

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY
INFORMATION CENTER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

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Civil Action No. 12-CV-00667-CKK

SECOND DECLARATION OF DAVID M. HARDY

I, David M. Hardy, declare as follows:

(1) I am currently the Section Chief of the Record/Information Dissemination Section (“RIDS”), Records Management Division (“RMD”), at Federal Bureau of Investigation Headquarters (“FBIHQ”) in Washington, D.C., and currently relocated to Winchester, Virginia. I have held this position since August 1, 2002. Prior to joining the FBI, from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked 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 270 employees who staff a total of ten (10) units and two field operational service center units whose

collective mission is to effectively plan, develop, direct and manage responses to requests for access to FBI records and information pursuant to the FOIA, as amended by the OPEN Government Act of 2007 and the OPEN FOIA Act of 2009; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General and FBI policies and procedures; judicial decisions and Presidential and Congressional directives. 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. This Second Hardy Declaration hereby incorporates by reference my First Hardy Declaration of July 30, 2012 and all Exhibits thereto.¹

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a. Specifically, I am aware of the FBI's response to plaintiff's FOIA request which seeks access to "[a]gency records concerning cell site simulator and other cell phone tracking technologies deployed by the Federal Bureau of Investigation to covertly locate, target, and track targets of interest."² I am, moreover,

¹ The Declaration of David M. Hardy dated July 30, 2012 ("First Hardy Declaration") and Exhibits A-G thereto describe the procedural history of plaintiff's February 10, 2012 FOIA request, how a FOIA request is processed in RIDS, the search and collection procedures which the FBI uses to obtain potentially responsive material, factors affecting the processing of plaintiff's request, and reasons behind FBI's *Open America* stay request.

² Specifically, plaintiff seeks access to the following agency records:

1. All documents concerning technical specifications of the StingRay device or other cell site simulator technologies.
2. All documents concerning procedural requirements or guidelines for the use of StingRay device or other cell site simulator technologies (e.g., configuration, data

familiar with the Court's July 1, 2012 Order providing the FBI with the opportunity to more fully explain the exceptional circumstances it faces in responding to plaintiff's FOIA request in accordance with the schedule proposed by plaintiff in the parties' most recent Status Report, my First Hardy Declaration dated July 30, 2012, and the Exhibits thereto, and the plaintiff's Memorandum in Opposition to FBI's Motion for *Open America* stay. This Second Hardy Declaration is submitted in response to plaintiff's Memorandum in Opposition to FBI's Motion for *Open America* stay, and in further support of the FBI's *Open America* stay request.

NATURE AND COMPLEXITY OF FOIA AND PRIVACY ACT REQUESTS

(4) Although plaintiff makes several seemingly appealing arguments to demonstrate the FBI's purported ability to process its five-part request expeditiously, all of its arguments overlook a critical and simple fact: the FBI's FOIA workload today is dramatically more complex and significantly more demanding than it was five, let alone ten or more years ago. While it is important to understand the FBI's rationale for seeking an *Open America* stay, focusing solely on the number of requests received, the number of pages assigned for processing, or the number of pending cases, only partially explains why the FBI needs a considerable period of time to respond to plaintiff's request. Of equal or greater importance to understanding the FBI's position is an appreciation for the nature and complexity of the requests the FBI has been receiving in the last

retention, data deletion).

3. All contracts and statements of work that relate to StingRay device or other cell site simulator technologies.

4. All memoranda regarding the legal basis for the use of StingRay device or other cell site simulator technologies.

5. All Privacy Impact Assessments or Reports concerning the use or capabilities of StingRay device or other cell site simulator technologies.

several years. The FOIA/Privacy Act landscape has changed dramatically, and responding to these requests has demanded a significant increase in FBI resources, time, and effort when compared to five, let alone ten or more years ago.

(5) As I conveyed in my First Hardy Declaration, in FY 2011, the FBI received 17,927 FOIA and Privacy Act requests, or an average of approximately 1,480 requests per month. Updated FY 2012 numbers (October 2011 through today), show the FBI has received 19,599 FOIA and Privacy Act requests, or an average of approximately 1,781 requests per month, with one month still remaining in this fiscal year. There are approximately 2.3 million pages currently assigned to the five FOIPA Disclosure Units for review. The number of pending requests has risen to approximately 3,764. Among the requests currently pending processing by the FOIPA Disclosure Units are 93 requests which each exceed 8,000 pages of potentially responsive records.³

(6) Over the past several years, requests have grown significantly larger and more complex. In 2009, the average size of an FBI FOIA request was 500 pending pages. As of August 30, 2012 the average size of an FBI FOIA request has increased to 1,128 pending pages, in effect doubling the work required to complete a request. Many of the requests which the FBI receives today are no longer simple, relatively straightforward, first-party requests from individuals seeking investigative records about themselves, *e.g.*, a request for a single bank robbery file. Rather, many of today's requests consist of many sub-parts – “multiple requests” within a request. While the FBI does not keep data on the number of parts to each FOIA request,

³ RIDS refers to a case which exceeds 8,000 pages as a “behemoth.”

as this would require additional agency resources, my experience indicates that the number of requests with multiple parts has increased substantially in the past five years. Plaintiff's FOIA request is a prime example of this phenomenon, as it consists of five sub-parts. *See* n.2, *supra*. Plaintiff's multi-part request is one of 93 currently pending behemoths, each exceeding 8,000 pages, and is illustrative of the increasing complexity and diversity of requests that the FBI has been experiencing in recent years. The number of "behemoths" has steadily increased from 26 ending in September 2007, 44 ending in September 2008, 56 ending in September 2009, 55 ending in September 2010, 85 ending in September 2011, and currently stands at 93 today. For administrative purposes in the FOIA Document Processing System (FDPS)(the computer software system RIDS uses to process requests electronically),⁴ when the number of pages determined to be potentially responsive to a request reaches 10,000, RIDS assigns an additional FOIPA number to that request and it is treated as a separate request for the FBI's Annual FOIA Report to the U.S. Department of Justice ("DOJ"). But initially, until the 10,000-page threshold is reached, a request is counted as one request no matter how complex or multi-parted. Plaintiff's request has five parts but RIDS has treated it as three separate requests because of the page count of approximately 25,000 pages.

(7) Other examples of recent compound requests which RIDS is currently addressing include, but are not limited to, the following:

- a request by the ACLU of Northern California for information on Muslim training and culture, currently the subject of litigation, contains 33 separate sub-

⁴ *see* First Hardy Declaration, ¶¶ 14 (a)(1), (c), and 22 for a more fulsome discussion of FDPS

parts.

- a pending request submitted by Mr. Kisseloff, currently the subject of litigation, which contains 18 separate sub-parts.
- an ACLU request concerning Section 215 of the PATRIOT Act, currently the subject of litigation, which contains 18 separate sub-parts.
- a pending EPIC administrative request, which contains 10 sub-parts, seeks records on the National Domestic Communications Assistance Center.
- a pending administrative request for information on the InfraGuard Jacksonville Member's Alliance, which contains 26 sub-parts.
- a pending administrative request with 17 sub-parts which seeks information on Gulen Academies.

(8) While the above will be reported by RIDS as more than six FOIA requests in the FBI's FY 2012 Annual FOIA Report to DOJ as parts of them exceed 10,000 pages, these six requests actually contain 122 sub-parts – and effectively may be considered as 122 separate requests for processing purposes. RIDS is required to carefully analyze each sub-part of each request; conduct a targeted search for records designed to uncover records potentially responsive to each sub-part of each request; identify and collect all potentially responsive records; scope and determine actual responsiveness; conduct a classification review as necessary; process all identified documents by conducting a page-by-page, line-by-line, word-by-word review; and finalize its releases.

(9) RIDS has also experienced a significant increase in the frequency of requests filed

by several prolific requesters. For example, since 2005, Ryan Shapiro has submitted over 500 separate FOIA and Privacy Act requests related to animal rights extremism, many of which consist of multiple sub-parts. Four separate complaints, concerning 81 requests, filed by Mr. Shapiro have now been consolidated into a single litigation in front of Judge Beryl Howell. There is little doubt of the enormous volume, frequency and complexity of these requests, as well as that of many of Mr. Shapiro's requests still in the administrative stage which have multiple sub-parts, had a multiplying effect on the work and time required to complete a "single" request. Plaintiff was willing to narrow the scope of its request by excluding active investigations, but that has had only a minor impact on reducing the overall number of pages to be processed since the subject of the request is for policy and related material.

(10) Plaintiff's argument as to the availability of an increased budget for FOIA work misses the mark. While the total budget requested by the FBI for FY 2012 was \$8.1 billion dollars, this figure represents the FBI's total operating budget, and not the allocation to RIDS alone, which is only one line item on the FBI's large budget request.

(11) While RIDS presently has 270 employees, only approximately 150 employees are devoted to full-time work in the five FOIPA units as line analysts who review and process potentially responsive documents.⁵ This same 150-person staff handles processing of both administrative requests as well as those requests which become the subject of litigation.⁶ The

⁵ Historically in 2010, RIDS had 145 employees and in 2011, RIDS had 159 employees that were devoted to full-time work in the five FOIPA units as line analysts reviewing and processing potentially responsive documents.

⁶ The FBI is currently a defendant in 122 litigations pending in federal courts nationwide.

remaining 120 employees, including contractors, are assigned to the Work Processing Unit (“WPU”);⁷ and the three Classification Units (“CU”).⁸ See First Hardy Declaration, ¶¶ 13 - 16. The remaining employees are assigned as administrative staff, supervisors and senior managers.

(12) The total number of pages responsive to a request proportionally impacts – and dramatically affects – the complexity of the FOIA processing required as well as the resources and time needed to respond to a particular request. The FBI’s experience is that as the number of pages in a request increases, the work and complexity associated with responding to a request proportionally increases as well, including the number of referrals (for either consultation or direct response) to other DOJ components and agencies, the need for internal reviews, declassification considerations, and the time associated with page-by-page, line-by-line, word-by-word review of all potentially responsive material to determine what can be released and/or withheld.⁹

⁷ WPU personnel focus solely on the initial perfection of incoming requests, including the search, collection, and at times the scoping of potentially responsive material. Once WPU completes its work, it forwards the requests to the perfected backlog for assignment to the FOIPA Units which review and process records for potential release or withholding.

⁸ The CUs, *inter alia*, conduct classification reviews of materials which are the subject of FOIA and Privacy Act requests. After responsive pages are scanned into the FOIPA Document Processing System (see First Hardy Declaration, ¶¶ 14 (a)(1), (c), and 22), they are broken down into manageable segments called “work folders.” CU-2, which only has seven full-time analysts, handles all classified material reviews involved in litigation cases, in addition to other classification responsibilities.

⁹ In this particular case, the logistics of conducting a classification review is complicated by the fact that the classified information is spread throughout the potentially responsive pages, thus making it difficult to give an accurate page count of classified material short of performing a hand-count. At this time, the FBI estimates that there are over 6,000 pages containing classified information within the responsive page count. Because the classified information is spread throughout the responsive pages, it complicates the processing since an entire work folder in FDPS must be assigned to a CU analyst for review. FDPS only allows one analyst to review a folder at any given time. While the CU analyst

(13) RIDS has an obligation to faithfully administer the FOIA program in accordance with statutes and regulations, and by treating all requesters fairly and equitable, giving none an undue advantage over any others. RIDS follows the rule of “first in-first out” using a multi-track queue system. *See* First Hardy Declaration, ¶¶ 14 (a)(I) - (II). Exceptions to the “first in-first out” rule are made by RIDS in rare circumstances: for those requesters who are granted expedited processing by either the FBI or DOJ in accordance with DOJ FOIA regulations for expedited processing;¹⁰ and for those requesters who initiate litigation and in which a court orders (or the parties agree to) priority processing and release by imposing a framework of expedited production deadlines. Another policy designed to ensure fairness among requesters involves the “behemoths” requests. Because RIDS has determined that no requester should have to wait more than three years before the FBI provides a complete response, it will continue to commit the necessary resources to accomplish that goal. This is a goal that RIDS is continually striving to achieve.

(14) Finally, I would like to provide an update with regard to the upgrade of FDPS which was discussed in my last declaration. Although RIDS has commenced preliminary work and will continue over the next several weeks, including additional programming, technical work, and testing, RIDS now anticipates that the implementation of the upgraded version of FDPS will begin in mid-September and conclude in mid-October.

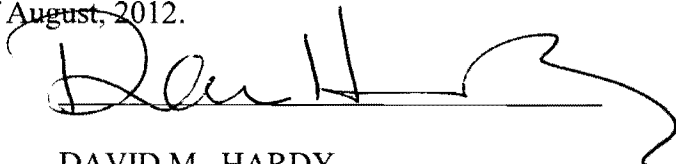
reviews that folder, the FOIPA analyst must work on another work folder until classification review is completed.

¹⁰ In the instant case, RIDS did not administratively grant plaintiff’s request for expedited processing because plaintiff failed to establish its eligibility under the applicable DOJ FOIA regulations.

CONCLUSION

(15) Through both this and my prior declaration, the FBI has amply demonstrated that exceptional circumstances exist to grant its request for an *Open America* stay of these proceedings. The staggering number of administrative FOIA requests and large number of pending litigation cases, with their inherent size and complexity, present extraordinary challenges for the FBI, far different than those faced five, let alone ten or more years ago. RIDS has a well-orchestrated process to faithfully administer the FOIA program in accordance with applicable statutes and regulations, and to treat all requesters fairly and equitable, giving none an undue advantage over others. RIDS's adherence to the "first in-first out" multi-track queue system ensures all requesters are treated similarly and fairly. By ordering RIDS to process and release material in litigation at a priority level and pace which is sooner and faster than that accorded to those requesters who do not have the means to pursue litigation, courts effectively grant the litigant requesters preferential treatment of their FOIA/Privacy Act requests. Despite its limited resources and numerous constraints, RIDS will continue to process cases in a way that ensures fairness to all requesters, and provide responses in as timely a manner as possible.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of August, 2012.



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