

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY
INFORMATION CENTER

Plaintiff,

v.

UNITED STATES DEPARTMENT
OF JUSTICE

Defendant.

Civil Action No. 1:13-cv-01961(KBJ)

FIFTH 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 248 employees who staff a total of twelve (12) 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, the OPEN FOIA Act of 2009, and FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order 13526; 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 (E.O.) 13526,¹ and the preparation of declarations in support of Exemption 1 claims asserted under the FOIA. I have been designated by the Attorney General of the United States as an original classification authority and a declassification authority pursuant to Executive Order 13526, §§ 1.3 and 3.1. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith.

(3) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to 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 handling of the Department of Justice referrals to the FBI from the National Security Division (“NSD”), pertaining to a Freedom of Information Act (“FOIA”) request made by Plaintiff, Electronic Privacy Information Center. Plaintiff requested records used to draft the semiannual reports on the use of pen registers and trap and trace (“PR/TT”) devices for national security purposes.²

(4) This Fifth Declaration supplements my previous four declarations filed in the

¹ 75 Fed. Reg. 707 (2010).

² The Foreign Intelligence Surveillance Act (“FISA”) of 1978, P.L. 95-511, 50 U.S.C. §§ 1801 et seq, as amended, provides a statutory framework for the U.S. Government to engage in electronic surveillance through the installation and use of pen registers and trap and trace devices for the purpose of obtaining foreign intelligence information. See Title IV of FISA, 50 U.S.C. §§ 1841-1846.

above-captioned civil action. The last declaration was filed March 18, 2016 (hereinafter “Classified Fourth Hardy Declaration”) and will be referenced throughout. This supplemental declaration will provide the Court additional information explaining the FBI’s withholdings in Documents 124, 126, and 127 as ordered in the Court’s Memorandum Opinion (“Opinion”) dated November 7, 2017. *See* Opinion at 35-36. The FBI will explain the withholdings in such a manner as to provide as much information on the public record as possible.

1. Document 124

(5) Document 124 is a Semi-Annual Report furnished by the U.S. Department of Justice to Congress on electronic surveillance and physical searches conducted under the FISA. In its Memorandum Opinion, the Court states that the material on pages 53-54 of Document 124 “may in fact be within the Remaining Challenges” based on its review of the un-redacted text. *See* Opinion at 36. Accordingly, the Court ordered that the Government “must either explain why the Court’s reading is incorrect or submit a supplemental declaration that provides an explanation for why the information is exempt from disclosure.” *Id.*

(6) Upon further review, the FBI has determined the two paragraphs on pages 53-54 of Document 124 under Section G entitled “Other Legal Interpretations under FISA by the FISC” are within the remaining challenges. The FBI has also determined it is required to withhold those paragraphs in full under FOIA Exemptions (b)(1) [E.O. 13526, § 1.4(c)], (b)(3) [National Security Act of 1947, 50 U.S.C. § 3024(i)(1)], and (b)(7)(E) and that no sentences within those paragraphs properly can be segregated from the whole and released in part without risking harms protected by these Exemptions.

(7) Specifically, the information withheld in Section G entitled “Other Legal Interpretations under FISA by the FISC” relates to a specific FISA application and provides information about the nature of the contents of that specific application. This application

remains classified. I have determined, as an original classification authority, that the withheld information in Section G is properly classified at the Top Secret level as it would reveal information that would allow for circumvention of valuable intelligence gathering sources and methods; and subsequent circumvention of these intelligence gathering sources and methods would cause exceptionally grave damage to national security. Therefore, this information is exempt from disclosure pursuant to (b)(1) [E.O. 13526, § 1.4(c)] and (b)(3) [50 U.S.C. § 3024(i)(1)] for the reasons set forth in paragraphs 29-30 and 32 of the Classified Fourth Hardy Declaration. *See* Classified Fourth Hardy Declaration ¶¶ 29-30, 32. Additionally, I have also determined the withheld information, if released, would allow for criminals to circumvent intelligence gathering sources and methods critical to the FBI's ability to detect and disrupt criminal activities. Release of this information would enable criminals to avoid the FBI's law enforcement efforts, enabling them to circumvent the law; thus, this information is also exempt from disclosure pursuant to (b)(7)(E) for the reasons set forth in paragraph 30 of the Classified Fourth Hardy Declaration. *See id.* ¶ 30.³

II. Document 126

(8) Document 126 is a Semi-annual Report furnished by the U.S. Department of Justice to Congress addressing physical searches and PR/TT surveillance under the FISA. In its Memorandum Opinion, the Court observes that footnote 16 on page 57 of Document 126 is labeled as "outside the Remaining Challenges even though the footnote pertains to text that the government admits is within the Remaining Challenges." Opinion at 36. The Court ordered the

³ On page 36 of its Memorandum Opinion, the Court determined that Section K of Document 124 entitled "FISA Process Improvements" "may in fact be within the Remaining Challenges." Opinion at 36. My understanding is that the U.S. Department of Justice has determined that Section K is within the Remaining Challenges and has released to Plaintiff the information within that section without any redactions. Accordingly, this declaration does not address this aspect of the Court's November 7, 2017 order.

Government “to explain this discrepancy” and “provide a declaration that addresses the text of the footnote and why it is exempt from disclosure.” *Id.*

(9) The FBI confirms that the footnote should have been identified as within the Remaining Challenges in the same manner as the text accompanying the footnote was so identified; the FBI regrets this oversight.

(10) In the Classified Fourth Hardy Declaration, the FBI described the classified investigative method and technique detailed in the text of page 57, which is identical to the investigative method and technique addressed in Document 125 on pages 3 through 5. *See* Classified Fourth Hardy Declaration ¶¶ 34, 38. The information in footnote 16 directly relates to and references the exempt text on page 57 addressed in paragraphs 34 and 38 of my classified fourth declaration, *see id.*, such that the FBI’s justification for withholding the text related to the footnote under (b)(1) [E.O. 13526, § 1.4(c)], (b)(3) [50 U.S.C. § 3024(i)(1)], and (b)(7)(E) extends to footnote 16. I have thus determined that footnote 16 is properly classified at the Secret level because disclosure of this information would tend to reveal information that would allow for circumvention of valuable intelligence gathering sources and methods; and subsequent circumvention of these intelligence gathering sources and methods would cause serious damage to national security. Additionally, I have also determined the withheld information, if released, would allow for criminals to circumvent intelligence gathering sources and methods critical to the FBI’s ability to detect and disrupt criminal activities. Release of this information would enable criminals to avoid the FBI’s law enforcement efforts, enabling them to circumvent the law. Accordingly, footnote 16 on page 57 of Document 126 is exempt from disclosure pursuant to FOIA Exemptions (b)(1), (b)(3), and (b)(7)(E) for the reasons set forth in paragraphs 34 and 38 of my classified fourth declaration.

III. Document 127

(11) Document 127 is a Semi-annual Report furnished by the U.S. Department of Justice to Congress addressing electronic surveillance and physical searches under the FISA. In its Memorandum Opinion, the Court states that the material on page 69 of Document 127 under the heading “FISA Process Improvements” “may in fact be within the Remaining Challenges” based on its review of the un-redacted text. *See* Opinion at 36.⁴ Accordingly, the Court ordered that the Government “must either explain why the Court’s reading is incorrect or submit a supplemental declaration that provides an explanation for why the information is exempt from disclosure.” *Id.*

(12) Upon further review, the FBI has determined the material within this section is within the Remaining Challenges. Defendant has therefore processed all segregable information under the heading “FISA Process Improvements” and has released all but the final paragraph of that section to Plaintiff without any redactions.

(13) With regard to the final paragraph of this section, the FBI has released the first two sentences as information that is non-exempt and segregable from the remainder of the paragraph. The FBI has specifically determined that the remaining sentences in this paragraph cannot be disclosed without risking the harm that the applicable exemptions are intended to prevent.

(14) The remaining text in the final paragraph of Section L entitled “FISA Process Improvements” describes the inner workings of the classified FISA application process and is associated with the use of a specific intelligence source/method, which is used by the

⁴ I am aware that the Court also ordered the Government to explain a notation on page 59 of Document 127. *See* Opinion at 36. My understanding is that the information on page 59, as well as the remainder of section F (pages 58-61) entitled “Post-Cut-Through Digits” was disclosed to Plaintiff without any redactions on July 6, 2016. Accordingly, I have not addressed that portion of the Court’s Opinion in this declaration.

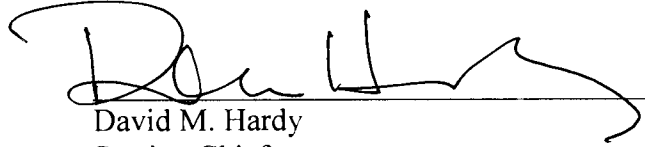
government to obtain valuable information on national security targets. These sentences are exempt from disclosure under exemptions (b)(1), (b)(3), and (b)(7)(E). I have already set forth in my earlier declarations the justifications for withholding information protected by these exemptions, and I incorporate my prior discussions of those exemptions here. *See* First Hardy Declaration ¶¶ 24-47 & 52 (ECF No. 23-1); Second Hardy Declaration ¶¶ 15-36 (ECF No. 24-1); and Third Hardy Supplemental Declaration ¶¶ 33-54 (ECF No. 27-7).

(15) The information at issue here is properly classified at the Secret level, and is thus exempt from disclosure pursuant to Exemption (b)(1) [E.O. 13526, § 1.4(c)]. The information is similarly protected from disclosure by statute [50 U.S.C. § 3024(i)(1)] that protects sources and methods from unauthorized disclosure and is thus exempt under Exemption (b)(3). And the information is also exempt from disclosure pursuant to Exemption (b)(7)(E) because disclosing the information would comprise investigative techniques and procedures and sensitive law enforcement techniques utilized to conduct national security investigations.

(16) Disclosing the redacted information about the classified application process, which is held *in camera, ex parte* before the FISC, and which enables the FBI to carry out its foreign intelligence and counterintelligence missions, would compromise the confidentiality of this process and risk adversely affecting its effectiveness. Additionally, disclosing this information would reveal critical information about classified sources and methods allowing for circumvention of these sources and methods that reasonably could be expected to cause serious damage to the national security and could otherwise hinder the FBI's ability to use these sources and methods to enforce federal laws. Accordingly, I have determined that the redacted sentences in the final paragraph of this section must be withheld as exempt pursuant to (b)(1), (b)(3), and (b)(7)(E).

Pursuant to 28 U.S.C. § 1746. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of December, 2017.

A handwritten signature in black ink, appearing to read "D. Hardy", written over a horizontal line.

David M. Hardy
Section Chief
Record/Information Dissemination Section
Records Management Division
Federal Bureau of Investigation
Winchester, Virginia