

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ELECTRONIC PRIVACY INFORMATION)
CENTER,)
)
Plaintiff,)
)
v.	Civil Action No. 17-cv-0121)
)
FEDERAL BUREAU OF INVESTIGATION,)
)
Defendant.)
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SECOND 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 (“E.O.”) 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 E.O. 13526, and the preparation of declarations in support of Exemption (b)(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 E.O. 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) This is my second declaration in this case and is being submitted in further support of the FBI’s motion for summary judgment and also to support the FBI’s response to plaintiff’s cross-motion for summary judgment. I previously executed a declaration, dated October 12, 2017, that was submitted in redacted form on the public docket and in unredacted form *in camera* and *ex parte*. This declaration incorporates by reference and supplements my previous declaration.

(4) Plaintiff attempts to re-cast the scope of its FOIA request in its response and cross-motion as broadly seeking any records about Russian interference in the 2016 Presidential election. However, plaintiff’s request opens with the explicit statement that the request “seeks records pertaining to the FBI’s *investigation* of Russian interference in the 2016 U.S. Presidential election.” *See* ECF No. 22-5, Hardy Declaration, Exhibit A, p. 1 (emphasis added). The first item of the “Documents Requested” section of the request also explicitly cabins its scope to “all

records ... pertaining to the FBI's investigation of Russian-sponsored cyber attack[s] on the RNC, DNC, and DCCC." *Id.* at p. 6.

(5) While the next two items do not specifically mention the word "investigation," the FBI reasonably interpreted those items to be extensions of plaintiff's request for – and to seek records related to – the Russian interference investigation. Certainly the subject matters of both items are tied directly to that investigation. This interpretation finds further support from the context of the request itself, which as previously mentioned, plaintiff broadly described as seeking records about the FBI's investigation of Russian interference in the 2016 Presidential election. Further, the FBI interpreted the request – particularly items 2 and 3 – from the perspective that the FBI is a law enforcement agency. So when a request is presented that explicitly ties itself to a particular investigation, the FBI reasonably and logically interprets such requests as seeking investigative records.

(6) Finally, one only has to look carefully at the topics of items 2 and 3 to see their ties to the FBI's investigation. Item 2 seeks communications with the DNC, RNC, and DCCC, purported victims of Russia's interference in the election. The FBI is investigating Russia's interference in the 2016 Presidential election. Item 3 seeks communications with other agencies about Russia's interference in the election. It is not unreasonable that the FBI interpreted this as seeking records from the investigation, or concluding that any responsive records would be located in the investigative files.

(7) All of these factors and considerations led the FBI to reasonably interpret items 1-3 of plaintiff's request as seeking records from the FBI's Russian interference investigation.

(8) Plaintiff referenced two specific, publicly available records in its response and cross-motion for summary judgment – a Joint Analysis Report ("JAR"), which is a joint analytic

product of the Department of Homeland Security (DHS), and the unclassified version of an Intelligence Community Assessment (“ICA”) publicly released by the Office of the Director of National Intelligence (ODNI) entitled “Assessing Russian Activities and Intentions in Recent US Elections” (hereafter referred to as “the ICA”). *See* www.us-cert.gov/sites/default/files/publications/JAR-16-20296.pdf (JAR-16-20296A) and <https://icontherecord.tumblr.com/post/155494946443/odni-statement-on-declassified-intelligence> (ICA 2017-01D). As previously mentioned, the FBI reasonably interpreted plaintiff’s request to seek records from the Russian interference investigation, searched for and located the investigative files to identify responsive records, assigned all responsive records within the investigative files into functional categories, and explained the bases for protecting each category. Based on its reasonable interpretation of plaintiff’s request, the FBI did not search beyond the investigative files to locate all documents within the agency that might potentially mention or pertain to the investigation, such as copies of the ICA or JAR. Indeed, if plaintiff intended to seek something more than records from the investigative files – despite the language of the request itself – then it failed to adequately describe the records actually sought. And interpreting the request as seeking *any* mention or reference to the investigation – or subject matter of the investigation – would have rendered it overly broad and unduly burdensome, and inadequate to describe the records sought because the FBI would have been unable to craft a reasonable search for non-investigative records.

(9) Furthermore, the public availability of a JAR concerning Russian hacking of political parties in 2015 and 2016 or of a declassified ICA about Russia’s activities and intentions in recent elections does not mean that the records in the FBI’s Russian interference investigation files that have been protected here would not, if disclosed, cause harm to that

investigation. That a modest amount of intelligence information on related topics has been publicly disclosed does not negate the need to protect records of an active investigation, for the reasons discussed in my first declaration in this matter, especially given that the FBI had determined the publicly disclosed information is not as specific as and does not match any information protected in the investigative files.

(10) Plaintiff also speculates that there must be records responsive to items 2 and 3 that are not located in the investigative files or covered by the functional categories described in my previous declaration. The categories described in my previous declaration cover all responsive records as of the search cut-off date for plaintiff's request. In particular, correspondence by outside parties pertinent to the investigation, if they exist, would be encompassed within the categories for FBI letters or FD-340s.

(11) Moreover, the FBI concluded that none of the records in the investigative files can be released at this time without adversely affecting the investigation and any resulting enforcement proceedings. Subsequent to the FBI's review of records in this case, however, limited public disclosures about the investigation were made concerning the indictments of Paul Manafort and Robert Gates, and the guilty pleas of George Papadopoulos and Lieutenant General Michael Flynn. The FBI has considered whether the limited public disclosures made about these three individuals changes its decisions to withhold the documents in the file at the time of the search cut-off date,¹ and has also consulted the Special Counsel's Office about this issue. The FBI has concluded that the limited public disclosures related to Messrs. Manafort, Gates, and

¹ The FBI notes that the actual charging documents and plea agreements did not exist as of the search cut-off date of the request. As such, those records would not be within the scope of plaintiff's request and are not subject to FOIA release here under the requirement that agencies must disclose information that matches and is as specific as information that has been the subject of a prior official public disclosure by the agency.

Papadopoulos, and Lt. General Flynn, do not require it to disclose any investigative records or alter its determination that disclosure of such records in this case would adversely affect the pending investigation and any resulting enforcement proceedings.²

(12) With regard to item 4, while plaintiff is correct that *some* FBI Standard Minimization Procedures (SMPs) have been publicly disclosed in redacted form (*i.e.*, those related to Section 702 of the Foreign Intelligence Surveillance Act (FISA)), the information withheld in response to item 4 does not consist of SMPs, let alone those that have been previously publicly disclosed.³

(13) Similarly, it is true that the FBI has released *some* information about its FISA procedures. However, the FISA consists of multiple provisions authorizing various types of surveillance/access to information. *See* 50 U.S.C., Chpt. 36, Subchpts. I – IV. The FBI has procedures implementing the different provisions of the Act and has not released all of the procedures for all of the provisions. The FBI compared publicly disclosed information with the information protected here. The information protected here does not match or mirror any information previously made public by the FBI through an official disclosure. As previously explained in my prior declaration, the FBI concluded that this information was currently and properly classified, and also precluded from disclosure under the National Security Act of 1947 as intelligence source and method information, or is inextricably intertwined with such information and therefore not reasonably segregable. ECF No. 22-5, Hardy Declaration, at ¶¶ 64, 69-74, 77-79, and 82. Moreover, the fact that the NSA released its own FISA procedures

² Items 1-3 of plaintiff's request reference Russian-sponsored cyber-attacks on political parties/organizations. The few publicly disclosed documents about Messrs. Manafort, Gates, and Papadopoulos, and Lt. General Flynn do not explicitly reference or discuss such topics.

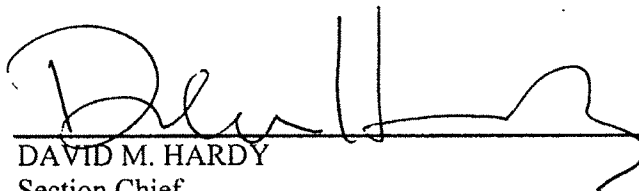
³ There is not only a single set of SMPs.

does not preclude the FBI's procedures from being currently and properly classified, or show that this information is not intelligence source and method information that is precluded from disclosure under the National Security Act of 1947.

(14) Finally, for clarification: the pages that the FBI processed and released in part to plaintiff in response to item 4 do not consist of the *entirety* of the FISA and SMPs manual, which seems to be suggested in plaintiff's arguments about these withholdings. Rather, the FBI processed and released in part only those pages responsive to item 4 – *i.e.*, information “pertaining to the FBI's procedure to notify targets of cyber attacks.”

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

Executed this 8th day of December, 2017.



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