

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
ELECTRONIC PRIVACY)	
INFORMATION CENTER)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 14-01311-KBJ
)	
FEDERAL BUREAU OF INVESTIGATION)	
)	
Defendant.)	
_____)	

DECLARATION 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”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“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 with 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 237 employees who staff a total of ten (10) Federal Bureau of Investigation Headquarters (“FBIHQ”) units and two (2) 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 13,526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. My responsibilities also include the review of FBI information for classification purposes as mandated by Executive Order 13,526,¹ 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 Executive Order 13,526 §§ 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 plaintiff's request for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552. Specifically, I am aware of the FBI's handling of plaintiff's FOIA request to FBIHQ, seeking access to "all of the FBI's privacy assessments not already published online."

(4) Pursuant to the September 15, 2015, joint status statement (*See* ECF, Document 20) in order to potentially resolve this matter prior to summary judgment, the parties agreed on a 500 page sampling selected by plaintiff. The FBI supplied a Vaughn Index in connection with the sample. In addition, the FBI agreed to conduct a supplemental search for additional Privacy

¹ 75 Fed. Reg. 707 (2010).

Impact Assessments (“PIAs”), and supplied a supplemental response to plaintiff by letter dated January 11, 2016. *See* Exhibit O. Following plaintiff’s review of the sample, plaintiff is challenging FBI’s assertion of Exemptions 5, 7(D), and 7(E), except when asserted in conjunction with Exemptions 1 and 3. Finally, plaintiff is challenging the adequacy of the FBI’s search and the segregability determination. (*See* February 16, 2016 joint statement, ECF Document 23.)

(5) The FBI submits this declaration in support of its motion for summary judgment. In accordance with *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), this declaration provides the Court and plaintiff with an explanation of the FBI’s procedures used to search for records responsive to plaintiff’s FOIA request, and provides justification for the FBI’s withholding of information pursuant to Exemptions 5, and 7(E) except when in conjunction with Exemptions 1 and 3. As for the challenged assertion of Exemption 5 this occurs on 12 Bates pages within the sample (EPIC 837-843, and 2001-2005). As for the challenged assertion of Exemption 7(E) this occurs on 146 Bates pages within the sample. (*See* Exhibit P). As to plaintiff’s challenge of FBI’s assertion of 7(D), upon additional review and analysis, the FBI withdraws Exemption 7(D) on sampling set Bates pages EPIC-15, and EPIC 2250-2257. Attached at Exhibit Q, is the reprocessed Bates pages with Exemption 7(D) withdrawn, and with additional segregable information released.

BACKGROUND-FBI’s PRIVACY ASSESSMENTS²

(6) FBI’s PIAs: A Privacy Impact Assessment (“PIA”) is an analysis of how

² Public source information pertaining to FBI PIAs and PTAs can be reviewed at www.fbi.gov/foia/privacy-impact-assessments/routine-databases.

information in identifiable form is collected, stored, protected, shared, and managed in an Information Technology (IT) system or online collection. The purpose of the PIA is to analyze how an agency handles information in order to: 1) ensure that handling conforms to applicable legal, regulatory, and policy requirements regarding privacy; 2) determine the risks and effects of collecting, maintaining, and disseminating information; and 3) examine and evaluate protections and alternative processes for handling information to mitigate potential privacy risks.

Performing a PIA is required by Section 208 of the E-Government Act for all Federal government agencies that develops or procures new technology involving the collection, maintenance or dissemination of information in identifiable form or that make substantial changes to existing technology for managing information in identifiable form.

(7) FBI's PTAs: A Privacy Threshold Analysis ("PTA")³ is designed to assess and document whether a PIA is required. A PTA contains basic questions about the nature of the system in addition to a basic system description. A properly completed and approved PTA provides documentation that a system owner believes, through an overview of potential privacy concerns, whether or not a full PIA is deemed to be required.

ADMINISTRATIVE HISTORY OF FOIA REQUEST RELEASES TO PLAINTIFF

(8) Set forth below is a chronology and description of the pertinent correspondence concerning FBI's releases in response to plaintiff's June 4, 2014, FOIA request. Copies of this correspondence are attached hereto as **Exhibits A-O**. Between December 15, 2014, and January 15, 2016, 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. Of these 2,490 processed pages,

³ Other DOJ agencies perform an Initial Privacy Assessment ("IPA"), while the FBI performs PTAs.

2,275 pages were released in whole or in part, while the remaining 215 pages were withheld in full per FOIA exemptions.

(9) By faxed letter dated June 4, 2014, plaintiff submitted a FOIA request for “all of the FBI’s privacy assessments not already published online.” Specifically, plaintiff’s request stated:

- All Privacy Impact Assessments the FBI has conducted that are not publicly available at <http://www.fbi.gov/foia/privacy-impact-assessments/department-of-justice-federal-bureau-of-investigation>.
- All Privacy Threshold Analysis documents and Initial Privacy Assessments the FBI has conducted since 2007 to *present*.⁴

In addition, plaintiff requested that any duplication fees for responsive material be waived.⁵ (***See Exhibit A.***)

(10) 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 (***See Exhibit B.***) and FOIPA 1272295-000 for records concerning FBI’s PTAs (***See Exhibit C.***), and advised plaintiff it was searching the indices to the FBI’s Central Records System for the information responsive to his request. Additionally, plaintiff was informed he could check the status of his FOIA request at www.fbi.gov/foia, and their request for a fee waiver is being considered with a decision to be determined at a later date.

(11) On August 1, 2014, plaintiff filed the current Complaint. *See* ECF, Document 1, Complaint for Injunctive Relief.

⁴ 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.

⁵ The FBI administratively separated plaintiff’s request into two subject matters. FOIA 1272294-000 (***See Exhibits A-B, D, F, H-I, and O***) was assigned to the PIA component of the request, while FOIA 1272295-000 (***See Exhibits A, C, E, G, and J-N***) was assigned to the PTA component.

(12) 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 (See Exhibit D for FBI PIAs Request) and 3,390 pages of records potentially responsive to the subject of his FOIPA request number 1272295-000 (See Exhibit E for FBI PTAs Request). The FBI informed plaintiff releases are made on CD's unless otherwise requested. DOJ regulations require the FBI to notify requesters when the anticipated fees exceed \$25.00, and to provide 100 pages or the cost equivalent (\$10.00) free of charge. Plaintiff was advised if all potentially responsive pages were processed for release, he would owe \$35.00 in duplication fees the FBI's PIAs Request (3 CD's at \$15.00 less \$10.00 credit), and 95.00 for the FBI's PTAs Request (7 CD's at \$15.00 less \$10.00), in order to receive the release on CDs. For a paper release, plaintiff was informed he would owe \$135.00 and \$339.00 respectively. Plaintiff was reminded the costs associated with this request were only an estimate, as some of the material may be withheld in full pursuant to FOIA/Privacy Act exemptions, or some material may not be responsive to the subject of the request. No payment was required at that time, but a written commitment to pay the estimated fee was required within thirty (30) days from the date of the letter. Finally, the FBI advised plaintiff if the FBI did not receive written notification from him within thirty (30) days the request would be closed.

(13) In letters dated August 20, 2014, the FBI advised plaintiff their fee waiver request was denied for each subject matter. (See Exhibit F for FBI PIAs Request and Exhibit G for FBI PTAs Request.) Subsequently, the FBI agreed to waive all fees related to the processing of the request. 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.

(14) 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). The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 6, 7(C), 7(D), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(6), (b)(7)(C), (b)(7)(D), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit H.**)

(15) By letter dated 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). The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit I.**)

(16) By letter dated February 17, 2015, the FBI advised plaintiff 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).⁶ The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit J.**)

(17) By letter dated March 16, 2015, the FBI advised plaintiff it had reviewed 500

⁶ RIDS inadvertently advised only 445 pages were deemed responsive and processed. In actuality it was 451 Bates stamped pages.

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). 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). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit K.**)

(18) By letter dated 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). The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit L.**)

(19) 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). The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 6, 7(C), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(6), (b)(7)(C), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal. (**See Exhibit M.**)

(20) 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 pages in full, or in part, for the fourth interim release for FOIPA request number 1272295-000

(FBI's PTAs Request). 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). Although in litigation, plaintiff was provided information concerning his right to appeal. (*See Exhibit N.*)

(21) By letter dated 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). The FBI indicated it withheld information pursuant to FOIA Exemptions 1, 3, 5, 6, 7(C), and 7(E), 5 U.S.C. §§ 552, (b)(1), (b)(3), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(E). Although in litigation, plaintiff was provided information concerning his right to appeal.⁷ (*See Exhibit O.*)

THE FBI'S SEARCH FOR RECORDS RESPONSIVE TO EPIC'S FOIA REQUEST

(22) Scope of Search. In the FBI's June 17, 2014, acknowledgment letters (*See Exhibits B-C*) of the plaintiff's administratively separated June 4, 2014 FOIA request (*See Exhibit A*) the plaintiff was advised the indices to the FBI's Central Records System ("CRS") would be searched for the subject of plaintiff's request. This is the standard search protocol for most FOIA requests, because of the way the CRS is indexed.⁸ Upon further review of the

⁷ This supplemental release was not considered as part of plaintiff's sampling set.

⁸ The CRS 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. The CRS is indexed in a manner that meets the FBI's investigative needs and priorities, and allows FBI personnel to reasonably and adequately locate pertinent files in the performance of their law enforcement duties. The general indices are arranged in alphabetical order and comprise an index on a variety of subject matters that includes individuals, organizations, events, or other subjects of investigative interest that are indexed for future retrieval.

plaintiff's FOIA request, 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. 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.

(23) Targeted Search. RIDS determined a targeted search reasonably calculated to located records responsive to plaintiff's request was needed. 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"). Within the PCLU, the Privacy and Civil Liberties Officer ("PCLO") ensures overall FBI-wide compliance with and implementation of information privacy protections. The PCLO assists in developing and evaluating legislative, regulatory, and other policy proposals that implicate privacy issues. In addition, the PCLO oversees, coordinates, and facilitates agency privacy compliance with laws, regulations, and policies relating to information privacy, such as the Privacy Act and Section 208 of E-Government Act. Finally, the PCLO approves all PTAs and conditionally approves PIAs for all FBI Information Technology ("IT") systems (DOJ's Chief PCLO is the final PIA approval authority). See ¶¶ 6-7 for PTA and PIA back ground details. Therefore, RIDS directed EPIC's request to the PCLU, which is the unit reasonably likely to maintain responsive material for EPIC's request. As applicable here, 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.

**RELEASE OF MATERIAL TO PLAINTIFF AND
JUSTIFICATION FOR REDACTED INFORMATION UNDER THE FOIA**

(24) In all, 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. 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. The FBI 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).

(25) All information inclusive of the sample was processed to achieve maximum disclosure consistent with the access provisions of the FOIA. Every effort was made to provide plaintiff with all reasonably segregable portions of material responsive to the request and subject to the FOIA. No reasonably segregable, non-exempt portions of documents subject to the FOIA were withheld from plaintiff. To further describe the information withheld could identify the material sought to be protected. Copies of the re-reviewed, reprocessed, and coded sample pages have been provided to the plaintiff and can be provided to the Court upon request. Summarized below are justifications and categories applicable to the challenged assertions of Exemption 5, and Exemption 7(E) alone (not in concert with Exemptions 1 and 3). As for challenged Exemption 5 withholdings, this pertains to 12 sampled Bates pages (EPIC 837-843, and 2001-2005). As for the challenged Exemption 7(E) alone withholdings, this occurs on 146 Bates pages within the sample. (*See Exhibit P*).

Summary of Justifications and Categories of Information Protected Pursuant to Exemptions 5, and certain 7(E)

(26) The FBI protected the following categories of information pursuant to Exemptions 5, and 7(E):

Exemption (b)(5)	Privileged Information
(b)(5)-1	Deliberative Process Materials
(b)(5)-2	Attorney-Client ⁹
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, storage, 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.
(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.

**EXPLANATION OF WITHHELD MATERIAL:
JUSTIFICATION FOR NON-DISCLOSURE UNDER EXEMPTION 5 AND 7(E) OF THE
FOIA**

EXEMPTION 5 – Privileged Information

(27) FOIA Exemption (b)(5) exempts from FOIA’s disclosure requirements “inter-agency or intra-agency memorandums or letters which would not be available by law to a

⁹ 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.

party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b)(5).

(28) FOIA Exemption 5 exempts documents or information normally privileged in the civil discovery context, and incorporates the attorney work product, attorney-client, and deliberative process privileges. As relevant here, the attorney-client privilege protects confidential communications from a client to an attorney and from an attorney to a client for the purpose of seeking and providing legal advice. The privilege covers client-supplied information and opinions given by an attorney based on and reflecting that information. The deliberative process privilege protects predecisional, deliberative communications that are part of a process by which agency decisions are made. It protects opinions, advice, evaluations, deliberations, proposals, or recommendations that form part of an agency decision-making process, as well as the selection and sorting of factual information relied upon as part of the decision-making process. As summarized below, the Exemption 5 material withheld in the sampling set comprises deliberative process and attorney-client privileged material.

(29) In order to apply FOIA Exemption 5, agencies must first satisfy the threshold requirement – *i.e.*, show that the information protected was “inter-agency or intra-agency.” Once the threshold is crossed, agencies must satisfy the elements of the pertinent privilege. With respect to the attorney-client privilege, agencies must show that the withheld information concerns confidential information shared by a client with an attorney for the purpose of obtaining legal advice or assistance, or legal advice or assistance provided by an attorney to a client reflecting confidential information. With respect to the deliberative process privilege, agencies must show that the withheld information is both predecisional – *i.e.*, antecedent to a final agency decision – and deliberative – *i.e.*, part of the process in which the agency engaged in an effort to

reach a final decision (whether or not any final decision was ever reached).

(b)(5)-1 DELIBERATIVE PROCESS PRIVILEGE

(30) In Category (b)(5)-1, the FBI withheld privileged deliberative process material within the two draft PTA proposals totaling twelve (12) pages. 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. 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. These pages satisfy Exemption 5's threshold requirement as inter-agency records; both draft proposals are internal FBI documents. These draft proposals satisfy the elements of the deliberative process privilege. First, the drafts are predecisional; they predate any final decision on the implementation of the system interface and network upgrades. Second, the drafts are deliberative. Specifically, before any decision on implementing these system and interface upgrades, OTDs proposals sought OGC concurrence that it met the legal requirements to begin the potential upgrade process. Disclosure of this type of information would cause FBI employees, including FBI agency attorneys, to hesitate in offering their candid and conscientious opinions if they knew that their opinions might be made a matter of public record at some future date. Such self-censorship would, in turn, degrade the quality of agency decisions as discussed above. Accordingly, the FBI appropriately asserted FOIA Exemption

(b)(5)-1, in conjunction with the deliberative process privilege, to protect these materials.¹⁰

(b)(5)-2 ATTORNEY-CLIENT PRIVILEGE

(31) In Category (b)(5)-2, the FBI protected privileged attorney-client communications. The same draft PTA proposals as described above (Bates pages EPIC 837-843, and EPIC 2001-2005) are also withheld in full pursuant to the attorney-client privilege (b5-2). The draft PTA proposals detail OTD's request for OGC legal opinions related to system and interface upgrades under consideration to counteract identified system vulnerabilities and shortcomings. The draft proposals reveal the exchange of confidential facts between the client (OTD support personnel), and its OGC agency attorneys, and reveal the analysis made by agency counsel for the purpose of formulating the agency's legal position. The agency counsel provided legal advice concerning the legal requirements and protocols before the information system and interface upgrades could be implemented. The FBI withheld these twelve (12) pages of the FBI's draft PTA proposals pursuant to the attorney-client privilege, in conjunction with the deliberative process privilege.

EXEMPTION (b)(7) THRESHOLD

(32) Exemption 7 of the FOIA protects from mandatory disclosure records or information compiled for law enforcement purposes, but only to the extent that disclosure could reasonably be expected to cause one of the six sets of harms enumerated in the subpart of the exemption. *See* 5 U.S.C. § 552(b)(7).

(33) Before an agency can invoke any of the harms enumerated in Exemption 7, however, it must first demonstrate that the records or information at issue were compiled for law

¹⁰ Exemption (b)(5)-1 and -2 were asserted to withhold in full Bates pages EPIC 838, 842-843, and 2001-2004.

enforcement purposes. 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. Under this investigative authority, the responsive records herein were compiled for specific law enforcement purposes.

(34) Specifically, the pertinent records were compiled and or created in furtherance of FBI's law enforcement, national security, and intelligence missions. 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. 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. Accordingly, 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.

(35) These records meet the threshold requirement of Exemption 7; they were compiled for law enforcement purposes in furtherance of FBI law enforcement, national security, and intelligence missions and functions.

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

(36) Exemption 7(E) protects records or information compiled for law enforcement purposes when release “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.” 5 U.S.C. § 552(b)(7)(E). The first category of this exemption affords categorical protection to techniques and procedures used in law enforcement investigations; it protects techniques and procedures that are not well-known to the public as well as non-public details about the use of well-known techniques and procedures.

(37) 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. 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. Discussed below are the specific justifications for asserting Exemption 7(E) alone. These justifications contain as much information as the FBI can provide about the redacted material without enhancing to the risk of circumvention of law. As indicated at Exhibit P, more than one type of 7E justification applies to the material withheld on the contested pages. Specifically, the 7(E)-2, and 7(E)-3, withholding categories overlap where indicated at Exhibit P; this information is multi-functional in its application as a technique or procedure in that it pertains to the operational integrity of sensitive information systems, system application capabilities, database structure and security,

and retrieval, analysis, and storage of investigative data collected in furtherance of criminal and national security investigations.

Justification of Specific Redactions of Investigative Techniques and Procedures

EXEMPTION (b)(7)(E)-2

(38) Exemption 7(E)-2 has been asserted to protect detailed information related to the development and deployment of sensitive internal FBI information collection systems, networks, infrastructure, and analytical application tools, as law enforcement techniques and its associated procedures. The withheld information about these technologies are multi-faceted and include internal FBI terminology, definitions, and details on sensitive information systems, and system applications unknown to the general public relating to operational directives and capabilities of these systems and the tools used in the collection, storage, retrieval, and analysis of collected investigative information. Disclosure of these various technological and developmental aspects could reasonably be expected to risk circumvention of the law as those pieces of related information, individually, or assembled in mosaic fashion, would provide key details on the development, use, capabilities, limitations and vulnerabilities, scope of employment, equipment innovations and specifications, and reveal current and/or contemplated investigative applications. This information would provide criminals and terrorists with a virtual “playbook” on how to evade detection from being surveyed by these sensitive internal FBI information collection systems, networks, infrastructure, and analytical application tools, used and employed in national security and criminal investigations, thus enhancing their ability to avoid detection, concealing their identities, or evading apprehension. 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)-2.¹¹ Finally, as the chart at Exhibit P indicates, categories of information withheld 7(E)-2 overlaps with information withheld 7(E)-3 as described in paragraph 37, *infra*.

EXEMPTION (b)(7)(E)-3

(39) Exemption 7(E)-3 has been asserted to protect detailed information related to the description of database structures, and program interface tools, used in the development of sensitive information systems. In addition, Exemption 7(E)-3 has been asserted to protect the details pertaining to the information systems data transmission pathways, the access portals for shared system initiatives, and the operational directives and integrity protocols of the information systems, system applications, databases, and program interface tools. Disclosure of these various internal databases, system applications, and interface tools, could reasonably be expected to risk circumvention of the law as this type of information could expose the devices, equipment, and/or databases to hackers and unauthorized users, who could disrupt official business and compromise the effectiveness of the FBI's internal computer systems by devising ways in which to access – and tamper with – the systems without detection. 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

¹¹ Exemption (b)(7)(E)-2, as a basis for withholding information, was asserted on the following Bates pages of the sample set: EPIC-2, 4, 9-10, 12, 15, 39-44, 172-176, 219-233, 252-257, 372-386, 504-505, 563-566, 587-592, 612-613, 645-646, 669-670, 717-718, 720-724, 811-914, 834, 836-837, 839-841, 866-870, 907-908, 945, 1270-1275, 1278, 1342-1344, 1349-1351, 1490-1493, 1495, 1497, 1562-1569, 1706-1707, 1712, 1714-1715, 1812, 1927, 1929-1930, 1937-1938, 1940, 2005, 2119-2120, 2123, 2217-2218, and 2258-2263.

Exemption 7(E)-3.¹² Finally, as the chart at Exhibit P indicates, categories of information withheld 7(E)-2 overlaps with information withheld 7(E)-3 as described in paragraph 37, *infra*.

EXEMPTION (b)(7)(E)-4

(40) Exemption 7(E)-4 has been asserted to protect the location and identity of FBI units, and or joint units, partners (e.g. federal contractors) participating in program and system development, and system testing. In addition, Exemption 7(E)-4 has been asserted to protect the building and office locations where the information systems, and interface applications are developed and tested, and the details on the operational coordination on shared missions. The office location and units, and operational partners, are usually found in the administrative headings of the PTA and PIA documents. Disclosure of the location of the units, and operational partners, conducting the research, development, and testing of these sensitive information systems and interface applications would reveal the location of these systems, exposing the systems, equipment, and/or databases to potential hackers and unauthorized users, who could disrupt official business and compromise the effectiveness of the FBI's internal computer and information systems by devising ways in which to access – and tamper with – the systems without detection. Disclosure provides foreign governments and their intelligence operatives with needed pieces of information to facilitate covert or cyber penetration of these facilities. The existence of these particular squads, units and sections, and specific coordination nodes, used in developing technological advancements of investigative techniques is not known to the general public. These squads are responsible for implementing particular FBI technological studies, and

¹² Exemption (b)(7)(E)-3, as a basis for withholding information, was asserted on the following Bates pages of the sample set: EPIC 39-43, 173-176, 230, 254-256, 386, 505, 589, 612, 669, 720-723, 812, 836, 839-841, 867-868, 907-908, 1270-1274, 1350-1351, 1492-1493, 1564-1565, 1706-1707, 1714-1715, 1929, 1937-1938, 2119, 2218, and 2260.

development of information systems, networks, and infrastructure into effective tools. Revealing the existence of these squads, development centers, training locations, and coordination of resources would reveal the level of FBI advancements, operational directives, as well as planning and operational application studies. Providing this information provides criminals and enemies of the United States with valuable insight into where the FBI is focusing its limited resources. Criminals, terrorists and hostile governments could then plan and structure their activities in a manner that avoids FBI strengths, exploits its weakness, and steals or exploits its technological advancements--all enabling circumvention of the law. Accordingly, the FBI properly withheld this information pursuant to Exemption 7(E)-4 as indicated at Exhibit P.¹³

EXEMPTION (b)(7)(E)-5

(41) Exemption 7(E)-5 has been asserted to protect detailed information related to software and hardware specifications, system infrastructure, and security protocols used to operate and maintain sensitive systems. Disclosure of the details pertaining to software and hardware use, and security protocols used to operate and maintain the sensitive information systems could reasonably be expected to risk circumvention of the law as this type of information could expose the devices, equipment, and security protocols and platforms to hackers and unauthorized users, who could disrupt official business and compromise the effectiveness of the FBI's internal computer systems by devising ways in which to access – and tamper with – the systems security protocols without detection. Accordingly, because the disclosure of this information could reasonably be expected to reveal non-public details about

¹³ Exemption (b)(7)(E)-4, as a basis for withholding information, was asserted on the following Bates pages of the sample set: EPIC 173-175, 220, 230, 254, 256, 386, 565-566, 612, 645-645, 670, 679, 720-722, 812, 836, 907-908, 928, 944, 1176, 1270-1274, 1343-1344, 1565, 1712, 1715, 1757, 1809, 1937, 2218, and 2260-2261.

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)-5 as indicated at Exhibit P.¹⁴

SEGREGABILITY

(42) Plaintiff has been provided all responsive non-exempt records or portions of records responsive to its FOIA request to the FBI. During the processing of plaintiff's request, the FBI examined each responsive page individually to identify non-exempt information that could be reasonably segregated from exempt information for release. After a line-by-line review, all segregable information has been released to plaintiff. 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.

(43) As discussed in paragraph 24 *supra*, 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. 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 pursuant to assertion of exemptions. Pursuant to the February 16, 2016 joint statement (*See* ECF, Document 23) plaintiff reduced the scope of challenged redactions to Exemptions 5, 7(D), and specific 7(E) within the sample set of documents. The challenged Exemption 5 withholdings occur on 12 Bates pages within the sample (EPIC 837-843, and 2001-2005). The challenged Exemption 7(E) alone withholdings occur on 146 Bates pages within the sample. (*See* Exhibit P). As to plaintiff's challenge of

¹⁴ Exemption (b)(7)(E)-5, as a basis for withholding information, was asserted on the following Bates pages of sample set: EPIC-219, 230, 254-256, 386, 505, 565-566, 589, 612-613, 645-646, 669, 720-722, 812, 836, 839-841, 867-868, 945, 1271-1274, 1278, 1351, 1492-1493, 1564-1565, 1706-1707, 1714-1715, 1929, 1937-1938, 1940, 2119-2120, 2218, and 2260.

FBI's assertion of 7(D), upon additional review and analysis, the FBI withdraws Exemption 7(D) on sampling set Bates pages EPIC-15, and EPIC 2250-2257. Attached at Exhibit Q, are the reprocessed Bates pages with Exemption 7(D) withdrawn and additional segregable information released.

(44) Of the 481 Bates pages of the sample set, 136 pages were Released in Full ("RIF"), 306 pages were Released in Part ("RIP"), and 39 pages were Withheld in Full ("WIF") pursuant to one or more FOIA exemptions. Each of these categories is discussed below to further address segregability.

A. Pages RIF. Following the segregability review of the sampling, RIDs determined that 136 pages could be released in full without redaction as there was no foreseeable harm to an interest protected by a FOIA exemption.

B. Pages RIP. Following the segregability review of the sampling, RIDs determined that 306 pages could be released in part with redactions per the identified FOIA Exemptions herein. These pages comprise of a mixture of material that could reasonably be segregated for release, material that was withheld as release would trigger foreseeable harm to one or more interests protected by the cited FOIA exemptions on these pages, and information that was inextricably intertwined with such material and therefore could not reasonably be segregated for release.

C. Pages WIF. Following the segregability review of the sampling, RIDs determined that 98 pages were required to be withheld in their entirety. RIDs determined all information on these pages 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

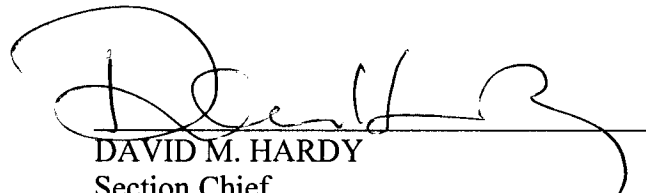
information could be reasonably segregated for release. Any further segregation of this intertwined material would only produce disjointed words, phrases, or sentences, which taken separately or together, would have minimal or no informational content.

CONCLUSION

(45) The FBI conducted a reasonable search for records responsive to plaintiff's FOIA request. The FBI has processed and released all reasonably segregable information from the records located through this search. The FBI properly withheld the contested information pursuant to FOIA Exemptions 5, and 7(E), 5 U.S.C. §§ 552, (b)(5), and (b)(7)(E). The FBI has carefully examined the responsive records of the sample set and has determined the information withheld from plaintiff, if disclosed, would: reveal privileged information; and disclose investigative techniques and procedures for law enforcement investigations the disclosure of which could reasonably be expected to risk circumvention of the law. Finally, the FBI has determined that there is no further reasonably segregable information to be released.

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

Executed this 22nd day of April, 2016.



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