

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC PRIVACY INFORMATION)	
CENTER,)	
)	
Plaintiff,)	
)	Civil Action No. 14-1311 (APM)
v.)	
)	
FEDERAL BUREAU OF INVESTIGATION,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Pursuant to Local Civil Rule 7(h)(1), Defendant Federal Bureau of Investigation (“Defendant,” “FBI,” the “Agency,” or the “Government”) respectfully submits the following Statement of Facts Not in Genuine Dispute in support of its motion for summary judgment:

1. Plaintiff Electronic Privacy Information Center (“Plaintiff” or “EPIC”) submitted a request for information under the Freedom of Information Act (“FOIA”) by faxed letter dated June 4, 2014, for “all of the FBI’s privacy assessments not already published online.” (*See* Decl. of David M. Hardy, Section Chief, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation [hereinafter “Hardy Decl.”] ¶¶ 8-9 (a copy of the Hardy Decl. is attached hereto as Exhibit “1”).)
2. Specifically, Plaintiff’s request stated:
 - All Privacy Impact Assessments [“PIAs”] the FBI has conducted that are not publicly available at <http://www.fbi.gov/foia/privacy-impact-assessments/departement-of-justice-federal-bereau-of-investigation>.
 - All Privacy Threshold Analysis [“PTAs”] documents and Initial Privacy

Assessments the FBI has conducted since 2007 to *present*.¹ (*Id.* ¶ 9.)

3. In addition, Plaintiff requested that any duplication fees for responsive material be waived. (*Id.*)
4. In letters dated June 17, 2014, the FBI acknowledged receipt of Plaintiff's FOIA request, assigning FOIPA number 1272294-000 for records concerning FBI's PIAs and FOIPA 1272295-000 for records concerning FBI's PTAs and advised Plaintiff it was searching the indices to the FBI's Central Records System for the information responsive to its request. (*Id.* ¶ 10.)
5. On August 1, 2014, EPIC filed its complaint in this case. (ECF No. 1.)
6. In letters dated August 12, 2014, the FBI advised Plaintiff it located approximately 1,350 pages of records potentially responsive to the subject of his FOIPA request number 1272294-000 and approximately 3,390 pages of records potentially responsive to the subject of its FOIPA request number 1272295-000. (Hardy Decl. ¶ 12.)
7. In letters dated August 20, 2014, the FBI advised plaintiff their fee waiver request was denied for each subject matter. (*Id.* ¶ 13.) Subsequently, the FBI agreed to waive all fees related to the processing of the request. (*Id.*)
8. In addition, the FBI agreed to review 500 pages of documents per month beginning on December 15, 2014, with the final production completed by August 31, 2015. (*Id.*)
9. By letter dated December 15, 2014, the FBI advised Plaintiff it had reviewed 1,069 pages of potentially responsive records, processed 22 pages deemed responsive, and released 22 pages in full, or in part, for the first interim release for FOIPA request number 1272294-000 (FBI's PIAs Request). (*Id.* ¶ 14.)

¹ For search scoping purposes June 24, 2014, was determined as the search cut-off date, which was the date the FBI conducted its original search for potentially responsive material.

10. On January 15, 2015, the FBI advised Plaintiff it had reviewed 816 pages of potentially responsive records, processed 89 pages deemed responsive, and released 69 pages in full, or in part, for the final interim release for FOIPA request number 1272294-000 (FBI's PIAs Request). (*Id.* ¶ 15.)
11. On February 17, 2015, the FBI advised EPIC it had reviewed 502 pages of potentially responsive records, processed 445 pages deemed responsive, and released 439 pages in full, or in part, for the first interim release for FOIPA request number 1272295-000 (FBI's PTAs Request).² (*Id.* ¶ 16.)
12. On March 16, 2015, the FBI advised Plaintiff it had reviewed 500 pages of potentially responsive records, processed 466 pages deemed responsive, and released 457 pages in full, or in part, for the second interim release for FOIPA request number 1272295-000 (FBI's PTAs Request). (*Id.* ¶ 17.)
13. On April 15, 2015, the FBI advised Plaintiff it had reviewed 500 pages of potentially responsive records, processed 493 pages deemed responsive, and released 462 pages in full, or in part, for the third interim release for FOIPA request number 1272295-000 (FBI's PTAs Request). (*Id.* ¶ 18.)
14. By letter dated May 15, 2015, the FBI advised Plaintiff it had reviewed 500 pages of potentially responsive records, processed 479 pages deemed responsive, and released 453 pages in full, or in part, for the fourth interim release for FOIPA request number 1272295-000 (FBI's PTAs Request). (*Id.* ¶ 19.)
15. By letter dated June 15, 2015, the FBI advised plaintiff it had reviewed 375 pages of potentially responsive records, processed 373 pages deemed responsive, and released 367

² RIDS inadvertently advised only 445 pages were deemed responsive and processed. In actuality it was 451 Bates stamped pages.

pages in full, or in part, for the fifth interim release for FOIPA request number 1272295-000 (FBI's PTAs Request). (*Id.* ¶ 20.)

16. Finally, on January 11, 2016, the FBI advised plaintiff it had reviewed 117 pages of potentially responsive records, processed all 117 pages as responsive, and withheld them in full, for a supplemental release for FOIPA request number 1272294-001 (FBI's PIAs Request). (*Id.* ¶ 21.)

17. With each of these rolling releases, the FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). (*See id.* ¶¶ 14-21.)

18. The FBI determined that the records EPIC requested concerning FBI PIAs and PTAs are not reflective of the manner in which FBI investigative records are indexed, since the subject matter of EPIC's request is not a named individual or victim, or that of a common investigation subject pursued by the FBI. (*Id.*)

19. Given the purpose, design, and organization of the information stored in the CRS, and in light of the subject matter of EPIC's FOIA request, the FBI determined that it needed to conduct searches outside an Automated Case Support ("ACS") search of the CRS and Sentinel to locate records potentially responsive to EPIC's FOIA requests. (*Id.*)

20. Thus, the FBI determined a targeted search reasonably calculated to locate records responsive to plaintiff's request was needed. (*Id.* ¶ 23.)

21. The FBI's targeted search was thus directed, on or about June 27, 2014, to the FBI's Office of General Counsel, Privacy and Civil Liberties Unit ("PCLU"). (*Id.*) Within the PCLU, the Privacy and Civil Liberties Officer ("PCLO") ensures overall FBI-wide compliance with and implementation of information privacy protections. (*Id.*)

22. RIDS directed EPIC’s request to the PCLU, which is the unit reasonably likely to maintain responsive material for EPIC’s request. (*Id.*)
23. There is no indication from the information located as the result of the targeted search efforts by the PCLU to conclude that responsive material would reside in any other FBI system or location. (*Id.*)
24. The FBI reviewed a total of 4,379 pages of potentially responsive documents, of which, 2,490 pages were deemed responsive to Plaintiff’s request. (*Id.* ¶ 24.)
25. Of these 2,490 processed pages, 2,275 pages were released in whole or in part, while the remaining 215 pages were withheld in full. (*Id.*)
26. The FBI properly withheld the following categories of information pursuant to Exemptions 5, and 7(E), as summarized on this chart:

Exemption (b)(5)	Privileged Information
(b)(5)-1	Deliberative Process Materials
(b)(5)-2	Attorney-Client ³
Exemption (b)(7)(E) and Category	Investigative Techniques and Procedures
(b)(7)(E)-2	Sensitive Internal FBI terminology, definitions, information systems, and system applications unknown to the general public relating to operational directives and capabilities of the systems and the tools used in the collection, stored, retrieval, and analysis of collected information.
(b)(7)(E)-3	Database and program interface tools, information transmission pathways, and access portals for shared system initiatives.

³ In the sample set provided to the plaintiff only (b)(5)-1 Deliberative Process was cited as justification to withhold the material; however, the FBI also asserts (b)(5)-2 Attorney-Client for the same information.

(b)(7)(E)-4	FBI units, unit locations, and partners (e.g. federal contractors) participating in program and system development, and testing, building/office locations where the devices are developed and tested, and operational coordination on shared missions.
(b)(7)(E)-5	Software and hardware specifications, system infrastructure, and security protocols used to operate and maintain sensitive systems.

(Hardy Decl. ¶ 26.)

27. The FBI withheld privileged deliberative process material within the two draft PTA proposals totaling twelve (12) pages. (*Id.* ¶ 30.)
28. As for the draft PTA located at Bates pages EPIC 837-843, the FBI’s Operational Technology Division (“OTD”) sought concurrence from the FBI’s Office of General Counsel (“OGC”) on implementation procedures and protocols, and legal requirements for a proposed interface update to an established information system to counteract identified system vulnerabilities and short-comings. (*Id.*)
29. As for the draft PTA proposal located at Bates pages EPIC 2001-2005, OTD sought OGC concurrence on implementation procedures, protocols, and legal requirements for a proposed upgrade of an established system network. (*Id.*)
30. The drafts predate any final decision on the implementation of the system interface and network upgrades. (*Id.*)
31. Before any decision on implementing these system and interface upgrades was made, OTDs proposals sought OGC concurrence that it met the legal requirements to begin the potential upgrade process. (*Id.*)
32. These draft PTAs contain the exchange of confidential facts between the client (OTD support personnel) and its OGC agency attorneys, and analysis by agency counsel for the purpose of formulating the agency’s legal position and providing legal advice concerning

the legal requirements and protocols before information system and interface upgrades could be made to counteract identified system vulnerabilities and short-comings. (*Id.*)

33. Pursuant to 28 U.S.C. §§ 533 and 534, and E.O. 12333 as implemented by the Attorney General's Guidelines for Domestic FBI 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 further the foreign intelligence objectives of the United States.
34. The responsive records at issue in this case were compiled for a specific law enforcement purpose. (*Id.* ¶ 33.)
35. The pertinent records were compiled and or created in furtherance of FBI's law enforcement, national security, and intelligence missions. (*Id.*)
36. To accomplish these missions, inherent tasks and operational functions are required, to include the identification of, development, and implementation of law enforcement and intelligence gathering methods, techniques, procedures, and guidelines. (*Id.*)
37. The FBI uses sensitive information collection systems, networks, infrastructure, and analytical application tools to conduct surveillance, collect intelligence, analyze and interpret collected data, and maintain secure storage of law enforcement and intelligence related data for future retrieval in support of operational needs.
38. There is a nexus between the FBI's law enforcement responsibilities and these responsive records, especially those concerning the development of surveillance technical abilities and associated logistical resources. (*Id.*)

39. Exemption 7(E) was applied to protect non-public investigative techniques and procedures utilized by the FBI to pursue its law enforcement mission as well as non-public details about techniques and procedures that are otherwise known to the public. (*Id.* ¶ 36.)
40. The revelation of these non-public techniques and procedures or non-public details of known techniques and procedures could reasonably enable targets to avoid detection or develop countermeasures to enforcement efforts, thus triggering circumvention of the law. (*Id.*)
41. The FBI explained its segregability analysis generally, *see id.* ¶ 25, as well as the specific segregability analysis applied to the sample set at issue in this case. (*Id.* ¶¶ 44-44.)
42. As indicated in the parties' Joint Status Report (ECF No. 23) of Feb. 16, 2016, the only issues remaining in dispute are EPIC's challenges to the sufficiency of FBI's search, the FBI's segregability analysis, and the FBI's withholdings pursuant to Exemptions 5, 7(D), and 7(E), with all challenges applied only to the agreed upon sample set.
43. The FBI has withdrawn its assertion of Exemption 7(D). (*See Hardy Decl.* ¶ 43.)

Dated: April 22, 2016
Washington, DC

Respectfully submitted,

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By: _____ /s/

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