UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	Case No. 1:13-cv-01961-KBJ

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN FURTHER SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff in this FOIA case, Electronic Privacy Information Center ("EPIC"), has conceded the bulk of the Motion for Summary Judgment filed by defendant, the United States Department of Justice ("the Department"). In its opposition and cross-motion, plaintiff now contests only the withholding in full of one document by the FBI, and the partial withholding of 25 semiannual reports to Congress by the Department's National Security Division ("NSD"). As plaintiff admits, defendant is therefore entitled to summary judgment on the majority of documents plaintiff had previously indicated were in dispute. *See* Pl.'s Proposed Order (ECF No. 25-4).

All of defendant's remaining withholdings in dispute protect information concerning pen register trap-and-trace devices authorized for use in national security investigations under the Foreign Intelligence Surveillance Act; all of that information is classified pursuant to Executive Order, specifically protected by statute, and/or would reveal sensitive law enforcement techniques. Defendant has released as much of the responsive records to plaintiff as it can without revealing that FOIA-exempt information, and so the Government is entitled to summary judgment in full.

Plaintiff's arguments to the contrary are unavailing. The lone FBI document still in dispute was properly withheld in full because to release any portion of it would reveal classified information about an intelligence method and law enforcement technique protected by FOIA Exemptions 1, 3, and 7(E). Likewise, the withheld portions of the semiannual reports to Congress would reveal classified information about intelligence sources and methods that is inextricably intertwined with the Department's reporting to Congress on specific national security investigations, compliance matters, and decisions of the FISC. The withheld portions of those semiannual reports are properly classified under the governing Executive Order, and are also protected by Exemption 7(E) because they contain information drawn from FBI

investigative files that would reveal non-public details of FBI law enforcement techniques. Finally, plaintiff accurately pointed out two redactions made in error, and defendant has now in good faith released the mistakenly withheld information, re-reviewed all of the semiannual reports in search of any similar errors, and thus released an additional statistic the Department found was also withheld in error. Plaintiff's other criticisms are meritless.

Because the Government's response to plaintiff's FOIA request fully complies with that statute and as discussed below, the Court should grant defendant's Motion for Summary Judgment and deny plaintiff's Cross-Motion

I. The Government Properly Withheld Classified Information Pursuant to FOIA Exemption 1.

As defendant has explained, it properly withheld classified information pursuant to FOIA Exemption 1, which 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." 5 U.S.C. § 552(b)(1). The current Executive Order, No. 13,526, governs the classification of national security information.

An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of Executive Order 13,526. Section 1.1 of the Executive Order sets forth four requirements for the classification of national security information: (1) an original classification authority classifies the information; (2) the U.S. Government owns, produces, or controls the information; (3) the information is within one of eight protected categories listed in section 1.4 of the Order; and (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original

classification authority is able to identify or describe the damages. Exec. Ord. 13,526 § 1.1(a). Courts accord substantial weight to agency declarations concerning classified information; indeed, "little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007).

A. The FBI Properly Classified Document 68.

Plaintiff challenges the withholding in full of document no. 68, which was a government "response to orders for additional briefing in reference to a request for" two combined Pen Register/ Trap and Trace and Business Records ("PR/BR") Orders. *See* Second Hardy Decl. ¶ 12; *see also* Third Hardy Decl. ¶ 31. In his third declaration, filed with this memorandum, senior FBI official David Hardy, an original classification authority (*e.g.*, Third Hardy Decl. ¶ 2), provides for the Court's *ex parte, in camera* review a classified explanation of the intelligence method and law enforcement technique discussed in the document. Third Hardy Decl. ¶¶ 8-13, 31, 42.[1] Defendant cannot provide those details in a public filing, but as Mr. Hardy also testifies in an unclassified portion of his third declaration:

> It is my determination that disclosure of specific information describing the intelligence activities or methods that have been or are being used within these documents, and are still used by the FBI in gathering intelligence information in other cases, could reasonably be expected to cause serious damage and exceptionally grave damage to the national security for the following reasons: (1) disclosure would allow hostile entities to discover the evolution of the FBI's intelligence gathering methods; (2) disclosure would reveal still-current, specific targets of the FBI's national security investigations; and (3) disclosure would reveal the determination of the criteria used and priorities assigned to past and current intelligence or counterintelligence investigations. With the aid of this detailed information, hostile entities and individuals could develop countermeasures which would, in turn, severely disrupt the FBI's intelligence

[1] Portions of Mr. Hardy's third declaration contain classified information. Those classified portions have been redacted from the public version of that declaration filed via the Court's ECF system. A full, unredacted, classified copy of the declaration is being lodged with a Department of Justice Classified Information Security Officer for *ex parte* submission to and *in camera* review by the Court.

> gathering capabilities. This major disruption could result in severe damage to the FBI's efforts to detect and apprehend violators of the United States' national security and criminal laws.

Id. ¶ 36. As Mr. Hardy further testifies, release of this information could be reasonably expected to cause serious harm to national security and it is, therefore, classified. *Id.* ¶¶ 35-36. The Court should affirm the FBI's considered determination, which is entitled to substantial deference, that the release of the withheld information would harm national security. *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001) (because courts lack expertise in national security matters, they must give "substantial weight to agency statements") (internal quotations and citations omitted); *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (because "courts have little expertise in either international diplomacy or counterintelligence operations, we are in no position to dismiss the CIA's facially reasonable concerns" about the harm that disclosure could cause to national security).

Plaintiff argues that the FBI has improperly withheld document 68 in full because, according to plaintiff, such material printed from Westlaw and discussion of legal standards cannot be subject to Exemption 1 (or Exemptions 3 or 7(E)). Pl. Mem. 30-31. But plaintiff's conclusory argument is unfounded. Mr. Hardy has previously explained that *otherwise* innocuous information, "when read or viewed within the context of other available documents and information, [would] reveal highly sensitive information to sophisticated adversaries," such as critical details about important investigative methods and techniques used by the FBI in national security investigations. *See* 2d Hardy Decl. ¶ 37; *see also* 3d Hardy Decl. ¶ 41. The Executive Order governing classification of national security information explicitly recognizes that otherwise unclassified material is properly classified under such circumstances: "Compilations of items of information that are individually unclassified may be classified if the

compiled information reveals an additional association or relationship that: (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information." Exec. Ord. 13,526 § 1.7(e). *See also, e.g., N.Y. Times Co. v. Dep't of Justice*, 915 F. Supp. 2d 508, 535 (S.D.N.Y. 2013) (finding "no reason why legal analysis cannot be classified pursuant to E.O. 13526 if it pertains to matters that are themselves classified"), *aff'd in part, rev'd in part on other grounds*, 756 F.3d 100 (2d Cir. 2014). Plaintiff is also mistaken to imply that the FBI has failed to "comply with special procedures to properly classify material that was previously unclassified." Pl. Mem. 31. Plaintiff cites 32 C.F.R. § 2001.13(c), which does not discuss review of FOIA requests and states only that

> [a] determination that information is classified through the compilation of unclassified information is a derivative classification action based upon existing original classification guidance. If the compilation of unclassified information reveals a new aspect of information that meets the criteria for classification, it shall be referred to an original classification authority with jurisdiction over the information to make an original classification decision.

32 C.F.R. § 2001.13(c). This directive does not vest plaintiff with any rights subject to judicial enforcement, but in any event, the FBI has plainly complied with it: Mr. Hardy is "an original classification authority with jurisdiction over the information," and he has made an original classification decision. *See id*; 2d Hardy Decl. ¶ 2. As he states, "I have determined that the Westlaw printouts attached to, and other case citations or legal analysis included in, Document 68 are properly classified due to their compilation with the balance of Document 68." 3d Hardy Decl. ¶ 51.

B. The Government has Properly Withheld Classified Information from the Department of Justice's Semi-Annual Reports to the House and Senate Select Intelligence Committees Pursuant to Exemption 1.

The Government has properly withheld classified information from twenty-five semiannual reports that the Attorney General has submitted to the House Permanent Select

Committee on Intelligence and the Senate Select Committee on Intelligence, as well as the House and Senate Judiciary Committees. 2d Bradley Decl. ¶ 9; 3d Bradley Decl. ¶ 4. The reports discuss, *inter alia*, all PR/TT surveillances conducted under FISA from July 1, 2000 to December 21, 2012. *Id.*

1. NSD Properly Withheld Classified Information Pertaining to Intelligence Sources and Methods in Paragraphs of the Semi-Annual Reports.

The semiannual reports have been released in part, and the withheld portions consist of three types of information: summary descriptions of intelligence targets and investigations, which specifically describe national security investigations and how they are conducted; summary descriptions of compliance incidents, which include details about United States intelligence methods; and information pertaining to intelligence sources and methods. 2d Bradley Decl. ¶ 10. "Based on the unclassified report headings" that have been released to EPIC, plaintiff speculates that defendant is withholding non-exempt information that does not fall into the three categories Mr. Bradley identified in his sworn declaration. Pl. Mem. 21. Plaintiff is incorrect, and its speculation is insufficient to contravene the record evidence (Mr. Bradley's testimony) or to defeat defendant's motion for summary judgment. This Court affords agency declarations "a presumption of good faith, which cannot be rebutted by purely speculative claims[.]" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991); *see Larson v. Dep't of State*, 565 F.3d 857, 867 (D.C. Cir. 2009) (finding summary judgment appropriate where agency's affidavit demonstrates that information was properly classified and "[t]he affidavit is not controverted by any contrary evidence in the record or any evidence suggesting agency bad faith").

Nonetheless, Mr. Bradley now provides further detail in his Third Declaration. As he explains:

> In some cases, intelligence sources and methods have been withheld from sections in the reports that, according to their unredacted headings, discuss significant legal interpretations by the FISC, its jurisdiction, or its procedures. That is because the descriptions of those compliance incidents and legal interpretations cannot be reasonably segregated from highly sensitive, classified information and then released. After carefully reviewing the withheld paragraphs I have found that the descriptions of the compliance incidents and legal analysis cannot reasonably be segregated and released without risking disclosure of the manner and means by which the United States Government collects intelligence information.

3d Bradley Decl. ¶ 8. Mr. Bradley thus explains that "in the context of plaintiff's FOIA request at issue in this litigation," even *otherwise* seemingly "mundane and non-sensitive material" would "reveal highly sensitive information to sophisticated adversaries of the United States." *Id.* ¶ 9. Therefore, Mr. Bradley "determined that these paragraphs are not reasonably segregable, including as to the legal analysis and compliance incident descriptions they contain." *Id.* ¶ 10. Rather, they are properly classified pursuant to Executive Order 13,526 and protected by FOIA Exemption 1.

2. The Information Withheld by NSD is Properly Classified Pursuant to Executive Order 13,526.

Plaintiff complains that NSD has not established the procedural requirements of Executive Order 13,526 have been met. But a Department official with original classification authority has determined that the withheld material meets the requirement for classification under the Executive Order, § 1.1(a). *See* 3d Bradley Decl. ¶¶ 3, 7-11; 2d Bradley Decl. ¶¶ 10, 13. In questioning this conclusion, plaintiff appears to impose its own misunderstanding of classification procedures, which is inconsistent with the Executive Order.

Plaintiffs appear to believe that a document should not be considered classified, and thus cannot be withheld under FOIA, if it does not have (or did not originally have, prior to FOIA processing) all of the markings generally called for by the Executive Order – which include,

among other things, the name of the classifying authority, the basis for classification, and separate portion markings for material within the document. *See* Pl. Mem. 14-16. The Executive Order directs a contrary result, specifying that "[i]nformation assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings." Exec. Ord. 13526 § 1.6(f); *see also Wilson v. McConnell*, 501 F. Supp. 2d 545, 555 (S.D.N.Y. 2007) ("[T]he failure to mark a document does not render the information in it unclassified."). An official with original classification authority has reviewed all of the documents withheld under Exemption 1 in this case and has determined that they are properly classified under the Executive Order. *See* 3d Bradley Decl. ¶¶ 3, 7-11; 2d Bradley Decl. ¶¶ 10, 13. Accordingly, the Executive Order directs that these documents be "considered as classified . . . despite [any] omission of other required markings." E.O. 13526 § 1.6(f).

Moreover, Executive Order 13,526 requires only four criteria to be satisfied for information to be deemed properly classified and exempt from release: (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 section 1.4 of the Executive 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. Exec. Ord. 13,526 § 1.1(a). This Court has consistently agreed, holding that "an agency need only satisfy the requirements of Executive Order § 1.1(a) to classify information properly for purposes of FOIA Exemption 1." *National Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 167 (D.D.C. 2013); *accord Mobley v. CIA*, 924 F. Supp. 2d 24, 50 (D.D.C. 2013)); *Mobley v. Dep't of Justice*,

870 F. Supp. 2d 61, 66 (D.D.C. 2012); *Schoenman v. FBI*, 841 F. Supp. 2d 69, 81 (D.D.C. 2012); *ACLU v. Dep't of Justice*, 808 F. Supp. 2d 280, 298 (D.D.C. 2011), *rev'd on other grounds*, 710 F.3d 422 (D.C. Cir. 2013).

In any event, Mr. Bradley's Third Declaration rebuts any claim that the documents in question were not marked for classification in accordance with the Executive Order. He testifies that he has personally reviewed all the documents discussed in his declarations, and that all were properly marked for classification per the Executive Order. 3d Bradley Decl. ¶¶ 3, 11. No more is required. *See Schoenman v. FBI*, 575 F. Supp. 2d 136, 152 (D.D.C. 2008) (in light of declarant's sworn statement that document was properly marked and the presumption of good faith accorded agency affidavits in FOIA cases, plaintiff's speculation that the document may not have been properly marked was insufficient to establish procedural noncompliance, even if the declaration could have been "more specific as to the procedural requirements of [the] Executive Order").

Plaintiff also complains, confusingly, that the documents it received – from which, of course, any classified information has been redacted pursuant to FOIA Exemption 1 – are not now marked with an overall classification level, but bear classification markings that have been struck through, *e.g.*, ~~SECRET~~. As Mr. Bradley explains, "[t]hat is because the documents, as released to plaintiff, are no longer classified[.]" 3d Bradley Decl. ¶ 11. They thus should not be marked classified under the Executive Order. Plaintiff further argues that defendant has improperly withheld classification portion markings from the semi-annual reports. Pl. Mem. 14-15. Regardless of the legal merit of this claim, it is moot: classification portion markings have not been redacted from the re-processed versions of the reports, and so have been released to plaintiff. 3d Bradley Decl. ¶ 11.

3. Defendant Has Released to Plaintiff Statistical Information that was Withheld in Error.

For the first time in its summary judgment brief, plaintiff points out limited inconsistencies in NSD's redactions to statistical information. Pl. Mem. 22-23. In particular, plaintiff notes that statistics concerning the number of United States persons targeted for surveillance in a given semiannual time period was released in some reports, but not in two others (Documents 126 and 137 on defendant's *Vaughn* index). *Id.* 23. This was the result of administrative error, and defendant has corrected those errors by releasing the statistics in question to plaintiff. 3d Bradley Decl. ¶ 5. Moreover, upon learning of its errors, NSD re-reviewed all of the semiannual reports and discovered that the number of United States persons targeted was also mistakenly redacted from Document 136; NSD has released that number to plaintiff, as well. *Id.*[2]

4. Other Material Plaintiff Asserts Defendant Improperly Redacted has Not Been Redacted, but was Never Present in the Responsive Records.

Plaintiff's other criticisms are confused and unfounded. Plaintiff notes certain statistics are included in certain reports, but not others, and that certain reports include precise statistics whereas others state a statistic was "at least" a certain level. Pl. Mem. 23. This is not the result of any redactions or other decisions by defendant in processing plaintiff's FOIA request, but simply reflects the content of the responsive records. 3d Bradley Dec. ¶¶ 6-7 (the numbers

[2] It bears noting that NSD's correction of these errors does not call into question defendant's response to plaintiff's FOIA request, but, in fact, illustrates the agency's good faith. *See Meeropol v. Meese*, 790 F.2d 942, 952-53 (D.C. Cir. 1986) (agency's responding to problems pointed out by requester, correcting problems, and releasing additional information did not call into question adequacy of search for records, but illustrated agency's good faith). Defendant also notes that, had plaintiff met and conferred about its questions through counsel after the semiannual reports were produced in early August, or after defendant provided plaintiff with a draft *Vaughn* index in early September, these administrative errors could have been addressed at that time rather than in the parties' summary judgment papers.

plaintiff wishes to see have not been redacted, but rather are simply not included in the responsive documents in question).

C. Plaintiff Has Not Established That Any of the Withheld Information has Been Officially Released.

Plaintiff notes that the Government has released considerable information to the public concerning FISA surveillance, including the now-discontinued, bulk internet metadata collection program discussed in defendant's opening memorandum. *See* Pl. Mem. 17-18. The United States' efforts to release as much information as it can about national security surveillance in the public interest while taking into account the obvious need for secrecy in counterterrorism and similar investigations does not mean, however, that the Government cannot protect other, classified information under law. 5 U.S.C. § 552(b)(1). There has been no official acknowledgment that waives Exemption 1, or any other exemption, over information defendant has withheld in response to plaintiff's FOIA request.

The standard for official disclosure requires plaintiff to identify an intentional, public disclosure made by or at the request of a government officer acting in an authorized capacity by the agency in control of the information at issue, that is "as specific as the information previously released." *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990). This test is a "stringen[t]" one, *Pub. Citizen v. Dep't of State*, 11 F.3d 198, 202 (D.C. Cir. 1993), to be applied with "exactitude," *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007). In the context of this case, it thus presents a "high hurdle" out of deference to "'the Government's vital interest in information relating to national security[.]" *Pub. Citizen,* 11 F.3d at 203.

Plaintiff does not come close to clearing this "high hurdle." The initial burden of production on an issue of official disclosure under FOIA always lies with the requester, who must "point to 'specific' information identical to that being withheld." *Davis v. Dep't of Justice,*

968 F.2d 1276, 1280 (D.C. Cir. 1992). There is not, as plaintiff would have it, a burden on defendant to "prov[e] the negative." *Id.* at 1279; *contra* Pl. Mem. 18. While plaintiff is free to note the Government's extraordinary efforts to release information concerning surveillance, plaintiff's general references to the declassification of "a great deal of information about operations conducted under the FISA Pen Register authority, including the Internet metadata program that was in operation from 2006 until 2011" and citation to a "report detailing compliance issues with foreign intelligence surveillance" (Pl. Mem. 17-18) does not establish that *any* of the specific, withheld information has been officially disclosed. Indeed, the information now in dispute concerns individual national security investigations, not the discontinued bulk coaction program, and the partially declassified "report detailing compliance issues" upon which plaintiff relies does not even concern use of PR/TT devices under FISA, but pertains to surveillance conducted under a separate provision of that Act, Section 702.[3] Plaintiff's non-specific and irrelevant citations do not contravene Mr. Bradley's and Mr. Hardy's detailed, sworn testimony (including Mr. Hardy's *ex parte*, classified submissions) that the withheld material in dispute is properly classified.

II. The Government has Properly Withheld Information Concerning Law Enforcement Techniques and Procedures Pursuant to FOIA Exemption 7(E).

As defendant has explained, *see* Def. Opening Mem at 25-28, Exemption 7(E) protects from disclosure information compiled for law enforcement purposes where release of the information "would disclose techniques and procedures for law enforcement investigations or prosecutions," *without* a requirement that the government establish such disclosure would cause

[3] See "Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the Foreign Intelligence Surveillance Act," *cited in* Pl. Mem. at 18, *available at* http://www.dni.gov/files/documents/Semiannual%20Assessment%20of%20Compliance%20with%20procedures%20and%20guidelines%20issued%20pursuant%20to%20Sect%20702%20of%20FISA.pdf (last visited December 11, 2014).

harm, or where it would "disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."[4] 5 U.S.C. § 552(b)(7)(E). Defendant has properly invoked Exemption 7(E) to protect information concerning law enforcement techniques, and plaintiff's contrary arguments are all unavailing.

A. The Withheld Portions of the Reports to Congress Were Compiled from FBI Investigatory Files and, Therefore, Were "Compiled for Law Enforcement Purposes."

The information withheld pursuant to Exemption 7(E) plainly meets the threshold requirement that it was "compiled for law enforcement purposes." Plaintiff's contrary argument is unfounded and ignores binding Supreme Court precedent.

"In assessing whether records are compiled for law enforcement purposes, . . . the focus is on how and under what circumstances the requested files were compiled, and 'whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding."' *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations omitted). The range of law enforcement purposes falling within the scope of Exemption 7 includes government national security and counterterrorism activities. *See, e.g., Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003); *Kidder v. FBI*, 517 F. Supp. 2d 17, 27 (D.D.C. 2007).

Plaintiff argues the reports were "compiled for the purpose of facilitating congressional oversight" by NSD's Office of Intelligence, Oversight Section, which it argues "does not serve a law enforcement function." Pl. Mem. 24-25. This is entirely specious. NSD is obviously part of

[4] "To clear that relatively low bar, an agency must demonstrate only that release of a document might increase the risk 'that a law will be violated or that past violators will escape legal consequences.'" *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n*, 740 F.3d 195, 204-205 (D.C. Cir. 2014), *quoting Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009), *& citing Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011).

the Department, and "[b]ecause the DOJ is an agency 'specializ[ing] in law enforcement, its claim of a law enforcement purpose is entitled to deference." *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 926. Moreover, Mr. Hardy and Mr. Bradley have each testified that the information redacted from the reports to Congress was drawn from FBI national security investigative files. 3d Bradley Decl. ¶ 12; 3d Hardy Decl. ¶¶ 31, 32, 49. The information was, therefore, compiled for a law enforcement purpose under Exemption 7(E), and the fact the information is now found as summarized in a report to Congress is irrelevant. Indeed, the Supreme Court, the Court of Appeals for the D.C. Circuit, and this Court have all made it abundantly clear that "information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document for a non-law-enforcement purpose." *FBI v. Abramson*, 456 U.S. 615, 631-32 (1983); *see Lesar v. Dep't of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980) (holding that documents compiled from review of previous FBI surveillance meet threshold); *Assassination Archives & Research Ctr. v. CIA*, 903 F. Supp. 131, 132-33 (D.D.C. 1995) (finding that information from criminal investigations recompiled into administrative file to assist FBI in responding to Senate committee hearings "certainly satisfies" threshold requirement).

The material withheld under Exemption 7(E) contains information drawn from FBI national security investigative files and, therefore, meets the threshold requirement for exemption under 5 U.S.C. § 552(b)(7)(E).

B. The Withheld Portions of the Reports to Congress Would Disclose Law Enforcement Techniques.

Plaintiff also argues that defendant has not justified its Exemption 7(E) withholdings of information pertaining to non-public law enforcement techniques because it does not

"demonstrate logically how disclosure of oversight reports would risk circumvention of the law." Pl. Mem. 27-28. Plaintiff is mistaken, but its argument is also irrelevant. As defendant has explained, its 7(E) withholdings protect information concerning confidential law enforcement techniques used in national security investigations. And it is axiomatic that law enforcement "techniques or procedures" are categorically protected from disclosure; the government need not show that harm would result from disclosure to invoke Exemption 7(E). *See Keys v. Dep't of Homeland Sec.*, 510 F. Supp. 2d 121, 129 (D.D.C. 2007); *Judicial Watch, Inc. v. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004); *Smith v. ATF*, 977 F. Supp. 496, 501 (D.D.C. 1997). Plaintiff's contrary argument consists of its conclusory citation to non-exempt headings under which portions of semi-annual reports to Congress have been withheld pursuant to Exemption 7(E), and its claim those headings indicate the information pertains to something else. Pl. Mem. 28. Plaintiff's speculation does not undermine the sworn testimony of Mr. Bradley that the information withheld pursuant to Exemption 7(E) from the reports to Congress would reveal law enforcement techniques. 3d Bradley Decl. ¶ 12; 2d Bradley Decl. ¶ 11.

In any event, defendant has gone beyond what is required to protect law enforcement techniques under Exemption 7(E) and also established that release of the exempt information would risk circumvention of the law. 3d Bradley Decl. ¶ 12 ("revealing the law enforcement techniques and intelligence methods discussed in the redacted portions of the reports to Congress would risk circumvention of the law because it could reasonably be expected to permit subjects of FBI national security investigations to circumvent the law enforcement techniques, thus evading detection and/or thwarting FBI national security investigations."); 2d Bradley Decl. ¶ 11 ("Disclosure of this information would provide criminals with insight into how the United States

Government gathers information for law enforcement investigations, which in turn could be used to develop the means to circumvent those techniques and evade prosecution.").

Defendant has established that it properly invoked Exemption 7(E) to protect confidential law enforcement techniques used in national security investigations. Accordingly, defendant is entitled to summary judgment on all of its Exemption 7(E) withholdings.

III. The Government has Properly Withheld Information Pursuant to the National Security Act and FOIA Exemption 3.

As Mr. Hardy testifies, release of any portion of Document 68 would reveal information about intelligence sources, methods, and activities. Third Hardy Decl. ¶¶ 43-46. It is therefore protected by FOIA Exemption 3, as well as Exemptions 1 and 7(E), discussed above. *Id.*

As defendant explained in its opening memorandum, Def. Mem. at 20-22, the Department properly withheld information pertaining to intelligence sources, method, and activities pursuant to Section 102A(i)(1) of the National Security Act of 1947, as amended, on behalf of the FBI.[5] *See* 1st Hardy Decl. ¶¶ 36-38; 3d Hardy Decl. ¶¶ 43-46. That Exemption 3 statute protects from FOIA disclosure intelligence sources and methods. 50 U.S.C. § 3024(i)(1); *ACLU v. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011). As it did with regard to defendant's Exemption 1 withholding of Document 68 in full, plaintiff argues some portion of it must be non-exempt and suitable for release. As Mr. Hardy has explained and defendant discussed in Part I.A, *supra*, however, plaintiff is mistaken. 2d Hardy Decl. ¶ 37; 3d Hardy Decl. ¶ 42. No portion of Document 68 can be released without revealing exempt information.

[5] Plaintiff has failed to oppose, and has conceded, defendant's other Exemption 3 withholdings made pursuant to Section 6 of the Central Intelligence Agency Act, Section 6 of the National Security Agency Act, and 18 U.S.C. § 798, as well as additional withholdings pursuant to the National Security Act, as amended.

IV. Defendant has Released All Non-Exempt, Reasonably Segregable Portions of the Responsive Documents.

As discussed supra and in the declarations of Mr. Hardy and Mr. Bradley, the Government has reviewed the withheld material and disclosed all non-exempt information that reasonably could be disclosed. *See* 1st Hardy Decl. ¶¶ 52-53, 2d Hardy Decl. ¶¶ 37-38, 3d Hardy Decl. ¶ 55, 2d Bradley Decl. ¶ 13, 3d Bradley Decl. ¶¶ 8-10. Accordingly, defendant has produced all "reasonably segregable portion[s]" of the responsive records. 5 U.S.C. § 552(b). The declarants' detailed explanations of the Government's redactions are more than sufficient, and defendant need not explain those redactions in such detail as to reveal the very information it seeks to protect. *See, e.g., Loving v. Dep't of Def.*, 496 F. Supp. 2d 101, 110 (D.D.C. 2007) (holding that "government's declaration and supporting material are sufficient to satisfy its burden to show with 'reasonable specificity' why the document cannot be further segregated," where declaration averred that agency had "released to plaintiff all material that could be reasonably segregated") (quoting *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002)).

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CONCLUSION

For all of the foregoing reasons, the Court should grant defendant's Motion for Summary Judgment, deny plaintiff's Cross-Motion, and enter Judgment for defendant.

Dated December 11, 2014

Respectfully submitted,

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