IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELECTRONIC PRIVACY INFORMATION CENTER, *Plaintiff*, v. FEDERAL BUREAU OF INVESTIGATION *Defendant*.	Civil Action No. 17-121

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case concerns EPIC's efforts to obtain records, in the possession of the FBI, detailing the agency's response to the Russian interference in the 2016 U.S. presidential election. There should be few issues of greater concern to the American public than the effort of a foreign government to influence the outcome of a U.S. election. Yet a year after the election the full extent of Russian interference remains unknown to the public. Critical information about how the FBI, the primary agency for investigating cyberattacks, responded to the threat is unavailable. And the public, which the Freedom of Information Act seeks to inform, remains in the dark. The failure of the FBI to release *any* material specifically related to the Agency's response to the Russian cyber attack in response to EPIC's FOIA request, or to provide in full the agency's procedures for notification following a cyber attack is contrary to law and leave at risk the security of future U.S. elections.

Plaintiff Electronic Privacy Information Center ("EPIC") sought four categories of records from the FBI. EPIC now challenges the adequacy of the FBI's search for records in categories one through three, the agency's assertion of Exemption 7(A) to withhold all records located, and the failure to release reasonably segregable portions of those records. EPIC also challenges the FBI's assertion of Exemptions 1 and 3 to category four of EPIC's FOIA request.

The FBI has not satisfied its statutory obligation to disclose records responsive to EPIC's request. As to categories one through three, the FBI conducted a patently inadequate search. The FBI has failed to support its categorical 7(A) claim because the conclusory allegations proffered are undermined by prior disclosures from the agency. The agency also failed to establish it has fulfilled the duty to provide reasonably segregable portions of the material.

As to category four of the EPIC FOIA request, the FBI's assertions lack the detail necessary to establish that certain FISA procedures sought by EPIC are *properly* classified as

required by Exemption 1, or fall within the National Security Act Section 3024(i)(1) and subject to Exemption 3. The FBI had failed justify the withholding of reasonably segregable portions of this record, particularly after the release of the numerous disclosures of similar FISA procedures.

Because the Government has improperly withheld non-exempt material subject to disclosure under the FOIA, the Court should grant EPIC's Motion for Summary Judgment.

BACKGROUND

During the 2016 U.S. presidential election, the Russian Government carried out an unprecedented campaign to "undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency." Office of the Dir. of Nat'l Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* ii (2017), Ex. 7. This Russian influence campaign represented a "significant escalation in directness, level of activity, and scope of effort compared to previous operations aimed at US elections." Ex. 7 at ii. The U.S. Intelligence Community made clear that this was not an isolated incident. "Moscow will apply lessons learned from its campaign aimed at the US presidential election to future influence efforts in the United States and worldwide, including against US allies and their election processes." Ex. 7 at iii. Yet, a year after election day, the FBI has released few new details about the scope of the interference, how the FBI investigated cyberattacks on political organizations in the United States, and whether the FBI has adequately secured the U.S. against future active measures.

I. The FBI had a central responsibility to respond to the Russian interference in the 2016 presidential election.

The FBI is, by its own terms, "the lead federal agency for investigating cyber attacks by criminals, overseas adversaries, and terrorists." FBI, *What We Investigate, Cyber Crime*, FBI.gov.[1] The Bureau's legal authority over cybersecurity is expressly provided for in Presidential Policy Directive-41. Directive on United States Cyber Incident Coordination ("PPD 41"), 2016 Daily Comp. Pres. Doc. 495 (July 26, 2016) (setting forth the FBI's legal authority for cybersecurity threat response).

[1] https://www.fbi.gov/investigate/cyber.

On December 29, 2016, the Federal Bureau of Investigation and Department of Homeland Security published the first public report on the Russian interference — the "Joint Analysis Report," or "JAR." U.S. Dep't of Homeland Sec. & Fed. Bureau of Investigation. *GRIZZLY STEPPE – Russian Malicious Cyber Activity* (2016), Ex. 6. The JAR explained some of the interference techniques used by the Russians and the defense measures adopted by the U.S. Government. In an unusual step, the JAR formally attributed the attack to Russian intelligence services. While "[p]revious JARs have not attributed malicious cyber activity to specific countries or threat actors," the report stated, this report immediately identified "Russian civilian and military intelligence Services (RIS)" as the actors who "compromise[d] and exploit[ed] networks and endpoints associated with the U.S. election, as well as a range of U.S. Government, political, and private sector entities." Ex. 6. at 1.

On January 6, 2017, the ODNI released to the public a joint U.S. intelligence assessment of the Russian interference. The report makes clear in its first pages that the FBI was a joint author of this report, and that the FBI spoke directly throughout this assessment:

> This report includes an analytic assessment drafted and coordinated among The Central Intelligence Agency (CIA), The Federal Bureau of Investigation (FBI), and The National Security Agency (NSA), which draws on intelligence information collected and disseminated by those three agencies….. *When we use the term "we" it refers to an assessment by all three agencies.*

Ex. 7 at i (emphasis added). The assessment stated that the Russian campaign involved both "covert intelligence operations" and "overt efforts by Russian Government agencies, state funded media, third-party intermediaries, and paid social media users or 'trolls.'" Ex. 7 at ii. The assessment also explained that the Russian efforts spanned "cyber operations; *intrusions into US state and local election boards*; and overt propaganda." Ex. 7 at 2 (emphasis added). Russian operatives perpetrated cyber attacks "against targets associated with the 2016 US presidential election, including targets associated with both major US political parties" such as "US primary

campaigns, think tanks, and lobbying groups," and then "released US victim data … publicly and in exclusives to media outlets." Ex. 7 at 2–3.

The report also confirms specific details about the Russian hacking of U.S. political organizations, including the DNC. The assessment concludes that "In July 2015, Russian intelligence gained access to Democratic National Committee (DNC) networks and maintained that access until at least June 2016." Ex. 7 at 2. They further assessed that "The General Staff Main Intelligence Directorate (GRU) probably began cyber operations aimed at the US election by March 2016," and that "the GRU operations resulted in the compromise of the personal e-mail accounts of Democratic Party officials and political figures. By May, the GRU had exfiltrated large volumes of data from the DNC." Ex. 7 at 2.

An FBI criminal investigation was subsequently disclosed to Congress after EPIC filed suit in this case. Compl. ¶ 1, ECF No. 1. On March 20, 2017, FBI Director James Comey announced in an open hearing before the House Permanent Select Committee on Intelligence that the FBI was:

> [I]nvestigating the Russian government's efforts to interfere in the 2016 presidential election, and that includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts.

Hardy Decl. ¶ 12. Following Mr. Comey's firing by President Trump, Robert Mueller was appointed special counsel to take over this investigation. Hardy Decl. ¶¶ 12–13.

The Special Counsel's Office has recently issued two indictments and unsealed one guilty plea, shedding new light on its investigation. The indictments of former chair of President Trump's campaign Paul Manafort and former campaign advisor Richard Gates—an extensive thirty-one page document—charge that the two acted as unregistered foreign agents of Ukraine, its political parties, and leaders, laundered millions of dollars, and made false statements to the

U.S. government. Indictment, *United States v. Manafort*, No. 17-cr-201 (D.D.C. Oct. 27, 2017). George Papadopoulos, a former foreign policy advisor for the campaign, pled guilty to making false statements to the FBI. Statement of the Offense, *United States v. Papadopoulos*, No. 17-cr-182 (RDM) (D.D.C. Oct. 5, 2017). This guilty plea, entered on Oct. 5, 2017, but unsealed with the announcement of the indictments, explains on its first pages that, "At the time of the interview [on Jan 27, 2017], the FBI had an open investigation into the Russian government's efforts to interfere in the 2016 presidential election." *Id.* at 1. The document details a timeline of Mr. Papadopoulos's contacts with Russian nationals and associates, and his contacts concerning "dirt" on then-candidate Hillary Clinton. *Id.* at 3–9.

II. There is a strong public interest in further disclosure about the nature and scope of the Russian interference and the response of the FBI.

Nearly a year after election day, open questions still remain about the adequacy of the FBI response to the Russian interference in the 2016 election cycle, whether and how the agency has secured the U.S. against future attacks, and the full scope of Russian measures. Yet members of Congress on both sides of the aisle insist that a key to impeding future attacks is building resilience through public education. There is strong public interest in disclosure of the details of the Russian meddling to the fullest extent possible.

Despite the central role the FBI played in the federal response to the Russian interference, there are still many unanswered questions about how, and when, the FBI became involved in responding to the cyber attacks on U.S. political organizations. For example, the head of CrowdStrike, the cybersecurity firm hired by the DNC in April 2016, has said that "he was baffled that the F.B.I. did not call a more senior official at the D.N.C. or send an agent in person to the party headquarters to try to force a more vigorous response." Eric Lipton, David E. Sanger, & Scott Shane, *The Perfect Weapon: How Russian Cyberpower Invaded the U.S.*, N.Y. Times

(Dec. 13, 2016).[2] DNC deputy communications director Eric Walker alleged that the "FBI never requested access to the DNC's computer servers" for review. Lily Hay Newman, *FBI Says the Democratic Party Wouldn't' Let Agents See Hacked Email Servers*, Wired (Jan. 5, 2017).[3] An unnamed FBI official contested this account in press reports, stating the agency "repeatedly stressed to DNC officials the necessity of obtaining direct access to servers and data, only to be rebuffed until well after the initial compromise had been mitigated." *Id*. The FBI has not provided details to facilitate a public evaluation of these responses, despite the fact that the existence of these communications is public knowledge.

The full extent and nature of the Russian interference is also still unknown to the public. For instance, on June 21, 2017, *nearly eight months after election day*, in an open hearing before the Senate Select Committee on Intelligence the Department of Homeland Security National Protection and Programs Directorate's Acting Deputy Under Secretary for Cybersecurity and Communications Jeanette Manfra confirmed for the first time that "election-related systems in 21 states . . . were targeted" by Russian cyber actors during the 2016 election—systems in nearly half the States. *Russian Interference in 2016 Election, Panel 1: Hearing before the S. Select Comm. on Intelligence*, 115th Cong. (2017). Vice Chair Mark Warner (D-VA) probed Ms. Manfra during the hearing about whether "at this moment in time, there may be a number of . . . state, local election officials that don't know their state[s] were targeted in 2016." *Id*.

Senators also pressed the FBI representative Bill Priestap, Assistant Director of the Counterintelligence Division on the FBI's response. Senator Feinstein pressed "Candidly, I'm very disappointed by the testimony," and "it seems to me we have to deal with what we've learned." *Id*.

[2] http://www.nytimes.com/2016/12/13/us/politics/russia-hack-election-dnc.html.
[3] https://www.wired.com/2017/01/fbi-says-democratic-party-wouldnt-let-agents-see-hacked-email-servers.

Senator Dianne Feinstein asked "[W]hat is your finding [concerning how states were targeted]" Mr. Priestap responded "I'd rather not go into those details," but "we continue to learn things." *Id.* Asked by Senator Collins (R-ME) about Russian use of malware and other techniques that could affect future elections, Mr. Priestap again responded, "I'm sorry Senator, I just can't comment on that because of our pending investigations." *Id*. Senator Rubio (R-FL) urged that "as much of [the systems data] must be made available to the public as possible," and said to "err on the side of disclosure about our systems so people have full confidence when they go vote." *Id.* Vice Chair Mark Warner concluded "I do not believe our country is made safer by holding this information back from the American public." *Id*.

Congressional leaders on both sides of the aisle repeatedly emphasized the unprecedented nature of the Russian interference, as well as the need for the American public to understand what happened and how it can be prevented in the future. The Chairman of the Senate Select Committee on Intelligence, Senator Richard Burr (R-NC), has made clear that this is a matter "the American public, indeed all democratic societies, need to understand." *Russian Intelligence Activities, Panel 1: Hearing Before S. Select Comm. on Intelligence*, 115th Cong. (2017). In an open hearing of the Committee, Chairman Burr emphasized that:

> The public deserves to hear the truth about possible Russian involvement in our elections, how they came to be involved, how we may have failed to prevent that involvement, what actions were taken in response if any, and what we plan to do to insure the integrity of future free elections.

Id. at 3. Similarly, Senator Kamala Harris (D-CA) stated the same day that:

> We must proceed with urgency and we must be transparent . . . . I strongly believe an informed public is one of our best weapons against future attacks.

Id. at 59–60.

On March 20th, Representative Nunes (R-CA), Chair of the House Intelligence Committee, stated during that Committee's first open hearing on the Russian interference that

"the indications of Russian measures targeting the U.S. presidential election are deeply troubling," and that:

> I recognize the challenge of discussing sensitive national security issues in public. However . . . it is critical to ensure that the public has access to credible unclassified facts and to clear the air regarding unsubstantiated media reports.

Russian Active Measures Investigation: Hearing Before H. Permanent Select Comm. on Intelligence, 115th Cong. (2017). Ranking Member, Representative Adam Schiff (D-CA), agreed:

> What is striking here is the degree to which the Russians were willing to undertake such an audacious and risky action against the most powerful nation on Earth. That ought to be a warning to us . . . . And if we do not do our very best to understand how the Russians accomplished this unprecedented attack on our democracy and what we need to do to protect ourselves in the future, we will only have ourselves to blame.

Id. at 5. Still, Representative Schiff concluded, "there is a lot we don't know." *Id*.

Despite lingering questions, special elections for both House and Senate seats are scheduled for the Winter of 2017 and Spring of 2018, with the midterm elections to follow not long after. For these reasons, there is a profound and urgent public interest in the release of the FBI records sought by EPIC concerning the Russian interference with the 2016 election. The release of records related to the cyber attacks and influence campaign against democratic institutions is necessary for the public to evaluate the FBI's response, to ensure that agencies are taking appropriate measures to protect U.S. electoral institutions against future attack, and to be informed as a bulwark against future foreign influence efforts.

III. EPIC seeks disclosure of the FBI records of the Russian interference in the 2016 election.

On December 22, 2016, EPIC submitted a FOIA Request to the FBI's Record/Information Dissemination Section via email ("EPIC FOIA Request"). EPIC's FOIA Request sought records

about the Russian interference with the 2016 presidential election. Compl. ¶ 23. Specifically, EPIC requested:

1. All records including, but not limited to, memos, reports, guidelines, procedures, summaries, and emails pertaining to the FBI's investigation of Russian-sponsored cyber attack on the RNC, DNC, and DCCC.
2. All records of communications to the RNC, DNC, and DCCC regarding the threat of Russian interference in the 2016 Presidential election.
3. All records of communications with other federal agencies regarding Russian interference in the 2016 Presidential election.
4. All records including, but not limited to, memos, reports, guidelines, and procedures pertaining to the FBI's procedure to notify targets of cyber attacks.

Compl. ¶ 23. EPIC sought "news media" fee status, 5 U.S.C. § 552(4)(A)(ii)(II), and a waiver of all duplication fees, 5 U.S.C. § 552(a)(4)(A)(iii). Compl. ¶ 24. EPIC also sought expedited processing of the request pursuant to 5 U.S.C. §§ 552(a)(6)(E)(i), (a)(6)(E)(v)(II). Compl. ¶ 25.

In an email dated December 22, 2016, FBI Public Information Officer, David P. Sobonya, acknowledged receipt of EPIC's FOIA Request. Compl. ¶ 26. The FBI made no determination concerning EPIC's request for expedited processing, or any other determination concerning EPIC's FOIA Request. Following the FBI failure to make a determination regarding EPIC's FOIA Request within the ten-day period prescribed by 5 U.S.C. § 552(a)(6)(E)(ii)(I), Compl. ¶ 29, on January 18, 2017 EPIC filed suit.

Pursuant to the Court's schedule in the case, the FBI initiated a series of rolling productions to EPIC. Order, ECF No. 13. As to categories one through three of the EPIC FOIA request, the FBI withheld documents located by the agency in full, asserting exemption (b)(7)(A). In response to category four of the EPIC FOIA request, in a letter to EPIC the FBI listed a series of web links and enclosed twenty pages of documents, nearly all with significant redactions, asserting Exemptions (b)(1), (b)(3), and (b)(7)(E). The document with redactions under (b)(1) and (b)(3) listed only the title of the document, numbers of each section, and a web link. EPIC informed FBI of its intent to

challenge the agency's withholding under Exemptions (b)(7)(A), (b)(1), and (b)(3), as well as the adequacy of the FBI's search and failure to provide reasonably segregable material.

ARGUMENT

The FOIA was enacted "to facilitate public access to Government documents" and "was designed to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *CREW v. DOJ*, 746 F.3d 1082, 1088 (D.C. Cir. 2014) (quoting *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991)). The purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *EPIC v. DHS*, 999 F. Supp. 2d 24, 29 (D.D.C. 2013) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)). "In enacting FOIA, Congress struck the balance it thought right—generally favoring disclosure, subject only to a handful of specified exemptions—and did so across the length and breadth of the Federal Government." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1266 (2011). As a result, the FOIA "mandates a strong presumption in favor of disclosure." *CREW v. DOJ*, 854 F.3d 675, 681 (D.C. Cir. 2017); *EPIC v. DOJ*, 511 F. Supp. 2d 56, 64 (D.D.C. 2007) (internal citations omitted).

The FOIA specifies that certain categories of information may be exempt from disclosure, "[b]ut these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *ACLU v. DOJ*, 655 F.3d 1, 5 (D.C. Cir. 2011) (quoting *Nat'l Ass'n of Home Builders v. Norton,* 309 F.3d 26, 32 (D.C. Cir. 2002)). Therefore, FOIA exemptions "must be narrowly construed." *Id*. "The statute's goal is broad disclosure, and the exemptions must be given a narrow compass." *Milner*, 131 S. Ct. at 1261 (internal citations omitted). Furthermore, "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); *see also EPIC v. DHS*, 384 F. Supp. 2d 100, 106 (D.D.C. 2005). Where the government has not carried this burden, summary judgment in favor of the Plaintiff is

appropriate. *See, e.g.*, *CREW*, 746 F.3d at 1087 (reversing district court award of summary judgment to the government due to the DOJ failure to justify categorical withholding under Exemption 7(A), among other exemptions); *Dugan v. DOJ*, 82 F. Supp. 3d 485, 500–01 (D.D.C. 2015) (denying summary judgment to the ATF for its 7(A) claim).

I. STANDARD OF REVIEW

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact is one that would change the outcome of the litigation." *EPIC v. DHS*, 999 F. Supp. 2d at 28 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). FOIA cases are typically decided on motions for summary judgment. *Id*.; *see Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.D.C. 2009). A district court reviewing a motion for summary judgment in a FOIA case conducts a de novo review of the record. 5 U.S.C. § 552(a)(4)(B); *CREW*, 746 F.3d at 1088 (citing *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989)). In the FOIA context, *de novo* review requires the court to "ascertain whether the agency has sustained its burden of demonstrating that the documents requested are not 'agency records' or are exempt from disclosure under the FOIA." *Assassination Archives & Research Ctr. v. CIA,* 334 F.3d 55, 57 (D.C. Cir. 2003).

Summary judgment is warranted only where the agency demonstrates "that it has fully discharged its obligations under the FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Cause of Action Inst. v. DOJ*, ___ F.3d ____, 2017 WL 4541352, at *4 (Oct. 10, 2017).

II. EPIC IS ENTITLED TO SUMMARY JUDGMENT

The FOIA provides that every government agency shall "upon any request which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . make

the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). But, despite the "prodisclosure purpose" of the statute, *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), the FOIA provides for nine exemptions. These nine exemptions must be "narrowly construed." *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

In a FOIA case, the "agency bears the burden of establishing that an exemption applies." *PETA v. NIH*, 745 F.3d 535, 540 (D.C. Cir. 2014). The agency may "meet this burden by filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed." *King v. DOJ*, 830 F.2d 210, 217 (D.C. Cir. 1987). It is not sufficient for the agency to provide "vague, conclusory affidavits, or those that merely paraphrase the words of a statute." *Church of Scientology of Cal., Inc. v. Turner*, 662 F.2d 784, 787 (D.C. Cir. 1980) (per curiam). When an agency invokes an exemption, "it must submit affidavits that provide 'the kind of detailed, scrupulous description [of the withheld documents] that enables a District Court judge to perform a de novo review.'" *Brown v. FBI*, 873 F. Supp. 2d 388, 401 (D.D.C. 2012) (citing *Church of Scientology*, 662 F.2d at 786) (discussing an agency invocation of Exemption 3).

A. The FBI has not justified its categorical assertion of Exemption 7(A) to withhold all records located in response to categories 1, 2, and 3 of EPIC's FOIA request.

In this case, the FBI argues that all portions of documents deemed responsive to categories one through three of the EPIC FOIA request are exempt from FOIA under 5 U.S.C. § 552(b)(7)(A). However, in the first instance, the agency has not carried its burden to perform a search reasonably calculated to uncover all relevant records, instead conducting an unreasonably narrow search limited to one set of files. The FBI has also not carried its burden to establish that Exemption 7(A) categorically applies to all records located because the agency relies on the implausible conclusion that disclosure of every single relevant record would risk pending proceedings. This is implausible given numerous official disclosures by the FBI and other

government agencies detailing the activities that are the subject of EPIC's FOIA Request, including in public reports and court filings in three recent criminal cases. Most tellingly, the FBI fails to discuss in its motion for summary judgment the two public assessments that the agency issued concerning Russian interference that are subject to EPIC's FOIA request. In light of these official disclosures, the FBI may not assert a categorical exemption for records sought in this matter and should provide reasonably segregable material.

1. The FBI has failed to establish it has conducted an adequate search for records responsive to items 1 through 3 of EPIC's FOIA request.

The FBI's declaration fails to establish that the agency conducted an adequate search for records responsive to items 1 through 3 of EPIC's FOIA request. The government "must show beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents." *DeBrew v. Atwood*, 792 F.3d 118, 122 (D.C. Cir. 2015) (quoting *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)). In order to conduct such a search, the government must "follow through on obvious leads to discover requested documents," *Campbell*, 164 F.3d at 28, and "cannot limit its search" to only one or more places if there are additional sources "that are likely to turn up the information requested." *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). Declarations used to support the adequacy of a search must be "relatively detailed and nonconclusory and . . . submitted in good faith." *Morley v. CIA*, 508 F.3d 1108, 1116 (D.C. Cir. 2007); *Weisberg v. DOJ*, 627 F.2d 365, 371 (D.C. Cir. 1980) (finding a search affidavit to be too conclusory when it "d[id] not denote which files were searched or by whom, d[id] not reflect any systematic approach to document location, and d[id] not provide information specific enough to enable [Plaintiff] to challenge the procedures utilized."); *see also Students Against Genocide v. Dep't of State*, 257 F.3d 828, 838 (D.C. Cir. 2001) ("Summary judgment may be based on affidavit, if the declaration sets forth sufficiently

detailed information for a court to determine if the search was adequate" (internal quotation marks omitted)). Summary judgment is inappropriate if the government's declarations "raise serious doubts as to the completeness of the search or are for some other reason unsatisfactory," *Perry v. Block*, 684 F.2d 121, 127 (D.C. Cir. 1982), or if there are "positive indications of overlooked materials," *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979).

The declaration in this case indicates that the agency has unreasonably limited its search for records responsive to categories one through three of EPIC's FOIA request, excluding significant FBI records related to the Russian interference in the 2016 election in manner that is inconsistent with EPIC's FOIA request.

The FBI states that it "construed the universe of records responsive to items 1 through 3" of the request as "co-extensive with the content of the investigative files from the FBI's Russia investigation." Def.'s Mem. 9, ECF No. 22-2. This is, namely, the investigation of Special Counsel Mueller that was officially acknowledged months after EPIC filed its FOIA request. Hardy Decl. ¶¶ 13-14 (describing the "Russia investigation" as the investigation transferred from under former Director Comey's oversight to Special Counsel Mueller). Notably, EPIC did not request records "co-extensive" with the Muller investigation, because that investigation was not publicly disclosed until after EPIC's request was filed. Instead, EPIC requested three categories of records broadly related to Russian interference and provided extensive background to demonstrate subject matter interest to EPIC. The FBI has not provided any support for the conclusion that that *all FBI records related to Russian interference*—including communications to "the RNC, DNC, and DCCC" following the hacks described in the intelligence assessment—are likely to be located in this single investigatory file. *Jefferson v. DOJ, Office of Inspector*

Gen., 168 Fed. Appx. 448, 450 (D.C. Cir. 2005) ("The Government has offered no plausible justification for limiting its search for responsive records to its investigative database."); *Concepcion v. CBP*, 767 F. Supp. 2d 141, 142–43 (D.D.C.. 2011) (denying summary judgment the agency where "CBP has failed to demonstrate that it has searched all the databases where one could reasonably expect to find records responsive to the plaintiff's FOIA request"). And, critically, because of the time line and facts set out by the FBI, there is reason to believe this search of the Special Counsel investigatory file did in fact exclude records about the Russian active measures more generally. *Tushnet v. ICE*, 246 F. Supp. 3d 422, 435 (D.D.C. 2017) (agency's "claim of 'subject matter expertise' alone cannot resolve" questions about the adequacy of the search).

For instance, the FBI search excluded the records related to two public reports on the Russian interference jointly authored by the FBI. These reports were published long before Director Comey publicly described the basic contours of the FBI investigation. The FBI declaration states that: "Other than former Director Comey's March 20, 2017 congressional testimony, the order appointing Special Counsel Mueller, and this and related court filings, there have been no official disclosures or public statements by the FBI or the Department of Justice about any details of the Russia investigation, including its subjects, its scope, or its focus." Hardy Decl. ¶ 14. However, the agency's declaration ignores entirely the publication of the two reports on the Russian interference jointly authored by the FBI, both of which preceded Mr. Comey's statement by months. These reports included assessments and attributions of Russian attacks on U.S. systems and political organizations, and must necessarily have been based on "memos, reports, guidelines, procedures, summaries, and emails" within the FBI. Compl. ¶ 23. As a result,

the search was too narrow, as a search of a far more limited investigatory file related to the criminal investigation announced on March 20, 2017.

The FBI had spoken directly about its broader knowledge of the Russian interference in these two reports, and touched on material pertinent to the first three categories of EPIC's FOIA request. On December 29, 2016, the FBI and DHS published the first public report on the interference – the "Joint Analysis Report" or "JAR." Ex. 6. The JAR formally tied the interference in the U.S. election to Russian intelligence services, and provided an overview of certain Russian attack and US systems defense techniques. Ex. 6. at 1. On January 6, 2017, the ODNI also released a joint assessment on the Russian interference "drafted and coordinated" among the FBI, Central Intelligence Agency, and the National Security Agency, and "draws on intelligence information collected and disseminated by those three agencies." Ex. 7 at i. This assessment clarifies on its first pages that the FBI was a key contributor and that the FBI spoke directly through this assessment. *Id*. The assessment states expressly that "[w]hen [it] use[s] the term 'we' it refers to an assessment by all" the agency authors, including the FBI. *Id*. The phrase "we assess" is used twenty-three times throughout the report. *See generally* Ex. 7.

In contrast to the limited search conducted by the FBI, the request set out the first three categories of records in broad terms. *Nation Magazine v. U.S. Customs Serv.,* 71 F.3d 885, 890 (D.C. Cir. 1995) (agencies have a "duty to construe [FOIA requests] liberally"). Each category begins with "All records" and supplemented alternatively by "Russian-sponsored cyberattack" or "Russian interference in the 2016 Presidential election." EPIC FOIA Request 6, Decl. of David M. Hardy, Ex. A, ECF No. 22-4. The agency's obligation was, accordingly, to begin a reasonable search for the documents requested. 5 U.S.C. § 552(a)(3)(D). In order to assist the search, EPIC provided extensive background related to the request, including the names of the

U.S. political organizations subject to the cyber attacks, the publicly reported FBI contacts with other agencies and political organizations concerning those threats, and other public information known at the time of the request that should have assisted locate relevant documents. EPIC FOIA Request, Decl. of David M. Hardy, Ex. A. Likewise, the complaint describes in detail EPIC's broad interest in FBI records concerning the Russian interference, Compl. ¶¶ 7–21, including citations to the two jointly-authored FBI reports on the Russian interference, Compl. ¶ 11.

Most obviously, the FBI has failed to explain why it has failed to search files that could reasonably include other *types* of "communications" between the FBI and the entities described in categories 2 and 3 of EPIC's request. Astonishingly, the FBI did not search incoming correspondence from outside parties (such as the DNC, RNC, or DCCC) to the FBI, even though EPIC specifically requested such communications records. Instead the FBI only reviewed FD-302 forms for recording "interviews" and "interactions," formal FBI Letters for outgoing correspondence, and internal FBI FD-1057 communications. Hardy Decl. ¶ 31. The FBI also did not search other obvious types of outgoing communications, such as electronic communications sent to the DNC, RNC, or DCCC. Hardy Decl. ¶ 31. It is implausible that FBI communications are all one sided, and it is reasonable to assume that the FBI has communicated with outside parties via e-mail. That the FBI did not turn up these records confirms that the narrow search of this file was unreasonable.

The FBI's search of a single investigatory file is, on its face, unreasonably limited in response to the terms of the EPIC FOIA request's categories one through three. And the agency's overly narrow view of official disclosure is not supported by the record. The FBI's joint authorship of two public reports involving Russian interference implies that there are likely to be responsive records outside of the investigatory file searched by the agency. The FBI's failed to

"follow through on obvious leads to discover requested documents." *Campbell*, 164 F.3d at 28. Such a limited search inevitably "raises serious doubts as to the completeness of the search." *Perry*, 684 F.2d at 127; *Wolf v. CIA*, 357 F. Supp. 2d 112, 118–19 (D.D.C.2004), *aff'd in part, rev'd in part on other grounds,* 473 F.3d 370 (D.C. Cir. 2007) (denying CIA summary judgment based on the failure to search a particular file); *Houghton v. U.S. Dep't of State*, 875 F. Supp. 2d 22, 27–30 (D.D.C. 2012) (denying summary judgment to the State Department for failure to search the emails of an individual who may have held a Department account); *Rubman v. U.S. Citizenship & Immigration Servs.*, 800 F.3d 381, 384 (7th Cir. 2015) (ruling that the agency's narrowing a search for "all documents reflecting statistics" to a single statistical table was impermissible).

2. The FBI has failed to establish Exemption 7(A) applies to all categories of documents.

Exemption 7(A) allows for the withholding of records "compiled for law enforcement purposes," if disclosure "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). "The principal purpose of Exemption 7(A) is to prevent disclosures which might prematurely reveal the government's cases in court, its evidence and strategies, or the nature, scope, direction, and focus of its investigations, and thereby enable suspects to establish defenses or fraudulent alibis or to destroy or alter evidence." *Maydak v. DOJ*, 218 F.3d 760, 762 (D.C. Cir. 2000).

An agency seeking to withhold records under Exemption 7(A) must establish two elements. First, for any Exemption 7 claim, the agency must show that the record was "compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7); *see John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) ("Before it may invoke [Exemption 7], the Government has the burden of proving the existence of such a compilation for such a purpose."); *Pub. Empls. for Envtl.*

Responsibility v. U.S. Section, Int'l Boundary and Water Comm'n, 740 F.3d 195, 202–203 (D.C. Cir. 2014); *Pratt v. Webster,* 673 F.2d 408, 416 (D.C. Cir. 1982). The D.C. Circuit refers to this as the "threshold requirement" of Exemption 7. *EPIC v. DHS*, 777 F.3d 518, 522 (D.C. Cir. 2015).

Second, the government must establish that disclosure of the records "(1) could reasonably be expected to interfere with (2) enforcement proceedings that are (3) pending or reasonably anticipated." *CREW,* 746 F.3d at 1096 (internal citations omitted) (internal quotation marks omitted). *See also STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 332 (D.D.C. 2015). Exemption 7(A) requires either a "presently pending enforcement proceeding" or a likelihood that the "investigation is likely to lead to such proceedings." *Ctr. for Nat'l Sec. Studies v. DOJ*, 331 F.3d 918, 926 (D.C. Cir. 2003); *In Def. of Animals v. HHS*, No. 99-3024, 2001 WL 34871354, at *2 (D.D.C. Sept. 28, 2001) (stating that "anticipated filing satisfies FOIA's requirement of a reasonably anticipated, concrete prospective law enforcement proceeding"). The government must also "show that disclosure of those documents would, in some particular, discernible way, disrupt, impede, or otherwise harm the enforcement proceeding*." North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989); *Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982) ("[T]he government must show, by more than conclusory statement, how the particular kinds of investigatory records requested would interfere with a pending enforcement proceeding"); *see also Kidder v, FBI*, 517 F. Supp. 2d 17 (D.D.C. 2007) (upholding a categorical 7(A) claim in a case concerning a "domestic terrorism investigation.")

While EPIC does not contest that the FBI's responsive records were compiled for law enforcement purposes, the agency has failed to establish that their release could "reasonably be expected" to interfere with "enforcement proceedings" that are "pending or reasonably

anticipated." The agency's categorical exemption claim is compounded by significant redactions in key sections of the FBI motion and declaration. The agency's arguments concerning the second prong of the 7(A) are vague, sweeping, and undermined by existing public disclosures concerning the Russian interference.

First, the agency has not demonstrated that all records located in response to the first three categories of the EPIC FOIA request FBI pertain to "enforcement proceedings" that are "pending or reasonably anticipated." For all three categories, the FBI nowhere supports the requirement of 7(A) that *all* the information withheld is actually related to a specific "pending or reasonably anticipated" "enforcement proceeding," as required under current doctrine. *See, e.g.*, *Nat'l Sec. Archive v. FBI*, 759 F. Supp. 872, 833 (D.D.C. 1991) (stating that an argument of interference with "counterintelligence operations" "must be rejected" as a justification, and issuing an order requiring the FBI to "submit an affidavit asserting whether there are proceedings currently pending or contemplated relating to each segment for which exemption 7(A) has been invoked"); *Bevis v. Dep't of State,* 801 F.2d 1386, 1389 (D.C. Cir. 1986) ("the material withheld [must] relate[] to a 'concrete prospective law enforcement proceeding.'"); *Bartko v. DOJ*, 62 F. Supp. 3d 134 (D.D.C. 2014). Indeed, the FBI's prior assessments and public reports were completed more than a year ago. Further, Russian interference includes a range of attacks against along different vectors: from the use of paid social media "trolls" and other propaganda against the public, to cyberinstrusions into state and local electoral boards, to spearphishing conducted against government employees, think tanks, and NGOs. Ex. 7 at 2, 3, 5. While it is clear that the FBI has some "pending or reasonably anticipated" proceedings for certain matters, the agency's public reports and statements show that the agency's review and analysis of certain cyber intrusions and active measures have already been completed.

The FBI loosely fits the records located into three "functional" categories - "Investigative," "Evidentiary," and "Administrative" information - accompanied by a sweeping, implausible allegations of harm from release. Hardy Decl. ¶ 32. Rather than a document-by-document justification agencies are permitted to justify an Exemption 7(A) invocation, the agency "may take a generic approach, grouping documents into relevant categories that are sufficiently distinct to allow a court to grasp 'how each . . . category of documents, if disclosed, would interfere with the investigation.'" *Bevis,* 801 F.2d at 1390 (citations omitted). However, agencies are not entitled to do so without limitation or restriction. These "functional" categories must still "allow[] the court to trace a rational link between the nature of the document and the alleged likely interference." *Crooker v. Bureau of Alcohol, Tobacco & Firearms,* 789 F.2d 64, 67 (D.C. Cir. 1986). The functional test is intended to serve as a "middle ground" between impermissible blanket exemption claim and a document-by-document analysis. *Gould, Inc. v. GSA*, 688 F. Supp. 689, 704 n.34 (D.D.C. 1988).

EPIC asks the Court to reject a sweeping exemption claim where, as here, the agency creates separate documents categories but then asks for an "exemption claimed for all records in a file simply because they are in the file." *Crooker,* 789 F.2d at 66. The agency may not "refuse to disclose any record compiled in anticipation of enforcement action merely because the record has found its way into an investigative file," *e.g.* the Mueller investigation file. *Campbell*, 682 F.2d at 263.

Further, the FBI assertions of harm are undercut by the agency's public disclosures, which go far beyond mere acknowledgment of an investigation. *See UtahAmerican Energy, Inc. v. Dep't of Labor*, 700 F. Supp. 2d 99 (D.D.C. 2010), *rev'd in part*, *vacated in part as moot*, 685 F.3d 1118 (D.C. Cir. 2012) (rejecting as "less than convincing" the agency's allegations of the

risk of witness tampering from release where report on witness interview had been previously released); *Detroit Free Press v. DOJ*, 174 F. Supp. 2d 597, 600-01 (E.D. Mich. 2001) (finding a news report "detail[ed] some of the evidence developed and being developed, and the direction and scope of the investigation" and that " disclosure of such substantial and detailed evidence . . . calls into the question the . . . FBI's justification for withholding the documents at issue"). For example, the FBI has not justified withholding details of communications with other government agencies, Hardy Decl. ¶¶ 35, 39, 42, where they have already published two reports on the Russian interference jointly with other three other law enforcement agencies—the DHS, NSA, and CIA. *See* Ex. 6. Given the official acknowledgement of this intra-agency collaboration, revealing the fact that these agencies communicated concerning the Russian interference could not plausibly interfere with the investigation.

The FBI also offers the conclusory claim that disclosure of records responsive to any records responsive to categories 1-3 would reveal the "scope" and "focus" of the investigation Hardy Decl. ¶¶ 35, 38–39, 42. While this statement might seem sensible in generic terms, it cannot apply in a case where the FBI has issued numerous public disclosures detailing Russian interference. First, as the FBI itself indicated, then-FBI Director Comey revealed in congressional testimony that the FBI is investigating the "Russian government's efforts to interfere in the 2016 presidential election" including "investigating the nature of any links between individuals associated with the Trump campaign and the Russian government" and also "whether there was any coordination between the campaign and Russia's efforts." Hardy Decl. ¶ 12.

The two public reports on the Russian interference, indictments of two individuals, and unsealed guilty plea likewise disclosed details of the "scope" and "focus" of the FBI

investigation. For instance, the December 2016 JAR released jointly by DHS and the FBI explain "is the result of analytic efforts between" the agencies and states that it "provides technical details regarding the tools and infrastructure used by the Russian civilian and military intelligence Services (RIS) to compromise and exploit networks and endpoints associated with the U.S. election, as well as a range of U.S. Government, political, and private sector entities." Ex. 6 at 1. The report identified two specific RIS actors "Advanced Persistent Threat (APT) 29" and "APT28" as perpetrators, and listed a full page of names of "Reported Russian Military and Civilian Intelligence Services." *Id*. at 2, 3. The January 2017 assessment of the Russian interference indicated the three contributing agencies, including the FBI, were directly communicating where the phrase "we assess" was used in the report. Ex. 7 at i. The phrase "we assess" is used twenty-three times throughout the report. *See generally* Ex. 7. The FBI, therefore, officially tied the order for the influence campaign directly to Russian President Vladimir Putin, identified "that Russian military intelligence (General Staff Main Intelligence Directorate or GRU) used the Guccifer 2.0 persona and DCLeaks.com to release US victim data," stated that Russia "collected against the US primary campaigns, think tanks, and lobbying groups they viewed as likely to shape future US policies," and much more. Ex. 7 at i–iii, 2.

Most recently, the Special Counsel has issued indictments that reveal additional details about the "scope" and "focus" of the Russia investigation. As previously noted, the indictments against Paul Manafort and Richard Gates contain thirty-one pages of the facts and charges, including acting as unregistered foreign agents of Ukraine, its political parties, and leaders, laundering millions of dollars, and making false statements to the U.S. government. Indictment, *United States v. Manafort*, No. 17-cr-201 (D.D.C. Oct. 27, 2017). The George Papdopoulos guilty plea contains additional details related to Russian interference, and expressly

acknowledges that the FBI investigation into the Russian interference was "open" during an FBI interview of Mr. Papadopoulos on Jan 27, 2017. The plea agreement documents Mr. Papadopoulos's contacts with specific Russian nationals and associates and contacts concerning "dirt" on then-candidate Hillary Clinton. Statement of the Offense at 1, 3–9, *United States v. Papadopoulos*, No. 17-cr-182 (RDM) (D.D.C. Oct. 5, 2017). In light of these disclosures, the FBI cannot justify its categorical withholding of all documents that might reveal the "scope" and the "focus" of the investigation, much of which has already been officially acknowledged by the agency.

The agency argues that disclosure of any of the records in each of the three "functional" categories described in the FBI declaration would risk affecting target behavior. But this claim is undercut both by the recent indictments and by prior public assessments. Obviously, following the FBI's filings in criminal court against Mr. Manafort, Mr. Gates, and Mr. Papadopulous, the FBI also can no longer allege, a viable risk that release will "identify and tip off" these three individuals, "provide" them "the opportunity to destroy evidence . . . and avoid detection," or analogous risks related to these individuals, individuals listed in the filings, their immediate contacts. Hardy Decl. ¶ 35; *see also* Hardy Decl. ¶¶ 38, 42–43. Similarly, the records related to the 2016 assessments would not likely pose such a risk.

Here, the FBI attempts to conceal broad categories of records by redacting significant sections of the declaration and by a motion pertaining to its assertion of Exemption 7(A). The FBI has provided only vague and implausible claims that are directly undercut by the agency's prior public disclosures concerning the subject matter of this FOIA request. This Court should reject the FBI's impermissible blanket claim to withhold all records simply because of their placement in the Russia investigation file.

3. The FBI has failed to release reasonably segregable portions of records located in response to categories 1, 2, and 3 of EPIC's FOIA Request.

The FOIA "makes clear that the fact that a responsive document fits within an applicable exemption does not automatically entitle the keeper of such material to withhold the *entire* record." *Charles v. Office of the Armed Forces Med. Exam'r*, 979 F. Supp. 2d 35, 42 (D.D.C. 2013). Thus, even when an agency has properly invoked a FOIA exemption, it must disclose any "reasonably segregable portion" of the record requested. 5 U.S.C. § 552(b); *see Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007)); *Oglesby v. U.S. Dep't of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("If a document contains exempt information, the agency must still release 'any reasonably segregable portion' after deletion of the nondisclosable portions."). "The 'segregability' requirement applies to all documents and all exemptions in the FOIA." *Ctr. for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984).

The burden is on the agency to "provide a 'detailed justification' for its non-segregability." *Johnson v. EOUSA*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data Cent., Inc. v. Dep't of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977)). Simply claiming that a segregability review has been conducted is insufficient. *Oglesby*, 79 F.3d at 1180–181. Courts have also an "affirmative duty to consider the segregability issue *sua sponte*." *Trans-Pac. Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C. Cir. 1999).

In this case, the FBI has improperly withheld reasonably segregable non-exempt portions of the records located in response to categories 1 through 3 of EPIC's FOIA request. The FBI devoted one brief, undetailed paragraph of the agency's declaration to segregability. The FBI cited to cases where their categorical 7(A) claim was upheld. Def.'s Mem. 20-21. But those cases did not involve the type of extensive public disclosures by the FBI concerning the subject and

scope of the records sought in the matter as are present here. The facts in this case rebut the agency's presumption that no reasonably segregable material can be disclosed. Where "the requester successfully rebuts [the] presumption" that the agency has complied with its duty to segregate, "the burden lies with the government to demonstrate that no segregable, nonexempt portions were withheld." *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007) (citations omitted). The agency's declaration clearly fails to justify such a sweeping withholding and the agency must conduct

As discussed in the preceding section, FBI has not supported the conclusion that release of these documents present a "reasonable risk" of interference or are linked to "enforcement proceedings" that are "pending or reasonably anticipated," as required to claim Exemption 7(A). *CREW,* 746 F.3d at 1096. In fact, it is implausible that this information could be properly exempt under any of these provisions because of the FBI disclosures in two public reports concerning the Russian interference jointly authored by the FBI, the Special Counsel's office publication two indictments and a cooperator's guilty plea as a part of the its pursuit of the Russia investigation. *See supra* Section II(A)(2). The FBI must, at a minimum, segregate information related to these disclosures that is responsive to EPIC's FOIA request. Yet, rather than acknowledging prior disclosures, FBI declaration states in a bare, conclusory fashion that the records were "reviewed" for segregability. Hardy Decl. ¶ 46. Accordingly, the FBI declaration falls short of the requirement to provide a "detailed explanation" to support any material's non-segregability under D.C. Circuit precedent. *Johnson*, 310 F.3d at 776.

The FBI acknowledges the duty to segregate, but preferred only the barest of attestations in support of its segregability analysis of material located in response to categories one through three of EPIC's FOIA request. In light of the FBI's failure to properly claim 7(A) and the paltry

support mounted by the FBI concerning segregability, it is evident the FBI has failed to release reasonably segregable material to EPIC.

B. The FBI has not justified its withholding of material under Exemptions 1 and 3.

In this case, the FBI argues that pages of the "Foreign Intelligence Surveillance Act and Standard Minimization Procedures" produced in response to category 4 of the EPIC FOIA request are exempt from disclosure under 5 U.S.C. §§ 552(b)(1) and 552(b)(3) based on Section 3024(i)(1) of the National Security Act of 1947. However, the agency has not carried its burden under either exemption. The agency fails to plausibly establish that the records are properly classified, as required to claim Exemption 1, or must be withheld to protect an intelligence "source or method" as required to claim Exemption 3 based on the National Security Act. Further, the agency fails to even acknowledge that numerous similar FISA procedures that have already been released to the public without any resulting harm to national security.

1. The FBI improperly withheld information under Exemption 1.

The FBI has failed to demonstrate that the redacted pages from the Foreign Intelligence Surveillance Act and Standard Minimization Procedures, responsive to category 4 of the EPIC FOIA request, are properly classified and thus subject to Exemption 1. An agency seeking to withhold responsive records under Exemption 1 must establish that the records withheld are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; and (B) are in fact *properly* classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (emphasis added); *see Judicial Watch, Inc. v. DOD*, 715 F.3d 937 (D.C. Cir. 2013); *Ctr. for Int'l Envt. Law v. USTR*, 718 F.3d 899, 904 (D.C. Cir. 2013); *ACLU v. DOD*, 628 F.3d 612, 624 (D.C. Cir. 2011).

The current operative classification order under Exemption 1 is Executive Order 13,526. *Judicial Watch*, 715 F.3d at 941. To show that records were properly withheld under Exemption

1, the agency must satisfy "the Executive Order's substantive and procedural criteria." *Id*. (citing *Lesar v. DOJ*, 636 F.2d 472, 481 (D.C. Cir. 1980)); *see also King v. DOJ*, 830 F.2d 210, 215 (D.C. Cir. 1987) ("An agency may invoke this exemption only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order's substantive criteria for classification.").

Executive Order 13,526 has four key procedural requirements that must be met for any information to be *properly* classified:

> (1) an original classification authority is classifying the information;
> (2) the information is owned by, produced by or for, or is under the control of the United States Government
> (3) the information falls within one or more of the categories of information listed in § 1.4 of this order; and
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

Exec. Order No. 13,526 § 1.1(a).

Information cannot be properly classified "unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security" to the degree necessary based on the classification level in Section 1.2. The information must also "pertain to one or more" of the listed categories in Section 1.4:

> (a) military plans, weapons systems, or operations;
> (b) foreign government information;
> (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
> (d) foreign relations or foreign activities of the United States, including confidential sources;
> (e) scientific, technological, or economic matters relating to the national security;
> (f) United States Government programs for safeguarding nuclear materials or facilities;
> (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
> (h) the development, production, or use of weapons of mass destruction.

Exec. Order No. 13,526 § 1.4.

In the Exemption 1 context, the agency must make a "plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Although courts afford "substantial weight" to the analysis of national security risks outlined in agency affidavits, that "deference is not equivalent to acquiescence; the declaration may justify summary judgment only if it is sufficient 'to afford the FOIA requester a meaningful opportunity to contest, and the district court an adequate foundation to review, the soundness of a withholding.'" *Campbell v. DOJ*, 164 F.3d 20, 30 (D.C. Cir. 1998). An agency declaration can be deemed insufficient to support an Exemption 1 claim if it lacks "detail and specificity," if there is evidence of "bad faith," or if the declaration fails to "account for contrary record evidence." *Id*. at 30.

An affidavit that "contains merely a 'categorical description of redacted material coupled with categorical indication of anticipated consequences of disclosure is clearly inadequate.'" *Id*. (quoting *PHE, Inc. v. DOJ*, 983 F.2d 248, 250 (D.C. Cir. 1993)). To establish that the exemption applies, the affidavit "must show, with reasonable specificity, why the documents fall within the exemption. The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping." *Id.* (citing *Hayden v. NSA*, 608 F.2d 1381, 1387 (D.C. Cir. 1979)).

At the outset, the FBI's emphasis on disclosure of certain records responsive to category 4 of EPIC's FOIA request is irrelevant to the courts evaluation of the agency's exemption claims for the redacted material. Hardy Decl. ¶¶ 48–50. In reality, over 80% of the FBI's "production" to EPIC consisted of links to publicly available information. The FBI redacted all but three of the pages actually physically delivered EPIC. While the FBI claims that it withheld no pages in full, the only withholdings EPIC challenges related to the category 4 production had all substantive

information was redacted. *See* Letter from David M. Hardy, Section Chief Records/Information Mgmt. Dissemination Section, Records Mgmt. Div., Fed. Bureau of Investigation, to John Tran c/o Marc Rotenberg, EPIC (May 11, 2017), Ex. 1; Foreign Intelligence Surveillance Act and Standard Minimization Policy Guide 36–37, 97–98 ([Redacted]), Exs. 2, 3. The pages of the Foreign Intelligence Surveillance Act and Standard Minimization Procedure at issue here were entirely redacted, aside from the title, the numbered paragraphs, and an embedded web link. This record was essentially withheld in full.

The FBI declaration fails to "show, with reasonable specificity, why the documents fall within the exemption.'" *Campbell*, 164 F.3d at 30. The agency declaration does not plausibly explain how disclosure of the redacted pages of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures could reasonably be expected to cause identifiable or describable damage to the national security commensurate with SECRET level classification. Exec. Order No. 13,526 § 1.2(a)(2); Hardy Decl. ¶¶ 61, 64–65 While the FBI recites the standard from the Executive Order, the declaration only vaguely states that the information will have an "impact" in relation to other non-public and public information. Hardy Decl. ¶ 65. If adopted, the FBI's conclusory reasoning would protect any FISA-related information from disclosure—notwithstanding the fact that numerous official public disclosures have been made regarding FISA activities and procedures.

The FBI's withholding of the pages of FISA procedures under Exemption 1 is substantially controverted by "contrary evidence in the record." *Campbell*, 164 F.3d at 30. The agency's position is wholly untenable in light of the numerous public disclosures made concerning FISA and FISA procedures, which the FBI neither acknowledges nor makes any attempt to distinguish. The FBI's own FISA minimization procedures are publicly available

online, with limited redactions. *See* Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016), Ex. 4;[4] Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2015);[5] Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2014).[6] The FBI targeting FISA procedures are also available, with certain redactions. *See* Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016).[7] The FBI has also released FISA procedures under the FBI Domestic Investigations and Operations Guide (DIOG) with redactions. *See* Fed. Bureau of Investigation, Domestic Investigations and Operations Guide § 18.7.1.6.2 (2013).[8]

The NSA has not only released its FISA procedures approved by the Foreign Intelligence Surveillance Court, but has also the agency's internal FISA specific procedures. *See* USSID 18.

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[4]https://www.dni.gov/files/documents/icotr/51117/2016_FBI_Section_702_Minimization_Procedures_Sep_26_2016_part_1_and_part_2_merged.pdf.
[5] https://www.dni.gov/files/documents/2015FBIMinimization_Procedures.pdf.
[6]https://www.dni.gov/files/documents/0928/2014%20FBI%20702%20Minimization%20Procedures.pdf.
[7]https://www.dni.gov/files/documents/icotr/51117/2016_FBI_Section_702_Targeting_Procedures_Sep_26_2017.pdf.
[8]https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2013-version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202013%20Version%20Part%2001%20of%2001/view.

Nat'l Sec. Agency, USSID SP0018: Legal Compliance and U.S. Persons Minimization Procedures (2011), Ex. 5;[9] Nat'l Sec. Agency, USSID SP0018: Supplemental Procedures for the Collection, Processing, Retention, and Dissemination of Signals Intelligence Information and Data Containing Personal Information of United States Persons (2015).[10]

The FBI's contention that it can withhold these FISA procedures in full under Exemption 1 is neither logical nor plausible. The agency's claim is controverted by substantial evidence on the record, namely the numerous prior disclosures of a variety of FISA procedures, and relies on impermissibly vague, limited support in the declaration.

2. The FBI improperly withheld information under Exemption 3.

The FBI has also failed to demonstrate that that pages of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures produced in response to category 4 of the EPIC FOIA request are must be withheld under Exemption 3 to protect "intelligence sources and methods" as required by Section 3024(i)(1) of the National Security Act of 1947, as amended. 50 U.S.C. § 3024(i)(1). Exemption 3 permits the withholding of records "specifically exempted from disclosure by statute . . . if that statute— (A) . . . (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). Here, the FBI relies on Section 3024(i)(1) of the National Security Act. The Act states "[t]he Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 3024(i)(1). "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of

[9] https://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf.
[10] https://www.nsa.gov/news-features/declassified-documents/nsa-css-policies/assets/files/PPD-28.pdf.

withheld material within the statute's coverage." *Ass'n of Retired R.R. Workers, Inc. v. U.S. R.R. Retirement Bd*., 830 F.2d 331, 336 (D.C. Cir. 1987).

To assess an agency's assertion of Exemption 3, the D.C. Circuit uses a two-part test: (1) whether "the statute in question [is] a statute of exemption as contemplated by exemption 3," and (2) whether "the withheld material satisf[ies] the criteria of the exemption statute." *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990); *CREW v. DOJ*, 160 F. Supp. 3d 226, 236 (D.D.C. 2016). As in the context of Exemption 1, "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not carry the government's burden." *Larson v. Dep't of State*, 565 F.3d 857, 864 (D.C. Cir. 2009).

EPIC does not challenge that § 3024(i)(1) of the NSA is an Exemption 3 statute. *See Larson*, 565 F.3d at 865. Rather, EPIC contests that all portions of the record withheld by the FBI—in effect all substantive portions of that record—fall within the scope of § 3024(i)(1). The FBI claim's that disclosure of this document would reveal "intelligence sources and methods" is highly implausible. While the FBI argues that the document must be redacted because FISA itself is an "intelligence activity or method" and therefore disclosure of FBI FISA procedures risks harming national security, Hardy Decl. ¶ 70., the proposition is conclusory, non-specific, and fails to account for the numerous disclosures of FISA activities and procedures.

As in the Exemption 1 context, the FBI declaration is simply not detailed enough to establish that all substantive portions of the FISA procedures at issue here would reveal intelligence sources and methods. 5 U.S.C. § 552(b)(3). In fact, while the FBI spends multiple paragraphs restating the Exemption 3 standard, the agency's actual justification for withholding is only a single, conclusory sentence: "The FBI has determined that intelligence sources and methods would be revealed if any of the withheld information is disclosed." *Compare* Hardy

Decl. ¶¶ 75–78, 80, *with* Hardy Decl. ¶ 79. This sentence cannot suffice to justify the near total redaction of the pages produced from the Foreign Intelligence Surveillance Act and Standard Minimization Procedures, when many similar procedures have been made publicly available.

The FBI's withholding under Exemption 3 is also clearly "controverted by . . . contrary evidence in the record": the widespread public disclosures of FISA minimization and other procedures by the FBI and other FISA participants set out in detail in the preceding section. *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). *See supra* Section II (B)(1). The FBI declaration neither acknowledges these prior disclosure nor make any attempt to distinguish the document here from the many FISA related materials released by the FBI.

In light of the minimal support for the Exemption 3 claim in the FBI declaration for the as well as the substantial contrary evidence on the record, the FBI's position that all substance of the pages produced from the Foreign Intelligence Surveillance Act and Standard Minimization Procedures must be withheld to protect "intelligence sources and methods" is neither "logical" nor "plausible." *Larson*, 565 F.3d at 862.

3. The FBI has failed to release reasonably segregable portions of the requested record.

As explained in Section II(A)(3), even when an agency has properly invoked a FOIA exemption it must disclose any "reasonably segregable portion" of the record requested. Here, the FBI has improperly redacted a document produced in response to category 4 of EPIC's FOIA request with only bare, conclusory support as to the Exemption 1 and Exemption 3 claims without accounting for substantial contrary evidence in the record. 5 U.S.C. § 552(b); *see Stolt-Nielsen Transp. Group Ltd v. United States*, 534 F.3d 728, 734 (D.C. Cir. 2008) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116 (D.C. Cir. 2007)); *Oglesby v. U.S. Dep't of the Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996) ("If a document contains exempt information, the

agency must still release 'any reasonably segregable portion' after deletion of the nondisclosable portions."). The burden is on the agency to "provide a 'detailed justification' for its non-segregability." *Johnson*, 310 F.3d at 776. In that context, it is insufficient for the FBI to claim in a conclusory fashion that segregability review has been conducted. *Oglesby*, 79 F.3d at 1180–181.

The FBI has withheld all substantive portions of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures. The agency's declaration does not justify such a broad withholding. None of the points made in the FBI declaration support the conclusion that the procedures consist entirely of properly classified information under Exemption 1, *see* 5 U.S.C. § 552(b)(1)(B), or that every sentence and paragraph in the procedures would reveal "intelligence sources and methods" if disclosed, and thus satisfy Exemption 3 and the National Security Act, *see* 5 U.S.C. § 552(b)(3). *See Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). In fact, it is highly implausible that all substance of the procedures could be properly exempt under any of these provisions because of the significant prior disclosures of similar FISA procedures the FBI and other agencies. *See, e.g.*, Minimization Procedures Used by the Federal Bureau of Investigation in Connection with Acquisitions of Foreign Intelligence Information pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016), Ex. 4; Procedures Used by the Federal Bureau of Investigation for Targeting Non-United States Persons Reasonably Believed to be Located Outside the United States to Acquire Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016); Fed. Bureau of Investigation, Domestic Investigations and Operations Guide § 18.7.1.6.2 (2013); Minimization procedures Used by the National Security Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section

702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016)[11]; USSID 18. Nat'l Sec. Agency, USSID SP0018: Legal Compliance and U.S. Persons Minimization Procedures (2011), Ex. 5; Minimization Procedures Used by the Central Intelligence Agency in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016)[12]; Minimization Procedures Used by the National Counterterrorism Center in Connection with Acquisitions of Foreign Intelligence Information Pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978, As Amended (2016).[13]

Through these prior public releases, the federal government has already demonstrated that it can segregate substantial information for release for a vast range of FISA procedures. An "empty invocation of the segregability standard" is not permitted under the FOIA. *Judicial Watch, Inc. v. DHS*, 841 F. Supp. 2d 142, 161 (D.D.C. 2012). In light of evidence to the contrary, the FBI declaration is simply insufficient to justify the withholding of all substantive information contained in these FISA procedures. To the extent this Court finds that some redacted portions of the record are properly subject to Exemption 1 or 3, the agency should still be required to release all reasonably segregable material.

III. THE GOVERNMENT'S MOTION SHOULD BE DENIED

The FOIA requires that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules . . . shall make the

[11] https://www.dni.gov/files/documents/icotr/51117/2016-NSA-702-Minimization-Procedures_Mar_30_17.pdf.

[12] https://www.dni.gov/files/documents/icotr/51117/2016_CIA_Section_702_Minimization_Procedures_Se_26_2016.pdf.

[13] https://www.dni.gov/files/documents/icotr/51117/2016_NCTC_Section_702_Minimizatio_Procedures_Sep_26_2016.pdf.

records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). However, an agency may withhold information if it fits within nine narrowly construed exemptions. *See* 5 U.S.C. § 552(b). But the FOIA also requires that the agency release any "reasonably segregable portion" of the records requested. 5 U.S.C. § 552(b). The agency in a FOIA case bears the burden of establishing that at least one exemption applies for each record withheld. *See Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973). The agency also bears the burden of proving that it has complied with the segregability requirement. *Johnson*, 310 F.3d at 776.

An agency seeking to justify its withholding of responsive records under the FOIA must satisfy five overarching requirements in addition to the particular standards of each FOIA exemption claimed.

> The government must "(1) [I]dentify the document, by type and location in the body of documents requested; (2) note that [a particular exemption] is claimed; (3) describe the document withheld or any redacted portion thereof, disclosing as much information as possible without thwarting the exemption's purpose; (4) explain how this material falls within one or more of the categories . . .; and [if the exemption requires a showing of harm] (5) explain how disclosure of the material in question would cause the requisite degree of harm.

Am. Immigration Council v. DHS, 950 F. Supp. 2d 221, 235 (D.D.C. 2013). To be granted summary judgment, the agency must establish that it has satisfied all the statutory requirements of the FOIA. *Harrison v. Fed. Bureau of Prisons*, 681 F. Supp. 2d 76, 85 (D.D.C. 2010).

In this case, the FBI failed to conduct an adequate search for records responsive to categories 1 through 3 of the EPIC FOIA request, unreasonably limiting the search so as to exclude potentially responsive records. The FBI has also improperly withheld in full all records the agency identified as responsive to categories 1-3 of EPIC's FOIA request, and has redacted all substantive information from one record produced in response to the fourth category. For the reasons discussed above, the FBI has failed to satisfy its burden to establish that Exemptions 7(A), 1, and 3 justify their withholding. The agency failed to establish that the records in

categories one through three fall within Exemption 7(A). The agency has also failed to provide reasonably segregable material. The agency has done so despite its extensive public disclosures regarding the subject matter of this FOIA request. Finally, the FBI has failed to justify its near total redactions under Exemptions 1 and 3 of pages of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures. Here again, the agency has done so despite prior disclosures of similar procedures.

To justify the adequacy search for responsive records, the agency must show "beyond material doubt is that it has conducted a search reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). And, to properly invoke Exemption 7(A) an agency must establish the records "compiled for law enforcement purposes" and that disclosure could "reasonably be expected to interfere with . . . enforcement proceedings that are . . . pending or reasonably anticipated." *CREW,* 746 F.3d at 1096. Here, the FBI conducted an unreasonably narrow search for records responsive to categories 1 through 3 of the EPIC FOIA request, failed to establish that release of the documents located could "reasonably be expected" to interfere with "pending or reasonably anticipated" "enforcement proceedings" as required by 7(A), and, scarcely mounting a defense as to segregability, failed to satisfy the duty to provide reasonably segregable material.

A court may award summary judgment to an agency invoking Exemption 1 only if "(1) the agency affidavits describe the documents withheld and the justifications for nondisclosure in enough detail and with sufficient specificity to demonstrate that material withheld is logically within the domain of the exemption claimed, and (2) the affidavits are neither controverted by contrary record evidence nor impugned by bad faith on the part of the agency." *King*, 830 F.2d at 217. To properly invoke Exemption 3 based on Section 3024(i)(1) of the National Security Act,

the disclosure of the records must reveal "intelligence sources and methods." 50 U.S.C. § 3024(i)(1). The FBI declaration in this case does not sufficiently explain why the pages of the Foreign Intelligence Surveillance Act and Standard Minimization Procedures produced pursuant to category 4 of EPIC's FOIA request logically fall within Exemption 1 or meets the requirements of Exemption 3 based on the bare, conclusory statements in the FBI declaration and faced with substantial previous releases of a variety of FISA procedures.

The agency declarations in this case are not sufficient to establish that all responsive, non-exempt records have been disclosed as required under the FOIA.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendant's Motion for Summary Judgment and grant EPIC's Motion for Summary Judgment.

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Respectfully submitted,

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