowledge that their assistance and their identities will be held in confidence.

(46) The release of a confidential source's identity would forever eliminate that source as a means of obtaining information. In addition, when the identity of one source is revealed, that revelation has a chilling effect on the activities and cooperation of other sources. Such a result would eliminate one of the FBI's most important means of collecting information and thereby severely hamper law enforcement efforts to detect and apprehend individuals engaged in the violation of federal criminal laws.

**Identifying Data and/or Information Provided by
Individuals Under an "Expressed" Assurance of Confidentiality**

(47) Exemption (b)(7)(D) was asserted to protect identifying information about and information provided by individuals to the FBI and/or law enforcement during the course of an FBI classified counterintelligence investigation of a third party, under express grants of confidentiality. These individuals provided specific and detailed information that is singular in

nature, concerning the activities of a subject of investigative interest to the FBI.²¹ The disclosure of the identity of these confidential sources and the information they provided could have disastrous consequences. In addition, disclosure of the identities of – and information provided by — confidential sources who have expressly been promised confidentiality has wider implications. If the FBI were to disclose the identities of – and information provided by – confidential sources, such disclosure would have a chilling effect on the activities and cooperation of this and other future FBI confidential sources. The FBI has found that it is only with the understanding of complete confidentiality that the aid of such sources can be enlisted, and that they can be persuaded to continue to provide valuable assistance in the future. Thus the identities of, and the information provided by, the sources who were expressly promised confidentiality were properly withheld pursuant to FOIA Exemption (b)(7)(D). Exemption (b)(7)(D) – Identifying Data and/or Information Provided by Individuals Under an “Expressed” Assurance of Confidentiality – has been asserted in this case to withhold information in the document referred to as: OLC 6.

EXEMPTION (b)(7)(E)
INVESTIGATIVE TECHNIQUES AND PROCEDURES

(48) 5 U.S.C. § 552(b)(7)(E) provides protection for:

Law enforcement records which 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.

(49) Exemption (b)(7)(E) has been asserted to protect information containing sensitive investigatory techniques and procedures authorized for use by the FBI. This exemption affords categorical protection to these techniques and procedures used in such investigations; it protects techniques and procedures not well-known to the public as well as non-public details about the

²¹ In OLC 6, the individuals providing information to the FBI are specifically referred to as “confidential sources,” thus confirming the information was provided under an expressed assurance of confidentiality.

use of well-known techniques and procedures. While several documents could easily be characterized as consisting fully of information that would disclose investigative techniques and procedures, and thus would be eligible for protection under (b)(7)(E) in their entirety, the FBI endeavored to release as much segregable information as possible to Plaintiffs. The release of additional information would disclose techniques and/or procedures used in law enforcement and national security investigations or prosecutions, or would disclose guidelines for law enforcement and national security investigations or prosecutions that could reasonably be expected to risk circumvention of the law. Although the circumvention of law component is not specifically required to justify the withholding of law enforcement techniques and procedures, this harm justification is nonetheless articulated in the 7E subcategories below.

(50) The subset of records selected by Plaintiffs for this motion contain information protected under one or more of the following seven subcategories:

1. General Electronic Surveillance Investigative Techniques and Procedures;
2. Collection/Analysis of Information;
3. Information Concerning the Installation, Locations, Monitoring, and Types of Devices Utilized in Surveillance;
4. Dates and Types of Investigations (Preliminary or Full Investigations);
5. Operational Directives Concerning Sensitive Investigative Techniques and Strategies;
6. Names, Numbers, and/or Alpha Designators of Sensitive FBI Squads and Units; and
7. FBI Secure Phone/Fax Number, Internal E-mail Address and/or Non-Public Web Address.

(51) These categories explain the basis for applying the exemption to particular information. To describe the protected information in any further detail would identify and highlight the sensitive information the FBI seeks to protect. The revelation of such details could enable the targets of these techniques to develop countermeasures or avoid detection in order to circumvent the FBI's law enforcement efforts.

(52) The FBI's reasoning for protecting this information cannot be examined in a vacuum, but must be analyzed within the larger context of our country's current national security

climate. The FBI is charged with protecting the nation from security risks posed by U.S. and non-U.S. individuals, organizations (such as terrorist groups), and foreign nations that seek harm against the United States. Thus, if specific investigative techniques or procedures are made public, then those individuals, organizations, and terrorist groups can use the information to learn the FBI's tactics in gathering information and can develop countermeasures to avoid detection.

**Exemption (b)(7)(E) – General Electronic Surveillance Investigative
Techniques and Procedures**

(53) Exemption (b)(7)(E) has been asserted, at times in conjunction with Exemptions 1 and 3, to protect general, non-public electronic surveillance details regarding the techniques and procedures utilized by the FBI in conducting national security investigations, including information revealing what types of techniques and procedures are routinely used in such investigations and are not publicly known, as well as non-public details about the use of well-known techniques and procedures. The government's use of electronic surveillance is a known public fact; however, the techniques used in connection with electronic surveillance are not well-known. All documents at issue contain sensitive information about the specific investigative methods and techniques used by the FBI in conducting surveillances in furtherance of national security investigations.

(54) To describe the investigative methods and techniques in further detail would highlight the very information the FBI seeks to protect pursuant to this exemption. Revealing details about information-gathering methods and techniques commonly used in national security investigations, and the circumstances under which they are used, would enable the targets of those methods and techniques to avoid detection of and develop countermeasures to circumvent the FBI's ability to effectively use such critical law enforcement methods and techniques in current and future national security investigations, thus risking the circumvention of the law. Accordingly, the FBI properly withheld this information pursuant to FOIA Exemption 7(E).

Exemption (b)(7)(E) – Investigative Techniques and Procedures has been asserted in this case to withhold information in the subset of documents Bates-numbered or referred to as: EO 12333-FBI 14-15, 30-33, 59-65, NSD000202-NSD000207, OLC 5, OLC 6 and C06235758. The FBI also relied on Exemption 1 to protect these techniques.

Collection/Analysis of Information

(55) Exemption (b)(7)(E) has been asserted to protect the techniques and procedures the FBI uses to collect and analyze information in connection with national security investigations. The release of this information would disclose the identity of methods used in collecting and analyzing information, including how and from where the FBI collects information, and the methodologies employed to analyze it. Such disclosures would enable investigative subjects to circumvent similar and currently used techniques. The relative utility of these techniques could be diminished if the actual techniques were released. In turn, this would facilitate the accumulation of information by investigative subjects regarding the circumstances under which specific techniques were used or requested to collect certain information, how the information collected is analyzed, and the usefulness of the information obtained. Release of this information would enable terrorists and other subjects to educate themselves on techniques employed by the FBI in collecting and analyzing information, and would allow these individuals to take countermeasures to circumvent the effectiveness of these techniques.

(56) Similar to the reasoning articulated above, the use of electronic surveillance is a known public fact; however, the methods the FBI utilizes to collect and analyze the information are not well known. Several of these documents contain sensitive information about investigative methods used by the FBI in conducting national security investigations. The methods are detailed within the documents in varying degrees of specificity. Releasing information on these methods and use would, in essence, highlight the types of activities, facts, or occurrences that are of particular interest to the FBI in national security investigations.

Publicly disclosing investigative methods, analysis of information gleaned from the methods, or any other sort of details regarding it, would inform individuals of the kinds of information the FBI is interested in capturing and would afford them the opportunity to employ countermeasures to circumvent detection or alter behavior to mislead investigators. Accordingly, the FBI properly withheld this information pursuant to FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) - Collection/Analysis of Information has been asserted to withhold information in the subset of documents Bates-numbered or referred to as: EO 12333-FBI 14-15, 30-33, 35, 59-65, NSD000202-NSD000207, OLC 5 and OLC 6. The FBI also relied on Exemption 1 to protect these techniques.

**Information Concerning the Installation, Locations,
Monitoring, and Types of Devices Utilized in Surveillance**

(57) Exemption (b)(7)(E) has been asserted to protect information concerning techniques and procedures related to locations, monitoring, and types of devices utilized in surveillances conducted by the FBI. The FBI utilized these techniques and procedures to obtain investigative intelligence relevant to the investigations at issue here. The law enforcement techniques used to conduct these surveillances are the same techniques utilized by the FBI in current criminal and national security investigations. Again, it is publicly known that the FBI and other law enforcement agencies engage in different types of surveillance in investigations. However, 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 and other potential criminals to develop and utilize countermeasures to defeat or avoid different types of surveillances, thus rendering the techniques useless to the FBI and other law enforcement agencies. Accordingly, because the disclosure of this information could reasonably be expected to reveal non-public details about law enforcement techniques that are still being used by the FBI and risk circumvention of the law, the FBI has properly withheld this information pursuant to

FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) - Information Concerning the Installation, Locations, Monitoring, and Types of Devices Utilized in Surveillance has been asserted to withhold information in the subset of documents Bates-numbered: EO 12333-FBI 31-32 and 59-60. The FBI also relied on Exemption 1 to protect these techniques.

Dates and Types of Investigations
(Preliminary or Full Investigations)

(58) The FBI has asserted Exemption (b)(7)(E) to protect techniques, procedures, and guidelines pertaining to the types and dates of investigations referenced in the records at issue in this case. Specifically, the information withheld, when referenced in connection with an actual investigation and not in general discussion, pertains to the type of investigation, whether it is a “preliminary” or “full” investigation, and the date it was initiated. Disclosure of this information would allow individuals to know the types of activities that would trigger a full investigation as opposed to a preliminary investigation, and the particular dates that the investigation covered, which would allow individuals to adjust their behavior accordingly. Moreover, the knowledge that a specific activity in general warrants investigation could likewise cause individuals to adjust their conduct to avoid detection. Because disclosure of this information could reasonably be expected to impede the FBI’s effectiveness and potentially aid in circumvention of the law, the FBI has properly withheld this information pursuant to FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) – Dates and Types of Investigations (Preliminary or Full Investigations) has been asserted to withhold information in the subset of documents Bates-numbered: EO 12333-FBI 60, and 64-65.

Operational Directives Concerning
Sensitive Investigative Techniques and Strategies

(59) Certain pages from the Domestic Investigations and Operations Guide and the Counterintelligence Division Policy Implementation Guide (Bates-numbered EO 12333-FBI 13-15 and 57-65), as well as a document titled, “Supplemental Guidelines for Collection, Retention,

and Dissemination of Foreign Intelligence” (Bates Numbered NSD000202-NSD000207), were responsive to Plaintiffs’ request. This law enforcement material comprises operational directives that provide information and instruct FBI employees on the proper use of certain sensitive FBI procedures, techniques, and strategies for conducting investigations. In the course of providing these instructions, these guides identify the procedures, techniques, and strategies at issue. Specifically, the protected information falls within both subtypes of 7(E): law enforcement techniques and procedures and law enforcement guidelines. Releasing such information would not only provide sensitive, unknown investigative techniques, it would also reveal sensitive unknown uses of these specific techniques and procedures. If released in its entirety, the information would provide individuals and entities with a unique look inside the FBI’s law enforcement and national security “playbooks.” Armed with such information, criminals could predict how and when the FBI will respond to certain suspicious/criminal activities, and the investigative techniques the FBI is most likely to employ in those situations. This would afford criminals the ability to preemptively modify their behavior in a manner that voids detection and disrupt the very investigative procedures, techniques, and strategies that these FBI guides are intended to protect. Consequently, the release of this information in full would increase the risk that targets of these national security investigations could develop countermeasures and avoid detection by interfering with the FBI’s ability to effectively use these important national security law enforcement techniques. A release of this information would allow individuals and entities seeking to commit crimes or threaten the United States’ national security an opportunity to avoid detection and circumvent the law. Thus, the FBI properly withheld this information pursuant to FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) – Operational Directives Concerning Sensitive Investigative Techniques and Strategies has been asserted to withhold information in the subset of documents Bates-numbered: EO 12333-FBI 14-15, 58-65 and NSD000202-NSD000207.

**Names, Numbers, and/or Alpha Designators
of Sensitive FBI Squads and Units**

(60) The FBI asserted Exemption (b)(7)(E) to protect techniques and procedures specifically pertaining to the names, numbers, and/or alpha designators of certain sensitive FBI squads and units. The existence of these particular squads and units is not known to the general public. Revealing their names, numbers, and alpha designators would reveal their existence, as well as the level of focus the FBI has applied to certain areas within the realm of counterterrorism. Providing criminals with the level of focus the FBI is applying to a certain type of terrorist activity would provide terrorists with an idea as to where the FBI is focusing its limited resources. Terrorists could then plan and structure their activities in a manner that avoids detection and disruption by the FBI, making it easier for them to circumvent the law. Therefore, this information has been redacted pursuant to FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) - Names, Numbers, and/or Alpha Designators of Sensitive FBI Squads and Units has been asserted to withhold information in the subset of documents Bates-numbered: EO 12333-FBI 58.

**FBI Secure Phone/Fax Number, Internal
E-mail Address and/or Non-Public Web Address**

(61) The FBI protected techniques and procedures related to its secure phone/fax numbers, internal e-mail addresses and/or non-public web addresses. Release of this type of information could allow individuals under investigation to exploit the FBI's Information Technology system to gain unauthorized access to, view and manipulate data on, or otherwise interfere with the FBI's unclassified but non-public intranet. Such actions could arm them with the information or ability to circumvent the law. Additionally, release of this information would allow individuals to disrupt official business and could subject FBI employees to harassing faxes and e-mails. Thus, the FBI properly protected this information from disclosure pursuant to FOIA Exemption 7(E). In this case, Exemption (b)(7)(E) – FBI Secure Phone/Fax, Internal E-Mail

Address and/or Non-Public Web Address has been asserted to withhold information in the document Bates-numbered: EO 12333-FBI 58.

CONSULTATIONS AND REFERRALS

(62) There are several processes by which agencies coordinate with one another about the disposition of shared information that is responsive to FOIA requests. Consultations are the process used when another agency's information is located in FBI records. With consultations, the FBI asks the other agency how it would like its information in FBI records to be handled. The FBI then responds to the requester about the disposition of the information. Referrals are the process used when another agency's records are located within FBI files. With referrals, the FBI sends the record back to the agency from which it originated, and that agency decides the disposition of the record and responds directly to the requester. See "Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them," DOJ Office Information Policy Guidance, <http://www.justice.gov/oip/blog/foia-guidance-13>.

(63) The FBI consulted with numerous other government agencies concerning the subset of documents selected by the Plaintiffs.

National Security Agency

(64) The FBI identified several documents which either originated with the National Security Agency ("NSA") or contained NSA equities, two of which are part of the subset of documents contested by Plaintiffs and have been Bates-numbered EO 12333-FBI 30-35 and 57-65. Following consultations between NSA and FBI, it was determined that certain information contained in these documents must be redacted pursuant to Exemptions (b)(1) and (b)(3). The NSA is providing a declaration to defend these withholdings.

Other Government Agency

(65) The FBI identified several documents which contained OGA equities, two of which are part of the subset of documents contested by Plaintiffs and have been Bates-numbered EO 12333-FBI 30-35 and 57-65. Following consultations between the OGA and FBI, it was determined that certain information contained in these documents be redacted pursuant to Exemptions (b)(1) and (b)(3). Since the FBI's justification for protecting similar information under Exemptions (b)(1) and (b)(3) also applicable to this OGA's information, the FBI has defended these withholdings instead of the OGA's providing a separate declaration.

SEGREGABILITY

(66) During the processing of Plaintiffs' request, each responsive page was individually examined to identify non-exempt information that could be reasonably segregated from exempt information for release. All segregable information has been released to plaintiffs. 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.

(67) As discussed in paragraph 4 *supra*, Plaintiffs are challenging only three FBI documents consisting of 18 pages. Of these 18 pages, 3 pages were Released in Full ("RIF"), 14 pages were Released in Part ("RIP"), and 1 page was Withheld in Full ("WIF"). Each of these categories is discussed below to further address segregability.

(a) Pages RIF. Following the segregability review, RIDS determined that 3 pages could be released in full without redactions as there was no foreseeable harm to an interest protected by a FOIA exemption.

(b) Pages RIP. RIDS further determined, in some instances after consultations with other agencies, that 14 pages could be released in part with redactions pursuant to the specific FOIA exemptions identified on these pages and described herein. These

pages comprise a mixture of material that could be segregated for release and material that was withheld as release would trigger foreseeable harm to one or more interests protected by the cited FOIA exemptions on these pages. The protected material was either exempt itself or was so intertwined with non-exempt information that segregation of the non-exempt information was not reasonably possible without revealing exempt information or leaving nothing but meaningless words or sentence fragments.

(c) Pages WIF. Finally, RIDS determined, after consultations with other agencies, that 1 page was required to be withheld in its entirety to protect exempt information. RIDS concluded that all information on this page was either fully covered by one or more of the cited FOIA exemptions, or that any non-exempt information on these pages was so intertwined with exempt material that no information could be reasonably segregated for release. Any further segregation of this intertwined material would only produce disjointed words, phrases, or sentences that, taken separately or together, would have minimal or no informational content.

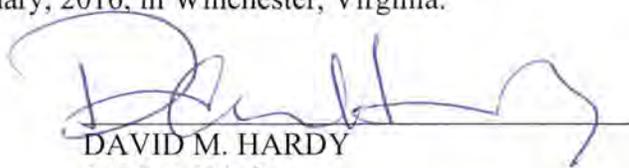
CONCLUSION

(68) The FBI conducted a reasonable search for records responsive to Plaintiffs' FOIA request. The FBI has processed (at times, with the assistance of other agencies) and released all reasonably segregable information from the responsive records to Plaintiffs. In addition to limited and uncontested withholdings pursuant to FOIA Exemptions 6 and 7(C), the FBI properly protected and withheld information pursuant to FOIA Exemptions 1, 3, 7(A), 7(D), and 7(E), 5 U.S.C. §§ 552 (b)(1), (b)(3), (b)(7)(A), (b)(7)(D), and (b)(7)(E). The FBI has carefully examined the responsive records and has determined (at times, with the assistance of other agencies) that the information withheld from Plaintiffs, if disclosed, would reveal information that would cause serious damage to national security, would violate federal statutes governing release of information on national security operations, would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law

enforcement and national security investigations or prosecutions that could reasonably be expected to risk circumvention of the law. After extensive review of the responsive records and advice provided by other government agencies, I have determined that there is no further reasonably segregable information subject to the FOIA to be released, without revealing exempt information.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, and that Exhibits A – I attached hereto are true and correct copies.

Executed this ^{26th} day of February, 2016, in Winchester, Virginia.



DAVID M. HARDY
Section Chief
Record/Information Dissemination Section
Records Management Division
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