

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. 12-CV-00667-CKK

Exhibit O

1 Daniel David Rigmaiden #10966111
2 CCA-CADC
3 PO Box 6300
4 Florence, AZ 85132
5 Telephone: none
6 Email: none

7 Daniel David Rigmaiden,
8 Pro Se, Plaintiff

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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Daniel David Rigmaiden,
12 Plaintiff,
13 v.
14 Federal Bureau of Investigation, et al.
15 Defendant.

Civil Action No.:
12-CV-01605-SRB-BSB
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
SUPPORTING MEMORANDUM

16 Plaintiff, Daniel David Rigmaiden, appearing *pro se*, respectfully submits *Plaintiff's*
17 *Motion For Partial Summary Judgment* pursuant to Fed. R. Civ. P. 56. While this motion
18 seeks summary judgment on seven issues, *see infra*, Plaintiff requests that the Court maintain
19 jurisdiction over this case while Defendants FBI and EOUSA comply with Plaintiff's pending
20 FOIA requests. The grounds for this motion are set forth in the proceeding *Memorandum*.
21 The facts in support of this motion are contained in (1) *Plaintiff's Statement Of Undisputed*
22 *Material Facts In Support Of Motion For Partial Summary Judgment* (Dkt. #37) (hereafter
23 "PSUMF"), and (2) *Plaintiff's First Supplemental Statement Of Undisputed Material Facts In*
24 *Support Of Motion For Partial Summary Judgment* (hereafter "1st Supplemental PSUMF").

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. INTRODUCTION**

27 Plaintiff is suing the Federal Bureau of Investigation ("FBI"), the Executive Office
28 for United States Attorneys ("EOUSA"), the Office of Information Policy ("OIP"), and the
United States Department of Justice ("USDOJ") for records under the Freedom of
Information Act ("FOIA"). *See* Dkt. #01. This suit relates to Harris Wireless Products Group
(hereafter "Harris WPG") brand portable/transportable wireless device locators which are also
known as cell site emulators, cell site simulators, IMSI catchers, LoggerHead, TriggerFish,

THIS DOCUMENT IS NOT IN PROPER FORM ACCORDING TO FEDERAL AND/OR LOCAL RULES AND PRACTICES AND IS SUBJECT TO REJECTION BY THE COURT.
REFERENCE LR Civ P 5.1
(Rule Number/Section)

1 and StingRay. These devices are used by law enforcement to locate wireless devices such as
2 cell phones and aircards. Defendants FBI and EOUSA have the policy that no warrant is
3 required to track and locate individuals in the United States using Harris WPG devices and
4 that mere pen register authorization is sufficient. *See* PSUMF, ¶¶ Nos. 29-31. Defendant FBI
5 also has a policy to destroy all evidence collected using Harris WPG devices at the conclusion
6 of a tracking/locating mission. *See id.*, ¶¶ Nos. 24-28. Defendant FBI has provided
7 contradicting public statements regarding its reasons for destroying location evidence and
8 other collected data after locating a wireless device and its user. *See id.*

9 Plaintiff has two pending FOIA requests with Defendant FBI, *i.e.*, an October 10, 2011
10 four category request, and a November 10, 2011 two category request. *See* PSUMF, ¶¶ Nos.
11 77-81 and 91-96. Plaintiff has one pending FOIA request with Defendant EOUSA, *i.e.*, a
12 November 10, 2011 four category request. *See id.*, ¶¶ Nos. 107-112. Via the noted requests,
13 Plaintiff is seeking (1) FBI and EOUSA records relating to Harris WPG brand
14 portable/transportable wireless device locators with an emphasis on user manuals for twelve
15 (12) specifically identified Harris WPG devices,^[1] and (2) FBI records relating to FBI
16 personnel comments made to *The Wall Street Journal* and a Brookings Institution panel
17 regarding government use of Harris WPG and other branded portable/transportable wireless
18 device locators. Plaintiff is yet to receive a single record in response to his FBI and EOUSA
19 FOIA requests dated October 10, 2011 and he received incomplete and overly redacted
20 documents in response to his November 10, 2011 FBI FOIA request. *See id.*, ¶ No. 121 and
21 1st Supplemental PSUMF, ¶¶ Nos. 1-3. Plaintiff requests the relief specified in Section III, *infra*.

22 **II. ARGUMENT**

23 The disputed legal issues of which Plaintiff seeks summary judgment are as follows:

24 1. Whether Plaintiff is entitled to fee waivers on his three pending FOIA requests
25 made to Defendants FBI and EOUSA.

27 1. The specific Harris WPG devices are (1) StingRay, (2) StingRay II, (3) AmberJack, (4)
28 KingFish, (5) TriggerFish, (6) LoggerHead, (7) Handheld Direction Finding Antenna, (8)
StingRay CDMA Software, (9) KingFish CDMA Software, (10) Geolocation (software), (11)
Tarpon (software), and (12) RealSite (software).

1 2. Whether Plaintiff is entitled to expedited processing on his three pending FOIA
2 requests made to Defendants FBI and EOUSA.

3 3. Whether Defendants FBI and EOUSA are required to conduct searches for the
4 records requested by Plaintiff in his two pending October 10, 2011 FOIA requests.

5 4. Whether Defendants FBI and EOUSA are required to provide digitally redacted
6 native form digital documents with metadata intact.

7 5. Whether FOIA exemption 5 U.S.C. § 552(b)(7)(E) broadly applies to all records
8 in the possession of Defendants FBI and EOUSA that relate to portable/transportable wireless
9 device locators.

10 6. Whether Plaintiff exhausted his administrative remedies prior to filing suit.

11 7. Whether Defendants FBI, EOUSA, and OIP are proper defendants in this case.

12 **A. Plaintiff is entitled to fee waivers under 5 U.S.C. §§ 552(a)(4)(A)(iii)**
13 **and (viii) for all pending FOIA requests.**

14 **1. Fee waiver under U.S.C. § 552(a)(4)(A)(iii).**

15 The relevant statute states that “[d]ocuments shall be furnished without any charge or
16 at a charge reduced below the fees established under clause (ii) if disclosure of the
17 information is [(1)] in the public interest because it is likely to contribute significantly to
18 public understanding of the operations or activities of the government and [(2)] is not
19 primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). As
20 explained below, Plaintiff meets the requirements for a fee waiver on all three pending FOIA
21 requests under 5 U.S.C. § 552(a)(4)(A)(iii).

22 **a The first fee waiver requirement of 5 U.S.C. § 552(a)(4)(A)**
23 **(iii) is met.**

24 First, “[t]he subject of the requested records [] concern identifiable operations or
25 activities of the federal government, with a connection that is direct and clear, not remote or
26 attenuated.” *See* 28 C.F.R. § 16.11(k)(2)(i). On August 27, 2007, the FBI publicly released
27 an email that clearly identified the Harris LoggerHead and its use by FBI personnel. *See*
28 PSUMF, ¶ No. 3. On August 12, 2008, the EOUSA publicly released a section of its
Electronic Surveillance Manual that identified the TriggerFish and its use by law
enforcement. *See id.*, ¶¶ Nos. 8-9. In two cases, *i.e.*, United States v. Rigmaiden, CR08-814-

1 PHX-DGC (D.Ariz.) and United States v. Allums, No. 2:08-CR-30 TS (D.Utah), investigators
2 clearly identified the Harris StingRay as a portable/transportable wireless device locator used
3 by law enforcement. See PSUMF, ¶¶ Nos. 12-13. The United States Patent and Trademark
4 Office (“USPTO”) lists Harris Corporation as the owner of the “LoggerHead,” “TriggerFish,”
5 and “StingRay” marks and identifies the related products as portable/transportable wireless
6 device locators. See *id.*, ¶¶ Nos. 4-5, 10-11, and 14-15. The news media has also reported
7 extensively on law enforcement use of portable/transportable wireless device locators
8 including those manufactured by Harris WPG. For example, articles identifying government
9 use of said devices have been published by *The Wall Street Journal*,^[2] *Wired Digital*, *The*
10 *Washington Post*, *The Huffington Post*, and *The Washington Times*. See *id.*, ¶¶ Nos. 49-58.

11 Second, Plaintiff has the ability, expertise, and intention to effectively convey the
12 responsive information to the public. See 28 C.F.R. § 16.11(k)(2)(iii) (When determining
13 whether the requested records will contribute to an understanding of the subject by the public,
14 “[a] requester's expertise in the subject area and ability and intention to effectively convey
15 information to the public shall be considered.”). Plaintiff is an expert on
16 portable/transportable wireless device locators. See PSUMF, ¶¶ Nos. 59-63. Plaintiff has
17 numerous contacts in the news media and at civil rights organizations eagerly awaiting
18 additional information on portable/transportable wireless device locators. See *id.*, ¶¶ Nos. 64-
19 74. For example, Jon Campbell of *LA Weekly News* requested technical information from
20 Plaintiff prior to publishing his September 13, 2012 article on LAPD use of the Harris
21 StingRay. See *id.*, ¶¶ Nos. 66-67. Plaintiff will disseminate all FOIA response records on
22 Harris WPG devices to his noted contacts who will in turn further disseminate the
23 information to the public. See *id.*, ¶¶ Nos. 64-74. Plaintiff will also upload the complete
24 responsive records to a website and allow free public downloads. See *id.*, ¶ No. 75.

25 Third, the specific information sought by Plaintiff will “contribute significantly to [the]

26 2. The two articles in *The Wall Street Journal* that are cited in PSUMF also directly
27 identify the FBI's comments made to *The Wall Street Journal* (RE: destruction of evidence)
28 and to a panel at the Brookings Institution (RE: no need for a warrant) in May of 2011. See
ATTACHMENT 09 and ATTACHMENT 10 of *Daniel Rigmaiden's First Declaration Under*
Penalty Of Perjury In Support Of Plaintiff's Motion For Partial Summary Judgment (Dkt.
#38).

1 public understanding[.]” 5 U.S.C. § 552(a)(4)(A)(iii), of the government's (1) use of portable/
2 transportable wireless device locators, and (2) destruction of evidence at the conclusion of
3 locating missions. For example, information requested in category No. 2 of Plaintiff's
4 October 10, 2011 FBI FOIA requests will clear up the FBI's contradicting public statements
5 regarding its reasons for destroying location evidence and other data collected by Harris WPG
6 devices. *See* PSUMF, ¶¶ Nos. 24-28 (quoting contradicting statements). Additionally, the
7 requested Harris WPG user manuals and other technical information will shed light on how
8 the Harris WPG products intrude upon the privacy and safety of countless wireless device
9 users. The FBI has already publicly admitted that its equipment forces a connection and
10 collects data “from all wireless devices in the immediate area of the FBI device that subscribe
11 to a particular provider... including those of innocent, non-target devices.”^[3] The Federal
12 Communications Commission (“FCC”) also indicated that the Harris WPG StingRay has an
13 automatic “release” (*i.e.*, disconnect) for 9-1-1 emergency phone calls. *See id.*, ¶¶ Nos. 40-41.
14 This language suggests that a user of a cell phone connected to a StingRay may be required to
15 call 9-1-1 twice during an emergency—first while connected to the StingRay, then a second
16 time after the “release” and reconnection with an actual wireless carrier cell site. *See id.* The
17 requested Harris WPG user manuals and other technical information will further explain the
18 StingRay's intrusions upon privacy and handling of 9-1-1 calls during emergencies.

19 **b The second fee waiver requirement of 5 U.S.C. § 552(a)(4)
20 (A)(iii) is met.**

21 The second fee waiver requirement is met considering Plaintiff does not intend to
22 profit from the responsive records. *See* 28 C.F.R. § 16.11(k)(3)(i) and (ii) (To determine
23 whether the fee waiver requirement is met, the disclosure should not be primarily in the
24 commercial interest of the requester.); Judicial Watch, Inc., v. Rossotti, 326 F.3d 1309, 1312
25 (D.C. Cir. 2003) (“We are also mindful that Congress amended FOIA to ensure that it is
26 liberally construed in favor of waivers for noncommercial requesters.” (internal quotation
marks and citation omitted)). Plaintiff will disseminate FOIA response records on Harris

27 3. *See United States v. Daniel Rigmaiden*, CR08-814-PHX-DGC, “Affidavit Of
28 Supervisory Special Agent Bradley S. Morrison,” Doc. #674-1, p. 3, ¶ 5 (D.Ariz.). *See also*
PSUMF, ¶ No. 24.

1 WPG devices to his noted contacts in the news media and at civil rights organizations at no
2 cost. *See* PSUMF, ¶¶ Nos. 64-74. Plaintiff will also allow free public downloads of all
3 responsive records via a website. *See id.*, ¶ No. 75.

4 **2. Fee waiver under U.S.C. § 552(a)(4)(A)(viii).**

5 The relevant statute states that “[a]n agency shall not assess search fees [] under this
6 subparagraph if the agency fails to comply with any time limit under paragraph (6), if no
7 unusual or exceptional circumstances [] apply to the processing of the request.” 5 U.S.C. §
8 552(a)(4)(A)(viii). As explained below, Plaintiff meets the requirements for a fee waiver
9 under 5 U.S.C. § 552(a)(4)(A)(viii) for his two October 10, 2011 FOIA requests directed at
10 the FBI and EOUSA.

11 On approximately October 10, 2011, Plaintiff submitted his first two FOIA requests to
12 the FBI and EOUSA seeking records on Harris WPG portable/transportable wireless device
13 locators and related equipment. *See* PSUMF, ¶¶ Nos. 77 and 107. USPS records indicate that
14 the FBI and EOUSA received Plaintiff's FOIA requests on November 7, 2011. *See id.*, ¶¶
15 Nos. 82 and 113. It then took the FBI and EOUSA nearly **eighteen (18) months** to merely
16 acknowledge Plaintiff's FOIA requests and this only occurred after Plaintiff filed the instant
17 suit. *See id.*, ¶¶ Nos. 87 and 119. Because the FBI and EOUSA violated the time limits
18 outlined in 5 U.S.C. § 552(a)(6)(A), Plaintiff is entitled to a fee waiver for searches conducted
19 under the two October 10, 2011 FOIA requests. *See* 5 U.S.C. § 552(a)(4)(A)(viii).

20 **B. Plaintiff is entitled to expedited processing under 5 U.S.C. § 552(a)**
21 **(6)(E)(i)(I) for all pending FOIA requests.**

22 The relevant statute states that expedited processing is merited “in cases in which the
23 person requesting the records demonstrates a compelling need[.]” 5 U.S.C. § 552(a)(6)(E)(i)
24 (I). As further argued below, Plaintiff has a compelling need for the requested records
25 considering the subject of his request is “[a] matter of widespread and exceptional media
26 interest in which there exist possible questions about the government's integrity which affect
27 public confidence[.]” 28 C.F.R. § 16.5(d)(1)(iv), and because Plaintiff has already waited
28 long enough.

1 **1. A matter of widespread and exceptional media interest.**

2 The media has repeatedly reported on the government's use of portable/transportable
3 wireless device locators. As previously noted, articles identifying government use of said
4 devices have been published by *The Wall Street Journal*, *Wired Digital*, *The Washington Post*,
5 *The Huffington Post*, and *The Washington Times*. See PSUMF, ¶¶ Nos. 49-58. The D.C.
6 Circuit also noted that “[t]he use of and justification for warrantless cell phone tracking is a
7 topic of considerable public interest: it has received widespread media attention and has been
8 a focus of inquiry in several congressional hearings[.]” ACLU v. United States DOJ, 655
9 F.3d 1, 12-13 (D.C. Cir. 2011).

10 **2. Possible questions about the government's integrity which affect public confidence.**

11 The specific information Plaintiff seeks will answer questions regarding the
12 government's integrity which affect public confidence. The first public confidence question
13 that needs answering is on what basis does the government destroy evidence collected by
14 Harris WPG devices and hide use of said devices from issuing magistrates, criminal
15 defendants, and criminal defense attorneys? See PSUMF, ¶¶ Nos. 24-28. The information
16 requested in all three of Plaintiff's FOIA requests relate to this multi-part question.

17 The second public confidence question that needs answering is how do Harris WPG
18 devices intrude upon the privacy of not only the targets of an investigation but also countless
19 innocent third parties in the vicinity of where the Harris WPG devices are used? See PSUMF,
20 ¶ No. 24 (quoting FBI declaration). The user manuals and other technical information
21 requested in Plaintiff's two October 10, 2011 FOIA requests relate to this question.

22 The third public confidence question that needs answering is whether Harris WPG
23 devices interfere with public safety, *e.g.*, will the StingRay delay a connection to a 9-1-1
24 operator via the automatic “release” of emergency 9-1-1 calls placed by innocent third parties
25 in the vicinity of where the devices are used? See PSUMF, ¶¶ Nos. 40-41. The user manuals
26 and other technical information requested in Plaintiff's two October 10, 2011 FOIA requests
27 relate to this question.

28 The fourth public confidence question that needs answering is how the FBI justifies its

1 position that Harris WPG devices fall into a category of tools called pen registers, which
2 require a lesser order than a warrant? See PSUMF, ¶¶ Nos. 29-31. The information requested
3 in Plaintiff's November 10, 2011 FBI FOIA request relate to this question (e.g., RE:
4 comments made by FBI personnel during a Brookings Institution panel).

5 **3. Plaintiff has been waiting since late 2011 to receive FOIA records.**

6 Even if Plaintiff is not entitled to expedited processing under 5 U.S.C. § 552(a)(6)(E)
7 (i)(I), he has been waiting for the FBI and EOUSA to provide the requested records since late
8 2011. Because Defendants have made Plaintiff wait years without conducting a search,
9 Plaintiff is entitled to expedited processing and immediate production.

10 **C. Defendants FBI and EOUSA are required to conduct searches for
11 the records requested by Plaintiff in his two pending October 10,
2011 FOIA requests.**

12 In its **eighteen (18) month** late acknowledgement of Plaintiff's October 10, 2011 FOIA
13 request, the FBI cited 5 U.S.C. § 552(b)(7)(E) in support of a refusal to search for the
14 requested records. See PSUMF, ¶ No. 89. In doing so, the FBI failed to adhere to 5 U.S.C. §
15 552(a)(3)(C) requiring that it "make reasonable efforts to search for the records in electronic
16 form or format," *id.*, and 5 U.S.C. § 552(b) requiring that "[a]ny reasonably segregable
17 portion of a record shall be provided to any person requesting such record after deletion of the
18 portions which are exempt under [5 U.S.C. § 552 (b)(7)(E)]." *Id.* The FBI's refusal to
19 search is further unjustified considering it searched and segregated documents for the
20 Electronic Privacy Information Center ("EPIC") in response to a similar (but not identical)
21 "StingRay" FOIA request. See PSUMF, ¶ No. 90. While conducting searches for EPIC in
22 2012, "[t]he FBI [] found 25,000 pages of documents that relate to the request[.]"⁴

23 In its **eighteen (18) month** late acknowledgement of Plaintiff's October 10, 2011
24 FOIA request, the EOUSA stated that it "do[es] not maintain records in a manner which
25 would enable us to reasonably search for this information." See PSUMF, ¶ No. 120 (quoting
26 EOUSA letter). Rather than provide an explanation as to why it cannot search for the

27 4. Gallagher, Ryan (Slate.com), *FBI Accused of Dragging Feet on Release of Info About*
28 *"Stingray" Surveillance Technology* (Oct. 19, 2012),
http://www.slate.com/blogs/future_tense/2012/10/19/stingray_imsi_fbi_accused_by_epic_of_dragging_feet_on_releasing_documents.html (last accessed: Nov. 29, 2012).

1 requested information, the EOUSA contradicted itself by claiming that it conducted searches
2 for the American Civil Liberties Union (“ACLU”) on a request that “generally overlaps”
3 Plaintiff’s. *See id.* While it offered the results of the ACLU FOIA searches in place of
4 fulfilling Plaintiff’s FOIA request, the EOUSA did not identify which ACLU FOIA request it
5 was referencing; the EOUSA did not provide information on how the ACLU FOIA request
6 “generally overlaps” Plaintiff’s; and the EOUSA did not provide an explanation as to why it
7 fulfilled the ACLU’s request but refuses to even conduct searches on Plaintiff’s request. *See*
8 *id.* Just like the FBI, the EOUSA is in violation of 5 U.S.C. §§ 552(a)(3)(C) and (b). *See*
9 *also Nation Magazine v. U.S. Customs Service*, 71 F.3d 885, 890 (D.C. Cir. 1995) (“The
10 agency must make a good faith effort to conduct a search for the requested records, using
11 methods which can be reasonably expected to produce the information requested...”).

12 **D. Defendants FBI and EOUSA are required to provide digitally**
13 **redacted native form digital documents with metadata intact.**

14 Plaintiff requested that the FBI and EOUSA provide all requested documents in native
15 digital form with metadata⁵ intact (where applicable). *See Nat’l Day Laborer Org. Network*
16 *v. United States Immigration & Customs Enforcement Agency*, 2011 U.S. Dist. LEXIS
17 11655, 10 Civ. 3488 (SAS) (S.D.N.Y., Feb. 7, 2011) (“[M]etadata is ‘readily reproducible’ in
18 the FOIA context.”). For example, Harris WPG product literature possessed by Defendants in
19 Portable Document Format (“PDF”) form should be provided to Plaintiff as PDF files with
20 metadata intact. Redactions can be made to the PDF content and metadata using software
21 specifically designed for secure digital redactions of PDF files. This software includes Redax
22 by Appligent Document Solutions and Acrobat X Pro by Adobe. *See PSUMF*, ¶ No. 76.
23 Once these redactions are made, the PDF files should be provided to Plaintiff.

24 Government agencies are required to “make reasonable efforts to search for the records
25 in electronic form or format,” 5 U.S.C. § 552(a)(3)(C), and “shall provide the record in any
26

27 5. Examples of metadata include “file designation, create and edit dates, authorship,
28 comments, and edit history.” The sedona Conference, *The Sedona Principles Addressing*
Electronic Document Production, p. 3 (Jonathan M. Redgrave et al. Eds., 2d ed. 2007),
available at <http://www.thesedonaconference.org>.

1 form or format requested by the person if the record is readily reproducible by the agency in
2 that form or format.” 5 U.S.C. § 552(a)(3)(B). Plaintiff’s requested form of document is
3 reasonable considering the government often times searches for records in digital form
4 followed by a digital redaction process which prepares PDF files for FOIA responses. *See*
5 PSUMF, ¶ No. 76 (citing to FBI’s EFF FOIA response document redacted using digital
6 process). However, rather than provide the digitally redacted documents to the requester (as
7 requested by Plaintiff in this case), the government commonly takes the extra steps of printing
8 the documents to paper, scanning the paper documents back into digital form, and then
9 providing those newly created digital documents in a FOIA response. Plaintiff is simply
10 requesting that Defendants cut out these extra steps and produce the actual digital records
11 rather than newly created, artificial digital forms of those records.

12 **E. FOIA exemption 5 U.S.C. § 552(b)(7)(E) does not broadly apply to**
13 **all records in the possession of Defendants FBI and EOUSA relating**
to Harris WPG products.

14 In its **eighteen (18) month** late acknowledgement of Plaintiff’s October 10, 2011 FOIA
15 request, the FBI informed Plaintiff as follows regarding Harris WPG devices, *etc.*:

16 Pursuant to FOIA exemption (b)(7)(E) [5 U.S.C. § 552(b)(7)(E)], the FBI
17 neither confirms nor denies the existence of records responsive to your request.

18 Please be advised that it is the FBI’s policy to neither confirm nor deny
19 the existence of any records which—if such records exist—would tend to
20 indicate, reveal, or acknowledge the identity of an individual, organization,
company, or technology critical to the performance of the FBI’s mission.
Acknowledging the FBI’s interest, if any, invites the risk of circumvention of
federal law enforcement efforts.

21 ATTACHMENT 37 of *Daniel Rigmaiden’s First Declaration Under Penalty Of*
22 *Perjury In Support Of Plaintiff’s Motion For Partial Summary Judgment* (Dkt.
#38) (FBI FOIA acknowledgment letter).

23 As further explained below, the FBI has improperly invoked exception 5 U.S.C. § 552(b)(7)
24 (E) considering (1) detailed technical information regarding the operations of Harris WPG
25 portable/transportable wireless device locators is generally known to the public, (2) much of
26 the information requested by Plaintiff and withheld by the FBI is already preserved in
27 permanent public records, and (3) the FCC has already publicly released Harris WPG
28 documentation explaining how to easily defeat the StingRay, *i.e.*, dial 9-1-1 to force an

1 automatic “release” from the surveillance equipment.

2 **1. FOIA exemption (b)(7)(E) does not apply considering detailed**
3 **technical information regarding the operations of Harris WPG**
4 **devices is generally known to the public**

5 In *Rosenfeld*, the Ninth Circuit found that “[i]t would not serve the purposes of FOIA
6 to allow the government to withhold information to keep secret a[n] investigative technique
7 that is routine and generally known.” Rosenfeld v. United States Dep’t of justice, 57 F.3d
8 803, 815 (9th Cir. 1995).^[6] Widely available news articles document the government’s routine
9 use of portable/transportable wireless device locators. See PSUMF, ¶¶ Nos. 49-58. For
10 example, a 2011 front page article in *The Wall Street Journal* explained in detail how
11 government agents use the StingRay to locate wireless devices—complete with pictures and
12 diagrams.^[7] A 2013 article by *Wired Digital* detailed even more precise operations of the
13 Harris WPG devices and supportive surveillance techniques.^[8] Agents from the FBI and
14 other government agencies have admitted that they *specifically* use the Harris WPG brand
15 devices subject to Plaintiff’s FOIA request. See PSUMF, ¶¶ Nos. 3, 8-9, and 12-13.^[9] In fact,
16 use of Harris WPG type devices is so well known that there are free software tools available
17 on the Internet allowing any member of the public to defeat the government’s use of the

18 6. This reasoning “is supported by holdings from district courts of the District of
19 Columbia Circuit, that Exemption 7(E) only exempts investigative techniques not generally
20 known to the public.” *Id. See, e.g., National Sec. Archive v. FBI*, 759 F.Supp. 872, 885
21 (D.D.C. 1991) (“Exemption 7(E) is properly invoked only for techniques not generally
22 known to the public.”).

23 7. See Valentino-DeVries, Jennifer (The Wall Street Journal), ‘Stingray’ Phone Tracker
24 Fuels Constitutional Clash, p. A1 (Sept. 22, 2011) available at
25 <http://online.wsj.com/article/SB10001424053111904194604576583112723197574.html> (last
26 accessed: Sept. 22, 2011); see also ATTACHMENT 10 of *Daniel Rigmaiden's First*
27 *Declaration Under Penalty Of Perjury In Support Of Plaintiff's Motion For Partial Summary*
28 *Judgment* (Dkt. #38).

23 8. See Zetter, Kim (Wired Digital), *Secrets of FBI Smartphone Surveillance Tool*
24 *Revealed in Court Fight* (Apr. 09, 2013), available at
25 <http://www.wired.com/threatlevel/2013/04/verizon-rigmaiden-aircard/all/> (last accessed: Apr.
26 10, 2013); see also ATTACHMENT 25 of *Daniel Rigmaiden's First Declaration Under*
27 *Penalty Of Perjury In Support Of Plaintiff's Motion For Partial Summary Judgment* (Dkt. #38).

26 9. The FCC also provided documents indicating that the State of Wisconsin DOJ, the City
27 of Houston Police Department, the Alexandria, VA Department of Police, and the Anne
28 Arundel County Police Department use the Harris WPG StingRay. See FCC’s February 29,
2012 response to Mr. Soghoian’s FOIA request (FOIA Control No. 2011-586),
ATTACHMENT 08 of *Daniel Rigmaiden's First Declaration Under Penalty Of Perjury In*
Support Of Plaintiff's Motion For Partial Summary Judgment (Dkt. #38).

1 devices via his/her cell phone. *See* PSUMF, ¶¶ Nos. 44 and 45.

2 Furthermore, Defendants cannot claim that the exemption applies simply because there
3 are specific technical details or techniques within the requested records that are yet to be
4 generally known. “If we were to follow such reasoning, the government could withhold
5 information under Exemption 7(E) under any circumstances, no matter how obvious the
6 investigative practice at issue, simply by saying that the 'investigative technique' at issue is
7 not the practice but the application of the practice to the particular facts underlying the FOIA
8 request.” Rosenfeld, 57 F.3d at 815. In any event, the government has made no effort to
9 conceal Harris' patents from the public,^[10] *see* PSUMF, ¶ No. 37, which explain the
10 technology in precise enough detail to allow for someone to duplicate the devices. *See*
11 United States v. Teletronics, Inc., 857 F.2d 778, 758 (Fed. Cir. 1988) (A patent application
12 must pass the test of enablement, which “is whether one reasonably skilled in the art could
13 make or use the invention from the disclosures in the patent coupled with information known
14 in the art without undue experimentation.”). Similar devices have already been built by
15 members of the public using online instructions, *see* PSUMF, ¶¶ Nos. 42-43, and
16 demonstrated to cell phone users in public forums. *See id.*, ¶ No. 38.

17 Nevertheless, even if the Court were to reject full disclosure based on an application of
18 *Rosenfeld*, or debate precisely what details can be considered “routine and generally known,”
19 Plaintiff is still entitled to at least some records or portions thereof under the public domain
20 exception. As further argued below, Plaintiff is entitled to records containing information that
21 mirrors other information currently preserved in public records.

22 **2. FOIA exemption (b)(7)(E) does not apply to any information**
23 **requested by Plaintiff that is already preserved in permanent**
24 **public records.**

25 “Under the public domain doctrine, FOIA-exempt information may not be withheld if
26 it was previously disclosed and preserved in a permanent public record.” Chesapeake Bay
27 Found., Inc. v. U.S. Army Corps of Eng'rs, 722 F.Supp.2d 66, 72 (D.D.C. 2010) (citation and

28 10. If the FBI was so concerned, it could have issued a secrecy order on the relevant Harris patents pursuant to the *Invention Secrecy Act*, 35 U.S.C. §§ 181-88.

1 internal quotation marks omitted). “[I]f identical information is truly public, then
 2 enforcement of an exemption cannot fulfill its purpose.” Niagara Mohawk Power Corp. v.
 3 United States DOE, 169 F.3d 16, 19 (D.C. Cir. 1999). However, the identified publicly
 4 preserved document or record need not be the same document or record sought in the FOIA
 5 request. Rather, the doctrine covers the same *information*—even if the document or record
 6 produced via a FOIA search is different from the publicly preserved document or record:

7 While the excerpts of [public] trial testimony produced by North do not
 8 establish that the documents [][sought in his FOIA request] became part of the
 9 public record, they are sufficient to demonstrate that **some information** within
 10 the requested documents may have been publicly disclosed.... Accordingly,
 11 DEA has an obligation to search for and produce any responsive records that
 12 contain **information** identical that which has been publicly disclosed.

North v. United States, 810 F.Supp.2d 205, 208 (D.D.C. 2011) (emphasis added).

12 Therefore, Defendants FBI and EOUSA are required to produce all records, or portions
 13 thereof, containing *information* which is the same as the *information* contained in publicly
 14 preserved documents. Copies of relevant documents preserved in public records were
 15 attached to Plaintiff's FOIA request letters sent to Defendants. Additionally, ¶¶ Nos. 3, 8-10,
 16 12-14, 16, 22-24, 32-34, 36, 37, 40, and 59 of PSUMF (Dkt. #37) outline non-exhaustive
 17 public information on Harris WPG devices, *etc.* with citations to public record source
 18 documents. For convenience purposes, a “quick reference” list of this information is also
 19 outlined in 1st Supplemental PSUMF, ¶¶ Nos. 4-25. Portions of documents in Defendants'
 20 possession (*i.e.*, user manuals, training manuals, technical literature, *etc.*) containing the noted
 21 publicly preserved information cannot be withheld under exemption (b)(7)(E).

22 **3. FOIA exemption (b)(7)(E) does not apply considering the FCC**
 23 **has already publicly released information on how to cancel**
 24 **Harris WPG StingRay surveillance.**

24 The FCC's revelations regarding the manner in which the StingRay handles emergency
 25 9-1-1 phone calls also points to a simple and effective way to defeat law enforcement use of
 26 the StingRay. Following FCC documents, if a target of an investigation suspects that he may
 27 be subject to StingRay surveillance, he need only dial 9-1-1 to force the StingRay to “release”
 28 (*i.e.*, disconnect) his/her phone from the StingRay facilities. *See id.* This method of law

1 enforcement circumvention is so simple that even your most technically handicapped criminal
2 will be able to execute it with ease. The FCC's public release of the above noted information
3 completely undermines and trivializes the FBI's claim that fulfillment of Plaintiff's FOIA
4 request will "invite[] the risk of circumvention of federal law enforcement efforts."

5 ATTACHMENT 37 of *Daniel Rigmaiden's First Declaration Under Penalty Of Perjury In*
6 *Support Of Plaintiff's Motion For Partial Summary Judgment* (Dkt. #38) (FBI FOIA request
7 acknowledgment letter).

8 **F. Plaintiff exhausted his administrative remedies prior to filing suit.**

9 Defendants raise the defense that Plaintiff failed to exhaust his administrative
10 remedies. *See* Dkt. #34, p. 2. This is incorrect. First, Defendants FBI and EOUSA failed to
11 make a determination and notification of Plaintiff's October 10, 2011 FOIA requests until
12 nearly **eighteen (18) months** after they were received and nearly **nine (9) months** after
13 Plaintiff filed suit. *See* PSUMF, ¶¶ Nos. 88 and 119. The relevant statute states that "[a]ny
14 person making a request to any agency for records under paragraph (1), (2), or (3) of this
15 subsection shall be deemed to have **exhausted his administrative remedies** with respect to
16 such request **if the agency fails to comply with the applicable time limit provisions** of this
17 paragraph." 5 U.S.C. § 552(a)(6)(C)(i) (emphasis added). Both the FBI and EOUSA failed
18 to comply with the relevant time limit provisions, *e.g.*, "determine **within 20 days** [] after the
19 receipt of [][Plaintiff's] request whether to comply with such request and [] immediately
20 notify [][Plaintiff] of such determination and the reasons therefor..." 5 U.S.C. § 552(a)(6)(A)
21 (i) (emphasis added). Furthermore, Plaintiff also submitted timely appeal letters to Defendant
22 OIP which were denied. *See* PSUMF, ¶¶ Nos. 83-86 and 114-117. Therefore, Plaintiff has
23 exhausted his administrative remedies with respect to **all claims** relevant to his October 10,
24 2011 FOIA requests and all matters should now be handled by the Court.^[11]

25 11. The fact that the FBI and EOUSA eventually responded to Plaintiff's first two FOIA
26 requests is of no relevance. A late response to a FOIA request only requires exhaustion of
27 administrative remedies if the response is sent *prior to* a Plaintiff filing suit. *Compare*
28 *Johnson v. Comm'r*, 239 F.Supp.2d 1125, 1136 (W.D.Wash. 2002) ("If an agency fails to
respond to the requester within the twenty workday period, but provides a response before the
requester files suit, the requester must pursue administrative remedies prior to filing a
complaint in the district court." (listing cases)).

1 Second, for Plaintiff's November 10, 2011 FBI FOIA request, Plaintiff appealed the
2 FBI's denial of expedited processing and a fee waiver. The OIP later denied Plaintiff's appeal.
3 See PSUMF, ¶¶ Nos. 99-105. The FBI stated that it began searching for the requested records
4 on January 23, 2012, *see id.*, ¶ No. 99, but only recently provided incomplete, overly
5 redacted records via letter dated July 12, 2013. See 1st Supplemental PSUMF, ¶¶ Nos. 3-4.
6 The November 10, 2011 FBI FOIA request is yet to be resolved. Therefore, the Court
7 ordering *future* expedited processing is an appropriate remedy for the FBI's multiple year delay
8 and Plaintiff's appeal letter sent to the OIP sufficiently exhausted all administrative remedies.

9 **G. FBI, EOUSA, and OIP are proper defendants in this case.**

10 Defendants raise the defense that the FBI, EOUSA and OIP are not proper defendants
11 in this case and that the USDOJ is the only proper defendant. See Dkt. #34, p. 1-2. This is
12 incorrect. The relevant statute states that a government agency "includes any... establishment
13 in the executive branch of the Government[.]" 5 U.S.C. § 552(f)(1) (adopting definition in 5
14 U.S.C. § 552(1)). See Silets v. FBI, 591 F.Supp. 490 (N.D.Ill 1984) ("§ 551(1) contemplates
15 that the FBI may be considered as an 'agency' separate from the Department of Justice."
16 (FOIA action)). The FBI and EOUSA have also been defendants in countless other FOIA
17 actions. See, e.g., Harrison v. EOUSA, 377 F.Supp.2d 141 (D.D.C. 2005); Blackwell v. FBI,
18 646 F.3d 37 (D.C. Cir. 2011); and Gordon v. FBI, 388 F.Supp.2d 1028 (N.D.Cal. 2005).

19 **III. CONCLUSION**

20 For the foregoing reasons, Plaintiff respectfully requests that the Court grant Plaintiff's
21 motion for partial summary judgment and order that Defendants FBI and EOUSA shall:

22 1. Immediately search for all requested categories of records listed in Plaintiff's
23 two October 10, 2011 FOIA requests and November 10, 2011 FOIA request.

24 2. Provide all responsive records to Plaintiff in native digital form (where
25 applicable) with metadata intact (where applicable).

26 3. Conduct any needed redactions of digital records using a digital redaction
27 process and provide the records in their original digital form, as opposed to providing
28 Plaintiff with secondary digital scans of paper print-outs of the primary digital documents

1 previously redacted.

2 4. When searching for records according to Plaintiff's FOIA requests, conduct
3 searches on the following Harris WPG products (1) StingRay, (2) StingRay II, (3)
4 AmberJack, (4) KingFish, (5) TriggerFish, (6) LoggerHead, (7) Handheld Direction Finding
5 Antenna, (8) StingRay CDMA Software, (9) KingFish CDMA Software, (10) Geolocation
6 (software), (11) Tarpon (software), and (12) RealSite (software).

7 5. If in Defendants' possession, among other records requested in Plaintiff's FOIA
8 requests, provide Plaintiff with all user manuals, training manuals, operations manuals, and
9 similar technical material for the Harris WPG products identified in Plaintiff's FOIA requests
10 —whether authored by Harris WPG or authored internally by the FBI and/or EOUSA.

11 6. When searching for records on Harris WPG products, do not apply exemption 5
12 U.S.C. § 552(b)(7)(E) considering the investigative techniques at issue are routine and
13 generally known. *See Rosenfeld v. USDOJ*, 57 F.3d 803, 815 (9th Cir. 1995).

14 7. [NOTE: If the Court does not agree with No. 6, then:] When searching for
15 records on Harris WPG products, do not apply exemption 5 U.S.C. § 552(b)(7)(E) to the
16 portions of records containing information that is already preserved in public records
17 identified by Plaintiff. *See North v. United States*, 810 F.Supp.2d 205, 208 (D.D.C. 2011).
18 Plaintiff identifies public sources of information in PSUMF (Dkt. #37) and summarizes the
19 information for convenience purposes in 1st Supplemental PSUMF.

20 8. Produce and file a *Vaughn* index and legal memorandum with respect to all
21 records or portions of records that were / will be withheld or redacted.

22 9. If a search turned up / turns up no records, submit an affidavit setting forth why
23 the search was adequate.

24 10. For any relevant record, reasonably segregate exempt and/or non-responsive
25 information from nonexempt and/or responsive information.

26 11. Provide Plaintiff expedited processing of his three pending FOIA requests.

27 12. Not assess fees against Plaintiff for search time, document duplication, or other
28 expenses associated with fulfillment of Plaintiff's three pending FOIA requests.

1 Respectfully Submitted: August 28, 2013

2
3 DANIEL DAVID RIGMAIDEN,
4 Pro Se Plaintiff:

5
6 Daniel Rigmaiden
7 Daniel D. Rigmaiden

8 **CERTIFICATE OF SERVICE**

9 I, Daniel David Rigmaiden, certify under penalty of perjury under the laws of the
10 United States of America that on August 28, 2013 I caused the following
11 to be placed into the CCA-CADC mailing system for first-class United States Postal Service
12 delivery:

13
14 Original attached document addressed to:

15 Clerk of the Court
16 Attn: Civil Docketing Section
17 Sandra Day O'Connor U.S. Courthouse
18 401 West Washington Street, Suite 130, SPC 1
19 Phoenix, AZ 85003-2118

20 One copy of the original document addressed to:

21 Brad P. Rosenberg, Trial Attorney
22 U.S. Department of Justice
23 Civil Division, Federal Programs Branch
24 PO Box 883
25 Washington, D.C. 20044

26
27
28 By: Daniel Rigmaiden